The ever-changing landscape of directors’ and officers’ personal liability for wage and hour violations
By Anthony Dragone

The landscape of wage and hour laws has been quickly evolving. This has led to an increase in class-action lawsuits against employers alleging that employees have been harmed because they have not received minimum wage and/or been provided overtime compensation. But should directors and officers of a company be concerned about personal liability in connection with such litigation? The answer will depend on where the claim arises or under what statute the action is brought.

The law: Fair Labor Standard Act
The Fair Labor Standards Act of 1938 (FLSA) provides that employers are liable for unpaid minimum wages or unpaid overtime compensation. The FLSA defines an “employer” as any person “acting directly or indirectly in the interest of an employer in relation to an employee...” §203(d) et seq. Plaintiffs have looked to this expanded interpretation of the term “employer” under the FLSA to create a cause of action for personal liability against individual officers and directors by claiming them to be “employers” under this definition.

The case: Boucher v. Shaw
A case before the United States Court of Appeals for the Ninth Circuit demonstrated that some courts are willing to expand the definition of employer, if certain conditions are met, while other courts require clear legislative intent prior to finding officers and directors personally liable for wage and hour claims.

In Boucher v. Shaw, 572 F3d 1087 (9th Cir. 2009), the plaintiffs, former employees of the Castaways Hotel, Casino and Bowling Center (Castaways), brought suit against the Castaways’ individual managers for unpaid wages under both state and federal law. The Ninth Circuit certified the state law question to the Nevada Supreme Court which held that individual managers could not be considered “employers” under state law. Under Nevada law an “employer” includes “every person having control or custody of any employment, place of employment or any employee.” Nev. Rev. Stat. § 608.011. The Nevada Supreme Court stated that it would not expand the common law definition of “employer” to include individual managers absent a clear expression of legislative intent.

On the FLSA claim, however, the Ninth Circuit held that the definition of an employer under the FLSA is not to be limited by the common law concept but “is to be given an expansive interpretation in order to effectuate the FLSA’s broad remedial purposes.” Instead, the appropriate test under the FLSA is to examine the “economic reality” of the relationship. The Court held that “[w]here an individual exercises ‘control over the nature and structure of the employment relationship,’ or ‘economic control’ over the relationship, that individual is an employer within the meaning of the Act, and is subject to liability.” As such, the Court stated that Plaintiffs had a legal right to pursue their federal wage and hour claims against the directors and officers of the Castaways.

State laws
Partially in response to cases like Boucher and in an effort to further eliminate uncertainty, several states have amended their laws to include personal liability for directors and officers in connection with state wage and hour violation claims. For example, the California legislature enacted legislation that amended the state’s wage and hour laws to specifically extend liability to directors and officers. The statute, §558.1 of the California Labor Code, states that:

(a) Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission ... may be held liable as the employer for such violation.

(b) For purposes of this section, the term “other person acting on behalf of an employer” is limited to a natural person who is an owner, director, officer, or managing agent of the employer...

Similar amendments have been enacted in other states, including New York, Illinois, Pennsylvania, and Washington. These state statutes clarify that individuals can be personally liable, which may cause an increase in wage and hour claims against directors and officers in these jurisdictions.
Insurance gap

With an ever-evolving basis for personal liability for directors and officers in connection with wage and hour claims, there is always the potential for gaps in coverage. Standard Employment Practices Liability (EPL) policies do not generally provide coverage for wage and hour claims. Moreover, most EPL policies have specific exclusions for claims arising out of the failure to pay wages or overtime for services rendered. If any coverage is granted within an EPL policy, it tends to be a small sublimit for defense costs.

Likewise, some Directors & Officers (D&O) liability policies may exclude any claims that arise or are attributable to the employment of any individual, including any actual or alleged violation of wage and hour laws. In the situation where the insured company provides indemnification, the director or officer is likely made whole, but in the situation where an employee sues directors and officers of an insolvent company for unpaid wages, the individuals can be left exposed.

What should employers do?

It is important that every company consult with an industry specialist to review insurance options for D&O and EPL insurance. Specialty products, or amendments to existing insurance products, may exist to insulate individuals from the very real exposure of personal liability in both state and federal wage and hour cases. These products can include:

1. Wage & hour extensions or standalone wage & hour insurance policies – Purchasing an endorsement to an EPL policy or a standalone wage and hour policy would provide defense and indemnity coverage to both the entity and the individual insureds (D&Os)

2. Carvebacks to exclusions for Side A D&O – Carving out a Side A (covers loss not indemnified) exception to wage and hour exclusions in a D&O policy to provide coverage to the extent that the company is not indemnifying the individual insureds.

3. Sub-limited wage & hour defense costs coverage – Purchasing a sublimit for defense costs coverage for wage and hour claims would offset some of the risk individuals may face.

Evaluating these solutions, combined with assessing the jurisdiction, applicable laws, and potential wage and hour exposures, are crucial steps in protecting the company and, more importantly, any directors and officers facing litigation without indemnification from their company or coverage from their insurance.

About Willis Towers Watson

Willis Towers Watson (NASDAQ: WLTW) is a leading global advisory, broking and solutions company that helps clients around the world turn risk into a path for growth. With roots dating to 1828, Willis Towers Watson has 40,000 employees serving more than 140 countries. We design and deliver solutions that manage risk, optimize benefits, cultivate talent, and expand the power of capital to protect and strengthen institutions and individuals. Our unique perspective allows us to see the critical intersections between talent, assets and ideas — the dynamic formula that drives business performance. Together, we unlock potential. Learn more at willistowerswatson.com.