Caution Called For In Documenting Compliance Efforts

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Vigilant employers are taking steps to evaluate or re-assess the status of their compliance with the federal Fair Labor Standards Act and the similar laws of other jurisdictions. It is wise to do so, but management should also be careful about how and under what circumstances it goes about compiling, communicating, and documenting information relating to these matters. Increasingly, plaintiffs in wage-hour lawsuits are seeking to force employers to produce such materials in the hope of generating useful evidence.

As an illustration, in *Craig v. Rite Aid Corp*., Case No. 4:08-CV-2317 (M.D. Pa., December 29, 2010)(opinion below), a federal magistrate judge ruled that an employer could not withhold information of this kind from the plaintiffs under what has been called the "self-critical analysis privilege". In 2008/2009, the employer had voluntarily undertaken an internal analysis of its compliance with the FLSA and other requirements. Among other things, it had gathered information, produced written assessments, and prepared recommended changes. The project involved multiple members of the employer's human-resources, operations, and compensation departments under the direction of in-house counsel, and the information had been shared with outside counsel. The plaintiffs filed their lawsuit for unpaid wages, and they later sought documents and materials that the employer had generated as a part of its review.

The employer contended that the information sought was protected from disclosure by the "self-critical analysis privilege". Some courts have recognized this privilege under limited circumstances in the interests of encouraging businesses to evaluate their compliance with the law without fear that the process will create evidence that will later be used against them. However, it is by no means a sure-thing, and in this instance the magistrate judge would not permit the employer to withhold the materials on that basis.

There are other legal principles that might protect an employer against having to surrender such information to the other side, such as the attorney/client privilege and the "work product doctrine" (the latter of which typically relates to information generated in anticipation of litigation). Indeed, the magistrate judge's ruling did not express an opinion about whether one or both of these might protect against the disclosure sought.

But the take-away is this: In planning for an internal evaluation of wage-hour compliance, management should give careful thought to matters like:

- Who will direct and control the process,
- Who will participate in the assessment, and what each participant's role will be,

- What will be communicated, and from whom and to whom communications will flow,

- What documents and other information will be generated or compiled, and when and in what form this will be done,

- What can be done to bolster the prospects that the components and results of the evaluation can be protected against disclosure in litigation, and

- How to avoid undercutting any such protections later.

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