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Update on Comp Time

Last month we reported on the Ninth Circuit comp time case of *Collins v. Lobdell,* 98-35655, decided August 24, 1999. After the October issue was written, we noticed that the U.S. Supreme Court did, on October 12, 1999, agree to review the case involving Harris County, now denominated *Christensen v. Harris County*, U.S. Supreme Court # 98-1167. In accepting the case, the High Court said it would limit its inquiry to "whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act . . . may, absent a pre-existing agreement, require its employees to use accrued compensatory time". As noted last month, there is a provision in the Act stating that a worker who has requested use of his or her comp time must be permitted to use that time "within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency". (29 U.S.C. §207(o)(5).)

The High Court's comment made when accepting certiorari suggests that it may not decide the precise question presented in the *Collins v. Lobdell* case, because in that case there was a negotiated collective bargaining agreement setting a cap at 144 comp time hours. Apparently in the *Christensen (Moreau) v. Harris County* case, there was no such negotiated cap.

Given the conflict between the statute concerning undue disruption and the common law right of the employer to create workplace rules, it may very well be that the Supreme Court will reverse the *Harris County* case

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while not necessarily undermining the *Collins* result. It is quite conceivable that the Court could find that, while there is no property right to compensatory time, the statutory provision guaranteeing use of comp time within a reasonable period, absent undue disruption, gives the employee some limited control of when the comp time is used. This balanced rule would still retain the employer's right to overrule the employee's choice in the event that they could demonstrate undue disruption of the operation. Of course, we predict that the Supreme Court will also recognize the importance of rights of collective bargaining. Therefore, if a bargaining unit contracted at arms length for a cap on comp time, presumably they received some employer concession on another article of importance. We predict therefore that the High Court will not overrule the *Collins* result even if the *Harris County* 5th Circuit ruling is reversed.

Since oral argument has not been had yet on *Christensen v. Harris County*, the Supreme Court will not rule in the next one or two months, but we should expect a ruling this term, probably some time in the spring.

If Primary Duty is Management

Building Official is Exempt

In *Mellas v. City of Puyallup*, the Ninth Circuit held last month that even if a City building official spends more than half of his time on non-exempt work, he may still be an FLSA exempt employee.

The FLSA provides an exemption from the minimum wage and overtime requirements for employees classified as bona fide executives, administrators or professionals. Under the FLSA regulations, there is a short test for executives. It applies to employees who earn a salary of at least $250.00 per week, if their primary duty is management and if they customarily and regularly direct the work of at least two employees. 29 C.F.R. §541.119.

Puyallup's building official was an exempt executive even though he spent less than half his time performing management duties, the Ninth Circuit found. He supervised two full-time building inspectors and one half-time inspector. His duties included interviewing and hiring building inspectors, assigning work to inspectors, conducting performance reviews, helping prepare budgets, reviewing building plans and representing the City at meetings.

There was no issue about the salary requirement, but only the "duties" test. The plaintiff argued that management was not his primary duty because he spent most of his work time doing other things like reviewing building plans. The FLSA rules do, as a rule of thumb, utilize the 50% parameter. Ordinarily, an employee's primary duty is the work that makes up at least 50% of his or her working time. But, if "pertinent factors" demonstrate that the employee's primary duty is management, the rule of thumb is overridden. In this case, the court found the building officer exercised considerable discretion, was largely free from supervision, and was paid significantly more than the other employees in the division. He argued he did not provide much day-to-day supervision of his employees, who were competent workers. The court found that the duties test does not require constant supervision but "customary and regular supervision". Moreover, even though the plaintiff answered to a supervisor above him, that did not detract from the fact that he exercised supervision over two or more subordinates.

The message in this case is that, while a "rule of thumb" may be convenient, it is not automatic in determining a worker's primary duty. We urge employers to look at all of the "pertinent factors" before concluding that an employee is

or is not exempt from the FLSA overtime and minimum wage requirements.

Public Employers Need to Worry About FCRA and FTC

Many public employers would be surprised to learn that, before running a credit or background check on prospective employees, they need to comply with the Fair Credit Reporting Act. In June 1998, we sent a general guidance memorandum to all of our contract clients, advising them that the FCRA applied to background checks on applicants for employment. Since the amendment of October 1, 1997, the FCRA definitely requires employer compliance whenever a "consumer report" or an "investigator's consumer report" is requested. Before obtaining either type of report, the employer must make two disclosures – one to the applicant/employee and another to the agency providing the report. To the consumer/ applicant/employee the employer must make a clear and conspicuous written disclosure that a consumer report may be obtained and must obtain written "consumer" consent. This disclosure must be done on a stand alone basis and not be part of a job application. The employer must also certify to the agency providing the report that consumer disclosure has been made, written consent received, and that the report will not be used illegally. The employer must also certify that it will abide by the Act's other requirements before taking any adverse action based on the report.

Before taking adverse action based on the report, the employer provides the consumer with a copy of the report and a description of the consumer's rights under the Act. You must provide a written description of the nature and scope of the investigation requested. This must be mailed or delivered within five days after receiving a request, or after first requesting a report, whichever is later.

Many municipal corporations today investigate thoroughly whenever employees complain about sexual or other illegal workplace harassment. In an advisory opinion, the Federal Trade Commission staff concluded earlier this year that workplace investigations conducted by outside investigators fall under FCRA. On April 5, 1999, an FTC staff attorney issued the advisory opinion in response to questions from an attorney in Vancouver, Washington. The opinion concluded that even if the outside investigator, hired for a sexual harassment investigation gets the information solely from the employer's work force and internal documents, it is still assembling or evaluating information and therefore is a CRA.

The advisory opinion goes on to conclude that the outside investigator's report is probably a consumer report and may be an investigative consumer report.

If an employer intends to take an adverse employment action based on such a report, certain FCRA requirements apply. In the FTC's opinion, no information including the identity of sources or other sensitive information may be edited from the copy of the report provided to the perpetrator/employee.

Since it is not uncommon in Washington to use outside attorneys or human resource investigators in workplace investigations, this advisory opinion creates a need for change. While the opinion is only advisory, and not definitive until a court makes a ruling, it also cannot be ignored. It opens up a legal theory for a perpetrator/ employee to claim an FCRA violation if the rules are not complied with. It is not an acceptable answer to say that the employer could simply use a staff person, rather than an investigator, as many small employers do not have qualified investigators on staff.

Therefore, in order to be careful, because of this advisory opinion, an employer would be well-advised to follow the FCRA rules. That means that the employer should get written notice and consent before obtaining any report from the investigator, by providing written notice to all affected employees that you intend to interview. The employer should certify that the report will not be used impermissibly and that all FCRA requirements will be complied with.

After the report is done, but before any other employment action is taken, the employee must be provided with a copy of any report and a copy of the FTC publication "A Summary of Your Rights Under the Fair Credit Reporting Act". No editing of information from the report is allowed. This may be problematic in sexual harassment investigations in particular, because sometimes witnesses will not talk without guarantees of confidentiality. Perhaps because of this some investigators have taken to not providing the names of the witnesses. Also, if you take adverse action, you must inform the employee of the nature of the action, name, address and telephone number of the CRA, the advisory opinion also implies.

If the employee requests more complete disclosure, the employer must also provide a written response.

Some attorneys are recommending that a new notice and consent form be created, which is signed by each employee at the time of their hiring. This form would authorize the employer to obtain additional consumer reports at any time during the course of employment for legitimate employment purposes, including any investigation.

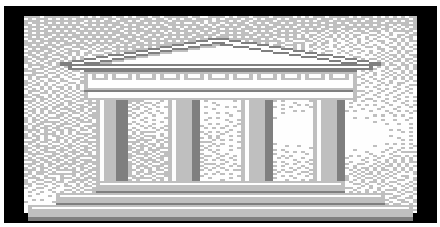
So what is the consequence if the FCRA is violated? Punitive damages are available for willful violations, actual damages must be paid for other violations, plus costs and possibly reasonable attorneys fees.

The advisory opinion, the FTC summary of consumer rights, and a summary of obligations of users of consumer reports are available on the FTC website.

See http://www.ftc.gov/os/statutes/fcra/vail.htm for the advisory opinion.

The website for the FTC summary of consumer rights mentioned earlier is available at http://www.ftc.gov/os/statutes/2summary.htm.

A summary of obligations of those who use consumer reports is available at http://ftc.gov/os/statutes/2user.htm



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