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The COMPASS

SERVING ALL POINTS OF NEBRASKA AND THE MIDWEST

Volume 5, Issue 1
July 2003

A Mixed Bag Of Tax Breaks and New Taxes

As the summer begins, both Congress and the Nebraska Legislature have finished work on new tax legislation. On the federal side, President Bush recently signed the Jobs and Growth Reconciliation Tax Act which was narrowly approved by the Senate days earlier. The federal Act includes a package of tax cuts for individuals and for businesses. On the state side, the Legislature recently voted to override the Governor's veto of a budget which includes some tax increases. Here is a quick summary of the changes.

Federal Tax Cuts for Capital Gains & Dividends

The most publicized changes in the federal Act involve reductions in the rate of tax on capital gains and dividends. The new Act reduces the tax rate on capital gains from a maximum rate of 20% down to 15% (or as low as 5% for taxpayers in the lower tax brackets). The new rates generally apply to sales which occur after May 5, 2003, on capital assets held longer than one year. With regard to dividends, the new Act provides that dividends received from a U.S. corporation are treated like capital gains. In other words, the new 15% and 5% tax rates will be applicable to most dividends instead of the ordinary income tax brackets. Some special rules and exclusions apply to limit this favorable tax treatment if, for instance, stock is purchased near the dividend date.

Federal Tax Cuts for Individuals

Child Tax Credit. For 2003 and 2004, the child tax credit increases to $1,000 per qualifying child (up from $600 per qualifying child). For 2003, the increased amount of the child credit will be paid in advance beginning in July or August 2003 on the basis of information on each taxpayer's 2002 return filed in 2003.

Marriage-penalty relief. For 2003 and 2004, the basic standard deduction amount for joint returns is double the basic standard deduction amount for single returns. In addition, the end point of the 15% tax bracket for joint returns is adjusted to twice the end point of the 15% tax bracket for single returns.

Expanded 10% rate bracket. For 2003, the 10% tax bracket ends at $14,000 of taxable income for joint filers and $7,000 for single filers and marrieds filing separately (up from $12,000 and $6,000 respectively). For 2004, those elevated figures will be increased based on inflation.

Rate Reductions. For 2003 and thereafter, the tax rates above 15% are 25%, 28%, 33%, and 35% (down from 27%, 30%, 35%, and 38.6%).

Increased Alternative Minimum Tax Exemption. For 2003 and 2004, the maximum AMT exemption amount is increased to $58,000 for joint filers and surviving spouses, $40,250 for unmarried taxpayers, and $29,000 for marrieds filing separately.

Federal Tax Cuts for Business

Expanded Expense Allowance for Capital Purchases. For depreciable equipment and similar capital assets placed in service in 2003, 2004, and 2005, up to $100,000 can be immediately deducted in the year the asset is placed in serv-

continued on page 2

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continued on from page 1

ice. To the extent purchased assets are not expensed, a 30%-50% additional depreciation allowance is available in some instances.

Accumulated Earnings Tax and Personal Holding Company Tax Rates Reduced. For tax years beginning after Dec. 31, 2002, the accumulated earnings tax rate and the undistributed personal holding company tax rate are reduced to 15% (both down from 38.6%).

Nebraska Tax Increases

Sales Tax. The approved state budget makes permanent last year's "temporary" increase of the state sales tax rate to 5.5%. In addition, the sales tax basis is expanded to include RV park charges, newspaper advertising supplements, detective services, pet grooming services, and some additional construction and repair labor.

Income Tax. The approved budget makes permanent last year's "temporary" increase of the individual income tax rates.

Alcohol & Tobacco Tax: Taxes on alcohol are increased by approximately 25%. Last year's increase of the cigarette tax to $.64 per pack is made permanent.

Property Taxes: The Legislature increased the maximum property tax levy available to school districts from $1.00 per $100 of valuation to $1.05 per $100 of valuation.

Like other recent tax legislation, the details of the new provisions are complicated and it is often difficult to determine whether and when they apply. If you have questions, we would be happy to help you sort through how all the new rules affect you.

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Workers' Compensation Law Changes for Ag Employers

On May 28, 2003, Governor Mike Johanns signed LB 210 into law. This legislation was adopted in response to *Larsen v. D B Feedyards, Inc.,* a 2002 decision of the Nebraska Supreme Court holding that a Craig, Nebraska feedlot operation was a covered employer under the Nebraska Workers' Compensation Act.

Under the new law, agricultural employers are exempt from providing workers' compensation coverage only if:

- the employer employs only individuals who are related to the employer; or
- the employer employs nine (9) or fewer unrelated full-time employees, whether in one or more locations, on each working day for thirteen (13) calendar weeks, whether or not such weeks are consecutive.

To qualify as an "agricultural" employer, the business must either cultivate the land for the production of crops, fruits, or other horticultural products, or own, keep or feed livestock.

The term "related employee" is broadly defined to include a spouse and employees "related to the employer within the third degree by blood or marriage." If the employer is an entity, such as a corporation, partnership or limited liability company, in which all of the shareholders, partners or members are related, then "related employee" means any employee related to any of those shareholders, partners or members to the third degree by blood or marriage.

The new law also requires that agricultural employers exempt from providing workers' compensation insurance must give workers the following notice at the time of hiring:

> IN THIS EMPLOYMENT YOU WILL NOT BE COVERED BY THE NEBRASKA WORKERS' COMPENSATION ACT AND YOU WILL NOT BE COMPENSATED UNDER THE ACT IF YOU ARE INJURED ON THE JOB OR SUFFER AN OCCUPATIONAL DISEASE. YOU SHOULD PLAN ACCORDINGLY.

An employer's failure to provide the required notice will subject the employer to liability under the Nebraska Workers' Compensation Act.

The new law becomes effective on August 31, 2003.

Agricultural employers desiring to be exempted from the requirement to provide workers' compensation insurance for their employees are encouraged to contact their attorney at Rembolt Ludtke to ensure compliance with this new law.

Court Recognizes "Highly Successful" Cross Examination by Rembolt Ludtke Attorney

It's not often that a court goes out of its way to recognize the trial tactics employed by attorneys. However, in a recent case, the Nebraska Workers' Compensation Court did just that. According to the Court's May 2, 2003, opinion in *Rohloff v. Chief Industries, Inc.*, 2003 WL 21008592:

> "The defendant was quite aggressive in pointing out problems with plaintiff's veracity in general. Much was made of the fact that the plaintiff is a convicted felon, having obtained money under false pretenses with the misuse of a ATM card. Additionally, defense counsel succeeded in obtaining testimony from the plaintiff, himself, that he served jail time as recently as December 2002 resulting from plaintiff's conviction for providing a false statement to a police officer. The defendant also points to the medical records and evidence offered by the plaintiff as fertile ground for suspicion.
>
> * * * *
>
> Viewed in a vacuum, it would appear that the plaintiff has met all the essential elements regarding proof of an accident. During the course of plaintiff's direct examination, he appeared credible. However, cross-examination by defendant's counsel was highly successful in pointing out that all was not as it appeared to be."

Our congratulations to Mark Fahleson, a member of Rembolt Ludtke's employment law section, for obtaining another great result for our clients.

Summer's here, school's out and the child labor laws are in force!

Now that summer is here and Nebraska youths are busy with summer employment, it is time for a review of the federal child labor requirements that may impact your business.

As you may know, the child labor restrictions of the Fair Labor Standards Act of 1938 ("FLSA") generally do not apply to youths 18 years of age or older. For those children under the age of 18, the following restrictions apply:

Nonagricultural Occupations

Under age 14: The employment of minors under the age of 14 is generally prohibited. Limited exceptions exist for employment as a newspaper carrier or by a parent who operates a sole proprietorship.

Age 14 or 15: When school is not in session (June 1 through Labor Day), children ages 14 and 15 may work in various non-manufacturing, non-mining, nonhazardous jobs under certain conditions: (1) maximum workday of 8 hours; (2) maximum workweek of 40 hours; and (3) work may not begin before 7 a.m. nor end after 9 p.m.

Age 16 or 17: Children who are 16 or 17 years of age may perform any job that is not declared hazardous or detrimental to the health or well being of children of that age by the Secretary of Labor. For this age group, the FLSA does not restrict the number of hours or the timing of the hours. Currently, the Secretary of Labor has issued hazardous occupation orders with respect to 17 different types of work, including jobs requiring the employee to drive a motor vehicle on the roadway (excluding certain incidental driving), occupations requiring the operation of certain power-driven machines, and occupations requiring the operation of bakery machines (including dough mixers). Some exceptions do exist for certain student learners and apprentices.

Agricultural Occupations

Under age 12: Youths 12 years old and younger may perform jobs on farms owned or operated by their parent(s) or with a parent's written consent, outside of school hours in nonhazardous jobs on farms not covered by the FLSA's minimum wage requirements.

Age 12 or 13: Children age 12 or 13 may work during the summer while school is not in session in nonhazardous jobs for unlimited hours provided the child has a parent's written consent or is employed on the same farm as the parent(s).

Age 14 or 15: When school is not in session, children age 14 or 15 may be employed in any nonhazardous farm occupation for unlimited hours. Agricultural occupations deemed hazardous include, but are not limited to, operating a tractor with a PTO of over 20 horsepower, operating or assisting to operate any combine, feed grinder, grain dryer or similar equipment, handling or applying ag chemicals and working with certain livestock.

Age 16 or 17: Children 16 years of age or older may generally perform any farm job, whether hazardous or not, for unlimited hours.

Given the public relations nightmares that accompany child labor law violations and the fact that employers are subject to civil money penalties of up to $10,000 per violation, employers need to be especially careful to ensure child labor law compliance.

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Employment Law Practice Group of Rembolt Ludtke & Berger LLP

Mark A. Fahleson

Mark has been instrumental in building the employment and labor law practice at Rembolt Ludtke & Berger LLP since he joined the firm in 1997. Prior to that date, Mark practiced law in Omaha and served as chief of staff/legislative director for a member of the U.S. House of Representatives. He graduated with high distinction from the University of Nebraska College of Law, where he was editor-in-chief of the Nebraska Law Review. Mark is active in a variety of community organizations, as well as taking a leadership role in several legal profession organizations. He teaches employment law at the University of Nebraska College of Law, is a frequent presenter on how employers can avoid liability for workplace issues, and has published countless articles to assist employers in complying with employment and labor laws.

Britt J. Ehlers

Britt's work with employment law issues fits in well to his business-oriented practice. He is a frequent lecturer on various management-side employment and labor law topics. Britt received his J.D. magna cum laude from Washburn University School of Law, where he was Executive Editor of the Washburn Law Journal. He has been with the firm since 1999, but also worked part time at Rembolt Ludtke & Berger LLP while obtaining his undergraduate degree from the University of Nebraska-Lincoln. Since returning to Lincoln, Britt has become active in several youth-oriented service agencies.

Rembolt Ludtke Offers Employee Training

In 1991, Congress amended Title VII of the Civil Rights Act so as to permit plaintiffs to recover punitive damages from employers for unlawful discrimination. Since then, countless court decisions have held that one of the factors they will examine in determining whether punitive damages will be awarded is whether the employer provided effective equal employment opportunity training to its employees.

In 1998, the U.S. Supreme Court held that in some sexual harassment cases an employer may have an affirmative defense to avoid liability for a supervisor's acts of sexual harassment. That affirmative defense requires the employer to prove, among other things, that it "exercised reasonable care to prevent" any sexually harassing behavior in the workplace. As a federal appeals court recently observed, exercising "reasonable care" is much more than simply having an anti-harassment policy; it means a quality company-wide training program. This training needs to be effective, and at a minimum, managers and supervisors should receive training *annually*.

The attorneys of Rembolt Ludtke currently provide on-site employee training for countless employers in Nebraska, Minnesota, Iowa and Kansas. The customized training includes educating employees and managers on:

- Equal Employment Opportunity Laws
- Unlawful Harassment
- Hiring & Interviewing
- Performance Appraisals
- Reducing Workers' Comp Costs
- Conducting Workplace Investigations
- General Employment/Labor Law

If this service is of interest to you, please contact either Mark Fahleson (mfahleson@remlud.com) or Britt Ehlers (behlers@remlud.com).

Recent $1.55 Million Nebraska Jury Verdict Reminds Us That We Don't Want Juries Making HR Decisions

"**Jury Awards Employee $1.55 Million**." Sounds like a headline you would expect to read in a California newspaper. Unfortunately for Nebraska employers, it appeared in Nebraska newspapers and involved a jury verdict against a small-town Nebraska employer. It serves as a useful reminder of what can happen when a jury of employees is deciding whether you treated your employees fairly.

In *Dossett v. First State Bank, Loomis, Nebraska* (Case No. 4:01CV565), Plaintiff Betty Lou Dossett began working for First State Bank of Loomis, Nebraska as a teller/bookkeeper in February 1994. Throughout her employment Dossett was an employee at-will. However, the Bank's employee handbook contained a "Progressive Disciplinary Action," that suggested that terminations would be preceded by verbal and written warnings. The Bank also reserved the right to change its policies at any time.

On the evening of January 15, 1998, Dossett attended a public meeting of the Phelps County School District board of education ("Loomis School Board") and spoke out against a proposed school merger. She also allegedly questioned the integrity of several school board members and the superintendent. The school district was the Bank's largest depositor. A few days later, the Loomis school district superintendent contacted the Bank president and told him that the school district was concerned about continuing to do business with the Bank if they would have to interact with Dossett. A school board member also contacted the Bank president to express his displeasure with Dossett's remarks as well as his concern about the school district continuing to do business with the Bank if Dossett was servicing the school district's account.

On January 29, 1998, Dossett's employment with the Bank was terminated. After Dossett demanded a letter setting forth the basis for her termination, on February 10, 1998, the Bank's president sent Dossett the following letter:

> *Dear Betty Lou,*
>
> *This is in response to your request that I send a letter to you setting forth the reason for your separation from employment at First State Bank.*
>
> *You were employed by the Bank from February 1, 1994 until January 29, 1998, when we met to advise you that your employment was terminated as a result of comments made by you during a meeting on January 15, 1998, which were negative about our local school board and superintendent, thereby reflecting poorly on our community and placing at risk substantial customers of the Bank.*
>
> *Very truly yours*
>
> *John R. Nelsen*
> *President*

Dossett filed a lawsuit against the Bank (but not the Loomis School District) alleging, among other things, that she was terminated in retaliation for exercising her right of free speech under the U.S. and Nebraska constitutions. Generally, constitutional rights protect individuals against only the actions of government officials. Here, Dossett claimed that there was a "meeting of the minds" between a governmental body (Loomis School District) and a private company (Bank). Therefore the Bank was constitutionally prohibited from terminating her in retaliation for her exercise of her First Amendment rights.

On February 13, 2003, the federal court jury in Lincoln returned a verdict entering judgment in favor of Dossett in the amount of $1,555,678.76–one of the largest employment case jury verdicts in Nebraska history. Two weeks later, the federal court granted the Bank a new trial "because the jury verdict was excessive . . . and . . . was the product of passion and prejudice." In May 2003, the case was retried in Lincoln to a new jury which, after deliberating just 2 hours, returned a verdict for the Bank.

To no one's surprise, Dossett has filed her notice to appeal the decision to the U.S. Court of Appeals for the Eighth Circuit, and the case is likely to be decided sometime in 2004.

Lesson: As employers, the last thing we want is for a jury (with the benefit of hindsight) to sit as a "super-HR department" judging the daily decisions we make in the workplace. This is confirmed by recent jury research conducted by Dispute Dynamics, Inc., a national litigation-consulting firm, which revealed that:

- 71 percent of polled jurors believe that "it is more important to see that 'justice is done' than to follow the 'letter of the law'";
- 69 percent agreed that "companies will lie to win a lawsuit."; and
- 97 percent agreed that "it is very important for people to stand up for what they believe in."

Often, when employers call me to strategize about how to handle a particular personnel situation, I encourage them to focus not only on the technical aspects of the employment or labor law at issue, but also ask themselves, "How would a jury of 12 employees view the Company's handling of this situation?" If the Company is not confident that it can prove to a jury of employees that it treated the employee fairly, then perhaps the Company should not be making that decision.

In *Dossett*, the Bank had the legal right to terminate Ms. Dossett, who was an at-will employee. The Bank, which is a private, rather than government, employer, had no legal obligation not to infringe upon Ms. Dossett's constitutional right of free speech, and was well within its rights to protect itself from further damage to its relationship with its largest customer. The Bank felt comfortable enough in its legal position to give Ms. Dossett a letter, drafted by its well-qualified legal counsel, stating the reason why Ms. Dossett was fired. But none of that mattered to the first jury, which awarded Ms. Dossett over $1.5 million and would likely have resulted in the closing of the Bank.

In hindsight, the Bank could have counseled Ms. Dossett regarding her public comments and the deleterious effect they were having on the Bank's relationship with its largest customer. The Bank could have warned her that future acts of this nature would result in disciplinary action, up to and including discharge. Obviously, the Bank would thoroughly document this counseling, and would remove Ms. Dossett from working on the Loomis School District account. Whether the Bank's failure to take some of these actions is the reason why the first jury decided to punish the Bank is unknown. However, taking these proactive measures would likely have placed the Bank in a better position before a jury of employees.

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Nebraska Supreme Court Continues to Chip Away at Employment-at-Will

This morning, shortly after work started, an employee entered the office of Acme, Inc.'s Human Resources manager Sally Smith. "I wanted to let you know I hurt my back really bad this morning while lifting a stack of metal," explained Mark Malingerer, an employee in Acme's fabrication division. "I'm glad you're here, Mark, because I need to let you know that we have to let you go. Your attendance as of late has been poor, and we simply can't tolerate any additional absences," explained Smith.

Does Acme, Inc. have a problem? Possibly, thanks to a recent decision of the Nebraska Supreme Court.

On March 7th, the Nebraska Supreme Court unanimously decided to recognize a cause of action for retaliatory discharge when an employer fires an employee for filing a workers' compensation claim (*Jackson v. Morris Communications Corp., d/b/a York News-Times,* Mar. 7, 2003).

In *Jackson*, the plaintiff Cathy Jackson began working as an at-will employee in the mailroom of the York News-Times in November 1994. Soon thereafter she received two promotions, and was working as a salaried co-circulation manager. In March 1997, Jackson injured her left wrist while operating a labeling machine. After reporting her work injury to her employer, Jackson sought medical treatment and was treated conservatively. However, Jackson continued to have problems with her wrist, and by April 1997 she was unable to perform some of the essential duties of her job. Jackson's supervisor reduced Jackson's duties and pay and met with her three times in late May 1997 to criticize her performance.

On June 2, 1997, Jackson's physical therapist contacted Jackson's supervisor to recommend that Jackson not perform any repetitive motions with her left wrist. The newspaper terminated Jackson's employment some two weeks later on June 16, 1997.

Jackson sued, claiming she was discharged in violation of the public policy expressed in the Nebraska Workers' Compensation Act. The trial court declined to create a new exception to employment-at-will and granted the employer's motion to dismiss.

On appeal, Nebraska's high court reversed the trial court and found that Jackson may proceed with her claim for wrongful discharge in violation of public policy based on her allegations that she was fired after injuring her wrist and filing a workers' comp claim. The court once again recognized the general "at-will" rule that, unless constitutionally, statutorily or contractually prohibited, Nebraska employers are free to terminate employees at any time, with or without reason, without incurring liability. However, the court noted that an exception to this "at-will" rule exists to prohibit employers from terminating employees for a reason that violates the public policy of the State of Nebraska. To determine what our "public policy" is, the courts traditionally look to state constitutional provisions and statutes. Here, the Court held that the Nebraska Workers' Compensation Act provides a mandate for public policy. The Act creates substantive benefit rights for employees and eliminates their right to bring a tort action for work-related injuries. According to the Court, the Workers' Compensation Act "would be seriously frustrated if employers were able to prevent employees from filing claims through the threat of discharge." So even though the employer might claim it terminated the employee for other legitimate reasons, the Court found the issue of whether the termination was motivated by the filing of the workers' compensation claim was an issue to be decided at trial.

Lesson: This is not the first time Nebraska courts have recognized the public policy exception to employment-at-will. In a 1987 decision, the Nebraska Supreme Court recognized a public policy exception for an employee who allegedly was fired for refusing to take a polygraph test, in violation of a state statute. A year later the Court recognized a public policy exception for an employee who allegedly was fired for reporting good-faith suspicions that his employer, a car dealership, was committing odometer fraud in violation of state criminal law. In 1997, the Nebraska Court of Appeals found a public policy exception for an employee who was discharged for refusing to drive a truck with defective brakes, which would violate the state criminal code. However, in another case in 2001, the Nebraska Supreme Court declined to find a public policy exception for an employee who allegedly was fired for making a claim for unpaid wages under the Nebraska Wage Payment and Collection Act, finding the statute was primarily remedial in nature and did not represent a very clear mandate of public policy.

The *Jackson* decision, although not surprising, is of particular concern to employers attempting to manage employees who have sustained a work-related injury. Now, even more so than before, employers must thoroughly document the legitimate, nondiscriminatory reasons why they took an adverse employment action against an employee claiming a work comp injury. That means giving full consideration to whether your decision complies with the Americans with Disabilities Act, Family and Medical Leave Act, Nebraska Workers' Compensation Act, and the *Jackson* decision. Until the courts sort out the breadth of this new exception, employers can expect employees (and their lawyers) to claim that any adverse employment action taken against them after the employee filed a workers' comp claim was in retaliation for their filing of the claim itself, entitling them to damages under *Jackson*.

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I Don't Want A Union In My Shop

In approximately 1996, Richard Wolfe, President of Wolfe Electric Company in Lincoln, began to hear stories of unions attempting to organize non-union electrical contractors. The unions were doing so by "salting"; that is, having union members apply for jobs with a company for the express purpose of organizing the workers of the company. Mr. Wolfe told his employees that the Company would no longer advertise for workers in the newspaper due to the union's organizing activities. The Company planned to hire employees through word of mouth referrals from its current employees. Mr. Wolfe also told employees that he would close the Company before he would allow a union to organize it.

Sometime thereafter, the Company began to use an employment agency, Advantage Personnel, to hire workers. Mr. Wolfe believed that the agency was experienced in screening out union members. However, on April 9, 1996, the Company hired a union organizer who had concealed his union membership from the employment agency.

In June 1996, two electricians quit their employment with the Company. Mr. Wolfe decided that it was necessary to hire additional electricians, and told employees, including the union organizer (whom Mr. Wolfe did not realize was a union member) to see if there were other people who would like to work for the Company. Soon thereafter, nine union members came to the Company to apply for work. They carried a video camera and tape recorder and clearly identified themselves as union members. They initially asked Karen Wolfe, Mr. Wolfe's wife, whether there was work available. She informed them that she would have to speak to her husband and would let them know.

At the time of the incident, Mrs. Wolfe was suffering from terminal cancer. Immediately after the union members left the office, Mrs. Wolfe became very upset because she was worried she might have said something that could be the basis of a lawsuit against the Company.

After speaking with his wife, Mr. Wolfe decided not to accept any applications and to prohibit audio and video equipment from the premises. A couple of hours later, several of the union members returned to the Company, Mr. Wolfe told them that they had upset his wife and that she was suffering from cancer. Mr. Wolfe informed the applicants that he was not accepting applications and asked them to leave.

Following his encounter with the union members, Mr. Wolfe held two employee meetings. At the first one, he expressed his anger at the union for upsetting his wife and stated that he would fight the union to the end, as he would do with anyone else who upset his wife. At the second meeting, he informed the employees that he had refused to accept a certified letter from the union and outlined a procedure to hire non-union applicants.

During a three month period following the encounter with the union applicants, the Company hired six electricians, none of whom were the union applicants.

The United States Supreme Court has long held that the refusal to hire an employee based upon his involvement in union activity is a violation of the National Labor Relations Act. In *NLRB v. Wolfe Elec. Co., 314 F.3d325 (8th Cir. 2002)*, the Eighth Circuit Court of Appeals specifically held Mrs. Wolfe's subjective fear of a lawsuit, and Mr. Wolfe's anger at the applicants for having upset his wife did not provide a justification for the Company's refusal to hire the union applicants.

Lesson: Many employers feel that having a unionized workforce is not in the company's best interest. It is important for such companies to note that unions often identify specific industries and will attempt to unionize those workforces within those industries by "salting" a workforce. This is what happened to Wolfe Electric Company. If a company believes that it may be targeted by a union organization attempt, and does not believe that a union workforce is in its best interest, it is important for the company to immediately explore its legal options with respect to hiring of employees. By doing so, the company can hopefully avoid costly litigation which can be drawn out for a number of years. In the case of Wolfe Electric Company, the action has continued for over six years.

As a side note to this issue, legislation was recently introduced in Congress which would relieve employers of any legal obligation to hire union organizers. The Truth In Employment Act of 2003 (the "Act") was introduced on April 11, 2003. The Act specifically protects employers from having to hire paid union organizers who are engaged in "salting." Although the bill is in its infancy, it is a sign that some in Congress recognize the extreme burdens imposed upon employers as a result of "salting."

The attorneys at Rembolt Ludtke & Berger LLP have extensive experience in all types of labor law, including assisting employers facing organizing efforts by unions. If you would like further information regarding the practice of "salting" or have other questions regarding unions, the attorneys at Rembolt Ludtke & Berger LLP will be more than willing to assist you.

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To Pay or Not to Pay: Department of Labor May Change Current Overtime Exemptions

On March 31, 2003, the United States Department of Labor ("DOL") published Notice of Proposed Rulemaking, announcing proposed revisions to the "white-collar" exemptions from overtime pay contained in the Fair Labor Standards Act ("FLSA"). These changes, if adopted, would affect an estimated 19 million to 26 million employees in the United States.

Most employers are covered by the FLSA, which was passed by Congress over 60 years ago. In fact, we all have lived under the FLSA for so long that we take many of its requirements and protections for granted. Among other things, the FLSA is the federal law that requires the payment of overtime to qualifying employees for all hours worked over 40 in a workweek. Congress created a number of exemptions from this overtime requirement, the most prominent of which are the "white collar" exemptions—executive, administrative and professional. Employers must become thoroughly familiar with the specific requirements for each exemption in order to properly classify and compensate their employees. However, in the near future, the standards employers currently use for classifying employees for overtime purposes may change.

Generally, exempt status under the white-collar exemptions hinges on two separate issues: (a) the employee's duties and responsibilities ("duties test"); and (b) the employee's level and method of compensation ("salary-basis test"). Under the duties test for each white-collar exemption, the employee's primary duty must be performing work that is expressly exempt under the particular white-collar exemption. For example, in order to qualify as an exempt executive, the employee's primary duty must be managing the enterprise (or a division or subdivision) in which the employee works, and the employee must customarily and regularly direct the work of 2 or more employees. To meet the salary test under what is called the "short test", the executive employee must be paid on a salaried basis (*i.e.*, generally not subject to reductions due to variations in the quality or quantity or work performed) at least $250 per week. Thus, whether the exemption applies depends on the specific duties and responsibilities of each employee's job, how much salary the employee is paid, and whether the salary is guaranteed without regard to the quality or quantity of work performed.

The Department of Labor's proposal would alter the classification system that determines whether an employee is exempt or non-exempt from overtime requirements. Some of the proposed changes include raising the minimum salary level necessary to qualify for exemption to $425 per week ($22,100 per year), streamlining the current "short test" and "long test" dependent upon the minimum salary of the employee and substituting them with a single standard duties test, clarifying the exempt status of certain highly-paid employees whose status may be uncertain under the current regulations, and changing the "duties" test by redefining how much time an administrative employee must devote to certain jobs to be considered exempt.

Many of the FLSA provisions have not been amended since the 1930's and 40's. The salary levels required for exemption were last updated in 1975, so the current proposals may be necessary to bring these regulations current. The question is not whether the DOL should raise the salary levels, as most lawmakers and attorneys agree on that, but by how much. There is great controversy over the exact salary limit necessary for overtime exempt status, as well as whether, and how, the duties test for the white collar exemptions should be changed.

Lesson: Today, the white collar exemptions are among the most highly controversial and heavily litigated provisions of the FLSA. Regardless of whether the DOL proposed changes are adopted, employers should carefully examine job descriptions to determine whether the essential functions of the position meet the duties test under the applicable exemption. If job descriptions do not exist, employers are strongly encouraged to draft such descriptions, perhaps with an eye towards satisfying the precise criteria for a particular exemption.

Also, employers seeking to qualify certain employees under the white collar exemptions should ensure that the employees are truly being paid on a salary basis. Policies that tend to jeopardize meeting the salary-basis test include salary deductions for part-day absences and suspensions without pay for disciplinary infractions other than violations of significant safety rules.

Failure to meet either the duties or salary-basis test may convert an employee to nonexempt status, entitling the employee to backpay for unpaid overtime during the preceding two (2) years. Employer liability stretches back three (3) years where the employer's violation is deemed willful.

The DOL's proposed changes may be helpful in clarifying who is exempt from the FLSA's overtime requirements and who is not. The proposals are subject to public comment until June 30, 2003. We are participating in the comment process. We will continue to monitor the rulemaking process carefully, and will inform you if and when any of the proposals become effective.

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You Could Have Mail

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