

September 2, 2005

### District Court Opens Door to ERISA Claims in Overtime Actions

The Federal District Court in Oregon recently refused to dismiss plaintiffs' claims that an employer violated ERISA by failing "to credit as 'hours of service' all overtime hours worked" by a class of employees. *In re Farmers Ins. Exch. Claims Representative' Overtime Litig.*, No. 33-1439 (D. Ore. Aug. 15, 2005). The underlying case is a claim for overtime made by claims representatives classified by Farmers Insurance as exempt administrative employees. The plaintiffs alleged that, not only are they entitled to back pay for unpaid overtime, but that they also are entitled to relief under ERISA because the defendants failed to credit untracked overtime hours as hours of service under the Farmers' benefit plans. The defendants moved to dismiss the plaintiffs' ERISA claims from the lawsuit. Please click [here](#) to view the opinion that pertains to the dismissal motion.

In addition to their FLSA claim, the plaintiffs alleged two claims under ERISA. First, they alleged that the defendants violated ERISA's recordkeeping provisions by failing to correctly track their hours worked. Second, they alleged that the defendants breached their fiduciary duties under their savings and pension plans by failing to credit all of their hours (and any overtime pay) required to be credited under the benefit plans.

The defendants moved to dismiss on the grounds that the plaintiffs: (1) lacked standing because they failed to allege "any specific, particularized injury to themselves or any actual or imminent damage resulting from defendants' alleged failure to keep records and credit hours of service;" (2) failed to state a claim under ERISA because plan participants have no private right of action under ERISA's recordkeeping provisions; and (3) failed to state a claim for breach of fiduciary duty.

Making clear that its decision was preliminary and governed by liberal federal court pleading rules, the court denied the defendants' motion. The court held: (1) the plaintiffs had standing because "[t]he actual or threatened injury required [to show standing]. . . may exist solely by virtue of 'statutes creating legal rights, the invasion of which create standing;'" (2) that ERISA's civil enforcement provisions could be construed as allowing an individual cause of action for "appropriate equitable relief" to enforce ERISA's recordkeeping provisions; and (3) the plaintiffs' breach of fiduciary duty claim is novel and perhaps ultimately would be found to lack merit, but nevertheless presented a viable basis to avoid dismissal.

The court's third reason for refusing to dismiss the plaintiffs' ERISA claims may cause plan fiduciaries concern. The plaintiffs conceded that an employer's "decision *whether to pay* overtime is a business decision, and not a fiduciary one." This is because, "under ERISA, crediting hours is a fiduciary function, independent of the payment of wages, necessary to determine participants'

participation, vesting and accrual of rights.” The plaintiffs argued, instead, that the defendants breached a fiduciary duty by failing to act prudently and solely in the interests of plan participants “by failing to credit [plan participants] with all of the hours of service for which they were entitled to be paid, including overtime, or to investigate whether such hours should be credited.” In other words, the plaintiffs argued that, to fulfill their fiduciary duty, the defendants should have investigated whether a basis existed to credit the alleged overtime hours and, if one did, the defendants should have credited plan participants with those hours.

The court agreed with the plaintiffs’ argument, at least preliminarily. In so doing, the court recognized that a fiduciary may have an independent obligation to determine hours of service under employee benefit plans without regard to how the employer records and characterizes those hours. Plaintiffs claim that a fiduciary should second-guess the employer’s determination that particular employees are exempt under the FLSA. While the court recognized that the plaintiffs’ theory was a novel one and rested on the plaintiffs’ drawing of a “very fine line” between business and fiduciary decisions, the result is troubling nonetheless. The court also deferred further activity on plaintiffs’ ERISA claims pending a decision on the underlying overtime activity.

Employers should take note of this opinion as it may motivate more plaintiffs’ lawyers to add ERISA claims to the complex and expensive federal and state wage-hour complaints already surging through our courts. At a more fundamental level, however, the opinion highlights the importance of proactive measures that an employer should take to ensure it operates in compliance with the provisions of the FLSA. In the past, evidence of such measures has established an employer’s good-faith attempts to comply with that Act. Now, *In re Farmers Insurance* may look to the same evidence to establish an employer did not breach its fiduciary duties under ERISA.

The attorneys at Seyfarth Shaw are prepared to help you assess whether the *In re Farmers Insurance* opinion will expose your pay practices or benefit plans to increased exposure from litigation. Our FLSA, ERISA, and litigation attorneys have a wide range of experience and a depth of substantive knowledge that will permit them to partner with you to prepare a practical business solution that is suitable to your needs.



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