

Duff on Hospitality Law

## Meeting Labor Numbers - Working Off the Clock Wage Claims

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It is no secret that wage and hour class actions are among the “hot topic” law suits that are on the increase. Like too many people, when I hear “class action” my heart starts to race, beads of sweat break out on my forehead and I start to feel sick to my stomach...and I don’t even own the business that is named in the suit. I just know the wage and hour cases are time intensive and expensive to defend. Wage and hour class actions often deal with the tried and true wage claims, misclassification of exempt employees as well as the overtime claims that go hand in hand with the misclassification. However, occasionally one comes along that makes you stop and think.

Last week one such action was brought in [Alabama against a franchisee of a fast food restaurant](#). This particular lawsuit highlights the challenge of balancing the need to manage labor costs and the long term cost of doing so in an inefficient (or illegal) manner.

The restaurant industry is not a high margin industry, so it is tempting to cut corners where you can. For example, if you open early in the morning, you want to have everything ready to go as that first bleary eyed customer stumbles in looking for their first jolt of caffeine. The problem is if you don’t have sufficient prep work done, having the customers show up before your staff is totally prepared can result in you being in the weeds faster than you ever anticipated. The problem is the cash needed to support the labor isn’t there if the employees do the prep work before the doors are open. If this recent Alabama lawsuit is to be believed, the employees were asked to show up for work at least a half hour before the business opened to the public – but they could not clock in until there was at least \$40 on the till. This essentially means all prep work was done off the clock - a fatal mistake under the wage and hour laws.

[The Fair Labor Standards Act \(FLSA\)](#) requires employers to pay for all hours worked to their benefit. This means simple things like turning on the kitchen equipment sufficiently early to ensure it is ready to go when the orders start flowing. This means getting the mise en place completed before the day starts. Not paying for this time means you have employees working off the clock.

Some work places know that they are requiring employees to work off the clock, such as the alleged violations in this new lawsuit. However, other work environments also create this problem, perhaps unintentionally.

**Employer A:** This employer limits employees' ability to clock in while still expecting an unrealistic amount of work to get completed within the “working day”. This leaves employees feeling like they are “bad” or “wrong” because they could not get everything done that was expected. Their solution is to clock out but keep working so they can catch up. This helps them appear as the “shining star” employee rather than the poor performer. No matter the motivation, this behavior is a problem.

**Employer B:** This employer creates an environment where employees feel so much a member of the team that they clock out and work off the clock (without anyone knowing) so that they feel like they are “helping” the business succeed. Here the good intentions of the employee still create liability for the company.

No matter the nature of the work environment, off the clock work is ultimately more expensive than simply managing your work force and keeping a realistic expectation on your labor numbers. If a wage and hour suit is brought, the employer could be responsible for paying for all the off the clock hours worked (for the last six years), the overtime pay that would have been accumulated but for the off the clock time (for the last two, possibly three, years), as well as an equal amount in liquidated damages. This is just under the FLSA. Add any state law violations and penalties and the amounts can continue to climb. You may even be liable for paying the attorney fees of the plaintiffs. All of this is on top of the emotional strain and costs to the company, not to mention the cost of paying attorneys to defend the claim.

**It is very important to manage your labor numbers.** It is even more important to manage your workforce and make sure that you aren't creating an environment that either consciously or unconsciously creates a situation that employees feel compelled to work off the clock. If you wonder how to manage your hours, or if you need an audit of your wage and hour practices to make sure there is not exposure to such claims, members of our [Labor, Employment & Immigration](#) team are available to help.

**Tags:** Class Action, Labor Costs, Restauranteers