Employment Law Letter

Summer 2008

EMPLOYERS: ARE YOU READY FOR CREATIVE OVERTIME CLAIMS?

IN SUMMARY:

It's no secret that as the cost of doing business rises for most companies, their employees are expected to work longer, harder and smarter to justify their compensation. Often that includes commitments outside of normal working hours, and away from the workplace. That's not a legal concern if the employee is legitimately categorized as salaried exempt; otherwise it may be a big problem.

What if your employees are text messaging each other during their bus or train commute, or using Wi-Fi at Starbucks, or even responding to email messages from home? Could they claim overtime pay even though you didn't know they were working? You might assume such occurrences would be infrequent and brief, but what if the electronic record shows otherwise?

One obvious line of defense is a good solid policy statement to the effect that any and all overtime must be approved in advance by a supervisor. Ideally, such a policy specifically addresses use of phones or electronic equipment away from the office and outside working hours. However, if an employer assigns a Blackberry or even a cellphone to a non-exempt employee, there must be some expectation that the employee will be working when he or she is away from the office, no matter what the company policy says.

There have been no reported cases on this subject yet, at least in Connecticut, but some lawyers say it's just a matter of time. One likely scenario is that employees who are laid off or fired will include claims for unpaid overtime in the list of arguments designed

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to increase their leverage in severance negotiations. In any event, no prudent employer would want to be involved in a test case.

Speaking of creative overtime claims, the federal appeals court with jurisdiction over Connecticut recently rejected an argument by New York City fire inspectors that they should be paid for their commuting time because they were required to carry fifteen to twenty pounds of files with them. Apparently they only reported to their office once a week, and they kept a week's worth of files in a large briefcase they carried to and from work each day.

The judges said the requirement of carrying a bulky briefcase didn't significantly lengthen the inspectors' commute, and while it provided some benefit to the City, it didn't convert commuting time into working time. The court also rejected a claim by one of the inspectors that his First Amendment rights were infringed when he was disciplined for complaining about being denied overtime and for filling in his time sheet to include his commute as working time, after being told not to. The judges said his complaints involved personal workplace issues, not matters of public concern.

Arbitration and Public Policy: Decisions are Clear as Mud

We have reported before on the trend over the last decade or so to second-guess decisions of arbitrators that appear to conflict with some clearly established public policy, usually embodied in a statute or a line of legal decisions. Trying to draw any general conclusions from such cases, however, is nearly impossible.

Take for example a recent Connecticut Supreme Court decision affirming an arbitration award in favor of a state corrections officer who was denied a transfer to a facility where his former girlfriend worked. Ten years earlier she had obtained a temporary restraining order against him after he assaulted and threatened her. The arbitrator said the public policy against workplace violence was in its formative stages, and was not yet widely accepted as grounds for overriding union contract language, in this case a provision allowing transfers by seniority.

The state moved to set aside the award on public policy grounds. A judge agreed there was a clearly established public policy against workplace violence, but said the arbitrator's award wasn't in conflict with that policy, because the violent conduct did not occur at work, and was too long ago to justify the denial of a transfer now. The Supreme Court agreed. While acknowledging that a "manifest disregard" for public policy might be grounds for overturning an

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arbitrator's award, in this case the arbitrator considered the issue but decided it was not controlling.

Sometimes public policies conflict with each other. A Superior Court judge recently refused to overturn an arbitration award reinstating a laborer fired for possession of marijuana at work, stating that while there is a clearly established public policy against drugs in the workplace, there is also a policy favoring rehabilitation of first-time offenders. The judge cited a number of other state and federal court decisions in support of the proposition that reinstatement of an employee charged with a first-time pot possession offense does not violate public policy.

Our opinion is that courts are beginning to deal with public policy challenges to arbitration awards the same way they have dealt with other such challenges. As long as the arbitrator has considered the public policy issue, a reviewing court is unlikely to overturn his award, even if the judge disagrees with the conclusion reached by the arbitrator.

High Court Overturns Awards For Injured Construction Workers

Multi-million dollar verdicts for workers injured in construction accidents have evaporated as a result of two recent decisions of the Connecticut Supreme Court. Both cases involved employees of construction contractors who were injured on the job and collected workers' compensation benefits, then sued the general contractor for damages suffered as a result of their injuries. In one, an excavator operator injured in a trench cave-in was awarded $3.4 million by a jury, and in the other, a steelworker paralyzed by a falling beam got a $41 million verdict.

In both cases, appeals were taken up to the Supreme Court, and in both cases the justices took issue with the trial court judges, who instructed the juries that a general contractor has a "non-delegable duty" to assure workplace safety. In the trench collapse case, the judge barred any argument that the subcontractor who employed the excavator operator may have had any responsibility for his injury. The Supreme Court said a reasonable person could only reach one conclusion, which was that the subcontractor and not the general contractor controlled the circumstances that led to the injury.

Apparently the attorneys for both workers are pressing the high court for reconsideration, arguing that these decisions let contractors off the hook too easily, and unfairly disadvantage employees. Employer advocates, however, assert that these decisions reinforce the policy that the primary means of compensating employees injured on the job should be through the workers compensation system, not verdicts of sympathetic juries.

Recent S&G Website Alerts:

Employers Take Note: Protection for Employees Expands, May 2008

Second Circuit Cour of Appeals Affirms Denial of Student's Request, June 2008

Changes in Suspension Law Postponed Until July 1, 2009, June 2008

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Individuals Can Be Liable For Employment Discrimination

Most people believe it was settled long ago that individuals can't be sued personally for employment discrimination. For example, if a department head gives larger raises to males than females, or disciplines minorities for offenses overlooked in the case of non-minority workers, the employer may have a legal problem, but the department head doesn't. Generally that's true, but a recent decision of a federal judge illustrates why it's not always the case.

The decision arose from a lawsuit by an in-house attorney for General Electric, alleging that GE did not pay female executives the same as similarly situated males, did not promote females to leadership positions, and failed to enforce policies prohibiting gender discrimination. The suit named not only GE, but various individuals including members of its board of directors, as defendants. The individuals moved to dismiss the claims against them, but were unsuccessful.

The court pointed out that while Connecticut's Fair Employment Practices Act prohibits discrimination by an employer, it also prohibits "any person, whether an employer or employee or not," from aiding, abetting, inciting or compelling a discriminatory act. The complaint alleged that members of GE's management development committee approved discriminatory acts. The plaintiff also claimed that a board member retaliated against her for complaining about these circumstances by arranging for her to be demoted. The judge ruled that was enough to state a claim for violation of the "aiding and abetting" part of FEPA.

Significantly, the judge also rejected a claim that Connecticut's law didn't apply to a director who lived out of state, because he spent a significant amount of time at GE's Fairfield headquarters, and the conduct complained of occurred there.

Our opinion is that the individual defendants in the GE case were named largely to give the plaintiff some added leverage in her lawsuit, but the lesson is an important one nevertheless: don't assume individuals can't be held liable under employment discrimination laws.

LEGAL BRIEFS

. . . *and footnotes*

Foxwoods Dealt Another Loss: The NLRB has overruled various objections filed by Foxwoods Casino to the conduct of a union election in November of 2007, in which a majority of dealers at Foxwoods voted for representation by the UAW. Adopting the decision of an administrative law judge, the Board ruled there were no grounds to set aside the election results based on the Board's failure to provide foreign language translations of election materials, alleged list-keeping by a union supporter on election day, and other allegations of impropriety. Foxwoods has announced its intention to contest this ruling, and to press in a federal appeals court its claim that any unionization effort must be conducted under tribal law.

Cash Balance Plans Upheld Again: The U. S. Court of Appeals for the Second Circuit, which includes New York and Connecticut, has ruled that cash balance retirement plans are not discriminatory based on age. Other appeals courts have reached the same

conclusion, but lower court decisions within the Second Circuit have produced varying results. The point of contention has been that while cash balance plans credit older and younger employees with the same annual contribution to their accounts, contributions for earlier years of service produce larger benefits at retirement, because they are credited with accrued interest. Congress adopted legislation validating cash balance plans in 2005, but litigation has persisted over plans adopted before that. Experts believe this decision is the last nail in the coffin for such challenges.

Can You Explain This? An arbitration award involving a lieutenant in the Department of Corrections who was demoted after an altercation with a prisoner has almost everyone baffled. Everyone, that is, except the judge who heard the employer's appeal from that award. The arbitrator denied the employee's grievance and found the demotion was for just cause, which normally would end the matter. However, he went on to say that the demotion could not be "extended in perpetuity," and ordered the employee to be re-promoted within 60 days. When the employer went to court, the judge adopted an imaginative interpretation of the award, to the effect that the arbitrator must have predicated his finding of just cause on the premise that the demotion could not be permanent. Go figure….

Insurance Waiver Payment Pitfall: Some employers pay their employees for declining health care coverage under the employer's plan. The theory is, fewer employees under the plan means lower claims. However, an arbitration panel voted 2-1 that an Enfield police officer who dropped his coverage after marrying an Enfield teacher was entitled to the payment even though he was still covered as a dependent on the same plan. The panel ruled the town and the board of education were different employers, even though they had the same taxpayer identification number.

Driving While Exhausted Merits Discharge: A school bus driver was fired after several passengers complained she was driving erratically. Earlier in the year, a parent reported that she appeared to be dozing while driving, and when confronted, she claimed she had not been sleeping well because she suffered from insomnia. On that occasion she was told to stay home if she was too tired to remain alert on the job. The unemployment compensation administrator ruled that meant her most recent driving problems constituted willful misconduct, and justified her discharge. That decision was upheld at the appellate levels, including Superior Court.

Spousal Pension Appeal Fails: The Connecticut Supreme Court has affirmed lower court decisions to the effect that the husband of a deceased employee of the City of Hartford has no standing to bring an employment discrimination claim based on the City's cut-off of his pension benefit as a surviving spouse when he remarried. The justices ruled that a claim of marital status discrimination could only be raised by someone who was or had been an employee of the defendant employer. The unsuccessful plaintiff was himself a Superior Court judge.

Church not Liable for Organist: It seems priests aren't the only church personnel involved in sexual misconduct. An organist was charged with assaulting minors who he met through church activities, and the church was sued on the theory of negligent supervision. However, a Connecticut court has ruled that an employer is not responsible for the misconduct of its employees if it occurs off the employer's premises,

outside working hours, and is unconnected with any of the employer's activities.

"Choice of Remedies" Provisions Approved: A federal appeals court has answered a question that experts have debated for years. Can union contracts require an employee to choose between the contractual grievance procedure and statutory remedies when making claims of employment discrimination? The answer is a qualified yes. Employees can't be prohibited from going to the EEOC or state CHRO, but they can be precluded from taking a claim to grievance arbitration if they are also pursuing a statutory remedy. Ironically the case involved an employee of the CHRO itself.

Save the Date: Shipman & Goodwin's annual fall seminar on employment law issues is scheduled for the morning of Friday, October 31. Announcements with details will be mailed in September.

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