Holland and Holland L.L.C.

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EMPLOYMENT LAW DIGEST

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FLSA PITFALLS

According to the Texas Workforce Commission, there are certain areas of wage and hour law that cause more confusion for employers than most other areas. The following is a brief outline of those pitfalls and some suggestions for avoiding or dealing with them.

"We're Not Covered - We're Too Small"

Some employers assume that because their business is small, they are not covered by the Fair Labor Standards Act (FLSA). Unlike most other state and federal employment laws, the FLSA does not depend directly upon the number of employees. The FLSA covers individual employees whose work affects interstate commerce, or it can apply to all employees working for an employer that is covered as an enterprise that is involved in interstate commerce. The U.S. Department of Labor (DOL) and the courts have attached broad meaning to the term "interstate commerce". Practically anything in connection with our modern, networked economy is going to be sufficient to be considered involvement in interstate commerce. The vast majority of businesses can save themselves a lot of time and legal expenses by assuming they and all their employees are covered under the FLSA.

"All Our Managers Are Exempt - They're Salaried"

Some employers make the mistake of assuming that simply because an employee is paid a salary, or is called "salaried" or "exempt", or has a high-ranking job title, the employee will be considered exempt from overtime pay. Few things could be further from the truth. Many non-exempt employees are paid a salary, such as receptionists, secretaries, file clerks, and technicians. In a similar vein, giving an employee a high-sounding job title such as "director of production" or "sales manager" will make no difference, if the employee's job duties do not satisfy the criteria found in the DOL's "duties" test for an exemption category. In short, the DOL looks right past what a person is called, instead focusing on the nature of the job and how the employee does the job.

"We Don't Owe Overtime Because the Salary We Pay Covers All the Time They Work"

A problem similar to the one immediately above occurs when an employer recognizes that an employee is non-exempt and eligible for overtime pay, but assumes that paying the employee a fixed salary that is meant to cover both straight-time and overtime pay will be sufficient to meet the overtime pay require-

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What's Inside?

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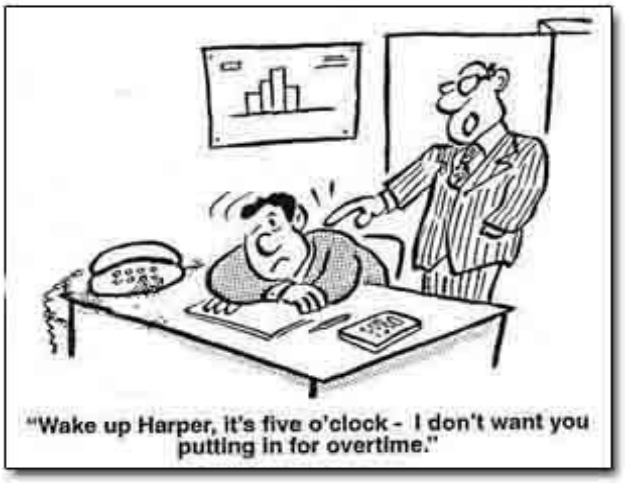
ments. Unfortunately, that assumption is wrong. Regardless of the amount of the salary, and regardless of whether the employee agrees that the salary covers both overtime and non-overtime hours, the DOL and the courts will rule that the employer owes extra overtime pay, since the salary at most can cover only straight-time pay for all hours worked. There are some little-known overtime pay methods that to one extent or another can give the appearance of a set salary that includes overtime pay (and such methods should be attempted only with the assistance of a wage and hour law expert), but, even those methods may fail to fully insulate an employer from the duty of paying extra pay for extra hours worked.



"There's No Overtime Around Here - Our Employees Just Volunteer Some Extra Time"

There is no such thing as "voluntary unpaid overtime" or "donated" time under the FLSA. Any manager who expects or allows his or her staff to put in unrecorded work time, otherwise known as working "off the clock", is a wage claim or lawsuit waiting to happen. It is simply impossible under the FLSA for an employee to waive the right to receive at least minimum wage and applicable overtime pay for all hours worked. An agreement to the contrary (other than a wage claim settlement supervised and approved by the DOL or a Court) is null, void, and completely unenforceable. Employers must ensure that all non-exempt employees properly record all time worked and that they are paid for all such time. (If an employer has true volunteers - generally accepted as possible only with governmental entities and non-profit charitable organizations - it should have all such individuals sign a proper volunteer agreement prepared by a wage and hour law expert).

"We Let Our People Keep Their Own Time Records"

Some employers fail to strictly follow the FLSA's recordkeeping requirements. Among other things, those regulations require employers to maintain detailed records of hours worked by each non-exempt employee. An employer that allows employees to keep their own time records is only asking for trouble. For instance, if an employee files a wage claim for unpaid overtime, and the employer has no time records to dispute the employee's own records showing that overtime was worked, the DOL and the courts will most likely accept the employee's records as valid, unless there is a good reason to doubt the credibility of such records. Another problem will occur if the DOL audits the employer for compliance with the FLSA; part of any compliance audit is an inspection of the required records, and non-existent records may be cause for further DOL action.

"We Don't Need to Pay Overtime, Because We Give Our Employees Comp Time"

Compensatory time off in lieu of overtime pay is something that governmental employers may use, but private sector employers may not make use of compensatory time. Private employers may use an informal variety of compensatory time by adjusting the schedule within the same workweek to ensure that total hours worked do not exceed 40. However, overtime hours may not be averaged out over a longer period of time except in exceedingly narrow cases of certain employees of residential care facilities, and in the case of certain police, firefighting, and EMS employees.

"They Don't Get Overtime - They're Contract Labor"

The difficulty here is not that independent contractors should be getting overtime pay for excessive hours they might put in on a project - they do not get overtime pay, regardless of how many hours they work, since independent contractors are not "employees" and are thus not covered under the FLSA. Rather, the problem occurs when an employer fails to understand that it takes a lot more than a contract to make a worker an independent contractor. Independent contractor status does not depend upon the existence of a

contract specifying that the worker is an independent contractor, or upon what the parties might call the relationship, but rather on the underlying nature of the work relationship. Some employers hire temporary workers to help them with a rush period and think that they are "contract labor" or "contract employees", when in reality such terms are practically meaningless under wage and hour laws and payroll tax laws. If such workers are truly employees, and they work more than 40 hours in a workweek, the employer must pay them overtime pay if they do not qualify for some sort of overtime exemption. There is no way to contract around that; no piece of paper and no amount of explanation will overcome the evidence of an employment relationship if the DOL or the IRS, or a state employment agency, is examining the situation. Before you classify an worker as an independent contractor, you should consult with a employment law attorney. ****

NEW NLRB POSITION

On July 29, 2014, the National Labor Relations Board announced that it intends to hold McDonald's USA responsible for its franchisees' violations of employment law. Employees filed charges against McDonalds alleging violations of the National Labor Relations Act. The charges were filed by employees who believe that they were wrongly disciplined for walking off their jobs to attend rallies and demonstrations coordinated by the Service Employees International Union seeking higher "living" wages of $15 an hour.

While the announcement does not represent a binding or final determination, the NLRB's position could have wide-ranging implications for businesses that operate as franchises, as well as those that use, provide or utilize temporary employees or independent contractors.

Historically, the law generally insulates franchisors from the acts of their franchisees. Courts have typically considered franchisees as separate and independent businesses from their franchisor. Employees could seek remedies for a franchisee's employment law violations against only the franchisee.

The full impact of the NLRB's position remains to be seen. While it is not yet binding precedent on any courts of law, it could, at the very least, encourage more employees and labor groups to bring charges or complaints with the NLRB against companies that operate under a franchise model, temporary employees or independent contractors.

Given the NLRB's position, franchisors should reevaluate how much control and influence they exercise over their franchisee's employment practices and policies. The more control and influence that the franchisor has over its franchisees' employment relationships, the more likely it is that the franchisor may be considered as a joint employer.

If courts actually adopt NLRB's position, it would take away one of the main advantages of utilizing a franchise model. Further, because many of the same "joint employer" considerations apply, such a decision could extend beyond franchise businesses and have implications for businesses that provide or use temporary employees or independent contractors. Companies that outsource work such as human resources and staffing could be affected as well.

Employers (especially those in the restaurant, staffing, and construction industries) should monitor this issue closely. Companies should assess potential implications on their business operations and be prepared to take corrective action to minimize the risk of being considered a "joint employer" with another entity. ****

BACKGROUND CHECKS

If you run background checks on employees or applicants, two federal agencies — the Equal Employment Opportunity Commission ("EEOC") and Federal Trade Commission ("FTC") have indicated an interest in determining whether or not you do so legally.

Lawsuits involving the creation and use of background checks have risen significantly. Lawsuits can be filed by private individuals as well as the EEOC and FTC. In fact, the EEOC and FTC recently issued two joint statements — one addressed to employees and one addressed to employers — to emphasize the importance of complying with the Fair Credit Reporting Act ("FCRA") and federal anti-discrimination laws when it comes to background checks. Much of the guidance offered in the joint statements states the obvious — make sure you comply with the law when running background checks and making decisions based on the resulting information.

Some of the highlights of the EEOC's and FTC's joint statements (with some suggestions) are:

Don't Discriminate. Employers who use background checks should consider doing so for all employees and/or applicants (or at least all employees and/or applicants in certain positions or departments), not just ones of a certain race, color, national origin, sex, religion, disability status, or age. Employers should use background check results uniformly. As provided by EEOC "if you don't reject applicants of one ethnicity with certain financial histories or criminal records, you can't reject applicants of other ethnicities because they have the same or similar financial histories or criminal records."

Consider Whether Selection Criteria Might Negatively Impact Certain Protected Groups More Than Others. The EEOC urges employers to "[t]ake special care when basing employment decisions on background problems that may be more common among people of a certain race, color, national origin, sex, or religion; among people who have a disability; or among people age 40 or older. For example, employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee." (This position has resulted in significant publicity and court challenges. But, for now, it remains EEOC's position).

Give Advance Notice and Get Written Consent. Employers who use third parties to conduct a background check must comply with the very specific notice and consent requirements set out in the FCRA.

Don't Forget About The FCRA's Pre-Adverse Action and Post-Adverse Action Requirements. Before taking an adverse action on an applicant or employee based in whole or in part on an FCRA-governed background report, an employer must give the employee advance written notice, the report itself, and a copy of a document that describes his or her rights under the FCRA. After taking an adverse action because of information obtained through a background report, an employer must give specific information, including the name of the third party who conducted the report and that the individual has the right to dispute with the third party the accuracy of the report. This must be given to the individual in writing.

Keep The Reports for At Least One Year, If Not Longer. Employers must keep background reports (as well as all other personnel documents) for one year after they were made or after a personnel action was taken based on the report, whichever comes later.

When It Comes Time To Get Rid Of A Background Report, Do It Securely. When disposing of background reports, an employer must make sure the reports are permanently destroyed, including by "burning, pulverizing, or shredding paper documents and disposing of electronic information so that it can't be read or reconstructed."

The fact that the agencies decided to issue the joint guidance documents indicates that they are actively looking for additional opportunities to go after employers who they believe obtain or use background reports in violation of the law. The agencies go so far as to expressly asks that individuals contact the agencies if they "think that a background check was discriminatory" or if "an employer got your background report without asking your permission, or rejected you without sending you the required notices." Employers who use background checks should make sure they are fully compliant with the applicable laws. ****

CONFIDENTIALITY PROVISIONS SHOULD BE REVIEWED

Certain routine confidentiality agreements and polices in non-union workplaces may be unlawful. The National Labor Relations Board's is continuing a trend of declaring unlawful what would be considered typical confidentiality agreements and policies by reading them broadly as discouraging employees from discussing their wages and conditions of employment.

The federal Fifth Circuit Court of Appeals recently issued an opinion in which it affirmed an NLRB decision that Flex Frac Logistics LLC, violated the National Labor Relations Act. Flex Frac is a Fort Worth, Texas-based non-unionized trucking company. Flex Frac required employees to sign a document which includes the following:

Confidential Information

> *Employees deal with and have access to information that must stay within the Organization. Confidential Information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; Silver Eagle Logistics LLC organization management and marketing processes, plans and ideas, processes and plans, our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; personnel information and documents, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any Silver Eagle Logistics LLC records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action.*

The above appears to be a fairly standard type of confidentiality provision included in many personnel policies. The Fifth Circuit Court of Appeals held the above provision violated the National Labor Relations Act because it prohibited employees from sharing or copying "confidential information" that included "personnel information and documents" without prior management approval. And further, disclosure of this information "could lead to termination, as well as other possible legal action." The Board found, and the Court confirmed, that the confidentiality policy was facially unlawful because employees would reasonably interpret the ban on disclosing "personnel information and documents" to prohibit discussing their salaries and wages with coworkers or non-employees. ****

The Court went on to say that it did not matter that the provision was not intended, and had not been applied, to prevent the employees from discussing compensation and other terms of employment among themselves. According to the Fifth Circuit, because the list of confidential information encompassed "financial information" and "costs," the clause implicitly included wages, supporting the "likely inference" that the clause prohibited wage discussions with third parties.

The Court further pointed to the fact that the clause gave no indication some personnel information, such as wages paid employees, was not to be included within its scope, implying that the outcome could have been different if Flex Frac had included such a disclaimer.

To avoid a similar problem with confidentiality provisions, employers should consider adding language to confidentiality agreements and policies to indicate that the provisions are not intended to prohibit employees from discussing with other employees—and even with third parties—information about the terms, conditions, wages, and benefits of their employment. ****

EXECUTIVE ORDER PROTECTS GAYS FROM DISCRIMINATION

On July 21, 2014, President Barack Obama signed an executive order banning workplace discrimination against lesbian, gay, bisexual and transgender employees of federal contractors and the federal government.

The executive order has two parts: It makes it illegal to fire or harass employees of federal contractors based on their sexual orientation or gender identity, and it bans discrimination against transgender employees of the federal government.

The provision affecting federal employees takes effect immediately. Federal contractors will be required to comply with the order by early 2015, according to senior administration officials.

By some estimates, the part of the order targeting federal contractors affects 24,000 companies employing roughly 28 million workers, or about one-fifth of the nation's workforce.

Despite the Supreme Court's ruling in the Hobby Lobby case in June, 2014, which provided a religious exemption to portions of the Affordable Care Act, Obama did not include a religious exemption in the executive order. ****

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E-mail copies are also available

ABOUT THE FIRM

Holland & Holland L.L.C. represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—**management counseling**

—review and preparation of **personnel policy** and procedures including employee handbooks;

—representation in administrative matters before the **Equal Employment Opportunity Commission**;

—**representation of management in state and federal court** for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—**protection of trade secrets** and other confidential information through the use of covenants not to compete and non-interference agreements;

—preparation of **arbitration agreements**, non-subscriber programs and waivers of jury trial agreements;

—**management training** on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

—general **human resource audits** to promote compliance with the myriad of legal and regulatory obstacles facing employers on a daily basis;

—**wage/hour compliance** audits and defense of FLSA collective actions.