Employment Law Briefing

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Exempt or owed overtime pay?

FLSA case reinforces importance of employee classification

Disputes over whether a given employee is due overtime pay are no strangers to employment law. A recent example: *Hines et al. v. State Room, Inc. et al.*, a case heard by the U.S. Court of Appeals for the First Circuit. The plaintiffs were all former sales managers who sued in federal court claiming that they'd been misclassified as exempt "administrative" employees and were entitled to unpaid overtime pay.

Meeting customers' needs

The State Room is a banquet facility that hosts wedding receptions and other social functions. The sales managers' principal role was to secure business by either cold calling names on a management-provided list or dealing directly with potential clients.

When cold calling, the sales managers would call only those listings they felt would be productive. And when dealing directly with clients, the sales managers would help determine what package was right for the particular client. If a client signed up for an event, the sales managers were then responsible for ensuring that every detail of the agreement met the client's expectations.

But the sales managers had no authority to make any financial decisions and were bound by management-controlled price schedules that dictated minimum charges for particular rooms based on an event's time and date. Further, they were prohibited from creating any financial obligations for their employer without management approval. The sales managers also weren't supervisors and had no direct authority over any other staff.

Qualifying for the exemption

Under the Fair Labor Standards Act (FLSA), eligible (or "nonexempt") employees must be paid one and a half times their regular hourly rate (otherwise known as "time-and-a-half" or "overtime pay") for all hours worked exceeding 40 hours in one workweek.

There's an exception to this rule for employees who qualify for various exemptions, one of which is the "administrative employee" exemption. To determine whether an employee is administratively exempt, a three-part test is used:

1. The employee must be paid a salary of $455 or more per week.

2. The employee's primary duty must be directly related to the management or general business operations of the employer or the employer's customers.

3. The employee's primary duty must include the exercise of discretion and independent judgment.

Specifically, the dispute settled on whether the sales managers met the third part of the test.

Rejecting the argument

Exercising discretion and independent judgment means that an employee has the authority to make an independent choice, free from a superior's immediate direction or supervision. The fact that an employee's decision may be subject to review doesn't necessarily mean that the employee isn't exercising discretion and independent judgment.

Relying primarily on their inability to make any financial decisions, the sales managers argued that they were nonexempt employees and, thus, were owed unpaid overtime. Rejecting this argument, the Tenth Circuit compared the

Pharmaceutical reps cite rigorous oversight

Another recent case, *In re Novartis Wage and Hour Litigation*, tasked the U.S. Court of Appeals for the Second Circuit with determining whether employees were "administratively exempt." Its outcome was different from that of *Hines et al. v. State Room, Inc. et al.* (See main article.)

Novartis employed sales representatives to encourage physicians to prescribe its products. To achieve this goal, the reps were extensively trained for several weeks. They were even taught how to ask questions and to tailor their sales pitches to each physician's "social style." In addition to employing sales reps, Novartis hired brand managers to formulate the "core messages" to be delivered when certain products were pitched. While the reps were allowed to change their sales approaches slightly based on a physician's social style, they weren't allowed to deviate from the core message. Similarly, reps were told to end their meetings with a scripted line created by management.

As discussed in *Hines*, an administratively exempt employee must meet all requirements in a three-part test, the third being that the employee's primary duty must include the exercise of discretion and independent judgment. On appeal, the reps argued, among other things, that the lower court had wrongly classified them as administratively exempt; they asserted that they didn't meet the test's third requirement.

Novartis argued that the district court's decision was proper because the reps exercised discretion and independent judgment while interacting with physicians and decided how best to establish a rapport. But the Second Circuit noted that these skills were gained or honed (or both) during the reps' extensive training. The court also pointed out that Novartis placed severe limits on how far the reps could deviate from what they were taught. Accordingly, the Second Circuit found that the reps didn't meet the third requirement and, therefore, *weren't* administratively exempt.

sales managers to insurance agents and customer sales managers, both of which are typically found to be administratively exempt positions.

The fact that an employee's decision may be subject to review doesn't necessarily mean that the employee isn't exercising discretion and independent judgment.

Despite acknowledging the sales managers' lack of freedom in financial maneuvering, the court ultimately determined that their primary duty was to engage potential clients and work with them to create a custom product, tailored to meet each client's needs and budget. This individualized attention, according to the court, was done using discretion and independent judgment, making the sales managers exempt employees.

Avoiding the risk

Employers must ensure that employees who aren't paid for overtime do qualify for an FLSA exemption. An employer that misclassifies an employee as exempt will be responsible for not only whatever monies a successful claimant may be owed in unpaid overtime, but also liquidated damages (equal to the amount of the unpaid wage), civil monetary penalties and attorneys' fees. ♦

Qualification before accommodation

Ninth Circuit addresses EEOC guidelines in ADA case

One cannot obtain protection under the Americans with Disabilities Act (ADA) unless he or she clearly qualifies for it. This was the key issue in *Johnson v. Board of Trustees Boundary County School District*, a case heard by the U.S. Court of Appeals for the Ninth Circuit.

Major episode

The plaintiff taught special education at the Boundary County School District in Idaho for about 10 years. Pursuant to a standard teaching contract, she was required "to have and maintain the legal qualifications to teach" special education during the school year.

One of these legal qualifications was that teachers have a valid teaching certificate issued by the state board of education. The plaintiff's certificate was set to expire around the start of the 2007–2008 school year. To renew it, she needed to complete at least six semester hours of training — at least three of which had to be for college credit.

During the summer of 2007, the teacher, who had a history of depression and bipolar disorder, experienced a major depressive episode that left her unable to complete her college courses. She met with the district superintendent shortly before classes were to resume to discuss what she'd need to do to lawfully teach during the 2007–2008 school year.

The superintendent informed the teacher that either 1) she could petition the school district's Board of Trustees to apply for provisional authorization from the state board of education to teach without a certificate, or 2) the district itself could apply with the Board of Trustees for provisional authorization by submitting a letter of request "outlining the good faith effort [it had] made in attempting to hire someone with appropriate certification."

Authorization denied

The teacher opted to petition the Board of Trustees to apply for a provisional authorization. In denying her request, the Chairman of the Board stated that provisional authorizations were used only when there was an open position but no certified teacher available, and in this case there were two certified teachers available to teach in the plaintiff's district.

Approximately one month after the denial, the Board of Trustees held a hearing to determine whether the teacher should be terminated because she'd violated the terms of her contract by allowing her certification to lapse. Despite hearing testimony and reviewing evidence of the plaintiff's mental illness, the Board terminated the teacher's employment. It noted that her prior teaching certificate was valid from Sept. 1, 2002, to Sept. 1, 2007, so she had had five years to complete her certification — not just one summer.

In response, the plaintiff sued the Board of Trustees in federal district court, alleging that it violated the ADA by discriminating against her because of her disability. The district court found in the Board's favor, and the plaintiff appealed.

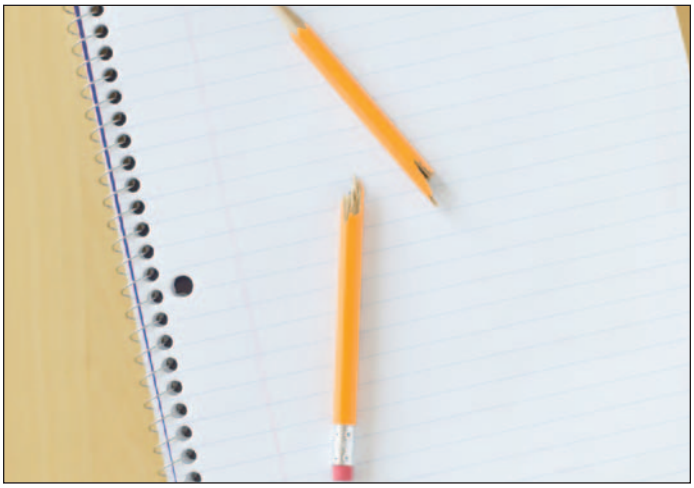
A two-step process

The ADA prohibits discrimination against "qualified individuals with a disability," defined under the act as "individuals who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individuals hold or desire." The Equal Employment Opportunity Commission (EEOC) has expanded this definition, providing that a "qualified individual with a disability" is one:

> … [1] who satisfies the requisite skills, experience, education and other job related requirements of the employment position such individual holds or desires, and [2] who, with or without reasonable accommodation, can perform the essential functions of such position.

Both parties conceded that, under the EEOC's two-step qualification inquiry, the teacher had to prove that she was qualified before the Board of Trustees would be required to provide a reasonable accommodation. The Board's position was that, because the teacher's certification had lapsed, she wasn't qualified and, therefore, not entitled to any reasonable accommodation.

The teacher countered by arguing that she'd met all of the job's prerequisites except for the certification, which she



could have obtained had the Board of Trustees granted her a reasonable accommodation.

Noting that the first step, unlike the second step, contains no reference to reasonable accommodation, the Ninth Circuit rejected the teacher's argument. It concluded that, if the EEOC had intended to require employers to provide reasonable accommodations so disabled employees could satisfy job prerequisites in addition to the essential job functions, the agency would have stated so in the definition.

Indeed, this interpretation is supported by the EEOC itself, which notes that "the first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate education background, employment experience, skills, licenses, etc." In light of this language, the Ninth Circuit found no merit in the plaintiff's argument that the Board was required to assist her in qualifying, and the court ruled against her on this point.

Final word

Interestingly, the EEOC tried to argue that the lower court had misinterpreted its guidelines, and that a reasonable accommodation must also be considered under the first step of the qualification inquiry. But, as this case shows, while the opinions of the EEOC carry some weight, the final word goes to the courts. ♦

Supreme Court rules on the "ministerial exception"

The courts clearly have considerable say in resolving a typical employment dispute. But when the employer is a religious organization, the First Amendment of the U.S. Constitution is a game-changer. The distinction made headlines this past winter when the U.S. Supreme Court handed down its decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.

Called to legal action

Hosanna-Tabor Evangelical Lutheran Church and School is a member of the Lutheran Church–Missouri Synod. The Synod categorizes its teachers in two ways: 1) "called," those regarded as having been called to teach by God, and 2) "lay," everyone else.

To be considered called, a teacher must complete certain requirements, including a course of theological study. If the teacher completes these requirements, he or she receives the formal title "Minister of Religion, Commissioned." Both called and lay teachers generally perform the same duties.

The plaintiff was a called teacher who taught both secular and religious subjects. Before 2004, she developed narcolepsy and began the 2004–2005 school year on disability leave.

When the plaintiff attempted to report back to work, she was told that her position had already been filled by a lay teacher for the remainder of the year. Moreover, the Synod expressed concern about her ability to return to teaching and offered to pay a portion of her health insurance premiums in exchange for her resignation.

The plaintiff refused, telling the principal that she intended to assert her legal rights under the Americans with Disabilities Act (ADA). She was subsequently terminated.

Through the courts

The plaintiff filed a claim with the Equal Employment Opportunity Commission (EEOC), which then sued the Synod. It alleged that the firing was in retaliation for threatening to file an ADA suit.

In district court, the school argued that the lawsuit was barred by the First Amendment, because the claim concerned a dispute between a religious organization and one of its ministers. Applying this "ministerial exception," the court agreed and granted summary judgment in the Synod's favor.

On appeal, the U.S. Court of Appeals for the Sixth Circuit recognized the existence of the exception but concluded that the plaintiff didn't qualify as a minister under it because called and lay teachers performed the same duties. The school appealed to the Supreme Court.

Existence confirmed

The Supreme Court held that the Establishment and Free Exercise Clauses (the "Religion Clauses") of the First Amendment protected churches from employment discrimination suits brought by their ministers.

Confirming that the ministerial exception existed, it noted that the Religion Clauses precluded any requirement that churches accept or retain unwanted ministers. Any ruling to the contrary would deprive religious institutions of control over whom they select to teach their beliefs. Such an infringement violates the Religion Clauses, according to the Court.

Moreover, the Supreme Court concluded that the plaintiff qualified as a minister based on the facts that she:

- Was designated a commissioned minister,
- Had an extensive background in religious training, and
- Had accepted the "call" to teach.

Indeed, the Court held that her case should have been dismissed. Making it clear that the ministerial exception isn't limited to the heads of religious congregations, it criticized the Sixth Circuit for placing too great an emphasis on the amount of time the plaintiff had spent on secular duties. Writing for the majority, Chief Justice Roberts wrote that the issue before the Court was "not one that can be resolved with a stopwatch."

No rigid formula

The Supreme Court's holding in this case is a narrow one. It finds only that the ministerial exception bars an employment discrimination suit brought on behalf of a minister who challenges a church's decision to fire him or her. It's obvious from the opinion that the exception isn't limited to religious leaders. But exactly who qualifies for the exception was left without a rigid formula. ♦

Absent while on FMLA leave

Terminating an employee for repeatedly failing to report his or her absences may seem understandable enough. But what if that worker believes the absences are covered under the Family and Medical Leave Act (FMLA)? The U.S. Court of Appeals for the Tenth Circuit faced such a question in *Twigg v. Hawker Beechcraft Corporation.*

Physician's certification

Hawker Beechcraft Corp. (HBC) maintained an FMLA leave policy that, in part, provided that, "until you receive formal notification that your family leave has been approved, you must properly report your absence to your department every day." The plaintiff requested FMLA leave from Feb. 20 through April 17. Pursuant to HBC's policy, she also submitted a "Certification of Health Care Provider" form completed and signed by her doctor. This form contained a questionnaire in which the doctor noted that the plaintiff's recovery would last about three months, but that she could perform non-weight-bearing work during this time.

The physician's certification didn't indicate the length of time that the plaintiff would need to be off work. So HBC approved only a nine-day leave from Feb. 20 to Feb. 29, based on the doctor's indication that the plaintiff could perform non-weight-bearing work.

Before her leave, the plaintiff applied for supplemental, short-term disability benefits. Under HBC policy, if an employee is approved for short-term disability benefits by his or her insurance carrier, the company will approve the employee's FMLA leave for the same period for which the carrier approved the benefits.

Employees on leave have no greater rights than employees who remain at work.

Upon receipt of additional documents from the plaintiff's doctor, the plaintiff's insurance carrier approved short-term disability benefits through April 1. The insurance carrier sent notice of this approval to HBC on March 14 and, pursuant to its policy, HBC extended the leave through April 1. The plaintiff later claimed she'd never received this notice.

Apparently unaware

HBC's attendance policy and rules of conduct, which the plaintiff signed prior to joining HBC, stated that it was a violation of company policy for an employee to be "absent for three consecutive working days without proper notification." Apparently unaware that her leave was approved only until April 1, and not through her requested date of April 17, the plaintiff didn't return to work on April 2. Nor did she return on April 3 or 4.

Because the plaintiff had failed to notify her supervisors of these absences, she violated the company's attendance policy. HBC sent her a letter on April 7 informing the plaintiff that she'd been terminated. After receiving this letter, she commenced a lawsuit alleging, among other things, FMLA interference.

Regardless of request

To prevail on such an interference claim, an employee must show that he or she was entitled to FMLA leave and that some action by the employer, such as termination, interfered with his or her right to take that leave.

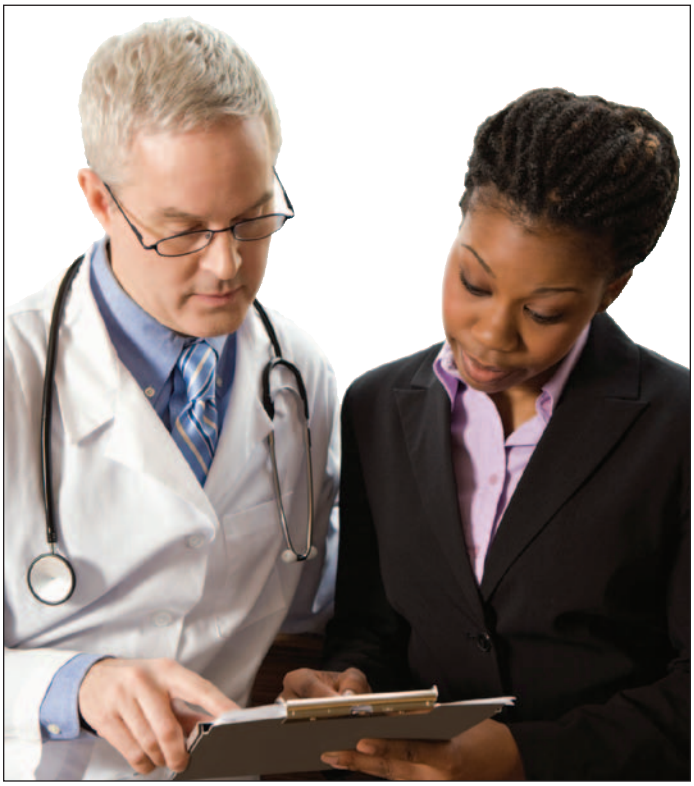
Employees on leave have no greater rights than employees who remain at work. And if some adverse action taken against the employee would have occurred regardless of the employee's request, the interference claim should be dismissed.

The Tenth Circuit came to just such a conclusion in this case. It noted that the plaintiff's argument was severely undercut by the fact that HBC had approved six weeks of leave, despite the plaintiff doctor's opinion that she could perform non-weight-bearing work.

Additionally, HBC demonstrated that it had terminated the plaintiff because she'd violated the company's attendance and notice of absence policies — not because of her FMLA leave. For these reasons, the Tenth Circuit ruled in the employer's favor.

To the letter

As this decision demonstrates, having clear, written policies regarding absences and leaves is essential to fending off FMLA interference and retaliation claims. Of course, putting them in writing isn't enough — you must adhere to such policies to the letter. ♦



A message to our clients and friends …

The attorneys in our Employment and Labor Section are available to answer your questions about the articles in the Briefing. We also stand ready to respond to any other questions you might have. It has always been our goal to provide timely and practical advice whenever and wherever a client has a problem. You can contact each of us directly. Call us or send us an email message. We will be there for you.

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