Lawyers, Time & Money: Avoiding Wage & Hour Missteps that Lead to Costly Legal Battles

By: Sally A. Piefer, Esq. (Lindner & Marsack, S.C.); Kristofor L. Hanson, Esq. (Lindner & Marsack, S.C.); and Christopher Smith, Esq. (CD Smith Construction).

In addition to the PowerPoint Presentation, we have provided recent case law for the topics discussed during our presentation. Those cases are summarized below. Please contact us to request a copy of the full case decision.

Misclassification Issues (Slide 5)

Candell v. Shiftgig Bullpen Temp. Emp. Agency (USDS for the Northern District of Illinois, Eastern Division, Decided May 20, 2019)

Plaintiff brought an action under the Age Discrimination in Employment Act of 1967 against Shiftgig and AFG. AFG filed a motion for summary judgment claiming they do not meet the ADEA's definition of "employer" and that Plaintiff did not meet the ADEA's definition of "employee." The Court agreed that AFG did not meet the definition of employer, and went on to analyze whether Plaintiff was an employee. The Court correctly stated that the Seventh Circuit applies a five factor "economic realities test" based on agency principles to determine whether an individual is an employee or an independent contractor under the ADEA. Those five factors are as follows:

> (1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the work place, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations.

The Court indicated that the employer's right to control is the most important of these factors, and ultimately found the Plaintiff was an independent contractor in relation to AFG. In reaching that conclusion, the Court stated the following: (1) Plaintiff was employed by Shiftgig, paid via Form W2 Wages; (2) Plaintiff never received a Form W2 from AFG, only a Form 1099 for services performed as an independent contractor; (3) AFG did not provide Plaintiff any paid vacation days, sick days or holidays; (4) the work Plaintiff performed for AFG required both specialized skills and a license from the Illinois Department of Insurance; (5) Plaintiff had the right to sell insurance in the same geographic area for others while performing work at AFG; (6) Plaintiff was free to leave at any time while performing work at AFG; and (7) Plaintiff signed an agreement as an "Independent Sales Agent." The Court granted summary judgment because Plaintiff failed to meet her burden of proof and establish that she qualified as an "employee" under the ADEA.

Varsity Tutors, LLC. v. LIRC (Court of Appeals of Wisconsin, District One, Decided October 15, 2019)

The Labor and Industry Review Commission (LIRC) appealed a trial court's order reversing LIRC's determination that Holland Galante was an employee of Varsity Tutors LLC (Varsity), an online business that connects tutors with students. The trial court concluded that Varsity proved the minimum six out of nine statutory conditions necessary to establish that Galante was an independent contractor, not an employee. On appeal, LIRC argued that Varsity failed to prove that Galante was an independent contractor because Varsity only proved two of the six statutory conditions. Therefore, LIRC asserted that its determination that Galante was an employee should be affirmed. The Court agreed with the trial court, affirmed, and found that Galante was an independent contractor for the purposes of unemployment compensation.

Under Wis. Stat. 108.02(12)(a), an employee is defined as "any individual who is or has been performing services for pay for an employing unit[.]" However, there are two exceptions to paragraph (a). The first is if the services of the individual are performed free from control or direction by the employing unit over the performance of his or her service. The second exception is if the individual meets six or more of the following conditions: (1) The individual advertises or otherwise affirmatively holds himself or herself out as being in business; (2) The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services; (3) The individual operates under multiple contracts with one or more employing units to perform specific services; (4) The individual incurs the main expenses related to the services that he or she performs under contract; (5) The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work; (6) The services performed by the individual do not directly relate to the employing unit retaining the services; (7) The individual may realize a profit or suffer a loss under contracts to perform such services; (8) The individual has recurring business liabilities or obligations; and (9) The individual is not economically dependent upon a particular employing unit with respect to the services being performed. Wis. Stat. § 108.02(12)(bm)(2).

In order to establish that Galante was an independent contractor for the purposes of unemployment compensation benefits, Varsity had to prove that Galante met six of the nine conditions set forth in Wis. Stat. § 108.02(12)(bm)(2). LIRC argued that Galante met only two conditions (conditions two and five), and that Galante did not meet any of the other nine conditions. The Court analyzed each then agreed with the trial court, determining that Galante met four additional conditions (conditions one, four, six, and eight). Altogether, Galante met six of the nine conditions, qualified as an independent contract, and was not awarded unemployment benefits.

White Collar Exemptions (Slides 6 and 7)

Rego v. Liberty Mut. Managed Care (USDC for the Eastern District of Wisconsin, Decided March 12, 2019 ED)

Employee filed a complaint against Liberty Mutual Managed Care, LLC (LMMC), alleging that she and others similarly situated were entitled to overtime pay under the Fair Labor Standards Act

(FLSA) for specific work they performed while employed as Utilization Management Nurses (UMN) at LMMC. LMMC denied liability, claiming that the UMN positions fell within the professional and/or administrative exemptions of the FLSA overtime provisions. The UMN position's primary duty is to conduct utilization reviews for its workers' compensation insurance products. Utilization reviews determine whether certain requested services or benefits are "medically necessary," and therefore covered by insurance.

To qualify as administratively exempt, (1) the employee must meet the salary requirement, (2) the employee's primary duty must consist of the performance of office or non-manual work directly related to the management or general business operations of the employer or the customers; and (3) the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significant.

The Court determined that the UMN job duties did not directly relate to the management or general business operations of LMMC, and held that the administrative exemption did not apply. The Court also determined that the UMN job duties did not allow for the exercise of discretion and independent judgment, so the administrative exemption defense was "doubly defeated." This Court also analyzed the learned professional exemption, and granted summary judgment in favor of the Plaintiffs on both the administrative and learned professional exemptions.

Mahran v. Advocate Health & Hosps. Corp. (USDC for the Northern District of Illinois, Eastern Division, Decided February 26, 2019)

Plaintiff filed an employment discrimination claim against Advocate, but also argued that Advocate denied him overtime pay in violation of the FLSA. Advocate argued that Plaintiff (a licensed pharmacist) met the "learned professional" exemption. To meet this exemption, Plaintiff must meet two criteria. First, he must have been compensated on a salary or fee basis greater or equal to $455 per week. Second, his primary duty must have been the performance of work "[r]equiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." 29 C.F.R. § 541.300.

It was Advocate's burden to demonstrate that Plaintiff met the learned professional exemption. Neither party disputed that Plaintiff earned greater than or equal to $455 per week, so the focus of the decision was on the second prong of the exemption. The Court acknowledged that pharmacy work was a "field of science or learning," but stated that the main issue was whether Plaintiff performed "work requiring advanced knowledge," or "work which is predominantly intellectual in character . . . as distinguished from performance of routine mental, manual, mechanical or physical work." In its decision, the Court considered some of the factors used in the administrative exemption, such as "discretion and independent judgment." The Court determined that Plaintiff used "specialized knowledge to make numerous discretionary decisions," which included how to follow-up with a physician regarding a questionable prescription; when a drug should not be dispensed because of a potential danger to the patient; and how to assign, supervise, and review the work of the technicians." As such, the Court and held that he met the "learned professional exemption," and his FLSA overtime claim failed.

Off-the-Clock & Work from Home (Slide 8)

Boutell v. Craftmaster Painting, LLC (USDC for the Western District of Wisconsin, Decided December 11, 2018)

Plaintiffs were former employees of Craftmaster Painting (Craftmaster). Plaintiffs contended that Craftmaster erroneously permitted employees to bank overtime hours, incorrectly calculated weekly overtime based on the lower rate earned during a week rather than average weekly regular rate, failed to treat their travel time to and from jobsites as hours worked for which compensation is owed, failed to compensate employees for work performed at the shop, failed to use the average blended rate to compute overtime and improperly excluded 401(k) contributions when determining prevailing wage and overtime rates.

With respect to travel time, Plaintiffs argued that Craftmaster improperly excluded travel time when calculating hours worked for regular and overtime pay. Craftmaster agreed that it was required to include travel time, but only if Plaintiffs' travel time would be considered "work time" under the FLSA and Wisconsin law.

The court stated that travel time would only be considered work time if Plaintiffs performed work at the shop before they engaged in travel or performed work at the shop after they engaged in travel. There was a factual dispute regarding how often Plaintiff's performed work in the shop at the beginning or end of a shift, so this issue was to be resolved at trial. Plaintiffs argued that regardless of the factual dispute, the Court must count all paid travel time because Craftmaster had an "established policy" (under Wis. Stat. § 109.01(3)) to count all paid travel hours worked. The Court determined that Plaintiffs had not demonstrated there was an established policy to count all travel time as hours worked, so the issue could not be resolved at summary judgment.

Sanford v. Preferred Staffing, Inc. (USDC for the Eastern District of Wisconsin, Decided March 20, 2020)

Plaintiffs were hired by Preferred Staffing, Inc. (Staffing), to work in various factories around Milwaukee, such as Kleen Test Products Corporation (Kleen Test). Plaintiffs claim they were required to arrive at the Staffing facility hours in advance of their work on the factory floor. They would arrive and check-in, and then had to wait idly until they were assigned to a particular building and assembly line at the Kleen Test facility. Once they received an assignment, Plaintiffs were given safety goggles and a short orientation about the work to be performed (if it was their first shift at Kleen Test). Plaintiffs then boarded buses for the facility. Staffing did not guarantee work, meaning not everyone who showed up would be given a work assignment. Individuals who were not given an assignment had to leave without any work/payment. Upon arrival at Kleen Test, Plaintiffs were required to wait in the cafeteria until a shift started, then they were given instructions and paid for an eight-hour shift. At the end of a shift, Plaintiffs occasionally waited for up to an hour before the bus took them back to the staffing facility.

Plaintiffs claim they were "engaged for at least eleven hours in a workday, but were only paid for eight." Defendants moved for summary judgment, arguing that the time spent outside of the eight hour shift was not compensable. The Court examined the Portal-to-Portal Act of 1947, which

exempted from FLSA time, activities that were preliminary to or postliminary to the "principal activity or activities" the employee was employed to perform. The Court stated that a principal activity is not just the discrete task the employee is hired to do, but also those tasks "which are an integral and indispensable part of the principal activities." Further, the Court stated that whether an activity is integral is a fact-dependent question for the courts to decide. Next, the Court stated that the "integral and indispensable test is tied to the productive work that the employee is employed to perform," not "whether an employer required a particular activity." Therefore, the Court found that the activities Plaintiffs performed before and after their eight hour shifts were FLSA exempted activities. In short, they stated that the Plaintiffs were "not employed to wait for a shift or take bus rides to or from the factory." The Defendants' request for summary judgment was granted and the FLSA claim was defeated.

Deductions from Salary (Slide 9)

Rebischke v. Tile Shop, LLC (USDC for the district of Minnesota, Decided January 25, 2017)

Defendant sells tiles and related accessory/maintenance items. A Store Manager oversaw each of the 108 locations nationwide. Store Managers directed work; had authority to hire/fire employees; and were compensated with a fixed salary, commissions, spiffs, and bonuses. The incentive-based portion of compensation varied widely from paycheck to paycheck, and some bonuses were even "negative." A negative bonus occurred when a store failed to meet its budget or other performance goals. The centralized HR department determines the amount of each Store Manager's compensation, and Regional Managers had no control over the compensation.

When a negative bonus was not offset by commissions and spiffs, it was flagged by HR so that the negative bonus did not offset any portion of the Store Manager's salary. Plaintiff contends that Defendant violated the FLSA by not paying for overtime hours worked. Plaintiff argued that he was non-exempt under the FLSA because Defendant improperly deducted negative bonuses from their fixed salaries. Prior to this suit, Defendant was aware of two examples of a negative bonus offsetting a portion of the fixed salary, but those "mistakes" were corrected immediately after they were brought to the attention of the HR department. When the suit was filed, Defendant conducted an audit of the past three years, and found twenty-two negative bonus deductions out of 4,737 checks issued during the time period, 0.5% of all checks. Defendant immediately corrected those deductions.

Plaintiff argued that the commissions and spiffs were also part of the fixed salaries, which would increase the number of improper deductions to 109 during the relevant period. Plaintiff argued that Store Managers were not paid on a salary basis. In reviewing that claim, the court stated the following: "In general, the salary basis test requires that 'the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.'" The court also indicated that an employer can provide an exempt employee with "additional compensation" beyond the guaranteed salary, and that the employer may deduct from this additional compensation based upon performant. The court determined that the commissions and spiffs were not part of the fixed salaries.

The court then analyzed the effect of the improper deductions, and stated that "not all improper salary deductions result in the loss of the FLSA exemption." An employer only loses the exemption "if the facts demonstrate that the employer did not intend to pay employees on a salary basis." An actual practice of making improper deductions demonstrate the intent to pay salary, and "isolated or inadvertent deductions" will not result in the loss of the exemption. Inadvertent deductions are "those taken unintentionally, for example, as a result of a clerical or time-keeping error." The court also laid out the Department of Labor's "non-exhaustive list" of factors to consider when deciding if deductions are isolated: (1) the number of (1) the number of improper deductions; (2) the time period over which the deductions were made; (3) the number and geographic location of employees who experienced deductions; (4) the number and geographic location of managers who made the deductions; and (5) if the employer had a clearly communicated policy permitting or prohibiting improper deductions. The court held that although the actual practice provision and window of correction are closely related, the window of correction is an independent basis by which the FLSA exemption may be preserved despite some improper deductions. The window of correction allows for even intentional improper deductions so long as they are isolated and reimbursed. The court granted summary judgment in favor of Defendants, and found that Plaintiff and other Store Managers were exempt from the overtime rules of FLSA.

Interns (Slide 10)

Hollins v. Regency Group (United States Court of Appeals for the Seventh Circuit, Decided August 14, 2017)

Defendant operated for-profit cosmetology schools in twenty states. The schools offered both classroom instruction and practical instruction in a "regency Salon," where members of the public could receive cosmetology services at low prices. Plaintiff was a student in Indiana and Illinois locations. Plaintiff asserted that Defendant violated various stated laws (in Illinois and Indiana), and she attempted to bring a collective action under FLSA, but class certification was denied. Plaintiff contends she and her fellow students were employees entitled to proper payments under the relevant statues. Plaintiff argued that the students were required to perform various menial tasks, such as acting as receptionists, cleaning and sanitizing the floor, selling salon beauty products, and restocking those products as needed. Plaintiff felt these tasks made her an employee instead of an intern.

The lower court adopted the "primary beneficiary" test laid out in a Second Circuit case, *Glatt v. Fox Searchlight, Inc.* The goal of this test is to determine when an unpaid-student work is actually an employee covered by the FLSA. The factors of this test are as follows: (1) the extent to which the intern and the employer clearly understand that there is no expectation of compensation; (2) the extent to which the internship provides training that would be similar to that which would be given in an educational environment; (3) the extent to which the internship is tied to the intern's formal education by integrated coursework or the receipt of academic credit; (4) the extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar; (5) the extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning; (6) the extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant

educational benefits to the intern; (7) the extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The Seventh Circuit affirmed the lower court's ruling that the students were the primary beneficiaries of the clinical program, and therefore, they were not employees. In part, the Court pointed to the fact that, "'Salon Safety and Sanitation' is the most heavily tested subject area on the Illinois and Indiana cosmetology licensing exam." The primary beneficiary test is now outlined on The Department of Labor's Fact Sheet #71, which was updated in January of 2018.

On-Call Issues (Slide 11)

Mayhew v. General Medicine PC, 2020 (USDC for the Southern District of Illinois, Decided January 21, 2020)

In *Mayhew v. General Medicine PC*, 2020 U.S. Dist. LEXIS 9387 (S.D. Ill. Jan. 21, 2020), an Illinois federal court (which is also part of the Seventh Circuit) evaluated an on-call program for an LPN who worked for General Medicine. She claimed she was entitled to pay for "on call" time because several times each month while "on call" she received urgent and non-urgent calls and text messages she was required to respond to. She claimed she needed to put in requests to avoid being put "on call" in the event she had personal events to attend or needed/wanted to travel. The "on call" requirements were for the LPN were: (1) to have a phone available to her; (2) have phone service wherever she was located; (3) answer the phone when available and respond to the caller. The parties disputed whether she needed to actually attend to patients while on call, and the court noted that there was no evidence of the number of times the employee actually visited a facility while on call. Nevertheless, the Court found that the restrictions placed on the LPN were not such that she was unable to use her time for personal and social activities. Therefore, the time was not compensable.

Please contact us if you have any questions regarding the above or our presentation. Thank you.

Sally A. Piefer
Kristofor L. Hanson
Lindner & Marsack, S.C.
411 E. Wisconsin Avenue, Suite 1800
Milwaukee, WI 53202
(414)273-3910
spiefer@lindner-marsack.com
khanson@lindner-marsack.com

Christopher J. Smith
Legal Counsel
CD Smith Construction
125 Camelot Drive
Fond Du Lac, WI 54935
(920) 924-2900