Law Offices of Mary L. Topliff
Workplace Wave

Overtime Exemption and FLSA Anti-Retaliation Developments

By Mary L. Topliff, Esq.

Employers prevailed in two recent overtime exemption court decisions involving insurance claims adjusters and pharmaceutical sales representatives, respectively. Although the significance of each of these cases hinges on higher court rulings in similar cases, they are instructive nonetheless. Juxtaposed with these overtime exemption cases is a recent decision from the United States Supreme Court, favorable to employees, that furthers the high court's expansive view prohibiting retaliation.

Insurance Claims Adjusters

In Hodge v. Aon Insurance Services, the California Court of Appeal held that insurance claims adjusters met the Administrative Exemption under California law and consequently, were not owed overtime pay. Aon is a third party administrator that provides claims adjusting services for large self-insured corporations (like Kmart), public sector agencies and other insurance companies.

Insurance adjusters across the country have brought various class action (as well as single plaintiff) lawsuits over the years. In the late 1990's, a class of adjusters prevailed against Farmers Insurance Exchange in a California jury trial resulting in a $90 million verdict for overtime pay (Bell v. Farmers Insurance Exchange).

APRIL 2011

Law Offices of Mary L. Topliff
555 Montgomery St.
Suite 1650
San Francisco, CA 94111
(415) 398-9597
topliff@joblaw.com
www.joblaw.com

Public Speaking

Ms. Topliff will be speaking on "Accommodating Leaves of Absence and ADA Requirements" at HR West, Northern California Human Resources Association's Annual Conference in Oakland on 4/11/11. For more information, go to www.hrwest.org or e-mail Ms. Topliff at topliff@joblaw.com

The Administrative Exemption requires, among other things, that the employee performs office work directly related to management policies or the general business operations of the employer or its customers. The court in Hodge examined whether the claims adjusters were providing the services of Aon's business (i.e., production work) or whether they were supporting the operations side of the business of Aon (i.e., administrative work). Some courts, including Bell, have held that jobs which are production-oriented cannot meet the Administrative Exemption test, recognizing the so-called "administrative/production worker dichotomy." The Hodge court noted that the Aon adjusters worked on insurance claims for the clients of Aon whereas the Farmers adjusters worked on Farmers' insurance claims. Thus, the Aon adjusters were not carrying out the work of their employer's business, but were instead

providing a "behind the scenes" function on behalf of companies like Kmart, whose business does not involve the selling of insurance. Regarding the Aon adjusters who worked on claims for insurance company clients, the court noted that the "administrative/production worker dichotomy" should not be strictly applied since some jobs do not neatly fall into one category or the other.

The court then noted that the evidence in the case established that the Aon adjusters had authority to set reserve amounts for the claims which directly impacted their clients' finances. The adjusters also made strategic decisions regarding the claims and coordinated with outside counsel. Thus, the court found that the adjusters exercised discretion and independent judgment on matters of significance and held that the Administrative Exemption applied.

The court did not mention the case of Harris v. Superior Court (Liberty Mutual), which held that insurance claims adjusters are nonexempt, that is, overtime-eligible. That case is currently pending before the California Supreme Court. Although the Hodge case may have limited value depending on the outcome of Harris, it stands as another in a series of cases in which courts have relaxed the "administrative/production worker" requirement.

Pharmaceutical Sales Representatives

Turning to another overtime exemption case, the Ninth Circuit Court of Appeals, applying the federal Fair Labor Standards Act (FLSA), held that pharmaceutical sales representatives qualified for the Outside Sales Exemption in Christopher v. Smithkline Beecham Corp. This case was an appeal from a District Court case in Arizona.

A similar case, called In re Novartis Wage & Hour Litigation, received a fair amount of media coverage when the Second Circuit allowed pharmaceutical sales representatives to proceed with their class action on the grounds that they were owed overtime pay because they should not have been classified under either the Outside Salesperson or Administrative Exemptions. The Second Circuit noted that the reps were not engaged in sales but were merely promoting products to physicians. The reps were prohibited by law from selling pharmaceuticals directly to consumers. In so finding, the court agreed with the Department of Labor's position espoused in an amicus brief filed in the case. The court further held that they did not have sufficient decision-making responsibilities given that the reps were, in effect, provided sales pitch scripts to follow.

The Ninth Circuit rejected the rationale of the Novartis court and the Department of Labor. It noted that the FLSA regulations drew a distinction between sales work and promotional work, stating that promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales is exempt whereas such work that is incidental to sales made by someone else is not exempt outside sales work. The court found that the primary duty of the reps was not simply promoting products in general or schooling physicians in drug development but targeting specific physicians to commit to prescribing certain drugs. It further noted that the sales practices of the drug industry had remained unchanged for over seventy years and the Department of Labor had never taken the position that the entire industry had misclassified these jobs until the Second Circuit case.

The Ninth Circuit's decision in Christopher sets the stage for a potential case before the United States Supreme Court, given the conflicting views amongst the Circuit courts on this issue.

Employers are well-served by regularly reviewing jobs to ensure their proper classification based on the current state of the law.

Anti-Retaliation

In the case of Kasten v. Saint-Gobain Performance Plastics Corp., the United States Supreme Court continued its trend of broadly construing anti-retaliation provisions, this time relating to the FLSA. The plaintiff alleged that Saint-Gobain placed its timeclocks between the area where employees put on their work-related protective gear and where they worked. This meant that employees were not paid for the time involved in changing their work clothing. Kasten alleged that he was fired because he complained verbally to company officials that the location of the timeclocks resulted in employees not being properly paid. Saint-Gobain contended that Kasten was terminated because he did not properly clock his time worked.

The high court examined whether an oral complaint of an FLSA violation would allow employees to claim they were retaliated against for their protected conduct. The FLSA's anti-retaliation provision refers to individuals who have "filed" any complaint. The court noted that a verbal complaint may be considered to have been filed and the reference to "any complaint" suggested a broad interpretation was appropriate. Thus, the court held a verbal complaint is sufficient to trigger a retaliation claim.

This case highlights the importance of educating managers regarding how retaliation claims can arise and of setting up a complaint reporting process.

The Law Offices of Mary L. Topliff can assist employers in:

- Prioritizing jobs to evaluate regarding overtime exemption status based on risk factors
- Evaluating job duties using customized questionnaires and efficient information-gathering
- Educating managers on the importance of accurate overtime exemption classifications
- Strategizing how to implement reclassifications to minimize risk and drafting employee communications

For more information on these issues, contact the author at topliff@joblaw.com ■

Watch for Next Workplace Wave

On March 25, 2011, the Equal Employment Opportunity Commission issued its final regulations on the Americans With Disabilities Act Amendments Act of 2008 (ADAAA). In the next newsletter, I will provide an overview of these important regulations, along with an analysis of their practical impact on the workplace. Meanwhile, the EEOC has published a Fact Sheet with helpful information, at www.eeoc.gov/laws.

For more information on these issues, contact the author at topliff@joblaw.com ■