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USCIS Announces Enhancements to E-Verify Program

U.S. Citizenship and Immigration Services (USCIS) has announced improvements to the E-Verify employment authorization program aimed at decreasing the mismatch rate for naturalized citizens [USCIS News Release, 5-5-08; www.uscis.gov/files/article/everify050508.pdf]. USCIS operates the E-Verify program in partnership with the Social Security Administration (SSA). More than 64,000 employers participate in E-Verify, with approximately 1,000 new enrollments weekly.

Naturalized citizens

Effective May 5, 2008, the E-Verify system includes naturalization data, which will help confirm the citizenship status of naturalized U.S. citizens hired by E-Verify employers. Naturalized citizens who have not yet updated their records with the SSA have until now been the largest category of work-authorized persons who initially face an SSA mismatch in E-Verify. Now, however, employers that use E-Verify will no longer get a mismatch when they verify the work eligibility

of naturalized citizens who have not yet updated their SSA records.

Additionally, a naturalized citizen who receives a citizenship mismatch with SSA can now call USCIS directly to resolve the issue (new option), or resolve the mismatch in person at any SSA field office.

Border Inspection System data

E-Verify also now includes real time arrival data from the Integrated Border Inspection System, which should reduce the number of immigration status-related mismatches for newly arriving workers who have entered the country legally.

Additional planned enhancements

USCIS plans to initiate citizenship status records information sharing with SSA. E-Verify also plans to check against Department of State passport records. These efforts will reduce mismatches even further. ■

National Medical Support Notice Revised

The Office of Child Support Enforcement (OCSE) has issued an Action Transmittal distributing a revised version of the National Medical Support Notice (NMSN) to "state agencies administering child support plans under Title IV-D of the Social Security Act and other interested parties" [AT-08-05, 4-11-08; www.acf.hhs.gov/programs/cse/pol/AT/2008/ar-08-05.htm]. The

new form has an expiration date of March 31, 2011. It is available on the APA website at www.payroll.org/i4a/pages/index.cfm?pageid=139 under "Non-Tax Forms and Instructions."

The NMSN is used by state agencies to enforce medical support orders issued under Title IV-D (Part D of Title IV of

Payroll Solutions

Q. Our university has admitted several foreign students with F-1 visas into a graduate degree program in the U.S. with university-paid scholarships that cover tuition, books, and fees. These students must serve as research assistants; however, *all* of the graduate students in this program must perform these duties, whether or not they receive financial aid. Are these scholarships subject to federal income tax withholding, and social security and Medicare taxes?

A. No. Scholarships and fellowships granted to nonresident alien students to cover tuition and related expenses (e.g., fees, books, supplies, and required equipment) are exempt from federal income tax withholding and reporting if the students are degree candidates and are temporarily in the U.S. as nonimmigrants under “F” (student), “J” (exchange visitor), “M” (nonacademic/vocational student), or “Q” (cultural exchange visitor) visas. Payments that do not qualify for the exemption because they are unrelated to tuition (e.g., food, lodging, etc.) are subject to withholding at a rate of 14%.

Where all candidates for the same degree are required to do the same work, the receipt of a scholarship or fellowship by a nonresident alien pursuing that degree is not considered to be gross income. Note, however, that if a nonresident alien student receiving a scholarship or fellowship is required to perform certain work, while other candidates for the same degree are not, then the scholarship or fellowship is taxable income to the nonresident alien student and is subject to withholding at regular rates.

Scholarships and fellowships granted to nonresident alien students are exempt from social security and Medicare taxes to the same extent they are exempt from federal income tax withholding (see *The Payroll Source*®, pp. 14-33 and 14-34).

the Social Security Act; 42 USC §651 et seq.). It consists of two parts – one for the employer (Part A, *Notice to Withhold for Health Care Coverage*) and one that the employer sends to its plan administrator (Part B, *Medical Support Notice to Plan Administrator*). Part A has been extensively revised, as discussed below; Part B is unchanged.

OCSE Commissioner Margot Bean’s Action Transmittal notes in closing that states will need time to make system programming changes to automate the new form. “Therefore, please continue to honor the previous form until states are able to implement the revised one.”

Changes to the NMSN, Part A

Notice to withhold for health care coverage

- In the header paragraph, added a new second sentence: “Receipt of this Notice from the Issuing Agency constitutes receipt of a Medical Child Support Order under applicable law.”

- In the header paragraph, added a new third sentence: “The information on the Custodial Parent and Child(ren) contained on this page is confidential and should not be shared or disclosed with the Noncustodial Parent.”

- In the agency information box, added a space for “Employer web site.”

- Below the Substituted Official/Agency Name and Address line, added a parenthetical: “(Required if Custodial Parent’s mailing address is left blank).”

- At the bottom of the page, added the new expiration date: “03/31/2011.”

Employer response

- In the first sentence, deleted the word “either.”
- In the first sentence, changed “1, 2 or 3” to “1, 2, 3 or 4.”

- In the third sentence, modified the text to read, “If 1, 2, 3 or 4 do not apply, forward Part B...”

- Added a new fourth sentence: “This includes any organization or labor union that provides group health care benefits to the employee.”

- Modified the fifth sentence to read, “Check number 5 and return this **Part A** to the **Issuing Agency** if the Plan Administrator informs you that the child(ren) would be enrolled in or qualify(ies) for an option...”

- Added a new sixth sentence: “You are required to respond to the Issuing Agency with the **Employer Response**

regardless of whether you provide group health benefits or the employee named herein is no longer employed by your organization.”

- Added a new seventh sentence: “Information on the Employer Representative at the bottom of this section is required.”

- Added a new check box # 1: “The employee named in this Notice has never been employed by this employer.”

- Renumbered the remaining check boxes: 1 is now 2, 2 is now 3, 3 is now 4, and 4 is now 5.

- Changed the check box # 2 language to read, “We, the employer, do not maintain or contribute to plans providing dependent or family health care coverage to our employees.”

- Added a new second sentence to the check box # 3 language: “Do not check this box if the employee is only temporarily ineligible for health care coverage.”

- At the bottom of the page, on the Employer Representative line, added “(Required).”

- At the bottom of the page, modified the last sentence by adding “Federal” before “EIN” and “Page 1 of this” before “Notice.”

Instructions to employer

- In the first paragraph, first sentence, added “legal” before “Notice.”

- In the first paragraph, removed the third sentence (added it (modified) to the third paragraph).

- Added a new third paragraph: “An employer receiving this legal Notice is required to complete and return **Part A** if appropriate. If group health coverage is not available to the employee named herein, or the employee was never or is no longer employed, the employer is still required to complete **Part A – Employer Response** and return it to the Issuing Agency with the appropriate responses checked. If you, the employer, provide the health care benefits to the employee, forward **Part B – Plan Administrator Response** to the health plan administrator of your organization. If the employee’s health care benefits are administered through another organization, including a labor union, forward Part B of the Notice to the labor union or other organization acting as the plan administrator for completion. If the employee has already enrolled the child(ren) in health care coverage, the employer should forward Part B to the plan administrator for completion and submittal to the

Issuing Agency.”

- Added a new fourth paragraph: “Keep a copy of **Part A** as it may be used to notify the Issuing Agency (if) at anytime in the future the employee separates from service for any reason including retirement or termination.”

Employer responsibilities

- In item # 1, first sentence, replaced “above” with “in this Notice.”

- In item # 1, first sentence, changed “1, 2, or 3” to “1, 2, 3, or 4.”

- In item # 2(b)(2), changed “4” to “5.”

Limitations on withholding

- In the last paragraph, third sentence, changed “4” to “5.”

Priority of withholding

- In the last sentence, changed “4” to “5.”

Duration of withholding

- In the first paragraph, modified the second sentence to read, “Coverage of a child as a dependent will end when conditions for eligibility for coverage under the terms of the plan no longer apply.”

- In item # 1(a), replaced “above” with “in this Notice.”

Possible sanctions

- Added a new second sentence: “Sanctions or penalties may be imposed under State law against an employer for failure to respond and/or for non-compliance with this Notice.”

Notice of termination of employment

- In the second sentence, added the words, “Part A with response 4 checked or...”

Contact for questions

- In the first sentence, replaced “above” with “at page 1 of this Notice.”

- Added a new second paragraph: “Indicate below to the Issuing Agency the requested information on your Plan Administrator to whom Part B – Plan Administrator Response is forwarded for completion.”

- Added at the bottom of the page: “Plan Administrator (Required):”

- Added fields at the bottom of the page for Plan Administrator information: “Name, Telephone Number, Contact Person, and FAX Number.” ■

Capitol Hill Update

The following are some recent payroll-related federal legislative developments. All information is current through May 1, 2008. *Note:* The status of legislation discussed in **PAYROLL CURRENTLY, Issue No. 5, Vol. 16**, is unchanged.

Taxpayer Assistance and Simplification Act

H.R. 5719 was passed by the House of Representatives (239-179) on April 15, 2008. It is now in the hands of the Senate Finance Committee.

The House version of the bill includes provisions that would:

- Remove cell phones and other similar telecommunications equipment from the definition of “listed property,” so that the heightened substantiation requirements applicable to listed property in proving that it is used for business purposes do not apply (see **PAYROLL CURRENTLY, Issue No. 23, Vol. 15**).

- Delay until 2012 (from 2011) the 3% withholding requirement on government payments to contractors providing goods and services (see **PAYROLL CURRENTLY, Issue No. 12, Vol. 14**).

- Order a feasibility study on delivering tax refunds through debit cards or other electronic means.

- Require that, to the extent permitted by law, a taxpayer be notified of (1) any unauthorized use of his/her identity uncovered during a tax investigation, and (2) any criminal charges brought against the individual involved (see **PAYROLL CURRENTLY, Issue No. 9, Vol. 16**).

- Change the standard of conduct that must be met to avoid imposition of a tax return preparer penalty – from

“reasonable belief” to “substantial authority” (for undisclosed positions). The standard for disclosed positions would remain “reasonable basis.” *Note:* These penalties now cover preparers of employment tax returns (see **PAYROLL CURRENTLY, Issue No. 12, Vol. 15**).

- Require that distributions from health savings accounts (HSAs) for qualified medical expenses be substantiated in a manner similar to that required for health flexible spending arrangements in order to be excludable from income, and that account trustees report expenses not substantiated.

- Treat certain foreign subsidiaries of U.S. companies performing services under U.S. government contracts as U.S. employers for FICA tax purposes.

Worker misclassification

H.R. 5804, introduced in the House on April 15, 2008, would modify the rules relating to the treatment of individuals as independent contractors or employees by creating a new classification safe harbor and terminating the current classification safe harbor in Section 530 of the Revenue Act of 1978.

The new safe harbor would be available only where the employer did not treat the individual as an employee for any period and all applicable federal tax returns required to be filed by the employer were consistent with independent contractor treatment, unless the employer had “no reasonable basis” for not treating the individual as an employee.

The bill, which would also increase information return penalties, is now in the hands of the House Ways and Means Committee. ■

Mandatory Doctor’s Appointment Was ‘Hours Worked’

Cynthia Howser was an hourly employee at ABB, Inc.’s plant in Jefferson City, Missouri. She left work to attend a doctor’s appointment, which was scheduled during her regular shift. The purpose of the appointment was to re-evaluate a work-related injury. ABB offered to compensate Howser for the time she missed from work to attend the appointment, but said it would deduct that time from her accrued paid leave. Instead, Howser opted to take an unpaid excused absence. She then sued ABB under the Fair Labor Standards Act (FLSA)

for failing to compensate her for the 3.8 hours of work time missed due to the appointment.

The Eighth Circuit Court of Appeals has affirmed that the 3.8 hours Howser missed to attend the doctor’s appointment were hours worked under the FLSA, and that ABB therefore owed her compensation for that time [*Copeland v. ABB, Inc.*, No. 06-3403, 2008 U.S. App. LEXIS 6282 (8th CA, 3-27-08)].

Under FLSA regulations (29 C.F.R. §785.43), time spent by an employee waiting for, and receiving, medical attention on

the employer's premises "or at the direction of the employer" during the employee's normal working hours on days when the employee is working constitutes hours worked. Here, ABB's third-party workers' compensation administrator scheduled the appointment for Howser and directed her to attend it.

Because the compensation administrator was acting

as ABB's agent when it directed Howser to attend the appointment, ABB was required to compensate Howser for the time missed, concluded the court. And the fact that Howser chose to take unpaid leave to attend the appointment did not constitute a waiver of her right to compensation, because FLSA rights cannot be waived. ■

Wage & Hour Roundup

The U.S. Department of Labor's Wage & Hour Division recently reported developments in the following Fair Labor Standards Act (FLSA) enforcement actions:

Misclassification

- McLane Co., Inc., a wholesale distributor of food and grocery products headquartered in Temple, Texas, has agreed to pay \$1,559,316 in back overtime wages to 570 current and former "retail merchandising specialists." W-H investigators found that McLane erroneously regarded these workers as FLSA-exempt outside sales employees.

- Quest Diagnostics, Inc., a New Jersey-based medical diagnostic testing company, has agreed to pay \$688,772 in back overtime wages to 238 employees. W-H investigators found that Quest misclassified employees working in the positions of "client systems analyst" and "senior client systems analyst" as FLSA-exempt.

Overtime

- The DOL has filed a lawsuit to recover \$1,094,486

in back overtime wages for 302 Denver-area employees of Aggregate Industries, WRE Inc., a manufacturer of aggregate-based construction materials. The suit was filed after W-H investigators found that the company paid truck drivers on a per load basis without regard to the number of hours worked.

Chicken processor settles donning and doffing case for \$3.875 million

On April 18, a U.S. District Court in Minnesota gave final approval to a \$3.875 million settlement (\$1.2 million in back wages plus \$2.675 million in costs and attorney fees) in a class action lawsuit involving production line employees of Gold 'n Plump Poultry, Inc., a chicken producer and processor with plants in Minnesota and Wisconsin. The employees had sued Gold 'n Plump under the FLSA for failing to pay them for time spent donning, doffing, and sanitizing clothing and equipment [*Frank v. Gold 'n Plump Poultry, Inc.*, No. 04-CV-1018 (PJS/RLE) (D Minn., 4-18-08)]. ■

DOL Website Now Offers 'FirstStep' Advisor for Employers

The U.S. Department of Labor (DOL) has launched a new web resource at www.dol.gov/elaws/firststep to help employers comply with federal employment laws. By using this tool, employers can easily determine which recordkeeping, reporting, and notice requirements apply to them under the major laws administered by the DOL.

The FirstStep Employment Law Advisor provides three starting points:

- **FirstStep – Employment Law Overview Advisor** asks questions such as size of business, location, and type of industry, through multiple choice or yes and no questions

in order to determine which federal employment laws apply to each user and then provides information from the DOL's *Employment Law Guide* on the basic provisions of these laws.

- **FirstStep – Recordkeeping, Reporting, and Notices Advisor** summarizes the paperwork requirements for each law.

- **FirstStep – Poster Advisor**, which can be used to download and print DOL posters for free, includes information on where the posters must be displayed in the workplace, and what size and language requirements apply to each. ■

ICE Arrests 311 Pilgrim's Pride Workers in Identity Theft Probe

On April 16, 2008, U.S. Immigration and Customs Enforcement (ICE) agents arrested 311 foreign national workers in five states who are suspected of committing identity theft and other criminal violations in order to obtain jobs [ICE News Release, 4-17-08; www.ice.gov/pi/news/newsreleases/articles/080417dallas.htm].

Pilgrim's Pride is one of the largest chicken processing companies in the U.S. As part of an ongoing investigation, ICE conducted simultaneous enforcement actions at plants in Mount Pleasant, Texas; Live Oak, Florida; Chattanooga, Tennessee; Batesville, Arkansas; and Moorefield, West Virginia.

Of the workers taken into custody during the enforcement action, 91 were charged with criminal violations, including

false use of a social security number and document fraud. Of the remaining employees, 220 are being processed for removal on administrative immigration violations, and 58 were processed and released on humanitarian grounds under supervision pending future immigration proceedings.

ICE agents have interviewed numerous individuals whose identities were stolen by Pilgrim's Pride employees. Those victims described hardships they suffered as a result, including mistaken tax liens, denial of medical and social services benefits, and damage to their credit ratings.

Misuse of social security numbers is a felony that carries a maximum penalty of five years in prison and a fine of up to \$250,000. ■

IRS Letters Explain FICA Taxability of Settlement Amounts Paid in Lieu of Medical Benefits

Responding to virtually identical inquiries from two members of the U.S. Senate, the IRS Office of Chief Counsel has written a pair of letters explaining why settlement amounts

received from a former employer in lieu of retiree health care coverage are subject to FICA tax withholding [INFO 2008-0001, released 3-28-08, www.irs.gov/pub/irs-wd/08-0001.pdf; INFO

2008-0006, released 3-28-08, www.irs.gov/pub/irs-wd/08-0006.pdf].

The letters explain that the term “wages” for FICA purposes includes all remuneration for employment, with certain specified exceptions (26 USC §3121(a)), even if the recipient at the time of payment is no longer an employee (26 C.F.R. §31.3121(a)-1(i)).

One of the items specifically excluded from the definition of wages is payments made by an employer under a plan that provides sickness or accident disability benefits to employees and their dependents. However, amounts paid directly to employees in lieu of health coverage are not subject to this exception.

The letters then say that the IRS uses the “origin of the claim doctrine” to determine the proper tax treatment of a court award or settlement. The doctrine focuses on the nature of the claim that led to the award or settlement. For example, awards of back pay arising out of an employment relationship are includable in income and subject to FICA tax withholding, even if the amounts recovered are paid in lieu of nontaxable fringe

benefits.

The letters cite Revenue Procedure 75-241 (1975-1 C.B. 316), where an employee was paid a cash amount in lieu of certain health and welfare benefits. The revenue ruling concluded that the payments were wages for FICA purposes because “the payments are attributable to service performed by the employees for their employer,” even though the employer paid the amounts in order to meet a statutory requirement. IRS Counsel noted that a significant factor in this ruling was that the employee had complete control over the disposition of the funds he received and the payer had no obligation to (and did not) verify that the funds were used to purchase health and welfare benefits.

“Thus, even though the contributions an employer makes under a plan ... that provides sickness or accident disability benefits to employees are generally excepted from FICA withholding, cash payments an employer makes directly to employees in lieu of such contributions are wages subject to FICA withholding.” ■

Insurance Sales Agents Were Employees Under the FLSA

Sales agents working for Cornerstone America, the marketing and sales division of Mid-Western National Life Insurance Co., were required to sign an agreement stating that they were independent contractors. When the agents sued to recover unpaid overtime under the Fair Labor Standards Act (FLSA), a U.S. District Court in Texas said they were employees and therefore entitled to the overtime pay [*Hopkins v. Cornerstone America*, 512 F.Supp. 2d 672 (ND Tex., 3-30-07)].

WHAT THE LAW SAYS – Courts consider the following factors in deciding whether the “economic reality” of the relationship between a worker and an alleged employer indicates that the worker is an employee or independent contractor under the FLSA: (1) the degree of control that the alleged employer has over the manner in which the work is performed; (2) the relative investments of the worker and the alleged employer; (3) the degree to which the worker’s opportunity for profit and loss is determined by the alleged employer; (4) the degree of skill and initiative required for the work; and (5) the permanence of the working relationship. These factors are not exclusive, and no single factor controls the determination.

Degree of control

The court said the degree of control exercised by Cornerstone and Mid-Western showed that the agents were employees; they were not in business for themselves. Although the agents had some flexibility in the hours, days, and places they worked, the economic reality was that the companies controlled the significant aspects of the business.

The companies controlled what policies the agents were allowed to sell, they decided what policies they would offer and underwrite, and they controlled the price of the policies. Agents could not sell insurance products from other companies (whether or not they were competing policies). In addition, the companies controlled the content of any advertising; agents could not place advertisements without approval. Finally, the companies controlled the hiring, firing, assignment, promotion, and commission rates of agents and managers.

Relative investments of the parties

Agents were required to: obtain an insurance license

at their own expense; pay for office expenses (such as transportation, office space, telephones, and office supplies); withhold and pay state and federal income taxes, self-employment taxes, and other employment taxes; and attend meetings and training sessions.

Weighing the relative investment of the agents against the companies’ investment, the court said the majority of the capital risk was borne by the companies, which had a significant infrastructure designed to underwrite, administer, and pay insurance claims. The companies invested a significant amount in corporate offices, training agents, etc. The agents were economically dependent on the companies’ investment, especially since they had no control over the development of the insurance products available for sale.

Opportunity for profit and loss

The companies controlled the insurance products sold and the price of those products. They determined whether agents would be hired or fired, as well as the rate of the agents’ compensation. They controlled the advertising, where agents would be placed, and the territories assigned to agents. It did not matter that the agents could work harder in order to increase their compensation because this was the *only* way they could do so – and “such returns are more properly classified as wages, not profits,” said the court.

Skill and initiative

Cornerstone organized its sales force as a pyramid with agents at the bottom. Every management level above sales agent received “overwrite” commissions based on the sales of the agents below them. Overwrite commissions were the chief form of compensation. The court concluded, therefore, that the most important skill for Cornerstone’s agents was the ability to bring new recruits into the bottom of the pyramid and to motivate them to sell insurance, which it said is no different from the skill of any other manager hired as an employee.

Permanency of the relationship

The agreements signed by the agents provided that either party could terminate the arrangement at any time without cause. The court said the question was not what they could have done but the economic reality of what they actually did.

The agents all had at least a year of service. Many agents were managers for years. The compensation scheme of overwrite commissions discouraged them from leaving. The long-term relationship with Cornerstone was evidence that the agents were economically dependent on the companies and indicated that they were employees.

Other factors

It did not matter that agents' earnings were reported on Form 1099 or that they filed tax returns consistent with independent contractor status. These actions merely reflected the subjective view of the parties about the agents' status, said the court.

It also did not matter that the agents did not receive health benefits, sick time, or vacation days. The fact that they agreed to terms of their compensation that excluded any

benefits did not show their independence, said the court, it showed instead an added burden placed on them by their employer.

Retaliation

Under 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]." Because the agents were employees, Cornerstone violated the FLSA anti-retaliation provision when it terminated the agents' agreements after they sued. FLSA rights cannot be waived, said the court, and Cornerstone's use of the contractual provision to penalize employees for asserting their FLSA rights violated public policy. ■

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

Thelma Higueros was employed by New York Catholic Health Plan, Inc., and often worked more than 40 hours per week without being paid overtime. When she complained to her supervisors about not receiving overtime pay, her employment was terminated. Higueros then sued the Plan for retaliation in violation of the Fair Labor Standards Act (FLSA).

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]."

The court said that this clause limits the right to sue for retaliation to three circumstances: filing a formal complaint, instituting a proceeding, or testifying in a proceeding. The clause does not permit recovery for employer retaliation against informal complaints. Accordingly, Higueros' claim was dismissed [*Higueros v. New York Catholic Health Plan, Inc.*, 526 F.Supp. 2d 342 (ED N.Y., 12-1-07)]. (Note: Other courts have taken a contrary position. See [PAYROLL CURRENTLY, Issue No. 6, Vol. 13.](#)) ■

FLSA 'Irrigation Exemption' Did Not Apply to Damtenders

In two related cases, a U.S. District Court has ruled that damtenders for the Yolo County Flood Control and Water Conservation District were not exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) under the "irrigation exemption" [*Watson v. Yolo County Flood Control and Water Conservation Dist.*, No. CIV. S-06-1549 FCD DAD, 2007 U.S. Dist. LEXIS 77131 (ED Cal., 10-17-07); *Carman v. Yolo County Flood Control and Water Conservation Dist.*, No. CIV. S-06-1374 FCD KJM, 2008 U.S. Dist. LEXIS 4757 (ED Cal., 1-23-08)]. The court also considered the applicability of the FLSA "homeworker" exception, and whether Watson and Carman were entitled to compensation for "on-call time."

Background

Bob Watson and Raymond Carman were damtenders. Watson worked at the Indian Valley Reservoir, which supplied water for household use, irrigation, recreation, flood control, storm drainage, and generating electricity. Carman worked at the Cache Creek Dam, which provided water to agricultural users. In addition to his maintenance and monitoring duties at the Cache Creek Dam, Carman worked one or two days a week at the Indian Valley Reservoir, between five and seven hours each day, and also went there in emergencies.

Both men were required to live on site. Both were paid a fixed salary, no matter how many hours they worked. And both sued their Yolo County employer for violations of the minimum wage and overtime provisions of the FLSA.

Irrigation exemption

The FLSA (29 USC §213(b)(12)) exempts from its overtime requirements "any employee employed in agriculture or in

connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for the supply and storing of water, at least 90% of which was ultimately delivered for agricultural purposes during the preceding calendar year." Note: Before 1997, the exemption did not contain the 90% delivery requirement.

The court said the irrigation exemption did not apply to Watson because the Indian Valley Reservoir was not used exclusively for the supply and storage of water. The Reservoir was open to the public for recreational use, such as fishing, and included a campground for which Watson had maintenance responsibilities. Note: On November 16, 2007, the court granted a stay so the District could appeal the ruling that the irrigation exemption did not apply [No. 2:06-cv-1549 FCD DAD, 2007 U.S. Dist. LEXIS 84934 (ED Cal., 11-16-07)].

The Cache Creek Dam, unlike the Indian Valley Reservoir, was not open to the public and was not used for any recreational activities. The court said that even though the dam was required to release specified excess water, the existence of limits on its storage capacity did not change its use. There was no evidence that the dam was used for anything other than storing and supplying water.

However, the irrigation exemption did not apply to Carman because he worked periodically at the Indian Valley Reservoir, which was not used exclusively for this purpose.

Homeworker exception

The FLSA homeworker exception (29 C.F.R. §785.23)

provides that an employee who resides on the employer's premises on a permanent basis or for extended periods of time is not considered to be working all the time he or she is on the premises. Because it is difficult to determine hours worked under such circumstances, any "reasonable agreement" of the parties that takes into account all of the "pertinent facts" will be accepted. *Note:* The homemaker exception does not exempt employees from the overtime provisions of the FLSA, but simply offers a way to calculate their hours worked.

There was never a written contract between Watson and the District, but there was a constructive agreement, said the court. In a 1995 memo, the District indicated that Watson would be compensated by salary for eight hours of work a day and that any work exceeding eight hours in a day would be compensated by profit-sharing. A 2002 memo directed that only minimal work should be done on holidays (with less than four hours of work anticipated) and required advance authorization before working extra time unless there was an emergency. Watson received notice of these policies and continued working.

Carman began working for the District in 1992 under a written contract that was terminated in 1995. He understood that under this agreement he would receive the same salary regardless of how many hours he worked, and that his salary was his only compensation. He received the 2002 holiday memo but never sought holiday pay under it. Because Carman was aware of the District's compensation policies and continued to work for the District, there was a constructive agreement said the court.

The court said that an agreement that explicitly directs an employee not to work more than a set number of hours without prior approval may be deemed reasonable "as a matter of law." The 2002 memo, under which District employees could not recover back pay for working more than four hours on a holiday without pre-approval, was therefore reasonable.

It was unclear whether the general policy of the District regarding hours and compensation set out in the 1995 memo took into account the actual number of hours worked, so the court could not determine its reasonableness. However, because the homemaker exception is not an *exemption*, both Watson and Carman were entitled to overtime compensation for hours worked in excess of 40 in a workweek.

On-call time

In determining whether on-call time is compensable, courts consider: (1) the agreement between the parties; and (2) the degree to which an employee is free to engage in personal activities. Here, the constructive employment agreements applicable to both Watson and Carman did not address the compensability of on-call time, so the court focused on the second item.

Watson was required to live on premises, had to be able to respond to hydro-electric alarms within 30 minutes, had to respond immediately to campers' needs, and his use of a pager would not have relieved his restrictions. However, the court was persuaded that Watson's on-call time was noncompensable. He could engage in personal activities while on call, such as woodworking, raising horses, capturing wild pigs, and having visitors. Campers were only present during part of the year, and others could perform Watson's duties when he was ill or injured.

Carman was required to be at the dam every day. He was subject to the same geographical restrictions as Watson and had to sometimes remain on the premises for up to two weeks at a time during flood season. There was no indication that Carman could trade his on-call responsibilities. Again, the court concluded that Carman's on-call time was noncompensable. He carried a pager but received only 10 to 20 notifications a year. He was free to engage in personal activities, such as going out to dinner with his wife, making home improvements, having visitors, and participating in a Masonic Lodge. ■

Utah Public Employers Must Verify Employment Authorization in July 2009

Recently, Utah Gov. Jon Huntsman, Jr., signed immigration legislation. Among other things, the Utah law will impose new employment eligibility verification requirements on public employers [S.B. 81, L. 2008].

In 2006, Gov. Huntsman had joined Arizona Gov. Janet Napolitano in calling on Congress to enact comprehensive immigration reform. When that failed to happen, states – like Arizona (and now Utah) – began to act on their own (see PAYROLL CURRENTLY, Issue Nos. 1 and 4, Vol. 16).

Requirements and definitions

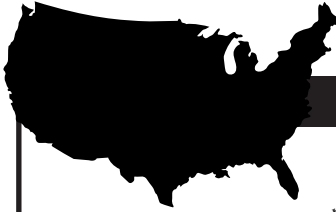
Effective July 1, 2009, each public employer (a department, agency, instrumentality, or political subdivision) in Utah must register with and use a status verification system to verify the employment authorization of new employees. A "status verification system" means E-Verify; an equivalent federal program; the Social Security Number Verification Service (SSNVS; see *The Payroll Source*®, pp. 6-5 to 6-7) or a similar online verification process implemented by the Social Security Administration; or an independent third-party system with an equal or higher degree of reliability.

Also effective July 1, 2009, a public employer may not enter into a contract for the physical performance of services

in Utah with a contractor unless the contractor registers and participates in a status verification system to verify the work eligibility of the contractor's new employees who are employed in Utah. This does not apply to a contract: (1) entered into prior to July 1, 2009, even though it may involve the physical performance of services in Utah on or after July 1, 2009; or (2) that involves underwriting, remarketing, broker-dealer activities, securities placement, investment advisory, financial advisory, or other financial or investment banking services.

Unlawful acts

It is unlawful to discharge an employee working in Utah who is a U.S. citizen or a permanent resident alien and replace the employee with, or have the employee's duties assumed by, an employee who the employing entity knows, or reasonably should have known, is an unauthorized alien hired on or after July 1, 2009. The unauthorized alien must be working in Utah in a job category that requires equal skill, effort, and responsibility, and which is performed under similar working conditions, as the job category held by the discharged employee. An employing entity that is enrolled in and using a status verification system on the date of discharge, however, is exempt from liability, investigation, or lawsuit. ■



STATE AND LOCAL NEWS

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Alabama

E-filing and payments threshold established. Effective 4-7-08, employers or withholding tax agents making withholding tax payments of \$750 or more are required to file returns and make payments electronically. Electronic payments submitted without an electronic return are subject to the failure to timely file a return penalty [Ala. Adm. Code §810-3-74-.01].

Bulk filer defined, registration required. Effective 4-7-08, an accountant or tax filing service that files withholding tax returns and makes payments on behalf of employers must register with the Department of Revenue as a bulk filer and must utilize bulk filer registration when filing withholding tax returns on behalf of clients [Ala. Adm. Code §810-3-74-.01].

Maine

Minimum wage and tip credit increased. Effective 10-1-08, the state minimum wage will increase to \$7.25 an hour from \$7.00 an hour (this updates *The Payroll Source*®, p. 2-67). Effective 10-1-09, the minimum wage will increase again to \$7.50 an hour. The tip credit remains 50% of the minimum wage rate (see *The Payroll Source*®, p. 2-68). Because of the state minimum wage increase, the tip credit will increase to \$3.62 an hour from \$3.50 an hour, effective 10-1-08; and to \$3.75 an hour, effective 10-1-09 [S.B. 604, L. 2008].

Maryland

Payment for accrued leave on termination not required: circumstances. Effective 4-24-08, an employer is not required to pay accrued leave to a terminated employee if: (1) the employer has a written policy that limits compensation of accrued leave; (2) the employer notified the employee of the employer's leave benefits at the time of hire; and (3) the employee is not entitled to payment for accrued leave at termination under the terms of the employer's written policy. As a result of this new law, the Division of Labor and Industry has updated its position on unused vacation at termination; see *The Maryland Guide to Wage Payment and Employment Standards* at www.dlir.state.md.us/labor/wagepay/wpunusedvacpay.htm [S.B. 797, L. 2008].

New Jersey

Paid family leave benefit established. Beginning 7-1-09, an eligible employee may take up to six weeks of paid leave to care for a family member with a serious health condition or to be with a child during the first 12 months after the birth or adoption of the child. Employees may receive two-thirds of their weekly wages, up to a maximum weekly benefit of \$524. Benefits will be funded through employee contributions into the existing temporary disability insurance (TDI) fund. Effective 1-1-09, employees will pay an additional 0.09% of annual earnings up to the TDI wage base. Effective 1-1-10, the rate will increase to 0.12% [A.B. 873, L. 2008; New Jersey Office of the Governor, News Release, 5-2-08].

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