Zinsergram a/k/a Legal Update

By L. Michael Zinser,
CSCMA General Counsel

U.S. DEPARTMENT OF LABOR PROPOSED RULE ON OVERTIME: AN UPDATE

As explained in a previous column, the U.S. Department of Labor has proposed a new Rule to increase the salary thresholds that one must earn, in order to be exempt from overtime under the Federal Wage and Hour Law. The Proposed Rule would bump the required salary from $23,660.00 per year to $50,400 per year – a dramatic increase.

With 2015 coming to a close, many Employers are wondering when the new Rule will go into effect. Initially, the conventional wisdom was that the Rule would take effect in the second quarter of 2016. However, on November 11, 2015, U.S. Solicitor of Labor Patricia Smith stated at an ABA Labor and Employment Law conference in Philadelphia that the Department's final Rule is not likely to appear before late 2016.

The U.S. Department of Labor is currently considering the more than 250,000 thousand comments it received on the Proposed Rule. Solicitor Smith said the lengthy time needed to finalize the Rule was due to the volume of comments that were received.

Organized labor reacted immediately – and angrily. A week later, they claimed the Rule would come out in July 2016. As of late December 2015, the Department of Labor's website does not address the "timing" of the Rule.

Many of the comments given to the Department of Labor suggest that the proposed salary threshold of $50,400 is too high. Until the final Rule is announced, Employers will not know whether in fact the proposed threshold will be reduced.

Once the final Rule is announced, it will be readily apparent which employees need to be transitioned to non-exempt status immediately, and/or which employees the Employer may want to consider compensating differently to ensure they remain exempt.

SECRET RECORDING IN THE WORKPLACE

With smartphones and other small electronic recording devices becoming commonplace, Employers may wonder whether it is lawful to have a policy prohibiting recording in the workplace. In a 2008 case (*Argyropoulos v. City of Alton*), the U.S. Court of Appeals upheld the discharge of an employee for surreptitious taping, with the Court stating:

> The statute does not grant the aggrieved employee a license to engage in dubious self-help tactics or *workplace espionage* in order to gather evidence of discrimination. As we have previously explained, inappropriate workplace activities are not legitimized by an earlier filed complaint of discrimination [*Emphasis added*].

A more recent case in the U.S. Court of Appeals for the 6th Circuit ruled that surreptitious workplace recordings are not protected activity under Title VII of the Civil Rights Act of 1964. An employee was fired because she violated a stated company policy against recording conversations in the workplace. The court stated:

> Jones has not shown why she needed to violate the recording policy in order to oppose defendants' alleged discrimination. She might have taken notes of the conversations, obtained the same information through legal discovery, or simply asked her interlocutors for permission to record. Jones argues that her conduct was reasonable because the recordings were not illegal, did not breach confidential information, were not disruptive of business operations, and were not disseminated beyond the litigation. But none of this suggests that the recording policy was illegitimate or that it would have been futile to oppose the alleged discrimination in ways that did not violate the policy. In light of these considerations, we decline to hold that Jones' recordings were protected.

All Employers should have a policy that addresses recording in the workplace. You never know when an employee is going to try to conceal a recording device during a termination or other type of meeting. I believe the following policy would pass legal muster:

> [Company] respects the privacy of its employees and strives to protect all confidential Company Information. [Company] strives to promote open and honest communication among employees, and endeavors to prevent the negative effect within the workplace that may result from recordings, surreptitious or otherwise.
>
> [Company] prohibits the use of any video and audio recording devices during working time, unless specifically permitted by [Company]. [Company] prohibits the use of cell phones, smart phones, tablets, voice recorders or any other device that may capture visual images or audio during working time without [Company]'s specific permission.

More specifically, the use of cell phones, smart phones, tablets, or other recording of visual images or audio is prohibited in locker rooms, restrooms and any other area where members of the public or co-workers would expect a reasonable degree of privacy and in any area (including computers) in which sensitive or closely guarded corporate or business materials are used or housed.

In the interest of providing a workplace of honesty, civility, and integrity, surreptitious recordings are always prohibited.

Any employees found in violation of this policy may be subject to disciplinary action, up to and including termination.

If you have any questions about this policy, please contact your supervisor or the Human Resources Department.

DISTRIBUTING CARRIER CONTACT INFORMATION

While some Publishers may worry about privacy concerns associated with distributing a newspaper carrier's name and phone number to their subscribers, it is not only within their legal rights, but evidence of independent contractor status.

It is considered evidence of independent contractor status if the contractor is able to contact directly his/her subscribers on his/her route. In litigation, it is helpful to be able to elicit evidence that a subscriber has the right to contact the carrier directly, or to contact customer service about a complaint.

Thus, by all means, it is a good practice to provide subscribers the name and phone number of the independent contractor newspaper carrier delivering to that subscriber. There is no legitimate privacy concern because that subscriber has a business relationship both with the Publishing Company and the independent contractor newspaper carrier.

BEST PRACTICES FOR AGENCY QUESTIONNAIRES

State Departments of Unemployment will sometimes send a newspaper a multi-page questionnaire trying to determine the independent contractor status of a newspaper carrier. You may wonder, "Is the newspaper obligated to complete this form and send it back to the Unemployment Department?"

The answer is, unequivocally, "**No.**" Typically, this form is routed to Human Resources. Human Resources should immediately contact Circulation Management for assistance.

A common mistake is that Human Resources reflexively completes the form without consulting Circulation Management or legal counsel. There are often errors such as completing the question asking for "wage information." With counsel, the answer will be, "There are no wages because this person is an independent contractor."

Rather than completing the form, the best practice would be to write a comprehensive position paper setting forth in persuasive terms why the individual is an independent contractor and not an employee. Particular care should also be taken to review your state's statute. Each state has a unique statute. Many states have a newspaper-specific provision that will be helpful to you in defeating the claim.

Remember: these forms are "loaded" with questions designed to elicit "employee" evidence. That is why completing the form is a problem. In many cases, completing the form leads to an administrative hearing that could have been avoided if the response had been handled through a persuasive position paper, carefully quoting any applicable newspaper industry-specific exclusions.