NEW CASE OFFERS GUIDANCE ON GOOD FAITH DEFENSE FOR FAILURE TO PAY OVERTIME UNDER 50% SALES EXEMPTION, AS APPLIED TO AUTO MECHANICS

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The New Jersey Appellate Division has rendered an opinion in an area with few precedents to guide employers—how to apply the "good faith defense" in the context of an overtime claim by an auto mechanic where the employer had received a green light for its practices by two NJ Department of Labor ("DOL") investigators in several prior audits. A failure to pay $9400 in overtime mushroomed to a total liability of $85,733.56 for the employer (excluding the additional substantial costs of defending the action, and attorneys' fees and costs on appeal).

The employer in Wagner v. Blue Sky Classic Cars, LLC, 2012 WL 5381720 (N.J. Super. Ct. App. Div. Nov. 5, 2012), was in the business of restoring, repairing, selling and buying classic and antique cars. It had a practice and policy of not paying its auto mechanics overtime in reliance on the fifty-percent sales provision of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(B)(10(A) (permitting an exemption from overtime where more than 50% of an employer's business is generated from the sale of motor vehicles).

Blue Sky's overtime practice had been reviewed during a DOL audit in November 2007 and got a green light from the investigator. There were additional employee complaints, and a ***second audit*** by DOL in 2008 was conducted. The auditor never concluded in any writing that the employer could safely avoid paying mechanics overtime, but the employer believed it had not violated any laws since it never received word that it owed any overtime.

Plaintiff filed suit in early 2009 for unpaid overtime under FLSA and New Jersey statutes, and prevailed at trial. The case turned on whether the employer satisfied the "good faith defense" provisions of N.J.S.A. § 34:11-56a25.2 and 29 U.S.C. §259a which generally are a bar to claims for

overtime where the employer "pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" of the DOL "or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged." 29 U.S.C. § 259a; N.J.S.A. § 34:11-56a25.2.

The Appellate Division in Wagner noted that there are no reported New Jersey cases interpreting the provisions of N.J.S.A. § 34:11-56a25.2, and upheld the trial court's holding that there was "no clear demonstration of DOL's policies and enforcement procedures with respect to mechanics." The Court held that the statute would be construed in the same way as the federal statute, to require good faith reliance on a "written administrative regulation, order, approval, or interpretation." Significantly, the Court cited the Court's decision in L&F Distributors v. Cruz, 941 S.W.2d 274 (Tex. App. 1996) recognizing that an employer "may not invoke the absolute defense of good faith if its reliance is based on a determination by a mere investigator for the [DOL]."

Lastly, the Appellate Division in Wagner affirmed the trial court's refusal to let one of the DOL investigators testify on the employer's behalf about her understanding of the employer's obligations to pay overtime (she would have testified about her audit and explained the lack of any explicit mention in a post-audit report that the employer's practices were lawful).

Wagner offers further proof that employers need to carefully vet their overtime practices and consult with qualified legal counsel to avoid significant liability in this business environment. Even where an audit is conducted by the DOL, the employer must take affirmative, good faith actions to be sure its practices will withstand judicial scrutiny.

If your business is in need of consultation to review its overtime practices or for any other employment matters, please feel free to contact me at koconnor@pecklaw.com.

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