BUSINESS BRIEFS

Legal Developments Affecting Business

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When the Oasis Becomes a Mirage: the Department of Labor's Proposed Amendments Affecting White Collar Exempt Employees

By David Briggs

Wage and hour laws are some of the most difficult and frustrating laws to comply with. Not only do they often defy logic, but many were also created without considering the large role that emails, cell phones, and VPN access play in a modern workplace.

Traditionally, there has been an oasis for employers to obtain at least some respite from many of these onerous and unforgiving laws: in particular, salaried exempt employees such as managers. However, the federal government is looking to make that oasis a lot smaller.

As many employers know, "exempt" employees are those that are exempt from certain wage and hour rules like minimum wage, overtime, and meal and rest breaks. Employers often rely on these "white collar" exemptions to provide flexibility in employees' work schedules. In order to qualify for these exemptions, the employee must be paid on a salary basis as well as perform certain duties consistent with either executive (e.g., managers), administrative (e.g., heads of HR or marketing), or professional (e.g., doctors, lawyers) employees. Currently, in order to qualify as an exempt employee, the employee must receive at least $455/week ($24,600 annually).

New DOL Proposal

The federal Department of Labor, or the "DOL," has proposed over doubling that amount to an estimated $970/week ($50,440 annually). On top of the large proposed increase to the minimum salary requirements, the DOL has also proposed that the required exempt-salary amount increase incrementally every year. One motive for this incremental increase could stem from the fact that the current $455/week has not been updated for over ten years, since 2004.

Though many experts predicted that the DOL would propose an increase to the current salary requirements, many were surprised by the sudden and significant upward jump. As justification for the sudden large increase, the DOL stated its concern that many employers were exaggerating the executive, administrative, or professional duties requirement, and suspected that many employees were not actually meeting the intent of the current regulations. The DOL also reasoned that by significantly raising the salary requirement, the DOL could better ensure that employers were meeting both the language and the intent of the salary exempt regulations. In other words, the DOL has assumed that a more highly compensated employee is more likely actually performing the duties that the DOL thinks that they should be performing in order to be classified as exempt.

Troublesome Impact on Businesses

The proposed increase in the exempt salary requirement does not account for regional differences in the cost of living. This means that an employer in La Pine must pay the same minimum salary as an employer in Portland in

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order to classify an employee as exempt. There is also no exception for certain industries, such as hospitality or non-profits, where salaried exempt employees are traditionally compensated well below the proposed threshold of $970/week ($50,440 annually).

The DOL is aware that this proposal would create a flood of new non-exempt employees who may earn overtime. In fact, the DOL is estimating that if the proposed rule goes into effect as is, it would impact 11 million workers. But the DOL has clearly explained that the purpose of the change is to ensure that more employees will be paid for time spent working over 40 hours in a week.

Next Steps in Finalizing the Regulations

While the proposal is far from final, one thing is certain: the DOL will be increasing the requirement for salaried exempt workers. The question now is by how much.

The DOL is now mulling over public comments on the proposed change. Many employers and business advocate groups commented on the proposal's negative impact on their business. Other comments focused on the proposal's likelihood of increasing costs to consumers, or the fact that many employees want to be salaried exempt, and have commented that the increased regulation takes away the flexibility that many workers prefer.

While there is no guaranty that history will repeat itself, we do know that during the last exempt salary increase in 2004, the DOL initially proposed a higher salary increase than the current $455/week. After a review of the comments from businesses, it then settled on a lower number.

As part of this rulemaking process, the DOL also asked for comments about whether there should be new requirements on how much time employees spend in "production" activities versus the time they spend in their roles as managers, administrators, or professionals. The DOL's thought seems to be that if employees spend too much time in production roles and not enough time in management, administrative, or professional roles, then they should not be classified as exempt. There are no current proposals to change the law on mandating a certain amount of time spent in a production role, but considering the DOL's comment, we may see additional regulations when the final rules are published.

Finally, the DOL has not clearly stated when the final rules are likely to be issued, although we are not likely to see them until spring or summer of 2016. Once issued, employers will very likely have a grace period of around sixty days to change their compensation practices before there is any risk of a wage and hour lawsuit.

Conclusion

The DOL is not likely to give employers much time to comply with the new regulations, so businesses must stay alert for new developments. Failure to change your pay practices after implementation, even if inadvertent, can lead to huge liability, since wage and hour violations include penalties, wages and attorney fees.

Businesses should also begin planning on how they may have to change their business model if the proposed rule is put into effect. If you would like help reviewing exemption classification or to discuss how this rule may affect your business, call one of our Employment Law attorneys. We would be happy to help.

They Can't Do That…Can They?

(What Happens when the Government Wants to Take Some of Your Land)

By Paul Sundermier, Of counsel

In many ways, the idea of the government taking private property for public use is an archaic area of the law – coming directly from our country's adoption of British Common Law in 1789. If you find your property is ever sitting in the path of the public-project bulldozer, you will find this article helpful.

I am a specialist in the field of eminent domain law. I have been practicing in this area almost exclusively for over 17 years. I have worked on the government side of these cases and, in the last few years, for the private property owner.

Eminent domain is the inherent power of the government to take private property and put it to a public use. The Fifth Amendment of the United States Constitution and Article I, Section 18 of the Oregon Constitution require the government to pay "just compensation" when acquiring private property for a public use. Oregon laws, Chapter 35 of the Oregon Revised Statutes, provide the procedures that the government must use when exercising the power of eminent domain. "Condemnation" is the process that happens when the government cannot acquire the property by agreement and brings a lawsuit to acquire it through the courts. Generally, case law (Oregon appellate court opinions) provides guidance as to what is compensable. That is, the government has to pay just compensation, but what is it paying for?

Potential jurors have asked me, when interviewing the jury pool for a condemnation trial, "They can't do that, can they?" You can imagine how helpful such a juror is to the private property owner's case! The idea that one's private property can be grabbed by the government is not universally recognized; the idea that just compensation may not include your real economic losses, even less so. Both ideas, however, are true.

Condemnation proceedings often begin a year or even years earlier with public hearings about a proposed government project. For example, think back to the Columbia River Crossing. If your land is potentially in the path of a public project, it is good to be proactive and become involved in the public process early on. Attend the meetings and learn what is planned – if you can. Typically, the government planners are required to present multiple options for the project.

As another example, assume that the public project is for the widening of a roadway. There will be a preferred route and other potential routes, sometimes with a "no-build" option. Don't count on the government to choose the no-build option. You should be careful how much information you give out at these meetings – your main purpose in attending these meetings is to gather information, not provide admissions that can be used later. It is impossible to know for certain what information might be important at this early stage. If you learn that your land or part of it is probably going to be in the path of the project, you should confer with a condemnation lawyer so that you can become familiar with the person you may need later. Sometimes there is no reason to engage the lawyer right then, and an experienced condemnation lawyer should not try to pressure you into an immediate engagement unless something has to be done soon.

In any large government project, there will likely be an Environmental Impact Statement or an Environmental Analysis required that can include many types of investigations and evaluations of the land and surrounding area, such as surveying, noise studies, archaeological studies, ground water studies, compaction studies, and testing and sampling for the dreaded "haz mat study." This is a good time to have your lawyer on board because the government can get a court order to forcibly accomplish all these studies, and it is usually best to try to mutually agree how the various environmental studies will be conducted instead of being subjected to the court's order.

After the government has surveyed and tested, and after it has chosen the route that will be constructed, the condemning authority will commission an appraisal of the private property. The appraiser is usually hired from an approved list, and is sometimes chosen based on the cost of the appraisal. The appraiser must give the property owner at least 15 days written notice before doing an inspection. The owner can draw limits on the inspection and determine how much information to give out, but that is best handled by a condemnation lawyer. Sometimes it is beneficial to give financial information and sometimes not, and your lawyer can help you determine these strategy decisions early on in the process.

After the condemning authority has the appraisal, it should adopt a resolution or ordinance to appropriate the property. The condemner usually directs its staff or consulting right of way agents to try to negotiate a purchase. Since many property owners are averse to the idea of litigation, settlements at or near the appraised values are common. In my experience, about 90% of all

condemnation matters settle at this stage. If the owner is not willing to sell at the final price offered, the condemning authority takes the matter back to its own lawyer to prepare and file a condemnation complaint.

The property owner and any persons with an interest in the property (like a contract purchaser or a tenant with a lease that provides for condemnation compensation) must be named as defendants. The complaint and summons must be served on them unless their lawyer accepts service.

At this stage, the property owners must appear in the court case, and must comply with all of Oregon's litigation and procedural rules. Otherwise, the property owners could have the case dismissed for default, which means the government can take the land without paying any more than the amount already deposited with the court. The complaint will usually be accompanied by a letter explaining when the condemner will take possession and the condemner will deposit its estimate of just compensation in court. The owner may withdraw that money from court without giving up the right to contest the amount actually due.

The property owner has very limited ability to contest "early possession" by the government (that is, before the final judgment is entered). The courts will uphold the condemner's "right to take" the land if it followed the prescribed path and the project is for a public use. Unless the property owner can show that the government acted in bad faith, engaged in fraud or engaged in an abuse of discretion, the court will not second-guess the legislative decision that the land is needed for the public project. This type of defence, to be successful, requires very compelling supporting evidence.

This is how a condemnation case begins. In a future article, I will explain how the case progresses in court and what is and is not compensable in Oregon.

Wrap It Up: ERISA Compliance for Group Health and Welfare Plans

By Christine Moehl

Most employers understand the importance of complying with the Employee Retirement Income Security Act of 1974 (otherwise known as "ERISA") when it comes to their company's retirement plan. However, few employers realize that ERISA applies to their group health and welfare plans as well, regardless of the size of the plan. Moreover, of the employers that do understand that ERISA applies to their health and welfare plans, many mistakenly believe that the documents provided by the insurance companies that provide fully-insured health and welfare benefits, or the TPAs that provide administration for self-insured benefits, satisfy all ERISA requirements. In our experience, this is usually not the case.

The penalties for failing to comply with ERISA requirements are significant. For example, failing to provide a Summary Plan Description ("SPD") to an eligible employee may result in a penalty of $110/per day per failure. Furthermore, if an employer willfully violates the disclosure requirements of ERISA, penalties of up to $500,000 may be imposed, as well as imprisonment of up to 10 years. Due to these steep penalties, as well as the increased frequency of group health and welfare plans audits by the Department of Labor, it is important for employers to bring their health and welfare plan documents into compliance with ERISA.

A simple and cost-efficient way for employers to bring their health and welfare plan documents into compliance with ERISA is to adopt a "wrap plan" (a.k.a, an "umbrella plan"). A wrap plan consolidates all of an employer's group health and welfare benefits into a single plan document that complies with all of ERISA's provisions. These plans are called wrap plans because they essentially act as a "wrapper" that enfolds around all of the insurance policies, certificates of coverage, benefit booklets and other various documents that, in the aggregate, constitute the health and welfare plans sponsored by the employer.

The need for a wrap document is predicated on the

numerous requirements ERISA imposes on group health and welfare plan documents. ERISA mandates that all group health and welfare plans (1) have a formal plan document in writing, (2) name a fiduciary with authority to administer the plan, and (3) delineate specific ERISA claims procedures. The wrap plan includes all of these required provisions and incorporates them into the individual group health and welfare plans sponsored by the employer. In addition, all health and welfare plans must have an SPD with specific content that is distributed to eligible employees. For this reason, the wrap plan will also have a wrap SPD that includes the specific content required by ERISA.

Most employers who have a wrap plan choose to wrap all of their underlying group health and welfare plans into the wrap plan. A typical wrap plan will include an employer's fully-insured group health insurance plan, group dental and vision plans, group term life insurance and disability plans, and the employer's flexible spending account. If any of the group health plans are subject to the IRS Form 5500 filing requirements (i.e., have over 100 participants), then the wrap plan has the added benefit of simplifying the Form 5500 filing so that only one return is due for all of the wrapped plans. This wrap plan structure can efficiently ensure that all of an employer's welfare benefit plans comply with ERISA's documentation requirements.

Luckily for employers, adopting a wrap plan is not a complicated process. The first step is to identify all of the group health and welfare plans that are subject to ERISA. Then, the basic terms of these plans are incorporated into a wrap plan document and a wrap SPD. After the documents are prepared, the wrap plan must be formally adopted by the employer and the wrap SPD must be distributed to all employees who are eligible to participate in any of the employer's group health and welfare plans.

If you would like more information about wrap plans or general guidance regarding ERISA compliance, please contact a member of the firm's Employee Benefit and Executive Compensation group.

Take the Right Steps to Protect Your Brand

By Eric Tweed

Imagine that you just spent a significant amount of time and money coming up with a name and creating a logo for a new product that you just cannot wait to get on the market, only to find out that someone else is already using a similar name or logo for a product similar to yours. Or worse yet, imagine that your product is already in the market place, and you get a cease and desist letter from someone claiming they have superior rights in the name or logo. This happens all too often, and the frequency of trademark disputes continues to increase as the world gets smaller.

The process of creating a cohesive look and feel to your marketing of products is often called branding. Branding helps your customers identify the source of the goods or services and, if the customer associates a positive experience with the brand, helps garner repeat customers. There are many ways that businesses can protect their brands from copycats and those that wish to piggyback off of the success of a particular brand. Federal trademark registration can create important and enforceable legal rights in your brand.

What is a Trademark?

A trademark is defined by federal law as "a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs, that identifies and distinguishes the source of the goods of one party from those of others." In other words, a trademark is how your customers identify that your goods came from your business. Trademarks are an absolute necessity in the branding process; though you can create a trademark without necessarily creating a brand, you cannot create a brand without creating a trademark.

Don't Put the Cart Before the Horse

After you have come up with a name or design that you are happy with, take the time to determine whether the trademark itself and your intended use are protected under trademark laws. This will save you time in the long run, before you spend more time and money

implementing a mark into your marketing plan that may not be protected under federal law. To do this, you should first evaluate the strength of the mark itself. Next, you must determine whether your chosen name or design is already in use by someone else on a different product or service. Finally, you need to determine whether the name or design can be registered with the US Patent and Trademark Office (USPTO).

Trademark law evaluates the strength of marks on what is often referred to as the "distinctive/descriptiveness continuum." More distinctive marks are stronger than more descriptive ones. The categories on the continuum are as follows:

1. Fanciful – Marks that comprise words that are made up, or are not commonly used (e.g., PEPSI for soda, or EXXON for fuel and energy).
2. Arbitrary – Marks that comprise words that are common, but do not suggest or describe a significant ingredient, quality, or characteristic of the goods or services (e.g., APPLE for computers).
3. Suggestive – Marks that require imagination, thought, or perception to reach a conclusion as to the nature of those goods or services (e.g., SPEEDI BAKE for frozen dough).
4. Descriptive – Marks that describe an ingredient, quality, characteristic, function, feature, purpose, or use of the specified goods or services (e.g., BEEF AND BREW for restaurant).
5. Generic – Marks that the public understands as a common or class name for the goods or services (e.g., ELECTRIC CANDLE COMPANY for electric candles)

When developing your brand, the most important goal is to be creative. Fanciful, arbitrary, and suggestive marks are provided greater legal protection and can always be registered so long as someone else has not registered a similar mark for a similar product or service. Descriptive marks can only be registered in limited circumstances, and generic marks can never be registered.

Availability of the Mark

Once you have selected a mark that you like, you should conduct a search to see if anyone has used a similar mark. You can conduct an initial, limited search using any internet search engine. The next step is to search the USPTO database; this search can be performed either by you, your attorney, or a professional search firm. This search process will help you determine whether the mark you have chosen is available for registration or whether the mark may cause confusion with existing marks. A search prior to investing in expanding your brand can save you time and money by ensuring that you have the right to use the mark you developed and will not have to abandon it in the future.

Federal Trademark Registration

After you are comfortable that your mark is available for use on your product, the next step is to consider registering your mark with the USPTO. Registration provides among other benefits, the presumption of ownership of the mark, the right to use the mark throughout the U.S., and the ability to stop others from using similar marks for similar products. This gives you the right to the exclusive use of your mark and to prevent other, similar products from piggybacking on your successful brand.

Do not get stuck using a weak mark or one that cannot be protected through federal registration. Before spending time and money investing in a new brand, consider contacting one of us in the Business & Taxation Law Group to discuss the strength of your brand and the registration process in more detail. We would be happy to help.

FIRM ANNOUNCEMENTS & SEMINARS

Transitioning Leadership at Saalfeld Griggs

Effective January 1, 2016, Doug Alexander will step down as the Managing Partner of the firm and Shannon Martinez will assume that role. Doug was the first Managing Partner in the firm's history and he has served in that role for 25 years. Under Doug's leadership, the firm has grown from six attorneys and eight staff to twenty-six attorneys and thirty staff. Doug will continue his practice and will have more time to devote to client matters. Shannon joined the firm in 2004 and has been a partner since 2011. She has

been working with Doug for the last 12 months preparing for this transition. While Shannon will be devoting more time to firm management matters, she will continue to serve her clients in banking and creditors' rights matters as she has done for the past 11 years. The firm has appreciated Doug's strong leadership over the last 25 years and welcomes Shannon to this role, hoping that she will serve for a similarly long tenure.

We would also like to extend a warm welcome to our newest attorneys:

James Martinez, Of Counsel, has recently joined the Corporate group. James is both a CPA and a lawyer, and brings tax support in particular to the firm.

Daniel Reynolds has joined the Litigation group. Daniel's practice is primarily focused on business litigation and construction law. Prior to joining Saalfeld Griggs, Daniel lived in Portland and attended Lewis & Clark Law School.

Andrew Salgado recently joined our Real Estate & Land Use group. Andrew's practice is centered on leases, sale agreements, options to purchase, easements, title matters, development agreements, and a variety of land use applications. Andrew attended the University of Oregon School of Law. Prior to law school and joining the firm, he lived in Vancouver, British Columbia and worked for the Vancouver Whitecaps FC (Major League Soccer).

Elayna Zammarelli has joined the Litigation group. Elayna's practice focuses on creditors' rights and bankruptcy issues. She represents institutions and individuals in creditors' rights and related legal problem-solving and debt collection activities, as well as loan documentation review and preparation. Prior to joining the firm, Elayna lived in Eugene and attended the University of Oregon School of Law.

Randall Sutton presented at the **Northwest Human Resource Management Association's 77th Annual NHRMA Conference & Tradeshow** on October 6 in Portland. The topic was: Protecting Your Company Against Corporate Raiding by Former Employees.

The **Oregon Bankers Association** published its Fall 2015 publication with an article by **David Briggs** titled **"It's Coming: A Primer on the New Oregon Sick Time Law."** It discusses how employers will be required to provide sick time to employees as of January 1, 2016.

Our **Employment Law Practice Group** held a 2015 Special Holiday "Scrooge" Edition Employment Law Breakfast seminar on December 2nd in office. Topics included: Holiday ADA Issues, Holiday Wage & Hour Issues, and Religious Accommodations.

Paul Sundermier, Of Counsel, will once again co-chair the 9th Annual Oregon Eminent Domain Seminar in Portland, on June 9 & 10, 2016.

Con-Tech, a charitable corporation sponsored by **Saalfeld Griggs PC** that provides opportunities to local high school students, is starting construction on its second home. Last year's home was a success and sold within days of hitting the market. Profits from that sale as well as in-kind, cash and material donations, have allowed **Con-Tech** to acquire another lot and provide construction materials and expertise to students from the Salem-Keizer School District C-Tech program. In building another quality home, those students will acquire critical employment and advanced construction skills.

The firm is proud to support many organizations in the mid-Willamette Valley and their activities.

- The firm's **Health Law Industry Group** was a sponsor of the monthly meeting of the **Marion Polk Medical Society** on November 6th. The dinner honored new Physicians and Physicians Assistants in Marion and Polk Counties.
- The firm's **Dental Industry Group** proudly sponsored the Washington County Dental Society meeting on November 10th in Beaverton, and the Marion & Polk Dental Society meeting on December 4th in Salem.
- The firm sponsored the annual **Boys & Girls Club Civil War Auction & Dinner** on November 19th. For more information on the Salem Boys & Girls Club, please visit: www.bgc-salem.org.

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