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## WORKPLACE CHRONICLE

June  
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### **REFRESHER COURSE:** **WHEN DEDUCTIONS ARE PERMITTED FROM EMPLOYEES' PAY**

With the new regulations being released by the Department of Labor (DOL), employers can expect scrutiny of their wage practices. This article reminds employers that deductions from pay are not permitted in many circumstances and sets forth the circumstances when employers are, and are not, permitted to make deductions.

#### Inside this issue:

Refresher Course: When Deductions Are Permitted from Employees' Pay	... 1
Recent Victories for Our Clients	... 1
Things We Learned En Route to Looking Up Other Things	... 2
Department of Labor Keeping Busy: Now—New COBRA Regulations	... 3
Labor Notes	3-4
Mark Your Calendar	... 4

The rules for exempt (typically salaried) and non-exempt (typically hourly) employees are different. For nonexempt hourly employees, the general rule is that employers are only required to pay employees for time actually worked. Thus, when an employee is absent, the FLSA does not require an employer to pay the employee for that time. Conversely, the employee must be paid for time worked. Docking employees a half-hour pay for a tardiness violation of 5 minutes would be an example of a common violation. Worse, some employers “dock” paychecks as a penalty for other rule infractions. It is okay, however, to pay the employee only for the time they actually work. So, if the employee shows up 15 minutes late, it is permissible to only pay the employee for 7.75 hours. Employers can round up and round down to the nearest 5, 6 or 15 minutes, provided they do not always round off in the employer's favor.

There is one caveat that applies to both exempt and nonexempt employees for Michigan employers. Under Michigan's Payment of Wage and Fringe Benefits Act, an employer is required to follow its written policies with regard to payment of fringe benefits. So, to the extent that an employer has written policies that are beyond the requirements of the law, it is required to follow those policies.

The rules for exempt employees are much more stringent. Generally, to sustain exempt status, exempt (e.g. executive, administrative and professional) employees must be paid on a salary (or fee) basis. If an employer makes improper deductions from employees' salaries, they lose the right to claim the employees are exempt from overtime.

Recently, the Department of Labor posted on its website an outline to the new regulations and what it terms the “Fair Pay Overtime Rules”. In the outline, the DOL succinctly lists seven instances when the pay of salaried employees may be docked:

- Absence from work for one or more full days for personal reasons, other than sickness or disability. So, for example, it would be permissible to adjust an employee's pay in full day increments for the time an employee is away from work to go on a shopping trip to New York City.



#### Recent Victories for Our Clients

PCT obtained the dismissal of overtime claims made by 25 route salespeople who delivered, merchandised and sold product in interstate commerce under the motor carrier act exemption to overtime set forth in the Fair Labor Standards Act. PCT submitted its Motion For Dismissal and, on the strength of its written arguments, was able to convince counsel for the Plaintiffs that opposing the Motion would be futile. Accordingly, rather than submit their own papers to the court and make oral argument, Plaintiffs agreed to an order dismissing their overtime claims. ❖

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**FORMS AVAILABLE ON THE  
PC&T WEBSITE:**

- Benefits and Detriments of Arbitration of Statutory Claims vs. Traditional Litigation
- Consent and Authorization to Release Employment Information
- Employment Application
- Fair Credit Reporting Act Forms
- Garnishee Disclosure Form
- HIPAA Authorization for Disclosure / Use of Personal Health Information
- I-9 Forms
- Relief of Charge
- Sample CCW Memo
- Sample Certification for Users of Consumer Report
- Severance Agreement and Release of Claims
- Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
- WH 380/381 Forms (under FMLA guidelines)
- Workplace Violence—Risk Factor Checklist

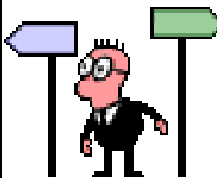
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**Refresher Course: When Deductions Are Permitted ...**

- Absence from work for one or more full days due to sickness or disability if deductions are made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences. So, for example, an employer could make adjustments to employees' pay in full day increments for time that they are sick so long as the employer had a policy providing for paid sick time and the employee had used up all of the time under the policy.
- To offset any amounts received as payment for jury fees, witness fees, or military pay. Thus, while it is not permissible to dock a salaried employee for two days he/she is gone on jury duty, it is okay to offset amounts that the employee is paid as jury duty pay by the courts.
- Penalties imposed in good faith for violating safety rules of "major significance."
- Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules. This is the new exception allowed by the DOL, and requires a written policy be in place and applicable to all employees. Remember, the DOL has warned that this will not apply, for example, to attendance or tardiness violations.
- Proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment. So, if an employee starts on Friday, the employer is only obligated to pay the employee a proportionate share for that week, not the whole workweek.
- Unpaid medical leave taken pursuant to the Family Medical Leave Act (FMLA). This is a rare exception where deductions from salaried employees' pay is not limited to full-day increments. Thus, if an employee needs a full day or a partial day of leave under the FMLA, the employer may make deductions to the employees' salary.

If you are interested in accessing the Department of Labor's presentation outline, you can access this yourself at the following link: <http://www.dol.gov/esa/regs/compliance/whd/fairpay/presentation.ppt>. ❖

**Things We Learned En Route to Looking Up Other Things**



If you hire an employee on a temporary basis to fill in for another employee who is out on medical leave, the temporary employee will qualify for unemployment compensation, presuming that s/he has sufficient credit weeks of service in the preceding benefit year. The earnings qualifier in this instance is quite low: a) Earnings in two different quarters; b) Earnings in one quarter exceeding \$1998.00

A number of employers use word filters to screen out and block pornographic sites. We are aware of one law firm that had to change filters, because it blocked access to some of the racier sexual harassment decisions handed down by the Courts. However, the latest trend requires attention. Some employees have determined that foreign sites do not contain the words, and thus are surfing Bulgarian and Brazilian porno sites. To counter this, consider using software that identifies soft-edged photographic images or have your IT department watch for frequent visits to foreign sites. ❖



## DEPARTMENT OF LABOR KEEPING BUSY: NOW – NEW COBRA REGULATIONS

As detailed in last month's "Workplace Chronicle", the Department of Labor (DOL) issued its final updated regulations pertaining to the Fair Labor Standards Act. Now, on May 26, 2004, the DOL issued its final rule pertaining to the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). While the regulation has an effective date of July 26, 2004, compliance with it is required on the first day of the first plan year after November 26, 2004. So, for example, for plans operating on calendar year bases, they must be in compliance with the new rule by January 1, 2005.



Pursuant to COBRA, employers that offer group health plans to their employees are required to offer continued coverage to employees and dependents in certain circumstances--statutorily defined "qualifying events"--where they would otherwise lose coverage. These continuation rights are at the group rates for a limited period of time. Employers that have employed 20 or more employees in the prior plan year are obligated to honor COBRA. The new final rules set minimum standards for timing and content of notices required, and for administering the notice process. Employers that have employed 20 or more employees in the prior plan year are obligated to honor COBRA. In summary, the effect of the new regulations is as follows:

- **General COBRA Notice.** A general notice must be provided to covered employees and their spouses within 90 days after becoming covered. The DOL has articulated guidelines for issuance, and posted on its website a model general notice. See: <http://www.dol.gov/ebsa/modelgeneralnotice.doc>.
- **Notices by employees/beneficiaries.** The new regulations set standards for employees and beneficiaries to give notice to the plan when certain situations occur (*e.g.*, divorce, a 2<sup>nd</sup> qualifying event, a child ceasing to be a dependent, etc.).
- **COBRA election notice.** The DOL has set detailed guidelines for what must be included in this notice, and provided a model. See: <http://www.dol.gov/ebsa/modelectionnotice.doc>.
- **Two new notices.** The regulations also add 2 new notice requirements. Upon receiving information from an individual that a qualifying event has occurred, the plan must notify the person within 14 days if it determines the individual is not entitled to COBRA coverage. In addition, when coverage is terminated before the end of a continuation period (*e.g.*, for nonpayment), each qualified beneficiary must be notified that coverage will end, the reason, date of termination, and other rights.



With the deadline for compliance around the corner, plan administrators (oftentimes employers themselves) must review and revise, as appropriate, their initial COBRA notices, their COBRA election notices, prepare the new notices, and ensure that their plan documents/summary plan descriptions, and administrative procedures, are in check with the new rule. Many employers have other entities administer their COBRA obligations. Even in these cases, employers should review their service contracts with such administrators and update them, as appropriate (*e.g.*, to specifically set forth who is responsible for notice obligations, liable in event of failure to meet notice obligations, etc.). ❖

## **LABOR NOTES**

### **MICHIGAN SUPREME COURT FULLY OPENS THE CIVIL RIGHTS ACT TO CAUCASIANS**

"Reverse discrimination" suits have been recognized under state and federal law for quite some time. However, under Michigan's Civil Rights Act ("CRA"), white employees and male employees were required to meet a higher burden of proof. Specifically, in addition to all of the other elements that minority status employees were required to prove, caucasians and males were also required to introduce "background circumstances supporting the suspicion that the defendant was the unusual employer who discriminates against" those in the majority. Allen v Comprehensive Health, 222 Mich App 426 (1997)

On June 11, 2004, the Michigan Supreme Court overruled Allen, holding that because the CRA prohibits discrimination on the basis of race, the increased burden for majority status employees is inconsistent with the CRA. Lind v City of Battle Creek. The implications of Lind loom large. Previously, white males under 40 were a demographic group that offered less prospect of litigation. Now, terminating them or selecting or promoting minority status candidates over whites and males must be as well thought out as when considering action adverse to one with "protected" status. ❖

## LABOR NOTES

*Rymal v Baergen* \_\_\_ Mich App \_\_\_ (June 8, 2004) - The Michigan Court of Appeals has ruled that individual liability for *retaliation* under the Civil Rights Act (CRA) is alive and well.

In *Jager v Nationwide Truck Brokers, Inc.*, 252 Mich App 464; 652 NW2d 503 (2002), the court ruled that liability for *discrimination* by employers applies to “employers and their agents.” The wording dictated that there was no individual liability for a nonemployer, including a supervisor or agent. *Jager*, followed the federal trend in this regard.

However, under the CRA, a “person” is prohibited from retaliating or discriminating against another person who had opposed or reported a violation of the CRA. *Rymal* holds that by using “persons” the CRA deems that individuals, including supervisors, can be personally liable for retaliation.

The 2-1 decision continues the battle by panels within the court tackling the issue of the individual liability. There is little doubt this issue remains unresolved. Stay tuned. ❖

### MARK YOUR CALENDAR

Please be sure to visit the Worklaw Network booth at **SHRM's 56th Annual Conference & Exposition**  
June 27-30, 2004 in New Orleans — BOOTH #1351

July 15, 2004—Lorman Education Services—Family and Medical Leave Act in Michigan— Troy, MI

4

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“[www.MI-EmploymentLaw.com/newsletter.htm](http://www.MI-EmploymentLaw.com/newsletter.htm)”

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