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Steven M. Crass: A free lunch for plaintiff's attorneys

By Steven M. Crass

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Valley agribusiness feeds the world … and out-of-area plaintiff's attorneys. I was disheartened recently to read about several wage and hour class actions filed against Valley agribusiness employers by Pennsylvania lawyers. The essence of a typical wage and hour class action is the simple allegation of a single employee that an employer failed to allow the employee to receive a meal and rest break. The employee then purports to represent every other employee of the employer.

Meal and rest period requirements sound reasonable in theory, but unfortunately, in practice, these rules lead to draconian results in which plaintiff's attorneys score a windfall. In the end, the irony is that employers that face these allegations have to account for their losses in reduced hiring, stagnating salaries, and layoffs, thereby hurting the very people the lawsuits are allegedly trying to help.

How can a simple claim of a missed meal period result in such devastation?

It is the result of stacking numerous violations and penalties on top of the penalties associated with the missed meal period itself. For example, if an employee alleges he or she worked two minutes of his or her 30-minute meal period, then that employee also claims to have worked an unaccounted two minutes — a minimum wage violation. If these two minutes increase the daily time to over eight hours — an overtime violation. Because the employee was not properly paid, the employee's wage statements were incorrect — a wage statement violation. Because meal and rest breaks are found in an Industrial Wager Order — a wage order violation. If the employee has left employment — a failure to pay last and final wages. Because all of these violations are alleged on behalf of all employees in a class-action lawsuit suit over a three-year period, damages and penalties can be in the tens of millions of dollars. And, because the term "employer" is defined broadly, there can be personal liability for the owner and supervisors.

There may be an unjustified perception that "greedy" employers should simply make sure they pay their employees properly, thus avoiding the prospect of these lawsuits. This is easier said than done.

First, the rules are extremely technical and even attorneys that practice in the area argue as to their application. This confusion makes sense, because there are 17 different Industrial Wage Orders. Just figuring out which wage order applies is extremely challenging. In some instances, employees may even work under more than one wage order in a single day, thus subjecting them to different meal, rest break and overtime rules on an hourly basis. In addition to California wage and hour laws, there is also federal law. Even in instances where an employer's time records reflect that they have successfully navigated the statutory and regulatory minefield, a common plaintiff's tactic is to allege that the "real policy" was that the employees were told to work off the clock. Accordingly, by the nature of allegation, the employer can provide no documentation to disprove the employee's allegation.

So what is the answer?

First, simplify laws so that well-intentioned employers can easily follow the rules. Second, new rules must be made to stop encouraging wage and hour class-action lawsuits. This can be accomplished by establishing a cap on the amount of penalties and attorney's fees that can be recovered that correlates with the actual amount of wages recovered, shortening the statute of limitations, and making it more difficult to file on behalf of other employees. Third, a safe haven needs to be designed to permit employers that have identified an inadvertent mistake to make back payments without the requirement to pay the large associated penalties. Fourth, there should be an administrative prerequisite that employees file a complaint with the Department of Labor Standards Enforcement (DLSE) prior to filing a civil lawsuit to determine the validity of the allegation. If the employer submits to the DLSE's jurisdiction, it should prevent the employee from filing a lawsuit. Fifth, the DLSE should readily answer employer questions to proactively prevent the violation in the first place.

Being an employer in California is not easy. Until changes are made, hungry plaintiff's attorneys will continue to belly-up to the wage and hour class action buffet, while Valley employers' work overtime attempting to comply with the seemingly never ending laws and regulations. As the adage goes, there is no such thing as a free lunch — unless you are suing those who feed us.

Steven M. Crass is an attorney with Baker Manock and Jensen, PC, of Fresno. He can be reached at (559) 432-5400.