



## The Lawsuit Du Jour

By John Donovan (Atlanta)

This might have already happened at your dealership: your payroll clerk is exasperated because the sales people are not punching their time cards. She knows that under federal law, the dealership is obligated to pay sales people their commissions or minimum wage for all hours worked, whichever is higher. But if they have low commissions and they don't punch in and out each day, she has no way to accurately calculate their hours or their pay.

She asks the General Manager what to do. Caught on a busy day with a hundred other things on his mind, the GM comes up with a reasonable solution. At the next sales meeting, he will tell the sales people that they must punch in and out every day or they won't be paid for the day. Then, he instructs her, if they don't punch, just don't pay them.

The payroll clerk follows the GM's instructions. Weeks pass with no complaints. Problem solved. Then the federal lawsuit arrives.

### Doing the Numbers

The plaintiff in the typical lawsuit is a former sales person who was terminated for low productivity. He has found an attorney who has filed a class action lawsuit against the dealership for a violation of the federal Fair Labor Standards Act. Under that law, sales people are exempt from overtime but they must still receive at least minimum wage for all hours they work. The sales person claims that the dealership shorted him and his coworkers by not counting all of their hours worked and not paying them the proper minimum wage.

The dealership quickly calculates the most hours the employee could have worked and determines the most they could owe is only \$250. But that's not the end of it. Under the law, employees are entitled to double the unpaid wages (another \$250), times all the sales people in the dealership who claim they've been shorted. Plus all of the employees' attorney's fees, which his attorney claims to be \$10,000.

The dealer faces a Hobson's choice: pay what it sees as legal extortion to settle the case, or continue to fight the case to trial, where it will wind up paying back wages to all the complaining sales people, plus two sets of attorneys' fees: the dealership's and the class of plaintiffs. The prudent dealer settles and cuts his losses.

This scenario is being played out again and again at dealerships across the country. Many personal injury and workers' compensation attorneys have expanded their practices to include wage and hour matters, and find it to be very lucrative. They know that wage and hour claims are rarely covered by insurance. They also know that it will almost always cost a dealer far more to fight a wage claim than to settle it. Easy money. As a result, wage and hour lawsuits are now the fastest growing type of lawsuit in the country.

### Preventive Medicine

How do you protect your dealership against these guerrilla tactics? The only real defense is to prevent them from happening in the first place. To do this, you must do two things: first, you (or someone at your dealership) must understand the federal wage hour law as well as any state laws which apply. You must understand the requirements of each of the various exemptions, as well as the rules governing time records, calculating overtime, timing of payments, etc.

Second, you must audit your entire payroll to make sure that you are paying people properly. Not just now, but at least once a year...from now

on. Job duties and pay plans change over time and what seem like minor changes can result in an employee losing his or her exemption from overtime.

The Fair Labor Standards Act has been around since 1938, and is still the least understood of all the employment laws. But that is changing fast. The fact is, whether you like it or not, in the years ahead you are going to be learning a lot about wage and hour compliance. The only choice you have is whether you are going to learn it now, when there is time to make corrections and avoid liability, or whether you will wait and let an employee's attorney teach it to you.

Our Dealership Practice Group has decades of experience conducting audits of dealership payrolls and pay practices to prevent the problems described above. If you would like us to help, or if you would just like some guidance so you can do it yourself, please contact your regular Fisher & Phillips attorney or contact any member of the Dealership Practice Group.

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## Unions Push On Several Fronts

By Joe Gagnon (Houston)

Organized labor's efforts to unionize auto dealerships continued unabated during 2007. While these efforts will no doubt continue in 2008, federal legislative changes loom on the horizon which, if enacted, will significantly increase the number of successful unionization efforts. Regardless of whether these changes are implemented, dealerships should consider implementing an updated pre-campaign strategy designed to anticipate and adapt to labor's evolving unionization efforts.

### A Brief Review

During 2007 there were 41 petitions filed with the National Labor Relations Board (NLRB) attempting to unionize dealerships across the country. Most unionization campaigns occurred in Illinois (16), followed by California (six), Missouri (five), Florida (four), Pennsylvania (two), and one each in Indiana, Michigan, Minnesota, New Jersey, New York, North Dakota, Ohio, and Washington.

The vast majority of the petitions (32) were filed by the Machinists (IAM). Although the Teamsters had previously expressed an intention to abandon unionization attempts at dealerships, it accounted for six of the petitions filed.

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## Unions Push On Several Fronts

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### The Employee Free Choice Act

Pending before Congress is the so-called Employee Free Choice Act (EFCA). If enacted, it will constitute one of the most significant changes to the National Labor Relations Act in over 60 years. As currently worded, the EFCA includes the following provisions:

- Replacing traditional secret ballot system currently used to vote on unionization with a "card check" system. Under the card check system, a union will be installed as the workers' representative if a majority of the employees sign cards indicating they favor the union.
- Requiring mandatory arbitration if a newly certified union and management cannot agree upon a labor contract after 90 days.
- Dramatically increasing penalties for violating employees' rights to organize a union. Under EFCA, a fine of up to \$20,000 per violation may be imposed for willful or repeated violation of employees' rights in a union campaign or in bargaining for an initial contract.

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### The Fallout

If the EFCA becomes law, the most significant effect on auto dealerships will be increasingly successful union campaigns. Labor will be able to forego the election process in favor of a stealth campaign with the card check system. This will likely delay management's notice of the union campaign, causing it to lose critical time in informing employees of the company's position, the risks of unionization, and the benefits of remaining union free. Moreover, under the card check system, unions can more easily exert pressure on employees.

With the mandatory arbitration provision, management will lose critical leverage in negotiating an initial contract with the newly-formed union. The union will have little incentive to accept what management offers and can instead hold out for the mandatory arbitration process. This could result in stalled negotiations, as unions resist management's good faith offers and wait out the clock to force arbitration. Alternatively, management, in seeking to avoid costly arbitration, may accept union demands it otherwise would have rejected.

With the imposition of substantial penalties, management may be less willing to risk mounting opposition to a union campaign. This will create a chilling effect over management efforts to stay union-free, with the inevitable result that some union campaigns will succeed with little or no resistance. Bureaucracy and litigation over claimed violations will increase.

### But will these Changes Occur, and if so, When?

With national elections trending Democrat and popular sentiment expressing less antipathy towards unions, businesses, including auto dealerships, are likely to see some sort of change in either 2008 or early 2009.

The 2008 elections may grant nothing more than a one-year reprieve from passage of the EFCA. President Bush will likely veto the EFCA if it makes it to his desk. The Democrats know this, but may nevertheless push the EFCA through Congress in order to create a campaign issue. Depending on numerous political factors, a compromise is always possible.

This does not mean that dealerships should ignore this issue. The outcome of this year's elections will profoundly affect whether the EFCA becomes law. If the Democrats retain control of Congress (which appears likely at this time) and regain the White House (which, although far from certain, is a distinct possibility), look for the EFCA to be among the first issues on the 2009 legislative agenda.

Even if the Republicans have the numbers to filibuster the EFCA, it is not certain that they would spend their political capital on this issue. What might be more likely is a compromise. For example, the Republicans might agree not to filibuster the mandatory arbitration provision if, in exchange, the Democrats drop the card check system. Whatever compromise there might be, even a watered down EFCA will have profoundly adverse effects on auto dealerships and their ability to resist unionization campaigns.

### Unionization efforts will continue while the EFCA is pending

Regardless of whether the EFCA becomes law, unionization attempts at auto dealerships will continue. Any dealership is a potential target. While past campaigns have focused primarily on service technicians, similar efforts have been directed at porters, parts counter employees, parts drivers, service advisors and salespersons.

### What can dealerships do?

Act now, before the law changes. Auto dealerships can and should take preventive steps to prepare for and respond to a union campaign. Any effective pre-campaign strategy requires knowing what the law allows. For example, the NLRB recently ruled that, in certain circumstances, employers may prohibit employees from using office email systems to spread information about certain union activities.

But even this pro-management ruling carries risks. Since the ruling may be read to imply certain limitations. Accordingly, always check with counsel before embarking on any pre-campaign strategy.

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