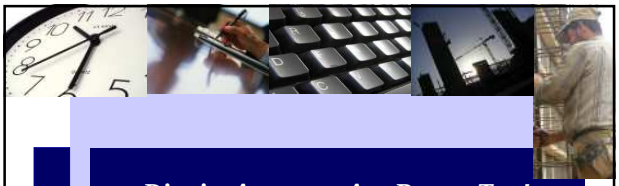

District Attorneys Are Bosses Too! Employment Law and Liability

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Guess what--

You thought when you became a DA you'd leave behind the headaches of running a law practice, like managing an office, employing people, worrying about workplace claims...

Well, not so fast.

Fair Labor Standards Act

The FLSA establishes minimum wage, overtime pay, record-keeping, and child labor standards for full-time and part-time workers in the private sector and in federal, state and local government.

Two Types of Employees

There are two types of employees under the FLSA:

1. Exempt
2. Non-Exempt

Exempt Employees

Exempt employees are excluded from the minimum wage provision and/or overtime pay provisions.

Most common exemptions:

1. Executive
2. Administrative
3. Professionals
4. Outside sales
5. Computer professionals

Exempt Employees - Executive

To qualify as an Executive:

a. Compensation on a salary basis at a rate of $455 per week
b. Primary duty is management
c. Customarily & regularly directs the work of 2 or more other employees
d. Has the duty to (i) hire or fire other employees or (ii) whose suggestions as to hiring and firing are given particular weight

Exempt Employees - Administrative

To qualify as an Administrator:

a. Compensation on a salary or fee basis at a rate of $455 per week or more

b. Primary duty to perform office or non-manual work related to management

c. Who "exercises discretion and independent judgment" in significant matters

Exempt Employees – Professionals

To qualify as a Professional:

a. Compensation on a salary or fee basis at a rate of $455 per week or more

b. Work requiring advanced knowledge in a field of science or learning, and which includes consistent exercise of discretion and judgment

c. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

And one more--

"Highly compensated" employees performing office or non-manual work and paid total annual compensation of $100,000 if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Pay Arrangements – Salary Basis

- Payment on a regular basis of a predetermined amount of compensation each pay period on a weekly, or less frequent, basis.
- The predetermined amount cannot be reduced because of variations in the quality or quantity of the employees work.

Non-Exempt Employees

Non-exempt employees are paid hourly and are subject to minimum wage provisions and/or overtime pay provisions.

Comp time:
Investigators—480 hours
Everybody else—240 hours

Pay Arrangements – Hourly Basis

- Regular rate of pay for the employee is paid by the hour.
- If more than 40 hours are worked, at least 1 ½ times the regular rate for each hour over 40 should be paid. That's what we mean by "time and a half."

Personal staff exemption--FLSA

FLSA § 3(e)(2)(C)(i)(II) excludes individual … who is not subject to the agency's civil service laws and who is selected by a public elective office holder of such an office to be a member of his or her personal staff. Congress intended to limit the exception to employees with an intimate relationship to elected officeholders.

Personal staff exemption—FLSA, con't.

Persons who are:

--under the direct supervision of the selecting elected official, and

--have regular contact with such official.

Typically does not include individuals who are directly supervised by someone other than the elected official even though they may have been selected by the official. For example, the term might include the elected official's personal secretary, but would not include the secretary to an assistant.

Wage and Hour Field Operations Handbook similarly explains:

"Personal staff" does not include individuals who are directly supervised by someone other than the elected official even though they may be selected by and serve at the pleasure of such official. Generally…includes only persons…under the direct supervision of the elected official and who have almost daily contact... It would typically not include all [staff], since all [staff] could not have a personal working relationship with the elected official.

The US 5th Circuit's interpretation

Teneyuca v. Bexar County, 767 F.2d 148 (5th Cir. 1985)

--whether the elected official has the power to hire or fire

--whether the employee is personally accountable to only the elected official

--whether employee represents the elected official in the eyes of the public

5th Circuit con't.

--whether the elected official has a considerable amount of control over the employee

--the location of the employee's position in the chain of command

--the closeness or intimacy of the work between the elected official and the employee

EEO laws: the biggies:

Title VII: 15 employees: sex, race, religion, national origin

ADA: 15 employees: disability

Age Discrimination in Employment Act: 20 employees: age (over 40)

Harassment: considered a form of discrimination

EEO laws: personal staff exemption:

The term "employee" [does] not include any person elected to public office…, or any person chosen by such officer to be on such officer's personal staff….The exemption [does] not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. (*Teneyuca v. Bexar County* applies.)

Family and Medical Leave Act

--50 employees in 75 mile radius
--12 weeks unpaid leave a year; can require use of paid leave
--Employee eligibility: one year of employment; 1250 hours
--Qualifying family or medical reasons
--Intermittent leave
--Personal staff exemption applies

And there's always Section 1983

If there's no statutory employment hook available, a DA may be able to be sued for work-related claims under Section 1983.

Immunity

Maybe and maybe not—
--qualified immunity: if performing an administrative function in connection with duties as a DA, and conduct does not violate clearly established law

--no immunity: bad stuff like harassment, which clearly falls outside the course and scope of lawful powers and duties

The Latest and Greatest from the Courts and the Alphabet Soup Agencies

Discrimination Cases

Employer liability often hinges on whether the alleged harasser is a supervisor and not merely a co-worker. If the harasser isn't a supervisor, then the employer is liable if it was negligent; but if the harasser is a supervisor, then the employer may be strictly liable.

So, the definition of "supervisor" makes a huge difference. Some courts had defined supervisors in the same way as the EEOC, as someone who directed the work of the alleged victim.

The U.S. Supreme Court, instead, held in 2013 by 5-4 that a supervisor must be able to "take tangible employment action" against subordinates—e.g., hiring, firing, failure to promote—even if such actions must be approved by upper management.

Retaliation

In another 5-4 decision in 2013, also disagreeing with the EEOC, the Court rejected the notion that unlawful retaliation could be proven if retaliation was *a* motivating factor in an adverse employment action, and instead held that retaliation requires a *but-for* determination.

Think you've had bad cases?

An African-American guy works on a tugboat. His white co-workers repeatedly call him the "N" word. One of those delightful co-workers tells him he ought to get his MF'ing "N" a** off the boat. He gets transferred to a different boat, the harassment continues. The employee complains to HR—HR tells him to "lighten up." But wait, there's more.

His new co-workers beat him up, stopping only when a passing boat seems to notice the altercation. He calls 911 and fearing for his life, he jumps in the Mississippi River and swims to shore. The company fires him for abandoning his post. The court says, nah, that's pretext. The court says, looks like there's some racial animus. Wisely, though after public pleadings that won't earn a Best Places to Work award, the employer settled.

"Younger people are the future of the company"

What a wonderful sentiment—except when you're firing a 65 year old employee! But that's exactly what Mr. Potato Head said, telling Mr. 65 Year Old to hit the bricks. Besides which, the company owed him unpaid overtime.

In another age case, the brilliant company fired an older employee for lacking computer skills—there were just a couple of problems. First, he had been denied computer training. And second…wait for it…they had a habit of calling him "old timer."

It's not what you <u>say</u> the employees do, it's what they <u>actually</u> do…

So, do your job descriptions reflect reality? Are those so-called essential functions really essential? Do employees really do the stuff that's in their job descriptions? A federal court reached the not-so-surprising conclusion that actual job functions determine what's essential, and not merely what a job description may say.

Sex, age, you pick it

A bank fired a 68 year old manager because she was overheard by a customer telling her ex-boyfriend the next time she saw him, she "would wear [her] nightgown, and it won't be my flannel one." The court said that was pretext because it was a first-time offense and, in the court's view, not so egregious as to justify immediate termination.

Jared will be happy to hear this

You know Jared, the Subway spokesperson, the guy who claimed he lost weight by eating Subway sandwiches? He might be glad to know that the American Medical Association has now officially declared obesity to be a disease—not just the side effects of obesity but obesity itself. And what does this mean for employers? You've already figured it out. ADA, FMLA….

EEOC fails in suit on background checks

In a major blow to the EEOC, a suit against a convention labor company is pitched because the EEOC couldn't show that the employer's policy of conducting criminal and credit background checks negatively impacted blacks and men.

In fact, the court concluded that the EEOC's expert "in an egregious example of scientific dishonesty, cherry-picked" data to try to support the EEOC's legal arguments, in addition to which the expert committed a "mind-boggling number of errors." It's a 32-page opinion that just blisters the EEOC and its recent guidance on the use of background checks.

Don't forget the FCRA

Yes, the EEOC has gotten into the business of background checks but for many years employers have been subject to the Fair Credit Reporting Act when they use a third party to conduct background checks. It's not enough to have a paragraph in your job application form saying we can check your background.

You have to provide an opportunity for rebuttal of negative information and advise an unsuccessful applicant of his rights under the law. Kmart and Sears have learned this lesson the hard way—they're paying $3 million to settle a class action affecting 64,000 claimants.

No, we're not immune

We law firms have our problems with the EEOC too. Discrimination claims against law firms and other legal employers were up 140% last fiscal year. Feel better?

Charter Schools

In a significant decision with real implications for Louisiana, the NLRB recently decided that charter school employees are not public employees and that they therefore have the right to form unions.

One of the acknowledged advantages of the charter school movement has been to provide public education free of the restrictions of teacher unions in how schools are managed and operated.

Because charter employees can now unionize just like any other groups of employees in business and industry, and since many of those employees have come from a unionized background, it was only a matter of time before organized labor realized the implications of this decision and commenced organizing efforts. One charter school in NOLA has already become unionized.

What are hours worked?

"Hours worked" includes time spent in company meetings, and that time counts towards computing 40 hours to determine if overtime is owed. The Supreme Court is now considering whether time spent by employees "donning and doffing" work clothing is compensable time.

Independent contractors

Roughnecks and crane operators are independent contractors? No, says DOL in recovering $687,000 in unpaid overtime for workers at a company in Houston**.** Even though the workers sometimes worked as much as 80 hours in a week, they received only straight-time for all the hours worked.

As DOL noted, it's the actual relationship that counts, not some label applied by the employer, or giving workers 1099s instead of W-2s. DOL also said employee misclassification "is a problem we commonly come across in the oil and gas industry."

There're some things you just can't do

And one of them is waive your rights under the FLSA. This is not new law but a recent case reminds us that employees cannot agree to forgo overtime if they are entitled to OT.

It cost a Subway franchisee $25,000 in backpay to 53 employees to find out the hard way. That's a lot more than it would have cost to, say, get legal advice on how to correctly pay your people. I'm just saying.

Stock brokers, deep sea divers, sanitation workers, rental car employees and floor installers – what do they all have in common?

They've all been granted conditional certification of class action status to sue their employers for minimum wage and overtime violations. The stock brokers were paid commissions only, with no guarantee of minimum wage. The divers weren't paid for attending mandatory safety training and shift briefings.

The sanitation workers were hourly so who knows what their employer was thinking. The rental car workers were called junior managers but they punched a clock—and then their bosses would cut their hours. The floor installers? Nothing complicated—the company just didn't pay overtime.

Unpaid interns

Like the buggy whip…

Family and Medical Leave Act

How many times has this happened to you?

You ask an employee to justify a request for FMLA leave with a letter from the employee's doctor, and you get back a scribbled note that just says the employee is being treated for some ailment but with no further information about the need for leave, duration, etc.

Well, finally, a federal court (our own Fifth Circuit) has said that such a merely "conclusory" letter from a doctor doesn't satisfy the employee's obligation to provide specific information an employer legitimately needs for certification of the leave request.

FMLA is never easy

According to DOL a child under 18 is a "son or daughter" under the FMLA regardless of whether the child has a disability. An employee can get FMLA leave for a child under 18 just by demonstrating a serious health condition.

But for FMLA leave to care for an adult child—over 18—the employee has to also show that the child is incapable of caring for himself or herself because of a physical or mental disability as defined by the ADA and a serious health condition as defined by the FMLA which requires care—all four criteria must be met.

More FMLA

Apparently there really is a fairy godmother—at least a foundation by that name. Because when the foundation granted an employee's mother's dying wish that she visit Las Vegas, the employee decided she just had to accompany dear old mom while she gambled, shopped, gawked—but received no medical treatment. But the employee also administered mom's meds.

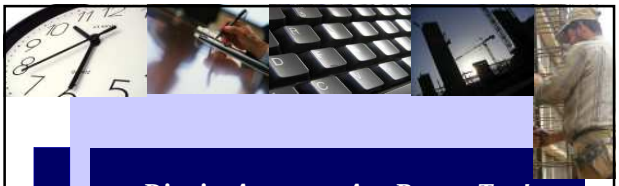
Clever employee, she put in for FMLA leave which was denied but she took off anyway, and got fired. The court said, nope, it doesn't matter where the care takes place. As long as mom needed someone to care for her, it was legitimate FMLA leave.

DOMA

So what does the Court's overturning of part of the Defense of Marriage Act have to do with employment? In killing some of DOMA, the Court held that federal benefits must be available to same-sex couples married in states recognizing same-sex marriage.

But left unanswered, and part of what troubled the dissent: Suppose two women marry in New York and move to Alabama which doesn't recognize same-sex marriage. "When the couple files their next federal tax return, may it be a joint one? Which State's law controls…Does it matter if they were just visiting in Albany?"

Left undisturbed by the Supreme Court was language in DOMA that says states that do not themselves recognize same-sex marriage are not required to recognize other states' same-sex marriages. FMLA regs define "spouse" as a husband and wife as defined by state law where the couple resides. Same for Social Security and veterans benefits. Surely more to come.



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