Law Offices of Mary L. Topliff
Workplace Wave

Wage & Hour Mid-Year Update

By Mary L. Topliff, Esq.

Legal issues involving how employees are paid continue to abound. The following are selected court opinions in this arena, ranging from overtime exemptions to commission plans to meal and rest breaks.

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Speaking Events

Ms. Topliff will be presenting a webinar for Employer Resource Institute on "Intermittent Leave in California: How to Correctly Apply FMLA/CFRA Rules and Stop Abuse" on 9/7/12. For more information, please email topliff@joblaw.com.

On 11/14/12, Ms. Topliff will be conducting a workshop on How to Conduct Workplace Investigations as part of BLR's CA Employment Law Update Conference in Berkeley, CA. For more information, please email topliff@joblaw.com.

Pharmaceutical Sales Representatives Meet FLSA's Outside Sales Overtime Exemption.

Back in April 2011, I wrote about a Ninth Circuit overtime exemption case, namely Christopher v. SmithKline Beecham Corp., involving pharmaceutical sales representatives, noting that the decision set the stage for a potential case before the United States Supreme Court, given the conflicting views amongst the Circuit courts on this issue. See April 2011 Workplace Wave Newsletter.

As expected, the Supreme Court did opt to review the case and, in June 2012, held that the pharmaceutical sales reps qualified for the FLSA "outside salesmen" overtime exemption and thus were not entitled to overtime pay. This case represents an important victory for pharmaceutical employers and will likely have an impact on similar sales jobs.

The crux of the case involved whether the pharmaceutical sales reps were really selling anything because they are actually prohibited by law from selling pharmaceuticals directly to health care providers. Their "sales" are in the form of nonbinding commitments from physicians to prescribe their employer's drugs. Thus, the meaning of the terms "sale" and "sell" were critical to the outcome. Furthermore, the Department of Labor's (DOL) regulations distinguished between someone who performs promotional work in connection with their own sales, which would be exempt, compared to such work when someone else is making the sale, which would be nonexempt.

The DOL took the position that an employee does not make a sale unless the property actually transfers title. On several grounds, the Court found that the DOL

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interpretation was not entitled to deference, nor was it persuasive in its own right. The Court noted that the FSLA's definition of "sale" included the catch-all description: "or other disposition." Ultimately, the Court found the sales reps' nonbinding commitments from physicians equated to a "disposition," i.e., a sale. This conclusion was further supported by the fact that the pharmaceutical sales reps bear all the external indicia of salespersons. For example, they were hired for their sales experience; were trained to close each sales call by obtaining the maximum commitment possible from the physician; worked away from the office, with minimal supervision; and were rewarded for their efforts with incentive compensation. Additionally, the reps earned an average of more than $70,000 per year and spent 10-20 hours outside normal business hours each week performing work related to an assigned portfolio of drugs in an assigned territory. Accordingly, the Court concluded that these sales reps were not the kind of employees the FLSA was intended to protect.

Practice Pointers: This case is relevant to employees who do promotional work that is tantamount to sales given the nature of the particular industry. The Supreme Court's "common sense" approach to the outside sales exemption allows for more flexibility and room for interpretation than was advanced by the DOL. The Law Offices of Mary Topliff frequently assists employers in determining the appropriate overtime exemptions pursuant to current and ever-changing laws to minimize the risk of liability.

Commission Chargeback Plan Upheld

In July 2012, the California Court of Appeal, in Deleon v. Verizon Wireless, LLC, decided a class action involving retail sales representatives who objected to Verizon's compensation plan which reduced future commissions when customers discontinued their cell phone service plans. At issue was whether this "commission chargeback" practice violated California Labor Code section 223, which prohibits "secretly pay[ing] a lower wage while purporting to pay the wage designated by statute or by contract" and subjects an employer to civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA) (Cal. Lab. Code, § 2698).

The Verizon compensation plan for the relevant periods explained that commissions on the sale of cell phone service plans were paid in advance, but not earned until the expiration of a chargeback period during which the customer could cancel the service. The "product" sold was the service plan itself and thus the chargeback period related to the length of the service plan. The commission plan stated that if a customer disconnected service during the chargeback period, the sale would not be considered vested and as such, the amount advanced for the sale would be deducted from future commission advances. The plan contained an acknowledgment for employees to sign, although those submitted to the court by the plaintiffs were not signed.

The Court first examined whether the commission payments constituted wages or pay advances. If they were really wages, this would have been problematic for Verizon since the Labor Code prohibits employers from taking back wages already paid. However, other courts have held that pay advances are not the same as wages, and that the essence of an "advance" is that at the time of payment the employer cannot determine whether the commission will eventually be earned because a condition had not yet occurred or it was not yet ascertainable. The Court found that Verizon's plan clearly described that employees had to meet certain conditions to trigger the commissions and expressly defined its payments as "advances" such that the commissions were not actually

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earned until the conditions were met. Thus, the court concluded that the commission payments constituted pay advances, not wages.

Finally, the Court rejected the plaintiffs' argument that they had not authorized in writing the deductions from their future commissions, citing another Labor Code section requiring written authorizations for deductions. The Court reviewed the employees' knowledge and understanding of the commission plan, favorably highlighting that Verizon gave employees copies of the plans, trained employees annually on how the chargeback provision operated and provided commission statements. Furthermore, the Court found that it was sufficient that employees accepted offers of employment and understood that they were bound by the terms in the compensation plans and relevant chargeback policies. The Court held that Verizon's chargeback provision did not require employees to pay back a portion of wages or secretly deduct amounts owed to employees, the chargebacks were not unconscionable and were properly characterized as advances and thus, its plan was upheld.

Practice Pointers: Compensation plans involving commissions and incentives should be carefully drafted for compliance with applicable law. In particular, the specific conditions for earning commissions, advances against commissions and chargebacks against future commissions must be expressly and clearly described. Moreover, steps should be taken to demonstrate the employee's knowledge and acceptance of the terms of these compensation plans, such as ensuring that employees have a copy of the applicable plan and regular, detailed commission statements, obtaining signed acknowledgments, and providing training.

Meal and Rest Break Obligations Clarified

Although untold numbers of articles have been written about the California Supreme Court's recent meal and rest period opinion in Brinker Restaurant Corp. v. Superior Court, it is worthy of a summary in this newsletter, especially for those readers who are not based in California. The high court resolved uncertainty over the scope of an employer's obligations to afford hourly employees meal and rest periods, and by doing so, impacted numerous class action and other lawsuits on these issues.

At issue in Brinker and other similar cases was the vexing question of whether the California Labor Code required employers to make certain that their nonexempt employees were actually taking their 30 minute unpaid meal breaks or whether employers merely needed to make such breaks available for employees to take. In a unanimous decision, the Court held that an employer need not ensure employees cease all work during meal periods. However, employers must relieve employees of their duties so that they may take an uninterrupted 30-minute meal period during which the employee is at liberty to come and go as he or she pleases. Employers may not pressure employees to work during their meal break or otherwise encourage them to skip breaks.

The Court further addressed the timing requirements for meal breaks, which had become another contentious issue. The statute provides that the meal period obligation arises when an employee's shift is more than five hours but did not specify whether the break needed to occur at a particular time. The Court held that absent a statutorily permissible waiver, a meal break must be provided after no more than five hours of work, and a second meal period provided after no more than 10 hours of work. However, an employer need not schedule meal breaks at five hour intervals throughout the shift.

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Moreover, with respect to paid rest periods, the Court explained that under applicable California law employees are entitled to 10 minutes of rest for shifts from three and one-half hours to six hours in length; another 10 minutes rest for shifts from six hours to 10 hours in length; another 10 minutes rest for shifts from 10 hours to 14 hours in length; and so on. Furthermore, rest periods need not be timed to fall specifically before or after any meal period.

Practice Pointers: Brinker finally clarifies employers' obligations regarding meal and rest periods for non-exempt employees. However, these obligations remain important for employers to follow, especially since the failure to properly provide the requisite meal and rest periods triggers a penalty of one extra hour's pay to the impacted employee for missing their meal period(s) and one extra hour's pay for missing their rest period(s) for each shift, according to Labor Code section 226.7. The Law Offices of Mary Topliff regularly assists employers to ensure that their policies and practices reflect current law regarding meal and rest periods, among other compliance requirements.

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