

H.R. ALERT*

JUNE 2005

THE DEPARTMENT OF LABOR ISSUES KEY OPINION LETTERS REGARDING ITS FAIR PAY REGULATIONS

The United States Department of Labor's ("DOL's") Fair Pay Regulations, which revised the Fair Labor Standards Act's ("FLSA's") white collar exemptions to the minimum wage and overtime requirements, became effective on August 23, 2004. Since that time, employers have struggled with the issue of whether their employees qualify for any of the white collar exemptions.

Since January of 2005, the DOL has issued a number of opinion letters regarding the Fair Pay Regulations, including letters regarding whether certain job positions qualify for the white collar exemptions and regarding deductions from an employee's pay. The DOL has recently opined that junior-level claims adjusters and paralegals are not exempt from the FLSA's minimum wage and overtime requirements. The DOL has further addressed a deduction from employee's paid time off (vacation) when absent from work. Each will be addressed in turn.

Junior Level Claims Adjuster Not Exempt

The DOL recently concluded that the junior level claims adjusters did not qualify for the administrative exemption, since they did not exercise discretion and independent judgment with respect to matters of significance. Junior level claims adjusters primarily conduct telephone interviews from a list of prepared questions in order to determine whether to accept or deny a workers' compensation claim for benefits; they then complete pre-printed forms in order to make or deny payments. According to the DOL, completion of the forms requires only the level of skill needed to apply well-established techniques and procedures, which are usually described on the face of the form. Junior-level claims adjusters have no authority to negotiate or make settlements of disputed claims, they may make only payments to claimants and health care providers when

such payments are clearly appropriate and not scheduled for dispute resolution. Thus, the DOL concluded that the junior level claims adjusters were not exempt administrative employees.

Paralegals Are Not Exempt

The DOL similarly concluded that the paralegal position did not qualify for the learned professional exemption. The DOL received a request from a paralegal, whose position had been reclassified as nonexempt. The paralegal also possessed a four-year degree from an accredited university, had a paralegal certificate and had worked as a paralegal for 22 years. The DOL, in its opinion, reaffirmed its longstanding position that paralegals do not qualify for the learned professional exemption, since paralegals are generally not required to possess an advanced specialized academic degree. The DOL did not undertake to determine whether the paralegal would qualify as an exempt administrative employee.

To Deduct or Not to Deduct?

The DOL also issued an opinion letter regarding whether an employer may deduct from an exempt employee's paid time off (vacation) for absences of less than one day. Under the FLSA, exempt employees are generally required to be paid on a salary basis, which means that the employee must receive a predetermined amount of money, which is not subject to reduction based on variations in the quality or quantity of the work performed. Deductions from salary may be made, however, when the employee is absent from work for one or more full days for personal reasons, other than sickness or disability.

Deductions from salary may also be made for absences of one or more full days occasioned by sickness

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Key Developments Under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”)

As many employers know, USERRA’s anti-discrimination provision prohibits an employer from denying initial employment, reemployment, retention in employment, promotion or any benefit of employment to a person on the basis of his or her membership in military service. Any person whose absence from a position of employment is necessitated by reason of service is entitled to reemployment rights and benefits of USERRA. See 38 U.S.C. §4311(a). This means that a person is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the beginning of his service, plus the additional seniority and rights and benefits that he would have attained had he remained continuously employed. See 38 U.S.C. §4316(a). With respect to rights and benefits not determined by seniority, a person must be treated equally in relation to employees having similar seniority, status and pay, who are on comparable non-military leaves. See 38 U.S.C. §4316(b).

In a key case, *Rogers v. City of San Antonio*, 392 F.3d 758 (5th Cir. 2004), fifteen firefighters for the City of San Antonio, Texas, filed suit against the City alleging that the City’s leave benefit policies, as applied to their brief absences for drilling and training in the military

reserves or National Guard, violated USERRA. Specifically, the firefighters alleged that the City’s collective bargaining agreement and policies regarding military leave of absence deprived them of straight and overtime pay, opportunities to earn extra vacation leave and vacation scheduling flexibility, and opportunities to secure unscheduled overtime work and job upgrades. The City argued that the firefighters could not recover because the City treated them the same as it treated other employees on non-military leaves of absence with respect to these non-seniority rights and benefits.

The court of appeals ruled that the firefighters were not entitled to lost straight-time, lost overtime or missed upgrades attributable to their absences for weekend or two-week annual drilling and training sessions, since there was no type of non-military leave available to any city employee under which the employee could accrue those kinds of benefits.

Employer Practice Tip: It is essential that you review and clarify which of your employee benefits are based upon seniority and which are not. You should also ensure that, with respect to non-seniority rights and benefits, all employees on leave of absence are treated equally.

Prosecuting “Covered Entities” for Violations of the HIPAA Privacy Rule

Under the Health Insurance Portability and Accountability Act (“HIPAA”) privacy rule, both civil and criminal enforcement mechanisms exist to ensure the privacy of protected health information (“PHI”). Criminal enforcement of the privacy rule includes fines ranging from \$50,000 to \$250,000 and imprisonment ranging from one year to ten years, depending on the nature and severity of the violation. Civil penalties range from \$100 per day per person up to \$25,000 per violation of a single privacy standard in any single calendar year.

In August of 2004, federal prosecutors with the United States Department of Justice (“DOJ”) filed criminal charges against Richard Gibson, who was

employed in a Seattle, Washington, cancer center, alleging that he violated the HIPAA privacy rule when he obtained PHI about the center’s patients and used that information to obtain credit cards in their names. Gibson later pled guilty to the charges and was sentenced to 16 months in prison and three years of supervised release. He was also ordered to pay more than \$9,000 in restitution. The DOJ announced that “this case should serve as a reminder that the misuse of patient information may result in criminal prosecution.”

In June of 2005, however, the DOJ, through its Office of Legal Counsel, reversed its position and issued an opinion indicating that only covered entities - health care providers, health plans, and health care

Final Regulations Regarding HIPAA Portability

On December 30, 2004, the Departments of the Treasury, Labor and Health and Human Services issued final regulations regarding health insurance portability under the Health Insurance Portability and Accountability Act ("HIPAA"). The final regulations will become effective on the first day of the plan year beginning on or after July 1, 2005, which is January 1, 2006, and will serve to clarify the 1997 interim regulations. A few of the changes are highlighted below.

Creditable Coverage and Certificates. The final regulations specify that plans will be required to implement written procedures regarding certificates of creditable coverage. The final regulations also include a model certificate of creditable coverage that can be issued to participants who lose health care coverage. The model certificate contains a required educational statement, which informs individuals about their rights under HIPAA. The model certificate can be accessed at the following Department of Labor url: www.dol.gov/ebsa/hipaamodelnotice.doc. With respect to creditable coverage itself, the final

regulations provide that coverage under a state children's health insurance plan and coverage under a foreign national health plan will qualify as creditable coverage.

Special Enrollment Rights. The final regulations expand the circumstances under which individuals are entitled to special enrollment rights. For example, if an individual reaches a lifetime limit for all benefits under another group health plan, he would be entitled to a special enrollment right. Special enrollment rights also exist where an individual, who is covered by an HMO, no longer resides or works in the HMO service area and has no other access to coverage under the HMO.

Limited Scope Benefits. As under the interim regulations, the HIPAA portability rules do not apply to limited scope dental and vision benefits, which are considered "excepted benefits." This remains true under the final regulations, as long as the dental or vision benefit provides benefits "substantially all of which are for treatment of" the mouth or eye.

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or disability, if the deductions are made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. In its recent opinion letter, the DOL stated that an employee's accrued paid time off leave bank may be reduced for partial day absences. According to the DOL, where an employer has a benefits plan (i.e., vacation time or sick leave), it is permissible to substitute or reduce the accrued leave in the plan for the time an employee is absent from work, whether the

absence is for a full-day or a partial day, as long as the employee nevertheless receives his or her guaranteed salary.

Employer Practice Tip: If you have not yet done so, you should carefully review your job descriptions to ensure that your employees are properly classified as exempt or nonexempt. You should also review your pay practices to ensure that you are not violating the salary basis rule concerning deductions.

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clearinghouses - may be criminally prosecuted for HIPAA Privacy violations. Certain individuals, however, such as directors, officers and employees may be criminally liable "in accordance with general principles of corporate criminal liability" especially when such individuals "act within the scope of their employment." It remains to be seen whether the DOJ's opinion will be changed in the

future.

Employer Practice Tip: Employers should continually monitor employee use and disclosure of PHI to ensure that individual employees are not violating the HIPAA privacy rule. The DOJ's opinion can be obtained at the following url: http://www.usdoj.gov/olc/hipaa_final.htm.

H.R. ALERT

Inquiries concerning topics addressed in the *H.R. Alert* may be directed to Nan Alessandra, Jane Armstrong, Kim Boyle, or David Korn. Your comments, questions, and suggestions are encouraged.

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