

Welcome to Legal Briefs for HR! This update on issues that matter to employers is provided as a service of the SHRM Texas State Council, which I serve as Co-Director of Legislative Action. Feel free to forward this email to anyone who would benefit . . . all are welcome to join this FREE service with over 3000 subscribers!

I'm looking forward to speaking at the Cross Timbers HRMA meeting (May 11), the Corpus Christi HRMA meeting (May 18) and the Self Opportunity HR roundtable (May 23 and 24). Hope to see you there!

Here's the latest:

1. **Not Just a Game** - A video game company is the latest employer to lose big in the game of employee classification. The settlement is for \$14.9 million and the finding is that about 600 current and former salaried "software engineers" (who functioned as computer programmers) should've been treated as non-exempt from overtime pay requirements. The engineers argued that they didn't manage anyone, had little creative control in the production of video games and they had no engineers' training or license. This settlement is in addition to an earlier one, for \$15.6 million, involving more than 600 computer graphic artists employed by the same company. *Hasty v. Electronic Arts Inc.* (Cal. Super. Ct. 4-25-06). If you have changing technology and morphing job duties, revisit job classifications regularly.
2. **Bank Blues** - A bank will settle claims of unpaid overtime for 2961 employees, to the tune of \$1.03 million. The DOL found that tellers, customer service reps and financial service reps at branches in AL, AZ, CO, FL, NM and TX "routinely" worked through lunch and after normal work hours, without pay, doing paperwork, calling customers and attending meetings. An investigation in AL led to the broader sweep. Check your procedures and train those managers, to make sure they understand that allowing "off the clock" work is a way to find themselves "off the job."
3. **Keep on Truckin'** - In another "off the clock" case, a trucking company found it should've paid its drivers for time used to attend company meetings, taking random drug tests, pre-trip prep and delays and meals eaten while working. The drivers are to report to work at 6 a.m., to perform pre-trip inspections and run the motors of their trucks. They then wait for their driving assignments and may not leave the garage until 9 a.m. The employer conceded FLSA violations for the meetings and drug tests, but argued that the waiting time was not "work" since the drivers socialized and drank coffee and pop, and should be noncompensable as "preliminary" activity under the Portal to Portal Act. The court found, however, that "work" is time controlled by the employer and that activities occurring before or after normal work hours may be compensable "integral and indispensable" activities as opposed to unpaid preliminary activities. The court also concluded that the drivers should be paid for meals

taken on the job (unless they were completely relieved of duties). *Twaddle v. RKE Trucking Co.* (S.D. Ohio 3-29-06).

4. **Bad Moon Rising** - A Fresno, CA jury awarded a 53 year old woman \$1.7 million for being spanked on her backside three times, in front of co-workers, as part of an alleged camaraderie-building exercise. Since when does humiliation build team spirit? *Orlando v. Alarm One Inc.*
5. **Poster Child** - Did you know that 14 states have made changes in 2006 to their employment law posters? If you have operations in AL, CA, CT, DC, FL, HI, MD, NV, NJ, NC, OR, RI, TX or WA, check with the state agency to get new posters.
6. **Kiss and Make Up** - While sex-based grooming and appearance codes can be a form of sex discrimination, the 9th Cir. held that a casino's "Personal Best" standard, which requires female employees to wear make up (and prohibits men from doing so) is neither an unequal burden nor sex stereotyping. The Court cited to similar findings in the 2nd, 4th, 5th, 6th, 8th and DC Circuits, explaining that the material issue is not whether the policies for men and women are different, but whether the policy creates an unequal burden based on plaintiff's gender. Plaintiff said she did not wear make up and doing so would make her feel degraded and demeaned. *Jespersion v. Harrah's Operating Co.* (9th Cir. 4-14-06). What are the odds she will now claim an allergy to cosmetics and ask for reasonable accommodation via suspension of the policy?
7. **Two Fer** - New Jersey is going after employers who misclassify workers as independent contractors with a double whammy - the Treasury and Labor Departments. An audit of 2.5% of employers found 26,000 not-so-independent contractors, who represented a \$15 million underpayment in income tax as well as UI and disability fund payments. The NJ three-factor test is [a] who controls and directs performance; [b] whether the service is within the employer's usual course of business; and [c] whether the worker is really running an independent enterprise. The governor has directed Treasury and Labor to identify and penalize employers who fail the test.
8. **Salary Slip Up** - A DOL Opinion Letter explains that deducting from an exempt employees salary, for loss of or damage to company equipment, will jeopardize exempt status. The FLSA regulations list permissible deductions (e.g., full day absence for personal reason) but none of them encompass docking for a lost laptop or damaged cell phone. A policy that allowed this would defeat the exemption because the salary is no longer paid "free and clear." Further, taking the deduction in increments or requiring the employee to reimburse the company would also result in "impermissible reductions in compensation." If you would like to receive FLSA and FMLA Opinion Letters, you can sign up from the DOL home page, at www.dol.gov.

9. **Envelope, Please** - Texas organizations figure prominently in this years OFCCP awards. The Opportunity Award went to **Dell** for its innovative programs and initiatives designed to ensure EEO for applicants and employees. You can read more about their programs under Press Releases (see April 26) at www.dell.com. The Exemplary Voluntary Efforts ("EVE") Award went to **Southern Methodist University** and two other contractors. The SMU press release is at www.smu.edu and click on More SMU News (April 27). Kudos to both!

10. **HR Boot Camp** - Check out www.NorthTexasSHRM.org for registration forms and info on the North Texas SHRM Annual Conference - HR Boot Camp on June 7 and 8!

Until next time,

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