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70 Year Old Law Still Confuses Employers

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Adopted in 1938, the federal Fair Labor Standards Act ("FLSA") established minimum wage, overtime, child labor and recordkeeping requirements for covered employers. As one Nebraska employer is discovering firsthand, the FLSA continues to create confusion and potential liability despite having been around for 70 years.

On April 8, 2008, the U.S. Department of Labor filed a complaint in federal court against the King Kong restaurant chain. The complaint, filed on behalf of 133 current and former employees of King Kong's Omaha and Lincoln restaurants, alleges King Kong failed to comply with the FLSA's overtime requirements by failing to pay one and one-half times a nonexempt employee's regular rate of pay for all hours worked over 40 in a workweek. According to press reports, the principal owner of King Kong contends that by providing meals to employees without charge the company should be relieved of some of its overtime obligations. The Labor Department is seeking nearly $120,000 in unpaid overtime and an equal amount as liquidated damages, as well as a permanent injunction ordering King Kong to cease violating the FLSA.

LESSON:

While the outcome of the King Kong lawsuit is unknown, what is known is that the FLSA continues to befuddle employers as they attempt to apply this Depression-era legislation to the modern workplace. In order to avoid the time and expense of wage and hour audits and litigation, employers need to keep abreast of developments under the FLSA. This includes the outcome of lawsuits such as the one pending against King Kong as well as interpretive guidance issued by the Department of Labor. Indeed, in recent weeks the Department of Labor has issued several new opinion letters seeking to clarify the FLSA's applicability.

For example, in a non-administrator opinion letter dated February 14, 2008, the Labor Department addressed the question of how employers must account for on-line computer-based training performed at an employee's home. The policy the employer asked the Department of Labor to review was as follows:

> Nonexempt employees performing on-line [training at] home are responsible for keeping accurate records of all time spent performing on-line [training]. The [time sheet] must be used, signed by the employee's manager and turned into the department time editor, in order for the employee to be compensated for their time. It is important to note that failure

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> of an employee to accurately record time for on-line [training amounts to] falsification of payroll records . . . .

According to the employer, the proposed time sheet requires such information as the type of training taken, completion date, start and end times, and the employee's and manager's signatures. Employees are permitted to take the training at home only with the prior approval of their manager, who will monitor the amount of time they spend on the training. Because the training is mandatory and directly related to the employee's work, the employer told the Labor Department that it treats the time spent training on-line at home as compensable hours worked under the FLSA. The primary question the employer wanted the Department of Labor to answer was whether the policy is "an acceptable method of capturing the time an employee spends training at home."

In its opinion letter, the Labor Department began its analysis by noting that employers are obligated to pay for all hours employees are suffered or permitted to work, including work done at home, if "the employer knows or has reason to believe that the work is being performed." The opinion letter further noted that while the FLSA regulations require an employer to maintain accurate records of "[h]ours worked each workday," no particular method of keeping required records is prescribed, provided that the relevant information is maintained and preserved. The opinion letter concluded that the employer's policy complies with the FLSA because the total hours worked each workday can be derived from the start and end times noted on the timesheet.

In another non-administrator opinion letter dated the same day, the Labor Department addressed the issue of whether the minimum salary requirement for the so-called "white collar" overtime exemptions could be pro-rated for part-time employees. The Department of Labor concluded that an employer cannot prorate the minimum salary of $23,660 per year or $455 per week required under 29 C.F.R. § 541.600 to qualify for an exemption under the FLSA. According to the opinion letter, "[t]here is no provision to prorate the salary requirement of $455 per week when an employee's hours are reduced." Rather, "[t]he employee must receive a salary of at least $455 in each week in which he or she performs any work regardless of the number of days or hours worked to qualify for the exemption in Section 13(a)(1) [of the FLSA]." The opinion letter went on to note that a non-exempt employee may be paid a salary to work 20 hours per week without violating the provisions of the FLSA if the amount of the salary paid when divided by the actual number of hours worked (less than 40) equals the equivalent of at least $5.85 per hour, the current minimum wage.

Copies of both of these opinion letters are available at www.remboltludtke.com

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