MOSES & SINGER LLP

Client Alert October 2011

Penalties Under the Wage Theft Prevention Act Applied Retroactively

Increased penalties imposed by the Wage Theft Prevention Act ("WTPA"), which went into effect on April 9, 2011, apply retroactively, a New York State trial court has ruled. All private sector employers are covered by the WTPA.

In May 2011, we alerted you to significant changes in the New York Labor Law, including requiring employers to notify employees of certain wage information and increased penalties for non-compliance. http://www.mosessinger.com/articles/files/NYWageLawPenalties.pdf. The WTPA also imposes greater fines and damages for violations of the Labor Law, including increased liquidated damages from 25 percent to 100 percent of unpaid wages for successful wage claims where the violation is found to be willful. Now, according to at least one New York court, these penalties can be imposed prior to the statute's effective date.

In Ji v. Belle World Beauty, Inc. et al., 603228/2008, NYLJ 1202515132461 (Sup. NY, August 22, 2011), a New York trial court held that because the WTPA is remedial in nature, the penalties apply retroactively. Plaintiffs in that case were nail technicians at defendant beauty salon. Plaintiffs alleged they worked 10 hour days, six days a week for $100 per day without being paid overtime or receiving meal or break periods. They also claimed their employer did not pay them for the time spent setting up in the mornings or cleaning up at the end of each day. After complaining about the long hours and lack of overtime pay, plaintiffs were terminated.

Plaintiffs sought to amend their complaint to: (1) include a claim for retaliation for their termination; and (2) reflect the increased damages a prevailing plaintiff can recover under the WTPA. Citing to a recent U.S. Supreme Court decision, Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011), the trial court found that plaintiffs' oral complaints to their employer concerning wage and hours constituted "filing" a complaint under Section 215(a)(3) of the FLSA, the statute's retaliation provision. Until Kasten, the Second Circuit, New York's federal appeals court, held that employee oral complaints to their employers did not trigger a retaliation claim under the FLSA. Lambert v. Genesee Hosp., 10 F.3d 46, 55 (2d Cir. 1993) (defining "complaint" under the FLSA as "filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor"); Keubel v. Black & Decker, Inc., 643 F.3d 352, 358, fn3 (2d Cir. 2011) (finding Kasten abrogated court's precedent).

In light of the U.S. Supreme Court's holding, the trial court found that plaintiffs' respective complaints to their manager and owner should have put defendants on notice that plaintiffs were asserting their statutory rights under the FLSA.

In addition the trial court found that generally, where a statute does not require retroactive construction, it is applied prospectively. Nevertheless, here, where the statute is remedial and does not invest new rights or impair vested rights, the penalties set forth in the WTPA apply retroactively. Since the Act merely increased the amount of liquidated damages a prevailing plaintiff could recover, the WTPA would be applied retroactively and plaintiffs could amend the complaint.

The Court rejected defendants' argument that New York State Supreme Court was not the proper venue to bring an FLSA claim.

The case serves as a reminder of the significant penalties now in place for wage and hour complaints and also that oral complaints can expose employers to retaliation claims. As set forth more fully in our prior alert, in addition to civil penalties, employers that fail to comply with the WTPA may also be subject to criminal penalties, including fines up to $20,000 or up to one year in jail. Moses & Singer employment attorneys can help you navigate this complex area of law.

If you have questions regarding this Alert, please contact the author, **Kimberly Klein** at 212.554.7853/kklein@mosessinger.com.

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