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# FLORIDA

## EMPLOYMENT LAW LETTER

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#### Drug Use

Many states have passed laws legalizing the medicinal use of marijuana, causing confusion for employers on whether they can still discipline or refuse to hire workers who test positive. At www.HRHero.com, you can find the following policy advice:

- HR Sample Policy: Drug-Free Workplace and Substance Abuse, [www.HRHero.com/lc/policies/206.html](http://www.HRHero.com/lc/policies/206.html)
- HR Sample Policy: Preemployment Drug Screens, [www.HRHero.com/lc/policies/302.html](http://www.HRHero.com/lc/policies/302.html)

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### RETALIATORY DISCHARGE

## Liquidated damages not mandatory in FLSA retaliation cases

*The federal appeals court over Florida recently ruled that an award for liquidated damages is not mandatory in Fair Labor Standards Act (FLSA) retaliation cases. The FLSA has strict rules requiring employers to pay employees fair wages and provides for stiff penalties for employers that retaliate against an employee who seeks unpaid wages. One penalty is liquidated damages, which essentially doubles any unpaid wages awarded by a jury.*

*Liquidated damages are mandatory in overtime cases unless an employer can prove that it acted in good faith and didn't willfully violate the FLSA. Until this recent ruling, there had been no clear-cut answer as to whether liquidated damages are automatically imposed on an employer that is guilty of retaliation. This ruling seems to give employers some leniency.*

### **The employer restructures**

Leonard Moore, Jason Evers, and Christopher Lungrin worked as delivery drivers for Appliance Direct, Inc. In 2008, the employees sued Appliance Direct and the owner and CEO of the company, Sei Pak, alleging they were not properly compensated for overtime work. As the lawsuit was pending, the company began changing the employment status of its drivers from employees to independent contractors. Some drivers received offers to become independent contractors, but Moore, Evers,

and Lungrin did not. Their employment was terminated, and their jobs were outsourced.

### **Taking it to the next level**

Moore, Evers, and Lungrin now found themselves with no jobs at all. None too pleased with this development, they took their lawsuit to the next level and sued Appliance Direct and Pak for retaliation, alleging that the company and its CEO retaliated against them by (1) not giving them the same opportunity as other employees to enter into contracts for delivery services and (2) interfering with their ability to be hired by other subcontractors to provide delivery services for Appliance Direct. The employees claimed the loss of their jobs and the denial of the opportunity to become independent contractors were a direct result of their overtime lawsuit.

With the retaliation lawsuit looming, Appliance Direct settled the employees' overtime suit. At some point after the settlement, the company filed for bankruptcy. The retaliation lawsuit against Appliance Direct was put on hold because of the bankruptcy, but the retaliation claims against Pak proceeded as scheduled. In a valiant attempt to have the lawsuit against him dismissed, Pak argued that the employees couldn't prove that he met the legal definition of "employer." Therefore, he

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could not be held liable for retaliation. The judge and jury didn't agree.

The law takes a subjective approach when deciding whether an individual qualifies as an employer under the FLSA. Courts have held that a corporate officer can be held personally liable if he has operational control over the corporation (e.g., involvement in the day-to-day operations of the company or direct supervision of the employees involved in the lawsuit). The legal status of an employer is determined by observing the totality of the circumstances surrounding the employment relationship.

In this case, the court noted that not only was Pak the CEO and 75 percent owner of Appliance Direct, but he also guided company policy, supervised managers, and was the ultimate decision maker. The court found there was sufficient evidence to prove that Pak ordered that Moore, Evers, and Lungrin not be given subcontracts for delivery services.

It was determined that Pak was in fact an employer for purposes of the FLSA. The jury found in favor of the employees and awarded them \$30,000 each for their retaliation claims, but the case didn't end there. Neither Pak nor the employees appeared to be satisfied with the decision. Pak immediately requested that the ruling be thrown out, and the employees appealed, claiming they were entitled to more damages. The employees noted that the FLSA provides for liquidated damages as well as an award for what they were rightfully owed.

### ***You owe me more! It's the law, right?***

The employees were correct to a certain extent. The FLSA entitles employees to liquidated damages equal to the amount awarded in unpaid wages. Prior case law has made it clear that under the Act, an award for liquidated damages is *mandatory* unless the employer can show that its failure to pay the wages was an honest mistake. To avoid liquidated damages, an employer must show that it made a good-faith effort to comply with the FLSA (in other words, that it didn't intentionally refuse to pay employees what they were owed).

That's the case for an *overtime* violation, but the jury's verdict against Pak was for *retaliation*. The law is not settled on whether an award for liquidated damages is mandatory in FLSA retaliation cases. In fact, there is conflicting case law, with different federal appellate courts having different views on the issue. However, it appears that this case may have changed that for Floridians.

The appellate court was faced with an issue of first impression (meaning the court was considering the issue for the first time). The court had to answer whether the FLSA requires liquidated damages for retaliation as it does for wage and hour violations. In other words, the court had to decide whether liquidated damages are mandatory or discretionary in FLSA retaliation cases.

It was undisputed that Pak failed to show at trial that he acted in good faith. That's important because if the employees were able to persuade the court that liquidated damages are mandatory in retaliation cases (and the employer didn't make a good-faith attempt to comply with the law), they would be entitled to double the amount of damages awarded at trial. Both sides presented conflicting case law in arguing whether the liquidated damages provision of the FLSA applies to retaliation cases.

The appeals court held that the lower court got it right; there was sufficient evidence to make Pak liable for retaliation. However, the court ultimately ruled the employees weren't entitled to an automatic liquidated damages award. The court concluded that the retaliation provision of the FLSA gives trial courts discretion as to whether to award liquidated damages after determining whether doing so would be appropriate based on the facts of the case. *Moore v. Appliance Direct, Inc.*, No. 11-15227, 2013 U.S. App. LEXIS 3047 (11th Cir., February 13, 2013).

### ***Takeaway***

This ruling by the appellate court provides some leniency for employers. This shouldn't be confused with the notion that employers are getting off the hook in FLSA cases. Pak was still required to pay each employee \$30,000. However, it could have been twice as much. Had the court said that liquidated damages are mandatory in FLSA retaliation cases in which an employer fails to show that it made a good-faith attempt to comply with the law, Pak would have owed each employee \$60,000. It is always important to ensure that you pay your employees properly and on time. If an employee seeks legal advice, under no circumstances should you take action that may be viewed by a jury as retaliation.

**Any FLSA violation can be costly, but fighting an allegation of retaliation can be a much bigger problem.**

This case gives employers the knowledge that liquidated damages are discretionary (as opposed to mandatory) in retaliation cases, which may provide some leverage for your company when negotiating future settlements. But it's important to remember that courts still have the discretion to award liquidated damages. Any FLSA violation can be costly, but fighting an allegation of retaliation can be a much bigger problem.

➔ *You can catch up on the latest court cases involving liquidated damages in the subscribers' area of [www.HRHero.com](http://www.HRHero.com), the website for Florida Employment Law Letter. Just log in and use the HR Answer Engine to search for articles from our 50 Employment Law Letters. Need help? Call customer service at 800-274-6774. ❖*

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