

THE EMPLOYER'S ADVISORY

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SALARY REDUCTIONS FOR REDUCED HOURS—A SHAM?

Savvy Sam is an exempt employee earning a salary of \$1,000 per week, and working a regular schedule of 45 hours per week (Monday-Friday and half of Saturday). Because of a reduced work load in the winters, the Company decides that in the future, for December through February, Sam doesn't have to work Saturdays, and his salary will be reduced to \$890 per week. Savvy Sam thinks this stinks. The Company never pays him more when he works 50 or 60 hours a week, why should it be allowed to reduce his salary when work load decreases? Savvy Sam sues for overtime pay for the past three years, claiming that his "salary" has been a sham and in reality he is an hourly employee. Will Savvy Sam succeed with his salary sham suit? Read on.

Under the Fair Labor Standards Act, an employer may not employ a person for more than 40 hours per workweek unless the employee receives overtime compensation of at least 1 ½ times the regular hourly rate for hours exceeding 40. The FLSA has several exemptions to its overtime requirement, including for employees

performing professional duties who are paid on a salary-basis. Both the duties-test and the salary-test must be satisfied for the employee to be exempt from overtime. The "salary" must be a guaranteed payment of at least \$455 per week.

Recently, a group of Wal-Mart pharmacists, whose duties clearly met the duty-basis test for exempt professionals, claimed that Wal-Mart failed to meet the salary-basis test because of its practice of reducing their salary during months when pharmacy sales decreased and their scheduled hours were reduced. As one pharmacist explained, "because the number of prescriptions filled was not high enough to justify me working my 45 hours per week, my payroll and hours were reduced."

But the Court found that this practice was consistent with the FLSA's salary-basis regulations: "under an FLSA regulation and the DOL's interpretation of this regulation, an employer may prospectively reduce salary to accommodate the employer's business needs, unless it is done with such frequency that the salary is the functional equivalent of an hourly wage." Further, the Court held that the requirement that exempt employees receive at least a predetermined amount as salary does not preclude an employer

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from making occasional prospective salary reductions before the affected pay period in response to business needs. An infrequent reduction in salary because of a reduction in hours is acceptable.

The Court warned that the salary-basis test “can be defeated by a pervasive manipulation of payments that makes a sham of what purports to be salary.” For example, when an employer has a regular practice each Friday of informing its professional staff of the work schedule for the following week and of making prospective adjustments in compensation for that week, such adjustments to salary are a sham—an employer’s attempt to obtain the benefits of the FLSA exemption without accepting the burdens of a salary-payment plan. The employee’s wage is the functional equivalent of an hourly wage, making the employee non-exempt and entitled to overtime payments. *2007 WL 201250*.

Bottom line: Savvy Sam will likely lose because the salary adjustment is limited to once a year for a low-demand period. A future reduction in salary because of reduced hours of work can be used to meet business needs without losing exempt status if done infrequently.

FMLA IN REVIEW

A trilogy of Family and Medical Leave Act cases were recently decided that are favorable to employers, and emphasize the importance of employers carefully reviewing each request for FMLA leave on a case-by-case basis.

Late arrivals do not necessarily equal intermittent leave. Throughout her employment, Brown was frequently late for work. In fact, during a 4-month period, she had 45 late arrivals or

absences. Due to her numerous absences, which Brown claimed were health-related, her employer, EMMC, offered Brown “medical leave,” but not specifically intermittent FMLA leave. Brown rejected EMMC’s offer of leave because she said that she could not afford to take unpaid leave. So, EMMC terminated Brown for excessive violation of its attendance policy. Brown’s attendance problems were never due to a doctor’s appointment or the need to follow a medical treatment plan. In fact, during her employment, no doctor ever told Brown that it was medically necessary for her to be late to work.

After her termination, Brown received a diagnosis that she suffered from a connective tissue disorder that, according to her doctor, made it “impossible for Brown to continue the functions of her job or to arrive at work on time.”

In her lawsuit, Brown claimed that because EMMC knew that she was sick, EMMC had an obligation to suggest that she use intermittent FMLA leave to excuse her tardiness. The Court declined to impose such a requirement on EMMC. In Brown’s situation, the Court found that “Brown never told EMMC that she was seeking leave for the short durations of her late arrivals.” Thus, the Court concluded, EMMC could not have known that the common occurrence of Brown’s late arrivals was her attempt to take leave. Finally, the Court held that the FMLA did not require individualized notice of the specific right to intermittent FMLA leave. *Brown v. Eastern Maine Medical Center, 2007WL3002999*.

Caveat: Had Brown’s doctor advised EMMC before she was terminated that her connective tissue disorder required her to arrive late at work on occasion, necessitating intermittent FMLA leave for this purpose, Brown would likely have won her FMLA claim.

All medical certifications are not good medical certifications. In an attempt to qualify for FMLA for a past absence, Donna Novak sent an FMLA medical certification form to her doctor requesting that the doctor provide the necessary information for her to qualify for FMLA leave. As requested, the doctor filled out the form and faxed it to Novak's employer, MetroHealth. But the doctor omitted required information, such as a description of the medical facts and the likely duration of Novak's condition. After learning that the certificate was incomplete, Novak contacted the doctor's assistant and told the assistant what to write in the empty spaces. The assistant complied and sent the completed form to MetroHealth.

But upon receipt of the notice and discovery of Novak's contacts with the doctor's office, MetroHealth questioned the authenticity of the medical form and gave Novak another week to submit the requested information. At that point, Novak again contacted her doctor and, in that conversation, told that doctor what another doctor had advised her regarding her condition. Using Novak's second hand information, the doctor completed the medical certification and submitted it to MetroHealth. Upon receipt, MetroHealth determined that the medical notices provided contradictory information that did not qualify under its FMLA policy. So, MetroHealth denied Novak's request to treat the leave as FMLA and terminated her because the absences were uncovered.

Novak sued MetroHealth and claimed that the company violated the FMLA. The 6th Circuit Court of Appeals found that the FMLA regulations require that the medical certification provided by the employee is presumptively valid if it contains the required information and is signed by the health care provider. But it also found that this presumption may be overcome by showing that the "certification is invalid or inauthentic." And the

Court did, in fact, find that MetroHealth had overcome that presumption due to the "suspicious and contradictory nature" of the medical certification form.

Novak, though, argued that MetroHealth should have advised her of the deficiencies in the certification and allowed her a reasonable opportunity to correct them. While the Court agreed that such a requirement is provided by the FMLA, the Court determined that MetroHealth satisfied this duty by notifying her of the problems and giving her a week to submit a new certification. Novak also argued that if MetroHealth was not satisfied with the certification that it should have sought a second opinion, as permitted by the FMLA, before denying her leave. The Court disagreed with this argument and concluded that the FMLA only states that an employer "may require that the employee obtain the opinion of a second health care provider." An employer's failure to require a second certification does not preclude the employer from contesting the employee's certification.

Practical Tip. While MetroHealth's handling of Novak's request for FMLA was deemed lawful, employers should reject an employee's medical certification only if the employer has good evidence that the certification is invalid or inauthentic.

Holidays count as work missed during an intermittent leave. Linda Mellen requested that her employer grant her intermittent leave until November 19. Her employer, Boston University, agreed. Then, Mellen sent a letter to the HR Manager stating that she was extending her leave by one day because of a holiday falling within her FMLA leave period. The HR Manager responded, advising Mellen that holidays do not extend an employee's FMLA leave, and BU expected Mellen

back at work on November 19. When Mellen did not return to work on November 19, she was fired.

Mellen sued BU claiming that it interfered with her FMLA right by miscalculating her leave period. Mellen contended that she was denied the full number of FMLA days owed her because BU did not extend her leave to account for holidays that fell within her leave. BU claimed that an FMLA regulation provided that in calculating the amount of FMLA leave taken, holidays occurring within a week taken as FMLA leave shall not affect the FMLA leave. The Court determined that BU was correct--the amount of leave used includes the holiday.

Practical Tip. The *Mellen* Court emphasized the importance of communicating with employees in writing on leave issues. After all, BU's defense was primarily premised on its letter to Mellen advising her that she was not entitled to a one-day extension of leave based on the holiday.

CONDUCT SPEAKS LOUDER THAN WORDS . . .

. . . is the message a California Court sent to Federal Express, by ruling that its drivers were being misclassified as independent contractors. In order to get reimbursement for certain work-related expenses, a class of Fed-Ex drivers sued Fed-Ex claiming that, although Fed-Ex labeled them "independent contractors" during their employment, they were actually being treated as employees, entitling them to certain expense reimbursements.

In its defense, Fed-Ex argued that the Operating Agreement between the company and its drivers clearly stated that the drivers were independent contractors. Fed-Ex pointed to

language in the Agreement that said "the manner and means" to satisfy the objectives of the contract "are within the discretion of the [drivers]," and that Fed-Ex did not have the "authority to impose any term or condition contrary to this understanding." Fed-Ex argued that this showed it did not possess the requisite control over the drivers to make them employees. Further, Fed-Ex argued that this was a "true entrepreneurial opportunity" for the drivers, and that this ability to run and grow their own business supported independent contractor status.

Despite the independent contractor language in the Operating Agreement, the court found that, in practice, it was evident that the drivers were really employees. The evidence showed that Fed-Ex had an enormous amount of control over its drivers. It mandated how the drivers must look, that they wear uniforms, and that they use specific scanners and forms obtained from Fed-Ex. The drivers were provided with many standard employee benefits, worked regular full-time schedules with regular routes, and the customers were all Fed-Ex customers. Contrary to Fed-Ex's argument that the position provided drivers with an "entrepreneurial opportunity," the drivers' supervisors could unilaterally reconfigure the drivers' routes without regard to the drivers' resulting loss of income.

In addition, no experience was required for the job, and the only skill required was the ability to drive. The drivers were not engaged in a separate profession or business, and they were paid weekly, not by the job. Finally, the drivers were required to work exclusively for Fed-Ex. Based on this evidence, the court ruled that Fed-Ex's drivers were employees, not independent contractors, and that they were entitled to the expense reimbursements they requested. See *Estrada v. Fed Ex*, 2007WL2297469.

Lesson: Labeling a worker as an independent contractor does not make him one. The courts will ignore this designation if the parties' actual conduct establishes a different relationship. In Colorado, workers who are misclassified as independent contractors can create employer liability for reimbursement of self-employment taxes and payment to the IRS of the worker's back taxes that should have been withheld; minimum wage and overtime pay; unemployment taxes; FMLA leave benefits; benefits under health plans and pension plans provided to employees; and, most significantly, workers' compensation liability for health care costs and lost wages for workers injured on the job. Each employment-related statute has penalty provisions that can more than double the liability. Throw in the attorney fees expended in litigation, and the potential cost to the company of mislabeling an employee as an independent contractor can be life-threatening.

NOW WHAT TO DO ABOUT NO-MATCH LETTERS ?

No-match letters are those confusing notices employers receive from the Social Security Administration, advising them that their employee's name and social security number do not match. On August 15, 2007, the Department of Homeland Security (DHS) promulgated a final rule entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." This rule, which was discussed in the 3rd Quarter 2007, Employer's Advisory, gives employers definite steps to take in response to no-match letters from Social Security. If the employer does not follow these steps, then the no-match letter is evidence that the employer knew of the employee's illegal status.

The American Federation of Labor did not like the rule, which ultimately requires that the

employee be fired if the discrepancy can not be resolved within a specified period of time. The AFL filed suit in a California court against DHS, asking that the court enjoin DHS from enforcing the rule. The Court granted a preliminary injunction, effectively suspending enforcement of DHS's rule. *American Federation of Labor v. Chertoff*, 2007WL 2972952.

But DHS has not given up. In November 2007, it filed an appeal with the Ninth Circuit, seeking reversal of the preliminary injunction. While this appeal is pending, DHS is working on revisions of the rule, which are expected by March 2008. In the interim, the rule remains suspended and, once again, there is no clear guidance regarding what employers should do in response to No-Match letters. The saga goes on.

NEW FORM I-9 IS REQUIRED

Employers must use an updated Form I-9 for employees hired on or after December 26, 2007. The form is available on-line at www.uscis.gov/files/form/i-9.pdf. The changes from the old Form I-9 are minor, but include a revised listing of documents that are acceptable as proof of legal status.

THE RISING MINIMUM WAGE

Due to a constitutional amendment that passed voter approval last year in Colorado, the minimum wage will increase each calendar year by any increase in the CPI. This year, it rose from \$6.85 per hour to \$7.02 per hour, effective January 1, 2008. The maximum tip credit remains at \$3.02, meaning that "tipped" employees must be paid at least \$4.00 per hour. For employees paid at minimum wage, every January 1 will be a Happy New Year!

Q & A

Q. Max received a below average evaluation in December and responded by threatening in a letter to hire an attorney and file charges of sex discrimination with the EEOC. This threat angered me because the evaluation was based on performance and not on his sex. I fired him for "being threatening and negative in response to constructive criticism." Now he has filed an EEOC charge of unlawful retaliation against the Company based on my termination notice. Did I goof-up?

A. Yes. An employee's threat to hire an attorney and sue for alleged discrimination (sex, race, national origin, or religious discrimination) is protected conduct under Title VII of the Civil Rights Act of 1964. Discharging the employee for this reason is unlawful retaliation. The company may want to quickly make an unconditional offer of reinstatement to Max followed by an offer of settlement in order to limit the damages for which it may be liable and avoid the cost of litigation. This case could be a big loser for you, unless you can establish that you would have fired him anyway for other lawful reasons. *Williams v. Alabama Dept. of Transp.*, 509 F.Supp.2d 1046 (M.D.Ala.,2007).

Q. What is the rule now concerning an employer's right in Colorado to designate who will be the treating physician for an employee injured on the job?

A. Effective January 1, 2008, employers no longer have the exclusive right to designate the treating physician. Instead, employers must maintain a list of at least two physicians

or two corporate medical providers, or one physician and one corporate medical provider, from which the injured employee selects his or her treating physician. If there are fewer than four such providers within 30 miles of the employer's place of business who are willing to provide services, then the employer may designate one physician or one corporate medical provider. If the employer is a health care provider or a public entity with its own provider system, the physician may be designated from the employer's own system. C.R.S. §8-43-404(5).

Q. Every time we give someone a raise it causes havoc in the office because it gets around and then others are pounding on my door demanding that they get a raise also. Can we prohibit employees from talking about raises to other employees and discipline or fire them for violating our rule?

A. A rule prohibiting employees from sharing information about their raises, benefits, or other terms and conditions of employment can not be applied by private employers to non-management or non-supervisory employees. The National Labor Relations Act protects the right of employees to share with each other this type of information. Management and supervisors are not covered by the National Labor Relations Act and, therefore, can be restricted. Also, employees in payroll, human resources or other positions that give them access to confidential personnel information regarding other employees have no right to disclose this information about others.