WILLCOX SAVAGE

Employment Law Outlook

Fall 2017

Federal Judge Holds 2016 Overtime Regulations To Be Invalid

William M. Furr

On August 31, 2017, U.S. District Judge Amos L. Mazzant, III, granted summary judgment to the business consortium that had challenged the Department of Labor's wage and hour regulations that would have doubled the minimum salary requirement for certain white-collar exemptions under the Fair Labor Standards Act.

In 2016, the United States Department of Labor issued regulations that would have increased the salary threshold for the FLSA's white-collar exemptions from $23,660 per year to $47,476 per year. These new regulations were scheduled to take effect on December 1, 2016. Shortly before the effective date of the regulations, Judge Mazzant issued an injunction temporarily blocking their implementation.

On August 31, 2017, Judge Mazzant issued his summary judgment ruling finding the overtime regulations to be invalid as a matter of law. Judge Mazzant held that the proposed salary level was excessive and concluded that the significant increase would render the duties test for determining exempt status essentially meaningless. Although Judge Mazzant acknowledged that the Department of Labor has the authority to set a minimum salary level for exempt employees, he found the DOL's proposed $47,476 threshold to be excessive. He concluded that the determination of whether an employee is exempt should focus primarily on the actual duties of the position rather than the salary threshold.

Most commentators agree that an increase in the minimum salary level for exempt employees under the FLSA is inevitable. U.S. Secretary of Labor Alexander Acosta has stated publicly that he believes the minimum salary level should be in the $30,000 to $35,000 range. Employers should expect an increase in the salary level to occur within the next two years.■

JOIN OUR SEMINAR!

Tending to Your Retirement Plans

Tuesday, November 14, 2017
8:00 a.m. - 10:15 a.m.
(7:30 a.m. Continental Breakfast)

WILLCOX SAVAGE
440 Monticello Avenue
Suite 2200
Norfolk, Virginia 23510

Agenda

Plan Design/Legal Issues
Cher Wynkoop, Willcox Savage

Plan Audit Issues
Jeff Snader, CWS CPA

Tomorrow's Retirement Plan
Nichole Labott, SageView

Participant Engagement
Carter Bailey, Transamerica

Register

www.willcoxsavage.com

Complimentary Seminar - Seating is Limited

Approved for 2 Hours HRCI and SHRM Credit

Compliance With COBRA Notification

Cher E. Wynkoop **Corina V. San-Marina**

An employer, in its role as a health plan administrator of a group health plan, is the party responsible for any COBRA triggered notifications. While typically, the employer contracts with a third-party administrator (TPA) to provide COBRA notices, the TPA rarely agrees to serve as the plan administrator, so the employer remains liable for any notice failure.

As illustrated by two recent court decisions, *DeBene v. Baycare Health Sys., Inc.*, 2017 WL 2350208 (11th Cir. 2017) and *Perkins v. Rock-Tenn Servs., Inc.*, 2017 WL 2829100 (6th Cir. 2017), if an employer delegates COBRA notification responsibilities to a TPA, it must ensure that the TPA has appropriate procedures in place to consistently deliver required notices. In both cases, a former employee alleged that the employer failed to provide a timely COBRA election notice.

In *DeBene*, the employer produced evidence that the employee was coded in the employer's records as "COBRA-eligible" and that the information was transferred to the TPA. The employer was able to provide evidence of the TPA's mailing procedures, a copy of the employee's notice, and a report from the TPA showing the date on which the notice was mailed. In addition, the employer was able to show that COBRA notices mailed on the same day were received by the other recipients who successfully elected coverage. The employer argued its actions were sufficient to prove compliance with COBRA even if the employee did not actually receive the notice.

In *Perkins*, the TPA's delivery manager provided an affidavit that explained its COBRA recordkeeping procedure. The manager explained that the TPA did not retain hard copies of the COBRA notices but did retain computer records and that, while he had not personally sent the notice to the employee, the TPA's computer system showed that a notice had been timely mailed. The court accepted the manager's affidavit as written testimony and the accompanying screen shots of computer records as business records sufficient to prove the COBRA notice had been timely provided.

In both cases, the employer was able to prove that an election notice was timely sent. Proof of receipt is not required, but the employer, as the plan administrator, must be able to prove that the notice was sent by means reasonably calculated to reach the recipient. While the best proof may be a certificate of mailing or a certified mail receipt, many large employers rely on comprehensive business records, as evidenced in the cases above.

Whether an employer as the plan administrator handles its own COBRA notice obligations or hires a TPA to provide the notification, it is crucial to maintain records sufficient to prove that timely, adequate notice has been provided to each qualified beneficiary.

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A qualified beneficiary is a covered employee, spouse or dependent of a covered employee. If all the qualified beneficiaries reside at the same address, the plan administrator may either include (1) separate election notices for each qualified beneficiary in a single mailing that is addressed to both the employee and spouse, or (2) send a single notice that clearly identifies all qualified beneficiaries covered by the notice, and explains each person's separate and independent right to elect COBRA continuation coverage.

Another important COBRA notice is the initial notice that must be sent to the employee and the employee's spouse, if enrolled in the group health plan, within 90 days after plan coverage begins. Failure to provide the initial COBRA notice will prevent a plan administrator from enforcing COBRA notification deadlines required by a qualified beneficiary (e.g., notice of divorce or legal separation) and will subject a plan administrator to statutory penalties.

An employer that hires a TPA should verify that the TPA will maintain adequate documentation of what was mailed and when, and should include in the TPA service agreement an indemnification provision from the TPA for failure to properly provide notices or follow internal procedures.■

A Brewing Pot: Asking Applicants About Past Wage/Salary History

Phillip H. Hucles

For myriad legitimate purposes employers routinely ask job applicants about their past salary or wage histories. Some employers ask to determine whether the applicants are legitimate contenders based upon their expectations. Some employers ask to determine the market or industry standard and whether they are under or over-paying for the position. Many reasons exist for employers to ask about past wage or salary histories. However, an emerging trend in the law shows how dangerous this may be for employers in the future.

A growing trend among states, cities, and municipalities throughout the country has sought to prohibit employers from asking individuals about their past wage or salary histories. What may seem a benign question to some represents to others a question fraught with inherent bias.

Those locations that prohibit employers from asking about past wage or salary histories believe that such wages or salaries inherently reflect and continue the cycle of pay inequalities seen in today's workplace. Many articles have studied the gender pay gap between men and women, for example. Asking about such wage or salary history would perpetuate those inequalities to the next position.

In these jurisdictions, although employers are prohibited from requiring applicants to share their past earning histories, applicants are free to volunteer this information to employers. Additionally, the laws either expressly or implicitly allow employers to ask applicants about their desired salary or wage range for the position.

At the time of drafting this article, Massachusetts, Delaware, Oregon, New York City, San Francisco, and Philadelphia (currently under litigation) all have enacted ordinances or laws prohibiting employers from inquiring about past wage or salary histories. Additionally, the following states have introduced legislation to prohibit such inquiries and they are currently before state committees or otherwise working their way through the legislative process: California, Connecticut, Georgia, Iowa, Illinois, Maryland, Maine, Mississippi, Montana, North Carolina, New Jersey, New York, Pennsylvania, Rhode Island, Texas, Virginia, Vermont, and Washington.

Although legislators in some of these states have expressed a disinterest in passing such legislation, the growing trend cannot be ignored. The sheer number of states taking steps to enact the legislation indicates that the question is merely "when" and not "if" such practices become illegal.

What employers also must monitor is how each state or city treats violations of the law. If the currently enacted regulations are any indication, localities treat violations of these laws severely. For example, violation of the New York City law could result in a penalty as high as $250,000 towards an employer. In Philadelphia, while the penalty is lower at $2,000, violators could potentially face jail time for habitual violations.

Employers should prepare for the inevitable and begin removing questions from standard applications, and from any prepared interview questions, about salary or wage history. Not only must employers amend their standard forms, they should also provide appropriate training to their managers to ensure they understand the severity of non-compliance.

What is unclear from current laws is whether employers can have purely "optional" questions on their standard applications that ask applicants about their past salary or wage history. In theory, if the question is truly optional – that is to say, applicants do not suffer any positive or negative repercussions from answering or not answering the question – it should not violate the spirit or letter of the law. But such a stance would skirt the line in a manner not recommended and invite litigation and potential liability.■

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