

# PILCHAK COHEN & TICE, P.C.

Attorneys Representing Management in Labor and Employment Law



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## Recent Victories for Our Clients

You can't always judge a case by its complaint. PCT recently won a declaratory action related to an insurance claim.

Our client, an insurance company, faced a case which had proceeded to default judgment and where the insurance client had few clear defenses. The claim exceeded six figures. Things looked bleak.

After carefully examining the underlying facts, things turned around. Not apparent by the complaint or the claims file was the plaintiff's criminal record, prior health problems and prior litigation. Additionally, we challenged whether our client was properly sued. Making a long story short, the claim against our insurance client crashed and PCT recovered over \$38,000 for the client. Turnabout can sometimes be dramatic! ❖

# WORKPLACE CHRONICLE

May  
2004

## Department of Labor Issues Final Rule on Overtime Exemptions

The Department of Labor (DOL) has issued its final rule relating to the "white-collar exemptions." Under the Fair Labor Standards Act (FLSA), employers can avoid paying exempt employees overtime pay. The "white collar exemptions" apply to statutorily defined executive, administrative and professional employees, outside salesmen, and computer professionals.

Last year, the DOL issued a proposed rule relating to these exemptions (See: Workplace Chronicle, Aug., 2003). After much debate and public comment, the DOL has now issued its final rule. The DOL predicts that the new regulations will provide overtime to approximately 1.3 million additional workers. Employers have until August 23, 2004, to revamp their policies and practices. Below are summaries of the major points contained in the 300 pages of regulations:

### Safe Harbor Provision.

The DOL has added a safe harbor provision.  
We advise all employers to take full advantage of it!

- **Higher weekly salary requirement.** Under the new regulations, employees must receive a weekly salary of \$455 per week (which is \$23,600 per year) to qualify as exempt. This is approximately triple the amount previously required (\$155 per week). The regulations also clarify that an employer may not provide for a minimum salary and add on other compensation that effectively compensates on the basis of work performed. Rather, the guaranteed weekly salary must be reasonably related to the services performed and the overall earnings.
- **No more "long" & "short" tests—just one "standard" test.** The new regulations get rid of the long/short tests, and use one standard test for each type of exemption. The first part of the test involves the payment method. In order to claim employees are exempt, employers must pay employees as follows:
  - executive – salary basis;
  - administrative – salary or fee basis;
  - professional – salary or fee basis;
  - computer professional – salary or fee basis, or hourly rate of at least \$27.63.

A person is considered paid on a fee basis if paid an agreed sum for a single job, not based upon hours or days worked. To be paid on a salary basis, employees must be paid a set amount that is not adjusted based on an employee's quality or quantity of work. In other words, employers generally cannot dock employees' salaries for time not worked, under most situations, if the employee has worked some part of a work-week. (But see final bullet point.) If they do, they lose the right to claim an employee is not entitled to overtime.

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- 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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**DOL Issue Final Rule ...**

- *Executive Employees.* The new regulations clarify that for one to be within the executive exemption, the employee must have the ability to hire, fire or make recommendations on those decisions. For example, taking and reporting attendance does not suffice.
- *Administrative Employees.* The final regulations cut back from the initial proposal. Employers had hoped that one would qualify if one merely held a “position of responsibility.” However, the new test is much like the old test: The person’s primary duty must relate to the management or policies of the business, and the person must customarily and regularly exercise discretion and independent judgment.
- *Highly Compensated Employee And Business Owner Exemptions.* Under the new regulations, an employee can be considered exempt under a stand-alone test for executives when compensated at least \$100,000 per year, paid on a salary basis at least \$455 per week, and customarily and regularly performs office or non-manual work. (This is up from the \$65,000 amount in the proposed regs.) Similarly, where an individual owns at least a 20% equity interest in the business and is actively engaged in management, he/she will be exempt (even if not paid on a salary basis). The final regulations retreat from the proposed regulations, by eliminating 20% owners that are solely involved in production from the exemption. The final rule also eliminates the proposed “sole charge” test, exempting individuals who are in “sole charge” of the facilities where they work.
- *Outside Sales Employees.* The new rule eliminates the requirement that no more than 20% of the duties of these employees be incidental to making sales. Now, the sales function need only be the “primary duty” regardless of the time spent on other tasks.
- *Clarification that Blue-Collar Employees and Certain Public Safety Workers are Nonexempt.* The new regulations make clear that no matter how much money certain employees make in blue-collar positions, they are still nonexempt. Examples of these types of employees include: non-management production line employees, carpenters, electricians, mechanics, plumbers, construction workers and laborers. Similarly, the exemptions do not apply to blue-collar public safety type positions such as: police officers, inspectors, park rangers, paramedics, fire fighters, etc.
- *Damage Limit Provisions.* Before, when employers made improper deductions, employees would claim they were not paid on a salary basis and make claims en masse for overtime for those hours above 40 hours worked in a work-week. Under the new regulations, the DOL has added at least one employer-friendly provision limiting the employer’s liability to employees in the same job classification working for the same managers responsible for making the improper deductions.
- *Safe Harbor Provision.* The DOL has added a safe harbor provision. **We advise all employers to take full advantage of it!** Specifically, so long as an employer has a clearly communicated policy that prohibits improper pay deductions and makes a good faith commitment to comply in the future, the employer will not lose the exemption for *any* employees unless the employer willfully continues thereafter to make improper deductions. The new procedure is similar to that used for sexual harassment: The employer only becomes liable when it is alerted to a condition that requires attention. While a written policy is not required, the DOL warns that it is the “best evidence.” The DOL also advises that such policies should be distributed at the time of hire, in an employee handbook, or on the employer’s Intranet. The DOL promises to post a model policy, which we will post on our web site well in advance of the August 23<sup>rd</sup> deadline.

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## **AFTER ACQUIRED EVIDENCE OF POST DISCHARGE MISCONDUCT MAY BE BAR TO FRONT PAY DAMAGES**

Over the years we have had much success obtaining front pay cut-offs in wrongful discharge and discrimination lawsuits based upon the “after acquired evidence” doctrine. Under the after acquired evidence doctrine, where an employer learns of on-the-job misconduct during the defense of the lawsuit, a front pay cut-off may be obtained if the employer can show that the misconduct would have resulted in the employee’s termination had the employer known of it.

Because there is so much inflating and actual fraud in the application process, we have always said that employers must stand firm in rejecting applicants that misrepresent their qualifications.

The seminal case is McKennon v. Nashville Banner Publishing Company, 513 US 352 (1995). In that case, the plaintiff had been terminated and sued for age discrimination. At the plaintiff’s deposition, it was discovered that while she was still employed she had copied and taken home certain confidential documents in violation of her job responsibilities. Although the Supreme Court determined that the after-acquired evidence of on the job misconduct was not a total bar to the plaintiff’s lawsuit, the Court did note that:

“as a general rule in cases of this type neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.”

Since the McKennon case, there have been numerous cases denying front pay damages where the employer could show that it would have fired the plaintiff had it known of the misconduct. The cases have also rejected front pay claims where the employer learns of a false answer on an employment application and can show that it would not have hired the plaintiff had it known the truth. At PCT, we always have made it a point to scrutinize the plaintiff’s application answers at deposition. Once a significant false answer is exposed, a front pay cut-off will be sought (and often obtained) as long as there are no examples where the Company has overlooked similar false information. Such a front pay cut-off has the effect of taking most of the wind out of the plaintiff’s sails.

Because there is so much inflating and actual fraud in the application process, we have always said that employers must stand firm in rejecting applicants that misrepresent their qualifications. The front pay cut-off is simply too important to the overall success of the litigation.

Now, there has been a development out of the Eighth Circuit Court of Appeals, which expands the after acquired evidence doctrine to post-termination misconduct. In Sellers v. Secretary of Transportation, 358 F3d 1058 (8<sup>th</sup> Cir 2004), the Eighth Circuit rejected a bright line rule foreclosing the possibility that a Title VII plaintiff’s post-termination conduct could limit the relief available to the plaintiff. In the Sellers case, the plaintiff went to work for a bank after her employment ended with the Department of Transportation. She was subsequently terminated when the bank found out that she had attempted to process an unauthorized loan application in the name of her spouse’s former wife. Sellers’ case against the Secretary of Transportation went to trial while she was still employed by the bank.

The jury returned a verdict in favor of Sellers in excess of one million dollars. In a post trial motion, the Secretary sought to reverse the district court’s award of front pay, bringing to light the plaintiff’s subsequent termination from the bank (of which it had only recently learned). When the district court rejected the argument, The Secretary appealed.

The issue for the Eighth Circuit was whether the post-termination misconduct at the bank limits the equitable remedy of front pay. The Eighth Circuit held that it would be inequitable for a plaintiff to avail herself of the disfavored and exceptional remedy of front pay where her own misconduct precludes her from availing herself to the favored and more traditional remedy of reinstatement. The Eighth Circuit went on to say that the proper inquiry is not whether the employer would have terminated the plaintiff for the post-termination misconduct but whether the misconduct would have made the plaintiff ineligible for re-instatement. The Eighth Circuit was also clear in what the focus of the inquiry should be: the employer must convince the court that the post termination misconduct would disqualify the plaintiff under the employer’s “employment regulations, policies and actual employment practices.”

As always, we are delighted to add an arrow to the quiver of defenses to claims brought by former employees who manage to get fired yet again. ❖

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## **DOL Issues Final Rules ....**

- *More Disciplinary Deductions Permitted.* Employers were previously prohibited from making deductions from employees' salaries for disciplinary time off unless the employee was suspended for an entire workweek, or if disciplined for major safety violations (a term strictly construed against employers). Under the new regulations, employers will be authorized to impose a disciplinary deduction for full day absences so long as in compliance with a written policy that applies to all employees for infractions of written workplace conduct rules. But, the DOL warns that this does not apply to performance and attendance issues, but only serious misconduct issues like sexual harassment, violence, drug or alcohol violations, or violations of state or federal laws.

At this point, the debate about the DOL's final rule continues. Legislation is being pushed that would block the DOL's final regulations. Nevertheless, employers should operate on the assumption that they are required to have their policies and practices up to date and in full compliance by August 2004. This includes ensuring that persons now classified as exempt truly meet the statutory exemptions and, if not, ensuring that their compensation is in compliance with the law. It also includes updating your written policies and practices so that you can issue disciplinary suspensions where appropriate, and to provide your organization with the safe harbor provisions of the FLSA. ❖

### **MARK YOUR CALENDAR**

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

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

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