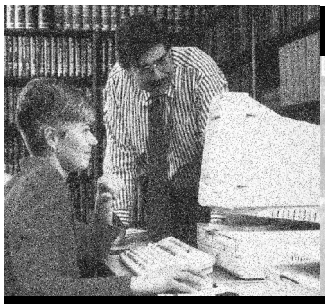

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management December 2005

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Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

Dressing and Undressing in Required Gear Considered Compensable "Hours Worked" Under FLSA

The U.S. Supreme Court recently issued a decision that clarifies certain rules under the Fair Labor Standards Act (FLSA) regarding the calculation of "hours worked" for employees who are required to put on specialized protective clothing or gear at the beginning of a shift and remove it at the end of the shift. According to the Court's ruling in *IBP, Inc. v. Alvarez*, when an employer requires employees to wear specialized protective clothing or gear, the compensable workday begins when they "don" (or put on) the gear, and it ends when they "doff" it (or take it off).

Conflict Between Existing Rules Settled

The Supreme Court's decision in *IBP* finally settles an apparent conflict between two long-standing rules under the FLSA. In the Portal-to-Portal Act of 1947, Congress amended the FLSA to eliminate from the definition of "compensable hours worked" time spent walking to and from an employee's work station, as well as time spent on other activities that are preliminary or "postliminary" to the employee's "principal activities". In 1956, however, the Supreme Court held that the FLSA generally covers the time spent donning and doffing essential protective gear because such activity is an "integral and indispensable" part of an employee's principal activities. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

The bottom line is ...

Employers should review their current pay practices to ensure that employees who are required to wear specialized protective clothing are compensated for all time spent "donning" and "doffing" the gear.

Facts

The *IBP* decision arose out of two cases decided by lower courts. In the first case, employees of a meat processing plant sought compensation for the time they spent: (a) putting on and taking off required protective gear (including chain-link metal aprons, leggings, vests, sleeves, Kevlar gloves, etc.), and (b) walking from locker rooms to the shop floor and back again at the end of their shift. In the second case, employees of a poultry processing plant filed a similar "walking time" claim, but were also seeking to be paid for the time that they spent waiting to don or doff their protective clothing at the beginning and end of their shifts.

Both of the lower courts found that the protective gear the employees were required to wear was "integral and indispensable" to the performance of their principal activities. In fact, most of the specialized clothing was mandated by law for safety and/or sanitation purposes, and the process for donning and doffing the gear was quite time consuming.

Supreme Court's Decision

The Supreme Court agreed with the lower courts holding that because the principal activities of the meat and poultry plant employees included donning and doffing specialized gear, the employees' compensable "hours worked" began when they first put on the gear and --

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Dressing and Undressing in Required Gear Considered Compensable "Hours Worked" Under FLSA (cont'd)

with some exceptions for unpaid breaks and other activities -- ended when they took it off. Specifically, the Supreme Court ruled that:

- Employees must be paid for the time they spend walking to their work station after they have put on specialized clothing or protective gear that is necessary to perform their job and for the time they spend walking back from their work area at the end of their shift to remove such items; and,
- Employees must be paid for time spent waiting to remove their required protective gear at the end of their workday.

Employers do not, however, have to pay employees for time spent walking to the changing area to put on protective gear ***before*** their workday begins, or for time spent waiting to put on protective gear at the ***beginning*** of their workday.

In light of the ruling in *IBP*, employers should review their current pay practices to ensure that they comply with the details of the FLSA's requirements. If you have any questions about this ruling, please contact our office at 315-437-7600.

Exempt Employees Can Be Docked for Some Absences Due to Bad Weather, DOL Says

The U.S. Department of Labor recently issued two opinion letters on when it is permissible for an employer to make salary/leave deductions from exempt employees for absences due to inclement weather, without jeopardizing their exempt status under the Fair Labor Standards Act (FLSA).

The FLSA provides that employees who are engaged in bona fide executive, administrative or professional positions are exempt from the minimum wage and overtime pay requirements, but only when the employee is paid on a "salary basis". The "salary basis" test requires that in order for an employee to maintain his/her exempt status, the employee must regularly receive a set amount of compensation on at least a weekly basis and that amount must "not be subject to reduction because of variations in the quality or quantity of the work performed." 29 CFR §541.602. In other words, such employees must be paid for the general value of their services in a given week, not for the hours of work they actually performed.

There are, however, limited circumstances under the FLSA when salary deductions are permissible without jeopardizing an employee's exempt status. For example, where an exempt employee is absent from work for one or more full days for personal reasons (other than sickness or disability) an employer is permitted to deduct a full day's salary from that individual. Employers should note, however, that only deductions in full-day increments are permitted. No partial-day deductions are allowed for exempt employees under the Act.

The Department of Labor's new opinion letters provide an additional set of circumstances under which an exempt employee may have deductions taken from his/her vacation time or other accrued leave. Specifically, an employer is permitted to have a policy that requires its exempt employees to use their accrued leave when they are absent from work due to inclement weather, so long as they receive their predetermined salaries. In other words, assuming that an employer has a properly written (and enforced) policy, it may deduct the time that an employee is absent from work due to inclement weather from his/her accrued paid leave without jeopardizing his/her exempt status.

However, if an employee has used all of his/her accrued leave, the employer may not make deductions from the employee's salary due to inclement weather except under the following circumstances:

- The employee must be absent for a full day. (Remember an employer may never deduct an exempt employee's salary for a partial day's absence); and
- The employer remains open for business.

In one of the Department of Labor opinion letters, this situation is described as follows:

> If any employee is absent for one or more full days for personal reasons, the employee's salaried status will not be affected if deductions are made

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Exempt Employees Can Be Docked for Some Absences Due to Bad Weather, DOL Says (cont'd)

from the employee's salary for such absences. An absence due to inclement weather does not constitute an absence due to sickness or accident. Therefore, an employee who is absent due to inclement weather, such as because of transportation difficulties, is absent for personal reasons.... [accordingly] a private employer may require an exempt employee who fails to report to work to take vacation or make leave bank deductions without jeopardizing the employee's exempt status. When the office is open, an exempt employee who has no accrued benefits in the leave bank account does not have to be paid (i.e., may be placed on leave without pay) for the full day(s) s/he fails to report to work due to such circumstances as a heavy snow day.

Given that improper salary deductions have potential of destroying the overtime pay exemptions for entire classes of employees, employers must be very careful in establishing and implementing vacation policies which call for the deductions discussed above.

If you need assistance in drafting or revising such a policy, please contact our office.

FMLA Does Not Protect Employees From Termination for Misconduct

A recent federal court decision illustrates an often-forgotten legal principle associated with the Family and Medical Leave Act (FMLA); that is, an employee may be terminated even though he/she is on FMLA leave, so long as the employer would have done so without regard for the leave. *See Throneberry v. McGehee Desha Count Hospital*, 403 F.3d 972 (8th Cir. 2005). In other words, if an employer would normally terminate a particular employee for certain misconduct, it may do so even though the individual is on FMLA leave. All employers should be aware, however, that such decisions will be heavily scrutinized by courts. Thus, these decisions should be made carefully, in consultation with your employment law attorney.

In *Throneberry*, a nurse who had worked for the hospital for more than 10 years, began to experience mental health problems following a divorce and her father's death. These problems adversely affected her job performance. Specifically, she was frequently absent from work, often left early, and perhaps most importantly, left work-related mail unread for months. After a few months and several disorderly and disruptive incidents, however, the hospital decided to place the nurse on an FMLA leave.

While on the leave, it was discovered that her unopened mail, some of which was more than five months old, indicated that she had submitted improper bills to Medicaid. This resulted in the hospital having to refund $40,000. Based on this misconduct, her employment with the hospital was terminated.

The nurse subsequently sued the hospital claiming that by firing her the hospital interfered in her right take her 12 weeks of job-guaranteed FMLA leave. The Court disagreed, ruling that an employer does not violate the FMLA when it can prove it would have made the same decision had the employee not exercised FMLA rights.

The bottom line is that an employer can terminate employees while they are on FMLA leave. Employees who engage in misconduct are not protected from termination just because they are on FMLA leave. However, since such terminations will be heavily scrutinized by the courts, employers must make sure that they have all of the facts properly documented to support the termination decision.

If you have any questions about this case or its implications, please contact our office.

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Department of Labor Offers New Poster Regarding Veterans Rights

The Department of Labor (DOL) recently announced that a notice-in-poster-format explaining the rights of employees under the Uniformed Services Employment and Reemployment Rights Act (USERRA) is now available for employers to download from the DOL website.

The Veterans Benefits Improvement Act, enacted by Congress in December 2004, mandates that employers provide the notice to "all persons entitled to rights and benefits under USERRA." Employers may meet this obligation by posting the notice in a prominent place where employees customarily check for such information, like on bulletin boards.

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service. The law also prohibits employers from discriminating against past and present members of the uniformed services and applicants to the uniformed services. The USERRA poster is now available at www.dol.gov/vets/programs/userra/poster.pdf. Employers can obtain detailed information about USERRA by calling 1-866-4-USA-DOL or by visiting www.dol.gov/vets/programs/userra/.

HR ADMINISTRATION AND TRAINING SERVICES

The Ferrara-Fiorenza Law Firm provides a full range of HR administration consulting services, including, in part:

- A comprehensive audit of your HR policies, practices and procedures.
- Advice for complying with employment laws.
- More effective, more efficient HR policies, practices and procedures, along with implementation strategies and assistance.

The Firm also works with employers to tailor training on a variety of personnel issues for managers/supervisors, including:

- Minimizing the Risk of Employment Litigation
- Preventing Workplace Harassment
- Leadership and Influence
- Managing Non-Performing Employees

For more information on the services Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. can provide to you, contact us at 315-437-7600.

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