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WAGE AND HOUR

New High-Risk Wage-and-Hour Class Action Environment Post-'Braun'

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Special to the Legal

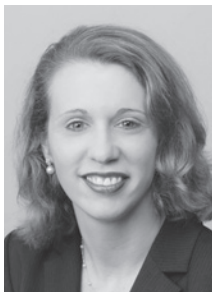
On Dec. 15, the Supreme Court of Pennsylvania made clear how costly wage-and-hour litigation can be to Pennsylvania employers by affirming an award of over $187 million dollars against Wal-Mart for claims relating to rest breaks and off-the-clock work in *Braun v. Wal-Mart Stores*, 2014 Pa. LEXIS 3324 (Pa. Dec. 15, 2014).

The dissenting opinion of Justice Thomas G. Saylor in the case is a clarion call to Pennsylvania employers (as well as the Pennsylvania legislature) to stand up and take notice of the significance of this decision. Opining that the trial court and Superior Court implemented "a severely lax approach to the application of governing substantive law in the issuance and sustainment of an almost $200 million verdict based on proof which was insufficient to establish liability and damages across a 187,000-member class," Saylor went on to say as follows:

"Although I take no issue with the majority's observation that the burden of proof may be relaxed to some degree in wage-and-hour cases, the latitude extended in this case is of an untenable magnitude. Here, the appellee class was permitted to effectively project the anecdotal experience of each of six testifying class members upon 30,000 other members of the class at large, to extrapolate abstract data concerning missed and mistimed 'swipes' from 16 Pennsylvania stores to 139 others, to overlay discrete data taken from several years' experience across a distinct four-year period, and to attribute a single cause to missed and mistimed swipes, all despite indisputable variations across store locations, management personnel, time, and other circumstances. ... It is very troublesome for the same to be relied upon in courts of law as the essential support for a large-scale class action verdict."

The *Braun* class consisted of 187,979 hourly paid employees who worked for Wal-Mart from March 19, 1998, to Dec. 27, 2005. The class members claimed that they were not given the paid breaks that they were promised in the employee handbook, and that they were often forced to work "off-the-clock," in violation of a handbook provision stating that they would be paid for all time worked. After a lengthy jury trial that included the presentation of fact and expert witnesses, the jury found in favor of the plaintiffs. The size of the verdict was significantly enhanced by the liquidated damages and attorney fees provisions of the Wage Payment and Collection Law (WPCL) to the tune of more than $96 million dollars.

At trial, plaintiffs' expert presented testimony to the jury that store managers were financially incentivized with significant year-end bonuses keyed to store profitability. This created, according to plaintiffs, an incentive to understaff stores and require employees to miss breaks and work off-the-clock as a means of minimizing expenses. The defendant presented an expert who testified that there was no link between Wal-Mart's managers' bonus compensation program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and rest breaks and that the plaintiffs' expert testimony was based on an "erroneous comparison of employee hours and store profitability."

At issue before the Pennsylvania Supreme Court was whether Wal-Mart was improperly subjected to "trial-by-formula," a process rejected by the U.S. Supreme Court in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), on due process grounds.

The *Braun* court rejected Wal-Mart's due process "trial-by-formula" argument explaining that, from the court's perspective, the record in the case contained actual evidence of wrongdoing on the part of the Wal-Mart, not just factual projections, and that the formula process was limited to the calculation of damages, and not to establishing liability. The court reasoned that the evidence of Wal-Mart's liability to the "entire class" was "established at trial by presentation of Wal-Mart's own universal employment and wage policies, as well as its own business records and internal audits." While the state Supreme Court attempted to distinguish its holding from the U.S. Supreme Court's decision in *Dukes*, as Saylor stated in his dissent, the opinion of the court in *Braun* effectively relaxes the burden of proof in the wage-and-hour class action context in Pennsylvania state courts.

The decision in *Braun* is all the more stark in light of the U.S. Supreme Court's decision in *Integrity Staffing Solutions v. Busk*, (Dec. 9, 2014, No. 13-433), issued just days before *Braun*. The unanimous U.S. Supreme Court in *Integrity Staffing* held that time spent waiting in line to pass through security checkpoints is not compensable under the Fair Labor Standards Act (FLSA). Would *Integrity Staffing* have turned out differently under Pennsylvania law? Perhaps. As with its federal counterpart, the Pennsylvania Minimum Wage Act (PMWA) does not define the term "work." It parrots the FLSA, which defines to "employ" to mean "to suffer or to permit to work." But, unlike the FLSA, the PMWA does not include identical portal-to-portal precepts. The PMWA specifically authorizes the secretary of Labor and Industry to make and revise regulations implementing the act. Section 231.1 (b), paragraph nine defines "hours worked" as follows:

As a result of Braun, Pennsylvania employers are now on notice that class action cases under the WPCL likely will increase.

"The term includes time during which an employee is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed workplace, time spent in traveling as part of the duties of the employee during normal working hours and time during which an employee is employed or permitted work; provided, however, that time allowed for meals shall be excluded unless the employee is required or permitted to work during that time, and provided further, that time spent on the premises of the employer for the convenience of the employee shall be excluded."

Would time waiting in line to pass through an employer-mandated security clearance be considered time "required by the employer to be on the premises of the employer ... or to be at the prescribed workplace"? A state court certainly could reach that conclusion.

The clear message for employers emerging from *Braun* is that employers in Pennsylvania must review their employee handbooks with a renewed awareness that under the WPCL any promises made will create WPCL obligations beyond those of traditional wage-and-hour laws like the FLSA and PMWA. Moreover, employers in Pennsylvania should be acutely aware that if promised, paid breaks must be provided or else employees will be entitled to additional compensation for time worked during breaks. More generally, Pennsylvania employers should be mindful of potential distinctions between Pennsylvania and federal wage-and-hour law, and analyze their policies to comply with both.

As a result of *Braun*, Pennsylvania employers are now on notice that class action cases under the WPCL likely will increase. Reliance on well-established federal law principles is not enough to protect against wage-and-hour liability in the state. For Pennsylvania employers it is time to review wage-and-hour policies, to provide managerial training on all relevant policies, and to take the steps necessary to ensure that payroll and workplace practices are in compliance with both federal and state law.

Employers in Pennsylvania can take comfort that under the WPCL, they are the masters of their own fate. Unlike other laws, employers have the ability to define the scope of their legal obligations under the WPCL. Employers should seize upon the opportunity to delineate the contours of those obligations and consider revising their policies to mitigate against potential risks under the WPCL post-*Braun*. •