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When is a Duck, a “Duck”?

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Those of us representing employers in the oil patch know the sad scenario all too well. Exceedingly well paid employees and contractors seek even more pay, usually once terminated, through a long-standing law, the Fair Labor Standards Act (the “Act” or the “FLSA”).

The latest target of this attack is Stuart Petroleum, who is being sued by Rory Dyson, in a West Texas federal court (*Dyson v. Stuart Petroleum*, 1:15-CV-00282-RP). Mr. Dyson, a contract flow tester, seeks overtime for hours that he worked over 40 in a workweek. Mr. Dyson says he deserves the overtime pay, though a contractor, because he was reportedly misclassified by Stuart Petroleum. And, for now, the Court agrees, holding very recently that the case may proceed as a “class action” of all flow testers allegedly misclassified by Stuart Petroleum.

During the energy industry’s boom in the last five to six years, companies long-active and those that eagerly popped up followed the shale plays around the United States and did two things: (1) tried to hire like mad; and (2) paid workers (employees and contractors alike) large salaries/compensation and fat bonuses of all manner—yearly, quarterly, monthly, daily, safety, attendance, etc. You name it, and the money was paid, in order to entice and hire workers needed to extract the oil and gas out of far-flung shale plays. The money was generously paid, often without much thought, simply with the idea of the business trying to exist, to be able to attract talent, and to retain workers.

And it was not easy. Finding truck drivers, rig hands, drillers, tool pushers, testers, welders, and many others was often very difficult, and reports were legion about workers changing employers with the lure of just an additional $5 bonus each day. Who could blame them? That’s the American way. As a result, it was not unusual to hear about, work with, and, in my case, defend against employees who were paid far more than $100,000 a year and sometimes more than $200,000 a year—when all of their bonuses, vehicle allowances, and compensation were combined. It is mind-boggling.

The money was paid because the economics, at the time, seemed to demand it. And everyone did the same or else a company might be out in the cold without the workers it needed.

But, hey, there’s a little problem.

All believed this is what the industry had “always done.” It certainly was what everyone was doing. And I mean everyone—from the Schlumbergers of this world to the mom-and-pop small driller in the Eagle Ford. And if Halliburton or Schlumberger paid its workers like this, wasn’t it correct?

But no one really took a hard look at one law: the Fair Labor Standards Act.

The Act, written for a United States of the 1930s (it was enacted in 1938), is straightforward and rather unforgiving. Or, to put it another way, the FLSA does not have exceptions for the oilfield or for employers paying folks what by anyone else’s standards would seem to already include “premium” pay. If the worker is not exempt from the law, then overtime is owed. That’s pretty much it.

So, when the boom hit, when workers flooded to Texas, North Dakota, Pennsylvania, and other states touched by shale exploration, that awakened others to the potential of other money that might be extracted from the industry—the money to be had in FLSA lawsuits. Employment lawyers and lawyers drummed out of tort cases by tort reform turned to this Grand-daddy law for comfort—for the recovery of wages, double damages ("liquidated damages"), and, of course, attorneys' fees. And the recovery could easily grow with the use of class actions that fit well in the industry, as companies had hired veritable armies of workers.

It was the perfect storm. With these workers being paid humongous bonuses and salaries, the potential overtime numbers grew exponentially and so have the lawsuits.

The *Dyson* case is just the latest example. Here Stuart Petroleum lost the initial round at court, where the judge ruled that a "conditional" class of allegedly misclassified "independent contractors" may proceed. The contractors are flow testers that monitor oil and gas wells. The standard for certifying a conditional class is low, so the result, at this point, is not entirely shocking, particularly as the company also employed folks doing exactly the same job, who were paid overtime. So, Mr. Dyson and others like him definitely looked like employees, his attorney argues, and should be treated the same for overtime purposes.

What happens next? For Stuart Petroleum, presumably the lawsuit fight will continue through discovery, and the focus will be on the issue of whether the workers are truly independent or were misclassified and should be treated like the other workers who were employees. Or, perhaps, like many others, the case will settle. Perhaps, the judge's ruling shows that the handwriting is on the wall. Time will tell.

For the industry, given the number of these lawsuits that have been filed, with many settled, presumably the outlook is changing, particularly as the industry is now recoiling from the precipitous drop in oil prices over the last year or so. The economy has changed, and, accordingly, salaries and bonuses have been adjusted downward. And, significantly and unfortunately, employees have had to be let go in massive layoffs, while some companies have retrenched or folded.

It is the unhappy worker, often terminated, that leads to the lawsuit. So, with the ongoing employee reductions, we may be looking at a few more of these cases, till all of this bottoms out. All in the industry are taking or should be taking a close look at the FLSA, review their employee classifications, and determine if the compensation system follows the law. Then the energy business can move forward positively, at least without this particular threat.

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