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Don't Overlook the Exemption for Certain Seasonal Employees

As summer approaches, recreation clubs and amusement facilities gear up by hiring lifeguards and other temporary employees. These employees often work ten or more hours a day, six or seven days a week, throughout the summer. Must they be paid overtime for those hours? Are they even entitled to minimum wage?

The Fair Labor Standards Act exempts from *both* the minimum wage and overtime requirements


any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3 per centum of its average receipts for the other six months of such year.

The courts have observed that the exemption is needed because these types of employers may require longer hours in a shorter season, their economic status may

make higher wages impractical, or they may offer non-monetary rewards.

The U.S. Department of Labor defines “amusement or recreational establishment” as an establishment “frequented by the public for its amusement or recreation.” But the courts have generally not upheld the open-to-the-public element of DOL’s definition.

A case decided a couple of years ago involved Sunset Pools which operated and maintained swimming pools at hotels and condominiums in the Washington, D.C. area. Under the State Department’s Exchange Visitor Program, Sunset hired two Bulgarian nationals to work as lifeguards from May to October 2006. During this time period, they worked in excess of forty hours a week but did not receive overtime compensation. When they sued, the court ruled that Sunset Pools was exempt and did not have to pay overtime.

Any employer intending to rely on this exemption should also check state law, where exemptions often differ. 

References: 29 U.S.C. § 213; 29 C.F.R. § 779.385; *Ivanov v. Sunset Pools Mgmt. Inc.*, 567 F.Supp.2d 189 (D.D.C. 2008).



Unpaid Interns and the Department of Labor

Nancy, a graduate student in architecture at the local university, comes to your architectural firm and offers to work for free for six months so she can gain some practical experience and build her résumé. Can you do that – legally?

Recognizing the rising number of unpaid internships, the U.S. Department of Labor recently issued aggressive guidelines to crack down on the practice. To quote the Acting Director of DOL's Wage and Hour Division, "If you're a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law." (Although non-profit organizations are subject to the Fair Labor Standard Act's minimum wage and overtime requirements just like their for-profit counterparts, DOL recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation, to non-profit religious, charitable, civic, or humanitarian organizations.)

The Fair Labor Standards Act entitles non-exempt employees to minimum wages of \$7.25 per hour and to time and a half for more than 40 hours' work in any workweek. The FLSA's definition of "employee" is very broad. Trainees, such as interns, are not considered employees, but the definition of "trainee" is quite narrow. Basically, a trainee's work must be for

the trainee's own benefit, not for the benefit of the employer.

DOL's new guideline list six factors to determine whether an individual qualifies as an unpaid intern:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment.
- The internship experience is for the benefit of the intern.
- The intern does not displace regular employees, but works under close supervision of existing staff.
- The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded.
- The intern is not necessarily entitled to a job at the conclusion of the internship.
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.


If *all* these factors are met, an employment relationship does not exist under the FLSA, and the Act's minimum wage and overtime provisions do not apply.

According to DOL, the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience. This would most likely be true if a college or university exercises oversight over the internship program and provides educational credit.

Similarly, the more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation, the more likely the intern would be viewed as receiving training. In contrast, if an employer uses interns as substitutes for regular

workers or to augment its existing workforce during specific time periods, they are employees subject to the FLSA's requirements.

A true internship should be of a fixed duration, established prior to the outset of the internship. It should not be used by the employer as a trial period for individuals seeking employment at the conclusion of the internship period. If an intern is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual generally would be considered an employee under the FLSA.

Returning to Nancy the architectural student, assume that she is put to work on the firm's clients and the firm bills for her time. Assume further that Nancy's university is not involved in the internship program and is not granting her credit for the work. Even though the internship is of some benefit to Nancy's career, it also directly benefits the architectural firm. In these circumstances, Nancy is an employee entitled to minimum wage and overtime payments. 

References: Employment & Training Admin. Advisory No. 12-09 (Jan. 29, 2010); Wage & Hour Div. Fact Sheet #71 (Apr. 2010).

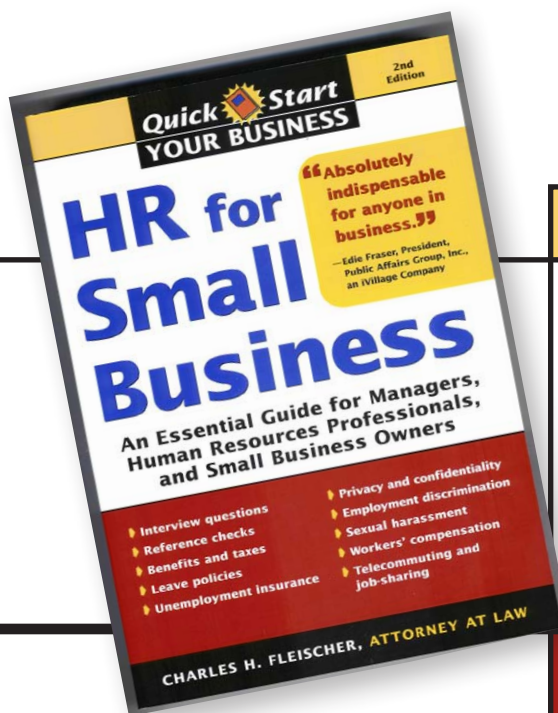
Breach of Contract Suit Backfires

Sometimes a bad deed does get punished.

National Inspection and Repairs, Inc. is a heavy equipment inspection and repair company based in Topeka, Kansas. Through an accidental error, one of its employees rendered its Quickbooks accounting system inoperable, so NIR sought outside assistance to develop a new system for accounting and inventory control. NIR's president, David Price, hired George S. May International Company, a consulting company from Park Ridge, Illinois, to develop the system.

May initially provided NIR with an analyst to survey NIR's business and assess its needs. May and NIR then entered into a consulting services contract. Among the provisions in the contract was a restrictive covenant prohibiting NIR from hiring any of May's employees for one year. (These types of restrictive covenants are sometimes called "no-cherry-picking clauses.")

Pursuant to the contract, May provided NIR with a Project Director. In collaboration with NIR, the Project Director developed a comprehensive list of projects to be implemented. May also provided NIR with a Staff Director named William Doane to manage and implement the projects. One of those projects was assisting NIR in interviewing candidates for the position of NIR Controller.



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Over the course of the engagement, May submitted a series of project reports to NIR. Price, NIR's president, examined and approved each report. At the end of the engagement, Price sent a letter to May saying he was satisfied with the work, that his employees were trained in the concepts developed by May and were beginning to implement them, and that the various recommendations May presented were realistic and were being instituted.

Simultaneous with termination of May's engagement, and in contravention of the contract between NIR and May, Price hired Doane as its Controller. Price claimed that, in Price's presence, Doane conducted what turned out to be a fictitious telephone conversation with a May official, during which the official supposedly released NIR from the restrictive covenant. But Price never spoke with anyone at May and made no attempt to verify the release.

According to NIR, Doane was far from an exemplary employee. NIR claimed that Doane stole hundreds of thousands of dollars from NIR while working in the Controller position. So NIR sued May for breach of contract, claiming that May had a duty to assure Doane would be a suitable employee – even though NIR had promised not to hire him.

The U.S. Court of Appeals in Chicago gave short shrift to NIR's position. The court found it remarkable that NIR was attempting to blame May for its own contractual breach. As the court pointed out, a breach of contract claim is a double-edged sword that a party advances at its own risk. In this case, the double edge proved fatal to NIR. 🗡️

Reference: *National Inspection & Repairs, Inc. v. George S. May Int'l Co.*, 600 F.3d 878 (7th Cir. 2010).

Retaliation for Intent to File Bankruptcy Held Illegal

The U.S. Bankruptcy Code makes it illegal for an employer to terminate or otherwise discriminate against an employee solely because the employee is or has been in bankruptcy. Tammy Robinette, a five-year veteran of WESTconsin Credit Union and an exemplary employee, sued the Credit Union in federal court in




Wisconsin, claiming it violated that very provision of the Bankruptcy Code when it fired her.

Just before the firing, Robinette's supervisor noticed a local newspaper report saying that Robinette's husband had a number of court judgments against him. When the supervisor asked Robinette about the judgments, Robinette responded that she and her husband were planning to file bankruptcy. The next day, the supervisor fired Robinette, explaining that a bankruptcy would not look good for the Credit Union. Shortly thereafter, Robinette and her husband did in fact file a petition in bankruptcy.

The Credit Union asked the court to dismiss the case, since the Bankruptcy Code prohibits discrimination against someone who *is or has been* in bankruptcy, not someone who is *planning* to file for bankruptcy. The court agreed that under a literal reading of the Code, Robinette would not be protected. But the court felt that a more liberal reading was justified here.

The court pointed out that retaliation statutes similar to the Bankruptcy Code provision are normally given liberal readings to effectuate their purpose. In addition, if the Credit Union could fire Robinette with impunity, simply because it acted quickly and before she actually filed for bankruptcy, other employers would be encouraged to act quickly as well. Such a footrace, said the court, is not what Congress intended in enacting the Bankruptcy Code retaliation provision.

Employers should note that, in addition to protection from retaliation for filing bankruptcy, federal law and the laws of many states also protect employees whose wages have been garnished. 


References: 11 U.S.C. § 525; *Robinette v. WESTconsin Credit Union*, 2010 WL 681406 (W.D.Wisc. 2010); 15 U.S.C. § 1674.

But FLSA Doesn't Bar Retaliation Against Applicants

In contrast to bankruptcy, where mere *intent to file* can give rise to protection against retaliation, the Fair Labor Standards Act does not protect *applicants for employment* from retaliation. In a recent case before the U.S. District Court in Alexandria, Virginia, Judge James Cacheris ruled that the FLSA's anti-retaliation provision only applies to actual employees, not persons seeking employment.

In that case, Natalie Dellinger had received a written employment offer from Science Applications International Corporation (SAIC), subject only to her passing a drug test and transferring her existing security clearance from CACI (her most recent employer) to SAIC. Dellinger passed the drug test and then submitted Standard Form 86, which was required in connection with her clearance. In filling out SF 86, she answered a question about lawsuits by listing a pending FLSA suit against CACI. That same day, SAIC withdrew its employment offer.

So Dellinger filed a second FLSA suit, this time against SAIC, claiming it retaliated against her in connection with her pending suit against CACI.

In ruling against Dellinger, Judge Cacheris quoted the FLSA's anti-retaliation provision, which prohibits an employer from discharging or otherwise discriminating against "any employee" because "such employee" has instituted a proceeding under the FLSA. The judge concluded the term "employee" does not include an applicant for employment. 

References: 29 U.S.C. § 215; *Dellinger v. Science Applications Int'l Corp.*, 2010 WL 1375263 (E.D.Va. 2010).

Protecting Your Intellectual Property

Most companies have trade secrets, such as customer lists, operating procedures, cost structures, profit margins and the like, that they don't want their competitors or the general public to see. Some companies also develop works that can be copyrighted and inventions that can be patented.

Through lack of attention to formalities, a company recently came very close to losing its rights to software that was critical to its core product.

Joel Just and Michael Byce were brothers-in-law who together developed the idea of a digital audio larynx – a device to help people produce clearer speech after surgical removal of their larynxes. Both were electrical engineers with experience working in the computer industry.

Byce continued to work on the device for several years, but then put the project aside. In 2003 Just formed an Oregon company called JustMed to continue development of the project. Just invited Byce to invest in the new company and Byce invested \$25,000 in exchange for 130,000 shares of stock. Byce also accepted a position on JustMed's board.

Next, JustMed hired a programmer to work on software for the device. By 2004 the company had a marketable product called JusTalk, using software that contained a copyright notice in JustMed's name. When the programmer left the company, Byce offered to become more involved in ongoing development of the software. Byce worked from his home in Boise, Idaho, using his own computer, with Just providing to Byce the original source code, JusTalk units, schematics, and other equipment. Byce eventually re-wrote almost all the source code written by the prior programmer; Just, admittedly a poor programmer, wrote no source code.

Byce's only form of compensation for his work was additional stock in the company. This left him in need of cash to live. He also was concerned that Just did not consider him an equal in the company. The issues came to a head when Just began discussions with a potential merger or buy-out partner and Byce saw a shareholder

list showing he held a minor position compared with Just and Just's wife. So to protect his interest in the company, Byce changed the copyright notice on the software to his own name and he deleted all copies of the source code from JustMed's computers.

When Just discovered what Byce had done, he filed suit against Byce to claim ownership of the source code. Just asserted that Byce was hired as an employee of JustMed to replace the original programmer (who was also an employee) and that Byce agreed to be paid a salary in the form of company stock. Byce, in contrast, claimed that he was an independent contractor, not an employee. The conflict was crucial because, if Byce were found to be an employee, the source code would be a "work for hire" and the copyright would be owned by JustMed. But if Byce were an independent contractor, he (Byce) would own the copyright.

The U.S. Court of Appeals in San Francisco, after reviewing all the circumstances, concluded that Byce was an employee. The Court's decision, however, makes clear that at least some factors pointed to an independent contractor status, including that JustMed hadn't bothered to fill out appropriate employee paperwork when Bryce came on board with the company. The Court ultimately discounted those factors, noting that JustMed was a small start-up that operated less formally than an established business might. JustMed's informal procedures, said the Court, made it more difficult to decide whether Bryce was an employee or an independent contractor, but it should not make the company more susceptible to losing control over software that was integral to its product.

JustMed had a close call, but it eventually prevailed. Here are some suggestions that will help to assure that your company (and only your company) reaps the economic rewards from its intellectual property.

Physical security. The workplace should be physically secure. Depending on the level of sensitivity involved, this could mean simply locking the door at night. Or it could involve more elaborate precautions, such as installing a security alarm system, placing financial reports or other confidential documents in a locked safe or cabinet, screening visitors, and restricting the areas to which visitors and customers have access.

Electronic security. Computer networks should be passworded, passwords should be complex, and they should be changed frequently. When an employee is terminated, his or her password, and the passwords of all others with whom the employee worked, should be changed immediately. Any network that is connected to the Internet (most are) should be behind a firewall and should run anti-virus and anti-spying software. Employers should adopt computer use policies, including monitoring, and should let employees know that the policies are in place and are vigorously enforced.


Confidentiality Agreements. Any employee who has access to confidential information about the company should be required to sign an agreement at time of hire that he will maintain the confidentiality of such information, both during employment and thereafter.

"No Cherry-Picking" Agreements. If your company is in a service-related business, consider including in your customer contracts a provision that your customers will not hire away your employees.

Intellectual Property Agreements. Who owns the copyright in a work produced or invented by an employee? As the *JustMed* case shows, the copyright in a work made for hire – that is, by an employee as part of his duties – is owned by the employer. *JustMed* also shows, however, that there can be a dispute over whether someone is an employee or an independent contractor. There also can be a dispute over whether an employee created a work as part of his duties, or instead created the work on his own time and at his own expense – in which case the work-for-hire rule might not apply.

Even more troublesome is the law regarding inventions. There is no work-for-hire rule here, so that the inventor, even if he is an employee being paid to develop the invention, holds the right to patent the invention. An agreement containing a provision such as the following goes a long way to protecting the employer in these situations:

Any discoveries, formulas, inventions, devices, methods, processes, designs, programs, or works of any kind that I create, invent, discover, write or develop, alone or with others, while

working for the Company or within _____ months after my work for the Company ends, that relate in any way to the business of the Company, are considered as made-for-hire and belong exclusively to the Company. I hereby assign absolutely to the Company all rights I may have in all such discoveries, formulas, inventions, devices, methods, processes, designs, programs and works, including the rights to apply for patents, to register copyrights, to grant licenses, and to receive royalties and other forms of compensation. I will cooperate fully with the Company in filing all such applications and registrations and will execute such additional documents as the Company may request to confirm this assignment. 

References: 17 U.S.C. § 201; *JustMed, Inc. v. Byce*, 600 F.3d 1118 (9th Cir. 2010).



Employee Gets Serious Jail Time for IP Theft

Judge James Spencer of the U.S. District Court in Richmond, Virginia recently sentenced Michael Mitchell, a former DuPont employee, to 18 months imprisonment, and an additional three years of supervised release for stealing confidential information concerning DuPont's Kevlar® fabric. (Kevlar is a registered trademark of DuPont.) He also received a concurrent 18-month sentence for obstruction of justice and he was ordered to make restitution to DuPont for the harm he caused.

According to the Statement of Facts filed by the prosecutor in the case and agreed to by Mitchell, Kevlar is

a synthetic fabric which is highly resistant to heat and it has a strength-to-weight ratio five times that of steel. The manufacturing process is a closely-guarded trade secret. Only those with a need to know have access to the Kevlar production facilities and to DuPont's resource library. Employees who do have access are required to sign non-disclosure agreements.

Mitchell was employed by DuPont as an engineer and salesperson for more than 25 years before he was terminated for performance reasons. His final position at DuPont involved sales and marketing of Kevlar. Following his termination, his supervisors reminded him of his non-disclosure obligations and, consistent with company policy, had him sign a statement affirming that he had returned all company proprietary documents.

Mitchell's statement about returning company documents turned out to be false. In fact, he still possessed numerous computer files containing confidential information that he had obtained during his employment. Within about two weeks after his firing, Mitchell met with a Korean competitor of DuPont named Kolon Industries. During that and subsequent contacts with Kolon, Mitchell bragged of his knowledge about Kevlar and about Kolon's competing product, Heracron®. Mitchell later entered into a consulting contract with Kolon.

Throughout their relationship, Kolon allegedly asked Mitchell highly technical questions about the Kevlar production process. Mitchell answered as best he could, but due to his limited knowledge, he contacted current and retired DuPont employees for assistance. Several of these employees notified DuPont about the inquiries, and DuPont in turn notified the FBI and the U.S. Department of Commerce, expressing its concern over possible theft of trade secrets and export control violations.

FBI and Commerce Department agents obtained a search warrant of Mitchell's home in Chesterfield, Virginia and seized computers containing electronic documents belonging to DuPont. One such document was a Denier Economics spread sheet containing highly sensitive information showing production yields of Kevlar yarn in a variety of thicknesses ("deniers"). A portion of that data had been disclosed to Kolon.

After the raid, Mitchell agreed to cooperate with the government in its ongoing investigation. Under supervision of federal investigators, he had numerous recorded telephone conversations and email exchanges with Kolon employees. At some point, however, Mitchell became embroiled in a pay dispute with Kolon, prompting him to send an email to Kolon employees without the knowledge or permission of the investigators. In the email, Mitchell said that he secretly recorded a meeting with Kolon officials and that he would turn the tape over to DuPont and government authorities if Kolon did not pay him an additional \$20,000. (This disclosure to Kolon was apparently the basis for the obstruction of justice charge.)

In a plea agreement Mitchell admitted to his conduct and admitted he knew at the time that he was acting illegally. Judge Spencer's tough sentence followed.

Sidebar: In February 2009 DuPont sued Kolon in federal court in Richmond, alleged that Kolon had stolen DuPont's trade secrets. Kolon then counterclaimed against DuPont saying that DuPont had a monopoly on the type of synthetic fiber used in Kevlar in violation of the antitrust laws. The trial court dismissed Kolon's antitrust suit; Kolon's appeal of that dismissal is now pending in the U.S. Court of Appeals for the Fourth Circuit. DuPont's trade secrets suit against Kolon is scheduled for trial in November.



References: 18 U.S.C. §§ 1839 and 1512; *U.S. v. Mitchell* (E.D. Va. No. 3:09-cr-425, sentencing Mar. 18, 2010); *DuPont v. Kolon* (E.D. Va. No. 3:09-cv-00058); *Kolon v. DuPont* (4th Cir. No. 12-1275).

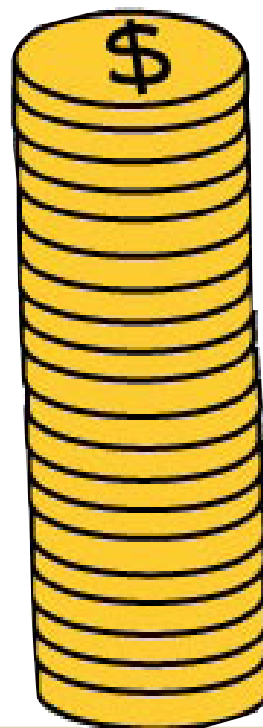
Health Care Reform Bill Has A Few Surprises

The massive health care reform legislation signed by President Obama last March, formally known as the Patient Protection and Affordable Care Act of 2010 (PPACA), is aimed primarily at reforming the health insurance industry. But it has a few surprises for employers, many of which are effective right away.

Group Health Premium Credit for Small Employers and Non-Profits

The PPACA adds a new section to the Internal Revenue Code (§ 45R) to grant a credit for small businesses and tax-exempt organizations that provide health insurance coverage for their employees. The credit is limited to employers who have fewer than 25 full-time-equivalent employees with average wages under \$50,000 and who pay more than half the premium amount for employee-only coverage.

The maximum credit amount is 35% of the employer-paid portion of health insurance premiums (25% for tax-exempt organizations), increasing to 50% (35% for tax-exempts) in 2014. The credit percentages phase out for employers who have between 25 and 50 full-time-equivalent employees and whose average wages are between \$25,000 and \$50,000. Since tax-exempt



organizations normally do not pay any income tax, the Secretary of the Treasury is charged with figuring out how to allow them the credit – presumably out of payroll taxes.

Automatic Enrollment for Employees of Large Employers

The PPACA amends the Fair Labor Standards Act (new FLSA § 18A) by requiring large employers (employers with more than 200 full-time employees) to automatically enroll new full-time employees in any health benefit plans offered by the employer. Notice of the plan must be given to employees and they must be permitted to opt out if they wish. (For plans requiring employees to contribute through payroll deductions, it is unclear how this requirement will square with State wage and hour laws prohibiting deductions without employee consent.)

Expanded Retaliation Protection

The PPACA expands the anti-retaliation provisions of the Fair Labor Standards Act (new FLSA § 18C) to prohibit retaliation in connection with an employee's receiving benefits or exercising rights under the PPACA itself.

Break Time for Nursing Mothers

New § 7(r) of the Fair Labor Standards Act requires employers to provide a reasonable break time and place for a nursing mother to express milk for up to one year after her child's birth. The place must be other than a bathroom and must be shielded from intrusion by co-workers and the public. The new

section says that employers are not required to compensate employees during breaks to express milk, but it is unclear how that provision applies to exempt employees, who generally must be paid on a salary basis.

Employers with fewer than 50 employees need not comply if doing so would impose an undue hardship.


Changes to Come

Insurance Exchange. Under new § 18B of the FLSA, employers must notify employees of the existence of health benefit exchanges, including a description of services provided by the exchanges and how to contact an exchange for assistance.

Excise Tax on "Cadillac" Plans. For tax years beginning after 2012, employers must pay a 40% excise tax on "excess benefits," defined generally to mean amounts above \$8,500 per year for individual coverage and amounts above \$23,000 per year for family coverage.

Cost of Health Insurance on W-2. For tax years beginning after 2010, the cost of employer-sponsored health coverage will be shown on W-2 forms issued to employees.

Reimbursement for OTC Drugs. After 2010, over-the-counter drugs will no longer be reimbursable under HSA, MSA and FSA plans. Insulin will continue to be reimbursable.

FSA Limitation. Also after 2010, FSA plans will be capped at \$2,500. 

Reference: Pub. L. 111-148 (111th Cong., 2d Sess.), available at: dpc.senate.gov/dpdoc-sen_health_care_bill.cfm.



Failure to Provide PPE.

Occupational Safety and Health Administration regulations require employers, at the employers' expense, to provide personal protective equipment (PPE), such as hard hats, respirators, etc., depending on the specific risks associated with the workplace. See "Employers Must Now Pay For Personal Protective Equipment," *EMPLOYER ALERTS*, Winter 2008, p. 7. OSHA regs also require employers to provide training in dealing with workplace hazards. And the regs say that each failure to provide PPE or training to an employee is a separate violation. Initial violations could result in fines up to \$7,000. The U.S. Court of Appeals for D.C. recently upheld the provision as separate violations. So, for example, a mold remediation company that fails to provide 10 of its workers with respirators and training might be guilty of 20 violations. That could get expensive. *29 C.F.R. § 1926.20(f); National Ass'n of Home Builders v. OSHA*, 602 F.3d 464 (D.C. Cir. 2010).

Deductibility of Bonuses. An accrual-basis company declared bonuses for certain employees at the end of the year based on the employees' performance during the year. Even though the company would not actually pay the bonuses until the following year, it wanted to deduct them as a business expense for the year then ending. (Under the accrual method of accounting, a deduction may be taken for the year in which a company receives the economic benefit from an expense, the company is legally obligated to pay the expense, and the amount of the expense can be determined with reasonable accuracy.) Because the company's bonus policy in this case required the bonused employees to be employed at the time the bonuses were paid, the IRS ruled that the company could not take a deduction until actual payment was made. *26 U.S.C. § 461(h); Chief Counsel Mem. No. 200949040 (Dec. 4, 2009).*

Recruiters Are Exempt Administrators.

In a ruling of interest to employment agencies and head hunters, Judge Catherine Blake of the U.S. District Court for Maryland has concluded that recruiters working for a staffing company are "administrative" employees exempt from the overtime requirements of the Fair Labor Standards Act. The Act defines an "administrative" employee as one whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer (or the employer's customers) and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. The recruiter involved in the ruling sourced, screened and interviewed potential candidates, checked references, negotiated salary, and met with the management personnel of the client company. This, said the court, qualified the recruiter as an exempt administrator. *Andrade v. Aerotek, Inc.*, 2010 WL 1244308 (D.Md. 2010).

Employer Liability for Employee Social Media Content.

Do your employees blog about their work, including in their blogs comments about the company's products or services? If so, you could be liable for any misleading statements they make. You could also be liable if an employee fails to disclose his or her connection with your company, since failure to disclose the relationship could itself be misleading. See new Federal Trade Commission guidelines on endorsements and testimonials in advertising, 16 C.F.R. § 255.0. In light of these new guidelines, employers need to reexamine their policies regarding employee blogs and other internet postings.

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