



## **RETAIL/SERVICE INDUSTRIES UPDATE: SEPTEMBER 29, 2005**

*This bulletin provides an update on employment issues for the retail/service industries. Please contact us if you have any questions about these decisions or about their effects on your business.*

### **Are Your Managers Entitled To Overtime Compensation?**

**Collective actions against retailers for overtime pay under the Fair Labor Standards Act continue in popularity.** RadioShack, one of the most recent retailers to come under fire for misclassifying and not paying overtime to managers, failed to convince a federal court that its managers were not owed overtime compensation.

The RadioShack managers were the highest-ranking employees on site at the stores and are responsible for general management tasks, including hiring, firing, scheduling, and evaluations. They make substantially more than their subordinates, as much as \$10 more an hour. Despite those factors, a federal court ruled that at least half of the 3,200 managers who opted-in the class failed to meet the FLSA executive exemption and are entitled to overtime pay.

Under the old FLSA regulations, to qualify for the executive exemption, an employee must “regularly and customarily” supervise the work of two or more employees. This definition has been interpreted to mean spending at least 80 percent of the time supervising two employees who work at least a traditional, 40 hour work week, or 80 hours total. Because RadioShack’s full-time employees only work 32 hours per week, the company urged the court to find that the traditional 80-hour guideline was no bright-line standard and the “unusual circumstances” portion of the rule permitted alternative tests, but the Court refused.

Although this case clarifies a standard in the old FLSA regulations, this case reminds us of the importance of regularly re-evaluating wage and hour classifications. For some employers, who have not yet conducted a wage and hour audit to assess the impact of the new Department of Labor FLSA regulations, there may be employees misclassified as a result of these recent changes in the law. For others, a change in

business practices in response to market changes, may have destroyed an exemption. For example, as illustrated above, an employer reducing full-time status from 40 hours per week to 32 hours per week to attract more qualified employees in a competitive market, could destroy its managers' executive exemption if there are no longer two or more employees who work at least a traditional, 40 hour work week, or 80 hours total. Likewise, employers with operations impacted by natural disasters, such as hurricane Katrina, may need to temporarily compensate managers for overtime if circumstances require that managers working to restore operations are – at least for now – performing non-supervisory work the majority of the time.

### **How The AFL-CIO Rift May Affect You**

**Unite Here, the union representing roughly 450,000 hospitality, laundry, apparel and food service workers quit the AFL-CIO on September 14, 2005**, joining five other unions that broke from the national labor body in recent months to form The Change To Win Coalition, a rapidly growing coalition of roughly 6 million workers that now includes the Teamsters Union, the Laborers' International Union, Unite Here, the United Farm Workers, the Service Employees International Union, and United Food and Commercial Workers Union.

The Coalition is important to watch because unlike the AFL-CIO, which organizes workers to build political clout and preserve jobs at risk of disappearing, the rapidly growing Change to Win Coalition is more interested in organizing workers in industries like retail and service around a promise of higher wages and expanding benefits.

The primary rift between the Coalition and the AFL-CIO involves the Coalition's plan to refund significant portions of all membership dues back to local unions *for organizing efforts*. The Coalition also intends to focus on uniting same-industry workers and facilitating union mergers. The full impact of the rift in labor is uncertain at this time, but employers, especially in areas heavily targeted by Change to Win Coalition members, such as the retail and service industries, should monitor changes in labor's structure and strategy that might affect them.

## **A Recent Federal Court Decision Might Change The Way You Hire**

### **Retail and service companies with delivery or warehouse drivers take note.**

Two longstanding suits brought by the EEOC and some UPS driver applicants, alleging that drivers with monocular vision were unlawfully denied jobs driving delivery trucks or package cars weighing less than 10,000 pounds (i.e., no subject to DOT certification rules) in violation of federal and California disability laws, were resolved on September 15, 2005 in favor of the employer.

In *EEOC v. United Parcel Service, Inc.*, 9<sup>th</sup> Cir., No. 03-16855, 9/15/05, the federal appeals court ruled that UPS' refusal to hire, at least some of the driver applicants with monocular vision, did not violate California disability law because the company adequately proved that they would pose a greater than usual public health and safety threat.

Although the drivers proved that they had a covered disability under California's broad anti-disability discrimination law, a task they could not accomplish under the Americans with Disabilities Act, the federal court of appeals found that UPS did not violate California law by refusing to hire the delivery driver applicants because it found that UPS established the "safety-to-others" defense. According to the court, the defense was established "because the UPS Vision Protocol rests on objective and statistical evidence that monocular drivers are involved in somewhat more accidents than binocular drivers, because the risk to harm to others is high, because the UPS standard does not categorically exclude monocular individuals from working as full-time package car drivers, and because the application of the Protocol is individualized to each employee or applicant."

Employers who deny a position to an applicant based upon a claim that the applicant's physical or mental limitations pose a risk to the health and safety of others must base such decisions on an individual assessment of whether that applicant's actual limitations pose a greater than normal risk to the health and safety of others. This is true under California law, as well as under the ADA. Had UPS been "short-sighted" and simply refused to place anyone with monocular vision in any driver position, without individual assessment, the result would have been quite different.

Also, it is worth noting although drivers subject to Department of Transportation certification rules would have been disqualified on account of those rules, the DOT certification rules provide no defense against claims by applicants seeking driver positions not covered by DOT certification rules.

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