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Media Financial Management
serving media finance professionals

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BUT WHEN IT COMES DOWN TO BUSINESS,
IT IS AGGRESSIVE AND RELENTLESS.

**Around the Labor & Employment
Legal World in 50 Minutes**

**New Orleans, LA
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My Personal Motto: "Never, never, never, never give up."





**The U.S. Department of Labor's
Proposed Rule
on Overtime Exemption**



Current Regulations

- **Duties Test:**
 - Executive
 - Administrative
 - Professional
 - Computer-related occupations
- **Salary Basis Test**
- **Minimum salary level necessary to satisfy exemption:**
 - \$455/week, which equates to \$23,660/year
 - Higher in some states (e.g., California)
- **Highly compensated employees:**
 - Shortened “duties” test
 - \$100,000/year



Changes in Proposed Rule

- Minimum standard salary level necessary to satisfy exemption:
 - Rises to **\$35,308/year (\$679/week)**
 - Non-discretionary bonuses and commissions are allowed to be counted toward as much as 10% of the standard salary threshold
- If this salary floor is not satisfied, must be eligible for overtime
- Highly compensated employees:
 - Rises to **\$147,414**



Small Newspaper Exemption Not Affected

- The minimum wage and overtime provisions of the Wage and Hour Law do not apply with respect to:

Any employee employed in connection with the publication of any weekly, semi-weekly, or daily newspaper with a circulation of less than 4,000, the major part of which circulation is within the county where published or counties contiguous thereto.

- The proposed rule does **not** modify this exemption.



Employer Action Plan

- Identify all exempt employees with a salary **below \$35,308**.
- For those employees who earn close to the new minimum salary, it may make sense to raise their salaries to \$35,308.
- If you have employees whose duties have changed or who have possibly been misclassified as exempt, now is a good time to reclassify them.
 - You can blame the reclassification on the Rule change.



Employer Action Plan

- If your Company chooses the option to pay the employees as non-exempt, ask the following questions:
 - How many hours do these employees currently work? If you do not know, consider tracking their time.
 - Will post-conversion pay and working hours replicate an employee's current situation, or will you need to restrict schedules at or near 40 hours?
 - Will you need to reassign certain tasks to other employees?



Employer Action Plan

- Will you base the new hourly rate on current annual salary, dividing by 2,080 (40 hours a week x 52 weeks), and just eat the overtime?
- Will you assign an hourly rate that assumes the employee will work a certain amount of overtime?



Consider the Consequences of your Actions

- **If you convert a currently salaried Manager to an hourly employee, what is the psychological impact?**
 - Will he/she identify more with non-supervisory employees and quit thinking like a Manager?
- **One Circulation Manager for a small newspaper has already been converted from salary to hourly.**
 - This Manager described the change as “devastating.”
 - The Manager no longer feels part of the Management team.
 - The Manager was not permitted to attend a community event to represent the newspaper because it would have resulted in overtime.
 - This Manager feels “in limbo.”



Consider the Consequences of your Actions

- **Another possible consequence is a change in benefits by moving from exempt to non-exempt.**
- **Do not forget about discrimination laws.**
 - **For example, a plan that increases the current male Managers' salaries but converts female Managers to hourly would draw fire as discriminatory.**
- **Reclassifying as hourly will adversely impact you under the National Labor Relations Act.**
 - **Hourly rate of pay is evidence of employee status.**
 - **Will be hurtful in litigating supervisory status.**



Consider the Consequences of your Actions

- **Overtime policies need to address such off-duty tasks as:**
 - Taking work home;
 - Making/receiving job-related phone calls and e-mails at home;
 - Working through lunch; and
 - Working before or after regular shifts.



Timing of Changes

- The Department of Labor will receive comments on the proposed rule for a period of 60 days.
- It will take time to consider those comments.
- They may make revisions in the proposed rule.
- January 2020 is a likely effective date.





NLRB Restores Significance of Entrepreneurial Opportunity



NLRB Restores Significance of Entrepreneurial Opportunity

- NLRB *Super Shuttle* decision reverses Obama Era *FedEx* case
- FedEx case recognized entrepreneurial opportunity *only if* contractor was providing services to more than one entity
- *Super Shuttle* reverses that.
- If the contractor has the right to engage in entrepreneurial opportunity, that is evidence of independent contractor status.
- This is an important factor.



NLRB Restores Significance of Entrepreneurial Opportunity

- *Super Shuttle* case specifically mentions *St. Joseph News-Press*
 - Carriers can hire substitutes
 - Carriers can contract multiple routes
 - Carriers can deliver other products including those of competitors
 - Carriers can solicit new customers



NLRB Restores Significance of Entrepreneurial Opportunity

Drafting Tip

- Every Independent Contractor Distribution Agreement should contain a clause similar to the following:

“Contractor shall have the right to engage in any other business, including the delivery of other newspapers, shopping guides, or other products published by other entities, including competitors of Company.”



NLRB Restores Significance of Entrepreneurial Opportunity

- **Indemnification Clause indicates lack of control on the part of the Company**
- **Vehicle ownership is a significant investment on the part of the independent contractor; drivers pay for gas, repairs, etc.**
- **Great importance placed upon the written agreement as evidence of the intention of the parties.**
- **No benefits, sick leave, vacation, or holiday pay provided to contractors.**
- **Taxes not withheld from contract compensation.**
- **The fact that most contractors renewed their agreements yearly was a neutral factor.**





**U.S. Courts of Appeal Reversing
Agencies, Finding Independent
Contractor Status**



U.S. Courts of Appeal Reversing Agencies, Finding Independent Contractor Status

- In a recent case, the United States Court of Appeals for the 11th Circuit reversed an NLRB “employee” finding and found independent contractor status.
- Control is the most important factor
- The individuals involved had entrepreneurial interest; they were free to accept work from other companies.



U.S. Courts of Appeal Reversing Agencies, Finding Independent Contractor Status

- The NLRB committed error by not giving great weight to the fact that no taxes were withheld.
- The Court gave great significance to the written agreement; “an agreement that designated the worker as an independent contractor is evidence of intent to create such a relationship.”



U.S. Courts of Appeal Reversing Agencies, Finding Independent Contractor Status

- The significance of the written agreement is not undercut by the fact that all of the individuals signed a similar contract.
- It was error for the NLRB to consider bargaining power.
- The NLRB confused work that is essential to the Company's business with work that is part of the Company's business.



U.S. Courts of Appeal Reversing Agencies, Finding Independent Contractor Status

Drafting Tip

- Be sure the Independent Contractor Agreement properly identifies the parties as follows:

“The Daily Times, a publishing and manufacturing business (hereinafter “Company”), and _____, an independent business entity in the distribution business (hereinafter “Contractor”) mutually agree to the following contract terms to become effective the date both parties sign this Contract.”

- In a recent case, finding employee status for newspaper carriers, the court noted that the written agreement stated that the newspaper was in the *distribution business*.



U.S. Courts of Appeal Reversing Agencies, Finding Independent Contractor Status

- The relevant inquiry is whether or not the work is part of the regular business of the Company and not whether the work is essential to the business of the Company.
- Newspapers are in the business of manufacturing product; independent contractor newspaper distributors are in the business of delivering product.



U.S. Courts of Appeal Reversing Agencies, Finding Independent Contractor Status

- The individuals at issue received no employee-like benefits



U.S. Courts of Appeal Reversing Agencies, Finding Independent Contractor Status

- The United States Court of Appeals recently made an independent contractor finding placing key evidence on the right of the contractor to hire and pay assistants and the written agreement of the parties.
- The contractors were responsible for hiring and paying their own staff;
 - Determining and paying for any benefits
 - Paying any taxes associated with the staff
 - Deciding whether to classify their staff as employees or independent contractors
- The individuals at issue provided all of their own supplies



U.S. Courts of Appeal Reversing Agencies, Finding Independent Contractor Status

- The lower court had inexplicably concluded that this factor was *neutral*.
- The court said the factor was not neutral but rather was strong evidence of independent contractor status.
- The lower court erred by not giving great weight to the written contract of the parties.



U.S. Courts of Appeal Reversing Agencies, Finding Independent Contractor Status

Drafting Tip

- The right of a newspaper distributor to engage or contract with substitutes is one of the greatest factors of independent contractor status. Make sure your written agreement has a separate paragraph articulating this right of freedom on the part of the contractor as well as articulating that in the event that that contractor is unable to deliver for any reason, the contractor is contractually obligated to find a substitute.



U.S. Courts of Appeal Reversing Agencies, Finding Independent Contractor Status

- The written contract is the best evidence of the intent of the parties.
- The written contract stated unambiguously that the individuals were “independent contractors who retained full control over their business.”





“Victory at all costs, victory in spite of all terror, victory however long and hard the road may be; for without victory, there is no survival.”

- Winston Churchill





Morning in America at the NLRB



Morning in America at the NLRB

- On December 14, 2017, in a 3 to 2 decision involving The Boeing Company, the Board overruled prior precedent that governed whether facially neutral workplace rule policies and handbook provisions unlawfully interfered with employees' rights.
- The NLRB has established a new test that overrules the old standard, which tried to determine whether employees could possibly construe a rule to violate their rights.
- Under the new standard, if a new rule, reasonably interpreted, would potentially interfere with employees' rights, the Board will evaluate (1) the nature and extent of the potential impact on National Labor Relations Act rights, and (2) legitimate justifications associated with the rule.
- This case overrules past NLRB cases holding that Employers violated the NLRA by maintaining rules requiring employees to maintain basic standards of civility in the workplace.



Morning in America at the NLRB

- Following the *Boeing* decision, new NLRB General Counsel Peter Robb issued a memorandum on June 6, 2019 to give guidance on handbook rules after *Boeing*
- The new General Counsel has found the following types of rules to be lawful”
 - A rule prohibiting the use of cell phones except during scheduled breaks and in designated break areas
 - A social media policy that prohibits employees from speaking on behalf of the Employer when posting online and requires them, when engaging in online activity relating to the Employer, to post a disclaimer stating “the things expressed on this site are my own and not those of the Employer.”



Morning in America at the NLRB

- The prohibition of employees from use of the Employer's logo and other intellectual property
- A confidentiality policy protecting information of patients, coworkers and other employees in addition to confidential or proprietary information about the Employer or the Employer's finances, business strategy or any other information that has not been publicly released by the Employer
- General Counsel Robb has brought back common sense when reviewing Employer handbook policies.





State Activity



State Activity - Responding to Agency Questionnaires

- Questionnaires typically come from the State Department of Unemployment or the Internal Revenue Service.
- Most often received by the Human Resources Department.
 - HR should involve the Department Head.
 - HR should also alert legal counsel.
 - Pay close attention to deadlines.
- If you have outsourced unemployment to a third-party company, make sure you are notified immediately about contractor claims.



State Activity - Responding to Agency Questionnaires

- **General Advice: Do not complete the form!**
 - The questions on the form are intentionally biased and confusing.
- **Instead, write a letter that persuasively makes the case for independent contractor status.**
 - Do not rush to meet short-term deadlines; do a thorough job.



State Activity - Responding to Agency Questionnaires

- State of Georgia Example
- State of Mississippi Example
- State of Texas Example





Premium Edition Legal Issues



Premium Edition Legal Issues



Imagine one morning at your office you are served with a Class Action lawsuit accusing you of the following:

- This is a case about a newspaper that devised a business practice designed to take advantage of its subscribers
- Subscribers sign up for advertised offers such as “One Year Subscription” or a “26-week Subscription”
- That is not what they received.



Premium Edition Legal Issues

- Instead the newspaper sends them, as frequently as once a month, a so-called Premium Edition.
- This Premium Edition is filled almost exclusively with advertising and other “puff” pieces.
- The newspaper charges each subscriber \$2 per issue of the Premium Edition.
- Rather than send the subscriber a bill *or* give them a chance to turn down the Premium Edition, the newspaper deducts \$2 in value from the end of the subscriber’s subscription.



Premium Edition Legal Issues

- The newspaper does not give its subscribers the chance to opt out.
- The newspaper buries the details about the surcharge in *fine print* that contradicts the explicit plain language of the advertisements that have bold headlines promising a fixed length subscription.
- Worse, subscribers who are signed up for automatic debit programs are likely to never notice their subscription has been *materially* shortened.
- This practice was designed “to fly under the radar.”



Premium Edition Legal Issues

- Advertising a fixed length subscription and then modifying it in fine print is an unfair and deceptive act that violates the law.
- The complaint cites Federal Trade Commission policy on deception. “Depending on the circumstances, accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline. Written disclosures or fine print maybe insufficient to correct a misleading representation.”
- Advertising a fixed length subscription and then modifying it in fine print is an unfair and deceptive act that violates the law.



Premium Edition Legal Issues

- The complaint cites Federal Trade Commission policy on deception. “Depending on the circumstances, accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline. Written disclosures or fine print maybe insufficient to correct a misleading representation.”
- The lawsuit asked for two remedies:
 - a. Refund all subscribers the money charged for the Premium Editions
 - b. Issue a permanent injunction preventing your newspaper from advertising fixed length subscriptions that it intends to materially shorten with Premium Editions without sufficient disclosure



Premium Edition Legal Issues

What do you do?

- These allegations are from a real case filed against a newspaper
- Rather than litigate, the newspaper decided to settle out of court



Premium Edition Legal Issues

- In another case, in another jurisdiction, the newspaper prevailed in a lawsuit
- When the newspaper started Premium Editions, it added a line of *small print* at the bottom of the subscription payment options section of the invoice disclosing “the expiration date will change when charges for any special editions apply. See reverse side for details.”
- The Court stated “granted, the newspaper’s billing practice of changing its subscriber’s expiration date to account for Premium Edition charges could have been more transparent from the beginning, but as a matter of law this is not a breach of the duty of good faith and fair dealing.”
- Breach of contract, good faith and fair dealing, and unfair trade practice allegations were dismissed.



Premium Edition Legal Issues

- **Premium Editions**
 - **What do they cost?**
 - **Do they impact the length of a newspaper subscription?**
 - **What have you communicated to subscribers or potential subscribers?**



Premium Edition Legal Issues

- **Subscriber buys “one year subscription”**
- **What is communicated about Premium Editions?**
 - **Is it in small fine print?**
- **Does the promotion material explain that the subscription will be shortened by the cost of the Premium Edition?**
- **Does the publishing company give the subscriber the chance to opt out?**



Premium Edition Legal Issues

- **Most states have consumer Protection laws or Unfair Business Practice laws**
 - **Most are broadly worded to benefit the consumer**
- **Did the act or practice have the capacity to deceive a substantial portion of the public?**
- **Potential anti-trust issues when using third-party publications as the premium edition**



Premium Edition Legal Issues

- Can you testify under oath that your promotion materials do not in any way deceive your subscribers?
- Are you confident you can successfully defend yourself against an Unfair Business Practice lawsuit?



“Thank you for the opportunity to present at the MFM conference”

Remember: *Preventative legal medicine is the best legal medicine!*

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