EMPLOYMENT LAWSCENE ALERT: SUPREME COURT DECIDES SECURITY CHECK TIME DOESN'T NEED TO BE PAID TIME

On December 9, 2014, the Supreme Court of the United States issued its decision in *Integrity Staffing Solutions, Inc. v. Busk et al.*, ruling that time spent waiting to undergo and undergoing security screenings after work each day is not compensable time under the Fair Labor Standards Act ("FLSA"). This case involved a collective claim by employees of a temporary staffing agency who worked at Amazon warehouses in Nevada retrieving products from shelves and packaging those products for delivery. These employees were required to pass through a security check after the end of their shift to make sure that they had not pilfered any product from the warehouse. At times, employees were required to wait as long as 25 minutes in line before they could leave the premises.

In overruling the Ninth Circuit Court of Appeals, the Supreme Court held that the activity of waiting in a security line, after work, was not a "principal activity or activities which the employee is employed to perform" because they were hired to retrieve products from warehouse shelves and package them, not to go through security screenings. Pursuant to the Portal-to-Portal Act, an employer is not required to pay minimum wage or overtime compensation for activities which are preliminary or postliminary to an employee's principal activities. The U.S. Department of Labor deems that the term "principal activities" encompasses "all activities which are an integral part of the principal activity," including those related activities which are "indispensable to its performance."

The Court concluded that the security screenings were not "integral and indispensable" to the employees' duties because it was not an intrinsic element of retrieving products from shelves and packaging them for shipment and could have been eliminated if the employer so desired. The Court found that the Ninth Circuit had erred in focusing on whether the employer required an activity because that was too broad of an interpretation and the focus under the FLSA and Portal-to-Portal Act is whether the activities are "integral and indispensable" to the productive work that the employee is employed to perform.

Employers should take note of this decision in determining what pre- and post-shift activities must be compensated. Time spent performing activities related to an employee's duties, such as donning and doffing protective gear that is necessary for performing an employee's job duties, should generally be compensated. However, not all activities, such as waiting at a security check and waiting in line to receive pay checks, are compensable.

KILLORAN FEATURED IN THE WISCONSIN LAW JOURNAL

Attorney Grant Killoran was featured in the *Wisconsin Law Journal* article entitled, “Killoran takes onstage experience to courtrooms.”

Read full article here.

EMPLOYMENT LAWSCENE ALERT: CAN AN EMPLOYER DEDUCT AN EXEMPT EMPLOYEE’S SALARY WHEN THE EMPLOYER CLOSES ITS BUSINESS DUE TO EITHER INCLEMENT WEATHER OR A POWER OUTAGE?

The Fair Labor Standards Act (“FLSA”) provides an employer an exemption for minimum wage and overtime payments for any employee employed in a bona fide executive, administrative, or professional capacity. An employee may qualify for exemption if the employee meets all of the pertinent tests relating to duties and receives compensation on a “salary basis” at not less than the minimum amounts as described in the appropriate section of the regulations. The FLSA regulations provide that, for an exempt employee to be paid on a “salary basis,” the employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. An employee will not be considered to be paid on a “salary basis” for any week if deductions are made to an employee’s salary for any absence occasioned by the employer or by the operating requirements of the business. However, a deduction may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability.

Oftentimes, the question arises whether an employer can deduct a day’s wage from an exempt employee’s salary when the employer closes its business due to inclement weather (e.g., a snowstorm) or a power outage. In other words, does an employer need to pay an exempt employee for that day when no work was performed by the employee because of the

employer's decision to close its business? It is the U.S. Department of Labor's ("DOL") position that an employer must pay an exempt employee his or her full salary if the employer closes its operations due to a weather-related emergency or other emergency, such as a power outage. The DOL's position is based, in part, on the FLSA's regulations that provide that deductions may not be made for time when work is not available. When it is the employer's decision to close its business because of some emergency, whether it is due to severe weather or a simple loss of power, the DOL presumes that employees remain ready, willing, and able to work. Under such circumstances, deductions may not be made from an exempt employee's salary when work is not available. If deductions are made under such circumstances, the employer risks losing the exemption, thus subjecting it to potential overtime liability.

On the other hand, when an emergency causes an employee to choose not to report to work for the day, even though the employer remains open for business, the DOL treats such an absence as an absence for personal reasons. This type of absence does not constitute an absence due to sickness or disability. Consequently, an employer that remains open for business during a weather emergency may lawfully deduct one full day's wages from an exempt employee's salary if that person does not report for work for the day due to adverse weather conditions. Such a deduction will not violate the "salary basis" rule or otherwise affect the employee's exempt status. If, however, the employee works only a partial day because of weather-related issues, the employer may not make deductions from the employee's salary for the lost time because an exempt employee must receive a full day's pay for the partial day worked in order for the employer to meet the "salary basis" rule.

EMPLOYMENT LAWSCENE ALERT: HOW TO AVOID BECOMING A WAGE AND HOUR MISCLASSIFICATION HEADLINE

Employers who label their employees as overtime exempt should be cautioned by a recent settlement out of a Florida federal court. The case, *Lytle et al. v. Lowe's Home Centers Inc. et al.*, 12-CV-01848 (M.D. Fla.), was premised on the allegation that plaintiff Lizeth Lytle and a class of similarly situated employees were improperly classified as exempt from the Fair Labor Standards Act ("FLSA") overtime requirements.

The FLSA requires that employees must be paid overtime for all hours worked in excess of forty hours per workweek, unless the employee is exempt. Exempt employees include those who qualify as a bona fide executive, administrative, or professional. Simply being paid on a

salary basis does not, by itself, determine the exempt status of an employee. Rather, beyond the requirement that an employee be paid on a salary basis of not less than $455 per week, an employee's job duties must satisfy the criteria to qualify under either the executive, administrative, or professional exemption. Importantly, job titles do not determine exempt status.

In the *Lytle* case, the class alleged that, although classified by their employer as exempt, their duties did not rise to the level required by the FLSA duties tests. The plaintiffs argued that, despite their managerial description as "Human Resource Manager," none had the ability to make meaningful decisions, nor did they supervise employees; instead, their job duties included tasks such as operating cash registers, cleaning bathrooms, greeting customers, and sweeping floors. The employer denied that it violated any laws; however, it agreed to, and the Court approved, a $3.5 million class settlement and a $1.3 million attorney fee award.

Employers who have classified their employees as "exempt" from overtime pay should not simply rely on the fact that an employee is being paid on a salary basis or that his or her job title may imply executive or administrative job responsibilities. Instead, employers should make sure that the actual job duties of each employee claimed as exempt meet the particular job duties of an executive, administrative, or professional employee. Drafting and keeping up-to-date written job descriptions that accurately describe an employee's actual job responsibilities is an important step in making sure that employees are properly classified as "exempt" or "non-exempt" and helping your company avoid becoming another wage and hour collective action headline.

DEAN LAING FEATURED IN THE WISCONSIN SUPER LAWYERS 2014 EDITION

We are proud to announce that our Partner, Dean Laing, has been featured as the Cover Story for the 2014 *Wisconsin Super Lawyers* magazine. A copy of the article, which calls O'Neil, Cannon, Hollman, DeJong and Laing S.C. "the midsize Milwaukee powerhouse," can be found here.

For the past 10 years, Super Lawyers has published its annual magazine in Wisconsin, in which it selects approximately 5% of Wisconsin attorneys as "Super Lawyers." In addition, each year the magazine selects the Top 50 Attorneys in Wisconsin. Super Lawyers' selection process consists of surveying all Wisconsin attorneys and judges, conducting its own independent research, and having its Blue Ribbon Panel evaluate attorneys.

Since 2006, Dean has been selected each year as one of the Top 50 Attorneys in Wisconsin. He is one of only 10 attorneys out of over 15,000 attorneys in Wisconsin—and the only commercial litigator—to be selected for that honor in each of those nine years. Dean has also been selected as one of the Top 25 Attorneys in Milwaukee each year since Super Lawyers began publishing the list in 2011.

Congratulations Dean on this tremendous honor.

EMPLOYMENT LAWSCENE ALERT: 2014 COULD STILL DELIVER IMPORTANT DECISIONS FROM THE NLRB

Although we previously posted an article outlining that the mid-term elections could improve the landscape for employers regarding administrative agency enforcement, including the National Labor Relations Board ("NLRB"), employers may still see a significant pro-union push from the NLRB before the end of 2014.

Democratic-appointee Nancy Schiffer's term on the NLRB ends December 16, 2014. The Obama Administration has nominated Senate Health Education and Pensions Committee chief labor counsel Lauren McFerran to take Schiffer's place on the five-member board. However, the now Republican-controlled Senate must approve all NLRB nominations. If the Senate does not confirm McFerran, or any other proposed nominee, the NLRB could be locked in a 2-2 partisan stalemate. Therefore, many believe that the currently Democratic NLRB will try to get major changes pushed through while they are still in the majority. This could include changes to union election procedures and changes to the definition of joint-employer status.

The NLRB has proposed rule changes that would significantly change the union election process. If issued, they would shorten the period between filing of an election petition and the election itself to only seven days. If this happens, employers will have less time to inform workers of the pros and cons of unionizing. Among other changes, the new rules would also require employers to submit a "statement of position" on the election petition by the time the pre-election hearing is held and waive any issues not raised in the statement.

Also, the NLRB could expand the standard for determining joint employer status in the Browning-Ferris case. A decision from the Board on this important topic is expected soon. For

the past thirty years, the NLRB has analyzed whether two or more companies are joint employers under a "degree of control" test. The Board, in its expected decision in Browning-Ferris, could change that standard to a "totality of the circumstances" standard. A broader standard from the Board in finding joint employer liability would be expected given the NLRB's General Counsel recent decision to permit 43 unfair labor practice charges against McDonald's, USA, LLC to move forward under a "joint employer" theory finding that McDonald's should be held liable, along with its independently-owned franchisees, based upon allegations that the franchisees violated workers' rights in responding to workplace protests. If the NLRB expands the definition of "joint employer," as expected, more companies that do not use direct employees could potentially face unfair labor practice charges for the conduct of other companies or could even be required to recognize and bargain with unions.

Employers should monitor the NLRB's decisions and actions through the end of the year and look for rulings that could impact them and their employees.

SUPER LAWYERS RECOGNIZES OCHD&L AMONG THE TOP WISCONSIN LAW FIRMS

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to be selected for inclusion in the Super Lawyers Business Edition. Top firms were chosen based on the number of attorneys within the firm who were selected to a 2013 or 2014 Super Lawyers list in business practice areas, as well as a combination of metrics indicating the quality of those attorneys. Quality factors that were considered included the number of years selected to the list, inclusion on a top list, and their average blue ribbon panel scores.

The following attorneys recognized as outstanding in the business and transactions practice group and featured in the Super Lawyers Business Edition include:

- James G. DeJong – Mergers and Acquisitions
- Seth E. Dizard – Creditor Debtor Rights
- Peter J. Faust – Mergers and Acquisitions
- Chad J. Richter – Business/Corporate
- John R. Schreiber – Creditor Debtor Rights
- Jason R. Scoby – Mergers and Acquisitions

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT TO DECIDE PREGNANCY ACCOMMODATION CASE

On December 3, 2014, the United States Supreme Court will hear oral arguments in *Peggy Young v. United Parcel Service Inc.*, No. 12-1226, and the outcome could have a significant impact on employers and their pregnant employees.

Peggy Young was a UPS delivery driver. She went out on leave for in vitro fertilization and, when she returned, had lifting restrictions. Although workers who had temporary restrictions from on-the-job injuries, were disabled, or had lost their Department of Transportation certification were allowed temporary alternate assignments, Ms. Young was denied a similar accommodation for her pregnancy-related restriction. In 2008, she filed a discrimination suit based on the claim that UPS violated Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act by refusing to accommodate her pregnancy by letting her perform light duty work. UPS rests its argument on the fact that federal law does not require special treatment or accommodations for pregnant employees, and that its facially neutral policy cannot become discriminatory simply because it does not extend the privilege to pregnant employees. Under UPS' policy, any worker who was injured or had a condition that did not stem from work was not accommodated. Although the United States District Court for the District of Maryland and Fourth Circuit Court of Appeals agreed with UPS, the United States Supreme Court granted certiorari in July 2014.

Interested parties on both sides have weighed in on the case by filing amicus briefs. Most recently, on October 31, 2014, the U.S. Chamber of Commerce filed a brief supporting UPS that stated that Ms. Young's interpretation would blur the line between intentional and unintentional pregnancy bias and should not be allowed to go forward. They, and other groups, have advocated that federal law requires only that pregnant and non-pregnant workers receive equal treatment, not that pregnant employees should get preferential treatment.

The outcome of this case will help guide employers on whether and when employers are required to provide work accommodations to pregnant employees when they provide them to non-pregnant employees who are similar in their ability or inability to work. The Supreme Court's decision could signal a shift in the law and enforcement of law related to pregnant employees that has already been evident elsewhere. In July, the EEOC issued additional guidance on pregnancy discrimination and accommodations, which stated that employers should offer accommodations to pregnant employees in the same way that accommodations were offered to non-pregnant employees with similar abilities or inabilities to work. The EEOC's guidance is not binding legal authority but, instead, the agency's interpretation of

how the law should be implemented. The Supreme Court now has the option to embrace the EEOC's more expansive interpretation of the PDA or to reign in the EEOC and limit what accommodations employers are required to give to pregnant employees. The Pregnant Workers Fairness Act, which would require reasonable accommodations for pregnant employees, is also pending in the House of Representatives.

Employers should monitor the outcome of this case and, depending on the outcome, review their policies to ensure that they are compliant with the law.

TAX AND WEALTH ADVISOR ALERT: SUCCESSION PLANNINGTHE THIRD SIN — "NOT TREATING A BUSINESS LIKE A BUSINESS"

The third sin committed in succession planning is when the business owner fails to treat the business like a business. This sin is a common one for closely-held businesses. Remember that the goal of succession planning is to maximize the value of the business to take care of the people that Mom and Dad care about. One potential way to maximize the value of the business is to sell it. In fact, in my practice, more than half the time, the parents' exit strategy ends up being sale rather than intra-family transfer.

So to best maximize the purchase price for the sellers, we have to consider the mindset of the unrelated purchaser. Buyers will pay less when Dad makes all of the decisions, has all of the key relationships and runs all of the major processes. As a mentor of mine once sagely put it, "how much would you pay for the Michelangelo sculpting studio?" But, if the business is run through well-designed systems, systems that people can step in and run, a Buyer will pay more. Also, Buyers get nervous and have been known to back out of deals where key relationships are not tied down by contracts. Leases, critical customers and key employees should have contracts to protect the business and its value. A question I often ask clients is, with this relationship, what would the board of Apple do? If they would have a contract, then why not you?

So treat the business like a business—it will maximize the choices Mom and Dad have to use the business to take care of the people they care about.

EMPLOYMENT LAWSCENE ALERT: WHAT THE MIDTERM ELECTION RESULTS MEAN FOR LABOR AND EMPLOYMENT LAW

In the midterm elections on Tuesday, November 4, 2014, the Republican Party gained a majority in the U.S. Senate. Now with control of both the House and the Senate, it is likely that the GOP will introduce legislation in an attempt to stop many of the current administration's employment agendas. Although President Obama maintains veto power, the Republican Party could curtail certain efforts that are currently being made.

Areas for employers to watch for potential changes include the NLRB and other federal administrative agencies. As this blog has covered recently, the NLRB has been aggressive in its enforcement of the National Labor Relations Act, and the penalties for violators have been stiff. There is currently proposed legislation to alter the composition of the NLRB from five members to six, three being from each major political party.

Increased congressional hearings that will scrutinize the Obama administration's labor and employment agenda are also likely. A target of these hearings may be the EEOC, which has also been pursuing an aggressive agenda of discrimination cases that some consider to be an attempt to expand the reach of Title VII.

Control by the Republicans of both the House and Senate could lead to budget cuts for federal agencies that enforce labor and employment laws as well. While this would not change the laws themselves, it would restrict the agencies' ability to enforce them.

Republicans will also have the ability to block or hold up nominations for various posts in the administration related to labor and employment law. There is speculation that Secretary of Labor Thomas Perez could be nominated to take over for U.S. Attorney General Eric Holder when he resigns. If that happens, the Republicans will have a larger, and likely more employer-friendly, say in who takes over as Secretary of Labor.