NEWSLETTERS

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RELIEF FOR CORPORATE OFFICERS IN CALIFORNIA WAGE CLAIM CASES

Your Company failed to pay an employee overtime wages as required by California law. The employee sues the Company and you, a corporate officer, individually under California law. Are you individually liable for your Company's failure to pay overtime wages?

A new California Court of Appeals decision stated that the answer is: **NO**.

In what has become a common tactic in wage and hour litigation, corporate officers have been sued in their personal capacity for a corporate employer's failure to pay overtime wages or to otherwise comply with the California Labor Code's wage provisions. The recent case of Reynolds v. Bement, 107 Cal. App. 4th 738 (2003), rejected this all too common strategy.

The Reynolds court decided that a corporation's officers, agents and/or directors are not personally liable for violations of the wage and hour provisions of the Labor Code. Nor can such individuals face liability for violations of the Labor Code under the unfair competition statute, Business and Professions Code §17200. The Court reasoned that, unlike the federal law (Fair Labor Standards Act), California wage and hour laws do not expressly provide for individual liability for the corporation's failure to comply with the wage and hour laws. Although individuals will not be liable for the wages found to be due, individuals acting on behalf of an employer or officers and agents of the employer still may be liable under the Labor Code for misdemeanor penalties and civil fines.

The Reynolds decision provides welcome relief to corporate officers, directors and agents, in California wage and hour litigation.

MAKE UP TIME - BEWARE

Consider the following hypothetical: Employee is a clerical worker who supports the engineering group. Her supervisor is the engineering manager. On Monday, the employee informs her supervisor that she will need to miss four hours of her normal workday on every Thursday for the next four weeks due to personal reasons. The supervisor is concerned about the heavy workload given the product production deadline in a couple of months. He tells the employee that she can, of course, miss the time, but suggests that she make up the time on other days by working more than her scheduled eight hours per day. He tells the employee that Human Resources has some forms to complete so that she can do this without triggering overtime pay. The employee goes to Human Resources and fills out the forms to work an extra three hours on Wednesday and one hour on Friday for the next four weeks, and signs them. Six weeks later when she is laid off, she sues for overtime.

This employee may win her claim. The California Wage Orders allow for "make up work time" that would be lost as a result of a personal obligation of the employee. Make up work time must be performed in the same work week in which the work time was lost and may not lead to an employee working in excess of 11 hours in any workday. According to the Wage Orders, however, "while an employer may inform an employee of this make up time option, the employer is prohibited from encouraging or otherwise soliciting an employee to request the employer's approval to take personal time off and make up the work hours within the same work week...". Thus, although an employer may publicize its make up work time policy, it cannot encourage or solicit employees in individual cases to make use of its policy.

CASH PAYMENT IN LIEU OF HEALTH INSURANCE?

Employees frequently ask employers to pay them a cash benefit if they do not enroll in insured benefits, such as health insurance. The reason for the employee's request may be that s/he is covered on a spouse's insurance or it may be that s/he is simply looking to maximize cash compensation. Whatever the reason, acceding to the request to pay cash in lieu of insurance may have unintended legal consequences.

This issue arose in an arbitration case which was recently reported. (In re Modernfold, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW, Local 2119.) In that case, a union employee opted out of group health insurance and demanded that he be paid the $500.00 per month which was allocated to health insurance under the collective bargaining agreement. The employee argued that the employer's contribution was a negotiated part of an entire monetary package, and that he was entitled to the full value of the package if he did not take the insurance. The employer successfully opposed the demand because doing so would result in adverse tax consequences to all members of the plan.

Letting employees choose between insurance and cash makes all insurance contributions taxable, unless you have established a Section 125 cafeteria plan. Under the Internal Revenue Code, if a plan offering employees a choice between cash payment and a non-taxable employment benefit, such as health insurance premiums, does not meet the requirements for a Section 125 cafeteria plan, then employees who choose the benefit will be credited with taxable income equal to the amount of the cash alternative. (Internal Revenue Code §125; Prop. Treas. Reg. §1.125-1, Q&A-9.) The Internal Revenue Service has stated in Private Letter Ruling 9406002:

> *"To the extent that the employee could have otherwise received an amount that is paid to the insurance company, it is includible in the employee's gross income at the time it is paid*

> *over to the insurance company... The difference between the compensation paid to an employee who elects health insurance coverage and the greater amount that would have been paid to that employee if he or she had not elected health insurance coverage is includible in the employee's gross income and constitutes wages for employment tax purposes."*

Private Letter Ruling 9406002 went on to note that when the insurance premium is deemed to be taxable income, that amount is subject to income tax withholding and other *payroll taxes*, such as FICA and FUTA.

The same result is reached even if the cash benefit is only an occasional exception made by a generous and well-meaning employer and if the cash payment given the employee in lieu of insurance does not equate exactly to the amount of the insurance premium.

Providing insurance benefits to employees generally affords important tax advantages both to the employer and to the employee. Do not jeopardize those tax advantages by making exceptions and allowing cash payments to employees who don't want or need the insurance without establishing a Section 125 plan or consulting with legal counsel.

COMPUTER PROFESSIONALS OVERTIME EXCEPTION - REVISITED

It is dangerous to assume that all Information Technology employees are exempt from overtime. There is a special rule for exempt computer professionals. An employee in the computer software field is exempt from the daily overtime pay provisions of Labor Code § 510, if all of the following apply:

> (1) The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment, and the employee is primarily engaged in duties that consist of one or more of the following:
>
> > (i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.
> >
> > (ii) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to, user or system design specifications.
> >
> > (iii) The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.
>
> (2) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. A job title is not determinative of the applicability of this exemption.
>
> (3) The employee's hourly rate of pay is not less than forty-three dollars and fifty-eight cents ($43.58). (The Division of Labor Statistics and Research will adjust this pay rate on October 1 of each year to be effective on January 1 of the following year by an amount equal to the percentage increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.)

The exemption does not apply to an employee if any of the following

apply:

(1) The employee is a trainee or employee in an entry level position who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

(2) The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.

(3) The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

(4) The employee is an engineer, drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation.

(5) The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation instructions, and other similar written information, either for print or for on screen media or who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs.

(6) The employee is engaged in any of these activities for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.

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