

WAGE HOUR: PRACTICE POINTER: A wage award for work off-the-clock requires evidence of Employer knowledge of that activity.

Employment attorneys representing management have been concerned about exposure to “off-the-clock” claims for overtime following termination of non-exempt employees. Last Tuesday’s decision in *Jong v. Kaiser Foundation Health Plan, Inc., et. al.*, (CA1/3 A138725 5/20/14) limits that exposure.

The Jong panel held that evidence that Outpatient Pharmacy Managers (OPM) worked more than 40 hours a week prior to Kaiser’s reclassifying them as non-exempt was not evidence that the plaintiff was performing work off the clock after that time. The Court noted that in his deposition plaintiff Jung testified that he knew it was Kaiser’s policy to pay for all hours worked, including overtime hours worked without prior authorization. He also signed an “Attestation Form for Hourly Managers and Supervisors – Working Off-the-Clock Not Allowed” and testified that he did not know whether anyone in Kaiser management was aware that he was performing work off the clock.

The Court quoted FLSA decisions that where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer’s failure to pay for the overtime hours does not violate wage hour law. Finding no evidence that Kaiser had such notice of contemporary “off-the-clock” activity, the panel sustained the trial court’s granting Kaiser’s motion for summary judgment.

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