Another Frightening Warning to Management: You May Be Held Individually Liable For Violations of the FLSA

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On September 20, 2013, the Eastern District of Missouri put executive level management on notice once again that so-called C-suite managers (in this case the CEO, President and Vice President) can be "employers" under the Fair Labor Standards Act (FLSA) and thus individually liable for unpaid wages. The district court ruling in *Rickard v. U.S. Auto Protection, LLC*, granted the plaintiffs' (a class of automotive sales representatives) motion for partial summary judgment requesting that the Court find that the CEO and two other executives of the Missouri limited liability companies (U.S. Auto Protection, LLC, and U.S. AutoWarranty, LLC, hereinafter referred to collectively as "USAP") were "employers" under FLSA and thus may be held individually and jointly liable for all damages owed as a result of any eventual judgment in favor of the employees.

The employees alleged that USAP employed sales representatives to "pre-screen" and "close" telephone sales of vehicle service contracts, which were essentially extended automobile warranties. According to the employees, USAP did not pay their sales representatives based on the number of hours they worked per week, but instead utilized a commission-based pay system, with a weekly or monthly minimum payment. The employees also claimed that sales representatives were not required to track or record the hours they worked in any way, and that USAP had no system in place for doing so.

The employees further alleged that sales representatives frequently worked in excess of 40 hours in a given workweek, as they often were required to work before and/or after their designated shifts, through some lunch periods, and on certain Saturdays. They asserted USAP refused to pay the proper overtime pay of one-and-a-half times the regular hourly rate of pay for this excess work, and that this deliberate failure on the parts of the employers violated FLSA.

After filing suit, the plaintiffs successfully petitioned the district for an order granting conditional certification of the case as a collective action under § 216(b) of FLSA, thus authorizing them to send notice to all current and former sales representatives who had worked for the defendants in the last three years.

The Court found that Ray Vinson (CEO), Shawn Vinson (President) and Matthew McLain (Vice President of Sales) were officers or members of USAP, and possessed control over the hiring and firing practices, pay practices and overall operational functions of the entities.

FLSA defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee..." *See* 29 U.S.C. § 203(d). Furthermore, a "person" is defined under FLSA as an individual, partnership, association, corporation, business trust, legal representative or any organized group of persons. *See* 29 U.S.C. § 203(a). There may be multiple simultaneous employers under FLSA, and recovery for FLSA violations is possible against all defendants found to be "employers."

A determination of whether an individual is an employer within the meaning of FLSA is based upon the totality of the circumstances of whether the individual in question is sufficiently involved in the day-to-day operations of the corporation. The district court looked at several economic factors relevant to the analysis including the individual's ownership interest, degree of control over the corporation's financial affairs and compensation

practices, and the role in causing the corporation to compensate or not compensate employees in compliance with FLSA.

Factors Weighed in Finding the CEO was an "Employer" under FLSA

The Court found a number of factors to be relevant in determining that Ray Vinson was an employer under FLSA. These included not only the extent of his ownership interest and extent of control, but also noted some esoteric facts such as possession of a company computer, and his attendance in the office and at meetings as relevant factors. The court's reasoning can be summarized into the following key points:

- Ray Vinson was the Managing Member and CEO of USAP from November 17, 2009, until the company went out of business in October 2011.
- He was the majority owner, with a 53.67 percent interest in the business.
- As Managing Member of USAP, he possessed the authority and power to manage all aspects of the business. This authority included the ability to set pay policies, determine pay rates of employees, and hire, fire and discipline USAP employees.
- While CEO and Managing Member of USAP, Vinson was increasingly involved with USAP. He had an office with a computer at the USAP location, and possessed a USAP email address. He was present at the USAP location as often as three or four times per week, and attended marketing meetings, meetings with USAP accountants, collaborative meetings regarding company policy and manager meetings, during which he handed out bonus checks to managers. He addressed the entire USAP staff on the production floor at times, and offered rides in his helicopter as an incentive to sales representatives for meeting sales goals.

Factors Weighed in Finding the President was an "Employer" under FLSA

Similarly, the district court also found that Shawn Vinson met the legal threshold to be deemed an "employer." The basis of the finding and analysis were similar to the factors examined for the CEO:

- Shawn Vinson owned 25.5 percent of USAP.
- In his position as President, he possessed the authority to manage USAP and make decisions concerning the business of the company; to make contracts, enter into transactions, and make and obtain commitments on behalf of the company; to hire, fire and discipline USAP employees; to set or change the pay rates of USAP employees; and to give approval for marketing expenditures of USAP.
- Beginning in 2010, Shawn Vinson was present at the USAP office location approximately three to four days per week, and devoted as much as 20 to 30 hours per week to USAP business. He had his own office and computer at USAP, and possessed a USAP email address.
- Vinson also attended USAP meetings, including sales meetings, meetings occurring on the sales floor, and team meetings involving a sales manager and his or her team. On at least two occasions Vinson himself called meetings, which were attended by sales managers, and during which business such as incoming call volume was discussed.

Factors Weighed in Finding the Vice President of Sales was an "Employer" under FLSA

As for Matthew McLain, the Vice President of Sales, the fact that he did not have an ownership interest in the company, and that prior to January 2011 he was an hourly employee of USAP and was not even a part of management, did not insulate him from "employer" status. The court found McClain was equally an employer based upon his responsibilities:

- McLain was hired by Ray Vinson as USAP's Vice President of Sales.

- In that position, McLain possessed the authority to discipline and fire employees of the company. His job duties included increasing production, training of sales representatives, monitoring sales, assisting in marketing efforts, changing the sales approach with USAP customers, and managing/supervising the Director of Sales.
- McLain further attended and participated in sales manager meetings, in which the issues discussed included changes to employees' pay structure and incentives offered by the owners.
- The Court also noted that McLain began spending more and more time at the USAP location, and by May 2011, he was working full-time, or 40-plus hours per week, there. McLain also possessed a USAP email address.

What Can be Learned

Individual owners and managers of companies are not protected from liability in wage and hour claims. Those with ownership interests such as the Vinson brothers (CEO and President), their attendance at meetings, presence in the office, use of company email, and power to make tangible employment actions such as to hire and fire, promote and demote are apparently enough to find "significant control" over the company's operations under FLSA. The district court even noted that it did not matter if some of the powers possessed were never actually exercised by the defendants or exercised rarely (as in the case of Shawn Vinson, who only called two meetings during his tenure as President).

Likewise, *Rickard* illustrates a continuing risk that individual liability is by no means limited to the business owners. Non-owner officers, such as the Vice President of Sales (who in this case had no ownership interest) can nevertheless be determined to be "employers" for the purposes of FLSA liability. As a consequence, managers, supervisors and even human resources personnel can be individually-named targets to FLSA actions and, as such, must take proactive steps to protect themselves. The cautionary tale from this ruling is that each such "employer" has a vested personal interest to ensure that his or her organization is FLSA-compliant.