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Visas in the News

Over the last several weeks, the Department of Homeland Security, acting through U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE), and the Department of Labor, acting through the Wage and Hour Division (W-H), have issued a variety of guidance and enforcement updates on visas for foreign nationals of interest to employers.

H-1B (specialty workers): selection process rules

On April 8, USCIS announced that it has received enough H-1B petitions to meet the congressionally mandated cap for fiscal year 2009 [www.uscis.gov/files/article/H-1B_8Apr08.pdf]. USCIS has also received more than 20,000 H-1B petitions filed on behalf of persons exempt from the cap under the "advanced degree" exemption.

USCIS will carry out the computer-generated random selection process for all cap-subject petitions received in order to select the number of petitions needed to meet the caps of 65,000 for the general category and 20,000 under the "advanced degree" exemption limit.

Filings will be handled in accordance with the interim final rule published on March 24, 2008, in the Federal Register (<http://edocket.access.gpo.gov/2008/pdf/E8-5906.pdf>). This means that the selection process for the "advanced degree"

exemption petitions will be conducted first; all "advanced degree" petitions not selected will then be part of the random selection process for the 65,000 limit. Petitions not selected will be rejected and the filing fees returned.

USCIS will also handle duplicative and multiple petition filings in accordance with the interim final rule - by denying all petitions filed by an employer for the same fiscal year with respect to the same worker if the worker is subject to one of the caps. Note that this rule does not preclude related employers from filing petitions on behalf of the same alien, however.

Comments on the interim final rule must be received by May 23, 2008, and identified by docket number USCIS-2007-0060. Submit comments in writing to: Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW, Suite 3008, Washington, DC 20529. Or submit comments electronically at www.regulations.gov.

DOL fines staffing company for violating H-1B program rules, seeks almost \$3 million in back wages

On March 11, the Department of Labor (DOL) issued a determination letter charging Advanced Professional Marketing, Inc. (APMI), a New York City-based medical

Payroll Solutions

Q. I work for a daycare center/preschool that is required by state regulation to provide periodic training for its employees. The training takes place off-site and outside of the employees' normal working hours. The center would like to pay its nonexempt employees for attending the training at a flat hourly rate and exclude it when the employees' overtime pay is figured. Would this be allowed?

A. No. The general rule is that time spent by an employee attending lectures, meetings, seminars, and training sessions is compensable worktime (and therefore includable in overtime calculations) unless *all* of the following conditions are met: (1) the meeting, lecture, etc., is held outside of the employee's regular working hours; (2) attendance is voluntary (not a condition of employment); (3) the meeting, lecture, etc., is not directly related to the employee's job; and (4) the employee does not perform any productive work for the employer while attending (see *The Payroll Source*®, pp. 2-58 and 2-59). Here, all of the requirements for noncompensability are not satisfied (e.g., the attendance is not voluntary).

A fact sheet issued by the U.S. Department of Labor addresses these requirements in connection with daycare centers and preschools and confirms that time spent attending training required for daycare licensing is working time for which employees must be compensated (www.dol.gov/esa/regs/compliance/whd/whdfs46.pdf).

staffing company, with violating provisions of the Immigration and Nationality Act that authorize employers to bring non-immigrant workers into the U.S. under the H-1B program.

A W-H investigation found that AMPI brought 156 H-1B guest workers from the Philippines into the U.S. to be employed primarily as physical therapists in medical facilities in the New York metropolitan area. AMPI willfully failed to pay required wages (i.e., the same wages as are paid to U.S. workers who perform the same types of work or the prevailing wages in the areas of intended employment), filed lawsuits seeking penalties against some H-1B workers for early termination of employment, failed to maintain required documentation/make required documents available for examination, and used incorrect prevailing wage rates on labor condition applications.

The determination letter assessed civil money penalties totaling \$512,000 for the violations and directed APMI to pay back wages in the amount of \$2,920,270 to the 156 H-1B workers.

F-1 (students): OPT period extended

On April 8, ICE issued an interim final rule extending the maximum period of optional practical training (OPT) from 12 months to 29 months for F-1 students who have completed a science, technology, engineering, or mathematics (STEM) degree and accept employment with employers enrolled in the E-Verify employment eligibility verification program [<http://edocket.access.gpo.gov/2008/pdf/E8-7427.pdf>].

An F-1 student with an approved OPT extension would be required to report changes in his/her name or address and changes in the employer's name or address and to periodically verify the accuracy of this information.

The employer of an F-1 student with an approved OPT extension would be required to report to the designated school official (DSO) within 48 hours after the OPT student has been terminated, or otherwise leaves his or her employment, prior to the end of the authorized period of OPT.

The rule also extends the authorized period of stay for all F-1 students who have a properly filed H-1B petition and change of status request (filed under the cap for the next fiscal year) pending with USCIS. If USCIS approves the H-1B petition, the students will have an extension that enables them to remain in the U.S. until the requested start date indicated in the H-1B petition.

Finally, the rule implements a programmatic change to allow students to apply for OPT within 60 days of concluding

their studies.

Comments on the interim final rule must be received by June 9, 2008, and identified by docket number ICEB-2008-0002. Submit comments in writing to: U.S. Immigration and Customs Enforcement, Department of Homeland Security, 425 I Street, NW, Room 7257, Washington, DC 20536. Or submit comments electronically at www.regulations.gov.

E-3 (specialty occupations): procedures clarified

On April 11, W-H issued final regulations clarifying the application requirements for employers seeking to use workers on E-3 visas [<http://edocket.access.gpo.gov/2008/pdf/E8-7563.pdf>]. *Note:* This visa classification was established in 2005 and applies to residents of Australia coming to the U.S. to work in "specialty occupations" (definition of this term is similar to that for H-1B visas; see *The Payroll Source*®, p. 14-38). It is limited to 10,500 individuals annually, not counting spouses and children.

H-2A (agricultural workers): program rules modified

On February 13, W-H and USCIS issued proposed regulations modifying the hiring process for H-2B workers.

The W-H regulations [<http://edocket.access.gpo.gov/2008/pdf/E8-2525.pdf>] would streamline the process by requiring employers to file H-2A applications directly with the federal Employment and Training Administration rather than with state agencies. The regulations would also increase the length of time employers are required to recruit for domestic workers before they are permitted to apply for H-2A workers. In addition, new tools and enhanced penalties are proposed, including audits, revocation of certifications, increased debarment authority, and substantial increases in fines, up to \$100,000 for violations resulting in serious injury or death of a worker.

The USCIS regulations [<http://edocket.access.gpo.gov/2008/pdf/E8-2532.pdf>] would:

- Extend from 10 to 30 days the time a temporary agricultural worker may remain in the U.S. after the end of employment;
- Reduce from six months to three months the time a temporary agricultural worker must wait outside the U.S. before he or she is eligible to reenter the country under H-2A status;
- Permit H-2A workers who are changing from one H-2A employer to another to begin work with the new petitioning employer before the change is approved by USCIS, provided the new employer participates in the E-Verify employment

eligibility verification program;

- Require an employer attestation regarding the scope of the H-2A employment and the use of recruiters to locate H-2A workers;
- Crack down on employers and recruiters that impose fees on prospective H-2A workers;
- Eliminate the ability of employers to file an H-2A petition without an approved temporary labor certification;

- Prohibit the approval of H-2A petitions for nationals of countries determined to be consistently refusing or unreasonably delaying repatriation of their nationals; and
- Establish a land-border exit system pilot program, under which H-2A visa holders admitted through a participating port of entry would also depart through a participating port of entry and present designated biographical information, possibly including biometric identifiers. ■

Nurses Working Unauthorized Hours Were Entitled to Overtime Pay

Gotham Registry, Inc., was a staffing agency that provided hospitals with nurses. Nurses placed by Gotham reported directly to the hospital and kept track of their hours on daily time sheets, which were compiled by the hospital and forwarded to Gotham. The company was not permitted on hospital premises to supervise its nurses or to verify their hours worked. For each nurse, Gotham received a standard hourly fee multiplied by the hours worked by the nurse, most of which was paid to the nurse.

In 1994, in order to settle a lawsuit filed by the Department of Labor (DOL), Gotham agreed to treat the nurses as employees and pay them overtime as required by the Fair Labor Standards Act (FLSA). After the settlement, Gotham implemented a policy aimed at limiting unauthorized overtime or insulating itself from claims for time and one-half compensation for unauthorized hours. The policy was printed on the nurses' timesheets as follows: "You must notify Gotham in advance and receive authorization from Gotham for any shift or partial shift that will bring your total hours to more than 40 hours in any given week. If you fail to do so you will not be paid overtime rates for those hours."

Gotham nurses asked to work overtime occasionally contacted Gotham first to request approval in compliance with the company rule, but three out of four approval requests were denied. At other times, the nurses accepted unscheduled shifts without obtaining Gotham's approval. After the nurses reported the unauthorized overtime on their timesheets, Gotham attempted to negotiate larger fees from the hospitals, but rarely succeeded. If Gotham received a larger fee from a hospital, it paid the overtime to the nurse working overtime there; otherwise, nurses received only straight-time wages for their unauthorized overtime hours.

The DOL sued Gotham for violating the 1994 agreement. The Second Circuit Court of Appeals said that Gotham had to pay the nurses for all their overtime hours even if they had failed to comply with the company's overtime authorization policy [*Chao v. Gotham Registry, Inc.*, 514 F.3d 280 (2nd CA, 1-24-08)].

WHAT THE LAW SAYS – Under the FLSA, an employer that "employs" an employee is required to pay the employee overtime pay for hours worked in excess of 40 in a workweek (29 USC §207(a)(1)). The FLSA defines "employ" as "to suffer or permit to work" (29 USC §203(g)), but does not define "work." U.S. Supreme Court cases clarify that work is an exertion or loss of an employee's time that: (1) is controlled or required by an employer; (2) is pursued necessarily and primarily for the employer's benefit; and (3) if performed outside the employee's scheduled work time, is an integral and indispensable part of the employee's principal activities.

Unauthorized overtime as work

Despite the limited control and burdens placed on Gotham, the Second Circuit said that the unauthorized

overtime was still compensable work. In the first place, Gotham admitted that it "employed" the nurses, which the court said meant that it considered their regularly scheduled activities to be work. And such work from the nurses' standpoint is all the same. "Work is work, after all. Nurses who work overtime, at the hospital's request, often continue doing the same kind of work they were doing on their regular shifts."

The court rejected the argument that the overtime work did not benefit Gotham. The nurses received at least straight-time compensation for unauthorized overtime work, so Gotham's argument meant that it benefited from the nurses' work if it had to pay only straight-time wages but did not benefit if it was required to pay overtime – in other words, unprofitable labor is not work under the FLSA. "What Gotham implies is that the nurses' overtime belongs to a new category of exertion, call it quasi-work, that was not contemplated by the drafters of the [FLSA] and is subject to its own compensation rules."

The suffer or permit standard

The court concluded that Gotham suffered or permitted the nurses' overtime and therefore violated the FLSA and the 1994 settlement agreement by failing to compensate them with the required overtime pay.

Gotham's knowledge. Gotham knew the unauthorized work was occurring, and it did not matter that the company only found out about it after the fact, said the court. There is no requirement that an employer's knowledge of unauthorized work occur at the time the work is performed.

And the reason an employee works overtime also does not matter. Once an employer has knowledge of an employee's overtime activities and those activities constitute work under the FLSA, they must be compensated whether the hours are worked voluntarily or under duress.

Gotham's duty to prevent unwanted overtime. The court said that in a normal employer-employee relationship, management is presumed to have an array of measures available to enforce a formal rule against overtime, so that an employer's mere knowledge of overtime worked is often treated as sufficient to establish liability under the FLSA. Here, the situation was complicated by Gotham's limited control over the nurses' activities, but the company still did not do enough to avoid liability.

The court said that Gotham did not use all possible measures to prevent the unauthorized overtime. A nurse who disregarded the no-overtime rule faced no adverse consequences beyond being paid straight-time wages for the resulting overtime, while violations of other company policies resulted in contractual penalties.

If Gotham was serious about preventing unauthorized overtime, said the court, it could have disciplined nurses who violated the rule. Or it could have announced a policy that it would not, under any circumstances, employ a nurse

for more than 40 hours in a week. Any hours over the limit would not be billed to the hospital and would not result in any compensation to the nurse. Or Gotham could simply have contracted in advance with the hospitals to charge a higher fee when nurses worked overtime – avoiding the need for an

anti-overtime policy altogether. “We are skeptical whether an employer with full knowledge respecting the activities of its employees ever lacks power, at the end of the day, to require those it retains to comply with company rules that implicate federal law.” ■

IRS Website Offers New Exempt Employer ‘Toolkit’

A new page on the IRS website for charities and other nonprofits centralizes federal tax resources commonly needed by tax-exempt organizations that pay employees. Visit the *Exempt Employer’s Toolkit* at www.irs.gov/charities/article/0,,id=172794,00.html for a list of forms and publications (e.g., Publication 1828, *Tax Guide for Churches and Religious*

Organizations), as well as links to pages on *Employment Taxes for Exempt Organizations*, *Employment Tax Exceptions and Exclusions for Exempt Organizations*, and pages on the *Life Cycle of ...* specific types of nonprofits (e.g., public charities, private foundations). ■

Court Rejects IRS Position, Says Medical Residents Qualify for FICA Student Exception

IRS regulations were amended in 2005 to restrict the scope of the FICA student exception in connection with the performance of services in the nature of on-the-job training and make it clear that the exception does not apply to medical interns and residents (see *PAYROLL CURRENTLY*, Issue No. 1, Vol. 13). After the amended regulations became effective on April 1, 2005, the University of Minnesota withheld and remitted FICA taxes on stipends paid to medical residents in its graduate medical education program, and then sought a refund.

The U.S. District Court for Minnesota, referencing a 2007 decision invalidating the amended regulations in a case involving stipends paid to medical students enrolled in a similar Mayo Clinic program (see *PAYROLL CURRENTLY*, Issue No. 18, Vol. 15), ruled that the FICA student exception applied to the residents here and ordered a refund of more than \$1 million [*Regents of the Univ. of Minn. v. U.S.*, No. Civ. No. 06-5084 (RHK/JSM), 2008 U.S. Dist. LEXIS 26263 (D Minn., 4-1-08)].

The student exception from FICA tax

The Federal Insurance Contributions Act (FICA), which provides that FICA taxes must be paid on “all remuneration for employment,” excludes several categories of “service” from “employment,” including service performed in the employ of a “school, college, or university” (SCU) if such service is performed by a student who is enrolled and regularly attending classes at such SCU (26 USC §3121(b)(10)).

Before the 2005 amendments, IRS regulations provided that an employee performing services while employed by an SCU incident to, and for the purpose of, pursuing a course of study was considered a student.

The residents were employed by the university

The residents’ services were performed in the employ of the University, said the court, because it was the University, not the hospitals in which they served their residency, which had the right to control the residents. University faculty and program directors interviewed candidates and selected residency program participants. Agreements entered into

by residents with the University each year were, in effect, employment agreements under which they agreed to take on duties and rotations assigned by the University’s program directors or designees. The University, not the hospitals, had the power to suspend or terminate a program participant’s residency. Program directors determined the residents’ rotation schedules. Attending physicians at the hospitals who taught and supervised the residents held faculty appointments at the University and acted as agents of the University in administering the residency program.

The residents were students

Enrolled in a residency program. All residents admitted to the residency program were formally enrolled at the University. Candidates applied for residency programs through the National Resident Matching Program (NRMP) but were also required to apply directly to a residency program under the procedures and criteria of that program. The University reviewed the applications; applicants were interviewed by program directors and faculty physicians; and the University determined which applicants to admit.

Regularly attending classes. Residents have not fully learned how to safely perform medical procedures on patients until after they have completed their residency program. In other words, the principal classroom for residents is “the clinical setting because they learn by caring for patients in a medical specialty under the supervision of a University faculty member,” said the court.

Incidental to, and for the purpose of, pursuing a course of study. The primary purpose of the University’s residency program was educational because it was designed to give residents the knowledge and skill to practice a medical specialty. The hospitals knew that residents were in the hospitals as learners because faculty physicians could have provided patient care more quickly and efficiently if there were no residents. Any patient care provided by residents was therefore incidental to the educational purpose of postgraduate medical study. ■

IRS Offers Advice on Proper Calculation of SUTA Credit, FUTA Tax

In a legal memorandum, the IRS explains how to calculate the state unemployment tax (SUTA) credit if the taxable Federal Unemployment Tax Act (FUTA) wages paid by an employer are excluded (exempt) from SUTA tax for specific

types of employees [ILM 200812001, 2-12-08].

Two types of credit

An employer’s FUTA tax rate of 6.2% can be reduced through credits the employer can take based on the amount

and timeliness of state unemployment taxes it pays. There are two types of credit against FUTA liability. Note that an employer's total "normal" and "additional" credits against the FUTA tax rate of 6.2% cannot exceed 5.4% (see *The Payroll Source*®, pp. 7-6 to 7-8).

Normal credit. Under IRC §3302(c), an employer calculating its liability for FUTA tax generally receives credit for contributions into state unemployment funds (SUTA taxes) that are timely paid, up to a maximum of 90% of the FUTA tax otherwise imposed. The employer must reduce the credit for SUTA taxes that are paid late.

Additional credit. Under IRC §3302(b), if the SUTA taxes paid do not provide the maximum credit, the employer may also receive an additional credit for the difference between the SUTA taxes that were required to be paid and the SUTA taxes that would have been required to be paid if the employer was subject to the state's maximum SUTA rate, up to the maximum credit allowable.

Calculating the amount of the credit

If some of the taxable FUTA wages paid by an employer were excluded from SUTA tax (such as remuneration paid to corporate officers), but other wages were subject to SUTA tax,

the employer may nonetheless be entitled to the maximum credit based on the SUTA tax paid and any additional credit attributable to wages subject to SUTA tax.

To reach the correct result, use the worksheet in the instructions for Form 940 (*Employer's Annual Federal Unemployment (FUTA) Tax Return*). The timely paid SUTA tax payments (input on line 2 of the worksheet) are based on SUTA wages that are often more than the FUTA wage base, which results in a credit based on the experience rate (input on line 3 of the worksheet), and any additional credit (calculated on line 3 of the worksheet) being more than the maximum credit allowable.

Some employers may believe that the SUTA credit is calculated on an employee-by-employee basis like the SUTA and FUTA tax. However, the SUTA credit used to offset an employer's FUTA tax liability is calculated using the aggregate of SUTA wages and credits based on the experience rate plus the additional credit available for SUTA wages. The worksheet in the Form 940 instructions and Form 940 itself take all of these nuances into account to calculate the correct amount of FUTA tax. ■

Court Affirms Award of Liquidated and Punitive Damages for Employer's USERRA Misconduct

The Sixth Circuit Court of Appeals has affirmed that PepsiAmericas, Inc. violated its corporate Military Active Leave Policy and Procedures on differential military pay and, by extension, denied benefits under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA; 38 USC §§4301-4333) in connection with an employee's absence for active duty training. Accordingly, the company was ordered to pay nearly \$84,000 in actual damages, liquidated damages, and punitive damages [*Koehler v. PepsiAmericas, Inc.*, No. 07-3093, 2008 U.S. App. LEXIS 5368 (6th CA, 3-6-08)].

Background

Kevin Koehler was a route salesman for Pepsi working out of its Cincinnati, Ohio, plant. In 2002, Koehler enlisted in the U.S. Army Reserve. After returning from active duty training, Koehler, who had not been disciplined for attendance issues previously, began to receive points under Pepsi's progressive disciplinary system. He was reprimanded for failing to call in sick on a designated hotline, although he was on active duty at the time the hotline was implemented and was not aware of its existence. By May 16, 2003, Pepsi had assigned Koehler 6.5 disciplinary points out of the eight required for termination of employment, some of which were attributable to his military activities.

Koehler's attempts to resolve the disciplinary issues by going through his supervisor and filing union grievances were ignored. Pepsi addressed his concerns only after he filed a complaint with the U.S. Department of Labor (DOL) and threatened to publicize the way the company treated its employees serving in the armed forces. A Pepsi vice president agreed to meet Koehler on June 17, 2003, and sent him a copy of Pepsi's military pay policy, which was intended to "bridge the gap between military pay and normal pay received." The policy disqualified employees who volunteered for active duty, but this did not apply to Koehler since he had enlisted as a reservist and was later ordered to active duty.

Koehler, his Army major, the Pepsi vice president, and the

Cincinnati plant's human resources manager, Nancy Carroll, attended the June 17 meeting. Carroll conceded that the disciplinary points for Koehler's military absences should be removed from his record. Koehler asserted that he was entitled to differential military pay for his military absences under Pepsi's policy, and Carroll said he would be paid the benefit amount owed. Koehler withdrew his DOL complaint the following day, relying on Pepsi's promise to pay. On July 3, the company made a direct deposit of \$10,820.22 (the net pay owed) into Koehler's bank account, then withdrew that same amount four days later. He was told: "We changed our minds. You don't deserve anything." Koehler sued.

Liquidated damages

In addition to an award of lost wages or benefits caused by an employer's violation of USERRA, a court may award an equal amount as liquidated damages if the employer's action was "willful" (38 USC §4323(d)). A violation is willful if the employer knew or showed reckless disregard for whether its conduct was prohibited by USERRA.

Here, the court said liquidated damages were warranted because Pepsi's violation was willful. Differential pay was a benefit of employment to which Koehler was entitled. Pepsi knew or recklessly disregarded whether its denial of differential pay to Koehler violated USERRA. Pepsi had established the policy and a company vice president made Koehler aware of it. Moreover, Pepsi did not act in good faith. The company ignored Koehler until he filed a complaint with the DOL and threatened to publicize his treatment by the company. And Pepsi's attorney denied that a deposit or withdrawal of funds to Koehler's account occurred until Koehler's bank records were introduced to prove otherwise.

Punitive damages

In addition to USERRA violations, the court found Pepsi guilty of the Ohio tort of conversion (the unauthorized taking of another's property) because the company reversed the direct deposit of \$10,820.22 without Koehler's consent. The

court therefore awarded punitive damages of \$50,000 under Ohio law, finding that the company had acted with “actual malice” toward Koehler. Pepsi’s failure to initially respond to Koehler indicated ill will. The court explained that even assuming that liquidated damages under USERRA are punitive,

they are limited to the actual damages owed. A court may also reasonably impose punitive damages under state law where appropriate “to punish the guilty party and deter tortious conduct by others.” ■

Employer Misstatement Did Not Extend Employee’s FMLA Leave Entitlement

Patricia Durose, a slot supervisor at Grand Casino of Mississippi, Inc., went out on leave under the Family and Medical Leave Act (FMLA) on March 27, 2003. She knew she had only 32 days of FMLA leave remaining and had to return to work by April 29. Her physician restricted her from working until April 29, and she notified Grand Casino. In response, Grand Casino sent Durose a letter indicating that her FMLA leave would not expire until May 28 and that she had to return to work on May 29.

Durose applied for personal leave to begin on April 29, but Grand Casino denied her request and terminated her employment on April 30 for failing to return from FMLA leave. The question for the court was whether Grand Casino’s letter

extended her rights under the FMLA. The court said that it did not [*Durose v. Grand Casino of Mississippi, Inc.*, No. 06-61109, 2007 U.S. App. LEXIS 24775 (5th CA, 10-23-07)].

Grand Casino provided Durose with all of the FMLA leave to which she was entitled, and the fact that the casino inadvertently informed her that she had more FMLA leave did not give her a statutory right to it. Durose could not show that she was prejudiced or harmed in any way by the casino’s letter. She knew that her FMLA leave expired on April 28 and timely applied for personal leave to begin on April 29. Moreover, there was nothing to indicate that she would have come back to work early in violation of her doctor’s orders. ■

New IRS Commissioner Takes Office

Douglas Shulman became the 47th Commissioner of Internal Revenue on March 24, 2008. He is the first to be appointed to this office since legislation was enacted in January (Pub. L. No. 110-176), setting a five-year term for the IRS Commissioner, subject to reappointment or removal by the President.

At the time of his appointment, Mr. Shulman was serving as Vice Chairman of the Financial Industry Regulatory Authority (formerly the National Association of Securities Dealers), the private sector regulator of securities firms doing business in the U.S. After joining NASD in 2000, he was involved in restructuring the company, led the negotiations

of the sale of the NASDAQ stock market and American Stock Exchange, oversaw the launch of industry-wide bond market transparency, and modernized NASD’s technology operations. Earlier in his career, he served as Vice President of Darby Overseas Investments.

In 1996-1997, Mr. Shulman served as Senior Policy Advisor and then Chief of Staff of the bipartisan National Commission on Restructuring the IRS. He holds a B.A. from Williams College, an M.P.A. from Harvard University’s John F. Kennedy School of Government, and a J.D. (magna cum laude) from Georgetown University Law Center. ■

Foreign Earned Income Exclusion Did Not Apply to Wages Earned in International Waters

During 2002-2004, Edward Clark, a U.S. citizen residing in Scotland, was employed by Maersk Line, Ltd., as second officer on two of its vessels, which operated under a subcontract with the U.S. armed forces. In 2002, Clark worked in international waters for 88 days and foreign ports for 117 days. In 2003, he worked in international waters for 115 days and foreign ports for 89 days. In 2004, he worked in international waters for 90 days and foreign ports for 92 days. In addition to his income from working in foreign ports, Clark claimed that his earnings from working in international waters were not taxable, and were excludable as foreign earned income under IRC §911.

Section 911 provides that a qualified individual may exclude from gross income his or her “foreign earned income”

up to a specified amount (\$87,600 for 2008). While the IRC does not define “foreign country” for purposes of §911, income tax regulations provide that the term “when used in a geographical sense includes any territory under the sovereignty of a government other than that of the United States” (26 C.F.R. §1.911-2(h)).

The U.S. Tax Court said this definition of “foreign country” did not include international waters, and ordered Clark to include in income the wages he earned there. Under general principles of international law, international waters are not under the sovereignty of any nation. Thus, international waters are not a “foreign country” for purposes of §911 [*Clark v. Commissioner*, T.C. Memo. 2008-71, No. 11946-06 (3-19-08)]. ■

DOL Offers Guidance on Public Employees Substituting Shifts

In a Wage-Hour Opinion Letter, the U.S. Department of Labor (DOL) explains that a public employer is not required to directly compensate an employee substituting a shift with another employee unless the substituting employee has worked so many substitute shifts that the employee’s wages for all hours worked in the workweek would otherwise

fall below the minimum wage [W-H Op. Ltr., FLSA2008-2 (3-17-08)].

Under the Fair Labor Standards Act (FLSA), one employee of a public agency may substitute for another employee if the employer approves of the substitution and if the substitution is solely at the option of the employees involved. If these

requirements are met, the employer is not required to pay overtime for the additional hours worked that the employee was not originally scheduled to work (29 USC §207(p)(3)). Under DOL regulations, where one employee substitutes for another, each employee is to be credited as if he or she had worked his or her normal work schedule (29 C.F.R. §553.31(a)).

In an unusual situation, a substituting employee might

seek to work so many substitute shifts that the employee's hourly wage would fall below the minimum wage, after dividing the employee's total weekly earnings by the total hours worked. The DOL explains that because §207(p)(3) is an exception only to the FLSA's overtime requirement, it would not exempt the employer from having to pay the substituting employee the minimum wage. ■

Court Rules State Is Immune to Employee FMLA Suit Involving Personal Medical Leave

When Sherry Wampler sued her employer, the Pennsylvania Department of Labor and Industry, for interfering with her right to leave under the Family and Medical Leave Act (FMLA), a U.S. District Court in Pennsylvania said that the Eleventh Amendment's doctrine of sovereign immunity barred the lawsuit [*Wampler v. Pennsylvania Dep't of Labor and Industry*, 508 F.Supp. 2d 416 (MD Pa., 9-14-07)].

The court said that the U.S. Supreme Court's decision in *Nevada Dep't of Human Resources v. Hibbs* (see [PAYROLL CURRENTLY, Issue No. 12, Vol. 11](#)) did not apply in this case. *Hibbs* said that states may be held liable for interfering with employee rights under the FMLA's *family-care* leave provision, 29 USC §2612(a)(1)(C) (i.e., spouse, parent, or child). Here, however, the question was interference with

employee rights under the FMLA's *self-care* leave provision, 29 USC §2612(a)(1)(D).

Hibbs said that Congress had found sufficient evidence of gender-based discrimination to justify applying the family-care leave provision against the states, but there was no evidence that the self-care leave provision was intended to, or did, target similar discrimination. Accordingly, Congress did not remove the states' Eleventh Amendment immunity to suit for purposes of the self-care leave provision.

Note: The decision in this case is the latest in a series of decisions that have found the Eleventh Amendment applicable to the FMLA's self-care provision (see [PAYROLL CURRENTLY, Issue No. 22, Vol. 14](#)). ■

Salvation Army Officers Were Ministers Exempt From FLSA Overtime Provisions

Steve and Lorrie Schleicher were administrators of the Salvation Army's Indianapolis Adult Rehabilitation Center and its affiliated thrift stores. They often worked more than 40 hours per week without receiving overtime pay. The Seventh Circuit Court of Appeals has affirmed that the Schleichers – ordained ministers of the Salvation Army with the rank of captain – were exempt from the provisions of the Fair Labor Standards Act (FLSA) under the “ministers exemption” [*Schleicher v. The Salvation Army*, 518 F.3d 472 (7th CA, 2-28-08)].

Courts have created a “ministers exemption” from the FLSA for employees whose primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual

and worship. The exemption applies only where the employer is a religious institution and the employee's primary duties are ministerial in nature; it does not apply to the religious employees of secular employers or to the secular employees of religious employers.

Salvation Army Adult Rehabilitation Centers are self-contained religious communities for their residents. The centers include a chapel as well as living and dining areas, and the residents pursue courses of religious studies and devotions along with undergoing work therapy as employees of thrift shops. “The Salvation Army's Adult Rehabilitation Centers are functional equivalents of cathedrals or monasteries, and the ministers who administer them are therefore engaged in ecclesiastical administration,” concluded the court. ■

DOL Says Employer's Method of Recording Time Spent Training at Home Complies With the FLSA

In a Wage-Hour Opinion Letter, the U.S. Department of Labor (DOL) discusses how the timekeeping requirements of the Fair Labor Standards Act (FLSA) apply to employees taking computer-based training at home [W-H Op. Ltr., FLSA2008-2NA (2-14-08)].

Employer's policy

An employer is considering adopting a policy for employees taking online training at home. An employee taking such training would be required to complete a timesheet that would have to be signed by the employee and his/her manager. The timesheet would record the type of training, the completion date, and start and end times. An employee would have to get his/her manager's approval before taking

at-home training, and the manager would monitor the amount of time spent on the training. *Note:* The training would be compensable work time under the FLSA because it would be mandatory and directly related to the employee's work.

DOL analysis

The DOL explains that FLSA regulations require an employer to maintain accurate records of the hours worked each workday by an employee (29 C.F.R. §516.2(a)(7)). No particular method of recordkeeping is required, so long as the relevant information is maintained and preserved. Here, the employer's timekeeping policy would comply with §516.2(a)(7) because the total hours worked each workday could be derived from the start and end times noted on the timesheet. ■



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Arkansas

Disaster relief announced. The Department of Finance and Administration (DFA) will waive failure to file, failure to pay, and interest charges for employers unable to make withholding deposits for tax payments due 4-3-08 to 5-27-08 because of recent storms, tornadoes, and flooding in counties that were declared state disaster areas. Employers should write "Disaster Storms" on the front of the envelope and on the top left corner of the tax form. If a notice of penalties and interest is received in error, call 501-682-1100 to request relief [DFA Press Releases, 4-11-08 and 4-14-08].

Idaho

Percentage method withholding tables revised. The State Tax Commission (STC) has revised the percentage method withholding tables, which employers may use immediately. The tables are not yet available on the STC's website. To receive the tables, employers may call 208-334-7660 (in the Boise area) or 800-972-7660, ext. 6667, or send an e-mail to taxrep@tax.idaho.gov and the STC will e-mail a spreadsheet with the revised tables.

Minnesota

Paycard law expiration date eliminated. The law governing the use of payroll card accounts in connection with wage payments to employees no longer has an expiration date. It was due to expire on 5-31-08 (this updates *The Payroll Source*®, p. 5-16) [S.B. 2830, L. 2008].

Vermont

Further extension of tax due date permitted for EFT. Effective 7-1-08, employers that are allowed or required to pay withheld taxes by electronic funds transfer (EFT) may be given up to six additional days for payment by the Tax Commission. This allows state and federal withholding taxes to be paid at the same time. Currently, only a four-day extension is permitted for employers that are required to pay withheld taxes by EFT [H.B. 521, L. 2007].

West Virginia

Paycards allowed, effective in June. Effective 6-6-08, employers may pay wages by deposit or electronic transfer of immediately available funds into an employee's payroll card account in a federally insured depository institution (this updates *The Payroll Source*®, p. 5-17). Payment of wages by means of a payroll card must be agreed to in writing by both the employer and employee. This reverses the Division of Labor's position that payroll debit cards are not allowed as a method of wage payment [H.B. 4032, L. 2008].

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