RIDDELL WILLIAMS P.S.

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EMPLOYERS SHOULD REMAIN VIGILANT ABOUT WAGE/HOUR PRACTICES

As 2006 begins, we want to share with you several wage/hour developments, including two recent court decisions, which illustrate how well-meaning employers can run afoul of state and federal wage/hour laws. Because violations of the federal Fair Labor Standards Act ("FLSA") and the Washington Minimum Wage Act ("WMWA") can make an employer liable for double damages plus employee attorney fees, employers should be especially mindful of their compliance obligations. With this in mind, now may be an excellent time to conduct an audit of your wage/hour practices. Please let us know if we can assist with such an audit.

Washington Minimum Wage Increases To $7.63 Per Hour

Washington's minimum hourly wage for most workers increased as of January 1, 2006 to $7.63 per hour. This annual increase was mandated by Initiative 688, which was approved by Washington voters in 1998, and which requires that the minimum wage rate be adjusted annually to account for increases in the Consumer Price Index. Washington's minimum wage is now the highest state-mandated hourly wage rate in the United States.

Employees Must Be Paid For Employer-Mandated Medical Treatment

More than sixty years ago, the United States Supreme Court ruled that "all hours that the employee is required to give his employer are hours worked, even if they are spent in idleness." Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944). A recent decision by a federal court of appeals in Chicago is a reminder that this principle is still the law of the land.

In Sehie v. City of Aurora, --- F.3d ---, 2005 WL 3534472 (7th Cir. 2005), the court considered the appeal of a city 911 dispatcher who angrily stormed out of her workplace rather than comply with her employer's instructions to work a mandatory overtime shift. After leaving work, the employee claimed that her absence was due to work-related stress. In response (and also because the employee had been involved in several "frictional incidents" with other employees), the employer informed the employee that she must attend a series of psychotherapy sessions outside of her normal work hours. The employee attended 16 such sessions, spending an hour at each session. She also spent almost two hours traveling back and forth by car to each session. The employee sued the employer and demanded that she be paid for all of the time that she was required to travel to and from and participate in these therapy sessions.

The court unanimously ruled in favor of the employee. In so doing, it rejected the employer's arguments that the therapy sessions were for her own benefit. Because the employer mandated the therapy sessions and required her to be counseled by a specific therapist, and also because internal records confirmed that the employer intended these sessions to improve her at-work relationships, the court easily found that this time was compensable.

The message is clear: If an employer establishes a medical treatment or counseling regimen as a condition of continued employment, the employee's participation in that program is likely to be compensable. Employers should be cautious about establishing "conditions of continued employment" that require outside activities.

White-Collar Executive Exemption Requirements Strictly Enforced

In another decision by a federal court in Chicago, employers are reminded that, in order to avoid overtime payment obligations under the federal Fair Labor Standards Act ("FLSA"), they have the burden of proving that the white-collar "executive employee" satisfies each and every component of that exemption. Here are the details:

In Perez v. RadioShack Corp., 2005 WL 2897378 (N.D. Ill. 2005), a group of store managers claimed they should be entitled to overtime pay because they do not qualify as exempt executive employees under the FLSA. The court previously had ruled that these store managers do have "management of the enterprise" as their primary duty. However, in this particular ruling (in November 2005), the court dealt RadioShack a serious setback for its failure to make sure these managers also satisfied two aspects of the exemption's *supervision* requirement.

The *supervision* requirement is as follows: Even if an individual satisfies the "management of the enterprise" requirement, he or she does not qualify for the executive exemption unless he or she "customarily and regularly directs the work of two or more other employees."

RadioShack's first setback was the court's determination that its managers failed to satisfy the *full-time employee* component of this requirement. The FLSA regulations state that this supervision requirement refers to two or more *full-time employees*, or four or more part-time employees or their equivalent. Perez and his colleagues presented evidence that many front-line employees actually work less than 40 hours per week and, as a result, managers with only two employees often fail to *direct the work of two or more employees*. RadioShack argued that under its own internal classification system, a *full-time employee* is one that is scheduled to work at least 37.5 hours per week. Here's how the court responded:

> The court is unwilling to adopt Defendant's implicit suggestion that an employer can manipulate its employees' entitlement to FLSA protection through the simple expedient of adjusting its own definition of 'full-time' employee. Nor is the court persuaded by Defendant's contention that it is fair to consider non-working scheduled hours such as lunch breaks in the calculation of hours supervised.

In reaching this conclusion, the court cited similar decisions by other federal courts. The message, therefore, is clear: A supervisory employee does not qualify for the FLSA's executive exemption unless he or she regularly supervises at least 80 hours of subordinate work hours (and this means *actual* work hours not *scheduled* work hours) each week.

RadioShack's second setback was the court's ruling on the *customarily and regularly* component of the supervision requirement. RadioShack argued (reasonably, we believe) that the executive exemption should not be defeated merely because there was a small number of occasions on which the individual did not supervise a combined total of 80 hours of other-employee work each week. In so doing, RadioShack claimed that *customarily and regularly* does not mean *always*. The court responded by setting a fairly high bar:

> In light of the case law, the court believes that an 80 percent standard is appropriate. This standard comports with the regulatory direction that "customarily and regularly"

> signifies a frequency greater than occasional and less than constant . . . . An 80 percent standard should not render a management employee's exempt status vulnerable to employee turnover, or other employment variables. At the same time, the court must balance this need for employer flexibility against the Supreme Court's mandate that the FLSA exemptions are to be narrowly construed against employers and are to be withheld except as to persons plainly and unmistakably within their terms and spirit.

Here again, the message for employers is clear: Do not overreach when claiming that your supervisory employees qualify as exempt executives. Before asserting (or continuing to assert) the exemption, be certain that, at least 80% of the time, these individuals are supervising at least two full-time employees (two employees, each of whom actually works no less than 40 hours per week) or their equivalent.

Because this decision was rendered by a federal court in Chicago, it is not binding on courts here in Washington or the western United States. Nonetheless, state and federal courts here in Washington generally tend to be more generous to employees than does the Chicago-based court, so we would expect a similar result if the matter were to be litigated here in Washington.

Please call on any one of us for additional guidance regarding these issues, or if you would like assistance in conducting an audit of your employer's wage/hour practices.

Rebecca L. Andrews
206.389.1635
randrews@riddellwilliams.com

Stephen E. DeForest
206.389.1779
sdeforest@riddellwilliams.com

Rachel Goldberg
206.389.1579
rgoldberg@riddellwilliams.com

Robert M. Howie
206.389.1561
rhowie@riddellwilliams.com

Karen F. Jones
206.389.1638
kjones@riddellwilliams.com

Laurence A. Shapero
206.389.1661
lshapero@riddellwilliams.com

Skylar A. Sherwood
206.389.1584
ssherwood@riddellwilliams.com