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Rule Spurs LITIGATION - 3/28/2005

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By David R. Corder
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Earlier this year, Harold Sebring III entered into talks to settle a labor lawsuit brought by a former employee. Elizabeth M. Miller, a paralegal, had accused the Tampa trial lawyer of failing to pay her overtime compensation for work in excess of 40 hours a week.

Miller's lawsuit, filed Aug. 16 in the U.S. District Court, Tampa, came at a curious time. Just days later, the U.S. Department of Labor adopted the first regulatory revisions in 55 years to the federal Fair Labor Standards Act, the law that governs overtime compensation and other labor matters. The federal agency had published a draft of the then-proposed rule changes months in advance of adopting them.

The new regulations, which mostly affected white-collar workers, did not exempt paralegals such as Miller from the overtime rules. The new rules essentially exempt from overtime compensation those professionals with at least a four-year college degree or workers who earn more than $455 a week. That puts some small-business owners like Sebring at a disadvantage.

Proponents of the labor law rules revisions, including President Bush, hailed the changes as a way to create flexible work policies that encourage time off rather than monetary compensation for work in excess of 40 hours a week. Critics, mostly organized labor, have called the changes just another perk for businesses at the expense of workers or a subtle form of litigation reform — a Bush priority.

However, any suggestion the revisions have lessened the litigation burden on businesses in the federal Middle District of Florida appears weak, says Tampa labor law attorneys John-Edward Alley and Peter Zinober.

The defense lawyers actually expect to see even more litigation under the Fair Labor Standards Act in the Middle District, which handles federal labor disputes from Hernando County south to Collier County.

"There is no question we're going to see a lot more of these lawsuits," says Alley, a shareholder at Ford & Harrison LLP.

There is evidence to support Alley's suspicions. So far this year workers have sued six companies with operations in the Tampa Bay area for unpaid overtime or wages due. There are more than a dozen labor lawsuits filed so far this year that allege job discrimination over race and sex — a labor issue governed by the federal Civil Rights Act.

Statistics tracked by the Administrative Office of the U.S. Courts have shown an upward trend in the number of labor lawsuits filed over the past four years in the Middle District. The figures include employee benefits disputes, which account for about half to two-thirds of all the labor lawsuits filed in the district. It does not cover job discrimination complaints filed under the Civil Rights Act.

For the 12 months ended March 31 last year, the Middle District reported 643 labor lawsuits. That's a 45% increase over the same period in 2003. Since 2001, labor lawsuits in the district have increased by about 103%. In comparison, labor lawsuits for all U.S. district courts increased by only 27% over the same four-year period, federal statistics show.

"There is no doubt the No. 1 type of case being filed in the federal courts in Florida are Fair Labor Standards Act claims," Alley says. "In just wage-and-hour, that has been true about the past two years. Before, the No. 1 type of case filed in Florida was Title III of the Americans with Disabilities Act."

Zinober and Alley fear this increased litigation may only get worse. They see indications the Middle District may experience the type of proliferation in labor claims that has occurred in the Southern District of Florida. For the 12 months ended March 31 last year, the Southern District reported 1,147 labor claims.

"We're already seeing it," says Zinober, founding partner of Zinober & McCrea PA. "We've just had two wage-and-hour cases filed not against small business but large business by some pretty reputable plaintiffs' lawyers. We're seeing that trend come up here. It's not really surprising."

Part of the reason is a more informed work force, says St. Petersburg labor law attorney Phyllis Towzey, who represents both plaintiffs and defendants.

"There will be more claims brought under the FLSA, because of the publicity revolving around the changes in the act," she says. "People are a little more aware of what their rights are. I don't see the act as significantly changing the rights of most workers, but it has definitely raised their awareness."

Since last August, Towzey says she has seen an increase mostly in the number of businesses and workers inquiring about their rights under the Fair Labor Standards Act and other worker protection laws.

"Recently I've seen a lot more higher-level executives who have been downsized and lost their jobs in mergers and acquisitions," she says. "I've had a lot of questions about age discrimination rights."

That awareness also applies to plaintiffs' lawyers, Zinober and Alley say. In 1997, a group of Florida plaintiffs' lawyers founded the Florida chapter of the National Employment Lawyers Association (NELA). The national group and Florida Employment Lawyers Association (FELA) focus solely on plaintiffs' employment rights.

"Until about 12 years ago only a few in the labor bar knew much about the Fair Labor Standards Act and nobody on the plaintiffs' side (did)," Alley says. "The one thing FELA has done is hold at least once a year a two-day education program. One of the things they have done well is taught the plaintiffs' bar about the FSLA."

Despite the proliferation of labor lawsuits, Zinober says the federal courts still tend to side with the employer. However, plaintiffs may file an FSLA action in the state courts.

"Perhaps, 70% of employment discrimination cases are disposed of in

federal court on summary judgment," he says. "In state court, that's maybe 10%. The reason is the standard for summary judgment is a little more difficult to meet in a state court."

On the other hand, Alley thinks federal judges are taking a more critical look at the attorneys' fees plaintiffs lawyers ask for in labor lawsuits. That's important because many say attorney fees drive litigation demand. The law allows either side to petition for attorneys' fees, but the standard for recovery is much higher for the defense.

In South Florida, for instance, U.S. District Judge Federico Moreno refused to grant a plaintiff's lawyer $16,000 in attorneys' fees on a claim for $316 in overtime wages.

"To ask in good faith for upward of $16,000 in attorneys' fees for prosecuting a case that plaintiff's counsel knew would involve no more than a modest sum of $316, and to continue to engage in a pattern of behavior aimed at inflating the levels of attorneys fees shocks the conscience of the court," Moreno wrote regarding an order on behalf of Veronica Goss v. Killian Oaks House of Learning (248 F.Supp.2d 1162).

If similar rulings occur in the federal courts, Alley suspects more plaintiff lawyers will take claims to the state courts.

"They're going to be filed in state court for several reasons," he says. "No. 1, there is a longer statute of limitations (up to four years on non-willful violations). No. 2, the plaintiffs' bar has worn out its welcome in federal court. And thirdly, in federal court you do most things on paper rather than go down to the state court and have a five- to 10-minute argument (before a state judge). With a state judge, the plaintiffs' bar tends to do better."

That's why Zinober advises his clients to make sure they have a written employee handbook that complies with the federal regulations. He says it is better for businesses to find the problem and fix it before an employee capitalizes on it.

"A lot of these small businesses are receiving wage-and-hour advice from their accountants," he says. "In some cases, they're getting good advice; in some cases, not; and in other cases, they're ignoring it. But they have to realize these cases do involve attorneys' fees for prevailing plaintiffs, and it is not unusual for the attorneys fees to exceed the liability by a multiple of more than 10."

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