

First Wednesday

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A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management

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Good, Bad and Ugly: Three Recent Developments in Employment Law

Employment law stays interesting because it is constantly developing and changing. These three short summaries highlight important legal developments that need to be considered by companies when making decisions that affect their employees.

The Good

The California Department of Labor Standards Enforcement (“DLSE”) has reversed its position on shortened employee work weeks for exempt employees. Previously, and as reported in *First Wednesday* in May 2009, the DLSE had taken the position that companies could not shorten work weeks and reduce the pay of exempt salaried employees to avoid or reduce the need for layoffs. In a new opinion letter, dated August 19, 2009, the DLSE corrects its previous view and now states that companies can, under certain circumstances, reduce salaries of exempt employees in connection with a reduced work week. This opinion aligns California with long-standing federal opinions which have allowed the practice.

Here is the factual setting as presented to the DLSE. The employer is experiencing significant economic difficulties due to the present severe economic downturn facing California and the nation. The employer seeks to cut costs until business conditions improve and has already conducted job layoffs. The employer would like to reduce the number of its employees’ scheduled work days from 5 days to 4 days per week. In implementing this plan, the employer would not pay non-exempt employees for the day they were not required to work and would reduce the salaries of the exempt employees by 20%. The employer views this measure as highly unusual and temporary, in light of the economic challenges presented. As soon as business conditions permit, the employer intends to restore both the full 5-day work schedule and the full salaries of its exempt employees.

The DLSE noted that a long line of federal opinion letters, issued by the Department of Labor, consistently have allowed this practice. (As noted above, California’s DLSE previously had opined that employers could not reduce the salaries of

exempt employees based on economic conditions, without jeopardizing exempt status.) The DLSE's new letter is carefully written and conditional. The employer must be experiencing "significant economic difficulties" due to the present severe economic downturn. Furthermore, as soon as business conditions permit, this employer said it intends to restore both the full 5-day work schedule and the full salaries of its exempt employees. Based on the facts presented, the DLSE opines that the employer is not prohibited under California law from implementing the proposed 4-day work schedule with 20% salary cut for exempt employees. Provided that all other conditions for an applicable exemption are met, the employer may implement the change.

The Bad

In a recent case decided under the Federal Fair Labor Standards Act ("FLSA"), the Ninth Circuit Court of Appeals, which oversees California and other western states, held that managers can be held personally liable for employee wages. The case is *Boucher v. Shaw*, filed July 27, 2009. The issue was whether Ms. Boucher and other employees of a Nevada resort, Castaways, could recover their unpaid wages, accrued vacation and holiday pay when Castaways filed for bankruptcy. The court held that three managers (one of whom had no ownership interest) could be held personally liable if they had sufficient "control over the nature and structure of the employment relationship," admittedly a broad definition and intensely factual issue.

This interpretation is not limited to the bankruptcy context. Under the FLSA, the definition of an "employer" who might owe wages includes not only the company but "any person acting directly or indirectly in the interest of an employer in relation to an employee ...". Under federal law, therefore, managers may have personal liability for unpaid wages if the "economic control" test is met. Under California law, as decided by the California Supreme Court in *Reynolds v. Bement* in 2005, managers typically cannot be held personally liable for wage and hour violations. Interestingly, this is one area where federal law is more employee-friendly than its California counterpart.

The Ugly

In July 2009, the California Supreme Court decided a case involving some isolated use of profane language, and whether that conduct amounted to "severe or pervasive" misconduct under California's sexual harassment law. To be found liable for sexual harassment, typically, the harasser's conduct must be "severe or pervasive." This decision, *Hughes v. Pair*, arose in the context of a trustee-trust beneficiary relationship but the court analyzed the case under California's sexual harassment laws that apply to employers and the workplace.

Suzan Hughes, the plaintiff, is a former wife of Mark Hughes, the founder of Herbalife International, and the mother of Mark's child, Alex. When Mark died, he left his entire estate to their son. One of the trustees, Mr. Pair, allegedly harassed Suzan by calling her "sweetie" and "honey" on a telephone call in which he also made some inappropriate suggestions of how they might get together romantically. Later that evening, at a King Tut exhibit at the Los Angeles County Museum of Art, Pair greeted Alex, the son, and then told Suzan (in front of Alex), "I'll get you on your knees eventually. I'm going to f*** you one way or another."

Suzan's case was dismissed by the Court because Pair's conduct, while plainly inappropriate in the context of their business relationship, did not amount to unlawful harassment since it did not meet the "severe or pervasive" standard.

The lesson companies should take away from this case is that conduct which might be considered ugly or inappropriate does not necessarily rise to the level required to state a claim for sexual harassment. While business executives know not to condone this type of behavior, there are "gray areas." After investigating these claims and taking remedial steps, they should take a step back and not jump to conclusions by labeling any conduct as "sexual harassment." This would be a legal determination. From the company's vantage, it typically makes more sense to label the conduct as "inappropriate" or perhaps a "company code-of-conduct" violation, but not to concede that sexual harassment has been committed.

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