

KEEPING IT LEGAL:

Staying Aware of Regulations on Overtime, Immigration, Dismissals

by David Madison, Ph.D.



Peter Hillman of Chadbourne & Parke covered the particularly hot topic of overtime regulations.

The following article is based on a panel presentation at the September 10, 2004 meeting of the HR Network at the Marsh headquarters in Manhattan. The network is co-sponsored by Marsh and the Five O'Clock Club, and is a venue for HR professionals to meet informally and hear discussions of important issues of the day.

The panelists on September 10 were:

- Peter Hillman of Chadbourne & Parke; Peter is both a general litigation partner and co-head of the firm's employment law practice.

- Charles Kaplan of Thelen Reid & Priest, where he is the partner who heads the New York-based attorneys in the firm's Labor and Employment Department.

- Andrew Lerner is of counsel to Pavia & Harcourt, and directs the firm's Immigration Practice Group.

The panel was moderated by Kate Wendleton, president of The Five O'Clock Club.

Chances are, if you're reading these pages, you have been through the drill of interviewing, getting hired, showing up for work and doing your job for a few years—and moving on to repeat

the drill, whether of your own volition or because your employer decided to end the relationship.

While we may not think about it all that much, all phases of this drill are *highly regulated by law*. We get a glimpse of this when we fill out the paperwork for a new job, and at the time we navigate separation and severance. The workplace is one of the on-going preoccupations of our lawmakers. Every year Congress and all fifty state legislatures churn out thousands of new laws—and a significant portion usually have to do with regulating the employer-employee relationship. Understandably, after a few decades of this activity, employment law has become a sprawling and complex structure. "Don't we have enough laws already? Why do we need more?," a skeptical pundit once quipped. But our lawmakers usually respond to pressure from citizens and lobbyists alike, and the creation of employment law is no exception. We have it because we people demand it and we need it.

Workers, managers and HR professionals need to be aware of the on-going output of laws and regulations.

When the HR Network Breakfast invited the panel of attorneys to discuss legal issues impacting the workplace, it was understood that only a few topics could be highlighted and a few suggestions offered. In fact, because their areas of expertise are so broad and complex, Messieurs Hillman, Kaplan and Lerner all brought multi-page handouts to help do justice to their presenta-

tions. The sidebar at the end of this article contains the contact information for all three, and we recommend that you contact them directly for more information on their specialties.

A large number of laws have to do with regulating the employer-employee relationship.

Peter Hillman: "This Just In!"

One of the hottest topics of election year 2004 was the new Federal overtime legislation, and, as it happened, our breakfast seminar occurred the morning after an important action in Washington relating to this. Peter began his presentation with the announcement: "There's breaking news: last night the House of Representatives voted to block the new overtime regulations that



"I think the best way for you to build the highest level of character is to work for me for the next 10 years at minimum wage."

took effect on August 23rd.” For all HR officers who had been working hard to implement the new regulations, suddenly, according to Peter, “everything is in chaos and confusion.” The fate of the overtime legislation rested with the Senate, which would have to concur with the blockage, but ultimately with the White House—and the contenders for the Oval Office differed on the merits of the bill. Obviously the September breakfast took place well before the November election, and this article went to press before the winner was known. But in the face of uncertainty, a few insights and suggestions could be offered—and may still apply for readers of this January issue.

- Employees who learn less than \$455/week (\$23,660 per year) are entitled to overtime no matter what. The action of the House of Representatives on September 9th preserved this guarantee.

Job titles are basically irrelevant. Prepare accurate, up-to-date and complete job descriptions.

- The overtime law that took effect on August 23, and that was blocked by the September 9th vote (which was actually an amendment to a \$423 billion spending bill), was *not wiped off the books*. Senate and eventual White House action will probably simply *modify* the law, to a greater or lesser extent depending on the

election. So proceed as if the new regulations will stay in place in some form. Many employers are behind on implementation, and will be in trouble if they view uncertainly as a pretext for further procrastination. Above all, make sure that everyone below the \$23,660 threshold is getting overtime.

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- “Proceed with implementation” means the review of every job classification and, indeed, of every employee. Job titles are basically irrelevant. Prepare accurate, up-to-date and complete job descriptions; make sure these really reflect what the employee is doing. The “major duties” test will apply.
- *Document, document, document* what you are doing. Saying, “But we didn’t know,” to excuse a lack of action during the period of uncertainty will earn no points with the Department of Labor. On the contrary, good faith is going to count for a lot. If it happens that you wrongly classified an employee and are challenged—either by the employee or the Department of Labor—if you can show that you gave thought and analysis to your decision, you will be in a better position. You want to be able to present documentation that you came to a logical conclu-



Interest by HR professionals in containing benefits’ costs produced an overflowing meeting.

The Job-Search Buddy System

Do you wish you had someone to talk to—fairly often and informally—about the little things?



“Here’s what I’m planning to do today in my search? What are *you* planning to do? Let’s talk tomorrow to make sure we’ve done it.” You and your job-search buddy could keep each other positive and on track, and encourage each other to do what you told the small group you were going to do: Make that call, send out those letters, write that follow-up proposal, focus on the most important things that should be done—rather than (for example) spending endless hours responding to job postings on the Web.

With your buddy, practice your Two-Minute Pitch, get ready for interviews, bounce ideas off each other. Some job-search buddies talk every day. Some talk a few times a week. Most of the conversation is by phone and e-mail.

Sometimes, people match themselves up as buddies. Just pick someone you get along with in your small group. Sometimes, your coach can match you up. However you do it, stay away from negative people who talk about how bad it is out there. They will drag you down.

The small group changes over time: people get jobs; new people come in. If you lose one buddy who got a job, get another buddy.

Your buddy does not have to be in your field or industry. In fact, being in the same field or industry could keep you focused on the industry rather than on the *process*. But you *do* have to get along! The relationship may last only a month or two, or go on for years. Some buddies become friends.

Of course, you should see your Five O’Clock Club career coach *privately* for résumé review, target development, salary negotiation, and job interview follow-up. It’s usually best to get professional coaching advice for these areas. ●



Charles Kaplan, Thelen Reid & Priest, warned attendees to carefully handle employee discipline.

sion—*i.e.*, did not act arbitrarily—you documented decisions and communicated them in a responsible fashion. Being able to show documentation that you *tried to get it right* represents good faith, and will count for a lot.

- Display the Fair Labor Standard Act Poster in several places in your workplace.
- Pay close attention as well to your state laws, which can differ from—and go beyond—what Federal laws require.
- Managers and HR officers have a concern quite apart from applying and complying with government regulations. The Department of Labor is not concerned with workplace culture and morale, but the management team responsible for helping a company achieve its goals and mission *is*. There is

no good way to tell people that they're no longer eligible for overtime. And some employees who *would* be eligible for overtime under the new regulations may see this as a demotion, as well as a threat to their advancement, status and career goals. So managers should keep communi-

cations open as updates on the new regulations come in—the fewer surprises the better. Managers can spread the word through memos and emails, but it is advisable to meet with employees in person to explain the impact of on-going events in Washington.

Needless to say, how people are paid is a highly sensitive, bottom-line issue that will generate strong feelings. Be prepared to listen well and deal compassionately with employees.

Document, document, document. Being able to show documentation that you tried to get it right represents good faith.

Charles Kaplan: Navigating Employee Discipline and Discharge—and other Hazards

Some of the basic guidelines for handling employees who have committed serious infractions may appear to be common sense, but experience has shown that employers sometimes can be guilty of lapses when grappling with disciplinary matters—and the consequences can be dire. It is well to remember the following when dealing with employees who must be cited for misbehavior or asked to leave:

- **Say what you mean, and say it carefully.** Statements may come back to haunt you. This is especially true with the use of

email to describe situations, make your points and communicate decisions. As we all know—but people tend to forget!—email creates a permanent record of exchanges, and you can be sure that *somebody will be saving everything*. In other words, dashing off an email is bad practice. Review your words carefully, and ask your colleagues to review them as well.

- **Loose lips sink ships.** Discretion and confidentiality are critically important. Sensitive matters should not be talked about—even whispered about—in the elevator or cafeteria.
- **Fair warning wins lawsuits.** You never want “I didn't know” or “Nobody told me” to be considered a factor. And document the warnings; be able to show that you have engaged in progressive discipline and have given an employee ample notice that something is wrong.

Dashing off an email is bad practice. Review your words carefully, and ask your colleagues to review them.

- **Discipline the worst first.** When egregious violators get away with murder, it will be harder to carry through disciplinary policy, and the perceived lack of justice will damage morale.
- **Look before you lop.** Appearances do matter, and if disciplinary actions appear to be falling disproportionately on, *e.g.*, women, minorities or older employees,

you may be sailing into troubled waters. A little strategic thinking and diplomacy can be indispensable ingredients in deciding when and how to take action.

- **Fair treatment wins cases.** Similarly, quite apart from issues of race, gender or age discrimination, nothing can be more crippling than simply the violation of fair play. People are just normally offended when baseball games, quiz shows or tax legislation



Another overflowing HR Network meeting hosted by The Five O'Clock Club and Marsh.



Andrew Lerner, Immigration Counsel for Pavia & Harcourt, covers some of the intricacies of immigration law.

are fixed against those who are playing by the rules. If you treat people fairly it's much harder for a former employee to convince a judge or jury that you did something wrong.

- **Never speak ill of the recently departed.** One of the most important components of confidentiality is discretion. Someone might be out of sight, but loose lips are not appropriate even then. Don't brag or tell tales out of school, 'We fired Albert for stealing.' This can result in suits for retaliation, libel or slander.
- **Buy out the bad risks.** But if you're in a tough situation, and you know the odds are against you—because you *haven't* followed all the rules above—obtain a separation agreement that includes a binding general release or settle a charge before it reaches court. There may very well be situations where it is wise to consider alternatives to juries, such as arbitration and jury trial waivers.

Charles pointed to a few other areas calling for employers to be alert and cautious:

- **Obligations for COBRA information.** As of November 26, 2004 new COBRA regulations are in effect—*i.e.*, by the time you read this article. These have to do especially with giving notice about continuing coverage, and, obviously, if a former employee suffers a catastrophic illness, the impact of non-compliance can be substantial. "It is very, very important," Charles noted, "to speak with labor counsel and employee benefits counsel to make sure

that changes are made correctly and in a timely manner. There can be a lot of liability flowing from errors in COBRA."

- **Obligations when you have investigated an employee.** The Fair Credit Reporting Act was amended in 2003, resulting in disclosure requirements for employers, as Charles pointed out: "When an employer uses an outside investigator for sexual harassment or other investigations of employee conduct—and that report leads to an adverse action against the employee—now, under federal law, the employer must provide a summary of that report to the employee. Be sure to check this law—to avoid draconian penalties for failing to comply."
- **Whistle blowers have broad protections.** While Sarbanes-Oxley was catching most of the headlines, it is easy to overlook the fact that there is a whole range of federal statutes protecting whistle blowers from retaliation—and companies should be concerned about whistle-blower liability under state laws as well. "Employees who are harassed or punished for this," Charles said, "now have a lot of places to look for help."

If a former employee suffers a catastrophic illness, non-compliance with COBRA can have a substantial impact.

Andrew Lerner: When Hiring Foreign Nationals

Although, as noted at the outset, there are many laws surrounding hiring and firing, there are gaps. "The world of immigration," Andrew explained, "is extremely uncertain and very unregulated. There are no regulations covering much of what I have to advise my clients on every day. That's the world we live in." But there are practices and regulations that employers are very familiar with—and still manage to fall into error and bring headaches upon themselves through oversight and sloppy execution. He offered several suggestions or observations for keeping on the right side of immigration law.

- **Don't rush the process when offering a job to the non-citizen.** This is not a

matter of *not hiring*, but of doing it carefully and checking with your immigration lawyer *before* saying, "You're hired." Chances are, there may be immigration-related ramifications. You don't want to be told by your attorney after the fact, "You've got a lot of problems here."

- **Be sure to follow the I-9 Employment Verification procedures.** You must be sure to complete the I-9 form properly, based on the prospective employee's presentation of identity and employment authorization documentation, such as a green card or a visa stamped "employment authorized."
- **If your company is small, prepare your case well.** For example, if you petition to hire at the managerial or executive level, the immigration department will scrutinize your request more carefully than if reviewing the petition of a large or mid-sized company. Make sure your case is well supported.
- **A business visit is a business visit,** and can usually be defended if the visit is going to be one or two weeks in duration. If the visit turns out to be for two or three months, it may catch the attention of immigration authorities. Be careful about what visitors are doing: they're allowed to observe and attend meetings, but if they are regularly showing up at the office from 9 to 5 each day and remain week after week, that looks a lot like work—which is not allowed for business visitors.
- **Corporate restructuring and immigration status.** If the restructuring involves substantial changes in corporate ownership, it is imperative to review those changes to determine what impact, if any, such changes may have on foreign nationals maintaining L-1 or E visa status (pertaining to intra-company transferees and treaty investor or treaty trader employees). Changes in visa status may be required.
- **Keep in mind that some visas require professional status.** A petition for an H-1B visa means that the foreign national employee must be providing services at the professional level—which means that the person must have a bachelor's degree or the equivalent, and that the position must, in fact, require such knowledge in order for the duties of the position to be performed. It is also important that employ-

ers consider degree requirements when preparing internal position descriptions.

Don't rush the process when offering a job to a non-citizen. Check with your immigration lawyer before saying, "You're hired."

- **More flexibility in retaining these professional level employees.** Under prior law, there had been a six-year cap in employing H-1B workers, but recent changes in the law enable companies to keep such employees longer. If a company is sponsoring a professional foreign national for a green card, one-year extensions may be available while the green card is in process, although this will add to the cost of keeping such an employee on payroll.
- **Beware of complications when it's "all in the family."** If the foreign national on your staff is on an E-1 or E-2 visa and has brought family members to the U.S., care must be taken to ensure that the family members do not remain longer than the period of stay granted upon entry. As a general rule such employees (and their family members) are granted one-year or two-year periods of stay upon each entry to the U.S. This is fine for E-1 or E-2 employees (who will probably travel frequently in connection with their employment) as they will continually be given one or two-year periods of stay *each time* they return to the U.S. Family members, however, will probably not travel as often, or at all. For this reason care must be taken to monitor the situation of family members to make sure they remain in status.

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- **For those in the green card process, more employer options.** Recent changes in the law may provide companies who sponsor employees for green cards with more flexibility—both in terms of the location of employment and the duties to be performed in connection with the permanent job opportunity.

- **Post-9/11 security concerns will mean delays and frustrations.** The threat of terrorism has changed the way we do business, especially in the realm of immigration screening. More agencies are sharing information, and there are more laws and security-oriented clearance procedures being implemented. This being the case, everyone wanting to enter the U.S. is under more scrutiny, and because of the expanded databases being utilized by inspectors at airports and ports of entry to the U.S. (containing more and more information concerning previous immigration-related violations, terrorist suspicions, etc.) there is more potential for misinformation and misidentification, causing undue delays for visitors. Don't expect things to go as smoothly as they did in the past.

Obviously, compliance with immigration law is vital for all employers—it has never been as important as it is now. And what should you do when immigration-related issues and problems arise?

- Speak to immigration counsel to make sure all options are reviewed and explored.
- Review with counsel all the facts impacting a prospective or current employee's options, taking into account the company's and employee's short-term and long-term objectives.
- Review the big picture in order to accurately compare the benefits and disadvantages of options available. ●

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"Selecting Five O'Clock outplacement was one of my best decisions this year."
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