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Inside this issue...

<i>Payroll Solutions</i>	2
<i>IRS Announces New Due Date for Furnishing Certain Forms 1099 to Recipients</i>	3
<i>Interstate Unemployment Claim Must Be Filed in State Where Former Employee Qualifies for UC Benefits</i>	4
<i>Employee Was FLSA-Exempt Despite Employer's Routine Salary Adjustments</i>	4
<i>Restaurant Delivery Employees Win Over \$4 Million for Minimum Wage and Overtime Violations</i>	5
<i>Employee Missed FMLA Eligibility Threshold by 1.2 Hours</i>	6
<i>FLSA Applies to Indian Tribe's Casino</i>	6
<i>Time Spent Donning and Doffing Protective Gear Was Compensable</i>	7
<i>State and Local News</i>	
<i>California - overtime exemption for certain professionals: minimum rates of pay adjusted for 2009</i>	
- withholding tables issued for 2009	
- SDI taxable wage base increases	
<i>New Mexico - withholding tables issued for 2009</i>	
<i>Utah - withholding tax form changes implemented for 2009</i>	8

IRS Extends Code Y Reporting Waiver for 2008 NQDC Deferrals

The APA has confirmed with Helen Morrison, Treasury Deputy Benefits Tax Counsel, that the IRS will issue a notice waiving the requirements for Code Y reporting for calendar year 2008 on amounts deferred into a nonqualified deferred compensation (NQDC) plan under IRC §409A.

After the IRS announced that deferrals should be reported on Form W-2 in Box 12 using Code Y or on Form

1099-MISC in Box 15a, the Service waived the deferral reporting requirements for calendar years 2005 and 2006 because no guidance had been issued to aid employers or payers in determining the amounts deferred under a NQDC plan. In Notice 2007-89 (see [PAYROLL CURRENTLY, Issue No. 23, Vol. 15](#)), the IRS extended the waiver for calendar year 2007. ■

TIN-Masking Effort to Stem ID Theft Moving Forward With IRPAC's Blessing

As part of an overall effort by the federal government to help slow the incidence of identity theft through the reduced use of Taxpayer Identification Numbers (TINs) in government forms, notices, and general correspondence, an expanded IRS Information Reporting Program Advisory Committee (IRPAC) has recommended that employers and payers be allowed to put less than the recipient's complete SSN (social security number) or EIN (employer identification number) on Forms W-2 and 1099 sent to employees and payees. IRS Commissioner Douglas Shulman applauded the committee's recommendation at its October 29 meeting, noting that the "identity theft issue is very much on my radar screen and of paramount importance to IRS."

In yet another realignment of IRPAC, the committee grew from 22 to 34 members in 2008 and was divided into five subgroups – Modernization, Office of Professional Responsibility, Ad Hoc, Burden Reduction, and Emerging

Compliance Issues. In addition to TIN-masking, payroll and accounts payable-related recommendations made by IRPAC dealt with Forms 941-X and 944, proposed Form W-4NR, reporting NQDC (nonqualified deferred compensation) distributions after an employee's death, and FIRE (Filing Information Returns Electronically) system enhancements, among others.

TIN-masking gains traction despite concerns

The issue of TIN-masking (i.e., using only the last four digits of an SSN or EIN rather than the full nine) has been on IRPAC's radar for a couple of years, ever since the federal Office of Management and Budget made reducing the use of personal identifying information a priority for federal agencies. The Modernization Subgroup concluded that masking TINs on information returns sent to payees would be a proactive measure in enhancing taxpayer privacy and curtailing ID theft, given that payee statements are mailed

Payroll Solutions

Q. When our company hires machinists, we have them sign an authorization that if they terminate their employment with the company for any reason within the first year after being hired, the company will withhold \$3,000 from their final paycheck toward the wages the company paid them during an earlier training period. Some of these employees leave the company and do not receive a final paycheck because their earnings are less than \$3,000 in a pay period. Is this practice acceptable if the employees agree to the withholding as a condition of employment?

A. No. According to the U.S. Department of Labor (W-H Op. Ltr., FLSA2005-18 (5-31-05)), wages cannot be considered to have been paid under the Fair Labor Standards Act (FLSA) unless they are paid unconditionally and finally or “free and clear.” The return from an employee to his or her employer of compensation due the employee under the FLSA’s minimum wage and/or overtime requirements – so that the employee’s pay is reduced below that amount – violates the “free and clear” standard. This is true even if the employee (as here) has agreed to let the company take the deduction because employees (or labor organizations acting on their behalf) cannot waive their FLSA rights.

with the words “Important Tax Document Enclosed” on the outside of the envelope.

Earlier this year, the subgroup met with Director Deborah Wolf and Deputy Director Rich Phillips from IRS’s Privacy, Information Protection, and Data Security (PIPDS) Office, which was already working on identifying the use of TINs by the Service in an effort to reduce their overall use on IRS correspondence. The subgroup feels that TIN-masking would compliment the work of PIPDS, and Wolf agreed to lead the implementation effort. At the meeting, Wolf said that work has already begun on a proposed revenue procedure giving employers and payers the option to mask the recipient’s TIN and soliciting public comment on the issue.

The Committee’s recommendation that IRS develop guidance to allow filers to not display the full TIN on Forms W-2, 1099, 1098, and 5498 provided to recipients comes with suggestions for steps IRS needs to take in order to move forward:

- Work with the Social Security Administration, tax filers, state agencies, and practitioners to come up with appropriate masking criteria;
- Involve state agencies to learn the impact on their processes if an employee’s SSN is masked on information returns;
- Work on outreach programs and media materials to fully inform the public of their responsibilities regarding their SSNs and ensuring its accuracy when they file their tax returns;
- Continue to examine other ways to help prevent ID theft and how the IRS can make its efforts in that direction more effective; and
- Work with PIPDS to help prioritize any other forms that could be subject to the guidance issued by IRS.

FIRE system enhancements

Several years ago, the IRS explored the possibility of developing a “clearinghouse” housing its electronic capabilities. The Modernization Subgroup learned that this concept was no longer a viable project and that no enhancements other than yearly compliance updates were planned for the FIRE system for the next five years.

However, the subgroup feels that the current FIRE system needs several enhancements to maintain its effectiveness in the near future, and that they would work well with the overall strategy of Electronic Tax Administration Director David Williams.

• **Support two-way communications.** The IRS should deliver notices and correspondence to filers electronically (e.g., B-Notices and penalty notices). This would reduce costs and improve both compliance and customer service.

• **Enhance transmission validation.** The IRS should provide upfront validation of e-filed information reports to allow payers to resolve issues before back-end processing, resulting in lower costs for error resolution.

• **Support unattended transmission.** The IRS should develop a web interface for the FIRE system that allows automated computer-to-computer transmissions without human intervention.

• **Replace current file format.** The IRS should replace its current outdated file format understood only by IRS legacy systems with more modern and extensible systems such as XML, reducing development costs for payers and the management and retrieval of data.

IRS personnel at the meeting said the Service is in the early stages of development to support two-way communications and that they hope to have a plan for Notices 972CG and CP2100 “sometime soon.” They also said they needed more feedback from the subgroup going forward on the issues of enhanced transmission validations and unattended transmissions, and that they were consulting with software developers and an in-house group on the file format replacement issue.

Form 944 filing changes

The Burden Reduction Subgroup examined the results of the Form 944, *Employer’s Annual Federal Tax Return*, filing program, which began in 2006, when employers with an annual employment tax liability of no more than \$1,000 were first required to file the form. After looking at the numbers, which showed that 305,000 Forms 944 were filed for 2006 with an overall burden reduction of two million hours (even though 645,000 employers were initially identified as potential filers) and that 12% of eligible employers continued to file Form 941 repeatedly, and considering IRS’s efforts to refine its selection criteria, which resulted in only 242,000 employers being selected for 2008, the subgroup offered several recommendations:

- Make the 944 program voluntary rather than mandatory, which IRS is considering;
- Increase publication of the filing requirement clarifications made by IRS in Pub. 15 and the Form 944 instructions;
- Allow new employers to file Form 941 for two years so

a full look-back period is established;

- Clarify the instructions for Form SS-4, *Application for Employer Identification Number*, to address an online application process for the question in Box 14 about whether the employer expects its yearly employment tax liability to be \$1,000 or less; and

- Provide an alternative mechanism for bulk e-filing of Form 944 that is similar to SSA's online preparation and filing method for Forms W-2.

Form 941-X release

Beginning in 2009, employers will make employment tax adjustments on Form 941-X, an amended Form 941 that is filed on its own, rather than on Form 941-c, which is submitted with a current Form 941. The subgroup applauded IRS's efforts to reduce burden for employers in the error correction process and its ongoing work with stakeholder groups in revising drafts of the form and its instructions.

However, it did recommend that the final version of Form 941-X and any other adjustment forms (e.g., 945-X, 943-X) be released at least six months before the tax year for which they must be used to allow time for programming and process changes, and that IRS release the new XML schema for e-filing of these forms as soon as possible.

New W-4 for nonresident aliens

While there are special rules that nonresident aliens must follow when completing Form W-4, *Employee's Withholding Allowance Certificate*, the Burden Reduction Subgroup found there was a wide and confusing range of instructions, forms, and publications to follow to correctly complete the form, with the result being unintentional noncompliance through underwithholding. They described the challenge as one of providing adequate information to employers on determining who is a nonresident alien and non-burdensome instructions to employees to help them correctly complete Form W-4.

The subgroup recommended the creation of Form W-4NR, which would be only for nonresident aliens and would contain all the instructions that are now found in multiple locations not related to Form W-4 (e.g., Pub. 15, Form 8233). Alternatively, the subgroup recommended that the current Form W-4 be enhanced through the addition of specific instructions for nonresident alien employees or the use of an index in the Form 8233 instructions, where the nonresident alien Form W-4 completion instructions now

appear. This issue will be carried over to 2009, and the APA will continue to survey its members as to the need for the proposed Form W-4NR while seeking statistical evidence of the total number of nonresident alien employees in the U.S.

NQDC reporting after employee's death

The Burden Reduction Subgroup found conflicting directions for reporting distributions from a NQDC plan after the employee's death. The distributions should be treated like other wages paid after an employee's death (reported on W-2 and 1099-MISC if paid in year of death, on 1099-MISC only if paid in year after year of death). However, the instructions to Form 1099-R indicate that such distributions should be reported on Form 1099-R, which creates confusion regarding withholding and rollover treatment, neither of which applies to these distributions.

The subgroup recommended that IRS eliminate the inconsistency between the instructions for Forms 1099-MISC and 1099-R by clarifying that NQDC distributions after an employee's death are wages for federal income tax purposes (even though there is no withholding) and should be reported on Form 1099-MISC. IRS agreed to change the forms' instructions for 2009 to incorporate the suggested changes.

Nonresident alien scholars

The Ad Hoc Subgroup looked at the reporting and withholding requirements for nonresident alien teachers here in the U.S. on J-1 visas. They concluded that university and school district employers are hampered in meeting their withholding and reporting obligations by the complexity of the laws and regulations in this area, a potential change in status under a treaty if the teacher is here more than two years, and the differences among the 60-plus tax treaties the U.S. has with foreign countries.

The subgroup recommended that a decision tree web link be developed and made available that would allow employers to follow a decision making process that leads them to the correct tax withholding for a nonresident alien scholar. IRS's Lowell Hancock is the lead on this project and he is working on having a decision tree designed this fall, although the actual implementation date has yet to be decided. ■

IRS Announces New Due Date for Furnishing Certain Forms 1099 to Recipients

The IRS has posted a note on its website indicating that an incorrect due date is printed in the 2008 *General Instructions for Forms 1099, 1098, 5498, and W-2G*, and the instructions on the reverse side of Copy C of the 2008 Forms 1099-B, 1099-MISC, and 1099-S [www.irs.gov/formspubs/article/0,,id=109875,00.html, item dated 11-5-08].

The note explains that the Emergency Economic Stabilization Act of 2008 (Pub. L. No. 110-343) changed the due date for furnishing Copy B of certain Forms 1099 to recipients for returns required to be filed after 2008. The new date is February 15 of the year following the calendar year for which the return is required to be filed. This change applies to:

- Form 1099-B, *Proceeds From Broker and Barter Exchange Transactions*;

- Form 1099-S, *Proceeds From Real Estate Transactions*; and

- Form 1099-MISC, *Miscellaneous Income*, but only if substitute payments in lieu of dividends and tax-exempt interest or gross proceeds payments to attorneys are reported.

The correct due date for furnishing the 2008 Copy B to recipients is as follows:

- February 17, 2009, for Forms 1099-B and 1099-S.
- February 17, 2009, for Form 1099-MISC if substitute payments are reported in Box 8 or gross proceeds paid to an attorney are reported in Box 14. If no such payments are reported, February 2, 2009, remains the due date for furnishing Copy B of Forms 1099-MISC to recipients. ■

Interstate Unemployment Claim Must Be Filed in State Where Former Employee Qualifies for UC Benefits

Effective January 6, 2009, a final rule issued by the U.S. Department of Labor (DOL), Employment and Training Administration, amends the definition of “paying state” for purposes of combined-wage claims (CWCs) filed under the federal-state unemployment compensation (UC) program [73 F.R. 63068, 10-23-08; <http://edocket.access.gpo.gov/2008/pdf/E8-25097.pdf>].

Current interstate process

The Federal Unemployment Tax Act (FUTA) requires each state, as a condition of participating in the federal-state UC program, to take part in certain arrangements for the payment of UC on the basis of combining an individual’s employment and wages in two or more states. A claim filed under this arrangement is a CWC. Current federal rules allow an unemployed worker with covered employment or wages in more than one state to combine all such employment and wages in one state in order to qualify for benefits or to receive increased benefits.

Thus, any unemployed individual who had employment covered under the UC law of two or more states – whether or not he or she has earned sufficient wages to qualify for UC under one or more of them – may elect to file a CWC. The “paying state” is the state in which the employee files the CWC, if he or she qualifies for benefits under the UC law of that state on the basis of combined employment and wages. In practice, this has meant that an employee could establish eligibility to file for UC benefits in his or her state of residence, for example, which would not be possible otherwise.

Amended definition of ‘paying state’

The final rule amends the definition of “paying state” to provide that any “single state” in which the employee had base period wages and employment, and in which the employee qualifies for UC benefits, may be a “paying state” (20 C.F.R. §616.6). For example, if an employee had wages and employment in the base period of State A and the base period of State B, the employee may elect either State A or State B (assuming he or she qualifies in both states) because the “paying state” must be a “single” state. Further, no state other than State A or State B may serve as the “paying state”

if the employee did not have wages in the base period of any other state.

The final rule also requires a state that denies a CWC to notify the employee of the option to file in another state in which the employee had wages and employment during that state’s base period (20 C.F.R. §616.7).

Purpose is to stop ‘forum shopping’

The purpose of this new rule is to prevent “forum shopping,” in which an employee files a claim in a state with a higher weekly benefit amount than other states in which the employee had covered employment. The rule limits “paying states” to those states in which CWC claimants (employees) had base period wages and employment. In comments to the proposed rule, one state UC agency related to the DOL that payments attributable to CWCs without employment in that state totaled \$41 million for the 12 months ending June 2006.

According to the DOL, “forum shopping” is undesirable for several reasons:

- May unfairly advantage employees who worked in multiple states over those who worked in just one state by giving CWC claimants the choice of filing a UC claim in a state with a higher weekly benefit amount.
- Results in higher costs for employers when the employee files a CWC in a state paying higher benefits, which are ultimately funded by those employers.
- Undermines the insurance principles of the federal-state UC program. Requiring that benefit eligibility be determined under the law of one state in which the employee had insured base period wages conforms more closely to the insurance principles of the program.

No credit reduction states for 2008

In other news affecting the federal-state UC program, the Secretary of Labor has signed the annual certification enabling employers that make contributions to state unemployment funds to take certain credits against their liability for FUTA tax. For 2008, there are no credit reduction states to be shown on Form 940, *Employer’s Annual Federal Unemployment (FUTA) Tax Return* [73 F.R. 66677, 11-10-08]. ■

Employee Was FLSA-Exempt Despite Employer’s Routine Salary Adjustments

Linda Havey received a base salary for her work as a mortgage underwriter for Homebound Mortgage, Inc. Underwriters that processed more than a certain number of loans each month in a quarter could receive an increase in base salary the following quarter, up to a maximum of \$64,000. If underwriters failed to meet their goals for two months in a quarter, the base salary would be reduced to the amount applicable to their production level. The base salary could also be reduced if the number of defects in an underwriter’s work exceeded a certain level. However, regardless of productivity or work defects, an underwriter always received a base salary of at least \$48,000.

A U.S. District Court ruled that Havey was exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) as an administrative employee (see *The Payroll Source*®, p. 2-9). On appeal, the question for the U.S. Court of Appeals

for the Second Circuit was whether Havey was paid on a salary basis. The court said that she was, and affirmed her FLSA-exempt status [*Havey v. Homebound Mortgage, Inc.*, No. 06-0978-cv, 2008 U.S. App. LEXIS 22117, (2nd CA, 10-22-08)].

☞ **WHAT THE LAW SAYS** – Under FLSA regulations, an employee is paid on a salary basis if the employee “regularly receives each pay period ... a predetermined amount constituting all or part of [the employee’s] compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed” (29 C.F.R. §541.602(a)).

Analysis

Adjustments within the pay period. Havey could not show that Homebound made salary reductions in the middle of a quarter. However, even if there were mid-quarter salary reductions, they were always prospective. And any

salary reductions never took Havey's salary below \$48,000. "Given the nature of her duties, the fact that her overall compensation for that quarter could be decreased due to quality errors does not render Havey a non-salaried employee if, under the employer's policy, the adjustments do not affect a 'predetermined amount' portion of salary exceeding the regulatory threshold rate."

Homebound's dual salary structure. Havey argued that Homebound's two-part compensation structure was not compensation on a salary basis because it effectively reduced

her pay "because of variations in the quality or quantity of the work performed."

The court disagreed, explaining that Homebound guaranteed a \$48,000 salary, which was well above the minimum required salary-basis compensation for exemption purposes. Homebound's compensation plan was not a sham designed to evade the requirements of the FLSA, but was designed to give underwriters the incentive to take on more work and maintain a high level of quality. ■

Restaurant Delivery Employees Win Over \$4 Million for Minimum Wage and Overtime Violations

A U.S. District Court in New York City has awarded 36 restaurant delivery employees more than \$4.1 million in unpaid wages, unreimbursed expenses, and liquidated damages under the Fair Labor Standards Act (FLSA) [*Ke v. Saigon Grill, Inc.*, No. 07 Civ. 2329 (MHD), 2008 U.S. Dist. LEXIS 86300 (SD N.Y., 10-21-08)].

Background

Saigon Grill restaurants in New York City provided delivery service to local businesses. The company required delivery employees to have a bicycle or motorbike, but did not reimburse them for the costs of acquiring or repairing their bicycles.

Delivery employees worked between 11 and 13 hours a day six days a week, and often worked several hours on the seventh day. Saigon Grill paid these employees between \$340 and \$600 per month in cash wages. The company deducted fines of between \$20 and \$200 from employee wages for infractions such as not logging a delivery into the company's computer system or not making a delivery quickly enough.

When not making deliveries, the employees were required to perform "side work," such as cutting cardboard to line delivery bags and filling sauce containers. Many employees could not meet the quotas for side work during their shift and stayed before or after their shift to complete it. Employees who did not complete the side work were docked between \$10 and \$30 to compensate kitchen employees who had to complete the tasks.

The company argued that the delivery employees were adequately compensated as tipped employees, and said the fines were used to cover the cost of providing food for them.

The tip credit

Under the FLSA (29 USC §203(m)), an employer is only required to pay a "tipped employee" \$2.13 an hour, so long as the employee's tips are enough to bring his/her wage up to the minimum wage then in effect (see *The Payroll Source*®, p. 2-36). However, in order to take advantage of the tip credit, the employer must first notify employees about minimum wage requirements and about the employer's intention to take the tip credit.

Here, the delivery employees made as many as 30 to 40 deliveries a day and received tips of as much as \$4,000 a month. However, Saigon Grill did not provide notices about the minimum wage or the tip credit, so it could not use the tip credit toward its obligation to properly compensate its employees.

Hours worked

Although Saigon Grill kept computerized records of its

customers' delivery orders, it destroyed all but two days of records showing its employees' hours worked. The company issued checks to the employees in amounts ranging from \$800 to \$1,000, "with the apparent goal of creating a false paper record of payments to the deliverymen." The employees were required to deposit the checks in a bank account, withdraw the same amount in cash, and return it to the company. Actual wages (a lesser amount) were paid in cash delivered in envelopes.

Because of the company's deceptive practices and destruction of employment records, the court relied on the employees' estimates of their hours worked, which were supported by a printed work schedule.

The court rejected the company's claim that the employees only worked during busy lunch or dinner periods. An employer must pay employees for waiting time if they are required to be available whenever performance is required. Here, even if there were times when the employees were not making deliveries or performing side work, they were waiting to make deliveries or perform other services.

Fines and deductions

Only wages paid to employees "free and clear" count in determining whether the wages paid by an employer satisfy the minimum wage and overtime requirements of the FLSA; wages that an employee must return "directly or indirectly" to the employer or to another person for the employer's benefit must be subtracted (29 C.F.R. §531.35). Therefore, the fines and deductions were subtracted from the employees' wages.

The court said the company's assertion that it used the fines to buy food for the employees was not believable. Moreover, although an employer may claim a "meal credit" as a noncash benefit supplied to employees (29 USC §203(m)), the credit is limited to the actual cost to the employer of the meals and requires the employer to keep records documenting those costs. Saigon Grill did not have records of meal costs and could not take a meal credit.

'Tools of the trade'

If an employer requires an employee to provide the "tools of the trade" used or required for the performance of the employee's work, there is a violation of the FLSA in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid under the Act (29 C.F.R. §531.35).

A transportation device can be an employee's "tool of the trade." Here, for example, where the company required delivery employees to have a bicycle or motorbike, which was essential to satisfy Saigon Grill's need to make rapid deliveries,

the court said the employees were entitled to a credit for the costs they incurred in purchasing and repairing bicycles during their employment.

Statute of limitations

The FLSA provides a two-year statute of limitations on enforcement actions, but allows a three-year period for “willful” violations. The court said the statute of limitations period is “tolled” (suspended or stopped temporarily) when employers fail to post the required notices advising employees of their minimum wage and overtime rights under the FLSA.

Here, not only were no notices posted, but the delivery employees could not speak English and were completely unaware of the FLSA. Saigon Grill was therefore liable for unpaid minimum wages and overtime covering the entire period of the delivery employees’ employment.

Liquidated damages

An employee who is improperly denied minimum wages or overtime may recover, in addition to reimbursement of the unpaid wages, an additional equal amount in liquidated damages unless the employer can show good faith and a reasonable basis for believing that it was not in violation of the FLSA.

Here, because Saigon Grill demonstrated “a knowing and deliberate disregard for [its] legal obligations in this respect,” it could not avoid the imposition of liquidated damages. These damages are not a penalty, explained the court, but a form of pre-judgment interest – compensation for a delay in receiving wages caused by the employer’s violation of the FLSA.

Employer liability

Under the FLSA, an “employer” is any person acting directly or indirectly in the interest of an employer in relation to an employee (29 USC §203(d)). Joint employers are

responsible, both individually and jointly, for FLSA compliance.

The restaurants that made up Saigon Grill were owned by separate corporations, all of which were controlled by Simon Nget. The court said that Nget was also an employer because he hired and fired employees, set their wages, controlled the conditions of employment, and maintained employment records at all of the restaurants.

Nget’s wife was an employer because she interviewed and hired employees, set their pay and work schedules, monitored their performance, imposed disciplinary fines, and set quotas. One of Simon Nget’s friends was an employer because he managed two of the restaurants, fired employees, imposed sanctions, and assigned work. However, Nget’s sister, whose role was limited to assigning side work when Nget or his wife was on site, was not an FLSA employer.

Retaliation

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, after Saigon Grill found out that delivery employees were planning to sue the company for FLSA violations, Nget and his wife called a meeting of the employees and offered them more money to drop their claim, or be fired if they did not. When the employees refused to abandon their claim, Saigon Grill terminated their employment and eliminated its delivery service. Deliveries made up between 25% and 40% of Saigon Grill’s business, and the company’s claim that the service was eliminated for financial reasons was not believable. The court concluded that Saigon Grill retaliated against the delivery employees for exercising their FLSA rights. ■

Employee Missed FMLA Eligibility Threshold by 1.2 Hours

The Seventh Circuit Court of Appeals has ruled that the U.S. Postal Service (USPS) did not violate the Family and Medical Leave Act (FMLA) by terminating Antoinette Pirant’s employment because she did not work 1,250 hours during the 12 months immediately preceding her absence from work [*Pirant v. U.S. Postal Svc.*, 542 F.3d 202 (7th CA, 9-4-08)].

To be eligible for FMLA benefits, an employee must have been employed by his or her employer for at least 12 months (not necessarily consecutively) and must have worked at least 1,250 hours within the previous 12-month period (see *The Payroll Source*®, p. 4-33). Here, Pirant did not contest the accuracy of USPS payroll records, which showed that she worked only 1,248.8 hours in the 12 months preceding her absence.

Wrongful suspension. Pirant claimed that she was wrongfully suspended for two hours before the end of one of her shifts. The court explained that the two hours did not count in determining Pirant’s FMLA eligibility because she had not timely pursued her right to challenge the suspension and

have the lost hours restored. She was advised that she could file a formal grievance but failed to do so until well after the deadline had passed. Moreover, she did not object when her grievance was dismissed for being untimely.

Donning and doffing. Pirant also claimed that the three to five minutes she spent each workday putting on and removing gloves, work shoes, and a uniform shirt, should also count toward her FMLA eligibility. The FMLA provides that the legal standards of the Fair Labor Standards Act (FLSA) apply in determining whether an employee meets the hours-of-service requirement (29 USC §2611(2)(C)).

Here, the court said Pirant’s work clothing was not “extensive and unique protective equipment,” and that donning and doffing it was analogous to changing clothes “under normal conditions,” which is merely preliminary and postliminary activity and not compensable under the FLSA. Accordingly, Pirant could not include this time in her hours of service total for purposes of the FMLA. ■

FLSA Applies to Indian Tribe’s Casino

The Spokane Tribe of Indians in Washington State operates a casino. As part of an investigation into possible violations of the Fair Labor Standards Act (FLSA), the U.S. Department (DOL) sought wage and hour records for employees working at the casino. When the tribe refused to provide them, the DOL sued. The tribe argued

it was not subject to the FLSA because it was a sovereign nation.

The court explained that the FLSA is a statute of general applicability that is silent about whether it applies to Indian tribes and would apply here unless it affected exclusive rights of self-governance. To satisfy the “self-

governance” exception, the court had to determine whether the casino (1) functioned as an arm of the tribe, (2) served a governmental function, and (3) touched upon purely intramural matters.

The casino, which was owned and operated by the tribe, functioned as an arm of the tribe, said the court. However, it did not serve a governmental function because operating casinos is not a traditional attribute of self-government – the fact that the casino’s revenues funded a

significant portion of the tribe’s government services did not matter. Finally, the casino did not meet the “intramural” standard because it employed both tribal and non-tribal members, and was a for-profit enterprise seeking interstate business from non-members. The court concluded that the FLSA applied to the tribe’s casino [*Chao v. Spokane Tribe of Indians*, No. CV-07-0354-CI, 2008 U.S. Dist. LEXIS 72687 (ED Wash., 9-24-08)]. ■

Time Spent Donning and Doffing Protective Gear Was Compensable

In three cases, U.S. District Courts in Wisconsin, Tennessee, and Maryland have ruled that time spent by employees of meat processing plants changing into work gear at the beginning of the day and changing out of it at the end of the day was compensable under the Fair Labor Standards Act (FLSA). The activities in question were either integral and indispensable to the employees’ principal work activity or were not covered by the FLSA’s “clothing exception” [*Spoerle v. Kraft Foods Global, Inc.*, 527 F.Supp. 2d 860 (WD Wis., 12-31-07); *Jordan v. Tyson Foods, Inc.*, 542 F.Supp. 2d 790 (MD Tenn., 3-31-08); *Perez v. Mountaire Farms, Inc.*, No. AMD 06-121, 2008 U.S. Dist. LEXIS 52844 (D Md., 6-10-08)].

☞ **WHAT THE LAW SAYS** – *Preliminary and postliminary activities.* Time spent by an employee to get ready for work (preliminary) or to get ready to leave work (postliminary) is not compensable work time unless the activities engaged in are essential to the employee’s principal work activity. For example, if an employee must change clothes (“donning and doffing”) while at work at the beginning and end of a shift, the time spent changing clothes is work time if changing clothes is integral and indispensable to the employee’s principal activity.

Continuous workday rule. Once it is established that an employee has begun his or her first principal activity and until the end of the employee’s last principal activity for the workday, the employee is entitled to compensation under the “continuous workday” rule (see *The Payroll Source*®, pp. 2-58 and 2-59).

Clothing exception. Under the FLSA’s “clothing exception” (29 USC §203(o)), an employee’s compensable work time does not include any time spent changing clothes at the beginning or end of the workday that is excluded from work time by the express terms of, or by custom or practice under, a bona fide collective bargaining agreement applicable to the particular employee.

Spoerle v. Kraft Foods Global, Inc.

Background. Employees at the Kraft Foods plant in Madison, Wisconsin, were required to wear items of “personal protective equipment” that included hard hats, steel-toed shoes, ear plugs, hair nets, safety glasses, gloves, and cotton frocks. Employees had to don some of these items (e.g., frocks, steel-toed shoes, hair nets, hard hats, safety glasses, freezer coats) before clocking in. After clocking in, employees had to put on gloves, aprons, and slickers.

Ruling. The donning and doffing of the protective gear was integral and indispensable to the employees’ principal activities because the gear was needed in order for the employees to perform their jobs safely, and was required by company policy and federal law. The donning and doffing was therefore a compensable principal activity.

The court said that in analyzing whether donning and doffing an item is “changing clothes” for purposes of the clothing exception, it is necessary to determine whether the item is something an employee would normally wear anyway or replaces

an item of clothing an employee would normally wear anyway (noncompensable clothes changing), or whether it is something additional that an employee would wear that is required for job-related reasons (compensable). The donning and doffing of protective equipment is not “changing clothes” because it is performed for the employer, is job-related, and is under the employer’s control.

Jordan v. Tyson Foods, Inc.

Background. Before employees could start their shifts at the Tyson Foods Goodlettsville, Tennessee, chicken processing plant, they were required to put on clean frocks stored in their lockers. Next, they retrieved and donned standard gear that included hard hats, hair nets, ear plugs, and other specialized items. Once these items were donned, employees went to the production area, walked through a sanitizing foot bath, and donned protective gloves over their frocks, after which they began work on the production line. Tyson compensated them only for their time on the production line.

Ruling. Tyson required employees to wear frocks that it provided and maintained. Employees could not wear their own frocks, take the Tyson frocks home, or clean them. Tyson benefited from employees wearing the frocks because this enabled the company to maintain the cleanliness of its facilities and prevent food contamination. Because wearing the frocks was work required by Tyson that primarily benefited Tyson, the donning and doffing was integral and indispensable (and therefore a principal activity) and compensable under the FLSA.

Here, donning a frock was the first principal activity of an employee’s workday and doffing it was the last principal activity. All activities in between (including donning and doffing hard hats, ear plugs, etc.) were therefore compensable, said the court, citing the continuous workday rule. Activities occurring before and after these principal activities (retrieving a clean frock, turning in a soiled frock, and stowing the clean frock for the next day’s work) were noncompensable preliminary or postliminary activities.

Perez v. Mountaire Farms, Inc.

Background. Before taking their place on the production line, employees at Mountaire Farms chicken processing plants were required to change into protective gear that included a lab coat, ear plugs, a helmet, an apron, a hair net, safety glasses, steel-toed boots, and gloves. At the end of the day, employees were required to remove the gear. Mountaire did not compensate the employees for the time spent on this donning and doffing. The question for the court was whether the donning and doffing was subject to the FLSA clothing exception.

Ruling. Following the reasoning in the *Spoerle* case, the court concluded that the clothing exception did not apply here because the items in question were protective equipment that employees would not normally wear. Therefore, time spent donning and doffing it was compensable. ■



STATE AND LOCAL NEWS

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California

Overtime exemption for certain professionals: minimum rates of pay adjusted for 2009. Effective 1-1-09, the minimum rates of pay that a computer software employee must earn to be exempt from state overtime requirements will increase as follows: the hourly rate will increase to \$37.94 from \$36; the monthly salary exemption will increase to \$6,587.50 from \$6,250; and the annual salary exemption will increase to \$79,050 from \$75,000 (recent legislation expanded the exemption to salaried employees). The employee must also meet the duties test outlined in Cal. Labor Code §515.5. These rates are adjusted annually for inflation [A.B. 10, L. 2008; Department of Industrial Relations, Memorandum, 10-17-08].

Also effective 1-1-09, a licensed physician or surgeon must earn at least \$69.13 an hour (currently \$65.59) to be exempt from state overtime requirements. The physician or surgeon must also be primarily engaged in duties that require licensing pursuant to the Medical Practice Act, as required by Cal. Labor Code §515.6. The minimum hourly rate for the exemption is adjusted annually for inflation [Department of Industrial Relations, Memorandum, 10-17-08].

Withholding tables issued for 2009. The Employment Development Department has issued the wage-bracket and exact calculation method withholding tables, effective for wages paid on or after 1-1-09, at www.edd.ca.gov/Payroll_Taxes/Rates_and_Withholding.htm [EDD Tax Branch News No. 69, 11-5-08].

SDI taxable wage base increases. For 2009, the state disability insurance (SDI) taxable wage base will increase to \$90,669 from \$86,698. The employee contribution rate will increase to 1.1% from 0.8% of annual earnings up to the wage base (this updates *The Payroll Source*®, p. 7-42). The employee contribution rate includes the cost of paid family leave. Therefore, the maximum employee contribution for 2009 will increase to \$997.36 from \$693.58 in 2008. Employer contributions are not required [Employment Development Department website, www.edd.ca.gov/Payroll_Taxes/Rates_and_Withholding.htm#2009UIETTandSDIRates].

New Mexico

Withholding tables issued for 2009. The Taxation and Revenue Department has issued wage-bracket and percentage method withholding tables, effective for wages paid on or after 1-1-09, at www.tax.state.nm.us/pubs/fyi104jan2009.pdf [Pub. FYI-104, *New Mexico Withholding Tax*, rev. 11-08].

Utah

Withholding tax form changes implemented for 2009. Effective 1-1-09, withholding tax forms will change from the TC-96 series to the TC-941 series. For a chart showing the new forms employers must use based on their current filing frequency (monthly, quarterly, or annually), visit <http://tax.utah.gov/research/bulletins/tb-08-08.pdf>. New forms will be mailed to employers and are also available at www.tax.utah.gov/forms/finals/release.html. Beginning with the 2009 tax period, withholding payments, including electronic funds transfer (EFT), will not count as the employer's return. Employers must file Form TC-941, *Utah Withholding Return*, separately [Utah State Tax Commission, Tax Bulletin 8-08, 10-16-08].

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