LeClairRyan Accountant and Attorney Liability Newsbrief

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TABLE OF CONTENTS

Page 3
First Circuit Bankruptcy Appellate Panel Holds Judge Can Sanction Firm, Not Only Individual Lawyer

Legal Malpractice Claim Precluded Because Judicial Mistake in Underlying Action Was Superseding Cause

Page 4
Massachusetts Wage & Hour Class Action: Trial Court Rules That "Sister Corporations" Can Be Sued For Unpaid Wages

Page 5
CFPB Proposes Ban on Class Action Waiver Provisions in Arbitration Agreements

Page 6
Federal FCPA Pilot Program Encourages Self-Disclosure and Cooperation

Page 7
Final Rule Increases Salary Thresholds for FLSA Overtime Exemption

Page 8
Home is Where the "Art" is: Massachusetts Homestead Statute Applies to Adjoining Parcels of Land

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Parties Cannot Alter by Contract the Scope or Grounds of Judicial Review of an Arbitration Award

by Matthew M. O'Leary

LeClairRyan shareholders Warren Hutchison and Nancy Reimer scored an impressive victory this spring when the Massachusetts Supreme Judicial Court ("SJC") affirmed the lower court's confirmation of an arbitration award to our accounting firm client. In doing so, the SJC was presented with an issue of first impression - whether parties to a commercial arbitration agreement may alter by contract the scope or grounds of judicial review of an arbitration award that are set out in the Massachusetts Uniform Arbitration Act ("MAA"). The SJC decided the issue in favor of plaintiffs, ruling that the scope of review of an arbitration award is limited to the grounds set forth in the MAA, and the parties cannot alter those grounds by contract. The SJC also reviewed the award under the provisions of the MAA and affirmed judgment in favor of the firm.

The defendant was a member of an accounting firm, with three other partners. They were each a shareholder in the firm, and a party to a stockholder agreement ("Agreement") that governed their professional association and relationship. In 2011, the defendant's three other partners voted pursuant to the Agreement to require him to withdraw as a director and stockholder in the firm. The defendant disagreed that the termination of his stockholder interest and position was in accordance with the Agreement's terms. The parties then engaged in arbitration as required by the Agreement, which stated in part:

> In the event of any dispute concerning any aspect of this Agreement, the parties agree to submit the matter to binding arbitration before a single arbitrator appointed by the American Arbitration Association... . The decision of the arbitrator shall be final; provided, however, solely in the event of a material, gross and flagrant error by the arbitrator, such decision shall be subject to review in court... . [T]he party against which final, adverse judgment is entered [shall be] responsible for (in addition to its own) the other party's(ies') costs and expenses, including reasonable attorneys' fees.

The arbitration resulted in an award in favor of the accounting firm and the three partners.

The defendant then sought to have the award vacated or modified in the Superior Court. He argued, among other things, the Agreement altered the scope of judicial review and the arbitration award could be vacated if the arbitrator made "a material, gross and flagrant error." The Superior Court reviewed the arbitration award under both the grounds set forth in the MAA and the purported contractually created "material, gross and flagrant error" standard. The Superior Court confirmed the arbitration award, holding the defendant did not show any grounds for vacating the

award under the MAA and did not show a "material, gross and flagrant error" by the arbitrator. The defendant then appealed, and the SJC granted direct appellate review.

On appeal, the defendant's argument was, essentially, that the arbitrator committed an error of law by misinterpreting the provisions in the Agreement governing termination of a shareholder. The MAA does not allow the courts to review an arbitration award for errors of law. The defendant argued the courts should review whether the arbitrator made an error of law in interpreting the Agreement in this case because, in the arbitration clause of the Agreement, the parties specifically provided for judicial review of an award to determine whether there was a "material, gross and flagrant error" by the arbitrator. He reasoned that arbitration is strictly a creature of contract, that the aim of the MAA is to enforce the parties' contractual agreement to arbitrate, and that, therefore, the parties' agreed-upon standard of judicial review should be enforced.

The SJC rejected the defendant's arguments and held parties may not modify through contract the scope of judicial review set out in the MAA. The directive of the MAA is that a court "shall confirm" an award unless grounds for vacating it pursuant to the MAA are shown. The SJC stated this statutory language "carries no hint of flexibility." In addition to the language of the MAA, the SJC found strong policy considerations that support limiting the scope of judicial review to the statutorily defined grounds for vacating an award set forth in the MAA. Allowing parties to expand the grounds for judicial review would "undermine the predictability, certainty, and effectiveness of the arbitral forum that has been voluntarily chosen by the parties." If parties were able to redefine by contract the scope of what a court was to review with respect to every arbitration award, it would spawn potentially complex and lengthy case-within-a-case litigation devoted to determining what the parties intended by the contractual language they chose. This is fundamentally contrary to the intent and purpose of the arbitration statute, which is to preserve arbitration as an expeditious and reliable alternative to litigation for commercial disputes.

Having found that the contractual "material, gross and flagrant error" standard does not apply, the SJC reviewed the arbitration award under the provision of the MAA. The SJC rejected each of the defendant's arguments and affirmed the arbitration award. The defendant contended the arbitrator exceeded his authority in awarding damaged beyond those allowed by contract. The SJC held if the arbitrator, in assessing damages, commits an error of law or fact but does not overstep the limits of the issues submitted to him, a court may not substitute its judgment on the matter. The SJC found the damages awarded were within the scope of the issues submitted to the arbitrator and, thus, the arbitrator did not exceed his authority in awarding damages.

The defendant also argued portions of the damages award were procured by fraud. He contended the firm misrepresented certain amounts and the arbitrator erroneously relied on evidence submitted by the firm rather than evidence submitted by him. The SJC again rejected the defendant's argument, stating "the arbitrator's approach was reasonable and more than fair to (him)" and the arbitrator was under no obligation to credit the defendant's evidence over that submitted by the firm. There was nothing to support the defendant's claim that the arbitrator reached his conclusion on the basis of fraud or undue means. The SJC stated the defendant presented nothing more than a dispute over a question of fact that is not reviewable by the courts.

This case highlights both the benefits and risks associated with choosing arbitration over litigation to resolve commercial disputes. The SJC's decision reinforced the public policy favoring arbitration as an expeditious and reliable alternative to litigation. The SJC refused to allow parties to compromise this public policy and rejected attempts to create grounds for review of arbitration awards beyond those found in the MAA. On the other hand, the SJC's decision makes clear there are very limited grounds for vacating an arbitration award. Even if an arbitrator makes a mistake of fact or law, the courts will not substitute their own judgment for that of the arbitrator. Parties considering arbitration as a mechanism for resolving commercial disputes should consult with an attorney and understand all of the benefits and risks of doing so.

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First Circuit Bankruptcy Appellate Panel Holds Judge Can Sanction Firm, Not Only Individual Lawyer

by Ben N. Dunlap, Esq.

In *In re MJS Las Croabas Properties, Inc.*, 530 B.R. 25 (Bankr. D.P.R. 2015), the First Circuit's Bankruptcy Appellate Panel decided sanctions under 28 U.S.C. §1927 can be imposed against a law firm, not only against an individual attorney, addressing an issue that has split other circuits. The Bankruptcy Court judge awarded sanctions based on the conduct of a creditor's attorney who filed a motion for relief from the bankruptcy stay and thereafter, over a period of weeks, refused to respond to repeated telephone calls and correspondence from opposing counsel attempting to resolve the matter prior to a hearing. The creditor's attorney then withdrew the motion on the eve of the hearing without proper notice, causing opposing counsel to travel from Texas to Puerto Rico to attend an unnecessary hearing.

The Appellate Panel held the judge did not abuse his discretion in concluding the attorney's conduct exceeded simple neglect and instead warranted sanctions under Section 1927. That section provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings of any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct. 28 U.S.C. §1927 (emphasis added).

The judge awarded costs and fees to the bankruptcy estate through the trustee, local counsel, and in-house counsel based on the conduct of the creditor's attorney. The order was entered against the creditor's attorney and her law firm, jointly and severally.

The firm appealed, arguing Section 1927 applies to individual attorneys only, not law firms. The Appellate Panel disagreed, noting a 2008 First Circuit opinion had implicitly allowed a Section 1927 sanction against a firm and concluding also that the word "personally" in Section 1927 means only that the attorney, as opposed to her client, is responsible to pay the cost of vexatious conduct.

The Appellate Panel was not persuaded by the firm's excuse that it was in the process of moving its office before the hearing on its motion, which "might account for our lack of communication."

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Legal Malpractice Claim Precluded Because Judicial Mistake in Underlying Action Was Superseding Cause

by Matthew M. O'Leary

In *Kiribati Seafood Co. v. Dechert LLP*, 2016 WL 1426297 (Mass. Super. Apr. 7, 2016), the Superior Court held that an error of law made by a foreign appellate court was a superseding cause of the plaintiff's damages and, thus, were not recoverable against the defendant law firm.

Kiribati Seafood Company, LLC ("Kiribati") sued Dechert LLP ("Dechert") for legal malpractice in handling litigation in Tahiti over damage to a fishing boat. Kiribati purchased and refurbished a fishing vessel that it named the Madee. During its first fishing voyage, the Madee lost one of its rudders in the South Pacific Ocean and was brought to the Port of Papeete in Tahiti for repairs. The maritime agent hired by Kiribati arranged for the Madee to be placed in a dry dock, which collapsed and caused significant damage to the Madee. At the time, the Madee was insured under a port risk policy. The insurer eventually paid out approximately $1,760,000 and the insurer was subrogated to Kiribati's rights against the port in that amount. As part of a settlement with Kiribati, the insurer assigned all of its subrogation rights against the port to Kiribati.

Dechert took over the litigation of Kiribati in the Tahitian lawsuit in October of 2005, when its previous attorneys that were part of a French firm joined Dechert. The Commercial Court in Tahiti issued its decisions regarding the Madee in January of 2008. The Commercial Court recognized the validity of the assignment of the insurer's subrogation interest to Kiribati and awarded it, among other things, the full $1,760,000 in damages claimed under the insurer's subrogation interest, plus additional damages that had not been covered under the insurance policy.

The port and the other defendants appealed the decision to the Court of Appeal of Papeete. Dechert filed a brief on behalf of Kiribati in which it argued, among other things, that Kiribati was entitled to recover the full amount of damages the insurer had already paid to Kiribati, in Kiribati's capacity of assignee of the insurer's subrogation interest and all damages not covered by the insurance policy. In April of 2010, the Court of Appeal issued its initial decision regarding the damage to the Madee. The Court of Appeal found the assignment of the insurer's subrogation interest to Kiribati

to be valid, but deferred decision until it received evidence of the consideration provided by Kiribati to the insurer for this assignment. The Court of Appeal explained it wanted to avoid awarding double compensation for the same damage. On behalf of Kiribati, Dechert submitted to the Court of Appeal a copy of a letter in which a representative of the insurer stated "[t]he subrogation rights were assigned for valuable consideration, the amount of which is privileged." Although Kiribati provided Dechert with other documents demonstrating the consideration provided by Kiribati, Dechert did not provide all of those documents to the Court of Appeal.

In May of 2011, the Court of Appeal issued its final decision disallowing the $1,760,000 awarded based on the insurer's subrogation interest assigned to Kiribati. The Court of Appeal concluded that because Kiribati had not presented any evidence the insurer had received financial consideration for the assignment and that portion of the award resulted in a double recovery to Kiribati. The Court of Appeal reasoned that since Kiribati had already been compensated by the insurer, it would obtain a double recovery if it were allowed to recover the same amount from the port.

Kiribati then brought a civil action against Dechert in the Massachusetts Superior Court, claiming Dechert was negligent in its representation before the Tahitian courts. In response, Dechert argued, among other things, it could not have been the proximate cause of the adverse ruling because the Court of Appeal's ruling was an error of law that constitutes a superseding cause. The Superior Court agreed with Dechert and granted summary judgment in its favor. The Superior Court stated that since an appellate court has a duty to apply the law correctly, judicial error resulting in an adverse ruling is a superseding cause that relieves a negligent attorney from liability for legal malpractice, without regard to whether the judicial error was foreseeable.

The Superior Court found that under French law (which was applicable to the Tahitian cases) when an insurer assigns rights against a third party, the assignee is entitled to stand in the shoes of the assignor, sue the third party, and obtain the same damages the assignee would have received if it had brought suit in its own name. The Superior Court found that, under French law, so long as the assignment is valid and enforceable, the amount of consideration is irrelevant in determining what amount of damages may be recovered from the defendants. The Superior Court concluded the decision by the Tahitian court to disallow the $1,760,000 damage award attributable to the insurer's assignment of subrogation rights was an error of law in light of the fact the Court of Appeal already ruled the assignment was valid. Under French law, it was not double recovery for Kiribati to have obtained $1,760,000 from the insurer and then, in its capacity as the insurer's subrogee, seek reimbursement of that amount from the port. Because the ruling was an error of law, it was a superseding cause that relieved Dechert from any liability for negligence.

The Superior Court's decision in *Kiribati* is interesting because in finding for the law firm, instead of considering whether it met the applicable standard of care, the Court focused on an error of law made by a Court in another jurisdiction.

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Massachusetts Wage and Hour Class Action: Trial Court Rules That "Sister Corporations" Can Be Sued For Unpaid Wages

by Lauren A. Appel

Due in part to Massachusetts' employee-friendly wage and hour laws, class action wage and hour litigation has increased significantly in Massachusetts over the past several years. Now, one recent decision indicates state courts are willing to expand the reach of wage cases further to include related entities as employers, in line with the federal courts' interpretation of Fair Labor Standards Act (FLSA) employer liability. Relying on the federal First Circuit Court of Appeals for guidance, the Massachusetts Superior Court in *Fitzgerald v. The Chateau Restaurant Corporation, Inc.* No. 14-01990-J, 2016 WL 344155 (Mass. Sup. Ct. Jan. 4, 2016) allowed a class action suit under the Massachusetts Wage Act to proceed against a holding company and the "sister restaurants" it manages, ruling that the plaintiffs could prove that each of these separate corporate entities could be liable to the class of restaurant employees under "joint employment" or "single integrated enterprise" theories.

Kevin Fitzgerald was an hourly restaurant manager. Following his termination, he filed suit alleging Wage Act violations, seeking to represent other hourly restaurant managers to recover automatic meal break deductions from his pay. The named defendants were Chateau Restaurant Corporation, its individual owner, and several local restaurants, all of which shared the "Chateau" name but were individually incorporated. Although Fitzgerald had worked for two of the Chateau restaurants, he did not allege to have worked for all defendants.

The defendants moved to dismiss the complaint on the basis that the hourly managers had not established an employment relationship with the defendants - i.e., they could not sue

restaurants for which they had not worked. The managers argued they could bring claims against all defendants under either a "joint employment" or "single integrated employer" theory because Chateau Corp. and its restaurants were related entities. While federal courts have long recognized the joint employer and single enterprise doctrines in analyzing employer liability under the FLSA, no Massachusetts state court case had applied them to Wage Act claims. The *Fitzgerald* court agreed with the managers that these tests could be used to impose Wage Act liability and denied the defendants' motion.

In its decision, the *Fitzgerald* court first discussed the First Circuit's interpretation of the joint employment and single enterprise tests. The joint employment doctrine allows an employee to bring a claim against a person or entity who is not his/her actual employer if the employee can show a link between the actual employer and that separate entity. This showing may be made based on whether the alleged employer (1) had the power to hire and fire employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.

Similarly, the "single enterprise" theory allows an employee to proceed against multiple entities if they are "so interrelated that they constitute a single employer." Under this theory, courts consider (1) interrelatedness of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. The court emphasized the flexibility of this test, highlighting that proof of each element is not required to show a single enterprise.

The *Fitzgerald* court cited a federal case, *Joyce v. Upper Crust, LLC*, 2012 U.S. Dist. LEXIS 103101 (D. Mass. July 25, 2012), as support that the above theories apply to the Wage Act. In *Joyce*, the court applied the joint employment test to both FLSA and Wage Act claims, holding that it was "reasonable to infer that [the two corporations] [were] so integrated with one another that [the management company] [was] liable for the conduct as a joint employer or under similar theories of liability for the conduct alleged in the complaint." Based on this language, the *Fitzgerald* court held that both theories were available to plaintiffs under the Wage Act and they had alleged enough facts to state a claim under these theories. The court noted the similarities between the allegations against the employers in *Joyce* and *Fitzgerald*, particularly that the companies in each case were owned by the same individual and had "interrelated operations."

Should employers worry about increased exposure because of the *Fitzgerald* decision? This ruling could present difficulties for separate but related entities in disclaiming liability under the Wage Act in state or federal court, and the Wage Act imposes stiff penalties on employers – strict liability and mandatory treble damages. The trial court's ruling does not set binding precedent on other courts, but should certainly serve as a warning to employers.

Finally, it is worth noting that both joint employment and single enterprise tests are fact-intensive inquiries. The *Fitzgerald* court emphasized the particular circumstances of the case in its decision, observing the individual defendant was both president and treasurer for each of the corporate defendants; all corporate defendants had a principal office located at the same address; and Chateau Corp. was a self-described holding company with a stated business purpose of "conduct[ing] a restaurant business." Further, the plaintiffs alleged that the conduct at issue – automatically deducting pay for meal breaks – was uniform policy and practice among the defendant restaurants. These specific facts could be easily distinguished from other cases brought under the Wage Act against a different group of alleged employers.

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CFPB Proposes Ban on Class Action Waiver Provisions in Arbitration Agreements

by Charles K. Seyfarth, Joseph E. Spruill, III, and D. Sutton Hirschler

On May 5, 2016, the Consumer Financial Protection Bureau (CFPB) announced proposed regulations that would prohibit financial service providers from using arbitration clauses that prevent consumers from bringing class action lawsuits. Under the CFPB's proposal, companies would still be able to include arbitration clauses in their contracts, but the clauses would be required to expressly state that they cannot be used to prevent consumers from being part of a class action lawsuit.

In addition to the ban on class action waivers in consumer arbitration agreements, the proposed regulations would require companies that arbitrate disputes with consumers to submit information regarding arbitration claims, awards and related materials to the CFPB. The CFPB says that it will use this information to monitor arbitration proceedings to assess the necessity of increased future oversight.

The 90-day public comment period regarding the proposed rules commences when the proposal is published in the Federal Register. Given the rulemaking process, it is likely that the regulations would not take effect until sometime in 2017.

The CFPB proposal is extremely broad, potentially affecting a large segment of the financial services community –

including banks, credit unions and a variety of other lenders. The prohibition on class action waivers, combined with the administrative reporting burdens for individual arbitrations, may cause financial services providers to re-evaluate their respective agreements and approach going forward. Companies that currently include arbitration provisions in their consumer agreements should be aware of the CFPB's proposed rules and continue to monitor these developments.

LeClairRyan advises financial services providers on a variety of issues, including the use of arbitration agreements, and regularly represents and defends clients in class action and individual claims actions throughout the United States.

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Federal FCPA Pilot Program Encourages Self-Disclosure and Cooperation

by Madeleine E. Cassetta and Brian W. Stolarz

"Voluntary self-disclosure of criminality," "full cooperation" and "timely and appropriate remediation," in connection with violations of the Foreign Corrupt Practices Act (FCPA), are the main ingredients in the recipe for qualifying for additional mitigation credit in FCPA matters, according to the newly launched one-year pilot program by the Fraud Section's FCPA Unit of the Criminal Division of the Department of Justice.

In a memorandum dated April 5, 2016, Andrew Weissmann, chief of the Criminal Division's Fraud Section, explained that the pilot program seeks to promote greater accountability for individuals and companies that engage in FCPA-related misconduct (the Weissmann Memorandum). There are two parts to accomplishing this goal. The first part consists of enhanced enforcement resources, such as the addition of 10 more prosecutors to the Fraud Section's FCPA Unit and the FBI's addition of three new squads of special agents dedicated to investigate and prosecute FCPA criminal activity, and increased collaboration with foreign law enforcement authorities. The second part consists of guidance for the business community with respect to the expectations of the FCPA Unit from companies seeking mitigation credit.

Most of the Weissmann Memorandum focuses on the second part, setting forth the standards for what constitutes (1) voluntary self-disclosure, (2) full cooperation, and (3) remediation. If there is satisfactory compliance with these conditions, companies may receive up to a 50 percent reduction in fines, no compliance monitor, and potentially even a declination of prosecution. These are obviously significant benefits that have to be considered when deciding whether to voluntarily disclose potential FCPA-related wrongdoing.

VOLUNTARY SELF-DISCLOSURE

The Weissmann Memorandum states, simply, that "voluntary self-disclosure of an FCPA violation is encouraged." No disclosure that is required by law, agreement or contract will, however, be considered. In addition, to be eligible for the additional mitigation credit, entities must make the disclosure "prior to an imminent threat of disclosure or government investigation" and "within a reasonably prompt time after becoming aware of the offense." The disclosing entity will have to demonstrate timeliness and ensure that it disclosed all relevant facts known to it, including the identity of the individuals involved in the misconduct. This focus on individual liability is in furtherance of the September 9, 2015 memorandum by Deputy Attorney General Sally Yates regarding individual accountability for corporate wrongdoing.

FULL COOPERATION

Cooperation is unique to each case and comes in many forms. The Weissmann Memorandum provides a list of requirements that companies will have to meet to receive credit for full cooperation:

1. Timely disclosure of all relevant facts, including those related to individuals involved
2. Proactive cooperation
3. Preservation, collection and disclosure of relevant documents and information about the source
4. Provision of timely updates on any internal investigation
5. De-confliction of an internal investigation with the government investigation, where requested
6. Disclosure of relevant facts regarding potential criminal conduct by third parties and their officers or employees, and third-party individuals
7. Making available officers and employees with relevant information for interview upon request (subject to the individuals' Fifth Amendment rights)
8. Disclosure of all relevant facts gathered during the entity's internal investigation and attribution of facts to specific source, subject to the attorney-client privilege
9. Disclosure of overseas documents, subject to foreign law, including foreign data privacy laws
10. Facilitation of third-party production of documents and witnesses from foreign jurisdiction, unless legally prohibited
11. Provision of translations of relevant documents in foreign languages, where requested and appropriate

In addition, the Weissmann Memorandum provides three important clarifications regarding cooperation. First, "the Fraud Section does not expect a small company to conduct as expansive an investigation in as short a period of time as a Fortune 100 company." Second, eligibility for full cooperation credit is not predicated upon waiver of the attorney-client privilege or work product protection, and none of the above listed items requires such waiver. Third, less than full cooperation – whether an entity decides to cooperate only later in an investigation or cooperates in a timely manner, but does not meet all the criteria – does not disqualify the entity from receiving some cooperation credit.

TIMELY AND APPROPRIATE REMEDIATION

Finally, the memorandum acknowledges that "remediation can be difficult to ascertain and highly case specific." Additional credit for remediation can be obtained only if the entity is eligible for cooperation credit, and is predicated upon the implementation of an effective compliance and ethics program in accordance with certain criteria that are subject to periodic updates as well as the appropriate discipline of those responsible for the misconduct. In particular, the entity must establish a culture of compliance, dedicate sufficient resources to compliance, ensure the quality and independence of the compliance personnel and function, perform risk assessments and audits of the compliance program and institute a reporting structure.

CONCLUSION

If a company meets the three requirements of voluntary self-disclosure, full cooperation and remediation to the satisfaction of the Fraud Section's FCPA Unit, then the entity will be eligible for the "full range of potential mitigation credit," including a reduction of up to 50 percent off the bottom sentencing guidelines fine range and no appointment of a monitor. In addition, a declination of prosecution will be considered. If a company fails to meet the voluntary self-disclosure standards, it may still receive some credit if it later fully cooperates and remediates in a timely and appropriate manner. In that case, the FCPA Unit will accord up to a 25 percent reduction off the bottom of the sentencing guidelines fine range.

The pilot program is an important step in establishing some guideposts and transparency to the Fraud Section's FCPA enforcement program, giving companies and counsel important information to consider when deciding FCPA-related strategies. Of course, it remains to be seen if the Department of Justice's sales pitch will be successful and whether companies will come forward and provide information in the hopes of lower fines, no monitors and potential declinations.

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Final Rule Increases Salary Thresholds for FLSA Overtime Exemption

by Lauren Appel and Daniel Blake

More than two years after announcing their intent to expand overtime for U.S. workers – and 270,000 public comments later — President Obama and Secretary of Labor Perez announced today the issuance of the U.S. Department of Labor's (DOL) final rule updating the Fair Labor Standards Act's White Collar Exemptions. The final rule automatically extends overtime pay eligibility to most salaried white collar workers earning less than $913 per week ($47,476 per year) and will update the salary threshold every three years. Marking the largest expansion of overtime eligibility under federal law since the 1970s, the new rule more than doubles the current standard salary threshold of $455 per week ($23,660 per year). The final rule goes into effect December 1, 2016.

In its press release issued Tuesday night, the DOL cited outdated salary thresholds that failed to keep pace with inflation as a primary motivator for the final rule. Noting that only 7 percent of full-time salaried workers are currently eligible for federal overtime protection, the DOL estimates that the final rule will make an estimated 4.1 million workers newly eligible for overtime, and increase automatic eligibility to 35 percent of all full-time salaried workers. Going forward, the final rule's periodic increases are designed to ensure wage inflation does not phase out certain workers from the law's protection.

The DOL also highlighted a number of its other key considerations for revising the White Collar Exemptions, including strengthening overtime protections for salaried workers already entitled to overtime, improving work-life balance, spreading work to more potential employees, and increasing productivity and workers' health.

Key changes to overtime eligibility under the final rule are as follows:

- The standard salary threshold will automatically update every three years to match the 40th percentile of full-time salary workers in the lowest wage census region, currently the South.
- The Highly Compensated Employees (HCE) salary threshold, above which most white collar workers are ineligible for overtime, will increase from $100,000 to $134,000. The HCE threshold will update every three

years to match the 90th percentile of full-time salaried workers nationally.

- The DOL will announce new salary thresholds 150 days before they take effect beginning August 1, 2019, with the first updates taking effect January 1, 2020.
- Up to 10 percent of the salary threshold for non-HCE employees can be met by non-discretionary bonuses, incentive pay, or commissions, provided these payments are made on at least a quarterly basis.

For employers, who will undoubtedly face difficult staffing choices as a result of the final rule, the DOL suggests the final rule will at least provide clarity by simplifying the overtime eligibility analysis. As many employers are aware, establishing that a worker meets the executive, administrative, or professional exemptions from overtime involves a two-part assessment of (1) whether the worker's salary is above the threshold set by the DOL; and (2) whether the worker's duties place them within the categories of workers the DOL intended to exempt from overtime. Under the final rule, many more workers will be overtime-eligible because their salaries fall below the standard threshold, eliminating the need for employers to perform the more difficult "duties" analysis.

While the final rule may clarify who is eligible for overtime, how employers can comply with the new law and still meet their business needs is now a more difficult question. Employers should review all salaried positions to ensure employees are properly classified and determine any necessary changes. Members of LeClairRyan's Labor and Employment team regularly help businesses comply with FLSA overtime requirements and are equipped to help businesses of all types and sizes ensure they are in compliance with the final rule.

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Home is Where the "Art" is: Massachusetts Homestead Statute Applies to Adjoining Parcels of Land

By Justin J. Twigg

In *Nealon v. Matthews*, 2016 WL 312409 (2016) the Unites States Bankruptcy Appellate Panel of the First Circuit held that a bankruptcy exemption available under the Massachusetts Homestead Statute, M.G.L. c 188, applied to land that was intended for subdivision and sale. The Bankruptcy Appellate Panel held the applicability of the statute was not determined by prior or future intent with respect to alienation of the property, but rather on the intent to have the property form a part of the home at the time the declaration of homestead was made. In relying upon an issue of law, the First Circuit was able to overcome several troublesome findings of fact for the bankruptcy debtor, Nealon.

Nealon acquired the property in dispute, then designated it as Lot 2, via quitclaim deed in January 2005. In the ensuing years, Nealon met with various professionals for the purpose of subdividing Lot 2 into four smaller parcels: lots 2A, 2B, 2C and 2D. Nealon's plan, at the time, was to sell the lot with the preexisting house on it as Lot 2B and build a new house upon the proposed Lot 2A, donating the remaining lots (which had wetlands restrictions upon them) to the Town of Hopkinton in return for the necessary approvals. While a plan of subdivision was ultimately approved in 2010, this plan was subject to several contingencies, including the donation of the two lots to the Town. Nealon's evidence at trial was that those conditions were never met due to a financier's requirement that the mortgage over the property be paid down by $70,000 in order to allow the lots to be donated. Accordingly, Nealon's plans to complete the subdivision were never formalized.

In 2014, Nealon filed for Chapter 7 Bankruptcy protection, and listed the entire property as an exempt asset. One of the creditors, Matthews, objected to the property's inclusion of Lots 2A, 2C and 2D as exempt assets under the Homestead Statute because they were part of a subdivision. Nealon responded that the subdivision was a nullity due to the unfulfilled conditions and that the use of the property both before and after the declaration of homestead in 2013 was consistent.

The court did not initially accept Nealon's evidence that there was no current intention to sell, and found the alleged use of Lots 2A, 2C and 2D was consistent with an intention to sell. The Bankruptcy Appellate Panel found that, in so doing, the lower court applied an incorrect standard. The proper focus ought to have been on Nealon's use and occupancy of the entirety of the property at the time of the declaration. It was sufficient for Nealon to simply have shown the Court that his use of Lots 2A, 2C and 2D was consistent with them being part of his principal residence, which he did by using them as dog trails and children's playgrounds.

Nealon demonstrates that the Massachusetts Homestead Statute is designed to protect individuals' homes as they are defined at the time of the declaration. Later attempts to change that use, such as the attempted subdivision here, will not cause a loss of the Homestead protection.

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