

SEPTEMBER 2023
EMPLOYER FORCED TO PAY
UNAPPROVED OVERTIME

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ANNOUNCEMENT:

Pozzuolo Rodden Pozzuolo, P.C. is pleased to announce that Joseph R. Pozzuolo, Esquire is now back to work full-time in the office from a brief sick leave. Mr. Pozzuolo is ready to personally provide the full spectrum of legal services you have come to expect from him over the last 40+ years. Mr. Pozzuolo may be reached directly at 215-977-8201 or joe@pozzuolo.com.

We thank you for your loyal support.

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An enforcement action by the U.S. Department of Labor resulted in a ruling that nurses were employees, not independent contractors, of a staffing agency that provided them on a temporary basis to hospitals. After this ruling, the agency took action to attempt to deter unauthorized overtime by the nurses and to avoid having to pay time and a half for such hours. It adopted a policy, printed on all of the nurses' time sheets, stating that the nurses had to notify the agency in advance of any hours exceeding 40 hours a week. If they did not, the notice stated that the nurses would be paid for such time only at their regular rate.

When nurses who had worked overtime hours at hospitals without notifying the agency ahead of time sought to recover pay at the overtime rate, they prevailed despite not having followed the employer's policy. A federal court ruled that the agency had not done enough to meet its duty under the federal Fair Labor Standards Act to "make every effort" to prevent performance of unauthorized overtime work of which it had knowledge. The agency's knowledge was present, albeit after the fact, as was evidenced by the nurses' time sheets showing the unauthorized overtime that was worked.

Suggestions from the Court

The ironic lesson from the decision is that employers desiring to prevent unauthorized overtime by their employees must do so by essentially "getting tough" with the employees through enforcement of sufficiently strong disciplinary policies, and not simply by declining to pay for the unauthorized overtime hours. Although the agency suffered a defeat in the litigation, the court's opinion offered suggestions for alternative approaches that it or other similarly situated employers can take in the future to deter unauthorized overtime while complying with federal law.

For example, an employer could keep a daily, unverified tally of its employees' hours and reassign shifts later in the week that would otherwise result in overtime, or it could refuse to assign any shifts to employees who habitually disregard an overtime rule. Whereas the agency had admitted that a nurse who disregarded its preapproval rule faced no adverse consequences beyond getting only straight-time wages for the ensuing overtime, if it were serious about preventing unauthorized overtime, said the court, the agency would discipline nurses who violate the rule.

According to the court, an employer could even entirely disavow overtime hours, announcing a policy that it will not, under any circumstances, employ an individual for more than 40 hours in a week. Under such a policy, any hours over the limit would not be compensated for the employee.

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