

the Checkoff

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The Labor & Employment Law Section

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Department of Labor Proposes New Overtime Rules

by Raquel Elejabarrieta, Esq.

On March 28, 2003, the Department of Labor proposed a drastic overhaul of the 1938 Fair Labor Standards Act's overtime pay requirements affecting nearly 22 million Americans. The Fair Labor Standards Act, also known as the FLSA or wage and hour law, sets the minimum age, restricts child labor, and mandates overtime. These changes are of particular importance to Florida, specifically South Florida, because South Florida leads the nation in number of lawsuits filed by workers against their employers under the FLSA.

The proposed changes include two key elements: an increase in the salary threshold for employees not entitled to overtime

and new definitions on the type of jobs and industries in which employees qualify for overtime. These proposed revisions would guarantee overtime payments to 1.3 million low wage employees, disqualify thousands of white collar employees earning more than \$22,100 a year, and give clarification to millions of employees whose pay status is now uncertain.

Currently, an employee earning only \$155 a week can qualify as a "white collar" employee not entitled to overtime pay. The proposal raises that salary threshold to \$425 a week or \$10.62 an hour. This change is likely to benefit most assistant managers

See "New Overtime Rules" page 9

An Update on the Enforcement of Restrictive Covenants by an Assignee or Successor under Florida Law

by Scott Silverman

Section 542.335(f), Fla. Stat., provides that "a court shall not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract, provided . . . in the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party's assignee or successor." Although the statutory language suggests that a corporate entity that did not actually contract with the former employee may not enforce a restrictive covenant where the covenant does not expressly authorize enforcement by an assignee or successor, in *Corporate Express*

Office Prods., Inc. v. Phillips, 2003 Fla. Lexis 521 (Fla. April 17, 2003), the Florida Supreme Court held that there are limited circumstances in which enforcement will be permitted.

As explained below, although this decision was rendered pursuant to the predecessor statute, Section 542.33 (1985), it has equal application to cases arising under the amended statute, Section 542.335 (1996). Accordingly, counsel who are called upon to assess enforceability questions with respect to contracts entered both before and after the effective date of the amended statute must understand the background and holding of this important case.

see "Restrictive Covenants," page 9

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Chair's Report



In February 2003, the Labor & Employment Law Section held a Long Range Planning Retreat for members of the Executive Council and Committee Chairs. This was the third bi-annual retreat, and was held

in conjunction with the Section's certification review program in Orlando.

I want to thank all of the Section members who took a Saturday off from their busy schedules to participate in the retreat. The limits of traditional Executive Council meetings simply do not permit the kind of deliberation and discourse necessary to effect any major changes in the direction the Section needs to take to be of maximum service to its members. I want to extend special thanks to Cary Singletary, Dave Linesch and the rest of the Long Range Planning Committee, who undertake the responsibility for making the retreat a reality. Cary was a primary architect of the very first retreat and has continued to spearhead the effort for the last two as well. I am also grateful to Lisa Gunther, who has *endured* our high-spirited debate for three retreats and four years.

One of the primary results of the 2003 retreat was a resolution to reorganize the Section's committee structure. The bulk of the Section

committees have always been defined by substantive legal/practice areas: EEO; Labor Relations; Litigation/ADR; Individual Rights; Employee Benefits; Legislative; and Federal Labor Standards. While these committees were modified in recent years to more accurately reflect the practice trends of our growing Section, the substantive "topic" delineation continued. Unfortunately, our committee structure has not fostered greater innovation and involvement in the Section. In an attempt, to expand involvement and resources, we are working on reorganizing the committee structure to reflect task/action-plan descriptions based upon each committee's function.

What we have observed in the past is that committees created around a fairly concrete task, such as the original certification subcommittee, the website subcommittee, and of course the CLE committee, accomplished the most and created the best opportunity for newer members. In contrast, when I attempted to appoint "fresh faces" to co-chair substantive law committees, I could not give a satisfactory answer to "what does that committee do?"

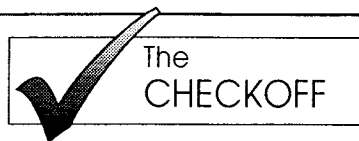
In order to provide a better answer to that question for future outreach efforts, I have solicited and received a number of thoughtful suggestions for task-based committees. Principal among these is to retain our CLE, website and publications committee,

perhaps under the auspices of an overarching Legal Education Committee. Tracking and reporting substantive law developments would still have a role within this committee. The difference, hopefully, would be that the information offered would be easily accessible to the *entire* Section membership instead of just the committees and Executive Council. In addition, we will likely retain our special projects committee as a proving ground for innovative ideas/projects and a catchall for dealing with issues-of-the-day like EPLI and unauthorized practice of law issues.

There have been many excellent suggestions for new committees tasked to work with the ABA, local Bars (many of which have Labor & Employment committees of their own) and law schools. In the same vein, we will continue our outreach to the judiciary through our Judicial Education Committee. Finally, we will consider a committee devoted exclusively to expanding member involvement and perhaps charged with membership surveys, "new member" receptions, and a mentoring program.

We still have much work to do to make this new structure a reality, and a functional one at that! Nevertheless, I am excited about the prospect of launching this new effort to expand the role of the Section for its members.

— Courtney B. Wilson, Chair



The Checkoff is prepared and published by the Labor and Employment Law Section of The Florida Bar.

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Supreme Court Strikes Down Secretary's Automatic Penalty for Failing to Designate Leave as FMLA Leave

by Jennifer Fowler-Hermes

Enacted in 1993 to promote the stability and economic security of families, the Family and Medical Leave Act ("FMLA") guarantees eligible¹ employees twelve (12) weeks of unpaid leave in a one (1) year period.² An eligible employee may take FMLA leave for one or more of the following reasons: for the birth of the employee's child; the placement of a child with the employee for adoption or foster care; to care for a parent, child or spouse with serious health conditions³; and, when the employee suffers from a serious health condition.⁴ The 12 week leave period is the maximum required by the FMLA,⁵ and employers may require that employees use any accrued paid leave as part of their 12 week FMLA entitlement.⁶ During the leave period, employers are required to maintain coverage under any group health plan that the employee would have been entitled to if she did not take leave.⁷ At the end of an employee's leave, employers have a duty to reinstate the employee if she is able to return to work.⁸ Employers are prohibited from interfering with employees' exercise of their FMLA rights and discriminating against employees who exercise their rights.⁹

Congress afforded the Secretary of Labor the authority to issue regulations necessary to carry out the FMLA.¹⁰ Pursuant to this authority, the Secretary has issued regulations directing employers on how to administer the FMLA.¹¹ Generally, courts give the Secretary's regulations considerable deference.¹² However, such deference has limits: A regulation cannot stand if it is arbitrary, capricious, or manifestly contrary to the statute.¹³ In the past few years, there has been a considerable divergence of opinion over whether the Secretary exceeded her authority when enacting regulations that require employers to provide individual notice to employees that leave will be designated as FMLA leave¹⁴ and penalize employers for failing to timely

provide this notice.¹⁵

On March 19, 2002, in *Ragsdale, et al. v. Wolverine World Wide, Inc.*,¹⁶ the Supreme Court set the record straight with respect to 29 C.F.R. §825.700(a), the regulation denying employers any credit for leave granted before an employee is provided notice that her leave will be designated FMLA leave. It held that the regulation is not a valid exercise of the Secretary of Labor's authority. The Court found that this regulation is not only inconsistent with Congressional intent, but also establishes sanctions that are unconnected to any impairment suffered by the employee.¹⁷

Tracy Ragsdale ("Ragsdale") began her employment with Wolverine World Wide, Inc. ("Wolverine"), a shoe factory, on March 17, 1995.¹⁸ In February 1996, she was diagnosed with Hodgkins disease and had to undergo surgery and months of radiation treatment.¹⁹ Wolverine's leave policy allows employees with six months of service, to take leave for up to seven months. On February 21, 1996,

Ragsdale requested and was granted a one month leave.²⁰ On March 18, April 22, May 21, June 20, July 22 and August 15, 1996, she requested and received one month extensions of her leave.²¹ During Ragsdale's leave, Wolverine held her position and, for six out of the seven months she was on leave, it maintained her health benefits and paid her health insurance premiums.²² However, Wolverine failed to notify Ragsdale of her FMLA eligibility or of her right to have her leave designated as FMLA.²³

On September 20, 1996, when Ragsdale exhausted her leave entitlement under Wolverine's leave policy and was unable to return to work she was terminated.²⁴ On September 26, 1996, Ragsdale requested additional FMLA leave or in the alternative permission to work on a part-time basis. Wolverine denied her request. On December 22, 1996, Ragsdale filed suit against Wolverine setting forth claims under the FMLA, ADA and Arkansas Act (Ark. Code

continued, next page

Next Edition of *Checkoff* To Honor Dean Vause

On May 9, 2003, Gary Vause, Dean and Vice President of Stetson University College of Law, renowned legal scholar and long-time friend to the Labor and Employment Section died from cancer. Dean Vause was 60.

While everyone within the Section has indirectly benefited from Dean Vause's dedication and contributions, many Section members had direct and significant contact with and assistance from Dean Vause over the years. The next edition of the *Checkoff* will have a space reserved for anyone wishing to contribute any comments (long or short) about Dean Vause, his contributions and his legacy. In addition, the next *Checkoff* will be dedicated to Dean Vause.

Anyone interested in contributing to this cause should call or email Michael Spellman at (850) 891-8554 or spellmam@talgov.com. The deadline for contributing comments is July 28, 2003.

COURT STRIKES DOWN

from preceding page

§16-123-101, *et. seq.*).²⁵ Ragsdale claimed that because Wolverine had not provided her with individualized notice that any portion of her 30 week leave, provided for by Wolverine's leave policy, was designated as FMLA leave, she was entitled to an additional 12 weeks of leave. Thus, she was claiming that due to Wolverine's failure to designate, she should have a total of 42 weeks of leave. Wolverine successfully moved for summary judgment on Ragsdale's FMLA claim, asserting that 29 C.F.R. §825.700(a), constitutes an "erroneous interpretation of the FMLA."²⁶

Ragsdale appealed and on July 11, 2000, the Eighth Circuit Court of Appeal affirmed the district court's decision.²⁷ The Eighth Circuit Court, following the Eleventh Circuit's precedent in *McGregor*, 180 F.3d at 308, found that the text of the FMLA did not contemplate that an employer would be required to provide more than 12 weeks of leave.²⁸ Noting that in some circumstances 29 C.F.R. §825.700(a) requires employers to provide more than 12 weeks of leave, it determined that the regulation is an impermissible interpretation of the FMLA and "must be struck down."²⁹ Ragsdale petitioned for certiorari. Certiorari was granted on June 25, 2001.³⁰

The Supreme Court's review of the case focused only on the penalty for failing to comply with the Secretary's additional notice requirements.³¹ It did not address whether the additional, individualized,³² notice requirement, set forth in 29 C.F.R. §825.208, is a valid exercise of regulatory authority.³³ Ragsdale argued that §825.700(a) reflects the Secretary's understanding that when an employer fails to comply with the designation requirement, it could deny, restrain or interfere with an employee's FMLA leave rights.³⁴ Her argument, which is adopted by the dissent,³⁵ is that the designation requirement "facilitates leave planning, allowing employees to organize their health treatments or family obligations around the total amount of leave that will ultimately be provided."³⁶

The majority agreed that a failure to provide notice of a designation may interfere with an employee's FMLA leave rights, but found "the more extreme [position] embodied in 825.700(a) is not [reasonable] . . . The regulation establishes an irrefutable presumption that the employee's exercise of FMLA rights [is] impaired [by a failure to designate] and that the employee deserves 12 more weeks."³⁷ The majority explained how this presumption "relieves employee's burden of proving any real impairment of their rights and resulting prejudice."³⁸ Calling this a

"regulatory slight of hand" the Court opined that the effect of the regulation was to run around important limitations of the statute's remedial scheme and thus alter the FMLA in a fundamental way.³⁹

By its nature, the remedy created by Congress requires retrospective, case-by-case examination the Secretary now seeks to eliminate . . . [The Secretary also seeks] to amend the FMLA's most fundamental substantive guarantee, the employee's entitlement to a total of 12 work weeks during any twelve month period.⁴⁰

Further, the Court theorized that the regulation could cause employers to discontinue plans that provide more generous benefits than provided for by the FMLA.⁴¹ Such a result is contrary to §2653 of the FMLA, which encourages employers to provide more than the statute requires.

The Court held that §825.700(a) exceeded the Secretary's authority to issue regulations to carry out the FMLA, as it "effects an impermissible alteration" of the FMLA.⁴² Although this decision is a victory for employers, it does not eliminate the administrative procedures employers must follow. Accordingly, designation forms should still be provided to employees and employers should not wait to designate.

Jennifer Fowler-Hermes is an associate with Kunkel, Miller & Hamant, representing management in employment related disputes. Ms. Fowler-Hermes received both her Bachelor of Arts (1994 with highest honors) and her Juris Doctorate (1997) from the University of Florida.

Endnotes:

¹ An employee is eligible for FMLA leave if she has worked for a covered employer for at least 1,250 hours during the preceding twelve months and worked for the employer for at least 12 months. See 29 U.S.C. §2611(2)(A). A covered employer is "any person engaged in commerce or in an industry affected commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." See 29 U.S.C. §2611(4)(A)(i). The Department of Labor takes the position that all smaller employers who lease their employees are covered. See 29 C.F.R. §825.106. Some practitioners feel that this is another example of the Secretary exceeding her authority. All public employers are covered. See 29 U.S.C. §2611(4)(A)(iii).

WANTED: ARTICLES

The Section needs articles for the *Checkoff* and the *Bar Journal*. If you are interested in submitting an article, contact either Michael Spellman (850/891-8554) or (SpellmaM@talgov.com) or Stuart Rosenfeldt (954/522-3456) or (srosenfeldt@rrdplaw.com) to confirm that your topic is available.

REWARD: \$150*

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Article deadline for next Checkoff is July 28 2003.