

**Can an Employer Maintain an Indemnity Claim against an Employee for Violation of the Federal Fair Labor Standards Act and the Washington Minimum Wage Act?**

**The Washington Court of Appeals Says “No.”**

By: Amanda Guile-Hinman

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On September 29, 2015, the Washington Court of Appeals determined that an employer cannot maintain an indemnity claim against an employee who may have violated the federal Fair Labor Standards Act and the Washington Minimum Wage Act while employed by the employer.

In *Kilgore v. Shriners Hosps. For Children*, No. 322-77-7-III, 2015 WL 5712107 (Wa. Ct. App. Sept. 27, 2015), the Washington Court of Appeals considered whether Shriners could assert an implied contractual indemnity claim against an employee (Kilgore). Kilgore was in charge of payroll for Shriners. Shriners alleged it discovered that Kilgore had falsified employee timecards, which resulted in Shriners paying employees back wages. Shriners had to pay almost \$400,000 to its employees as a result of Kilgore’s alleged wrongful conduct.

Shriners argued that Kilgore violated both the federal Fair Labor Standards Act (FLSA) and Washington’s Minimum Wage Act (MWA) by falsifying employees’ timecards. Kilgore’s wrongful conduct, alleged Shriners, constituted grounds for Shriners to assert an implied contractual indemnity claim against Kilgore. Shriners relied on Washington cases which held that an employer has a right to seek indemnity and/or contribution from an employee when the employee commits a wrongful act. *See, Glover v. Richardson & Elmer Co.*, 64 Wash. 403, 409-10 (1911); *Gaffner v. Johnson*, 39 Wash. 437, 438-39 (1905).

While acknowledging the general holding in *Glover* and *Gaffner*, the Washington Court of Appeals rejected Shriners’ argument. First, the Court reasoned that no federal cases were found where an employer could maintain an indemnity claim against an employee for violation of the FLSA. To the contrary, federal cases had held that state-law indemnity claims could not be brought by an employer against an employee for violations of the FLSA. The federal courts reasoned that

allowing an employer to assert an indemnity or contribution claim against an employee for violation of the FLSA would frustrate the purpose of the FLSA “because an employer who believed any violation of the FLSA’s overtime or minimum wage provisions could be recovered from its employees would have a diminished incentive to comply with the FLSA.” The Court ruled that there was no basis under the FLSA for recovery by Shriners from its employee, Kilgore.

When the Court considered whether the MWA allowed for an indemnity claim by an employer against an employee, the Court acknowledged that *Glover* and *Gaffner* generally held an employer could assert an indemnity claim against an employee. However, the Court noted that there are no Washington cases which set out the elements for an implied contractual indemnity in the context of MWA. The Washington Court of Appeals then analyzed the MWA by considering interpretations of the comparable FLSA provisions. The Court explained again that federal courts have rejected state-law indemnity claims for FLSA violations since such claims would frustrate the purpose of the FLSA. The Court relied on these federal cases to hold that allowing an employer to assert an indemnity claim against an employee for violation of the MWA would similarly defeat the purpose of the MWA.

The Court thus held that Shriners could not maintain an implied contractual indemnity claim against Kilgore based on Kilgore’s alleged wrongful conduct in violation of the FLSA and MWA. Holding otherwise would frustrate the purpose of the FLSA and MWA by diminishing an employer’s incentive to comply with these statutes.

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