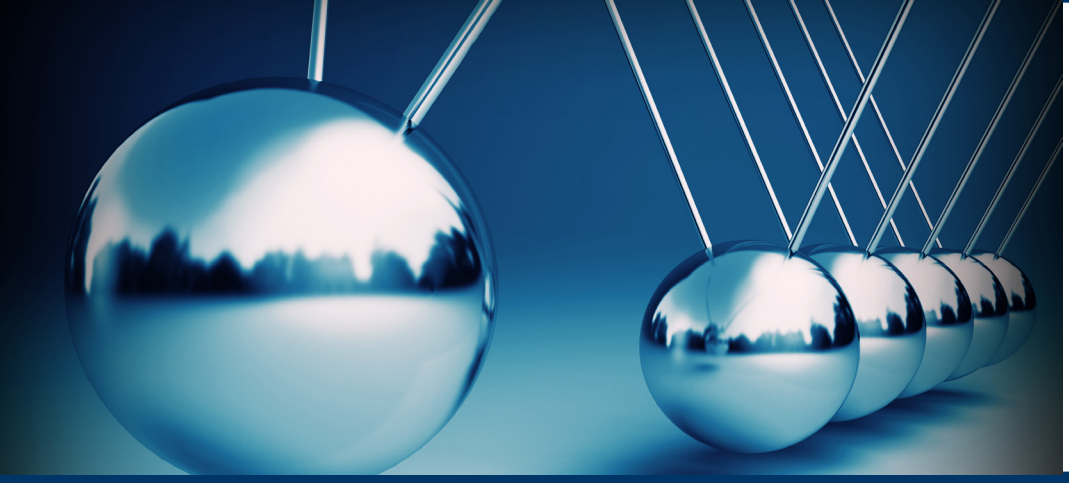

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LABOR AND EMPLOYMENT NEWS

September 2015

DEPARTMENT OF LABOR WINS CHALLENGE TO HOME HEALTHCARE WORKER OVERTIME REGULATIONS

As we noted last year, the payment of minimum wages and overtime to home health care workers who work through third party agencies has been a contentious issue. Last December a judge struck down new United States Department of Labor ("DOL") regulations which mandated minimum wage and overtime for those "domestic service" employees employed through third-party agencies who provide "companionship services" to those who cannot care for themselves. In re-writing its regulations, the DOL changed its 40 year interpretation of the Fair Labor Standards Act (FLSA).

Needless to say, the DOL appealed the Judge's decision. On August 21, the District of Columbia Court of Appeals reversed the court below. It held that the DOL had the discretion to change its interpretation of the FLSA and mandate over-time pay for domestic workers providing companionship services if a third-party has hired them.

Massachusetts has long required overtime pay for those workers. Connecticut follows the Federal regulations. The DOL previously stated that for at least six months after the regulation's effective date it would not sue violators. For another six months it would exercise "prosecutorial discretion" in enforcing the rules. It has not yet announced whether it will extend that position given the delay the lawsuit caused. However, in light of the DOL's victory, employers will now be subject to private lawsuits, including collective actions.

Agencies providing such assistance to households will have to make sure that their pay practices comply with the regulations.

If you have any questions regarding the above, please contact Lissa J. Paris at 860.240.6032 or lparis@murthalaw.com or Michael C. Harrington at 860.240.6049 or mharrington@murthalaw.com.

NATIONAL LABOR RELATIONS BOARD ADOPTS NEW JOINT EMPLOYER STANDARD

Background

Continuing its emphasis on workers' rights, the NLRB overturned 30 years of precedent and just issued a decision that changed the standard for determining whether a company using contract employees or franchisees is considered a "joint employer" for purposes of the National Labor Relations Act (NLRA). The decision, a setback for employers operating under a franchise model, will significantly alter the ability of a

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franchisor (or other entity that uses contract employees or subcontractors) to avoid the bargaining table or other labor disputes.

The case started with a dispute at a recycling facility which Browning- Ferris Industries of California, Inc. (BFI) owned. BFI engaged Leadpoint Business Services to operate the facility. The Teamsters sought to represent a group of the facility's workers, and petitioned to have BFI declared a joint employer with Leadpoint. BFI's agreement with Leadpoint expressly disclaimed BFI's role as a joint employer. However, the agreement allowed BFI to "discontinue the use of any personnel for any or no reason." BFI also set hiring standards and maximum pay rates, number of staff assigned to various tasks, and participated in other operational activities such as safety training.

The New Interpretation of Joint Employment

For thirty years before this decision, the NLRB defined "joint employer" narrowly. The "remote" employer (franchisor, contractor, or company using a firm to provide staffing) would be considered a "joint employer" only if it actually controlled essential terms and conditions of the employees work—hiring, firing, control over daily assignments, etc. In a 3-2 vote, the NLRB overturned the Regional Director's finding that BFI did not jointly employ the Leadpoint workers. The Board found that its previous standards for analyzing joint employment situations were "increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships." Declaring that the times require a new standard, the NLRB held that, even if the "remote employer" does not exercise control over the third party's employees, if the contract between the two provides the remote employer with such authority, the NLRB will now consider the two to be joint employers. The Board also loosened the factors defining a "common law" employee. Even if the remote employer has no contract with the service supplier, the Board will look to factors such as whether the remote employer can dictate the number of workers supplied, control scheduling seniority and overtime, assign work or dictate methods of work performance to determine joint employment. These are all factors to be considered—and one factor will not necessarily determine the outcome.

The Take-Away

The BFI decision is certain to be appealed. In the meantime, employers who use franchise arrangements or third-party services to supply labor must consider whether they want to review their agreements or other work arrangements to avoid the possibility of being required to engage in collective bargaining. We will update you as the situation develops. If you have any questions about what to do now please contact, Michael C. Harrington at 860.240.6049 or mharrington@murthalaw.com or Jennifer A. Corvo at 860-240-6055 or jcorvo@murthalaw.com.

RECENT MASSACHUSETTS APPEALS COURT DECISION REMINDS EMPLOYERS THAT THERE IS NO SUCH THING AS A FREE LUNCH

Recently, human resources and legal professionals have sharpened their focus on state and federal wage & hour laws because 1) the United States Department of Labor has proposed significant modifications to the exemptions from overtime pay, and 2) New England states are aggressively investigating exemption status and overtime pay practices. In Connecticut, companies are exposed for double damages and attorney's fees for wage & hour violations. In Massachusetts, the exposure is treble damages and attorney's fees.

In August, the Massachusetts Appeals Court issued a ruling reversing the trial court's grant of summary judgment for the employer; this serves as a reminder that employers should make certain they have reliable systems in place to track lunch breaks in addition to "time in" and "time out" at the beginning and end of the work day. It will surprise no one that many non-exempt employees work through lunch or take less than the time required by law or allowed by the employer over the required lunch break (one-half hour in Massachusetts and Connecticut). When total weekly working hours exceed forty, non-exempt employees become entitled to time and one-half overtime pay. As this case demonstrates, even an electronic time-keeping system may not be recording time accurately.

In Vitale v. Reit Management & Research, Plaintiff worked as a bookkeeper at a property management firm. In 2010, the company implemented a new electronic timekeeping system ("Kronos") requiring hourly employees to punch in and punch out at their computer terminals.

Problems arose because when first implemented, Kronos lacked a readily-accessible function allowing employees to punch in and punch out for lunch. As a result, employees "clocked" forty hours per week if they actually worked only the required thirty-five hours and also actually took the allotted one-hour lunch every day. To adjust for this fault in the electronic system, the company paid overtime only when total hours exceeded forty-five for the week. It simply assumed that every employee took the full hour lunch break every day. Company instructions on recording lunch breaks of less than one hour were confusing and inconsistent.

Plaintiff filed a class action complaint claiming that she regularly worked during her lunch periods and that the company knew this but failed to pay her. In the trial court, the company succeeded with its argument "that it was fair and reasonable to assume" that its employees would have reported any work during lunch break through the available, reasonable reporting procedures.

The Appeals Court reversed. It concluded that the trial court had to determine whether the Employer *knew or should have known* that the Plaintiff worked overtime. The Appeals Court's reasoning provides a cautionary tale for employers who are not vigilant in determining whether employees are actually working overtime hours. While an employee must prove that she has unpaid overtime hours, and that her employer had actual or constructive knowledge of the overtime, *employers have a duty to inquire into the conditions prevailing in its business*. Here:

- The Employer received questions from employees (including Plaintiff) that indicated that they did not know how to separately account for their time worked during lunch, but it only answered these questions on an individual basis and did not take it as a sign that it should educate the rest of the workforce.

- The Employer's email announcing the electronic time keeping system touted the fact that employees would not have to punch in or out for lunch, but neglected to mention that employees were required to account for time worked during lunch.

- The manual regarding the timekeeping system didn't jibe with the Employer's practices (for example, saying overtime was "coming in early or staying late.")

Most important, the Court concluded that a jury might decide that management had reason to know that the Plaintiff and other employees did not take the full one-hour lunch break. The Court noted that the Plaintiff typically took lunch breaks at her desk and "at times" she received work assignments from her supervisor during lunch. She claimed that the "pressing nature" of her assignments often prevented her from taking full lunches. The Company's "sternly worded policy" requiring all employees to obtain specific prior approval before working overtime did not provide a complete defense because 1) it did not address lunch breaks and 2) there was evidence that this policy was "honored in the breach". For example, one witness stated that her supervisor had given her "general blanket approval for overtime" when her department was "unusually busy".

The Take-Away

While this case applies only in Massachusetts, Connecticut (and most other states) have similar laws. If any part of this scenario sounds familiar, we recommend that you double-down on your training of managers and staff on your expectations for lunch breaks and authorized overtime hours. Not surprisingly, busy managers who have little knowledge of or regard for the overtime laws, but have to get their projects completed "yesterday," unwittingly create exposure for overtime claims.

The law makes clear that *employers*, and not employees, bear the ultimate responsibility for ensuring that employee time sheets are an accurate record of all hours worked. The employer's duty to maintain accurate records of its employees' hours cannot be delegated.

You absolutely do not want the Department of Labor or a jury to decide whether your company has complied with its duty.

If you have any questions regarding the above, please contact Susan J. Baronoff at 617.457.4031 or sbaronoff@murthalaw.com or Barry J. Waters at 203.772.7719 or bwaters@murthalaw.com.