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Inside this Issue



DEPARTMENT OF LABOR
WAGE AND HOUR
EXEMPTION GUIDELINES



TERMINATION UPHELD FOR
FAILURE TO UPDATE
EMPLOYER DURING
FMLA LEAVE



WAGE AND HOUR TIP:
CURRENT WAGE AND HOUR
HIGHLIGHTS



OSHA TIP:
WHO PAYS FOR
JOB SAFETY GEAR?



EEO TIP:
RETIREE HEALTH BENEFITS
UNDER THE ADEA (Is there a
Conflict in the way the EEOC
Interprets the Age Act?)



UNITE AND HERE MERGE,
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THE ALABAMA EMPLOYER'S
DESK MANUAL RETURNS;
MARK YOUR CALENDARS
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LABOR & EMPLOYMENT LAW

Employment Law Bulletin

To Our Clients And Friends:

Congress adjourned on July 23, 2004 without stopping the implementation of the Department of Labor Wage and Hour Exemption Guidelines, which become effective on August 23, 2004. The following are key points regarding these new exemption regulations:

- If you currently have employees classified as non-exempt, the regulations do not require you to do anything about those employees. Exemptions are like tax deductions -- an employer takes them at its risk and has the burden of proving that the exemption is appropriate under the regulations.
- If an employee currently is exempt as an executive, administrative or professional, that employee's regular weekly recurring salary increases to a minimum of \$455, which does not include bonuses or commissions. For those individuals who currently meet the executive exemption, such as a manager or assistant manager, as of August 23 the individuals must have authority regarding the full range of employment decisions, from hiring through firing, or have input that is given "particular weight" regarding those decisions. The input must be about employees supervised by the exempt individual.
- There is a limited circumstance where an individual who does not have a college degree may qualify for an exemption as a professional employee; the individual must have gained knowledge through intellectual instruction and perform work that is also performed by individuals with degrees in their field. Be careful if you seek to transition someone from non-exempt to an exempt professional when that person does not have a college degree.
- **The new regulations provide that an employer may make disciplinary deductions from an exempt employee's pay in day at a time increments, provided**

the exempt employee is subject to the same written disciplinary rules and procedures as all other employees. The disciplinary rules must be in writing for the deduction from an exempt employee's salary to occur. **Remember that an employer may not deduct an exempt employee for a partial day absence, unless it is due to a Family and Medical Leave Act occurrence.**

- **The new regulations substantially change the percentage limitations on the amount of non-exempt work.** If the exempt employee's "primary duty" is exempt work, the amount of time spent on exempt work can be less than 50% and still meet the exempt status. Under the current regulations, the limitation on non-exempt work is 20% and 40% for those in the retail or service sectors.

We advise employers to conduct an annual wage and hour compliance audit regarding exempt status and payroll practices. During June and July, we met with approximately 500 employer representatives regarding the new regulations. If you were unable to attend those meetings and would like to receive a complimentary copy of our materials and cd of the regulations, please contact Sherry Morton at smorton@Impv.com.

TERMINATION UPHELD FOR FAILURE TO UPDATE EMPLOYER DURING FMLA LEAVE

Two areas that are often confusing for employers under FMLA involve what kind of reporting or updates may the employer require from an employee on an FMLA leave and under what circumstances may an employer restrict an employee from working at another job during leave if the leave is due to the employee's own serious health condition. Both of these questions were answered in favor of the employer on June 14, in the case of *Geromanos v. Columbia University College of Physicians and Surgeons*, (S.D. NY).

Geromanos, a nurse, was discovered in a semi-conscious state at work by her supervisor. She was admitted to the hospital's emergency room, and the medical determination was that her condition was due to intoxication on the job. The company placed her on paid medical leave at her full salary, provided she enter and complete an alcohol abuse treatment program, submit weekly progress reports regarding her involvement in the program and not perform any paid work during the leave. The hospital was required to report the incident to state nursing authorities, which resulted in a suspension of Geromanos's nursing license for a minimum of six months.

The hospital did not tell Geromanos that the leave was covered under the FMLA, nor did it tell her of her rights under the FMLA. **She failed to provide the weekly updates and the hospital discovered that she worked on a part-time basis as a paid Lamaze instructor during the leave, a job she held prior to the leave. She was terminated for violating two of the conditions of her leave - - reporting her progress on a weekly basis and not engaging in other paid work.**

Geromanos sued, alleging that the weekly reporting requirement conflicted with the FMLA regulation that an employer may not request re-certification of an employee's serious health condition during a twelve-week absence except in thirty-day increments. She also asserted that she should not have been terminated for working at the same part-time job she held prior to the leave.

In granting summary judgment for the employer, the court stated that "since Congress did not require FMLA leave to be paid leave, Columbia was free to impose whatever conditions it chose to as a condition of continuing plaintiff's salary while she was not working - - including the provision of reports detailing her cooperation with and progress in the substance abuse program she was attending." The court elaborated that the progress reports were not a request for a re-certification of her condition, but rather that she was engaged in and complying with the treatment program. Regarding the



issue of working at another job during the leave, the court stated that the employer could impose and enforce that requirement as a condition of continuing to pay Geromanos's regular salary during the leave. Finally, the court noted that had Geromanos been released to return to work upon the completion of her leave, the revocation of her nursing license would have eliminated her ability to perform 70% of her job duties. Therefore, the employer could have terminated her because of her inability to return to work at her usual job duties. The court also stated that although Geromanos did not receive notice as required by the FMLA, she received the benefits required by the statute

**WAGE AND HOUR TIP:
CURRENT WAGE AND HOUR
HIGHLIGHTS**

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Price & Vreeland, P.C. Mr. Erwin can be reached at (205) 323- 9272. Prior to working with Lehr Middlebrooks Price & Vreeland, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.

Many wage and hour issues continue to be in the news on a regular basis with the revised regulations for "white collar" employees being the hot topic. Other current issues include:

1. **Congress is also considering at least two proposals that would increase the minimum wage.** One would raise the rate to \$6.25 in two increments while the other would increase it to \$7.00 in three increments. Indications continue that a strong push will be made to pass some type of minimum wage increase during this year. Also, in the November election Florida voters will consider a ballot initiative to establish a state minimum of \$6.15 per hour.
2. Litigation under the Fair Labor Standards Act also continues to be an issue for employers. The Supreme Court, which is currently considering a case involving the question of the time the employee spends walking from the clothes

changing area to the actual workstation, has asked the U. S. Solicitor General to file a brief as to whether he believes such time is compensable.

3. In a separate matter, the U. S. Ninth Circuit ruled that **employees working for an electronics manufacturing firm who were required to change into an uniform at the plant were entitled to pay for the time spent in changing as well as time spent traveling between locker rooms and clean rooms where the employees worked.**
4. Recently the Supreme Court refused to consider an appeal of a Ninth Circuit decision dealing with joint employment of employees by two related but separately owned firms. The court held that employees who worked for both companies were entitled to have their hours combined when determining the overtime pay they were due. Further, because one of the firms had been previously investigated by DOL the violations were willful and the employees were entitled to liquidated damages. This has the effect of doubling the amount back wages that were due the employees.
5. The U. S. District Court in Washington D.C. recently issued a decision regarding the applicability of the administrative exemption to Auto Damage Claims Adjusters. The court found that these employees' primary duty was inspecting vehicles, writing estimates that were prepared using company software and traveling to an from inspection sites. Further, the court found that these duties did not require the level of discretion and judgment that is required by either the current or new regulations. Consequently, these employees were determined to be non-exempt even though the new regulations state "insurance claims adjusters generally

meet the requirements for the administrative exemption.”

- 6. DOL had previously stated that they would issue some revisions to the Family and Medical Leave Act regulations, portions of which were invalidated by the Supreme Court in its 2002 ruling in Ragsdale v. Wolverine Worldwide, Inc. Initially DOL planned to have the revisions issued by January 2003 and after several delays they had stated the revisions were to be completed by June 2004. However, they now have delayed the publication until March 2005. In the same notice DOL stated that it expects to issue some revised Child Labor regulations related to the hours and working conditions for minor age 14 and older by September 2004.

Fair Labor Standards Act litigation continues to be an active matter, thus employers need to ensure that they comply with the statute. If I can be of assistance please give me a call.

**OSHA TIP:
WHO PAYS FOR JOB SAFETY GEAR?**

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks Price & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at (205) 226-7129.

OSHA announced on July 7 that its proposed rule, “Employer Payment for Personal Protective Equipment,” would be reopened for 45 days to allow further public comment.

This proposed rule was issued on March 31, 1999 and, with a few specific exceptions, would have employers pay for all required personal protective equipment (PPE) used by their employees.

While OSHA standards requiring the use of PPE generally indicate that the employer is to provide and ensure their use, the matter of payment for such items is not always clear. The general requirement to provide PPE is found in 29 CFR

1910.132(a). This standard states that PPE must be provided, used, and maintained in a sanitary and reliable condition. It does not explicitly address payment. On the other hand, a number of the agency’s health standards specify that referenced PPE is to be provided at no cost to the employee. Other standards suggest that PPE items are owned by the employee. The logging standard, 29 CFR 1910.266, specifically makes an exception as to requiring the employer to pay for certain types of logging boots. In this case the issue of who pays is left open to negotiation and agreement between the employer and employee.

In an effort to clarify and establish a uniform policy, OSHA issued a directive to its field staff in 1994. The declared policy would require employers to provide and pay for needed PPE with limited exceptions. Where items were very personal in nature and could be used by the worker while off the job, i.e. steel-toe safety shoes, the issue of payment could be left to labor-management negotiations.

Subsequently, Union Tank Car Company was cited by OSHA for requiring employees to pay for metatarsal foot protection and welding gloves. The citation was appealed to the Occupational Safety and Health Review Commission where it was vacated. The Commission found that OSHA had failed to adequately explain its 1994 policy in light of several earlier letters of interpretation that were inconsistent with that policy.

Final action on the proposed rule, now four years old, has been urged by advocates of workers in low-pay jobs. They argue that these include many of the jobs where hazards are most severe and protective equipment most needed. OSHA has indicated that the agency is in the process of reaching a final determination on the proposal.

In its present form the rule would clarify that, with only a few exceptions for specific types of PPE, the employer must pay for the items provided. The three identified exceptions are safety-toe protective footwear, prescription safety eyewear and the logging



boots required by 1910.266(d)(1)(v). There appears to be the prospect that the exception list could expand to a degree. This because the agency has pinpointed the issue of employer payment with respect to “tools of the trade” as being the one item needing further public input and review. Apparently the number of earlier comments dealing with the custom and practice of employee-provided equipment suggested the need for further evaluation.

It should be noted that whether the employer or the employee owns, pays for, or provides personal protective equipment needed for the job, the employer is ultimately responsible. The employer is subject to citation and penalty for the absence of required PPE or for improper, misused or defective PPE.

**EEO TIP:
RETIREE HEALTH BENEFITS
UNDER THE ADEA
(Is there a conflict in the way the
EEOC interprets the Age Act?)**

This article was prepared by Jerome C. Rose, EEO Consultant for the Law Firm of Lehr Middlebrooks Price & Vreeland, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the EEOC. As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the states of Alabama and Mississippi. Mr. Rose can be reached at (205) 323-9267.

Are you confused about what is happening under the Age Discrimination In Employment Act (ADEA) with respect to retiree benefits? In February the Supreme Court in the case of *Cline, et al v General Dynamics Land Systems, Inc.*, held that an employer would not violate the ADEA if it provided some benefits to older retirees that were not provided to younger, potential retirees although both were 40 years or older. In that case the employer had negotiated a provision in a collective bargaining agreement that would cut off certain retirement benefits to employees who were over 40 but younger than 50 years of age. Prior to that decision the EEOC interpreted the ADEA as requiring that there could be no discrimination between employees within the protected age group. [See EEOC

Regulations at 29 C.F.R. 1625.2(a)] According to the Supreme Court in the Cline decision, the key consideration under the ADEA is whether the discrimination, if some exists, is in favor of the older rather than the younger members of the protected class.

Hold on! On April 22, 2004 the EEOC issued a final notice of a proposed new rule which, seemingly, would do just the opposite with respect to retiree health benefits. The new rule would allow employer’s to reduce or eliminate altogether certain health benefits to retirees over the age of 65 that may be provided to employees who retire between the ages of 50 and 64. In effect the new rule would grant an exemption under the ADEA to employers who have retirement systems that coordinate retirement health benefits with an employee’s eligibility for Medicare.

According to Cari Dominquez, the EEOC’s Chair, the purpose of the exemption is to allow employers to continue the practice of paring down their health care costs after employees become eligible for Medicare in order to minimize costs and avoid duplicate coverage. Both union and management organizations complained that without the exemption most companies would be forced to reduce health care benefits in general or not provide them at all.

Since retirees do not become eligible for Medicare until they reach age of 65, the practical effect of the new rule is to “carve out” certain health benefits for employees, who retire early, usually between 50 and 64, but are not eligible for Medicare. The exemption provides a bridge of medical coverage for those employees who are not eligible for Medicare, but it provides nothing for those 65 or older who are eligible, for Medicare whether or not they actually take the program. Thus, an employer can drastically reduce or eliminate entirely medical coverage for employees over the age of 65.

The new rule when finally adopted will be codified as Section 1625.32 of the Commission’s Procedural Regulations found at 29 C.F.R. 1625, et seq. It is expected to be final

within the next month or so. Thus, employers who currently offer a health benefits package to their retirees should be aware of the following key aspects of the new rule:

- The exemption applies only to the practice of coordinating retiree health benefits with Medicare.
- Employers may offer a “carve-out plan” for retirees who are eligible for Medicare or a comparable state health plan.
- The exemption does not apply to those employees who are “eligible” for coverage under Medicare, whether or not they actually elect to receive such benefits.
- The exemption applies to existing and newly created employee benefit plans.
- The exemption applies to dependent and/or spousal health benefits that are included in any benefit package provided to retirees.
- The exemption does not apply to any other acts, practices or employment benefits not covered by the rule.
- The exemption does not apply to health benefits that are provided to current employees who are at or over the age of Medical eligibility (presently, 65 or over). It applies only to retiree health benefits.

The matter of how to apply the exemption to any given benefit program could be complicated and may require the assistance of legal counsel. In the mean time every effort will be made to keep you posted as to the actual effective date of the new rule through this column. Please don't hesitate to call if you have any questions.

**UNITE AND HERE MERGE,
JOIN IN BLASTING AFL-CIO**

The consolidation among labor unions continues, as UNITE (a prior merger of two textile and apparel unions) merged with the Hotel Employees and Restaurant Employees union. The new union is named UNITE HERE. These two unions were active in an organization called the New Unity Partnership (NUP), which seeks to change the direction of organized labor and the AFL-CIO.

According to NUP leader Andrew Stern of the Service Employees International Union, “I believe the AFL-CIO has no hope – no hope – of organizing the 90% of workers who are not in a union. In the past, when our own unions, when our union policies, when our own union traditions and the interest of individual leaders got in the way . . . we changed them. Sisters and brothers, it is time. It is long overdue. We need to transform the AFL-CIO or build something new.” Another NUP leader, Douglas McCarron, president of the Carpenters, stated that **“for too long unions have been doing things the same old way. They have been organized the same way, they have been structured the same way and they have been doing the same things. And when you ask why, the answer is ‘that’s how we’ve always done it.’ Where I come from, to do the same thing over and over again and expect different results is a sign of insanity.”**

UNITE HERE's greatest emphasis will be on organizing. The heritage of both unions is not a common one; textiles and apparel compared to restaurants and casinos. However, both unions must deal with the decline in membership and thus sought each other out due to their philosophical alignment.

**THE ALABAMA EMPLOYER'S DESK
MANUAL RETURNS; MARK YOUR
CALENDARS NOW**

LMP&V will publish in August an entirely revised Alabama Employer's Desk Manual, a must have reference guide that has been used by HR professionals in Alabama for approximately twenty years. The new desk manual will include the most up to date wage and hour regulations, COBRA regulations and other changes based upon legislative, regulatory and statutory developments. Look for information about purchasing the desk manual and updates shortly.

Also, LMP&V's Effective Supervisor program returns, with updated changes to content. The dates and locations are as follows:

September 14	Mobile
September 21	Huntsville
September 23	Decatur
September 28	Auburn/Opelika
October 7	Birmingham

You will receive information about this program shortly.

Additionally, on October 19 and 20 in Birmingham we will conduct a two-day update regarding a full range of labor and employment law issues. This program will be an excellent update for in-house counsel or the human resources professional, and will also assist managers who are responsible for HR or newly appointed to HR positions. Each attendee to that meeting will receive a complimentary copy of the Alabama Employer's Desk Manual. More information about that program will be forthcoming shortly.

All of these programs will include group discounts. Note that we also conduct the Effective Supervisor program for individual employers. For further information, please contact Sherry Morton at 205/323-9263 or smorton@LMPV.com.

DID YOU KNOW . . .

. . . that a Colorado employer recently paid \$750,000 to settle a national origin harassment case against Mexican – born employees? *EEOC v. Phase 2 Company*, (D. Colo., June 1, 2004). The employees were the recipients of daily slurs that included calling them “lazy,” “stupid,” and “damn wetbacks.” The employees complained to the company, yet no action was taken and the intensity and frequency of the comments increased. The employer also treated the Mexican employees less favorably, such as requiring that they use filthy restrooms compared to Anglo employees, requiring them to bring their own water to work compared to Anglo employees and forbidding them from using construction site elevators compared to Anglo employee.

. . . that once again a court has concluded that an employer has the right to hold managers to higher standard of behavior than non-managers? *Koski v. Willowood Care Center*, (OH Ct. App, May 26, 2004). The administrator became romantically involved with a nurse he eventually married. He was demoted and his pay was cut by 30%. He claimed that his demotion and pay cut were constructive discharge and sex discrimination, because no action was taken against his wife. In rejecting his claim, the court said that “an employer might distinguish between a supervisor and non-supervisor who have embarked on a romantic relationship and . . . might chose to punish the supervisor more harshly.” The owner was concerned that the supervisor’s behavior could expose the company to a lawsuit and “threatened the morale of those employees under his supervision.”

. . . that the U.S. Supreme Court is deciding whether to consider a case where the discriminatory motive of a non-decision maker can substantiate a discrimination claim? *Hill v. Lockheed Martin Logistics Management, Inc.*, (June 24, 2004). Hill alleged that a safety inspector intentionally provided wrong information to decision-makers about her alleged safety violations, because the inspector was biased against her due to gender. Usually, unless the individual making the recommendation has authority such that they are primarily responsible for the decision, their bias cannot be attributed to the decision-maker if the decision-maker did not know about it. The lower court granted summary judgment, because the safety inspector was not “principally responsible” for the decision. In asking for Supreme Court review, Hill argued that the [lower court decision] effectively legalizes intentional discrimination . . . in all phases of such a decision-making process except for the very last stage.”

. . . that failure to provide a COBRA notice cost the employer over \$300,000? *Delcastillo v. Odyssey Resource Management, Inc.*, (D. Neb., May 26, 2004). The employee was never

told about the steps he needed to take to continue health coverage or that his health coverage would even terminate. During that time, the employee and his wife incurred over \$27,000 in medical expenses and divorced, allegedly so that she could qualify for public assistance; she was uninsurable. The damages awarded included the maximum statutory penalties of \$110 per day per violation, plus interest.

. . . that EEOC Chair Dominguez stated on July 15, 2004 that a large percentage of discrimination charges filed involve retail employers? There is a higher degree of harassment claims filed against retailers, particularly by teenagers in the fast food industry.

The EEOC also stated that it is concerned about the progression of women and minorities in the "high end" retail sector. According to Dominguez, "women are now more than half of professionals, but their movement into the category of officials and managers continues to be slow." The EEOC noted that one of the fastest growing areas of discrimination charges involves sex discrimination claims filed by minority women based upon lack of promotion or other progression.

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