

Litigating Wage Claims: The Good, Bad and the Unexpected

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Unlike most other employment-related claims, Oregon wage and hour laws contain provisions providing for penalty wages and attorney fees for successful plaintiffs. The result is that, in principle, no wage claim is too small to litigate. Experienced wage and hour defense litigators abound with stories of cases where a sum of less than \$1,000 was at issue, only to wind up costing the employer tens of thousands of dollars in total attorney fees and penalty wages.

What are the **basic facts** about wage and hour laws that make litigating these claims more costly? To begin with, state statutes define exactly how and when employers must pay final paychecks to employees who quit or who are terminated; significantly limit allowable deductions from paychecks; severely restrict who is exempt from the obligation to pay overtime; broadly define “hours worked” for which employees must be paid; and do not allow “comp” time in lieu of paying overtime. These statutes typically include a provision for attorney fees for a successful plaintiff and civil penalties that can be steep, often bearing little relation to the actual violation. It also is important to note that the statute of limitations for back wages is six years in Oregon (whereas a two-year statute applies to claims for overtime wages).

It is not a defense to failing to pay an employee because he/she did not timely submit time cards or a time sheet. Employers also are required to establish and maintain regular paydays and payment of wages must be within 35 days from the time the pay period began.

It is important to understand that most employers also are covered by the federal Fair Labor Standards Act (“FLSA”) in addition to being covered under Oregon law. Although the FLSA is similar to Oregon law, it is not identical. To the extent that the laws differ, employers must follow the law that is most beneficial to employees. For example, federal minimum wage is \$7.25 and Oregon’s minimum wage is \$8.50. Because Oregon’s minimum wage is higher and therefore more beneficial to the employee, Oregon employers who also are covered by the FLSA must pay the higher Oregon minimum wage.

It is important to understand from the outset that the penalties for violating many of Oregon’s wage laws include reasonable attorney fees. ORS 20.077 provides that the prevailing party is entitled to an award of attorney fees where “one or more claims are asserted for which an award of attorney fees is either authorized or required. . . . The provisions of this section apply to all proceedings in the action or suit, including arbitration, trial and appeal.”

Likewise, ORS 653.055(4) allows an attorney fees award to the prevailing party in any action brought by an employee for an alleged violation of ORS 653.010 to 653.261. The reality is that the possibility of an attorney fee award drives much wage and hour litigation and forces an employer early on to decide whether to settle even where a defense verdict is likely.

Final paychecks: Employee quits *without* notice – final paycheck due within five (5) days (excluding Saturdays, Sundays and holidays) or the next regularly scheduled payday, whichever occurs first. Employee quits *with* at least 48 hours notice (excluding Saturdays, Sundays and holidays) – final paycheck due on the last day of employment. If the last day worked falls on a weekend or holiday, the final check is due not later than the end of the next business day. Employee is *terminated* – final paycheck due not later than the end of the next business day following the date of termination.

A final paycheck must include pay for all hours worked through the date of termination. Additionally, the check must include any accrued, unused vacation pay where the employer's policy is silent or fails to specifically state that earned vacation is not payable upon voluntary and/or involuntary separation from employment. Lastly, a final paycheck must include any commissions earned and payable under the terms of the employer's commission plan.

It is advisable to deliver a final paycheck in person; however, an employer must mail the check if requested to do so by the employee.

Penalties: An employer who “willfully” fails to pay a final paycheck is liable for additional wages for every day the employee remains unpaid, up to a maximum of 30 calendar (including non work) days. The daily penalty is calculated at eight times the employee's hourly regular pay rate (i.e., eight hours of pay per day). ORS 652.150. The penalty wage is capped at 100% of the total wages due to the employee unless the employee or his/her lawyer or other representative provides the employer with written notice of the unpaid wages and the employer fails to respond within 12 days of receiving the notice. ORS 652.150(2). Employers should understand that this penalty wage provision also may apply where the alleged unpaid wages include unpaid overtime (discussed below under “Exempt” classification).

Although an employer may plead “financial inability to pay” as a defense, such financial inability is, as a practicable matter, very difficult to demonstrate. It also is important to note that the term “willfully” is broadly construed; the employer's mere failure to pay the final check when due, even if because of a mistake, generally triggers the penalty wage.

Deductions: The wage deduction statute (ORS 652.610(3)) allows deductions from an employee's wages only under the following circumstances:

(a) the employer is legally required to make the deduction (i.e., federal and state tax withholdings); (b) the employee has voluntarily signed an authorization permitting the deduction and such deduction is (i) for the employee's benefit (i.e., health insurance coverage, United Way donation, goods or services purchased from the employer); and (ii) the deduction is recorded in the employer's books.

Deductions from a *final paycheck* are subject to additional limitations that (a) the deduction is for repayment of money the employer loaned the employee; (b) the loan was paid in the form of cash, check or other negotiable instrument; (c) the employee has signed a written authorization allowing the deduction; (d) the loan was solely for the employee's benefit and not in connection with the employee's job; (e) the loan is recorded in the employer's books, and (e) the deduction does not exceed the amount subject to garnishment under ORS 18.385(2)).

Penalty: For actual damages or \$200, whichever is greater, in addition to reasonable attorney fees and costs and disbursements to the prevailing party.

“Exempt/Non-Exempt” classification: Exemptions from overtime requirements are very narrowly construed under both state and federal wage and hour laws. In general, an employee is not properly classified as exempt unless he/she meets both the “salary” and “duties” tests of each of the recognized exemptions. This means that the employee must be paid a salary of at least \$455.00 per week, the amount of which does not vary from week to week or month-to-month depending on the amount of time worked or the quality of work performed. Additionally, the employee must meet the particular “duties” test for each exemption. In general, the employee must perform the various types of duties during at least 51% of an average workweek.

The most common exemptions are as follows: (a) Administrative, (b) Executive, and (c) Professional. Other commonly recognized exemptions from overtime are “Computer Professionals” and “Skilled Computer Technicians”. Employers should understand that simply because an employee is paid a salary does not mean he/she is exempt; the duties test for one or more of these exemptions also must be met. Additionally, the job title alone is not indicative of whether the employee is correctly classified as exempt; i.e., an “administrative assistant” is not automatically exempt because the job title includes the word “administrative.”

Penalties: While there is no specifically mandated penalty for misclassifying an employee, the employer may well be liable for unpaid overtime if, for example, an employee was misclassified as “exempt” and he/she worked overtime (more than 40 hours per workweek) for which the employee was not compensated. The statute of limitations for unpaid overtime is two years up to a maximum of three years if the employer “willfully” failed to pay the overtime. The FLSA also allows for an award of liquidated damages (equal in amount to the

unpaid wages) in addition to liability for the unpaid wages. 29 USC § 216(b). The courts do have the discretion not to award liquidated damages or reduce the award based on the employer's defense that it was acting in "good faith" and did not intentionally violate the Act.

Overtime. Both Oregon and the FLSA require that a non-exempt employee who works more than 40 hours during the employer's seven-day work week must be paid 1.5 times the employee's regular rate for all such hours or parts thereof. An employer may have a policy requiring advance approval for overtime hours, but the employer usually will be liable for unpaid overtime even if the employee violates the policy. (Instead, the employer may discipline the employee).

Private sector, non-governmental employers in Oregon are not allowed to provide "comp time" to an employee in lieu of paying overtime, even if the employee would rather receive the "comp" time.

Penalties: A failure to pay overtime violates ORS 653.261 for which ORS 653.055(1)(b) mandates payment of a penalty as provided in ORS 652.150 (discussed above). Additionally, and as noted above, failure to pay overtime may subject the employer to liability under the FLSA.

"Hours worked": Both federal and state law defined "hours worked" as both time actually worked and time during which the employee is authorized or permitted to be at work. In other words, if the employee's scheduled start time is 8:30 a.m. but he/she arrives at and begins working at 8:00 a.m., the employer will be liable for the extra 30 minutes of work even if the employee did not specifically ask the employee to work during that period. The same is true for periods of an employee's lunch break during which the employee performs work or must remain on duty even if no work is performed. For instance, an employee who has what is otherwise an unpaid lunch break from 12:00 p.m. – 1:00 p.m., but who finishes lunch and goes back to work at 12:30 p.m., or who does any substantive work tasks during his/her lunch period, also may be liable for the portion of the lunch during which the employee performed work. Again, this is true even if the employer did not ask or authorize the employee to work. Allowing or permitting an employee to work during his/her unpaid lunch break also may subject the employer to liability for overtime (e.g., the employee's "extra" 30 minutes of work during lunch results in a total of 42.5 hours of work per work week).

"Hours worked" also generally includes time spent preparing for and/or cleaning up before and after work (such as putting on required protective clothing or preparing necessary paperwork after the shift or work day has ended). Travel time that occurs during the employee's workday also may be considered "hours worked" even if the employee does not perform any substantive work. In

addition, employees who are required to attend or participate in training and/or meetings must be compensated for this time as it is considered “hours worked”.

Penalties: Not surprisingly, the failure to pay all hours worked may result in a number of alleged violations, including: (a) failure to pay wages earned within 35 days of the date earned (ORS 652.120); (b) failure to pay overtime under state and/or federal law as discussed above; and (c) failure to pay minimum wage for all hours worked resulting in liability for (i) the full amount of the wages, less any amount actually paid to the employee by the employer; and (ii) civil penalties provided in ORS 652.150.

Litigating Wage Claims: In light of the potential liability for penalty wages and attorney fees, defending wages claims can often feel like trying to escape from quicksand – the more one struggles, the deeper one sinks. Consequently, employers (and their lawyers) defending wage claims should have a proactive plan to address wage claims, including the following:

1. *Pay on time.* Final pay wage claims often involve late payment of wages that are admittedly due and owing. To avoid this category of claims, employers should train their payroll personnel on the requirements of the Oregon final pay law, including the broad definition of “wages.” Multi-state employers that process their Oregon payroll out of state should make some arrangement to allow Oregon facilities to comply with the final pay rules, either through preparation of final paychecks on-site or by expedited delivery of out of state checks.

2. *Avoid Disputes.* Late wage claims may involve disputes about whether wages are owed in the first place. These disputes-- and the resulting wage claims--are often the product of poor communication by the employer. Employers can avoid many final wage claims by effectively communicating their policies with respect to such matters as payment of accrued but unused sick leave, vacation, and paid time off upon separation from employment. Commission payments—how and when they are earned, how they are calculated, and the effect of termination on the payment of commissions—is another area where unclear policies and agreements can result in claims. Employers should give particular attention to “plain language” commission policies, and use examples of calculations to avoid misunderstandings. Even the best policy offers no assistance if the employer cannot prove that the policy was communicated to the employee. Consequently, employers should require employees to acknowledge in writing the receipt of employee handbooks and any standalone pay policies.

Although it may be tempting to do so, employers should avoid building in any potential areas of disagreement into their pay policies or agreements. For example, while it may make sense to employers to provide that employees

terminated “for cause” forfeit their accrued but unused vacation pay upon termination, such a policy simply invites dispute as to whether there was “cause” for the termination. A better practice is to provide that all employees who are involuntarily terminated are not eligible to receive unused vacation pay, or perhaps better yet, to write a uniform policy applicable to all employees regardless of the circumstances of the termination.

Employers should also emphasize solid timekeeping practices to ensure that all compensable time is accounted for and paid. Improper payroll rounding practices, unlawful wage deductions, interrupted meal periods, travel time mistakes, even off-duty e-mails can lead to an employee not being paid all sums due and owing. Unless corrected in a timely final paycheck, these compensable time errors will produce final wage claims from non-exempt employees.

2. *Determine the facts early.* In final pay wage claims for violations of ORS 652.140, employers and their counsel should maintain vigilance for any written notices of nonpayment. Under ORS 652.150, unless the employer has violated the final pay statute in the year prior to the employee’s termination, the potential penalty for failure to pay all wages due and owing upon termination of employment is limited to an amount equal the unpaid wages unless the employee or his attorney provides a written notice of the nonpayment, which remains unpaid for twelve days after receipt by the employer. A fairly common tactic by plaintiffs is to provide the notice of nonpayment in a letter detailing additional legal claims and demanding a sum far in excess of the potential unpaid wages. Upon receipt of such a demand, employers and their attorneys should give serious consideration to conservatively calculating and paying any unpaid wages the portion of the demand related to unpaid wages to liquidate the amount of the penalty.

3. *Don’t Forget the Penalties.* According to the Oregon Court of Appeals, an employer who willfully violates the wage-payment provisions of ORS 652.140 may not avoid litigation simply by paying the unpaid wages. Instead, the employee may sue to recover penalty wages and attorneys’ fees even after it pays the underlying wages. See *Wyatt v. Body Imaging, PC*, 989 P.2d 36, 41-2, 163 Or. App. 526 (Or. App.1999).

4. *Circle the Wagons.* Employers generally may not use legal claims against the employee to warrant withholding final wages. However, employers may allege such claims as counterclaims in any final pay litigation as an offset to employer liability under the final pay statute.

The availability of attorneys’ fees for successful claims often drives final pay claims. Consequently, defending the claim for fees is of paramount importance, and the employer should consider raising an affirmative defense to any claim for attorney’s fees. ORS 652.200 provides two potential defenses. First, if the employee willfully violates his contract of employment, for example by

taking employer documents in order to compete with the employer, he is precluded from recovering attorneys' fees. Oregon courts generally have interpreted this requirement to mean that the employee's conduct was severe enough to warrant his termination. Consequently, if the employee voluntarily quit his employment and there were no disciplinary actions pending, this defense may prove problematic. Second, if the employee's attorney unreasonably failed to give written notice of the wage claim, the plaintiff may not recover fees.

5. *Consider an Offer of Judgment.* In light of the fact that attorneys' fees often are the predominate consideration in final wage payment claims, employers should consider the advisability of an offer of judgment under ORCP 54E or FRCP 68. Insofar as they have the potential of cutting off the recovery of attorneys' fees if they are rejected and the plaintiff recovers less at trial, offers of judgment generally have a powerful impact on a plaintiff's willingness to engage in meaningful settlement negotiations.

In conclusion, employers should prevent final pay claims before they happen with solid pay practices and procedures. However, if they receive such a claim, employers and their attorneys should act promptly, armed with a thorough knowledge of the complex wage payment rules and defenses.