



The Biweekly
Payroll
Compliance
Publication
Of The
American
Payroll
Association

PAYROLL CURRENTLY

Volume 16

Issue # 2

January 25, 2008

Inside this issue...

<i>Payroll Solutions</i>	2
<i>IRS Issues Guidance on Information Reporting Requirements for Stock Options</i>	3
<i>IRS Corrects Error in Section 15 of Circular E for 2008</i>	3
<i>IRS Issues Fact Sheet on Worker Classification and Employment Taxes</i>	3
<i>OCSE Employer Services Team Gets a New Supervisor</i>	4
<i>DOL Discusses Practice of Making Automatic Deductions for 30-Minute Lunch Period</i>	4
<i>Safety Supervisor Was Not an FLSA-Exempt Executive</i>	5
<i>Engineer-Manager Was Covered by FLSA 'Combination Exemption'</i>	5
<i>Employee Could Not Sue for Interference With Spouse's FMLA Rights</i>	6
<i>Famous Dave's Restaurants Owned by Different Companies Were Joint Employers</i>	6
<i>Employee Who Complained About Overtime Wages Was Not Protected by FLSA Anti-Retaliation Provision</i>	7
<i>Insurance Adjustors Were Not Exempt Administrative Employees</i>	7
<i>State and Local News</i>	
<i>Maine - EFT threshold</i>	
<i>Maryland - Form MW 507 revised</i>	
<i>Massachusetts - Withholding tables (2008)</i>	
<i>Missouri - Online option for filing withholding returns, paying taxes</i>	
<i>Rhode Island - Cafeteria plan mandate</i>	8

Taxpayer Advocate Renews Call for Withholding on Payments to Independent Contractors

On January 9, National Taxpayer Advocate (NTA) Nina Olson released her annual report to Congress. (Note: The Taxpayer Advocacy Service, created as part of the IRS Restructuring and Reform Act of 1998 (Pub. L. No. 105-206), is an independent office within the IRS.) The report summarizes the most serious problems encountered by taxpayers in 2007 and makes legislative and administrative recommendations to address them [www.irs.gov/advocate]. Of particular interest to payroll professionals is the NTA's continued attention to the problem of independent contractor income that is unreported and untaxed (see **PAYROLL CURRENTLY**, Issue No. 3, Vol. 14).

Problem: the cash economy

According to the report, the "tax gap" – the amount of tax that is not voluntarily and timely reported and paid – which stands at \$345 billion per year, remains a problem. Households that pay their taxes have to pay an average surtax of about \$2,680 per year to pick up the tab for those that do not. The tax gap can also erode the level of confidence that taxpayers have in government.

The report asserts that underreported income from the "cash economy" – taxable income from legal activities that is not subject to information reporting or withholding – is probably the single largest component of the tax gap, likely accounting for over \$100 billion per year. This type of income is most often earned by unincorporated businesses.

Many independent contractors who work in the cash economy have low profit margins and cannot afford to pay their taxes timely. Especially in situations where an independent contractor offers to provide a discount for "under the table" cash payments, there may be little motivation for the service recipient (payer) to comply with current information reporting requirements.

While the payer may be liable for any backup withholding that should have been collected, backup withholding is only required if the contractor provides an incorrect taxpayer identification number (TIN) and may not be required for over a year after the contractor is hired. Moreover, the penalty for missing or incorrect information reporting forms, such as Form 1099-MISC or Form W-9, is generally \$50 per form.

Recommendation: target noncompliant independent contractors

To address this problem, the NTA would require payers:

- To institute backup withholding on payments subject to information reporting (i.e., nonemployee compensation in excess of \$600 paid in the course of a trade or business) that are made to independent contractors specifically identified by the IRS as "substantially noncompliant"; and
- To stop backup withholding when the IRS deems a contractor "substantially compliant."

Only those substantially noncompliant contractors

Payroll Solutions

Q. One of our employees has requested an extended leave of absence under the Family and Medical Leave Act (FMLA). She is a long-time employee who is credited with eight sick days each year, three personal holidays, and five weeks of vacation. With the start of the new year, this employee's leave bank has been credited with all of this personal time, but she wants to take unpaid leave. Can the company insist that the employee use her paid time off first before she takes unpaid leave?

A. Yes. Employers can require eligible employees to use paid vacation, personal, sick, or other leave as part of the 12-week statutorily guaranteed leave, so long as that does not violate any existing contract between the employer and its employees' collective bargaining representative.

The employer must make its designation of leave as paid or unpaid FMLA leave known to the employee within two business days of receiving notice from the employee that a leave will be taken or having enough information to make the decision. The employer cannot make this decision after the leave has ended unless the employee was absent for an FMLA reason and the employer did not learn of the reason until the employee returned to work, or the employer has been unable to confirm that the leave qualifies under the FMLA.

The employer's notice to the employee that leave is being designated as paid or unpaid FMLA leave may be oral or written. If the notice is oral, it must be confirmed in writing by the next payday (or by the following payday if the first payday is less than a week after the oral notice is given). The written notice may take any form, including a notation on the employee's pay stub.

See *The Payroll Source*® beginning at p. 4-32 for more information about FMLA leave.

specifically identified by the IRS would be subject to withholding on payments subject to information reporting. Only contractors who had recently failed to pay income tax or self-employment tax liabilities on more than one occasion would be deemed substantially noncompliant. The NTA recommends that even if a contractor has outstanding tax liabilities attributable to several years, the IRS should retain the discretion to treat the contractor as substantially compliant if, for example, the contractor made arrangements to satisfy past obligations and scheduled a year's worth of estimated tax payments through EFTPS or entered into a voluntary withholding agreement. The process of determining a contractor's status as "substantially compliant" or "substantially noncompliant" should eventually be automated, suggests the NTA, perhaps utilizing the IRS's existing e-Services or TIN-matching systems.

These recommendations would provide:

- The IRS with a proactive way to help prevent noncompliance by contractors who cannot afford to pay their taxes and choose not to enter into voluntary withholding agreements.
- Payers with an additional incentive to hire compliant contractors (and keep them compliant) – there would be little likelihood they would have to institute withholding on payments to them.

Note: Although the IRS can theoretically levy on payments to noncompliant contractors with unpaid tax debts under current law, the IRS can only issue a levy after a taxpayer has incurred a delinquency. The IRS may also have difficulty identifying payments that could be subject to levy in a timely manner.

Recommendation: accelerate the TIN validation process

The NTA also recommends that Congress accelerate the lengthy TIN validation and backup withholding processes by requiring payers that make payments that are already subject to information reporting to validate the payee's TIN with the IRS before making the payments. If the payee's TIN cannot be validated, then the payer should begin backup withholding on the first payment. *Note:* It is recommended that this proposal not be implemented until the IRS has expanded its TIN

validation process so that payers can validate TINs using a touch tone phone as well as the Internet.

The current process. When payments are subject to third-party information reporting, the payer is required to report those payments to both the IRS and the payee on an information return (generally on Form 1099-MISC). The IRS needs to be able to associate the information return with the payee using the payee's TIN. The payee generally must provide the payer with a TIN, which the payer uses in completing the information return.

If a payee provides an incorrect TIN to the payer so that the payer is unable to file correct and complete information returns or payee statements, the IRS may assert a small penalty (generally \$50) against the payer. A payee may be subject to backup withholding if:

- The payee fails to provide a TIN;
- The payee has provided the payer with two incorrect TINs in a three-year period; or
- The IRS has notified the payer that the payee's TIN is incorrect and the payee does not provide the correct TIN within 30 days.

Delays built into the current process. Both TIN validation and backup withholding are often delayed. Although a payer can check an IRS database to determine if the payee's name and TIN match, a payer is not permitted to begin withholding until the IRS notifies the payer of a name-TIN mismatch.

The IRS cannot identify mismatches and send notices to payers promptly because payers are not required to file information returns that the IRS can use to identify mismatches until February of the year following the payment, and the IRS does not send backup withholding notices until September or October of the following year (or in some cases until March of the second following year).

Even after the IRS notifies a payer that the payee has supplied an invalid TIN, withholding may be further delayed. For example, if, within 30 days after the payer sends the payee a notice indicating the TIN is incorrect, the payee provides the payer with a Form W-9 reporting a new TIN, withholding is not required until the IRS receives the W-9 and verifies that the TIN is still incorrect and sends another notice to the payer. ■

IRS Issues Guidance on Information Reporting Requirements for Stock Options

The IRS has issued interim guidance on information returns required to be filed by employers under IRC §6039 in connection with certain stock options [Notice 2008-8, 2008-3 IRB 276].

Background

The Tax Relief and Health Care Act of 2006 (Pub. L. No. 109-432; see *PAYROLL CURRENTLY, Issue No. 1, Vol. 15*) amended §6039 to require an employer to file an information return with the IRS when an employee exercises an incentive stock option (ISO) or when stock that has been acquired under an employee stock purchase plan (ESPP) for an option price of 85% - 100% of the stock's fair market value is later transferred to a third party.

Previously, §6039 required employers to provide information regarding such transactions only to employees. As amended by the Act, however, §6039 now requires employers to file an information return with the IRS following a stock transfer, in addition to providing employees with an information statement. Amended §6039 applies to stock transfers occurring on or after January 1, 2007.

Information return filing waived for 2007 in the absence of regulations

The Act said that the time and form for filing the information return with the IRS, as well as the information to be contained in the return and furnished to employees, would be set by the Treasury Secretary and the IRS in regulations. However, because regulations under amended §6039 have not yet been issued, the IRS is waiving the obligation to file an information return for 2007 for covered stock transfers. Employers should continue to provide information on these transactions to employees under existing regulations.

Note: The new regulations are expected to retain the existing rules relating to the information statements for employees, and to generally require that the same information be included on the information returns filed with the IRS. Further, it is expected that the new regulations will be effective retroactive to January 1, 2007.

IRS Corrects Error in Section 15 of Circular E for 2008

The IRS has posted a notice on its website to identify an error in the 2008 Circular E, *Employer's Tax Guide* (Pub. 15).

Notice 1376, *Error in Publication 15 (Circular E), Employer's Tax Guide* (www.irs.gov/formspubs/lists/0,,id=97802,00.html), identifies an error on page 31, in Section 15, Special Rules for Various Types of Services and Payments. In the row for

Information statements for employees under current regulations

Under current regulations (26 C.F.R. §1.6039-1(a)), the statement furnished by an employer to an employee with respect to a stock transfer relating to the employee's exercise of an ISO must include the following information:

- The name, address, and employer identification number of the corporation transferring the stock;
- The name, address, and identifying number of the person to whom the stock was transferred;
- The name and address of the corporation whose stock is the subject of the option (if other than the corporation transferring the stock);
- The date the option was granted;
- The date the shares were transferred to the person exercising the option;
- The fair market value of the stock at the time the option was exercised;
- The number of shares transferred pursuant to the option;
- The type of option under which the transferred shares were acquired; and
- The total cost of all the shares.

Under current regulations (26 C.F.R. §1.6039-1(b)), the statement furnished by an employer to an employee with respect to the employee's transfer of stock acquired pursuant to an option granted under an ESPP must include the following information:

- The name and address of the corporation whose stock is being transferred;
- The name, address, and identifying number of the transferor;
- The date the stock was transferred to the transferor;
- The number of shares being transferred; and
- The type of option under which the transferred shares were acquired. ■

IRS Issues Fact Sheet on Worker Classification and Employment Taxes

The IRS has issued a Fact Sheet on *Employment Taxes and Classifying Workers* [FS-2007-27; www.irs.gov/newsroom/article/0,,id=177092,00.html] to help business owners better understand these important issues. For example, it is a common misconception that someone working part time or earning less than \$600 per year should be classified as an independent contractor. But part time status and the number of hours worked are generally not factors that determine whether a worker is an employee or an independent contractor.

Employee or independent contractor?

Several factors are used to determine how to classify

Dependent care assistance programs, the phrase "limited to \$50,000" should be "limited to \$5,000." The corrected parenthetical should read: "(limited to \$5,000; \$2,500 if married filing separately)."

The corrected version of Publication 15 has been posted on the APA website at www.payroll.org/i4a/pages/index.cfm?pageid=139. ■

workers, and it all comes down to the degree of control a business has over its workers. Generally, the more control the business has over a worker, the more likely it is that the worker is an employee rather than an independent contractor. Facts that provide evidence of the degree of control and independence fall into three categories:

Behavioral control. This relates to whether the business has a right to direct and control how the worker performs the task for which he or she was hired. In general, anyone who performs services for an employer is an employee if the employer can control what will be done and how it will

be done. This is so even when the employee has complete freedom of action. What matters is that the employer has the right to control the details of how the services are performed. Such details include:

- When and where to do the work;
 - What tools or equipment to use;
 - What workers to hire or to assist with the work;
 - Where to purchase supplies and services;
 - What work must be performed by a specified individual;
- and
- What order or sequence to follow.

Financial control. This looks at whether a worker has the ability to affect financial decisions. Does the worker have a significant investment in assets or tools? Are there unreimbursed expenses that the worker has to bear? Are the worker's services available to the public? Does the worker get paid whether the work is done or not, or does the worker get paid only upon finishing the job? Independent contractors can realize a profit or loss on a job. Can the worker make business decisions that affect his or her bottom line?

Relationship of the parties. This relates to the terms of the contract between the worker and the business. Is the worker offered vacation or sick pay, a pension plan, health or life insurance, or any other type of benefits? Is it anticipated that the relationship between the worker and the business will continue indefinitely, or will it last only for a specific period or project. Does the worker market his or her business to others?

Employment tax obligations

A business that has employees is responsible for paying or withholding several federal taxes:

- **Federal income tax.** The employer withholds this tax from an employee's wages.
- **Social security and Medicare taxes (FICA).** The employer withholds part of these taxes from an employee's wages and pays a matching amount.
- **Federal unemployment tax (FUTA).** The employer pays this tax only from its own funds; the employee does not pay

this tax or have it withheld from wages.

A business generally does not have to withhold or pay any federal taxes on payments to independent contractors.

Getting help

Download IRS Publication 1779, *Independent Contractor or Employee . . .*, for further guidance.

To see a discussion of worker classification issues by a panel of experts – including APA's Senior Director of Publications and Government Relations, Michael P. O'Toole, Esq. – watch the IRS's (free) archived *Tax Talk Today* webcast for November 2007 at www.taxtalktoday.tv.

If you want the IRS to determine whether a specific individual is an independent contractor or an employee, file Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*.

Related news: FedEx

Form 10-Q, *Quarterly Report*, is a report required to be filed with the Securities and Exchange Commission by all public companies, reporting financial results for the quarter and noting any significant changes or events in the quarter. In a report filed by FedEx Corporation on December 21, 2007, the company supplemented its financial statements with a note about a "contingency" involving worker misclassification.

The day before the filing, on December 20, FedEx learned that an IRS audit for calendar year 2002 had concluded that pick-up-and-delivery owner-operators at FedEx Ground had been misclassified as independent contractors. The IRS said that these workers should be reclassified as employees for federal employment tax purposes, and that it anticipated assessing taxes and penalties of \$319 million plus interest for 2002.

The company reported that similar issues are under audit for calendar years 2004 through 2006, but insisted that it believes its treatment of these workers is appropriate, that it will "vigorously defend" its position, and that it cannot yet project the amount of a potential loss. ■

OCSE Employer Services Team Gets a New Supervisor

Effective January 3 with the retirement of Anne Gould, the Office of Child Support Enforcement (OCSE) has a new employer liaison. Sherri Grigsby is the now the Supervisor of OCSE's Employer Services and External Interfaces Team. She manages the daily operations of the Employer Services program; leads the National Insurance Match Initiative, which matches information maintained by insurers on pending claims with information maintained by OCSE on delinquent child support obligors; and oversees the Multistate Financial

Institution Data Match, which matches information on delinquent obligors against records of their financial accounts.

Sherri has over 14 years of experience working in child support enforcement programs at both the state and federal levels. She worked for nine years as a contractor supporting OCSE's Federal Parent Locator Service. Prior to that, she worked for the Virginia Division of Child Support Enforcement. Sherri holds a B.A. from James Madison University. ■

DOL Discusses Practice of Making Automatic Deductions for 30-Minute Lunch Period

In a Wage-Hour opinion letter, the U.S. Department of Labor (DOL) answers questions about an employer's proposal to automatically deduct a 30-minute lunch period from its employees' total daily time worked [W-H Op. Ltr., FLSA2007-1NA (5-14-07)].

Employer's policy

The employer is a long-term health care facility for elderly and disabled residents. Employees currently punch a time clock when they begin their lunch break and at the conclusion

of the 30-minute lunch period. Under the employer's proposal, employees will no longer punch out and in at lunchtime because of numerous problems arising from this practice.

The employer proposes to automatically deduct a 30-minute lunch period from the employee's total daily time worked, unless the employee notifies the employer that he or she did not take a 30-minute lunch period that day. The employer will post this policy near the time clock, include it in the employee handbook, and review it at new hire orientation

and during periodic in-service discussions.

DOL opinion

Q. Is this new practice acceptable for purposes of the Fair Labor Standards Act?

A. FLSA regulations (29 C.F.R. §516.2) require that each employer keep and maintain an accurate record of all hours worked for each employee. The regulations do not prescribe the method or means for recording hours worked so long as the records accurately reflect the number of hours worked each day and each week by each employee. Time clocks are not required. Therefore, the employer's proposal to discontinue the use of a time clock to record the meal period does not violate the FLSA so long as the employer accurately records actual hours worked, including any work performed during the lunch period.

Q. If an employee takes a lunch period of less than 30 minutes, is the employer obligated to pay for the full 30 minutes or only for that portion of the 30-minute time period the employee was not actually eating lunch?

A. Bona fide meal periods are not work time. Ordinarily, 30 minutes or more is long enough for a bona fide meal period (29 C.F.R. §785.19). Meal periods of less than 30 minutes in which the employee is completely relieved from duty for the purpose of eating may be bona fide, and thus not considered hours worked, under special conditions (see W-H Op. Ltr. FLSA2004-22; www.dol.gov/esa/whd/opinion/flsa.htm).

If the facts demonstrate that the period of time is a

bona fide meal period, then the employer is not required to compensate for time during which the employee is completely relieved for purposes of eating a meal. The employer must always, however, compensate employees for work time. If the employee commences work before the full 30-minute lunch period has ended, then the employee must be compensated for this work time.

The Wage-Hour Field Operations Handbook enumerates the factors considered on a case-by-case basis in determining whether a meal period is bona fide (§31b23; www.dol.gov/esa/whd/FOH/FOH_Ch31.pdf):

- Work-related interruptions to the meal period are sporadic and minimal.
- Employees have sufficient time to eat a regular meal. Periods of less than 20 minutes should be given special scrutiny to ensure that the time is sufficient to eat a regular meal under the circumstances presented.
- The period involved is not just a short break for snacks and/or coffee but rather is a break to eat a full meal, comes at a time of the day or shift that meals are normally consumed, and occurs with no more frequency than is customary.
- There is an agreement between the employees and employer that the period of less than 30 minutes is sufficient to eat a regular meal.
- Applicable state or local laws do not require lunch periods in excess of the period indicated. ■

Safety Supervisor Was Not an FLSA-Exempt Executive

Randy Jones worked as a Safety Supervisor for Riggs Distler & Co., Inc., an electrical and mechanical contractor that builds, repairs, and replaces power facilities. When his employment ended, he sued the company for unpaid overtime under the Fair Labor Standards Act (FLSA). The company argued that Jones was an FLSA-exempt executive employee, but the court disagreed [*Jones v. Riggs Distler & Co., Inc.*, No. 6:07-cv-168-Orl-31KRS, 2007 U.S. Dist. LEXIS 89072 (MD Fla., 12-4-07)].

WHAT THE LAW SAYS – The FLSA executive exemption applies to an employee: (1) who is paid a salary of at least \$455 per week, not including board, lodging, or other facilities; (2) whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision of the enterprise; (3) who customarily and regularly directs the work of two or more other employees; and (4) who has the authority to hire or fire other employees or whose recommendations in this area are

given particular weight (see *The Payroll Source*®, p. 2-12).

Directing the work of two or more employees

Riggs-Distler admitted that an organization chart would not show two or more employees directly reporting to Jones. But because the Department of Labor permits employers to substitute four half-time employees (or one full-time employee and two half-time employees) for the two (full-time) employees whose work the executive must be directing, the company argued that an employee with a slight amount of authority over a large number of employees can qualify for the exemption.

The court disagreed, saying that Jones did not have the power to “direct” employees with respect to the performance of their jobs – as is required for exemption under the FLSA – because “whatever authority he possessed was limited to the discrete area of safety.” Having the authority to fire employees who fail to follow safety regulations is a far cry from “customarily and regularly” directing their work. ■

Engineer-Manager Was Covered by FLSA ‘Combination Exemption’

Northwings Accessories Corp. (NAC) is an aircraft component repair company offering repaired aircraft components for aircraft maintenance as an alternative to purchasing replacement parts from an original equipment manufacturer (OEM). Manuals issued by OEMs specify the standards that parts must satisfy in order to be considered safe for flight, but do not indicate the specialized tools, materials, or fixtures necessary to perform the safety tests. NAC therefore maintains a machine shop it uses to engineer and manufacture the tools and fixtures it needs to repair aircraft parts.

In 2003, when Carlos Pinillia was promoted to manager of the NAC machine shop, he retained his status as an

hourly employee. In 2005, NAC made Pinillia a salaried employee and assigned him engineering duties. After NAC terminated Pinillia's employment, he sued to recover overtime compensation under the Fair Labor Standards Act (FLSA) for the period when he was a salaried employee. NAC argued that Pinillia was an exempt executive “and/or” professional employee, and the court agreed that Pinillia was exempt under the “combination exemption” [*Pinillia v. Northwings Accessories Corp.*, No. 07-21564-CIV-HUCK/SIMONTON, 2007 U.S. Dist. LEXIS 83842 (SD Fla., 11-13-07)].

Executive exemption

The FLSA executive exemption applies to an employee: (1)

who is paid a salary of at least \$455 per week, not including board, lodging, or other facilities; (2) whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision of the enterprise; (3) who customarily and regularly directs the work of two or more other employees; and (4) who has the authority to hire or fire other employees or whose recommendations as to the hiring, firing, advancement, promotion, or other change of employment status of other employees are given particular weight (see *The Payroll Source*®, p. 2-12). Pinillia said that he met the first and third requirements for the exemption, but not the second and fourth requirements.

The court found that Pinillia met the fourth requirement because he had the sole authority to determine if individuals were qualified to work in the machine shop, and if he deemed an applicant unqualified, the applicant was not hired. He conducted performance evaluations and provided input about poorly performing employees that sometimes led to their dismissal.

Pinillia's duties as manager included authorization of vacation time, resolving discrepancies on employee timesheets, and determining the ability of the machine shop to perform certain jobs in-house. These were clearly "management" duties, said the court, but they did not satisfy the second requirement because they were not Pinillia's *primary* duty. His conversion to salaried status in 2005 resulted in a \$20,000 increase in compensation, the hiring of a lead to take over some of his management duties, and an overall decrease in his management responsibilities.

Learned professional exemption

The learned professional exemption applies to any employee (1) compensated on a salary or fee basis at a rate

of at least \$455 per week, and (2) whose primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (29 C.F.R. §541.300).

Pinillia met the primary duty requirements for a learned professional. His work as an engineer required advanced and specialized knowledge. FLSA regulations (29 C.F.R. §541.301(c)) specify that engineering is a field of science or learning. Pinillia's work required advanced knowledge customarily acquired by a prolonged course of specialized intellectual instruction, and it did not matter that Pinillia did not have a degree in mechanical engineering.

Combination exemption

Under the FLSA's combination exemption, employees who perform a combination of the exempt duties outlined in the regulations for administrative, executive, professional, outside sales, and computer employees may qualify for exemption. For example, an employee whose primary duty is a combination of exempt administrative and executive work may qualify for exemption. "In other words, work that is exempt under one section of this part will not defeat the exemption under any other section" (29 C.F.R. §541.708).

Here, Pinillia was exempt under the combination exemption because virtually any time he was not performing exempt executive work, he was performing exempt professional work by designing the tools and fixtures needed by NAC to carry out its repair business. The fact that Pinillia occasionally manufactured the tools he designed (nonexempt work) did not matter because it was his skills as manager and mechanical engineer that mattered to NAC and accounted for his annual salary of \$75,000. ■

Employee Could Not Sue for Interference With Spouse's FMLA Rights

Edward Paynter and his wife Misty were employees of Licking Memorial Health Systems (LMHS). During her employment with LMHS, Misty requested leave under the Family and Medical Leave Act (FMLA) on several occasions. When her employment with LMHS was terminated following another such request, she filed a charge of disability discrimination with the Equal Employment Opportunity Commission. When Edward Paynter's employment with LMHS was terminated several months later, he sued – saying the

company had wrongfully interfered with his wife's rights under the FMLA.

The court dismissed Edward Paynter's FMLA interference claim because it was based solely upon his connection to his wife. Even if the FMLA allows a third party to assert a retaliation claim, said the court, more is required than mere association with an individual who sought to exercise FMLA rights [*Paynter v. Licking Memorial Health Systems*, No. 2:07-cv-328, 2007 U.S. Dist. LEXIS 71930 (SD Ohio, 9-27-07)]. ■

Famous Dave's Restaurants Owned by Different Companies Were Joint Employers

A U.S. District Court has ruled that 25 employees who worked at more than one Famous Dave's restaurant in a workweek were entitled to back wages and liquidated damages under the Fair Labor Standards Act (FLSA) because the restaurants were a single enterprise and the companies that owned them were joint employers [*Chao v. Barbeque Ventures, LLC*, No. 8:06CV676, 2007 U.S. Dist. LEXIS 91397 (D Neb., 12-12-07)].

Background

Four of five Omaha area Famous Dave's restaurants investigated by the U.S. Department of Labor (DOL) were owned by Barbeque Ventures of Nebraska, LLC, which was solely owned by Willy Theisen. The fifth restaurant was owned by Old Market Ventures, LLC, which was owned by Barbeque

Ventures of Nebraska and Greg Cutchall. Theisen operated the Barbeque Ventures restaurants as the sole owner, served as manager of the Old Market restaurant, and supervised an Area Director who was in charge of all five restaurants. Although the Area Director was aware that some employees were working at multiple restaurant locations, the restaurants' payroll service did not cross reference payroll records to see if employees were working at multiple locations and pay them for overtime when employees worked a total of more than 40 hours in a workweek. After completing its investigation, the DOL sued Barbeque Ventures and Old Market Ventures on behalf of 25 employees.

A single enterprise

The court said that three factors are relevant

in determining whether multiple companies are a single enterprise under the FLSA: (1) related activities; (2) unified operation or common control; and (3) a common business purpose.

Here, the four Barbeque Ventures restaurants and the Old Market restaurant satisfied all three factors. Their activities were related because all five restaurants sold barbecued food under the Famous Dave's name. The restaurants were under common control because (1) they were supervised by the same Area Director, (2) Barbeque Ventures owned four of the restaurants and was the majority shareholder in the fifth restaurant, and (3) they were all managed by Theisen. Finally, the restaurants shared a common business purpose.

Joint employers

Joint employers are responsible, both individually and jointly, for FLSA compliance. Courts have found joint employment based on economic interests even when an employee works for separate companies at different locations. Here, the economic ties between the companies were clearly apparent. Barbeque Ventures and Theisen maintained

complete control of all five restaurants and benefited from their operations. Barbeque Ventures and Old Market Ventures were therefore joint employers for purposes of liability for overtime due to employees working at more than one location.

Liquidated damages

An employer violating the FLSA (i.e., required to pay back minimum wages and overtime) must pay an additional equal amount in liquidated damages unless it can show good faith and a reasonable basis for believing that it was not in violation of the FLSA.

Here, the court said that liquidated damages were warranted. Although Theisen and Cutchall claimed they did not know that employees were working at different locations and did not know that their payroll provider was not tracking those employees, their managers knew what was occurring. Theisen and Cutchall each had significant other restaurant experience, Cutchall admitted he was aware of the FLSA overtime regulations, and there was no evidence that they attempted to determine if their employees were working more than 40 hours in a workweek. ■

Employee Who Complained About Overtime Wages Was Not Protected by FLSA Anti-Retaliation Provision

Derrick Boateng was employed by Terminix International Co. Ltd. On multiple occasions between March and May 2007, he worked more than 40 hours per week without being paid overtime. During this period, he told his manager about the situation. On May 17, 2007, he showed his manager a printout of his hours worked and told him that he had not been paid properly. The next day, the manager terminated his employment. Boateng then sued Terminix for retaliation in violation of the Fair Labor Standards Act (FLSA).

Note: Under the FLSA's anti-retaliation provision (29 USC §215(a)(3)) it is unlawful for an employer "to discharge ... any

employee because such employee has filed a complaint or caused to be instituted any proceeding under or related to [the FLSA]."

Here, the court said that the FLSA's anti-retaliation clause protects an employee "filing" a complaint, which "contemplates following some form of official procedure." The clause does not permit recovery for employer retaliation against informal, oral complaints made internally to an employee's direct supervisor. Accordingly, Boateng's claim was dismissed [*Boateng v. Terminix International Co. Ltd.*, No. 07-617, 2007 U.S. Dist. LEXIS 65466 (ED Va., 9-4-07)]. ■

Insurance Adjusters Were Not Exempt Administrative Employees

A U.S. District Court in Colorado has ruled that "physical damage claim analysts" (PDCAs) employed by the American Family Mutual Insurance Co. (AFMI) were not administrative employees exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) [*In re American Family Mutual Insurance Co. Overtime Pay Litigation*, No. 06-cv-1743-30-WYD-CBS (MDL No. 1743), 2007 U.S. Dist. LEXIS 77548 (D Colo., 10-9-07)].

WHAT THE LAW SAYS – To qualify as an exempt administrative employee, each of the following tests must be met:

1. The employee must be paid at least \$455 a week on a salary or fee basis, not including board, lodging, or other facilities;
2. The employee's primary duty must be the performance of office or nonmanual work;
3. The employee's primary duty must be directly related to the management or general business operations of the employer or the employer's customers; and
4. The employee's primary duty must include the exercise of discretion and independent judgment regarding matters of significance.

The question for the court in this case was whether the third and fourth requirements were satisfied.

Directly related to general business operations

FLSA regulations and opinion letters issued by the U.S. Department of Labor outline various examples of adjusters' primary duties that qualify them for exemption. The primary duties of the PDCAs here did not include many of the cited duties, such as assessing credibility, determining coverage, evaluating liability, establishing reserves, engaging in negotiations, or involvement with litigation. Instead, the PDCAs' primary duties were to act as representatives of AFMI, process their assigned property damage claims from start to finish, resolve the claims in a manner that restored claimants to their position before the accident in question, and do this all within the scope of AFMI policy.

The PDCAs performed administrative duties because they were responsible for servicing the company's claim handling process. Therefore, they satisfied the third requirement even though many of their duties were routine and claim service policies and procedures were developed by upper management.

Discretion and independent judgment

The PDCAs did not qualify for the administrative exemption because they did not satisfy the last requirement. They did not exercise discretion and independent judgment regarding matters of significance in connection with the claims they handled.

Although they worked independently and with little direct supervision, they were required to process claims within AFMI's established guidelines. They were limited to using their skills in applying well-established techniques, procedures, or specific standards from manuals and other sources.

The PDCAs could not determine coverage, nor could they use their own judgment in determining the value of a particular claim. They could not meaningfully negotiate claims because they did not have the authority to deviate from the company's prescribed estimating procedures. ■



STATE AND LOCAL NEWS

For more state and local news, subscribe to APA's *PayState Update*, the biweekly newsletter devoted exclusively to state and local payroll compliance. Call 210-224-6406 or visit www.americanpayroll.org/paystate.html for more information.

Maine

EFT threshold. Effective 1-1-08, employers having a total combined tax liability of \$100,000 or more for all tax types, except property taxes and commercial forestry excise taxes, during the lookback period (July 1 through June 30 of the previous year) are required to remit taxes (e.g., withheld taxes, unemployment insurance taxes) via electronic funds transfer (EFT). The EFT threshold will be reduced to \$50,000, effective 1-1-09; and \$25,000, effective 1-1-10 [Code Me. R. §18-125-102; *Maine Tax Alert*, 1-08].

Maryland

Form MW 507 revised. Form MW 507, *Employee's Maryland Withholding Exemption Certificate*, has been revised (download at http://forms.marylandtaxes.com/08_forms/mw507.pdf). The following employees should complete a new Form MW 507 because the number of exemptions to which they will be entitled for withholding purposes will decrease: (1) employees who are single and anticipate they will have a federal adjusted gross income (AGI) of over \$100,000; and (2) employees who will be filing jointly, as head of household, or as a surviving spouse and anticipate having a federal AGI of over \$150,000 [Maryland Employer Withholding Tax, Tax Alert 11-07, 12-6-07].

Massachusetts

Withholding tables (2008). Effective for wages paid on or after 1-1-08, the Department of Revenue has issued revised wage-bracket and percentage method withholding tables (download at www.mass.gov/Ador/docs/dor/Forms/Wage_Rpt/PDFs/circ_m08.pdf) [Circular M, *Income Tax Withholding Tables Effective January 1, 2008*].

Missouri

Online option for filing withholding returns, paying taxes. Employers may now file Form MO-941, *Employer's Return of Income Taxes Withheld*, and zero returns (if no tax was withheld) online at <https://dors.mo.gov/tax/whtxonline/LogIn.jsp>. Taxes may be paid by electronic bank draft (e-check), credit card, or TXP Bank Project. There are fees for e-check and credit card payments.

Rhode Island

Cafeteria plan mandate. By 7-1-09, an employer with annual average employment of more than 25 employees for six consecutive months of the year in Rhode Island must adopt and maintain a cafeteria plan through which employees and their dependents may purchase health insurance. A covered employer is not required to pay for, or otherwise contribute to, the cost of any health insurance purchased through the cafeteria plan [H.B. 6137, L. 2007].

PAYROLL CURRENTLY

**Publisher,
Executive Director**
Dan Maddux

**Senior Director of
Publications and
Government Relations**
Michael P. O'Toole, Esq.

Managing Editor
Anne S. Lewis, Esq.

Editors
Laura Lough, Esq.
Edward Kowalski, Esq.

Inside Washington
Scott Mezistrano, CPP
William Dunn, CPP

**Manager,
Art Department**
Jennifer Sanfilippo

Graphic Designer
Judith Aquino

Web Implementation
Rosemary Birardi

PAYROLL CURRENTLY NEWSLETTER

Payroll Currently (ISSN 1065-6529) is published biweekly by the American Payroll Institute Inc., in cooperation with The American Payroll Association, 30 East 33rd Street, 5th Floor, New York, NY 10016-5386; Tel: 212-686-2030; Fax: 212-686-4080. Payroll Currently is designed to provide authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. © Copyright 2008 American Payroll Association. All rights reserved.