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Brooklyn Federal Court Finds Local Establishment Not Covered by FLSA

Article By:

Noel P. Tripp

The high volume of **FLSA litigation**, particularly in jurisdictions such as New York and Florida, has in recent years forced many small businesses truly outside the scope of FLSA coverage to defend lawsuits brought pursuant to its **minimum wage** and **overtime provisions**. Typically, these smaller employers attempt to address the issue of coverage early in the litigation with the goal of avoiding a protracted proceeding, though they are not always successful. Recently, a federal judge in Brooklyn found a local Long Island restaurant to be outside the scope of FLSA coverage. *Li v. Zhao*, 2014 U.S. Dist. LEXIS 109920 (E.D.N.Y. Aug. 8, 2014).

Defendant restaurant New China House Take Out was a "small dine-in, take-out, and delivery restaurant" in Westbury Long Island owned and operated by a husband/wife team and consisting of "four tables and a five-burner cooking range." Plaintiff, a delivery person and one of the restaurant's two employees, alleged both types of FLSA coverage: enterprise and individual coverage. He alleged New China House was an FLSA-covered enterprise which did $500,000 of business annually, and that in any case he was individually covered by the FLSA due to his involvement in interstate commerce, because he drove a car manufactured out-of-state to make local deliveries for the restaurant, and used a cell phone connected to a broader network of phone towers.

As concerned enterprise coverage, in granting summary judgment to the restaurant, Judge Pamela Chen assumed "that the amounts which accrued in China House's bank account were derived entirely from its cash sales, and that the restaurant covered all of its expenses in cash before depositing the remainder in its bank account; and factor[ed] in the highest estimates for its costs and non-cash sales, as supported by the evidence [to] . . . conservatively approximate the restaurant's gross sales." These amounts, the highest potential sales figures supported by the evidence, fell far below the $500,000 cutoff. As concerned Li's own interstate activity, Judge Chen noted that the "mere fact that Li drove a car, which happened to be manufactured outside of New York, to make deliveries within New York does not establish his engagement in an interstate activity." The same logic applied to the cell phone: its business use was intrastate, and not a basis for individual coverage.

The Li decision is a victory on the merits, but highlights that even a non-covered entity can incur significant legal costs in proving such. Small employers (many of whom may be covered by state wage-and-hour provisions) must set compensation practices with these issues in mind.

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