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BEAN KINNEY & KORMAN PC
ATTORNEYS

Business Law Newsletter

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"Getting It Done"

DEPARTMENT OF LABOR REVISES OVERTIME REGULATIONS AFTER 50 YEARS
By Philip M. Keating

All employers, regardless of size, are subject to the requirements of the federal Fair Labor Standards Act ("FLSA"). The FLSA establishes requirements for the payment of the minimum wage and overtime. The minimum wage is straight forward, although care must be taken by employers to track hours worked and compensation received. With respect to overtime, the FLSA establishes that every employee is entitled to overtime pay unless they fit into one of the several exemptions set forth by the Department of Labor.

The most widely known and applicable exemptions to overtime requirements are the executive, administrative, and professional exemptions. The regulations defining the requirements for these exemptions have been in place for almost 50 years and the salary tests for the exemptions were last updated in 1975. For example, the salary test for overtime exemptions under the old regulations was $250 per week.

The new regulations require that an employee earn a salary of at least $455 per week, or $23,600 per year, in order to be eligible for any of the overtime exemptions. Thus, employees earning less than these amounts must be paid overtime even if they satisfy the other requirements for one of the exemptions. The $455 per week or $23,600 per year only includes the fixed salary paid to an employee and does not include other forms of compensation such as commissions or bonuses.

Further up the compensation scale, the new regulations provide that an employee who earns over $100,000 per year and provides any of the duties of an exempt executive, administrative or professional employee is exempt from overtime. It is important to emphasize that at this compensation level, the entire exempt classification test does not have to be satisfied. Furthermore, the $100,000 compensation level may include forms of compensation such as commissions and bonuses. Finally, if the employee falls short of the $100,000 level, the employer may preserve the overtime exemption by making an additional payment to the employee within one month of the 12 month measuring period.

The tests for the exemptions have been modified by the new regulations. With respect to all of the exemptions, the new regulations define the "primary duty" as the principal or most important task an employee performs, not necessarily the duty on which the employee spends 50% of their time. For the executive exemption, the new standard requires that the employee's primary duty be management of the enterprise in which the employee is employed or a customarily recognized department or division of the business. In addition, the employee must direct at least two other employees and have hiring/firing authority.

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NON-SOLICITATION AGREEMENTS
By James V. Irving

Like non-competition agreements, business non-solicitation agreements are strictly construed by Virginia courts as restraints of trade. An agreement restricting a former employee from soliciting his former employer's personnel will not be enforced unless it is narrowly drafted and no broader than necessary to serve the former employer's legitimate business purpose. On December 23, 2003, the Roanoke County Circuit Court analyzed a non-solicitation agreement in the case of International Paper Company d/b/a XPEDX v. Brooks. The case is instructive because the Court found the Agreement defective in three separate particulars.

John Brooks worked as a sales representative for XPEDX until January of 2003. During his employment, he signed a Non-Solicitation Agreement that provided in pertinent part the following: "Employee agrees…that he will agree not to solicit other employees of the Employer to join Employee (new employer) in a newly formed business, in direct competition with the Employer." Upon leaving XPEDX, Brooks went to work for an established competitor called Unisource and allegedly began soliciting XPEDX's sales force to come to work for Unisource. On June 26, 2003 IPC filed a Bill of Complaint against Brooks alleging, among other things, breach of the Non-Solicitation Agreement.

Virginia Supreme Court precedent requires strict scrutiny of non-solicitation agreements and the rules of construction hold that any ambiguity will be construed in favor of the employee.

The Court pointed out that the employer bears the burden of showing that the proposed restraint is reasonable in duration, geography, and scope. Noting that the restriction was unlimited in duration and geography, the court ruled that it was not narrowly tailored to accomplish its purpose and that the employer's legitimate need did not justify restricting the solicitation of XPEDX employees in perpetuity and worldwide.

The Court also noted that the language of the Agreement made it unenforceable on its face. Read literally, the Agreement provides that the employee "agrees that he will agree.…" Although the Court suggested that if this were not a contract subject to strict construction, it might be inclined to read the clause in light of the surrounding circumstances, it would not do so in the case of a restraint on trade. Since there was no mutual agreement on the non-solicitation terms, but only a promise to negotiate such terms in the future, the Agreement was too vague to be enforced.

Finally, the Court found that the employer's claim failed because Brooks had not violated the terms of the Agreement. The plain language of the clause prohibited Brooks from soliciting employees to the benefit of a "newly formed business in direct competition with the employer." Brooks did not leave XPEDX to accept employment with a newly formed business, but instead went to work for an established competitor. Thus, he had not violated the Agreement.

Limitations on post employment business relationships are always difficult to enforce and are therefore demanding for the drafter. The Brooks case underlines the need to focus on the specific business risk that must be addressed in a non-competition agreement, and to limit the restriction to that particular need.

The following list is presented in response to many inquires about our firm's areas of practice and the particular focus of each of our attorneys.

BEAN, KINNEY & KORMAN, P.C.
Attorney Roster as of September 2004

SHAREHOLDERS:	**PRIMARY PRACTICE AREAS:**
BRUST, Jennifer A.	Bankruptcy; Civil Litigation; Adoption
CANFIELD, David C.	Commercial Real Estate; Business Transactions; Lending
CORISH, Joseph P.	Lending; Commercial Real Estate; Bankruptcy
DAVIS, J. Bruce	Transactional; Civil Litigation; Title Insurance Defense
DELANEY, Raighne C.	Civil Litigation, Personal Injury; Construction Law
FISHER, Leo S.	Civil Litigation; Employment Law; Business Entities; Trademark
IRVING, James V.	Business; Business Litigation; Appellate Litigation
JAEGER, Philip W.	Mergers & Acquisitions; Corporate Law
KEATING, Philip M.	Employment Law; Immigration; Labor Law
KINNEY, Jonathan C.	Real Estate; Land Use; Zoning; Business Entities; Estate Planning; Wills & Trusts
KORMAN, James W.	Domestic Relations; Personal Injury
MALIK, Sabiha	Commercial Real Estate; Business Transactions; Lending
REPCZYNSKI, Thomas W.	Bankruptcy; Civil Litigation; Landlord/Tenant
SCHRIER-POLAK, Carol	Domestic Relations; Mediation
SCHROLL, James R.	Bankruptcy; Civil Litigation; Lending
TAYLOR, Frederick R.	Real Estate (residential & commercial); Business
THOMAS, Charles B.	Commercial Transactions, Business Law
WEITZMAN, Mitchell B.	Civil Litigation; Landlord/Tenant; Bankruptcy
OF COUNSEL:	**PRIMARY PRACTICE AREAS:**
YEAGER, Martin J.	Civil Litigation; Construction Law; Landlord/Tenant, Bankruptcy
ASSOCIATES:	**PRIMARY PRACTICE AREAS:**
BOWDEN, Alan C.	Commercial Litigation; Commercial Transactions and Business Law
GLASER, Christopher A.	Commercial and Real Property Litigation
KLIEWER, Lori K.	Real Estate, Land Use, Zoning; Estates
MEYER, Tracy A.	Domestic Relations, Civil Litigation
O'MALLEY, Mary Grace A.	Domestic Relations, Civil Litigation
SPOONER, Scott J.	Civil Litigation, Intellectual Property Litigation and Licensing

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DEPARTMENT OF LABOR REVISES OVERTIME REGULATIONS AFTER 50 YEARS

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The administrative exemption requires an employee to perform work directly related to assisting with the management of the business. The employee must exercise discretion and independent judgment. Duties and responsibilities that are considered administrative in nature include tax, finance, accounting, budget, auditing, marketing, safety and health, human resources, public relations, government relations, internet and database administration, legal and regulatory compliance, and similar activities.

The professional exemption fundamentally requires that the work being done involves the use of advanced knowledge in a field of science or learning that customarily is obtained through a prolonged course of specialized intellectual instruction. The new regulations provide an expanded list of positions that may satisfy this test, including registered or certified medical technologists, nurses, dental hygienists, physician assistants, accountants, chefs, athletic trainers, funeral directors, and some paralegals.

Given these new regulations, it is important that employers take time to assess their compliance with the Fair Labor Standards Act. The FLSA is a very attractive area for lawsuits against employers. In addition to the substantive provisions of the FLSA, employers must assess the record keeping systems and practices they utilize as it is the employers duty to have the records.

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