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A Moving Target: The Not So Final Overtime Rule

by Steven F. Pockrass (Indianapolis) and Marc L. Zaken (Stamford)

On November 22, 2016, a federal judge for the Eastern District of Texas issued a preliminary injunction temporarily blocking the U.S. Department of Labor (DOL) from implementing and enforcing its revised white collar overtime regulations on a national basis—sending ripples throughout the employer community. Since then, many employers—some of whom had already prepared to comply with the new regulations and were ready to roll out new payroll practices—have been wondering what to do. Should employers hold off on implementing the overtime regulations or press forward?

Uncertain Next Steps

The short answer for employers is that while this injunction is in effect, employers are not required to pay overtime in accordance with the new rules. But, the injunc-

tion is only temporary. The next step is for the judge to consider whether to make his ruling permanent. He can do so by vacating the new overtime rules—i.e., rendering the new rules a nullity as if they had never been issued at all. Such a vacatur seems likely, given his preliminary ruling. While we do not know when the judge will render his final decision in the case, we anticipate that it could be soon. If the judge does vacate the rule, then employers would not be required to comply with the new regulations.

But what happens if the judge changes his mind and lifts the injunction or if an appellate court overturns his ruling? In that case, are the regulations effective retroactively to December 1, 2016, or would the regulations take effect only prospectively from the date the injunction is lifted or a

Please see "OVERTIME" on page 6



Ogletree Deakins Strikes Gold in Sacramento, OKC

Firm Opens Two New Offices and Expands Presence in West and Midwest

Ogletree Deakins recently announced that it has opened offices in Sacramento and Oklahoma City. The Sacramento opening expands the firm's presence in California, making it the sixth office in the state, while the Oklahoma City office bolsters the firm's capabilities for assisting clients with operations in the Midwest. Ogletree Deakins now has 51 offices across the United States, and in Mexico, Canada, Germany, and the United Kingdom.

The Sacramento office joins a network of offices across the state that includes 125 attorneys and locations in Los Angeles, Orange County, San Francisco, San Diego, and Torrance. Anthony DeCristoforo, who joins Ogletree Deakins from Stoel Rives LLP, will serve as the Sacramento office's founding and manag-

ing shareholder. DeCristoforo has more than 20 years of experience representing employers in employment litigation. The office is expected to grow quickly.

The Oklahoma City office opened on January 17 with Sam Fulkerson as managing shareholder. Fulkerson, who most recently was a shareholder with McAfee & Taft, has practiced labor and employment law in Oklahoma for nearly three decades. He has been recognized throughout his career, including listings in *Chambers USA* and *Best Lawyers*.

Joining Fulkerson in the Oklahoma City office is shareholder Victor Albert, an attorney with 30 years of experience in the labor and employment field. Albert also has years of trial experience, having tried to a jury verdict over 60 cases in state and federal courts in Oklahoma. ■

Spotlight on Ogletree Deakins' Toronto Office

Did You Know Jury Trials Are a Rare Occurrence in Canada?

In January 2016, Ogletree Deakins opened its 49th office (and fourth international location) in Toronto. Hugh Christie serves as the office's managing partner and has practiced labour and employment law in Canada for more than three decades. Hugh is joined by partner Ed Majewski and associate Michael Comartin.

As the Toronto office marks its one-year anniversary, we highlight some interesting facts about the city and employment law north of the border. For example, did you know:

- Metro Toronto is the fourth most

populous city in North America and the most populous city in Canada.

- Bring your winter coat, toque, and snow boots if you're visiting in January or February. If you forget them, make use of the network of brightly lit underground tunnels that connect the buildings downtown.

- Common nicknames for Toronto include the Queen City, Hogtown, and Hollywood North. It was once home to both the tallest building and the largest distillery in the British Empire.

- Toronto is also known (at least to Torontonians) as the Centre of the Hockey Universe, and the Ogletree Deakins office is in the same complex as the Hockey Hall of Fame.

- Canada is the largest trading partner of the United States, and the two countries share the longest undefended border in the world. Some towns straddle the border, and residents buy gas in one country and groceries in the other.

Doing business in Canada comes along with a host of requirements that are very different from those in the United States. Some of those differences include:

- There is no at will employment in

Canada. Under most circumstances, an employee is entitled to notice of termination (or termination pay in lieu of notice) if he or she has been continuously employed for at least three months.

- Damages for wrongful dismissal in Canada often include more than the employee's salary. Damages may also encompass bonuses, benefits, and stock options. This is an area of exposure for employers that can unknowingly adopt policies and bonus plans that can increase their risk.

- In Canada, employment law is largely regulated by provincial governments, not by the federal government. If your business has multiple locations in Canada, be sure to review each location's policies, agreements, etc. for compliance with each jurisdiction's particular laws.

- According to Hugh Christie, the number one thing that surprises U.S. employers about Canadian law is that litigation isn't nearly as expensive or drawn out as it is south of the 49th parallel, the border between the U.S. and Canada.

- Jury trials are almost unheard of, and punitive or exemplary damage awards are almost as rare. ■

Ogletree Deakins

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Additional Information

To request further information or to comment on an article, please call Stephanie Henry at (310) 217-0130. For additional copies or address changes, contact Marilu Oliver at (404) 870-1755.



Tech Corner: Extranets and Their Perks

Firm's Clientlink Provides Platform for Clients to Access Key Data

Extranets carry certain advantages that prove uniquely advantageous in the legal industry. As a means for sharing information and documents, they provide far more data security than email. Extranets also help avoid the perennial issues around deleted emails and lost attachments. Their greatest advantage, however, lies with ever-present, secure access to the full scope of relevant information about legal matters, from case status to billing, that does not require working through a human gatekeeper. People with questions do not need to wait until any particular hour or reach any particular person in order to get access to, say, a trial calendar or a pleading—they have 24/7 access through a secure web portal. Making that effective, however, requires setting up an extranet that is organized intuitively and tailored around the needs of the user.

Many firms, including Ogletree Deakins, offer extranet services to clients. Our collaboration platform, [Clientlink](#), not only facilitates the exchange of documents, contacts, tasks, financials, docket events, and other critical information, but also houses tailored knowledge banks customized for use by particular organizations. Sometimes the knowledge banks are also customized for particular types of professionals within those organizations, like the human resources department. Knowledge banks typically contain educational resources, training materials, checklists, newsletters, desk references for all 50 states, and other resources to help professionals with their day-to-day duties. Features to look for and expect in extranets include: secure access to matter documents; robust searching and filtering options; discussion boards; flexible-use wiki pages; targeted news feeds; docketing information; a state-of-the-art user interface; and custom features based on client needs. ■

Ogletree Deakins State Round-Up

ARIZONA



Proposition 206, a referendum to increase the state minimum wage rate to \$12.00 per hour by 2020 and require employers to provide paid sick time to employees, decisively passed in the November election. However, the law potentially may never become effective if a newly filed lawsuit alleging that the proposition violates the Arizona Constitution proves successful.

CALIFORNIA



As of January 1, 2017, companies of all sizes doing business in California must take extra care to ensure they are not paying employees differently based on their race or ethnicity or basing new employees' compensation solely on their prior salaries. Governor Brown recently signed two pieces of legislation that significantly expand the state's recently revamped Fair Pay Act.

CONNECTICUT



A federal district court in Connecticut recently held that Title VII of the Civil Rights Act prohibits discrimination based on an individual's sexual orientation. The court stated that "[i]f interracial association discrimination is held to be 'because of the employee's own race,' so ought sexual orientation discrimination be held to be because of the employee's own sex." *Boutillier v. Hartford Public Schools*, No. 3:13-cv-01303-WWE (November 17, 2016).

DISTRICT OF COLUMBIA



The Council of the District of Columbia recently passed the Universal Paid Leave Amendment Act of 2016 (UPLA). The UPLA enables workers to receive a combination of paid leave, which can include up to eight weeks of parental leave, six weeks of family medical leave, and two weeks of personal medical leave every year.

FLORIDA



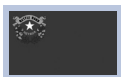
On December 14, 2016, three industry groups (the Florida Retail Federation, the Florida Restaurant & Lodging Association, and the Florida Chamber of Commerce) sued the City of Miami Beach in state court, seeking an injunction blocking the city's minimum wage-boosting ordinance from taking effect. In June of 2016, the city passed the ordinance to increase the minimum wage for employment within the municipality to \$10.31, effective January 1, 2018.

LOUISIANA



Last year, Louisiana Governor John Bel Edwards signed Executive Order JBE 2016-11, which sought to protect LGBT individuals from discrimination practiced by state contractors. On December 14, 2016, Judge Todd Hernandez of the 19th Judicial District Court issued an order permanently enjoining the executive order and declaring it illegal as a matter of law.

NEVADA



Voters recently approved Nevada's Initiative to Regulate and Tax Marijuana, which went into effect on January 1, 2017. The passage of Question 2 places Nevada in a group of eight states (plus the District of Columbia) that will allow the recreational use of marijuana, four of which passed such initiatives in the November 8, 2016 election.

NEW JERSEY



The Town of Morristown, New Jersey, just released its "Notice of Employee Rights to Paid Sick Time." Employers in Morristown must provide this notice to all new employees at the time of hire and to current employees as soon as practical. In addition, the notice must be posted in a "conspicuous and accessible place" in each location where employees are employed.

NEW YORK



The New York State Department of Labor (NYS-DOL) recently proposed amended regulations that would significantly alter the salary levels for some exempt executive and administrative employees, as well as alter the permitted tip credits and uniform maintenance pay for New York hospitality employers. The NYSDOL adopted the proposed regulations and released the final orders, which went into effect on December 31, 2016.

OHIO



On December 19, 2016, Governor John Kasich signed Senate Bill 199, which prevents employers from prohibiting concealed handgun license holders from storing firearms in their locked vehicles when parked on company property. The law does not affect employers' ability to otherwise exclude firearms from their premises.

TEXAS



Texas's Second Court of Appeals recently examined the issue of whether an employee who is taking leave under the federal Family and Medical Leave Act may obtain unemployment benefits under the Texas Labor Code. In a win for Texas employers, the court determined that such a person may not simultaneously enjoy the benefits of both statutes. *Texas Workforce Commission v. Wichita County, Texas*, 02-15-00215-CV (December 8, 2016).

WASHINGTON



Initiative 1433, which raises the minimum wage and requires paid sick leave throughout Washington, was recently approved by voters. The first substantial increase in the minimum wage began on January 1, 2017, and the state minimum wage is now \$11.00 per hour. The paid sick leave requirement will take effect on January 1, 2018.

For more information on these state-specific rulings or developments, visit www.ogletree.com/our-insights.

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MARCH 22-23, 2017

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Featuring members of Ogletree Deakins' Employee Benefits and Executive Compensation Practice Group, in-house counsel, and senior compensation and benefits professionals

This symposium is designed for senior corporate benefits professionals and in-house counsel who are responsible for employee benefits and executive compensation. Join us as we focus on strategic issues and facilitate peer-level discussion on these and other topics:

- **The Affordable Care Act at seven years old: the law's ongoing impact and future**
- **Demystifying the new IRS regime for determination letters and plan corrections**
- **Continuing issues with severance pay**
- **Update on the continuing onslaught of 401(k) fee litigation**
- **What the new administration in Washington, D.C. means for benefits**

To view the full program agenda, [click here](#).

DATE AND TIME

Wednesday, March 22, 2017

12:00 p.m. – 5:00 p.m.	Registration
3:00 p.m. – 5:00 p.m.	Meeting
6:00 p.m. – 7:00 p.m.	Reception
7:30 p.m. – 9:30 p.m.	Dinner

Thursday, March 23, 2017

7:30 a.m. – 8:00 a.m.	Breakfast
8:00 a.m. – 12:00 p.m.	Meeting
12:00 p.m. – 1:00 p.m.	Lunch
1:00 p.m. – 3:00 p.m.	Meeting

LOCATION

JW Marriott
110 E 2nd Street
Austin, TX 78701
(512) 474-4777

COST

\$595 per person

REGISTRATION

Register online by clicking [here](#)
or email ODEvents@ogletree.com.



Joint Employment and Mixed Unit Bargaining: A Checklist of New Issues

by Bernard J. Bobber and Douglas M. Topolski*

Recent National Labor Relations Board (NLRB) decisions have required employers to rethink how they address both labor relations and employee relations issues. Nowhere is this truer than in the area of multi-employer business relations.

In light of recent NLRB decisions that have received extensive coverage, including *Miller & Anderson, Inc.* and *Browning-Ferris Industries of California, Inc.*, virtually every employer that works with employees of another employer and falls into the category of “user” or “supplier” employer is now presented with a host of new considerations.

Below is a list of factors that users and suppliers should review to evaluate labor risks in their user/supplier relationships.

Contractors

- Real costs of contracting out:
 - Do suppliers or users have unions?
 - Will you be required to bargain with these unions?
 - If yes, will you need to hire help to do so?
 - Will you be required to make contributions into union benefit funds that may be difficult to end if you sever a relationship with a user or supplier?

Written Agreements

- Will you enter into a written agreement?
 - For each location?
 - For each supplier or user?
 - If you are a supplier, will you require users to address collective bargaining obligations raised by CBAs covering your employees?
- Will the agreement be terminable at will or for a term? Each may create a different type of liability.
 - “At will” can be used to show control over wages and working conditions.
 - “Term” can create bargaining obligations upon termination.
- Will you require an indemnification provision?

* Bernard Bobber is a shareholder in the Milwaukee office of Ogletree Deakins. Douglas Topolski is a shareholder in the firm’s Washington, D.C. office. Both attorneys represent management in labor and employment related matters.

Right to Control

- The more control you reserve over each element of the employment relationship, the more likely it is that you will have to bargain about that element with the union.
 - Memorializing control in a contract for business reasons will be deemed as evidence of control.
 - Franchise quality and brand control defenses may not help.
- Hiring
 - Who has control over the number of employees utilized; qualifications of supplier employees; licenses; drug tests; experience; background checks; and expectation of employment with user (temp-to-hire arrangements)?
- Firing
 - Is there a right to remove supplier employees at will or to cancel the contract at will?
- Discipline
 - Does a user supervisor have the right to recommend or invoke discipline?
- Supervision
 - Who has the right to assign placement of supplier employees?
 - Who can control how tasks are performed?
 - Consider whether instructions from supervisors, SOPs, contractual directives, etc. control workers
- Direction
 - Who controls the flow of work and assignments and the priority of tasks?
 - Who addresses emergencies based upon equipment, customer, and market needs?
- Wages and hours
 - Who establishes minimum and maximum wages?
 - Is there a cost plus agreement?
 - Must the user agree before supplier wages or benefits costs can be implemented or passed on to the user?
 - Who sets shift times and schedules?
 - Who can put limits on overtime?
 - Who controls who might get sent home when business is slow or the day’s work is complete?

Bargaining Obligations

- Do any of your suppliers or users have CBAs?

- Has your company been approached about bargaining?
 - What issues?
 - How much control do you or can you exercise over each issue?
- Has your company been approached about grievances or arbitration?
 - What issues?
 - How much control do you or can you exercise over each issue?
 - Are you a party to any CBA containing the grievance and arbitration procedure?
 - What proof exists that your company agreed to be bound by any grievance or arbitration procedure?
 - Participation is a matter of agreement.
- Are any of your user or supplier employees recently organized but working on a first contract?
 - What terms and conditions of employment do you or might you control?
 - Was your company named in the petition as a joint employer?
 - Has the union sought to bargain with your company even though it was not named as an employer in the representation case?
 - Have you removed any employees in cases where the union sought information about the removal?
- Do you have a franchise agreement that your company enforces or is required to follow?

Future Circumstances

- Do you plan to rebid a contract with a supplier that has union employees?
 - Has any union asked your company to bargain over this?
 - This may require bargaining.
- Do you plan to cancel any supplier contracts that involve supplier employees who are union members?
 - This may also require bargaining.

Conclusion

Users and suppliers should carefully consider the above factors whenever they negotiate, draft, or perform agreements concerning third party staffing. ■

Top 10 OSHA Citations of 2016—What to Look for in the New Year

by John F. Martin (Washington, D.C.) and Jansen A. Ellis (Atlanta)

Each year, the Occupational Safety and Health Administration (OSHA) publishes a list of the most frequently cited violations across all industries. While the results typically don't vary too much from year to year, employers can use this data as a helpful guide to stay on top of enforcement trends, review their own operations, and take steps to prevent injuries before they occur.

1. Fall Protection

Fall protection has been the most frequently cited OSHA violation for six straight years, so this standard should be top of mind for construction employers. In addition to requiring employers to provide fall protection through the use of guardrail systems, safety net systems, or personal fall arrest systems, this standard mandates that employers ensure that all walking or working surfaces have the strength and structural integrity to safely support employees. The largest number of violations under this standard occurred in residential construction.

2. Hazard Communication

Employers must communicate to employees information concerning chemical hazards and appropriate protective measures. This standard has several requirements, which includes developing and maintaining a written hazard communication plan, labeling containers of chemicals, distributing safety data sheets (SDS) to employees, and developing employee training programs.

3. Scaffolds

Violations involving scaffolding in construction work consistently rank high on the top 10 citations list. Compliance under this standard begins with having a "competent person" to design, construct, and inspect the scaffolds, as well as training employees. Fall protection is an important area under this standard, and employers must take various steps to protect workers from falls as well as from falling objects. Employers most commonly cited for this violation include framing, roofing, siding, and masonry contractors.

4. Respiratory Protection

OSHA requires employers to provide

respiratory protection when employees are exposed to air quality or breathing hazards, and they must do so pursuant to a written respiratory protection program. The most common citations issued under this section involved instances where employees wore respirators but were not medically evaluated for respiratory protection. Another common trouble spot was the employer's failure to conduct respirator fit testing, which ensures that the employee's equipment fits correctly and effectively.

5. Lockout/Tagout

This term refers to the servicing and maintenance of machines and equipment where the unexpected startup or ener-

gization of the machines or equipment could harm employees. Proper lockout/tagout procedures ensure that machines are powered off and cannot be turned on while an employee is working on them. OSHA frequently cited employers under this standard when they failed to properly develop the required written program, train employees on lockout/tagout procedures, or perform periodic inspections of these procedures.

6. Powered Industrial Trucks

Powered industrial trucks include forklifts, motorized hand trucks, tractors, and platform lift trucks, among other things. In 2016, OSHA commonly cited employers under this standard when operators lacked certification or failed to safely operate the trucks. Proper training and evaluation of the operator's performance are also required under this section and are areas in which employers frequently receive citations.

7. Ladders

Citations involving ladders came in at the number seven spot. Employers must adhere to various requirements depending on the circumstances in order to protect workers from hazards related to ladders, including through the use of

side rails, cages, wells, and other safety devices. The top citation in this area involved improper use of portable ladders. Additionally, ladders must only be used for the purpose for which they were designed, and any ladders with structural defects must be taken out of service until repaired.

8. Machine Guarding

This standard is intended to protect machine operators and other employees working around machines from various hazards, including rotating parts, flying chips, and sparks. Installing guards helps to keep employees' hands, feet, and other appendages away from moving machinery. Examples include barrier guards,

two-hand tripping devices, and electronic safety devices. In addition to issuing citations for a lack of machine guarding, OSHA also commonly cited employers for having machinery that was not anchored properly.

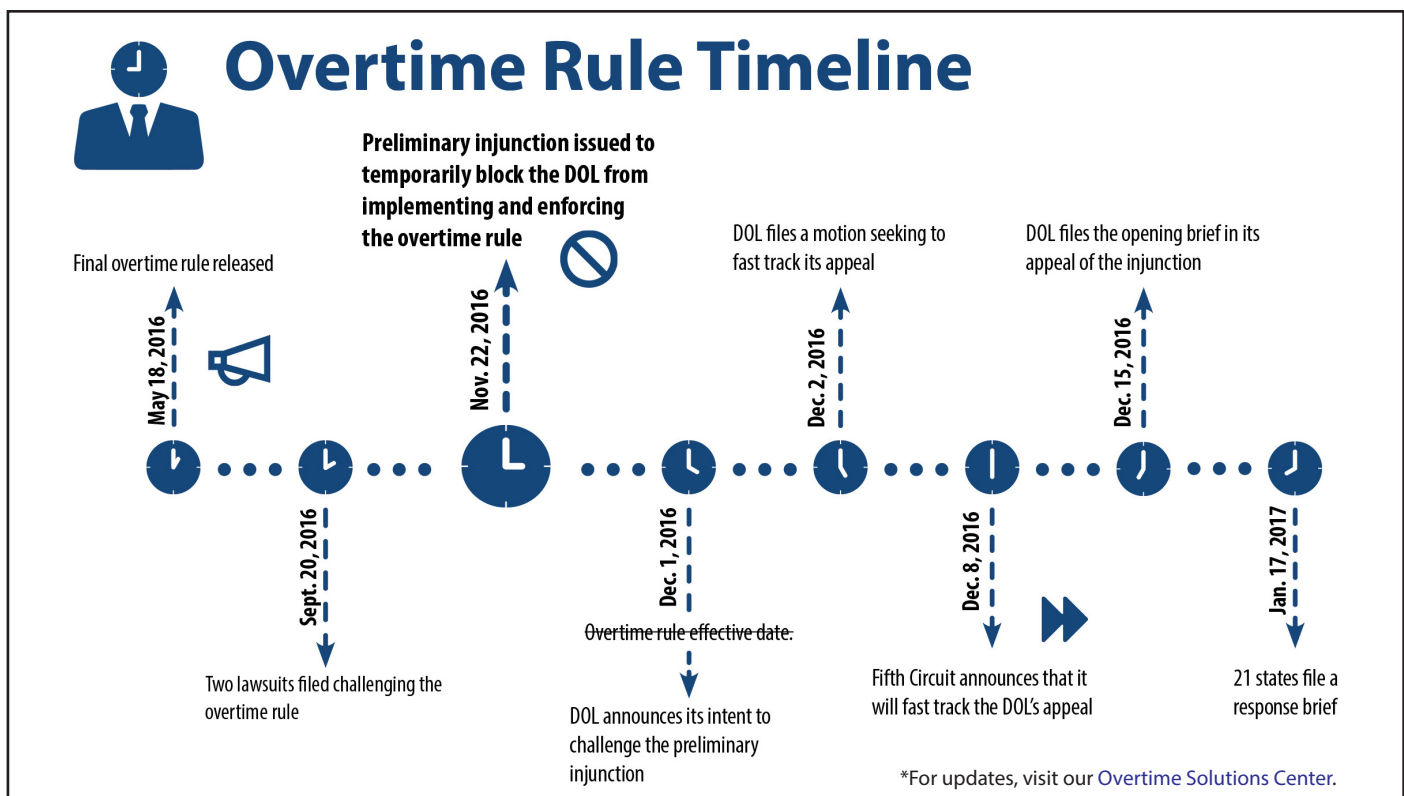
9. Electrical—Wiring Methods

This standard covers the grounding of electrical equipment, wiring, and insulation and is designed to protect employees exposed to dangers such as electric shock, electrocution, fires, and explosions. Last year, OSHA commonly cited employers for worn extension cords. If insulation is cracked or worn to the wiring, OSHA generally will not accept a quick tape repair; they will demand the employer take the cord out of service.

10. Electrical—General Requirements

Violations related to general electrical safety round out the top 10 list for 2016. Common offenses under this standard include improperly installing or using electrical equipment, failing to guard live parts of electric equipment, and insufficient unobstructed access and working space around electric equipment. ■

"Employers must communicate to employees information concerning chemical hazards."



“OVERTIME”

continued from page 1

vacatur is reversed? The answer, unfortunately for employers, is very unclear.

Employers must weigh various business and legal risks in deciding whether to comply with the now enjoined overtime regulations. There is a legal risk that if the regulations are later upheld, they may be enforced retroactively. In that event, employers may be liable for overtime payments to employees who were classified as exempt under the current regulations but who are not exempt under the new regulations, plus potential attorneys' fees. In the event of litigation attempting retroactive enforcement of the overtime rule, employers will have difficulty defending against claims if they do not have accurate records of the hours worked by employees. So, an employer that decides to hold off on complying with the new regulations may want to keep accurate records of the hours worked by any employee who is now considered exempt but could be considered non-exempt under the new regulations.

Recent Court Activity

Since the injunction was issued, there has been much activity at the trial court, in addition to the appellate court hearing the appeal of the injunction.

Appellate Activity

- On December 1, 2016—ironically, the former effective date for the revised regulations—the DOL filed a notice with the U.S. Court of Appeals for the Fifth Circuit announcing its intent to challenge the Texas district court's issuance of the nationwide preliminary injunction.

- On December 2, 2016, the DOL filed a motion with the Fifth Circuit seeking to fast track the DOL's appeal of the injunction, and, on December 8, the Fifth Circuit announced that it will fast track the appeal.

- On December 15, 2016, the DOL filed the opening brief in its appeal. In its brief to the Fifth Circuit, the DOL asserted that Judge Amos L. Mazzant III, the federal judge in Texas who issued the injunction, erred as a matter of law by enjoining the overtime regulations.

- On January 17, 2017, the 21 states that obtained the preliminary injunction submitted their brief in response to the DOL's appeal, urging the Fifth Circuit to uphold the injunction.

Trial Court Activity

- On December 9, 2016, the Texas AFL-CIO filed a motion to intervene in the lawsuit.

- On December 15, 2016, the business-plaintiffs that had challenged the

overtime regulations filed an opposition to the Texas AFL-CIO's motion to intervene, arguing that the Texas AFL-CIO does not have a right to intervene in this action as “of right” under Rule 24(a)(2) of the Federal Rules of Civil Procedure.

- The DOL filed a motion to stay proceedings pending the outcome of the expedited appeal to the Fifth Circuit, and, on December 15, 2016, the business-plaintiffs filed an opposition to the DOL's motion to stay the proceedings.

- On January 3, 2017, Judge Mazzant denied the DOL's Motion to Stay Proceedings Pending Appeal of the court's grant of the injunction.

Administration Changes

Expanding the number of workers eligible for overtime had been a major goal of the Obama administration, so it is not surprising that the DOL has filed a motion to expedite the appeal. However, even with an expedited schedule at the Fifth Circuit, briefing will not be completed and the case will not be argued or decided until after the inauguration of Donald Trump as president. Of course, an appeal of the judge's ruling will fall to the new Trump administration, which may not be as motivated to enforce these Obama administration regulations. ■

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E-Discovery in the 21st Century: An Interview With Donna Panich

Indianapolis Shareholder Shares Her Insights on Why E-Discovery Is Important in Employment Cases

Danuta B. (Donna) Panich is the founding co-chair of Ogletree Deakins' E-Discovery and Records Retention Practice Group. A summa cum laude graduate of the Indiana University School of Law who has practiced law for almost 40 years, Panich early on recognized the significance of electronically stored information to the successful management of cases and investigations. Regarded as a thought leader in the areas of employment law litigation and e-discovery best practice, Panich analyzes complex issues of data preservation, collection, and privacy for business clients.

Justin Ingersoll: Can you explain what e-discovery is and how the field of e-discovery has emerged and developed?

Donna Panich: E-discovery is simply the discovery of electronically stored information. The vast majority of information these days is digital in nature and, therefore, in any kind of litigation or adversarial proceeding or investigation, any inquiry into the facts—"discovery," if you will—requires discovery to take into account electronically stored information, commonly called "ESI."

Jl: Tell us a bit about the discovery process.

DP: In the e-discovery life cycle, after pre-litigation, you start with preservation, then collection and identification of relevant information, and, finally, review. Oftentimes there's an enormous quantity of information to review. We don't talk about a box full of documents as a case file anymore. Even in a small matter, you would expect to have multiple gigs of data to go through and review to determine what is or is not relevant, and what must be produced.

So the case team—the case manager from Ogletree Deakins' Litigation Support Department and the e-discovery counsel—work together to identify the search criterion and the protocols that are going to be used to winnow the data that is collected. So, let's say that you collect email accounts for 10 custodians. The vast majority of those emails are not going to be relevant to anything. We employ a number of different approaches to find what *is* relevant in that.

Jl: Can you talk more generally about why discovery is so important to the out-

come of a matter and why efficient and effective management of the process is necessary?

DP: Well, obviously, from a substantive perspective, what we want to do is find the relevant information that is going to help the case team litigate the case—to find the evidence that supports our client's position and will form the basis for a presentation, whether it's a motion for summary judgment or a trial or even in a settlement conference where you're presenting why the case doesn't merit an outcome that is significantly in favor of the opposing side.

At the same time, we have an obligation under the rules of civil procedure, as well as under common law and our

we can't change the playing field, we can provide the most efficient and effective way of getting through the discovery process so that money isn't wasted and the relevant evidence is found in a way that is as cost-efficient as possible.

Jl: You were one of the pioneers in the field of e-discovery—one of the people who correctly saw that technology would be of increasing importance to the practice of law. What was your journey to becoming an authority in the field of e-discovery?

DP: Well, I did start off in the early days of e-discovery, right around the turn of the century. I was working on a class action out in Iowa that was pending in state court. It was a wage and hour

"Even in a small matter, you would expect to have multiple gigs of data to go through and review."

ethics rules, to preserve relevant information and to respond fully to discovery requests, provided that those discovery requests aren't objectionable and are within the confines of the proper scope of discovery as defined by whatever rules govern the proceeding at issue—whether that be a state court proceeding or the federal rules or whatever.

If information isn't properly preserved and if information isn't timely produced, that can result in sanctions against the parties. Now, those sanctions can be monetary in nature—a fine, for instance—or they can be case-altering, as in the instance of an adverse inference instruction or even dismissal or default, or issue preclusion, or being precluded from introducing evidence on a particular subject. And even if the spoliation isn't discovered, at some point it can affect how one goes about, for instance, settling a case (if one recognizes that one has exposure in that regard).

And then of course, there's just the cost. Discovery generally—most of it being electronic in nature these days—costs a lot and can be what makes or breaks a particular case. Many companies settle cases because it simply costs too much to go through discovery. So while

class action and my opponent, who happened to be from New York, came to the judge in our state court proceeding and demanded that my client turn over a lot of email from its managers dealing with the wage and hour issues based upon the first ruling in the case of *Zubulake v. UBS Warburg*. And so that was my introduction.

I briefed that motion to compel. I argued it and won it back then in the state court of Iowa—although I probably would lose it today based upon the growth of e-discovery as an accepted discovery tool. But in any event, that's when I started. That whet my appetite and I began working with e-discovery in a much more systematic way.

Shortly thereafter, the firm that I was with at the time started a group that focused on e-discovery issues and I was a member of that group and worked on various projects relating to e-discovery, including reviews as well as litigation preparedness programs, remediation programs, and putting together e-discovery protocols for clients. And so I was in at the ground level within that group. It's just been an interesting arena. It has continued to grow and evolve and obviously has taken on an enormous importance in litigation practice of every sort. ■

Court Rejects Worker's FMLA Interference Claim

Finds Employer's Single Visit to Home While Worker Was On Leave Does Not Support Cause of Action

A federal appellate court recently held that an employer did not unlawfully interfere with a worker's right to take leave under the Family and Medical Leave Act (FMLA). According to the Third Circuit Court of Appeals, the worker's claim was "doomed by an insufficient showing of injury" since he was not actually denied leave. Likewise, the employer's single visit to the worker's home while he was on leave, without more, was not actionable under the FMLA. **Fraternnal Order of Police, Lodge 1 v. City of Camden**, No. 15-1963, Third Circuit Court of Appeals (November 17, 2016).

Factual Background

Charles Holland worked as a police officer with the City of Camden, New Jersey. The Fraternal Order of Police, Lodge 1 filed a lawsuit against the city on behalf of Holland and several other officers. The complaint alleged that the City of Camden Police Department maintained an unlawful quota policy and that failure to comply with the quota policy resulted in disciplinary action.

The union claimed that the city retaliated against the officers because they expressed their disagreement with the quota policy. For example, Holland and another officer were placed on a low-performer list for failure to comply with the policy. According to the suit, the city also interfered with Holland's right to

take leave under the FMLA to care for his seriously ill mother.

In May 2009, Holland was approved for FMLA leave to care for his mother. On May 27, however, he received an oral warning that he was using too much leave. Less than a month later on June 17, Holland received a letter from the lieutenant stating that he was being placed in the "Chronic Sick Category." Holland claimed that when he informed the lieutenant of his approved FMLA leave, the lieutenant said the inspector did not care if the leave was approved and that Holland would continue to be placed in the category (and possibly subject to discipline). Holland also alleged that Camden staff visited him at home on one occasion when he was on FMLA leave.

The trial judge granted the city's motion for summary judgment in its entirety. Specifically, the judge ruled that Holland failed to establish that the city violated the FMLA. According to the judge, Holland did not show that he was precluded from using protected leave or that he was "otherwise prejudiced by Camden's actions." This ruling was then appealed to the Third Circuit Court of Appeals.

Legal Analysis

Under the FMLA, eligible employees are entitled to take 12 weeks of protected leave during a 12-month period to

care for a family member with a serious health condition. The federal law also makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" in the FMLA.

Holland argued that the city "interfered" with his right to take FMLA leave by placing him on a chronic sick list and threatening to discipline him. He also pointed out that officials visited him at home while he was on leave.

The city, on the other hand, claimed that this "interference" was part of an internal miscommunication. According to the city, Holland was questioned about his use of leave because one branch of the department was unaware that his request for FMLA leave had been approved. The city also asserted that none of its actions were "sufficient to deter a person of ordinary firmness from exercising [their] right[s]."

The Third Circuit agreed with the trial judge. The court noted that Camden officials only visited Holland once while he was on leave. While "Camden's actions may have been insensitive," the court wrote, "they were not beyond the limitations the FMLA places on employers attempting to manage their workplaces."

The Third Circuit also held that Holland failed to show actual harm. According to the court, the FMLA "provides no relief unless the employee has been prejudiced by the violation." In this case, Holland did not allege that he was denied FMLA leave. In fact, he admitted that he was able to take time off to care for his ill mother.

As a result, the Third Circuit upheld the lower court's decision to dismiss Holland's FMLA claim.

Practical Impact

According to Sharon Margello, a shareholder in the Morristown, New Jersey office of Ogletree Deakins, "This is a positive yet cautionary decision for employers. As noted by the court, 'there is no right in the FMLA to be left alone.' Under the law, employers have the right to ensure that employees who are on leave from work do not abuse their leave. However, employers must be mindful not to interfere with workers' rights under the Act." ■

Ogletree Deakins News

New to the firm. Ogletree Deakins is proud to announce the attorneys who recently have joined the firm. They include: Jeffrey Costolnick and Ana Dowell (Atlanta); Ashkan Saljoughi (Berlin); Sandra Kahn (Boston); John Barcus, Deanna Caldwell, and William Neubauer (Dallas); Michael Nail (Greenville); Alix Udelson (Houston); Debra Barsom (Los Angeles); Mauricio Romero Alpuche (Mexico City); Christine Bestor Townsend (Milwaukee); Krystina Barbieri (Morristown); Lisa Hanchey and Atoyia Scott Harris (New Orleans); Victor Albert and Sam Fulkerson (Oklahoma City); Nikki Fermin, Gregory Gomez, and Sean Paisan (Orange County); Heather Lyell (Portland); Marissa Cwik and Emmalyn Ramirez (Raleigh); Clinton Morse (Richmond); and Anthony DeCristoforo (Sacramento).

California Supreme Court issues key wage and hour ruling. On December 22, 2016, the Supreme Court of California ruled that California law prohibits on-duty and on-call rest periods. According to the court, "[d]uring required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time." For more on this case, visit our Insights page at www.ogletree.com/our-insights. To subscribe to our California blog, visit www.ogletree.com/our-insights/subscribe.

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