Employment Law Digest

An Update from Thornton, Summers, Biechlin, Dunham & Brown, L.C. Employment Law Department

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ENFORCEMENT AND LITIGATION ON OVERTIME PAY IS ON THE RISE

Over the last decade, more and more attention has been focused by the Department of Labor on the wage payment practices of employers in the United States. This focus has been particularly intense on payment of overtime wages. How serious has this issue become? Well, the Department of Labor has hit record highs for collecting back wages for employees, and lawsuits by employees disputing overtime pay and exemptions has started to hit employers in the pocketbook. Employers must prepare and protect themselves from the onslaught of overtime complaints.

RECENT ENFORCEMENT PRACTICES

Employers should be concerned about the trend of increasing enforcement within the Department of Labor (DOL) regarding the failure to pay overtime. In fiscal year 2002, the DOL collected more than $175 million in back wages for approximately 264,000 workers throughout the United States. This was a 10-year high for collection of back wages for the DOL.

The Fair Labor Standards Act (FLSA) gives the Department of Labor far-reaching authority in conducting investigations from employee complaints or its own leads. In its investigations, the DOL can use its extensive subpoena powers to enter businesses to inspect employers' records and interview employees in private. In contrast to other labor laws, these investigations may also lead to criminal proceedings against an employer who repeatedly violates overtime requirements of the FLSA.

Further, under the FLSA employees can easily circumvent the administrative processes of the DOL and proceed directly to court on violations of the FSLA either individually or collectively. The number of lawsuits accusing employers of allegedly cheating workers out of overtime pay has proliferated in recent years, making privately filed class-action litigation an increasing threat to employers.

Last year for the first time, the number of federal wage-and-hour causes of action filed in the United States exceeded the number of federal employment discrimination suits. Complicating matters even

more, states are authorized to enact their own wage-and-hour laws under the FLSA, and the law deemed most favorable to the employee prevails.

MISTAKES MADE BY EMPLOYERS

There are several common mistakes that employers make in dealing with overtime and their employees. The mistakes may be simple accounting errors or drastic adverse employment actions that can land an employer in legal trouble. Employers need to be careful in how they manage employee overtime.

The first major mistake is assuming because an employee is paid a "salary" there is no obligation to pay overtime if it is worked. Another common mistake employers make occurs when supervisors are allowed (or ordered) to spend most of their time performing the non-exempt work of their subordinates. Even more prevalent is the mistake of improper pay docking practices. An employer who makes deductions from an exempt employee's salary for absence from work for a partial day may defeat an employee's exempt status. These errors in overtime management may bring about liability for backpay under federal law for all hours worked over 40 in a workweek.

Also, employers fall victim to mistakes in proper computation of overtime. Overtime, when due, is based on the employee's regular rate, which includes the hourly rate plus any other form of remuneration for employment. However, there are some exceptions to this rule. An employer does not have to include discretionary bonuses, vacation pay, holiday pay, or sick pay, in the calculation of the employee's regular rate.

Finally, employers must refrain from retaliating against any employee who complains about a perceived wage violation. Under the Fair Labor Standards Act, it is unlawful to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted any proceeding related to a wage violation. Employers must take care in protecting themselves against violations of wage laws under the FLSA or similar state statutes.

EXEMPTIONS FROM OVERTIME

Although an employer must scrupulously watch how they pay employees overtime, they can reduce overtime expenses by properly characterizing an employee. There are several exemptions that an employer can receive, if they properly characterize an employee's duties. Employees classified as executives, administrative employees, professionals, outside salesmen, or computer professionals, who comply with the duty requirements under the FLSA, may be exempt from overtime under the so-called "white collar" exemptions. However, employers must ensure that the classification is not superficial. Meeting the "primary duties test" (i.e. performing exempt work at least 50% of the time) is a key factor in maintaining an employees exemption and avoiding costly litigation.

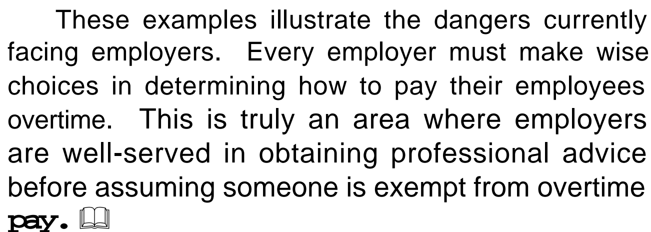
LAWSUITS RESULTING FROM INCORRECT OVERTIME PAYMENTS

In Texas, there are many examples of how improper overtime practices can result in large verdicts for employees. For example, in the United States District Court in Waco, a group of 180 former and current Waco firefighters filed suit in 1999 claiming improper calculation of overtime pay by the City. *Singer v. City of Waco*, 2001 WL 1824740 (ALM Tex. Jury). The firefighters asked the court for $5.2 million in back overtime pay. In April of 2001, a jury found the City liable for unpaid work dating from 1995 to 2000.

Overtime violations were also found when four hairstylists from Supercuts complained about improper calculation of overtime pay. *Rainbow Group, Ltd. v. Johnson*, 2002 WL 1991141 (Tex.App. B Austin 2002). The plaintiffs alleged that the overtime calculations should have included "off the clock" time spent at the salon and mandatory meetings. The jury awarded over $40,000 in backpay with interest, and over $225,000 in attorney's fees. Although the attorney's fees were reduced on appeal, the threat of the large verdict looms for any employer who does not keep a close watch on employee overtime.

In addition, lawsuits in other areas of the United States have resulted in large verdicts against employers due to improper overtime practices. Wal-Mart was hit with several large judgments for off-the-clock violations of the Fair Labor Standards Act. A jury in Oregon recently found the store guilty of improper practices against 425 employees, and the company agreed to a $500,000 settlement in a similar case brought by 100

employees in New Mexico. Also, Petco Animal Supplies announced in December, 2002 that it reached a settlement for $2.5 million with about 1,000 employees for misclassification of managers as exempt.



These examples illustrate the dangers currently facing employers. Every employer must make wise choices in determining how to pay their employees overtime. This is truly an area where employers are well-served in obtaining professional advice before assuming someone is exempt from overtime pay.

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TRENDS IN THE LAW

DEPARTMENT OF LABOR PROPOSES SIGNIFICANT CHANGE

With pressure from both labor and management, the United States Department of Labor in a March 31, 2003 proposal dramatically changes the so called "white collar" test for determining the most common exemptions from overtime pay. According to DOL analysis, the proposed changes will automatically guarantee overtime to 1.3 million workers who are now considered exempt while at the same time moving 10.7 million workers from non-exempt to exempt status.

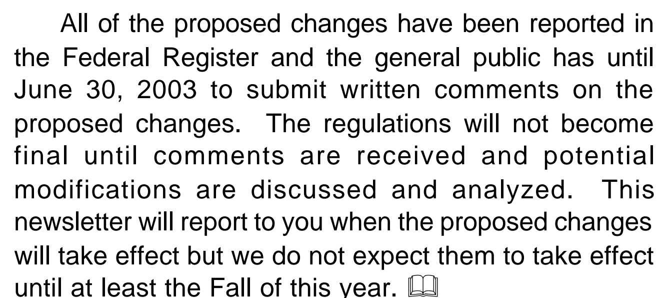
The most fundamental change is the long overdue increase in the minimum amount of weekly pay necessary to establish the "guaranteed" salary portion of the white collar exemptions. Currently, in order to be considered exempt as an "executive," "administrative" or "professional" employee the employee must receive a guaranteed salary of $155 a week. The proposed regulation change by the Department of Labor would increase that amount to $425 a week.

With respect to the executive white collar exemption, the Department of Labor proposal would change the duties part of the test to add the requirement that the employee must have the "authority to hire or fire employees, or recommend hiring, firing, or promotion."

With respect to the white collar exemption known as the "administrative" exemption the proposed change would eliminate the often confusing current requirement that the employee "customarily and regularly exercise discretion and independent judgment" and replace it with the requirement that the exempt employee "hold a position of responsibility with the employer." A "position of responsibility" is defined under the proposed regulations as either (1) performing work of substantial importance or (2) performing work requiring a high level of skill or training.

With respect to professional employees, the DOL's proposal divides professional employees into two categories: "learned" and "creative." Under the learned profession employee exemption, the proposal again eliminates the heavily litigated requirement that the employee "consistently exercise discretion and judgment." The proposal keeps the requirement that the exempt employee's primary duty consists of performing office or non-manual work requiring knowledge of an advance type ... acquired from a prolonged course of specialized intellectual instruction but adds the following: "but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience." The proposals changes to the "creative" professional employee requirements adds a primary duty test which is similar to the current regulations of performing work requiring invention, imagination, originality or talent in the recognized field of artistic or creative endeavor.

The proposed changes also modify the lengthy and complicated exemption for computer systems employees as well as outside salesmen. For a detailed look at each exemption with a comparison of the current regulation and the proposed regulation, see the Department of Labor's website: www.dol.gov.



All of the proposed changes have been reported in the Federal Register and the general public has until June 30, 2003 to submit written comments on the proposed changes. The regulations will not become final until comments are received and potential modifications are discussed and analyzed. This newsletter will report to you when the proposed changes will take effect but we do not expect them to take effect until at least the Fall of this year.

EXCESSIVE SICK LEAVE

Employees who are excessively absent from the workplace "due to illness"can disrupt the productivity of

the office and irritate coworkers. Although this annoyance can reach a boiling point for employers, they must avoid treading on the Family Medical Leave Act (FMLA) when taking action. A federal district court in Illinois recently found the discharge of an excessively absent employee could be regarded as illegal retaliation under the FMLA, although the plaintiff in the particular case failed to provide the necessary evidence of a serious health condition. *McCauley v. Hydrosol, Inc.*, 2002 WL 31545882 (N.D. Ill. 2002). An employer must investigate each absence, to determine whether any absences over the normal yearly allotment qualify under the FMLA, before taking any adverse employment actions based on those absences. 🕮

THE MANY FACES OF SEXUAL HARASSMENT

The United States District Court, Northern District of Texas, recently approved a consent decree to settle claims of male-on-male sexual harassment for $140,000 in favor of six employees of a West Texas auto dealership. The EEOC found that the six men had to suffer through lewd and inappropriate comments of a sexual nature, and endured their genitals and buttocks being grabbed against their will. The dealership attempted to argue that the conduct was merely horseplay and denied all allegations. However, horseplay is no defense to sexual harassment, since the employee may characterize the actions differently in the future, which is exactly what happened here. 🕮

EMPLOYER SAVED FROM PUNITIVE DAMAGES

The Fifth Circuit ruled in October, 2002 that Bally's Olympia Casino in Mississippi was not liable for punitive damages in a sexual harassment case, because Bally's made a good-faith effort to comply with Title VII of the Civil Rights Act. Under Title VII, an employer is liable for punitive damages if, (1) the agent is employed in a position of managerial capacity, (2) the agent acts within the scope of employment, and (3) the agent acts with malice or reckless indifference towards the federally protected rights of the plaintiff. The District Court in this case found all three factors. However, the Fifth Circuit ruled that even if all three factors are met, liability cannot be imputed to the employer, if the agent's actions are contrary to the employer's good faith effort to comply with Title VII.

In citing the Supreme Court, the court states "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply." The court found Bally's had evidenced good-faith by having a well-publicized policy forbidding sexual harassment, giving training on sexual harassment to new employees, establishing a grievance procedure for sexual harassment complaints, and initiating an investigation of the plaintiff's complaints.

It has been repeatedly stated in this newsletter that solid uniformly applied personnel policies and procedures, as well as management training on proper management techniques and sexual harassment, will go a long way toward protecting the future of any company with fifteen or more employees. 🕮

NONCOMPETE AGREEMENT AND MILITARY LEAVE

After remand from the United States Court of Appeals for the Eleventh Circuit, a Florida appeals court ruled in November that a 12-month non-compete agreement negotiated between a funeral home and a sales representative was unenforceable. The sales representative went on a 12-month reserve military leave shortly after ending his employment and signing the agreement. Upon his return to the United States, the funeral home attempted to enforce the 12-month non-compete agreement after re-employment was refused to the representative.

The Florida intermediate appeals court ruled that the 12-month non-compete period began when the representative left the United States. The funeral home had threatened suit for violation of the non-compete agreement against the sales representative's subsequent employer, which resulted in the representative's termination. The court found the funeral home had no right to try to enforce an expired covenant when it contacted the representative's employer. The representative had done no competing work during the 12-month military leave, and more than 14-months had elapsed between the beginning of leave and the commencement of employment with a competitor. 🕮

- Claudia G. Arrieta

UPCOMING EMPLOYMENT SEMINARS

6/24/03 Lorman Education Seminar
ADA/FMLA & Workers' Compensation
Four Points Sheraton Riverwalk
110 Lexington Avenue
Registration 8:30 am
Session 9:00 am - 4:00 pm

NOTE: Locations and exact times for each seminar are to be determined. Please contact Deanna Jennings at 210-342-5555 for registration information and additional information you may need to attend these seminars. We look forward to seeing you.

The employment law section of Thornton & Summers represents management in a wide variety of employment law matters. Because we have offices located in Austin, Corpus Christi and McAllen, Texas, we can offer exclusive and timely insight into handling particular employment matters in diversified areas of the state. Of course, our focus is still on claim avoidance through timely advice and counsel before events occur which can lead to lawsuits; however, our firm has extensive jury trial experience in a wide variety of employment law matters. Our expertise includes the following areas:

- management counseling;
- review and preparation of personnel policy and procedures including employee handbooks;
- representation in administrative matters before the Equal Employment Opportunity Commission, Texas Commission on Human Rights and Texas Workforce Commission;
- representation of management in state and federal court for employment related claims involving Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Polygraph Protection Act, Consolidated Omnibus Budget Reconciliation Act, Worker's Compensation Retaliation, Family Medical Leave Act, Fair Labor Standards Act, Texas Commission on Human Rights Act and a variety of state court claims such as intentional infliction of emotional distress, invasion of privacy, defamation and negligence;
- preparation of arbitration agreements and non-subscriber programs;
- Training and preventative seminars to comply with recent U.S. Supreme Court decisions; and
- Wage/hour audits; FLSA claims.

The contents of this newsletter are presented as general information only and are not intended as legal advice. The reader is invited and advised to consult with an attorney for more specific information regarding the matters and materials addressed herein, or for advice based on the individual circumstances of his or her specific situation.

Be sure to check our website at:
http://www.thorntonsummers.com
for the most recent significant changes in the law that affect you.

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If you, or anyone in your office, would like a copy of this newsletter on a quarterly basis, at no cost, please contact Deanna Jennings at (210) 342-5555, extension 227.

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