Insight
EMPLOYMENT AND LABOR LAW

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Major Change For Michigan Discrimination Law

Supreme Court Rejects Continuing Violations Doctrine

"Three years means three years," the Michigan Supreme Court recently declared in *Garg v. Macomb County Community Mental Health*, as it overruled the "continuing violations" doctrine that has often been used by plaintiffs to avoid the three-year statute of limitations governing civil rights claims in Michigan. Since at least 1986 when the Supreme Court issued its opinion in *Sumner v. Goodyear Tire & Rubber Co.*, plaintiffs have been able to rely on alleged discriminatory events occurring outside the three-year period if the "untimely" events were sufficiently connected to "timely" claims.

In its 1986 *Sumner* decision, the Michigan Supreme Court followed federal Title VII precedents in adopting the so-called "continuing violations" theory. Under this theory, a plaintiff can avoid the statute of limitations time-bar if the plaintiff can demonstrate that at least one violation had taken place within the limitations period. If so, the plaintiff can present evidence concerning discriminatory events occurring outside the three-year statute by showing either "a policy of discrimination" or that the employer had engaged in "a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern."

In determining whether the continuing violations theory should apply, courts historically considered three factors: (1) whether the alleged acts involved the same type of discrimination that tended to connect them in a continuing violation; (2) the frequency of the alleged acts or whether they were more in the nature of an isolated decision; and (3) the degree of permanence of the discriminatory act and whether it should have triggered an employee's awareness of and duty to assert his or her rights earlier.

As a result of *Sumner*, countless plaintiffs over the past two decades have been allowed to present evidence of alleged acts of discrimination that had occurred five or even ten years before the filing of the lawsuit. Given the realities of the workplace, this put employers in the difficult position of defending against stale claims that were often highly incendiary. This was permitted for various "policy" reasons, including the remedial nature of civil rights statutes, the notion that lay people may not realize they must act quickly or they will lose their rights (especially when fearing reprisal from an employer), and the difficulty of determining exactly when a series of discriminatory acts accrues into a legal claim.

In *Garg*, the Michigan Supreme Court reversed *Sumner* and rejected its underlying rationale. As has been its hallmark over the past several years, the Court majority began with the actual language of the statute

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of limitations governing civil rights claims in Michigan. The Court found that the language was unambiguous and that it was compelled to follow the legislature's clearly expressed intent. The statute states that a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." Therefore, the Court concluded, a plaintiff must file a lawsuit within three years of each adverse employment act by a defendant, and that a plaintiff "shall not" bring a claim for injuries outside the limitations period. There is nothing in the statute that allows a claim outside the three-year period to be revived simply because it is "sufficiently related" to injuries occurring within the limitations period. The Court held that "to allow recovery for such claims is simply to extend the limitations period beyond that which was expressly established by the legislature."

Addressing the dissent's policy arguments that had been accepted in *Sumner*, the majority pointed out that it would be "utterly deconstructionist" to sustain the continuing violations doctrine which "bears no relationship to [the language chosen by] the legislature." The majority also noted that, because Michigan has a three-year statute of limitations governing civil rights claims (as opposed to the short 180 or 300 day period allowed under Title VII), employees do not have to "act quickly or risk losing their cause of action" under Michigan law.

The *Garg* decision can also be read to exclude "untimely" acts of discrimination even as "background" evidence for "timely" claims. The Court majority twice stated that "once evidence of acts that occurred outside the statute of limitations period is removed from consideration, there was insufficient evidence" to support Garg's claim. Though some plaintiffs' counsel will argue that untimely acts should still be allowed as background evidence, or to show a bad actor's propensity to discriminate, or to show that the employer was on notice that one of its employees was a bad actor, the dissenting opinion seemingly confirmed the majority's more far-reaching intent. Justice Cavanagh stated in dissent that the majority's holding not only abolished the continuing violations doctrine, but "goes even further and reasons that evidence of acts occurring outside the period of limitations must be excluded."

The *Garg* opinion has already had a significant impact on employment discrimination litigation in Michigan. The Michigan Court of Appeals has accepted appeals from trial court decisions allowing the continuing violations theory and has issued opinions emphasizing *Garg's* clearly stated rule for the statute of limitations — "three years means three years."

Eric J. Pelton

Minimizing Risks From Workplace Romance

Like it or not, employers, the birds and the bees are often at play in the workplace, and romantic relationships between co-workers are a fact of life. The California Supreme Court recently issued a ruling regarding workplace romance that has California employers squawking and buzzing, and that should raise awareness in other states regarding the potential perils of workplace romance.

The issue the California court considered, in *Miller v. Department of Corrections*, was whether an employee may assert a claim of sexual harassment based on supervisory favoritism towards another employee who is having a consensual affair with the supervisor. Most courts have dismissed such claims, finding that "paramour" favoritism does not constitute sexual harassment of individuals of either sex who are not favored. But the California Supreme Court thought otherwise under that state's civil rights law. It held that consensual sexual affairs may constitute sexual harassment of co-workers not involved in the affair if favoritism is sufficiently widespread to create a hostile work environment. Although not con-

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trolling in Michigan or under federal law, the case is a reminder to employers in all jurisdictions regarding the legal ramifications of workplace romance — even where it is entirely consensual.

As you might have expected, the facts in *Miller* were rather egregious — perhaps material for a Hollywood movie. The plaintiffs, former employees at a women's prison, alleged that the warden gave preferential treatment to three other female employees with whom he was having sexual affairs, and that this constituted unlawful sexual harassment. The warden's affairs were common knowledge in the workplace, and the employees involved made no attempt to keep them private. In fact, the three women frequently squabbled over the warden in the workplace. The plaintiffs alleged that they were denied promotions that were instead given to the warden's paramours, even though the plaintiffs were more qualified, and that they were retaliated against after complaining. Following the reasoning of most courts that have looked at similar issues, the trial court dismissed the claims. The California appeals court agreed.

The California Supreme Court reversed, however, concluding that a hostile work environment can be created, even if the plaintiffs are never themselves subjected to sexual advances, if the atmosphere created by the consensual affair is demeaning to women and conveys the message that the path to success is to sleep with the boss. The court opined that "when sexual favoritism in the workplace is sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as 'sexual playthings' or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or the management." The court cautioned, though, that isolated instances of favoritism by a supervisor toward a paramour would ordinarily not constitute sexual harassment.

Obviously, the extreme facts of *Mille*r are likely not to be repeated very often. But the case has received a substantial amount of publicity, and it is not unlikely that copycat claims will arise in other jurisdictions, with plaintiffs' attorneys arguing that the *Miller* holding should apply under other state or federal civil rights laws.

Miller is a good reminder of the risks employers may face when romance blossoms in the workplace, especially if it is between a supervisor and subordinate — a not uncommon scenario. To minimize risk, employers should consider whether to adopt non-fraternization policies that prohibit or otherwise regulate workplace romances. Some states (not Michigan) have laws prohibiting employers from taking action against employees for lawful off-duty conduct, which could be interpreted to restrict non-fraternization policies. In addition, it is

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important that such policies be drafted in a way that does not violate employees' rights under Section 7 of the National Labor Relations Act (NLRA). In *Guardsmark LLC*, the National Labor Relations Board recently found that an employer's policy prohibiting employees from fraternizing, dating, or becoming "overly friendly" with co-employees did not violate the NLRA. The Board found that employees would reasonably understand that the rule prohibited only "personal entanglements" and not the type of union organizing or other concerted activity protected by the NLRA. Nor was the policy promulgated in response to union activity or applied to restrict employees' right to organize. But some thought it did go too far in inhibiting Section 7 rights, or it would not have been challenged in litigation.

Often employers adopt non-fraternization policies that are less encompassing than the policy in *Guardsmark*, such as prohibiting supervisors from having romantic relationships with individuals they supervise. This type of policy would require the supervisor to notify the employer if any such relationship began to develop. At that point, several alternative scenarios could play out, including the transfer or resignation of one of the individuals. Employers should also consider whether to require the two individuals to sign an acknowledgement that the relationship is consensual, that they are aware of the company's sexual harassment policy and its reporting obligations, and that their workplace conduct will be professional at all times. Procedures like these not only minimize the risk that one of the employees involved in the affair will end up bringing a sexual harassment complaint, but also the risk that co-workers will complain. In addition, employers should make sure that the sexual harassment training they provide to managers and employees covers the topic of workplace romance.

Although workplace romances and an occasional lawsuit may be inevitable, these steps can go a long way to minimize risk.

Sonja Lengnick

New Court Decisions Refine FMLA Issues

Waivers Of FMLA Claims. Employers routinely require employees to sign a waiver or release of all claims as a condition for receiving severance pay. A three-judge panel of the U.S. Court of Appeals for the Fourth Circuit — relying on a U.S. Department of Labor (DOL) regulation that states "employees cannot waive, nor may employer employers induce employees to waive, their rights under the FMLA" — recently held that such waivers are unenforceable with respect to FMLA claims. In *Taylor v. Progress Energy,* the court held that without prior DOL or court approval, the FMLA bars both prospective and retrospective waivers of FMLA claims. This ruling of the Fourth Circuit (covering North Carolina, South Carolina, Virginia, and West Virginia) is at odds with a decision last year by the Fifth Circuit (Louisiana, Mississippi, and Texas) that the DOL regulation does not apply to retrospective waivers. Progress Energy, supported by business groups and the DOL itself as *amici curiae*, has asked the Fourth Circuit to re-examine the case *en banc*. The DOL has taken the position in its *amicus* brief that the regulation was intended to prohibit only prospective waivers. Any other result would obviously inhibit employers from offering generous severance packages in exchange for waivers.

Policy To Curb FMLA Abuses Did Not Violate FMLA. In *Callison v. City of Philadelphia*, the U.S. Court of Appeals for the Third Circuit held that the employer did not interfere with FMLA rights when it suspended an employee for four days without pay for violating the employer's sick leave policy, which required an employee to notify the employer when he or she leaves home while on sick leave. The City of Philadelphia had developed this policy in an effort to reduce employees' abuse of FMLA time off. Because Callison had a significant number of absences, the City placed him on a "sick abuse list" which required

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him to obtain medical certification for all sick days taken and subjected him to progressive discipline for violations of the policy. The policy also required that when an employee is home on sick leave, the employee must notify the appropriate authority when leaving home during regular working hours and upon return. The court held that the employer's policy did not conflict with or diminish the employee's substantive rights under the FMLA, and thus did not violate the FMLA. Something to consider?

Lack Of Proper Notice Nullifies FMLA Protection. In *Woods v. DaimlerChrysler Corp.*, the U.S. Court of Appeals for the Eight Circuit reaffirmed that employees who fail to give notice to their employers of the possible existence of a serious health condition are not afforded the protections of the FMLA. Woods violated DaimlerChrysler policy by leaving work without permission on two occasions. After the second occasion, Woods remained off work for two weeks. During his absence, he called his human resources office on two occasions indicating that he would be seeing a physician and that he would mail in a doctor's note excusing him from work for a week. He then mailed in a doctor's note that simply stated he had been advised to remain off work pending further evaluation and treatment. After DaimlerChrysler advised him to report to work or be subject to disciplinary action, Woods wrote a letter and met with his human resources representative, stating that he had left work because he was so stressed that he felt his health and well-being were at risk. But he offered no substantiation or documentation that his continued absence was due to an FMLA-protected serious health condition. Consequently, DaimlerChrysler terminated his employment. The Eighth Circuit upheld the termination, finding that if Woods had wanted FMLA leave, he had the responsibility to give notice "as soon as both possible and practical" that a serious health condition caused his absence. Since he had not done so, he was not protected by the FMLA.

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Care Of Family Member Requires Close And Continuing Proximity. The FMLA allows eligible employees to take FMLA leave to care for a spouse, child, or parent with a serous health condition. In *Tellis v. Alaska Airlines, Inc.*, the U.S. Court of Appeals for the Ninth Circuit clarified what it means to "care for" a family member with a serous health condition. Tellis told his employer that his wife was having difficulties with her pregnancy and he needed to take some time off. He took three days of vacation, during which his vehicle broke down. He flew out-of-state to pick up another vehicle, which he then drove back home. While he was gone, he regularly called his wife, who gave birth in his absence. When Tellis failed to show up for his next regularly scheduled shift after his vacation, his employer tried unsuccessfully to contact him and then terminated him for unexcused absence. Tellis argued in his subsequent FMLA suit that his trip to pick up the car constituted "care" for his spouse because it provided reassurance to his wife that she would soon have reliable transportation, and that his frequent phone calls to her provided moral support and psychological comfort. The court rejected these arguments, holding that Tellis' absence was not for an FMLA-qualifying reason. The court reasoned that "providing care to a family member under the FMLA requires some actual care" and that the employee must be in "close and continuing proximity" to the ill family member.

Shannon V. Loverich

Supreme Court Rejects "Negligent Retention" In Harassment Setting

In its recent decision in *McClements v. Ford Motor Company*, the Michigan Supreme Court refused to expand an employer's liability for common law "negligent retention" to workplace sexual harassment situations. The Court at the same time held that an employer cannot be sued by a contractor's employee under the Michigan Elliot-Larsen Civil Rights Act unless the employer actually exercises control over a term or condition of that individual's employment.

Milissa McClements worked as a cashier for AVI Food Systems in cafeterias located on the grounds of Ford's Wixom Assembly Plant. AVI hired McClements, assigned her to the Wixom Plant location, paid her wages and benefits, and had its own employment polices, including one prohibiting sexual harassment. AVI had its own labor contract governing the terms and conditions of employment for its hourly workers.

McClements sued Ford alleging that one of its superintendents had subjected her to a sexually hostile work environment when he asked her out and later grabbed her in an AVI cafeteria storeroom and kissed her. She claimed that Ford knew this superintendent had a propensity to sexually harass women and that Ford had "negligently retained" the superintendent — thereby allowing him to harass her. McClements also sued Ford (not AVI, her employer) for sexual harassment under the Elliott-Larsen Act.

Rejecting McClements' "negligent retention" claim, the Court explained it has recognized such claims only where there is a propensity to engage in conduct considered tortious under the common law (e.g., a propensity to violently assault others). Here, the superintendent's alleged propensity was sexual harassment — a "statutorily based tort," not a common law tort. Because no remedy existed for sexual harassment prior to the Elliott-Larsen Act, the Court reasoned, McClements' remedies were confined to those in the statute itself.

As for McClements' sexual harassment claim against Ford, the Court held that, while the superintendent's alleged conduct may have violated the statute, she had sued the wrong party. To sue Ford, said the Court, McClements had to show that Ford was in a position to, and did, exercise control over a term or condition of her employment with AVI. It was not enough to show that the Ford superintendent may have affected her employment with AVI, when he had no actual or apparent authority to enter AVI's storeroom area and certainly had no authority to create a sexually hostile environment for AVI employees.

The Court's two rulings put helpful boundaries around some basic legal concepts that plaintiffs' employment lawyers have been trying to expand.

Julia Turner Baumhart

Kienbaum Opperwall Hardy & Pelton served as litigation counsel for the Company, and Ms. Baumhart argued the Michigan Supreme Court appeal, in the McClements v. Ford Motor Company *case.*

Americans with Disabilities Act Update

Psychological Tests To Assess Candidacy For Promotion. In *Karraker v. Rent-A-Center, Inc.*, employees claimed that the company's use of the Minnesota Multiphasic Personality Inventory (MMPI) violated the ADA's prohibition on use of "medical examinations" as a condition of employment. They asserted that the the MMPI was being used to screen out individuals with mental impairments. The U.S. Court of Appeals for the Seventh Circuit looked to EEOC Guidelines regarding "medical examinations," noting the distinction between psychological tests designed to identify a mental disorder or impairment (prohibited "medical exams" under the

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ADA) and those that merely measure personality traits such as honesty, preferences, and habits (not prohibited). Depending on the method of scoring and level of analysis, the MMPI could be used for either purpose — i.e., to merely evaluate personality traits or to identify mental impairments. The Court determined that the company used the test in a manner that, at least in part, focused on revealing mental illness and that it had the effect of diminishing promotional prospects for those with a mental disability. Therefore, use of the test violated the ADA.

Employee "Regarded As" Disabled. In *Kelly v. Metallics West, Inc.*, the U.S. Court of Appeals for the Tenth Circuit affirmed a jury verdict for the plaintiff based on discrimination and retaliation claims under the ADA's "regarded as" language. Kelly was a customer service supervisor who developed a blood clot in her lung, which required hospitalization and several weeks off work. She returned with a doctor's note describing her need for a portable supplemental oxygen device that could be kept next to her desk. Her employer said no and encouraged her to remain off work until she could return without such assistance. Kelly complied, but when she later returned she experienced severe shortness of breath and headaches. When she presented a second doctor's note stating her need for supplemental oxygen, the employer again said no and (most unwisely) wrote in a letter that, while she had been an exceptional employee, management considered her an "unstable" employee due to her health and decided it was best to replace her. Kelly sued, and a jury found in her favor on a theory that, even if her breathing condition was temporary and could be alleviated by use of portable oxygen, her employer nonetheless "regarded" Kelly as disabled and terminated her employment as a result. On appeal, the Tenth Circuit concluded that Kelly fit the ADA's definition of a "qualified individual with disability" because she was "regarded as" disabled but could with reasonable accommodation perform the essential functions of her job. The court noted the "bizarre" result that the ADA's "regarded as" language can create greater protection than a person who actually

is disabled. But it reasoned that, even if Kelly was not actually disabled, she suffered real prejudice as a result of the employer's perception of her abilities.

Employee Not Actually Disabled. A contrasting situation was presented in *Rooney v. Koch Air, LLC*, recently decided by the U.S. Court of Appeals for the Seventh Circuit. After undergoing two back surgeries, Rooney returned to full-time work in his customer assurance manager position, but refused to perform job-site visits. One of his job duties was to give technical assistance to dealers of the company's heating and air conditioning products. Rooney claimed he could not bend or climb ladders as required during job-site visits. Rooney was eventually offered a lower position that would not require job-site visits, but he rejected the offer and resigned. He sued, claiming he had an ADA-protected disability and that he had been constructively discharged. The Seventh Circuit disagreed, finding that Rooney's claimed inability to perform one task (job-site visits) did not constitute a substantial limitation on the major life activity of working. The court also concluded that, because the job-site visits were an essential function of the position, he was not meeting his employer's legitimate expectations, and consequently did not make out a *prima facie* case of ADA discrimination.

Jay C. Boger

Sixth Circuit Winnows Arbitration Issues

A recently published decision of the U.S. Court of Appeals for the Sixth Circuit (which includes Michigan), *Scovill v. WSYX/ABC*, continues the ongoing process of addressing procedural questions affecting the enforceability of arbitration agreements. *Scovill* focused on two such questions: first, the severability of illegal provisions in an arbitration agreement; second, the division of responsibility between courts and arbitrators for deciding whether agreements that are alleged to contain illegal provisions may nonetheless proceed to arbitration.

Scovill was a news anchor/reporter whose employment contract with WSYX contained a binding arbitration provision. Scovill resisted the station's effort to compel arbitration of his age discrimination claim, asserting that several illegal provisions rendered the agreement unenforceable. The trial court held that three provisions could not be enforced: (1) a cost-shifting provision that required the unsuccessful litigant to bear the entire cost of the arbitration; (2) a remedies provision that limited the remedies available to a prevailing employee; and (3) an evidentiary provision that stated in essence that, if the arbitrator was satisfied that the employee did engage in the complained-of misconduct, the arbitrator must uphold the action taken by the employer as a result. The trial court then "severed" these provisions, enforced the remainder of the arbitration agreement, and dismissed the court proceeding.

Scovill's employment agreement contained two severability clauses which stated that any part of the agreement (or the arbitration provision) could be declared to be invalid or unenforceable without affecting the enforceability of the remaining parts of the agreement (or arbitration clause). The Sixth Circuit affirmed the trial court's ruling severing the challenged provisions as consistent with both the parties' intent and prior Sixth Circuit caselaw — in particular *Morrison v. Circuit City Stores, Inc.*

The Sixth Circuit also rejected Scovill's contention that the trial court should have held the agreement unconscionable and thus unenforceable as a whole. Noting that in assessing unconscionability courts consider, among other factors, the parties' "age, education, intelligence, business acumen and experience, relative bargaining power [and] who drafted the contract," the Sixth Circuit concluded that Scovill was a college-educated, experienced professional who had previously signed an employment contract for a different job that included a similar arbitration provision, who acknowledged reading the agreement, and who asked questions about the agreement.

In a cross-appeal, WSYX raised an issue new to the Sixth Circuit, arguing that severing the challenged provisions was inconsistent with the U.S. Supreme Court's 2003 decision in *PacifiCare Health-Systems, Inc. v. Book*. In *PacifiCare*, the Supreme Court declined to decide prior to arbitration whether a provision limiting a party's rights to less than the full range of remedies under RICO was enforceable, because it was unclear how the arbitrator would construe an ambiguous provision. The Court gave that interpretative decision to the arbitrator in the first instance, and left open the possibility that, if the arbitrator interpreted the agreement in a way that violated a party's rights, the resulting award could be vacated.

WSYX argued that under *PacifiCare* the decision regarding the enforceability of the cost-shifting provision and the evidentiary standard should have been given to the arbitrator in the first instance. The Sixth Circuit held that the cost-shifting provision required no interpretation and that the *PacifiCare* approach consequently did not apply. The court felt, however, that the evidentiary standard could be read two ways, one permissible and one not. Accordingly, *PacifiCare* applied and the trial court should "have left interpretation of this provision to the arbitrator subject to review after arbitration."

Noel D. Massie

Wage and Hour Developments

"Hours Worked" When A Shift Straddles Two Workweeks. In a recent opinion letter, the U.S. Department of Labor (DOL) explained how "hours worked" may be calculated where a single shift encompasses two work weeks. For example, in the specific case before the DOL, employees worked four ten-hour shifts in a Saturday-to-Saturday work week. The last shift of the week began at 10:00 p.m. on Saturday and ended at 8:00 a.m. on Sunday. If only hours worked during the official work week were counted, employees would have worked less than 40. According to the DOL, as long as the employer's arrangement is not a scheme to avoid paying overtime owed under the Fair Labor Standards Act (FLSA), an employer may attribute all hours worked in a single shift to the work week in which the shift began, even if the shift extends into the subsequent work week. This technical clarification should help manufacturing and other industrial employers who routinely have shifts straddling two work weeks.

When Do Meal Periods Become "Working Time"? The DOL recently addressed, in another opinion letter, the parameters for when meal periods must be paid work time under the FLSA. Generally, under the so-called "employee freedom" test used by the DOL and some courts, a meal or break period may be unpaid if (1) the employee is "completely relieved of all duties"; (2) the employee may leave his or her "duty post"; and the period is at least 30 minutes long (a shorter period may suffice in limited circumstances where, for example, the employer and employee negotiate a specific time in exchange for leaving early).

As you might expect, application of this test to specific situations has led to varying outcomes. Emergency workers and public safety employees, for instance, who must remain ready for a call during meal or break periods are often considered working and are accordingly paid. The DOL recently concluded that a lunch break could be unpaid even though, for security reasons, the employer required employees to remain in a particular lunch room, prohibited a change of clothes, and did not even allow employees to make telephone calls. Despite those restrictions, the DOL said, the employees were completely relieved of their duties and were given an uninterrupted meal period, thus satisfying the test. A key question is always whether the break is used for the "predominant benefit" of the employer or employee. Of course, these rules are only for non-exempt hourly employees, since reductions in salary for meal periods would be inconsistent with the "white collar" overtime pay exemptions.

Reimbursement Of Training Wages Could Violate FLSA's "Free And Clear" Provision. In a May 31, 2005 opinion letter, the DOL confirmed that requiring a departing employee to reimburse the company for wages paid during an initial training period would violate the "free and clear" provisions of the FLSA if, in doing so, actual wages paid fell below the required minimum wage or overtime levels. Any requirement that an employee directly or indirectly "kick back" all or part of

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a wage payment is inconsistent with the FLSA rule that minimum wages and overtime must be paid finally and unconditionally. Consequently, a private agreement or employment policy that has the effect of requiring employees to sign away baseline wage protections under the FLSA is not enforceable.

Non-Supervisory "Management Activities" For Exempt Executives. Turning to the overtime exemptions, in an August 2, 2005 opinion letter the DOL clarified that activities such as "planning and controlling the budget" and "monitoring or implementing legal compliance measures" were examples of management activities supporting the "executive" overtime pay exemption. Although budgeting and legal compliance responsibilities were added to the regulations in August 2004, this merely clarified earlier positions taken by several courts in defining executive employees. The DOL also reiterated that "management activities are not limited to the supervisory activities" and the spectrum of exempt management duties will extend beyond traditional supervisory duties.

Managers Concurrently Performing Exempt And Non-Exempt Duties. Time spent by an otherwise exempt employee performing non-exempt work will not guarantee overtime pay if the employee's "primary" duty (i.e., "principal, main, major or most important duty") consists of management activities, even if less than 50% of the employee's time is spent on such duties. This interpretation has proved especially helpful to retail and service establishments where on-site managers routinely perform non-exempt work (e.g., running a cash register or filling orders) in addition to their management responsibilities. Despite the perceived leniency in the revised FLSA regulations on this point, determining a manager's primary duty requires planning and documentation to preserve the exemption, particularly if the manager will perform non-exempt work on a regular basis.

OFCCP Defines Internet Job Applicants, Provides Advance Notice Of Audits

The Office of Federal Contract Compliance Programs (OFCCP) recently published final rules concerning the definition of "Internet job applicants" for whom contractors must attempt to collect gender, race, and ethnicity information. Individuals who meet all of the following criteria will be considered "Internet applicants": (1) the individual submits an expression of interest in employment via the Internet or related technologies such as email; (2) the employer-contractor considers the individual for a specific position; (3) the individual possesses the basic qualifications for the position; and (4) the individual does not remove himself or herself from the selection process or disclaim interest in the job.

Employer-contractors should retain appropriate records on such individuals. To limit retention burdens, an employer-contractor may establish a process specifying that it will not consider expressions of interest unless they conform with its standard procedures (e.g., rejecting unsolicited resumes or submissions that do not identify the position sought).

The final rules were published in the October 7, 2005 Federal Register, and will become effective 120 days after publication.

The OFCCP also announced it is sending out "advance notice" letters of audit for the second year in a row. Approximately 225 such letters are being sent to corporate headquarters notifying that some of their establishments may be scheduled for compliance reviews in fiscal year 2006. Scheduling letters will then be sent to individual establishments.

Julia Turner Baumhart

Wage and Hour Developments *from page 10*

Tracking Hours Worked By Exempt Employees. On April 11, 2005, the DOL confirmed that requiring exempt employees to submit time sheets tracking hours worked in various activities did not contradict the "salary basis" test for the white-collar overtime exemptions. Explaining that employers often use time sheets to track hours spent by exempt employees for purposes of preparing budgets and administering paid time off or other benefits, the DOL reasoned that as long as these employees are paid on a salary basis within the meaning of the FLSA (i.e., payment of a predetermined salary

These recent developments illustrate the intensely fact-specific analysis required by the FLSA and the DOL regulations when determining whether an exemption applies or has possibly been compromised by an employer's pay policy or practices.

regardless of the quality or quantity of work), mandatory time sheets do not convert exempt workers into non-exempt workers. Nevertheless, if the employer tracked exempt employee hours in order to correlate pay with hours actually worked, the salary basis test would not be satisfied and the exemption would be jeopardized.

These recent developments illustrate the intensely fact-specific analysis required by the FLSA and the DOL regulations when determining whether an exemption applies or has possibly been compromised by an employer's pay policy or practices.

Margaret Carroll Alli

WARN Act Still Generating Lawsuits

It has been more than 15 years since Congress enacted the Worker Adjustment and Retraining Notification (WARN) Act and the U.S. Department of Labor issued its interpretive regulations — which left many issues for litigation and judicial construction. The more obvious and recurring questions have now been resolved, though the statute still creates nettlesome planning and timing issues for businesses that are downsizing or closing operations. And from time to time the courts are called upon to address WARN issues raised by a union or employee group.

One theory that was popular for a time, but now appears defunct, is that the sale of a business as a going concern, which understandably results in the "termination" of the seller's workforce as employees of that entity, requires 60 days' advance notice under WARN. The U.S. Court of Appeals for the Eighth Circuit recently ruled in *Smullin v. Mity Enters, Inc.* that WARN's definitions were not implicated by the sale of a business where the buyer retained two-thirds of the plant's employees, effectuated the sale over a weekend, and continued the same business in essentially the same form thereafter.

A second WARN theory that has found greater acceptability concerns the potential WARN liability of lenders or affiliates that become involved in the operation of a failing business. In *Smith v. Ajax Magnathermic Corp.*, the Sixth Circuit recently allowed a WARN claim to go forward against a consortium of lenders that were alleged to have appointed a new management group and to have become sufficiently entangled with the actual owner of the business that it had undertaken responsibility for its overall management. While the courts have recognized that a lender or affiliate is not liable under WARN if it is merely protecting its financial interest or preserving assets, the Sixth Circuit concluded that there were sufficient factual issues regarding the roles in *Ajax Magnathermic* to allow the litigation to go forward.

Theodore R. Opperwall

Lori L. Rogala and Robert Q. Romanelli Join the Firm

Having specialized in this field during her legal practice, Lori Rogala has substantial experience representing clients in employment litigation and labor matters, in the federal and state courts as well as before federal and state agencies. Prior to joining Kienbaum Opperwall Hardy & Pelton, Ms. Rogala was an associate in the labor and employment practice group at Dykema Gossett PLLC in Detroit, Michigan. In 2000, she graduated cum laude from the Case Western Reserve University School of Law, where she was the Notes Editor of the Journal of International Law. She received her undergraduate degree in business administration from Miami University of Ohio in 1997.

Before joining Kienbaum Opperwall Hardy & Pelton, Rob Romanelli was an associate in the litigation practice group at Cox Hodgman & Giarmarco PC in Troy, Michigan, where he represented clients in a variety of employment and commercial litigation contexts, including contract claims, employment discrimination and wrongful discharge lawsuits, and trade secret, non-competition, and non-solicitation litigation. In 1999, he graduated from the DePaul University College of Law, where he was the Lead Articles Editor of the DePaul Journal of Art & Entertainment Law. He received undergraduate and graduate degrees in communication and journalism from Michigan State University in 1993 and 1995.

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