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Attorneys at Law

3 Bethesda Metro Center, Suite 460
Bethesda, MD 20814
www.lerchearly.com

Tel. (301) 986-1300
Fax (301) 986-0332
info@lerchearly.com

CLIENT ALERT

**SMALL EMPLOYERS AND THEIR OWNERS IN MARYLAND CAN
ACTUALLY BE LIABLE FOR FAILING TO PAY OVERTIME? --
“YOU CANNOT BE SERIOUS”**

By: Marc R. Engel, Esq.

Tennis great John McEnroe is perhaps as well known for his boorish scolding of umpires -- “*you cannot be serious*” -- when calls did not go his way on the tennis court as he is for his artistry with a tennis racquet. In his post-tennis career, McEnroe rebranded himself by poking fun at this catch phrase in numerous commercials. One doubts that McEnroe is laughing now. These days, McEnroe, in addition to his television commentary, owns a tennis academy in Long Island. According to published news media reports, a maintenance man filed an action *alleging* that he and other employees at the tennis academy were not paid overtime as required by New York state labor law. I am unaware of whether there is any merit to the allegations made by the employee.

To the surprise of far too many in Maryland, “small employers” (a label often applied to profit and not for profit businesses with fewer than 15 employees) and their owners, as well as those with sufficient hiring authority, can and have been held liable for failure to pay overtime to employees who are entitled to receive it.

The FLSA and the MWHL

The Fair Labor Standards Act (“FLSA”) defines the term “employer” broadly to include “any person acting directly or indirectly in the interest of an employer in relation to an employee.” The analogous Maryland statute, known as the Maryland Wage and Hour Law (“MWHL”), defines the term “employer” in a similar fashion as including a person who acts



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directly or indirectly in the interest of another employer with an employee. Because of the similarities of the two statutes, the Maryland courts interpret the MWHL consistent with the FLSA for purposes of determining who constitutes an employer under the MWHL.

The Possibility of Individual Liability

An employee who meets the FLSA definition of the term “employer” is *jointly and severally liable* for any unpaid wages owed by the traditional employer. In determining whether an individual is an employer in Maryland for purposes of the FLSA and for purposes of the MWHL, the courts consider the “economic realities” of an individual’s role with a corporation. Under the economic realities test, an employer is someone who (1) has the authority to hire and fire employees; (2) supervises and controls work schedules or employment conditions; (3) determines the rate and method of payment; and (4) maintains employment records. The economic realities test can also include consideration of the person’s job description, his/her financial interest in the enterprise, and whether the individual exercises control over the employment relationship. Although no single factor in the economic reality test is controlling, courts consider the totality of the circumstances.

As a result, small businesses and their owners face significant liability under the FLSA as well as under the MWHL. In addition to the owner, other individuals who have the authority to hire and fire employees and have supervising control over work schedules and employment conditions also have potential personal exposure under the statutes. The FLSA and the MWHL have significant legal and financial consequences to entities and individuals deemed employers under these statutes. Employees are entitled to be made “whole” for monies that they are owed,



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and there is a presumption under both statutes that victorious employees in wage and hour (*i.e.*, overtime) cases are also entitled to be awarded liquidated damages and attorney's fees. The FLSA and the MWHL are among the most unforgiving employment statutes for employers.

Conclusion

All employers, including so called "small" employers, *must* be serious when it comes to preventing and defending wage hour and overtime claims. In this regard, small employers, just like their larger counterparts, should be mindful of the following:

1. Carefully reviewing job positions to determine whether individuals have been properly characterized as exempt or non-exempt.
2. Determining whether individuals have been properly characterized as employees or independent contractors. In most instances, these individuals are actually employees for purposes of one or more employment statutes.
3. Establishing sound and lawful handbook policies that address when and under what circumstances employees can work overtime.
4. Training managers on the overtime rules and how and under what circumstances overtime can be worked.
5. Using timesheets that contain appropriate certifications by employees regarding the hours (including overtime hours) that they work.
6. Regularly monitoring the amount of overtime that employees work.
7. Strongly consider purchasing Employment Practices Liability Insurance (EPLI) that provides at least some kind of coverage for, among other things, wage claims.



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Marc R. Engel, Esq. is an employment attorney and litigator at Lerch, Early & Brewer, Chartered where he co-chairs the firm's Employment and Labor Group and is a member of the firm's Litigation Group. He advises employers of all types of employment issues (including wage and hour and overtime issues), performs human resource audits, and conducts training on a variety of employment issues, including strategies for defending overtime and compensation claims, and improving hiring, performance management, retention, and avoiding discrimination and harassment claims. He also litigates and mediates employment and business disputes and counsels clients on litigation avoidance strategies. In 2011, Marc was listed in Washingtonian Magazine's Top Lawyers for Employment Law. He has been recognized as a Top Rated Lawyer in Labor & Employment Law by Martindale-Hubbell, a premier attorney rating organization. For more information about human resource audits or the employment practice, please contact Marc at (301) 657-0184 or by email at mrengel@lerchearly.com. For more information about the firm, please visit our website at www.lerchearly.com. **This article is not intended to provide legal advice as to any specific matter.**