Workplace Law
Monthly Newsletter
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I. U.S. Supreme Court Upholds Long-Standing Tax Treatment of Severance Plan

The U.S. Supreme Court has held unanimously that severance paid to involuntarily terminated employees is taxable wages subject to FICA (Social Security and Medicare) taxes, sustaining the long-standing position of the Internal Revenue Service, the U.S. Tax Court and several Federal Courts of Appeals. U.S. v. Quality Stores, Inc., et al., No. 12-1408 (Mar. 25, 2014). In so ruling, the Court rejected the holding of the Court of Appeals for the Sixth Circuit that FICA taxes did not apply to severance payments in connection with a reduction in force or a discontinuance of a plant or operation. The Supreme Court – unsurprisingly, based on its prior rulings – confirmed that the FICA tax definition of wages includes severance payments regardless of the reason for an employee's separation from employment.

The Court observed it had previously held the general definition of "wages" for purposes of FICA taxes and federal income tax withholding is intended to be identical (except as modified by the specific exclusions in the statutes). Rowan Cos. v. U.S., 452 U.S. 247 (1981). It noted that severance payments clearly are "wages" subject to federal income tax withholding and nothing in the FICA tax provisions of the Internal Revenue Code created a different definition for FICA tax purposes.

The IRS has ruled severance payments that are linked to state unemployment benefits would be treated as exempt from FICA taxes if all of the following conditions are met:

1. Benefits are paid only to unemployed former employees who were laid off by the employer;

2. Eligibility for benefits depends on meeting prescribed conditions after terminating employment;

3. The amount of weekly benefits payable is based on state unemployment benefits, other compensation allowable under state laws, and the amount of straight-time weekly pay;

4. The duration of benefits is affected by the fund level and the employee's seniority;

5. The right to benefits does not accrue until a prescribed period after termination of employment;

6. The benefits are not attributable to the rendering of particular services; and

7. No employee has any right, title, or interest in the fund until he or she is qualified and eligible to receive benefits.

IRS further held that this exception does not apply to a benefit paid in a lump sum, which cannot be excluded from FICA tax wages. IRS Revenue Ruling 90-72. However, employers generally have found that meeting the conditions for this exception is neither practical nor desirable.

The Sixth Circuit held that its ruling did not apply to settlement of employment claims, specifically citing its prior decision in Gerbec v. United States, 164 F.3d 1015 (6th Cir. 1999), which held that an award of lost back pay and future wages was subject to FICA taxes.

II. Employer Can Fire Worker Who Refused FMLA Leave and Violated No-Show Policy, Federal Court Rules

An employer did not violate the federal Family and Medical Leave Act for terminating an employee for violating its no-show, no-call policy, where the employee elected not to take protected FMLA leave, even though the reason for the employee's need for time off would have been covered under the statute, the U.S. Court of Appeals for the Ninth Circuit, in San Francisco, has ruled. Escriba v. Foster Poultry Farms, Inc., Nos. 11-17608 & 12-15320 (9th Cir. Feb. 25, 2014). Affirming a judgment in favor of the employer on the employee's claim for interference with her FMLA rights and rights under California law, the Court also ruled the district court did not err in admitting evidence about the plaintiff's prior FMLA leave.

Background

Maria Escriba worked for Foster Poultry Farms, Inc., for 18 years until her termination for failing to comply with the company's three-day "no-show, no-call rule" after the end of an approved period of leave.

On November 19, 2007, Escriba asked her supervisor, Linda Mendoza, for time off to visit her sick father in Guatemala. Escriba specifically requested vacation time, not leave under the FMLA. On November 21st, Mendoza met with Escriba again to review her plans for leave. Another Foster Farms supervisor, Alfonso Flores, also attended to serve as Spanish interpreter to ensure Escriba understood the parameters of the leave. Flores asked Escriba twice whether she needed additional, unpaid time to care for her father in Guatemala. Escriba responded, "No," to each inquiry.

Thereafter, Mendoza completed the paperwork granting Escriba two weeks' vacation and instructed Escriba to speak with Human Resources if she required additional leave to care for her father. Escriba left for vacation on November 23, 2007, and was scheduled to return to work on December 10, 2007. She did not return to work and did not contact the company to request additional leave. The company terminated Escriba's employment for failing to comply with its no-show, no-call policy. Under this policy, an employee is automatically terminated if he or she is absent for a period of three work days without notifying the company or without seeking a leave of absence. Escriba subsequently sued Foster Farms for interference with her rights under the FMLA and California law.

Under the company's employee-leave policy, an employee who requests FMLA-protected leave must exhaust paid vacation time. The initial paid leave runs concurrently, counting against the employee's balance of vacation time and FMLA-protected leave. Thus, by first exhausting paid vacation time, an employee would preserve the balance of all available FMLA time.

The jury returned a verdict in favor of Foster Farms. Escriba appealed.

Applicable Law

To make out a *prima facie* case of FMLA interference, an employee must establish that:

- he was eligible for the FMLA's protections;
- his employer was covered by the FMLA;
- he was entitled to leave under the FMLA;
- he provided sufficient notice of his intent to take leave; and
- his employer denied him FMLA benefits to which he was entitled.

Worker Can Decline to Use FMLA Leave

Escriba argued the employer was required to designate her vacation as protected FMLA leave, regardless of whether she declined such leave. The appellate court disagreed. The Court noted that Escriba's version of the law was inconsistent with the FMLA's regulations, which provide that an employee need not specifically invoke the FMLA's protection. 29 C.F.R. 825.302(c). The

Court found the regulation "strongly suggest[ed]" employees might choose not to exercise their rights under the FMLA. It also noted that, if employers required employees to take FMLA leave simply because they referenced an FMLA-qualifying reason, employers could be subject to liability for forcing FMLA leave on an unwilling employee. Consequently, the Court concluded that "an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection."

In this case, substantial evidence supported the jury's verdict that Escriba chose not to designate her leave as FMLA-protected. She requested vacation to visit her father in Guatemala and specifically denied seeking FMLA leave at least twice. She also had sought and obtained FMLA leave on 15 prior occasions, which strongly suggested she knew how to request and obtain such leave. Further, the Court noted that, because the company's policy on concurrently running of FMLA leave and vacation time, Escriba may have purposefully declined FMLA leave so she could preserve the full 12-week FMLA entitlement for later use. Accordingly, the Court concluded sufficient evidence supported the jury's verdict and affirmed the judgment in favor of the company.

While at first glance Escriba may seem to be a positive, commonsensical development for employers, it actually raises a significant issue about leave administration. The Ninth Circuit's analysis suggests employees may be able to reject an employer's designation of time off from work as FMLA-qualifying leave. If so, an employee seemingly could refuse FMLA leave when the employee has available paid vacation time or sick leave, and then request an additional 12 weeks of unpaid FMLA leave, thereby extending the time off. Such a result would seem inconsistent with an employer's obligation under the FMLA regulations to designate qualifying time off as FMLA leave and to substitute paid leave for all or part of the unpaid FMLA leave period, which would run concurrently.

III. U.S. Supreme Court; Donning, Doffing of Protective Gear is "Changing Clothes" under FLSA

The U.S. Supreme Court has held that time spent donning and doffing protective gear can constitute "changing clothes" under the Fair Labor Standards Act, and therefore not compensable where the employer and the union have so agreed in a collective bargaining agreement. Sandifer v. U.S. Steel Corp., 134 S.Ct. 870 (2013).

In 2007, steel workers brought a putative collective action against their employer, seeking overtime pay for time spent donning and doffing personal protective equipment that the company required them to wear because of hazards at its steel plants. The protective gear included a flame-retardant jacket, pants, a hood, a hardhat, a "snood" (a hood that also covers the neck and upper shoulder area, which, as Justice Antonin Scalia described, "on the ski slopes,

one might call it a 'balaclava'"), "wristlets," work gloves, leggings, metatarsal boots, safety glasses, earplugs and a respirator.

Pursuant to a provision of its collective bargaining agreement with the employees' union, the employer did not compensate employees for time spent putting on or taking off the protective equipment. The provision's validity depended on Section 203(o) of the FLSA, which allows parties to collectively bargain over whether "time spent in changing clothes . . . at the beginning or end of each workday" must be compensated.

The U.S. Supreme Court first examined the meaning of the word "clothes." Citing the rule of statutory construction that words should be interpreted according to their "ordinary, contemporary, common meaning," the Court observed that dictionaries from the era of Section 203(o)'s enactment defined "clothes" as items that are both designed and used to cover the body and are commonly regarded as articles of dress. Noting that nothing in Section 203(o)'s text or context suggested anything other than this ordinary meaning, the Court rejected the employees' argument that the term "clothes" somehow omitted protective clothing.

The Court then considered the meaning of the term "changing." It found that, while the normal meaning of "changing clothes" connotes "substitution," at the time of Section 203(o)'s enactment, the phrase also carried the meaning "to alter." Therefore, "time spent in changing clothes" includes time spent in altering dress, the Court said. Whether one exchanges street clothes for work clothes or simply chooses to layer one garment over another may be a matter of purely personal choice, and Section 203(o) should not be read as imposing only a substitution requirement — thereby allowing workers to opt into or out of its coverage at random or at will — when another reading is textually permissible, the Court concluded. Applying these principles, the Court held that the donning and doffing of the first nine types of required gear (i.e., flame-retardant jacket, pants, hood, hardhat, "snood," "wristlets," work gloves, leggings and metatarsal boots) fit within the definition of "changing clothes." However, it found the safety glasses, earplugs, and respirator do not constitute "clothes" because they are not commonly regarded as articles of dress.

Although the time spent putting on or taking off safety glasses, earplugs and a respirator was minimal, the Court rejected the argument that it was *"de minimis"* — too trivial to warrant consideration. It found that there "is no more reason to disregard the minute or so necessary to put on glasses, earplugs, and respirators, than there is to regard the minute or so necessary to put on a snood." Instead, the Court concluded that the question for courts is whether the period at issue can, on the whole, be fairly characterized as "time spent in changing clothes." For example, if an employee devotes the vast majority of the time in question to putting on and taking off equipment or other non-clothes items (perhaps a diver's suit and tank), the entire period would not qualify as "time spent in changing clothes" under Section 203(o), even if some clothes items were donned and doffed as well. However, if the vast majority of the time is spent in donning and doffing "clothes," as the Court defined that term, the entire period qualifies, and the time spent putting on and taking off other items need not be subtracted.

QUESTIONS?

If you have any questions about wage and hour issues as they apply to the hospitality industry or other workplace laws, please contact **Paul J. Siegel**, at (631) 247-4605 or siegelp@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work. You can also visit **www.jacksonlewis.com**.