Wiggin & Dana

Employment Advisory

Fall 2001

Department of Labor Revises Its Wage and Hour Regulations

As Connecticut employers well know, they have been operating under archaic and what many feel to be unreasonable wage and hour laws. Particularly difficult to administer have been the rules addressing exempt employees. Most commonly the questions arise in the context of whether an employee falls within the wage and hour laws' definition of exempt, and under what circumstances an exempt employee's salary may be reduced.

Effective July 25, 2001, the rules have been revised, with mixed results for employers. On the one hand, employers must now meet a higher salary threshhold test prior to being able to legally classify an employee as exempt. On the other hand, Connecticut employers may now dock an exempt employee's pay under a broader range of circumstances.

Salary Threshold

Prior to the effective date of the new regulations, a white collar employee (i.e., one employed in an executive, administrative or professional capacity) was required to be paid at least one hundred twenty-five dollars per week in order to be eligible for an exemption. To be eligible for exemption under the shorter test, employees must have earned at least one hundred seventy-five dollars. Under the new regulations, these thresholds have been increased to four hundred and four hundred and seventy-five dollars respectively. Thus, as a general rule, employees must be paid a salary of at least $20,800 in order to be eligible for an exemption under Connecticut wage and hour laws.

Salary Basis

Only employees paid on a salary basis are eligible for an overtime exemption. Salary basis means a predetermined amount paid for each pay period, regardless of the number of days or hours worked and which is not generally subject to reduction. Employees need not be paid for any workweek in which they perform no work. Prior to implementation of the new regulations, deductions to a salary could be made only under the following circumstances: (1) the first and last week of work could be prorated to reflect those days actually worked, and (2) employees could be paid only for time actually worked in a week in which they are absent from work due to a Family and Medical Leave Act qualifying event.

Changes to the Docking Provisions

Connecticut employers may now deduct from an exempt employee's salary in five circumstances. In addition to the two circumstances mentioned above, employers may deduct for (1) one or more full days if the employee is absent for personal reasons other than sickness or accident; (2) one or more full days of sickness or disability provided the deduction is made pursuant to a bona fide plan, policy or practice of making deductions from an employee's salary after sickness or disability leave has been exhausted: and (3) one or more full days if the employee is absent as a result of a disciplinary suspension for violating a safety rule of major significance.

A Cautionary Note

Employers should be careful not to deduct for absences that do not fall within the five noted exceptions. In particular, no deductions can be made for absences of less than a full day unless it is a Family and Medical Leave Act qualifying absence, or it is taken pursuant to a bona fide paid time off benefits plan that specifically authorizes the substitution or reduction from accrued benefits for the time that an employee

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Wiggin & Dana LLP
Counsellors at Law

One Century Tower
P.O. Box 1832
New Haven,
Connecticut
06508-1832
203.498.4400

One CityPlace
185 Asylum Street
Hartford, Connecticut
06103-3402
860.297.3700

400 Atlantic Street
P.O. Box 110325
Stamford, Connecticut
06911-0325
203.363.7600

www.wiggin.com

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Employer's Failure to Keep Records May Result in Liability for Discrimination

The failure to keep accurate employment related records in accordance with applicable law may have broader implications than many employers suppose. Indeed, in a recent Second Circuit case, *Byrnie v. Town of Cromwell*, the Court of Appeals held that an employer's destruction of records which it is obligated to maintain under federal law may not only hamper the employer's ability to defend an employment discrimination claim, but also favor a plaintiff employee by providing an inference that the documents contained information that would help the employee to prove unlawful discrimination.

The Case

The Town of Cromwell School District advertised for an art teacher and composed a hiring committee to screen the applicants. Byrnie, a 64 year old male, had extensive experience teaching art in the school district and applied for the position, along with 40 other candidates. After a lengthy recruitment process the field was narrowed to four, including Byrnie. The school district ultimately hired a 42 year old woman.

Byrnie subsequently filed suit, claiming both age and sex discrimination. After dismissal at the Commission on Human Rights and Opportunities ("CCHRO") and the district court's subsequent granting of summary judgment for the school district, Byrnie appealed to the Second Circuit. On appeal, Byrnie claimed that because the school district destroyed documents relevant to the hiring process, he was entitled to an "adverse inference" that the destroyed records would have enabled him to prove discrimination. The destroyed records included: the applications of the other candidates, the ballots used by the hiring committee, and the talley sheet of committee members' votes. Also missing were the notes taken by hiring committee members during the interviews and the memorandum prepared by the principal upon which the school district's lawyers relied to craft the Answer to the CCHRO complaint.

The Court Decision

The Appeals Court agreed that Byrnie was entitled to an "adverse inference" due to the school district's destruction of the documents. First, the Court held that the school district had a legal duty to retain the documents because Byrnie had filed a charge with the CCHRO thereby putting the school district on notice of potential litigation and the relevancy of the documents. Moreover, the Court found, the school district was required by federal regulations implementing Title VII and the Americans with Disabilities Act to retain all records pertaining to employment decisions for a period of two years.

In determining what effect, if any, the destruction of the documents ought to have on the litigation, the Court announced a rule of which employers should be aware. If an employer destroys documents that it is obligated to retain under federal law, then an employee may be entitled to an inference at trial that the records would have helped him establish his claims. In order to be entitled to this inference, the employee must first prove that he is a member of the general class of people that the regulatory agency that issued the record-keeping requirement intended to protect. The employee must also show that the records were destroyed with a culpable state of mind (e.g., knowingly) and that they were relevant to a party's claim or defense.

Practical Implications

The rule announced in this case is relevant not only to discrimination claims, but also, for example, wage and hour claims where payroll documents may have been destroyed, and requests for reasonable accommodation under the Americans With Disabilities Act where documents relating to the interactive process are at issue. In light of this case, employers should ensure that they are maintaining employment records for the required time periods as mandated by state and federal law. For more information about record-keeping requirements under federal law, please see our *In Focus* section of this *Employment Advisory*.

Sexual Harassment Prevention Training Seminars

To assist employers in meeting Connecticut training obligations, Wiggin & Dana will present three seminars on the topic of sexual harassment:

October 2, 2001: New Haven

October 3, 2001: Stamford

October 4, 2001: Hartford

For more information on these training sessions, please contact Marcia Keegan at 860.297.3733.

Supreme Court Rules that ERISA Pre-empts State Beneficiary Designation Statute

In the recent case, *Egelhoff v. Egelhoff*, the U.S. Supreme Court held that a Washington state statute which automatically revoked the designation of a spouse as a beneficiary under an employee benefit plan upon a divorce was preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). This decision is good news for plan administrators.

David Egelhoff and his second wife, Donna, were divorced in April of 1994. Two months later, David died intestate following a traffic accident. At the time of his death, Donna Egelhoff was still designated as the beneficiary under David's life insurance policy and pension plan with his employer. David's children from his first marriage sued Donna claiming they were entitled to the life insurance and pension plan benefits because a Washington state statute automatically revoked her beneficiary designation upon the divorce, leaving David's children as the statutory heirs. Ms. Egelhoff countered that the state statute was preempted by ERISA. ERISA preempts any state law that "relates to" an employee benefit plan.

The U.S. Supreme Court agreed with Donna Egelhoff that ERISA did indeed preempt the Washington statute. The Court found that the statute has an "impermissible connection" with an ERISA plan because it attempted to dictate who should receive the benefits under an ERISA plan. Under ERISA, the plan itself, not a state law, must "specify the basis on which payments are made to and from the plan." Furthermore, ERISA requires that the plan be administered according to the "documents and instruments governing the plan." The state law, by voiding the beneficiary designation, in effect required a plan administrator to ignore the plan documents.

The Court further explained that the statute interfered with nationally uniform plan administration by requiring plan administrators to familiarize themselves with the state laws and thus undermining ERISA's objective of minimizing administrative burdens. The problems caused by application of state law are further compounded where more than one state is involved, e.g., the participant lives in one state, the beneficiary lives in another state, and the employer is located in a third state.

The decision by the Supreme Court should allow plan administrators to rely on beneficiary designations on record, without having to resort to state family or probate laws to make this determination. It is unfortunate in this case that the issue of the pension and life insurance proceeds was not addressed in the divorce proceedings. For example, pension benefits are often divided as part of the settlement via a qualified domestic relations order ("QDRO"). A QDRO may also designate whether or not the former spouse will be treated as the surviving spouse under a pension plan.

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is absent from work, provided the employee receives payment in an amount equal to his guaranteed salary. Moreover, no deductions may be made for any part of a workweek absence that is attributable to (1) lack of work occasioned by the operating requirements of the employer; (2) jury or witness duty; or (3) temporary military leave.

Employers should also note that deductions for disciplinary suspensions are only allowed if the suspension is the result of violating a major safety rule. Safety rules of major significance include only those relating to the prevention of serious danger to the employer's premises, or to other employees. No deductions can be made for an absence of less than one week resulting from a disciplinary suspension for violating ordinary rules of employee conduct.

Federal Record Keeping Requirements

Wiggin & Dana
Employment and Benefits

John G. Zandy, Chair
203.498.4330

Karen L. Clute
203.498.4349

Sherry L. Dominick
203.498.4331

Stephen B. Harris
860.297.3732

Peter Lefeber
203.498.4329

Lawrence Peikes
203.363.7609

Peter M. Wendzel
860.297.3705

Marcia K. Keegan
860.297.3733

William J. Albinger
Lori Rittman Clark
Elizabeth M. Garrett
Joan Allen Rowe
Gayle C. Wintjen
Mary Bohan, paralegal
Gisele Roemer, paralegal
Robin Clark, Affirmative Action Specialist

Business Practice
William A. Perrone, Chair
203.363.7604

Health Care
Jeanette C. Schreiber, Chair
203.498.4334

Litigation
Shaun S. Sullivan, Chair
203.498.4315

Real Estate, Environmental and Land Use
Susan J. Bryson, Chair
203.498.4337

Trusts and Estates
Leonard Leader, Chair
203.363.7602

Utilities
Linda L. Randell, Chair
203.498.4322

Federal laws impose different requirements regarding the length of time employment-related documents must be kept. Here is a brief summary of some of those requirements.

1. What kind of records must be kept under Title VII of the Civil Rights Act ("Title VII") and the Americans With Disabilities Act? How long must they be maintained?

Title VII prohibits discrimination on the basis of race, sex, color, religion, national origin and ethnicity. The Americans With Disabilities Act ("ADA") prohibits discrimination on account of certain disabilities and may require employers to make workplace accommodations to disabled employees. The requirements for Title VII and the ADA are the same.

Personnel records, including job applications and other hiring-related documents, records relating to demotion, promotion or transfer, and records regarding requests for reasonable accommodations, must be kept for one year from the date of making the record or the personnel action involved, whichever is later. Records relating to involuntary termination of an employee must be retained for one year from the date of termination. If a charge of discrimination is filed with the EEOC, all records relevant to the claims asserted must be kept until final disposition of the charge, which means either the last date on which an employee may file a complaint in court, or, if a court complaint is filed, when the court litigation terminates.

2. What are the record-keeping requirements under the Fair Labor Standards Act ("FLSA")?

The FLSA governs, among other things, the payment of wages to employees and the hours they may work. The requirements under the FLSA are vast. Below is a non-exhaustive summary of some its record-keeping requirements. Note that these records must be held at the place of employment or a central record-keeping office.

The following records must be kept for three years: payroll records, union agreements guaranteeing employment and agreements or contracts that affect overtime pay or exclusions from the regular rate. Records that must be preserved for two years include: basic employment and earnings records that substantiate payroll (such as time cards and production cards) and records documenting wage additions and deductions.

3. What record-keeping requirements are imposed by the Age Discrimination in Employment Act ("ADEA")?

The ADEA prohibits discrimination on account of age. Its regulations follow the FLSA and Title VII, so its record keeping requirements overlap with the statutes described above.

The ADEA mandates employers to retain the following documents for three years: payroll records, and other documents containing each employee's name, address, date of birth, occupation, rate of pay and weekly compensation. An employer who utilizes any of the following documents must keep them for one year from the date of the employment action to which the document relates: job applications and resumes, records relating to transfer, promotion, selection for training, layoff, recall or termination; the results of aptitude tests or physical exams and advertisements relating to job openings. If an employer has a pension, benefit or insurance plan or seniority or merit based system of any kind, then documents relating to such plans must be kept for one year after the termination of the plan or benefit. Also, documents relating to claims of discrimination must be retained according to the requirements imposed by Title VII, as described above.