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MANAGEMENT NEWS

Recent Developments in Labor & Employment Law



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New FLSA "White Collar" Exemptions And "Safe Harbor" Rules

The U.S. Department of Labor issued new Federal Labor Standards Act ("FLSA") Fair Pay regulations effective August 23, 2004, resulting in long overdue changes to the salary level and job duty requirements necessary for exemption from federal minimum wage and overtime rules. In addition to making it easier for employers to determine

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This occasional newsletter is published by Hill, Farrer & Burrill LLP as a service to clients, friends and colleagues.

Each publication summarizes recent developments in state and federal law affecting employers, but should not be relied upon as an opinion or advice of the Firm regarding any specific matter.

their legal obligations with respect to wage and overtime exemption issues, the regulations create a “safe harbor” for employers who make isolated or inadvertent improper deductions in exempt employees’ pay.

As you navigate through the new regulations, keep in mind that the FLSA provides only minimum standards that may be exceeded by other federal, state or local laws or by collective bargaining agreements or an employer’s own initiative. Employers in states with higher standards, such as California, are still obligated to meet their particular states’ requirements, such as those contained in the California Industrial Welfare Commission’s Wage Orders.

Time For Change

The FLSA requires that most U.S. employees be paid at least the federal minimum wage and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in one workweek. However, the FLSA provides an exemption from both minimum wage and overtime pay for employees that meet certain salary and job duty requirements. Though the FLSA contemplated the need to update the exemptions “from time to time,” it has been nearly 30 years since the DOL set the weekly salary level required for exemption at the rate of \$155.

Under the new regulations, an employee must be paid on a salary basis an amount not less than \$455 per week -- nearly triple the former level. A “salary basis” is defined as a predetermined amount of pay that cannot be reduced because of variations in the quantity or quality of the employee’s work. Subject to a few exceptions

discussed below, a salaried employee must be paid for a full week of work regardless of the number of hours or days worked. If an employee is paid on a salary basis, the employer cannot make deductions when work is not available if the employee is ready, willing and able to work.

The salary requirements do not apply, however, to outside sales employees, teachers, or to employees practicing law or medicine. Further, exempt computer employees may earn their weekly pay of \$455 either on a salary basis or on an hourly basis of not less than \$27.63 per hour under the FLSA.

Application of Exemptions to Particular Job Classifications

The new regulations provide some clarification to rules for exemption of executive, administrative and professional employees. They also add a computer designation and a category of outside sales employees to the list of job duties eligible for exemptions under certain circumstances.

Executive Exemption

In addition to meeting the salary basis and minimum rates of pay requirements, the new rule adds that executives who own at least a bona fide 20 percent equity interest in an enterprise are exempt only if they are “actively engaged in its management.” The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the company. The special rules for exemption of “sole charge” executives have been deleted. The new regulations retain the test for executive employees that require that the employee have the

authority to hire or fire other employees or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees must be given particular weight.

Administrative Exemption

In addition to the requirements that the employee must be compensated on a salary or fee basis at a rate not less than \$455 per week to qualify for the administrative exemption, the employee’s primary duty must include the exercise of discretion and independent judgment with respect to “matters of significance.” The work must be non-manual office work directly related to the management or general business operations of the employer or the employer’s customers.

Professional Exemptions

The new rules set forth exemptions applicable to *learned professionals* and *creative professionals*. The *learned professional* exemption applies where the employee’s primary duty is the performance of work requiring advanced knowledge, which is defined as primarily intellectual in character and includes work requiring the consistent exercise of discretion and judgment. The advanced knowledge must be in a field of science or learning and it must be customarily acquired by a prolonged course of specialized intellectual instruction. The *creative professional* exemption requires the employee’s primary duty to be the performance of work requirement invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employee Exemption

To qualify for this exemption, the employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the field of computers. The employee's primary duty must include the application of systems analysis techniques with respect to hardware, software or system design; design, development, creation, testing or modification of computer systems or programs related to user or system design specifications; design, documentation, testing, creation or modification of computer programs related to machine operating systems; or a combination of any of these, the performance of which requires the same level of skills.

Outside Sales Exemption

An employee will be exempt where the employee's primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer. Additionally, the employee must be customarily and regularly engaged away from the employer's place of business.

Highly Compensated Employees

The new regulations increase to \$100,000 the minimum annual compensation required for exemption as a highly compensated employee. This is a \$35,000 increase over the last minimum.

Non-Exempt Personnel

There is no change to the fact that the exemptions do not apply to manual laborers or other "blue collar" workers who perform

repetitive operations with their hands, physical skill and energy. Police officers, fire fighters, paramedics and other law enforcement-related and rescue workers are similarly excluded from the exemptions.

Deductions From Pay

The new regulations allow an employer to make deductions from pay when an exempt employee is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made as part of a bona fide plan, policy or practice providing compensation for salary lost due to illness; to offset jury or witness fees or military pay; for penalties imposed in good faith for infractions of safety rules of major significance; or for unpaid disciplinary suspensions of one or more days imposed in good faith for violations of workplace conduct rules. An employer is also not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave pursuant to the Family Medical Leave Act.

The employer stands to lose the exemption if the employer has an "actual practice" of making improper deductions. Factors relevant to a determination of "actual practice" include the number of improper deductions, the time period in which improper deductions are made, the number and geographic proximity of the employees whose salaries are improperly deducted and the managers responsible, and whether the employer has a clearly communicated policy permitting or prohibiting improper

deductions. Where "actual practice" exists, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions.

Of significance is the "safe harbor" provided by the new regulations which safeguards the exemption for employers who meet three requirements. The safe harbor is available to employers who (1) have a clearly communicated policy prohibiting improper deductions that includes a complaint mechanism, (2) reimburse employees for any improper deductions, and (3) make a good faith commitment to comply in the future. If all three of these requirements are met, the employer will not lose the exemption for *any* employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints. The Firm has developed a model safe harbor policy that it will provide upon request, and the Department of Labor has also published a model policy that may be found at www.dol.gov.

State Legislature Amends "Bounty Hunter" Law

As part of the state budget compromise, Governor Arnold Schwarzenegger signed into law the "Labor Code Private Attorney General's Act of 2004" (otherwise known as SB 1809) on August 11, 2004. The bill addressed perceptions of inequities and abuses in the so-called "bounty hunter law" which was enacted in 2003, and which encouraged suits for overly minor and technical violations of the state Labor Code by providing

civil penalties for such violations as well as reasonable attorneys' fees. SB 1809 sought to correct these deficiencies by, among other things, providing for a detailed scheme requiring the exhaustion of administrative remedies before filing suit, as well as judicial oversight of the amounts of civil penalties assessed.

The prior law (known as SB 796) authorized suits to recover civil penalties for those provisions of the Labor Code for which a civil penalty was not already provided. It also allocated distribution of any civil penalties that were recovered to the aggrieved employee in the amount of 25%, the Labor Workforce Development Agency ("LWDA") in the amount of 25%, and the general fund in the amount of 50%. The law was enacted as a result of the Legislature's acknowledgment that enforcement of the state's labor laws by governmental agencies "had fallen drastically behind the growth in the labor force and would continue to worsen with the state budget crisis." Employees were accordingly "incentivized" by SB 96 to sue their employers for violations of the state's wage and hour and safety laws under the "bounty hunter" statute.

As suits began being filed under the new law, however, the potential for abuse became readily apparent. The assessment of civil penalties created by the statute previously unpenalized violations – set at \$100 for each aggrieved employee per pay period for each initial violation, and \$200 for each aggrieved employee per pay period for each subsequent violation – were automatic and not subject to adjustment based on either the employer's intent to evade the

law or the ultimate effect of the violation on employees. Such minor violations as failing to provide employees with the information required to be itemized on their paycheck stubs could accordingly result in massive potential liability, with essentially no defense. For this reason, business groups argued that the new law tipped the balance of labor law protection disproportionately in favor of employees. Hence the enactment of SB 1809, which was specifically intended "to provide relief to some employers who may be adversely affected by frivolous lawsuits brought pursuant to" the bounty hunter law.

SB 1809 corrects the perceived inequities in the law in a number of ways. First, the civil penalties that can be collected under the law have been reallocated so that 25% continues to go to the aggrieved employee, but 75% is distributed to the LWDA "to be continuously appropriated for the purposes of enforcement and education." Moreover, in any civil action by an aggrieved employee seeking recovery of civil penalties under the statute, "a court may award a lesser amount than the maximum civil penalty amount" if, based on the facts and circumstances of the particular case, "to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." The superior court is also required to "review and approve any penalty sought as part of a proposed settlement agreement" reached in a suit brought for such penalties. The new statute also provides that no civil action may be brought for any violation of a posting, notice, agency reporting, or filing requirement of the Labor Code except when they involve mandatory payroll or workplace injury reporting, and repealed

Labor Code § 431 – which required employees to file a copy of any application they use with the state.

High Court Rules Employer Not Necessarily Liable For Constructive Discharge Claim Based On Sexual Harassment By Supervisor

Though employers are generally held vicariously liable for sexual harassment by their supervisors, the United States Supreme Court ruled that a plaintiff who sues for constructive discharge based on hostile work environment must show that her resignation was a reasonable response to an official job action. Pennsylvania State Police v. Suders.

Unless an employee can show that the resignation was triggered by an official change in employment status, "the employer would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force" and may be able to defend the claim by relying on its internal complaint procedure. Where the supervisor takes a tangible action against a subordinate, the Court explained, the action is an official act of the employer.

The good news for employers is that employees alleging constructive discharge based on sexual harassment will be required to utilize internal complaint mechanisms to report discriminatory conduct before heading to the courthouse.

NLRB Reverses Itself By Restricting Protections In Investigatory Interviews To Unionized Settings

Employees in non-union settings will no longer enjoy the right to the presence of a co-worker at pre-disciplinary investigatory interviews, as has long been guaranteed to union workers. The Weingarten right, as it is known, was firmly established for unionized employees in 1975 when the Supreme Court affirmed an NLRB's decision that guaranteed union members the presence of their union representative at such investigatory interviews. Perhaps ending over twenty years of uncertainty, the NLRB's latest reversal overturns its decision in Epilepsy Foundation of Northeast Ohio, which had applied the Weingarten rule to nonunion settings.

In IBM Corp., the Board examined the various policy considerations underlying the application of the Weingarten right and changes in the contemporary workplace, such as increasing requirements to conduct workplace investigations and new security concerns raised by national and workplace violence. These, the Board reasoned, dictate that an employer in a nonunionized setting must be allowed to conduct thorough, sensitive and confidential investigations which can best be accomplished by permitting such an employer to investigate without the presence of a coworker.

Among the distinctions between union and nonunion settings on

which the Board relied in reaching the favorable decision in IBM Corp. were that (1) coworkers do not represent the interests of the entire workforce in nonunion settings, (2) coworkers cannot redress the imbalance of power between employers and employees, (3) coworkers do not have the same skills as union representatives, and (4) the presence of a coworker may compromise confidentiality. The Board clearly stated that the employer's right to conduct prompt, efficient and thorough confidential investigations outweighs the interest of the nonunion employee to the presence of a coworker.

Mass E-Mail on Arbitration Plan Found Inadequate Notice to Employees

Employers are relying more each day on the ease and efficiency of electronic communication with employees. Many employers rely virtually exclusively on e-mail to communicate announcements, policy changes and other information to employees. In a recent federal district court case, a mass e-mail that briefly mentioned a new mandatory arbitration policy and described the plan only through links to other pages failed to meet the minimal level of notice required for such an agreement. (Campbell v. General Dynamics Gov't Sys. Corp.)

This particular case involved an employee claiming discrimination in violation of the Americans with Disabilities Act after he was fired allegedly because of sleep apnea. The employee claimed he could not

be bound by the arbitration plan because he had never seen it.

The court listed several additional steps the employer could have taken to ensure the employees received notice of the new plan. Among them were the requirement that an employee signify by return e-mail that he had received, read and understood the message, requiring the employee to state "I accept" in a return e-mail; sending paper letters; holding meetings with sign-in sheets, or configuring their computer system to keep track of when and if employees clicked on the links.

In another recent case, a California appellate court invalidated an arbitration agreement when it limited available "discovery" to two depositions per party and permitted the employer to pursue claims against the employee while requiring the employee to arbitrate. By limiting such discovery and preserving for itself the right to go to court to resolve trade secret, non-competition and intellectual property disputes, the employer impermissibly attempted to "maximize its advantage" in an unconscionable way, thereby rendering the arbitration agreement unenforceable. Fitz v. NCR Corporation.

If you are contemplating changes to or the addition of policies such as an arbitration policy, the best course of action is to review your notice and implementation plan with counsel to minimize risk.

Living Wage Ordinances Upheld

By refusing to dismiss a lawsuit challenging Cintas Corporation for failing to pay a living wage, a California Superior Court ruling clears the path for a potential class action suit, and an eventual decision on the breadth of local governments' enforcement of living wage ordinances. Finding that the City of Hayward has the authority to specify contract terms through ordinances (Amaral v. Cintas Corp.), a judge ruled that the city's living wage ordinance is permissible "...without regard to whether the performance of the work...takes place within or without the city's boundaries" and irrespective of whether the work is done by city residents.

In June 2003, two production workers employed by Cintas Corp. sued Cintas, on behalf of themselves and others similarly situated, for violations of the Hayward living wage ordinance. Cintas Corp., which provided laundry and uniform services to the city until 2003, had previously certified its intention to comply with Hayward's living wage ordinance in 1999 and 2000. The ruling specifically states that "...under the California Constitution...the City of Hayward had the power to enter into contracts, and to establish specifications for bidding on those contracts." With this ruling, California cities are constitutionally authorized to enter into contracts during the performance of their necessary functions.

The court's ruling reflects the increasing trend by cities across the country to adopt living wage ordinances. In 1994, the City of Baltimore, became the first

American city to adopt a LWO. Since then, approximately 95 local government entities, 26 of which are California cities, have adopted and implemented LWO.

The Cintas case has already been appealed, and employers who contract with cities having LWOs are awaiting guidance from the state appellate court on this important issue. In the case of FUI One Corp. v. City of Berkeley, the U.S. Ninth Circuit Court of Appeals rejected a challenge made to a city's living wage ordinance on federal constitutional grounds.

ADA Update

- In Kratzer v. Rockwell Collins (U.S. District Court, Iowa), a machinist with a knee injury failed to engage in the "interactive process" required by the ADA by not providing updates on her work restrictions. Because the employer never knew the extent of the employee's limitations, it could not determine the action that it needed to take in order to reasonably accommodate her.
- In another case involving a machine operator, an employee's multiple sclerosis was found to pose a direct threat to himself and his co-workers when the physicians who examined him were concerned that his inability to move quickly might render him unable to avoid fallen objects or to evacuate the building in an emergency. (McClellan v. Case Corp., U.S. District Court, North Dakota).
- Finally, in Bryan v. UPS, the U.S. District Court in San Francisco ruled that the California Fair Employment and Housing Act (FEHA) was

more protective of employees who had monocular vision than the ADA in determining whether they were protected under the law. While the ADA recognizes "working" as a major life activity when the limitation implicates "a class or broad range of employments," the court held that a limitation on "working" qualifies as a disability under FEHA even if it only implicated a particular job.

If you have any questions about these issues or any other labor matters, please contact any member of the Labor & Employment Department at Hill, Farrer & Burrill LLP -- we're here to help.

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