

## **CLIENT ALERT**

### **CAN “SMALL EMPLOYERS” AND THEIR OWNERS IN MARYLAND ACTUALLY BE LIABLE FOR FAILING TO PAY OVERTIME? WELL, YES!**

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(with assistance from Nicole M. Behrman, Esq.)**

To the unfortunate and often costly surprise of far too many in Maryland, “small employers” (a label often applied to profit and not for profit businesses with fewer than 15 employees) and their owners, as well as those with sufficient hiring authority, can be liable and have been held liable for failure to pay overtime to employees who are entitled to receive it.

#### **Overview of the FLSA and the MWHL**

The Fair Labor Standards Act (“FLSA”) defines the term “employer” broadly to include “any person acting directly or indirectly in the interest of an employer in relation to an employee.” The analogous Maryland statute, known as the Maryland Wage and Hour Law (“MWHL”), defines the term “employer” in a similar fashion as including a person who acts directly or indirectly in the interest of another employer with an employee. Because of the similarities of the two statutes, the Maryland courts interpret the MWHL consistent with the FLSA for purposes of determining who constitutes an employer under the MWHL.

#### **The Possibility of Individual Liability**

An *employee* who satisfies the FLSA definition of the term “employer” is *jointly and severally liable* for any unpaid wages owed by the traditional employer. In determining whether an individual is an employer in Maryland for purposes of the FLSA and for purposes of the MWHL, the courts consider the “economic realities” of an individual’s role with a corporation. Under the economic realities test, an employer is someone who (1) has the authority to hire and fire employees; (2) supervises and controls work schedules or employment conditions; (3) determines the rate and method of payment; and (4) maintains employment records. The

economic realities test can also include consideration of the person's job description, his/her financial interest in the enterprise, and whether the individual exercises control over the employment relationship. No single factor in the economic reality test is controlling; rather, courts consider the totality of the circumstances.

As a result, small businesses and their owners face significant liability under the FLSA as well as under the MWHL. In addition to the owner, other individuals who have the authority to hire and fire employees and have supervising control over work schedules and employment conditions also have potential personal exposure under the statutes. The FLSA and the MWHL continue to pose significant legal and financial risks and challenges to entities and individuals deemed employers under these statutes. Employees are entitled to be made "whole" for monies that they are owed, and there is a presumption under both statutes that victorious employees in wage and hour (*i.e.*, overtime) cases are also entitled to be awarded liquidated damages and attorney's fees. The FLSA and the MWHL are among the most unforgiving employment statutes for employers.

### **Conclusion**

*All employers*, including so called "small" employers, should be vigilant when it comes to preventing and defending wage hour and overtime claims. In this regard, small employers, just like their larger counterparts, should be mindful of the following:

1. Carefully reviewing job positions to determine whether individuals have been properly characterized as exempt or non-exempt. Preferably, this review should be conducted with, and under the direction of, experienced employment counsel.
2. Determining whether individuals have been properly characterized as employees or independent contractors. In many instances, these individuals are actually regarded as employees for purposes of one or more employment statutes.

3. Training managers on the overtime rules and how and under what circumstances overtime can be worked.
4. Establishing sound and lawful handbook policies that address when and under what circumstances employees can work overtime.
5. Using timesheets that contain appropriate certifications by employees regarding the completeness and accuracy of all hours (including overtime hours) that they claim to have worked.
6. Reviewing the organization's overtime policies and procedures during the orientation process and, upon completion of the orientation process, requiring non-exempt employees to certify in writing that they understand and will fully abide by these policies and procedures.
7. Regularly monitoring the amount of overtime that employees work.
8. Strongly consider obtaining Employment Practices Liability Insurance (EPLI) that provides at least some kind of coverage for, among other things, wage and overtime claims.

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