

LABOR WATCH

A MONTHLY REPORT ON THE DEVELOPMENTS IN LABOR RELATIONS, EMPLOYMENT LITIGATION, IMMIGRATION, AND HUMAN RESOURCE MANAGEMENT

TO PAY OR NOT TO PAY? ADDRESSING UNAUTHORIZED OVERTIME

In order to prevent unauthorized, unnecessary, and costly overtime, companies frequently have policies requiring employees to get prior authorization before working overtime. If the employee then works unauthorized overtime, can the company then refuse to pay for the overtime hours pursuant to company policy? No. This common sense approach to controlling overtime costs has been held by some courts to be a violation of the Fair Labor Standards Act.

Recently, a federal appeals court held that employers must pay time and a half to employees performing overtime work, although the work was unauthorized and was in violation of company policy. *Chao v. Gotham Registry, Inc.* involved a staffing agency that refused to pay overtime that was worked but not authorized. The company's policy stated that prior to working more than 40 hours in a week, the employee had to notify the employer and receive authorization. For all unauthorized overtime, the employee was only to receive his or her regular hourly rate of pay.

The employer argued that the FLSA only requires compliance where the employer "suffers" or "permits" work to be done. Because the employer did not knowingly permit the work to be done, and it did not learn of the overtime work until after the hours had been completed, it was not liable for that time. The court rejected that argument, explaining that an employer's

actual or imputed knowledge that an employee is working is a necessary condition to finding the employer permitted the work, but that knowledge does not have to arise at the same time the employee works the overtime hours.

The court also examined whether the employer did enough to prevent overtime work and determined that the employer could have, but did not, discipline policy violators. The court concluded that the employer was required to pay overtime wage premiums even when the company policy restricted overtime work.

Prior to the *Chao* case, however, the Ninth Circuit determined that employers need not pay overtime rates when the company can show that it notified the employees that overtime work is not expected, the employees were not pressured to work overtime, and the employee could complete his or her work during normal working hours.

Obviously, courts do not totally agree on this issue. So how is an employer supposed to control overtime costs with inconsistent guidance from the courts?

The bottom line is that if employers have knowledge that employees are coming in early and/or leaving late and doing productive work during that time, that time must be paid. Companies should maintain an overtime policy prohibiting unauthorized overtime work. This policy should be enforced through disciplining the employee for violations of the policy. However, the company should pay the employee for the overtime work done at the appropriate overtime rate. Employees should be informed of that policy from the time of hire with periodic reminders. Employers also have a duty to be mindful of the hours worked by employees and consistently monitor those hours.

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E-STORING PERSONNEL RECORDS – IS IT AN OPTION?

Finding space to store voluminous personnel documentation is often a problem for many companies. To solve this problem, some companies keep only the basics and destroy others documents, while others pay exorbitant fees to store the records in off-site storage. This then begs the question whether employers may electronically store personnel records and other important employee records and destroy the original records.

There are many federal laws and regulations that govern the length of time such documents must be maintained. However, as many of these statutes and regulations were written before electronic storage became an option, most fail to address whether these documents may be maintained in electronic form only.

While Title VII regulations are silent on the issues of electronic storage, regulations issued pursuant to the Age Discrimination in Employment Act, Fair Labor Standards Act, and Family and Medical Leave Act specifically state that no particular form for retaining records is required. ADEA regulations further provide that if the information specified is available in records kept for other purposes, or can be readily obtained by recomputing or extending data recorded in a different form, employers need not make or keep further records. Significantly, FMLA regulations explicitly refer to records kept in computer form, requiring that such records be made available for transcription or copying. Therefore, while more specific guidance would be ideal, it does appear that the ADEA, FLSA, and FMLA regulations allow employers to preserve employment records in electronic format.

Additionally, an amendment to the Immigration and Nationality Act allows for an employer to retain a completed I-9 form as a paper, microfiche, microfilm or electronic document. The Employment Retirement Income Security Act and IRS tax and compensation directives also recognize the electronic storage option as a means of meeting its respective record maintenance and retention requirements. Similarly, the Health Insurance Portability and Accountability Act and Sarbanes-Oxley Act both contemplate electronic record keeping and reporting schemes.

Because federal employment regulations designed to accomplish similar administrative goals are interpreted and applied in a consistent manner, retention of employment records electronically would arguably satisfy the requirements under statutes, such as Title VII, whose regulations are silent on the issue. Nonetheless, there has been no definitive answer regarding storing documents in electronic form pursuant to the record retention requirements of these other statutes. Similarly, state law is often silent on the issue of the manner of retention.

There does exist a practical concern regarding the admissibility of employment records in electronic form in the event such records are to be used as evidence in trial. State and federal rules of evidence create some risk that a printout of documents scanned into a computer would not be admissible into evidence in a trial. This concern would relate primarily to documents with original signatures. For this reason, there would be some value in retaining paper copies of documents with original signatures for those signed documents that were created to be used for a specific legal purpose (e.g., a severance agreement and general release).

Therefore, based on the lack of guidance and these general concerns, employers may want to proceed with some caution if implementing an electronic storage system. Some suggested precautionary measures include:

- **Safety.** Make sure the records are protected from damage or loss.
- **Accessibility.** Make sure the records are readily accessible, readable, and easily copied. This is especially important, for example, if the Immigration and Naturalization Service, Equal Employment Opportunity Commission, Department of Labor, or other government agency were to conduct an audit of the company and request documentation.
- **Privacy.** It is essential, and often mandated, that disclosure of personnel files be made only to those on a "need to know" basis. Therefore, if files cannot be locked up, passwords or other security tools must be used to protect the privacy of the employees' files.
- **Confidentiality.** Make sure that medical files, self-identification forms (identifying race/ethnicity information), and so forth, are still kept separately from files that are used to make employment-related decisions.
- **Retention.** Make sure mandated retention periods are complied with.
- **Back-up.** Make sure that the company implements an effective back-up system to protect against information loss so that files are available when needed (e.g., litigation).

Provided that these safety measures are taken into consideration, most companies should be able to effectively implement an electronic storage system with few worries and reap the numerous advantages of such system.

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WORKERS' COMPENSATION INSURANCE: UNDERSTANDING YOUR EXPERIENCE RATING

In prior editions of Laborwatch, we have outlined ways to reduce workers' compensation costs. However, these articles did not fully explain the mechanism that reduces those costs. As any employer knows, workers' compensation claims are generally paid with the help of workers' compensation insurance. While all plans vary, there is always a premium. Therefore, this article will show how an experience rating is calculated.¹ In doing so, this article will reinforce prior advice on reducing workers' compensation costs.²

The first step in determining a premium for workers' compensation insurance is to assign an employer to a group according to the employer's business operation or classification. This is known as a "manual rating," and it is done because the cost and probability of claims is easier to determine for a group than for an individual employer. Therefore, an employer needs to make sure it is in the right classification.

In addition to the manual rating, there is often an experience rating. To qualify for an experience rating, an employer must meet state-specific minimum premium requirements. Therefore, not all employers will qualify for an experience rating, however all employers should be mindful of how an experience rating is determined because a sudden rise in premium rates may suddenly make an employer qualify.

The purpose of an experience rating is to provide employers with some degree of influence over the premium they will pay. Experience ratings are based on the actual payroll and loss histories of an individual employer; therefore, they promote a safe workplace by forcing employers to focus on reducing injuries and providing return to work programs in order to reduce workers' compensation costs. Looking at

how an experience rating is calculated demonstrates how an active employer can reduce its premiums.

There are two types of costs that go into an experience rating, the "**primary loss**" and the "**excess loss.**" The **primary loss** constitutes the first \$5,000 of a claim and the **excess loss** is made up of all costs over \$5,000. In addition, the **excess loss** is capped by all states, with the majority of states providing a cap at \$100,000. For example, if an employer has a \$200,000 claim, \$5,000 counts as the

primary loss, \$95,000 is the **excess loss**, and the remaining \$100,000 is not included because it exceeds the cap. Losses below the state-mandated cap are known as ratable losses, and those above the cap are nonratable losses.

The purpose of the **primary loss** is to reflect the frequency of injuries while the **excess loss** reflects the severity of claims. When it comes to determining an experience rating, the **primary loss** is given greater weight than **excess loss**, thus clearly putting an emphasis on injury reduction. The reason an experience rating is done in this manner is because frequency of injuries is much easier to predict than severity. In addition,

very large losses are infrequent and including the entire amount of a severe loss will reduce the predictability of losses, hence each state provides a cap on the ratable loss.

Return-to-work programs can benefit employers because medical-only claims generally have a lesser impact on an employer's experience rating. Again, this varies by state, but most states have approved a procedure that reduces medical-only claims by 70%. Under this procedure, only 30% of primary and excess losses are included in the experience rating calculation. In such a case, the maximum primary loss

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would be \$1,500 (30% × \$5,000) as opposed to \$5,000, and the excess loss would be reduced in the same manner.

Experience ratings are generally done based on the latest three years of available loss data. Experience ratings are done based on a summary of losses, which are contained in a unit stat report. This report is usually generated six months after the end of the policy year, and it is prepared by the insurance company and submitted to the ratings bureau. This means that for a policy for the year 2010, the experience rating would be based on the losses in 2006, 2007, and 2008 because the data for 2009 would not be available when the policy is written.

The experience rating shows how an employer's loss history compares to other employers in its classification. If an employer is on par with the average in its classification, then it will get an experience rating of 1.0. An above-average employer will have a rating less than 1.0, and a below-average employer will have a rating greater than 1.0. An above-average employer then gets a credit, and the below-average employer gets a debit when it comes to paying a premium because all insurance carriers must use an employer's experience rating.

Here is an example of how it works. If an employer has an experience rating of 0.75, it gets a 25% credit, and if an employer has a rating of 1.25, it would have a debit of 25%. In essence, the above-average employer's premium will be calculated by multiplying the carrier's rate by 0.75, and the below-average employer will have its premium calculated by multiplying the carrier's rate by 1.25. The savings for reducing the experience rating are obvious.

The size of an employer's payroll is also a part of this, as larger businesses generally have their own loss histories, which will factor more heavily in the determination of their experience rating. Small employers, because they have relatively fewer claims, will not have their loss histories weighed as heavily. This creates a problem for small employers because frequent claims, even if they are inexpensive, will raise the experience rating faster.

What is an employer to do? Obviously, the first step is to foster a safe work environment and take steps to reduce time away from work and the cost of claims. The best way to accomplish the latter is to implement a return-to-work program. Finally, and perhaps most importantly, employers need to be involved. This includes involvement in individual claims and involvement with the insurance carrier. Companies that have more than six open claims should request a loss run from their carriers quarterly. With the loss run in hand, the employer should get on the phone or meet in person with the adjuster and go over all of the open claims to discuss strategies to bring claims to a close.

A company that has fewer than six claims should request a loss run once a year, and the request should be made within three months after the end of the policy year. This will allow the company to review open claims, discuss reserves, and confirm strategy for closure prior to the generation of the all important unit stat report that is prepared six months after the policy year.

Like all other insurance premiums, workers' compensation premiums are on the rise. Employers can offset this rise by reducing the number and severity of claims and, thus, obtaining a favorable experience rating.

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¹ For more detailed information on this topic and additional examples, download the introduction to experience ratings published by the National Council on Compensation Insurance, Inc. at https://www.ncci.com/media/pdf/abc_Exp_Rating.pdf. Additional information may also be found at the NCCI website, www.ncci.com.

² This article appeared in the November issue of Laborwatch and can be found here: http://www.berenstate.com/New_Folder/2007Laborwatch/Nov07LW.pdf

MOVING IN THE WRONG DIRECTION – SUIT ALLOWED IN ABSENCE OF FORMAL EEOC CHARGE

Certain filings with the Equal Employment Opportunity Commission may be considered a "charge" for purposes of timeliness under the Age Discrimination in Employment Act and other similar statutes the EEOC administers and enforces such as Title VII and the Americans with Disabilities Act.

Prior to February 27, 2008, employers understood that an employee must file a formal document entitled "Charge of Discrimination" with the EEOC to invoke jurisdiction and obtain a subsequent right to sue the employer. However, the Supreme Court ruled, in *Federal Express Corp. v. Holowecki*,¹

MOVING IN THE WRONG DIRECTION – SUIT ALLOWED IN ABSENCE OF FORMAL EEOC CHARGE (Continued from page 4)

that an employee's intake questionnaire and supporting affidavit constituted a charge as required by the ADEA. The ruling means that an employee may initiate formal proceedings against the employer without completing a Charge of Discrimination with the EEOC.

In *Holowecki*, the employee filed suit against the employer despite failing to complete and file a Charge of Discrimination with the EEOC. In response, the employer moved to dismiss the lawsuit on the ground that the employee had not followed proper procedure as required by the ADEA. The Supreme Court held that the employee's questionnaire contained all the information required by the EEOC's regulations. The Supreme Court further held that the employee's supporting affidavit requested the EEOC to take action to protect the employee's rights. In sum, the Supreme Court determined the employee's documentation constituted a "charge" even though the employer did not receive notice of the filing or the opportunity to resolve the case at the EEOC level.

Although the *Holowecki* decision only involved the ADEA, employers should be aware that the same principles may be

applied to Title VII and ADA cases enforced by the EEOC. Therefore, employers must carefully evaluate all filings with the EEOC to determine whether a charge of discrimination has been completed in a timely manner. This poses an interesting dilemma to employers because the EEOC previously delayed disclosure of information such as questionnaires and affidavits until after the conclusion of the administrative proceedings. We will have to wait to see if the EEOC revises its regulations and procedures to remain consistent with the recent *Holowecki* decision. In the interim, employers should continue to assert the defense that the employee failed to follow proper procedure if the employee fails to file or files an untimely Charge of Discrimination.

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¹No. 06-1322 (February 27, 2008)

NLRB ISSUES TWO GUIDELINE MEMOS REGARDING "SALTING"

On February 15, 2008, the Office of the General Counsel of the National Labor Relations Board issued two guideline memorandums concerning the union organizational tactic of "salting." As you may know, "salting" is the practice of union supporters attempting employment with non-union companies in an effort to organize the employees. The guideline memorandums were issued as a result of two recent management-favorable NLRB decisions on the issue.

General Counsel Memorandum 08-04 addressed the NLRB's decision in *Toering Elec., Co.*¹ In *Toering*, the NLRB held that a "salt" must be "genuinely interested" in employment in order to be protected by the National Labor Relations Act. This decision overturned the previous assumption that any applicant was covered by the Act.

General Counsel Memorandum 08-04 is essentially an updated playbook to be used by regional personnel in handling "salting" issues in the wake of *Toering*. Applicants must now (1) make a bona fide application for employment and (2) have a genuine interest in becoming employed with the employer. In terms of a "genuine interest" showing, the employer can rebut this by showing that the applicant

refused similar employment in the past, made belligerent or offensive comments on the application, engaged in disruptive behavior during the application process, engaged in other behavior that is inconsistent with a "genuine interest" in employment, or that the application was stale or incomplete.

General Counsel Memorandum 08-29 addressed the NLRB's decision in *Oil Capital Sheet Metal Inc.*² In *Oil Capital*, the NLRB overturned the longstanding presumption that a "salt" that was not hired due to his or her union activity would work indefinitely for the employer. The NLRB ruled that the burden is now on the General Counsel to prove that the "salt" would have actually worked for the time claimed. In making this determination, the General Counsel requires the regional personnel to look at the "salt's" personal circumstances, union policies and practices on salting, union plans regarding the employer, union instructions to "salts" regarding duration of employment, and historical information on "salt's" previous employment in campaigns.

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THE TEN-MINUTE HR AUDIT

(Series No. 2)

This time, we have two audit tasks for you. The first applies only to employers who have employees classified as exempt from overtime under the motor carrier exemption. The second applies to virtually any employer and relates to confidentiality policies.

The Motor Carrier Exemption:

Under earlier versions of the law, employers with service technicians, delivery drivers, and similar employees with driving duties were sometimes able to take advantage of the motor carrier exemption under the Fair Labor Standards Act. In a nutshell, this exemption made persons who drove motor vehicles carrying their employer's property across state lines exempt from the overtime provisions of the FLSA. Originally, it didn't matter what size of vehicle the employee drove. However, a revision to the law occurred requiring the employee to drive a "commercial motor vehicle" with a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds. As a result, some delivery personnel or service technicians correctly classified as exempt under the motor carrier exemption lost their exemption because the vehicle being driven was less than 10,001 pounds.

If you have delivery employees or service technicians to whom you are not paying overtime because you classified them as

exempt under the motor carrier exemption, check now to ensure the vehicles they are driving are at least 10,001 pounds. Of course, the employees also must still be involved in interstate commerce (i.e., driving across state lines or, in some cases, intrastate deliveries are sufficient if the deliveries involve carrying product that has crossed state lines).

Confidentiality Policies:

We all know that loose lips can sink ships. In an effort to protect their "ships," many employers implemented confidentiality policies. Unfortunately, most employers do not realize that they cannot lawfully prohibit employees from discussing their wages and other working conditions with coworkers. This type of prohibition violates the National Labor Relations Act. And, yes, the NLRA applies to nonunion employers too. Such discussions are considered protected concerted activity under the NLRA and, therefore, cannot be lawfully prohibited. Check your policies to see if you have such a prohibition. Remember, it could be listed as a work rule rather than in an actual confidentiality policy.

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NLRB ISSUES TWO GUIDELINE MEMOS REGARDING "SALTING"

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In sum, the NLRB decisions in *Toering* and *Oil Capitol* and the subsequent General Counsel Memorandums are significant victories for management. Both decisions positively changed the burden of proof requirements in "salting" unfair labor practice matters. Additionally, not only do the decisions positively affect future "salting" litigation, but the NLRB also ruled that the changed burdens are to be

implemented in all pending matters unless the retroactive application would work as a "manifest injustice."

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¹351 NLRB No. 18 (2007)
²349 NLRB No. 118 (2007)

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