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Inside

FLSA COVERED - AND NOT EXEMPTED - EMPLOYERS NEED TO PAY ONLY TIME AND A HALF FOR OVERTIME IN EXCESS OF EIGHT HOURS A DAY AND/OR FORTY HOURS PER WEEK

In a decision that we are confident will generate a lot of discussion, the P.R. Supreme Court just ruled that P.R. Act. No. 379 (the overtime statute) imposes on employers covered by the Fair Labor Standards Act (FLSA) the obligation to pay ONLY time and a half for all overtime in excess of eight hours a day or forty hours a week. Moreover, if the FLSA exempts the employer from paying overtime in excess of forty hours, it needs not pay overtime for those hours under the local statute.

In Puerto Rico, the Constitution guarantees pay at time and one half the regular rate for work performed in excess of eight (8) hours. Pursuant to Act No. 379 of 1948, as amended, however, overtime was defined as work performed in excess of eight (8) hours a day, or in excess of forty (40) hours during a week. This overtime is paid at double the regular rate. In a *"Provided"* provision the Act states - in its pertinent part - that "every employer in any industry in Puerto Rico covered by the provisions of the Fair Labor Standard Act approved by the Congress of the United States of America on June 25, 1938, as heretofore or hereafter amended, shall be under the obligation to pay only for each extra hour of work in excess of the legal eight (8) hour work day a wage at a rate not less than time and a half the rate agreed upon regular hours. . .. "

Discussing this latter provision, the Supreme Court ruled that it was intended to temper the local statute to the federal law. Thus, besides the express mandate of paying overtime at time and a half for work performed in excess of eight hours, the Court ruled that this provision does not extend the obligation of federally covered employers beyond the federal statute.

Accordingly, the Supreme Court established the following norms for paying overtime:

1. Employers and employees not covered by the FLSA: should pay all overtime - that is in excess of eight hours a day and forty hours a week - at double the rate paid for regular hours;

2. Employers and employees covered but not exempted by the FLSA: pay time and a half for all overtime, including the excess of eight hours a day and/or forty hours a week.

3. Employers and employees covered but exempted by the FLSA: need to pay only time and a half for overtime in excess of eight hours a day.

In very general terms, an employer is covered by the FLSA if it engages in com-

merce or in the production of goods for commerce or has employees handling, selling or otherwise working in goods or materials that have been moved in or produced for commerce, *and* has an annual gross volume of sales made or business done of not less than $500,000.00. The federal statute exempts several occupations or classifications.

The Court made clear, however, that these obligations may be altered by legislation to that effect and/or by agreement with the employees such as collective bargaining agreements.

A NEW LOCAL MINIMUM WAGE STATUTE HAS BEEN ENACTED

In 1956, Puerto Rico enacted a local Minimum Wage Act, which has been subsequently amended throughout the years. The Act created a Minimum Wage Board, which in addition to dealing with wages, established certain terms and conditions of employment - such as vacation and sick leave, minimum compensation guarantees, maximum hours of work, and so forth - that an employer must observe in recruiting and hiring employees. This has been done through orders of the Board, known as Mandatory Decrees.

In July, 1998 a new Minimum Wage Act was enacted. This new statute incorporates much of the amendments made to the labor laws in previous years. Among the most significant provisions of the new law, are the following:

- Minimum Wage: the Federal minimum wage will automatically apply to employers covered by the Fair Labor Standards Act. For those not covered by the FLSA, the minimum wage is established at seventy percent (70%) of the Federal Minimum Wage. The Labor Secretary, however, is authorized to set a lower percentage if it is established that the stipulated amount would substantially affect employment in these industries.

- Computation: Federal law and its regulation will govern the determination of how the minimum wage is paid, working time, exempt employees or occupations.

- Minimum Wage Board: is abolished and the corresponding responsibilities transferred to the Department of Labor.

- Vacation & Sick Leave: as was the case with the 1995 amendments to the previous Minimum Wage Act, the new statute establishes vacation and sick leave accrual of one and one quarter (1 1/4) days and one (1) day, respectively, per month during which the employee worked not less than one hundred and fifteen (115) hours.

- Statute of Limitations: the employee now has two (2) years from his/her termination to bring suit under the Act. Whether the employee brings suit after his/her termination or while employed, the employee can claim back-wages only for a period of three (3) years. This is a significant departure from the previous legislation which provided for a three (3) year statute of limitations and the right to claim up to ten (10) years of back wages. The new statute of limitations would not come into effect until a year after the effective date of the Act.

Those employees who, as of August 1, 1995, were covered by a Mandatory Decree providing for higher rates of accrual in terms of vacation and sick leave, or which required less hours of work for such accrual, would continue to be entitled to those higher benefits. This provision only applies while the employee continues employed for the same employer. Those industries with lower wages and/or benefits, however, will continue paying the same. In this regard, the new Act only provides that its goal is to bring these benefits to the statutory level in the least possible time taking into consideration the economic capabilities of the industry in question.

The new Act repeals all Mandatory Decrees in contradiction to its provisions, or which refers to matters not strictly related to minimum wage, vacation and sick leave. Provisions in previous legislation concerning Industries required to pay holidays, minimum guaranteed daily compensation and/or extraordinary compensation for daily overtime, were given statutory protection; and thus, continue in full force.

The shortening of the statute of limitations and the period for which the employee may recover back wages will certainly enure to the benefit of the employers.

In the next issues of ***PR Labor News*** we will discuss particular questions and issues that may arise under the new Act.

A NEW AFFIRMATIVE DEFENSE FOR THE EMPLOYER IN CASES OF SUPERVISORS' SEXUAL HARASSMENT

The U.S. Supreme Court recently decided the question of an employer's liability toward its employees for the purported acts of harassment of its supervisors. The decision, however, is greatly limited to the facts of the case and the question presented.

The issue resolved by the Court involved a situation where the employee neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of refusing to submit to the advances. Also, the Court went out of its way to note that the alleged harasser was a mid-level supervisor, so that it could not be reasonably inferred that his actions are those of the employer.

Analyzing the question under agency principles, the Court ruled that an employer vicariously respond to a victimized employee for an actionable hostile environment created by a supervisor with immediate or higher authority over him/her. When no tangible employment action is taken against the employee, however, the employer may raise a defense of liability and damages. This defense comprises two necessary elements; namely (a) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

The Court found that having the employer's liability in these cases depends in part on its effort to create antiharassment policies, will effectuate the purpose of the law of eradicating this type of conduct. Moreover, the decision makes clear, that an employer would be liable if it knew or should have known about the conduct in question and failed to stop it, or when a supervisor takes a tangible employment action against a subordinate.

Although the decision was resolved under federal law, it brings to light the essential need for a clearly stated written policy against sexual harassment with clear and precise procedures to follow. This is specially important in Puerto Rico because here, local law does not provide for trial by jury. Thus, plaintiffs prefer the federal forum. In appropriate cases, however, the employer will have available this defense.

AN EMPLOYEE DID NOT TOLL THE STATUTE OF LIMITATION TO FILE A SEXUAL HARASSMENT CASE IN COURT BY FILING A GRIEVANCE UNDER THE EMPLOYER'S INTERNAL PROCEDURE

The Puerto Rico Supreme Court recently ruled that an employee did not toll the statute of limitations for suing the employer by filing a grievance under its internal grievance procedure requesting only that alleged the acts of harassment stop.

The statute of limitation refers to the period of time a claimant has to file suit in Court. Tolling refers to an affirmative action of the claimant - and in some cases by the debtor - that has the effect of interrupting or freezing the period to file a claim. Generally in Puerto Rico, once a statute of limitations is tolled, it starts to run anew.

In Puerto Rico, a purported victim of sexual harassment has one year to file suit in Court. Contrary to its federal counterpart, a plaintiff need not file a claim in the administrative agency before going to Court. Our Supreme Court, however, has ruled that if the plaintiff does file before the local administrative agency, the statute of limitation is tolled and starts running again once the agency ends its participation in the matter.

Under this legal scheme, the Court resolved the issue of whether the filing of a grievance under the employer's internal procedures - simply requesting that the purported harassment stop - has the same effect of tolling (freezing) the statute of limitations. The Court reasoned that the procedures in question - the administrative agency's and the employer's internal forum - have different purposes. In the administrative agency's forum, the claimant requests that the employer respond for the damages caused in violation of the law. The purpose of the internal procedure in question was to correct the alleged harassment and take appropriate disciplinary action. Thus, the Court concluded that the latter event is not legally sufficient to excuse the employee to file suit in Court within the prescribed year.

The reader should note, however, that this ruling is greatly limited by its facts. There, the employee only requested in its grievance that the alleged harassment stop. Also, the action would have been time-barred in any case because it was filed in Court more than a year after the last event under the employer's internal procedure.

The Court indicated that if there were identity of purposes between the employer's internal procedure and the judicial action, and the former procedure was suitable to address the statutory claims, among other circumstances, the grievance by the employee may toll the filing period.

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