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REPORT FROM COUNSEL

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WORKING OVERTIME

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On March 31, 2003, the United States Department of Labor (the "*Labor Department*") issued a Notice of Proposed Rulemaking (the "*Proposed Rule*") to change the regulations issued under the Fair Labor Standards Act ("*FLSA*") with respect to exemptions from overtime pay for executive, administrative, professional, outside and computer employees (commonly known as the "white collar" exemptions). For those American employees not exempt under the white collar exemptions, the FLSA mandates a standard workweek of 40 hours and requires non-exempt workers to be paid "time and a half" for each hour beyond 40 hours worked in a week.

The Proposed Rule, through its various changes, would have the effect of both increasing and decreasing the number of workers who qualify for overtime pay. The estimates of the overall effect on the number of workers who would qualify for overtime pay varies from a decrease of at least 644,000 (Labor Department estimate) to a decrease of more than eight million (Economic Policy Institute estimate).

The current FLSA overtime regulations, originally adopted in 1938, require that for an employee to be exempt each of the following three tests must be met:

1. *Salary Basis Test*. The employee must be paid a predetermined and fixed salary, not an hourly wage that is subject to reductions because of variations in the quality or quantity of work performed.

2. *Salary-Level Test*. The amount of salary paid must meet minimum specified amounts.

3. *Duties Tests*. The employee's job duties must primarily involve managerial, administrative or professional skills as defined in the regulations (tests for each category of exemptions).

According to the Labor Department, the salary basis test has remained essentially unchanged since 1954; the salary levels used for the salary-level test were last updated in 1975; and the duties tests have remained essentially unchanged since the last time they were modified in 1949.

In drafting the Proposed Rule, the Labor Department attempted to modernize, consolidate and streamline regulatory text, reduce redundancies, and make the regulations more understandable and easier to decipher when applying them to particular factual situations. A goal of the Proposed Rule is to reduce administrative and litigation costs associated with the confusion associated with classifying employees.

The Proposed Rule, which is divided into subparts A through G, would make the following substantial changes to the current regulations:

**** Eliminate the separate long and short duties tests for executive employees and substitute a single standard duties test.***

The proposed standard duties test would provide that an exempt executive employee must: (1) have a primary duty of managing the enterprise or division/department; (2) customarily and regularly direct the work of two or more other employees; and (3) have the authority to hire and fire other employees (or have particular weight given to their recommendations for the change in status of an employee).

**** Replace the "discretion and independent judgment" requirement for administrative employees.***

The Proposed Rule would retain the requirement that an exempt administrative employee have a "primary duty" of performing office or non-manual work related to the management or general business operations of the employer or the employer's customers, but replace the "discretion and independent judgment" requirement with a new requirement that the employee hold a "position of responsibility" with the employer. To meet this new "position of responsibility" requirement, an employee must either (1) perform work of "substantial importance," or (2) employ a high level of skill or training. The Proposed Rule includes a revised list illustrating the types of activities that are generally considered of "substantial importance" for purposes of the exemption.

**** Eliminate the separate long and short duties tests for learned professionals, artistic professionals and teachers and substitute a single standard duties test for each.***

In a significant departure from the current regulations, an employee would qualify for exemption as a learned professional if the employee has a primary duty of performing office or non-manual work requiring advanced knowledge in a field of science or learning, which can be acquired by either specialized intellectual instruction (current regulations) or an equivalent combination of specialized intellectual instruction and work experience (Proposed Rule). An employee would qualify for exemption as an artistic professional if the employee has the primary duty of performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. The proposed standard duties test for the teacher exemption is slightly different from the current short test.

**** Increase and standardize the minimum salary level required to qualify for exemption from the FLSA and eliminate the separate higher salary level test for professional employees.***

Under the Proposed Rule, the minimum salary level required to qualify for exemption from the FLSA minimum wage and overtime requirements as an executive, administrative or professional employee would be increased from \$155 per week to \$425 per week and the current long and short duties tests, used in conjunction with the current minimum salary levels, would be eliminated. The separate higher salary level test for professional employees would be eliminated.

**** Add a special rule for highly compensated employees.***

Under the Proposed Rule, employees paid at least \$65,000 annually and performing non-manual work would be exempt if they have an identifiable executive, administrative or professional function as described in the standard duties tests for executive, administrative and professional employees.

The public comment period closed June 30, 2003. As a result of these comments, the Labor Department may revise the Proposed Rule. In addition, labor groups will continue to lobby Congress for action in order to limit the effect of the Proposed Rule. However, it seems fairly clear that a significant change in the law is likely.

About the Authors

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AGE DISCRIMINATION IN EMPLOYMENT

The combined effects of an aging population and a sluggish economy have led to an increase in lawsuits alleging age bias in the workplace. The Age Discrimination in Employment Act (ADEA) prohibits age discrimination in the employment of persons who are at least 40 years old. The ADEA covers most private employers of 20 or more persons. It forbids age discrimination in advertising for employment, hiring, compensation, discharges, and other terms or conditions of employment. Retaliation against a person who opposes a practice made unlawful by the ADEA or who participates in a proceeding brought under the ADEA is a separate violation.

The ADEA takes into account that sometimes there is a correlation between age and the ability to fulfill the requirements of a job, and that even older workers must comply with employers' rules and requirements that have nothing to do with age. An employer does not violate the ADEA if it takes an otherwise prohibited action where age is a "bona fide occupational qualification" necessary to the operation of a particular business. Nor is it a violation to differentiate among employees based on reasonable factors other than age or to fire or discipline an employee for good cause.

Before suing in court, an aggrieved person first must allege unlawful discrimination in a charge filed with the Equal Employment Opportunity Commission (EEOC) and then wait 60 days to allow the EEOC an opportunity to resolve the dispute informally before taking further legal action. Court remedies include injunctions (court orders stopping a discriminatory practice), compelled employment, promotions, reinstatement with back pay and lost benefits, and an award for attorney's fees and costs of bringing the suit. If a court finds that an employer's violation of the ADEA was willful, it may also award liquidated damages equal to the out-of-pocket monetary losses of the plaintiff.

It is not essential to an ADEA lawsuit that there be a "smoking gun" in the plaintiff's favor in the form of derogatory age-based comments about older employees. In fact, remarks of that kind will not support liability if they have no connection to the challenged employment decision. In a recent lawsuit brought by an on-air television reporter who was fired, a boss's comment that "old people should die" was an insignificant stray remark because it was made about the boss's own father. On the other hand, it was very helpful to the plaintiff's case that the same boss had stated repeatedly that she wanted to "go with a younger look" and she did not like having an older man appearing on the news.

Employers sometimes select older workers to be terminated as a money-saving measure, given their generally higher compensation and perhaps their being close to vested retirement benefits. There is no ADEA violation in a decision that treats employees differently because of something other than age, such as money. An employer will not be liable under the ADEA for terminating an employee solely to prevent his pension benefits from vesting. (That conduct might very well violate ERISA, however.) Such a scenario is distinguishable from situations in which employers face ADEA liability because they have made decisions based on the stereotype that productivity and competence always decline with old age.

CAPPED COMMISSIONS

As a sales representative for a computer software company, Richard received an annual salary and sales commissions as determined by a compensation plan that was part of his contract. There was a specific formula for how commissions were to be calculated, but language in the plan gave the company broad authority to make a final decision about compensation and to change the plan at any time. For sales commissions, in particular, the employer reserved the right to review any transaction generating a commission beyond a salesman's annual quota and to determine the "appropriate treatment" of it.

When Richard scored an especially large sale, the company decided that its "appropriate treatment" was to cap Richard's commission at an amount that was less than he expected under the usual formula. The company's position was that the large commission expected by Richard was not justified because it arose from a single transaction on which Richard had not done as much work as he claimed, and because he had only been employed by the company for eight months. Richard quit and sued for breach of contract.

A federal court ruled in favor of the employer. The language in the compensation plan was broad, but it was not ambiguous. The whole thrust of the document was to leave determination of the commissions to the employer's discretion, notwithstanding that the plan identified some forms of appropriate treatment of commissions.

When a contract leaves a decision up to one party's discretion, it is nearly unassailable in court. A court may intervene if that party is guilty of fraud, bad faith, or a grossly mistaken exercise of judgment, but Richard did not make those arguments. Despite the fact that it was arguably unfair, the court ruled that such a decision was "out of our reach."

BE CAREFUL WHAT YOU FAX

The Telephone Consumer Protection Act (TCPA) prohibits any person within the United States from using a telephone facsimile machine to send an unsolicited advertisement to a person with whom the sender does not have an existing business relationship. A prior business relationship will be treated as consent to a faxed advertisement unless the recipient withdraws that consent.

Court remedies under the TCPA should command the attention of any company giving thought to a fax advertising blitz directed at potential customers. A person receiving an unsolicited fax may bring an action to prohibit violations of the TCPA and for actual damages, or statutory damages of \$500 per violation. For a willful or knowing violation, a court has the discretion to triple the amount of statutory damages. Actual damages may amount to cents per page and the costs of tied-up telephone lines. Statutory damages, however, could reach into the millions for a "blast-faxed" advertising campaign with hundreds or thousands of faxes, with each transmission considered a separate violation.

Not only can the cost of TCPA violations be steep, but in some cases that cost may be extracted from the personal assets of corporate officers, not just the business itself. In one case, the officers and sole shareholders of a small advertising service were found to be *personally* responsible for statutory damages based upon nearly a million unlawful faxes a month, over five months.

HOMEOWNERS' INSURANCE: THE DEVIL RESIDES IN THE DETAILS

Reading and understanding all of the language in a homeowners' insurance policy are not formalities to be skipped over while searching for the signature line. As with any contract, the fine print can have real and lasting consequences, and its contents will control over any contradictory verbal assurances. Taking the time to understand the terms of their policies might have headed off bad outcomes for homeowners in two recent cases.

Business Purposes Exclusion

Joan bought property consisting of a home, two barns, and other outbuildings. She also purchased a homeowners' insurance policy that excluded coverage for any nondwelling structure that was rented out "unless used solely as a private garage." Joan rented the barns to a commercial marina, which used them for winter storage of customers' boats. When one of the barns collapsed due to snow and ice on its roof, Joan submitted a claim for loss of the barn.

The insurer denied coverage, prompting Joan to point out that the rental exclusion should not apply because the marina was using the barn as a "private garage." Her point made sense as far as it went, but the insurer won because of a separate exclusion from coverage for any nondwelling "used in whole or in part for business purposes." Joan's main occupation was as a financial analyst, and she brought in only a few thousand dollars by renting out the barn. But all that was necessary for the business purposes exclusion to apply was that the insured regularly engage in the conduct with an intent to profit.

It was significant for the court that, by failing to disclose her conduct, Joan had prevented the insurer from knowing the risks it was insuring. The purpose of a business pursuits exclusion, after all, is to rule out coverage for a whole set of risks and liabilities flowing from business activity. It did not matter that the damage to the barn was not caused by the boats that were stored there for profit.

"Household" Defined

At the heart of another dispute over homeowners' insurance coverage was what turned out to be an erroneous assumption by the homeowners that "residents of your household" meant any persons living on the same parcel of land, even if in a different house from that occupied by the insureds. Ken and June lived in one house and their daughter and 10-year-old grandson lived rent-free in another house that was only 20 feet away and had the same mailing address. The close-knit family often shared meals and activities, and Ken and June regularly cared for their grandson.

When the grandson accidentally shot a playmate with a rifle, Ken and June submitted a claim under their homeowners' policy, which covered "residents of your household who are your relatives." The insurance company succeeded in arguing that it had no obligation to defend the grandson in a suit for his friend's injuries because he was not a resident of Ken's and June's household.

In legal terminology, a "household" is a collection of persons living together as a unit under one roof or within a single "curtilage." "Curtilage" is a technical term for the area next to a house that is inside the same enclosure, is used for the intimate activities of the house, and is protected from observation by passers-by. The house where the grandson lived did not meet any of these criteria so as to make the grandson part of Ken's and June's "household." The four individuals in this case probably constituted a household in many respects and for many purposes, but not in the context of interpreting the homeowners' insurance policy.