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Nothing New in the World of Wage and Hour? Think Again.

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BAKER DONELSON

EXPAND YOUR EXPECTATIONS™

Warner Parks among top 7 hikes in U.S.

Fodor.com, an international travel website, has named Warner Parks as one of the seven best hikes in the United States.

The guide says: "Just beyond Nashville's bustling cityscape, Percy Warner and Edwin Warner State Parks lie west of town near the Bellevue suburb. Both parks offer a picturesque break from the city with rolling hills, grassy fields, horse paths, and the shade of towering hardwoods. The Mossy Ridge Trail in Percy Warner Park is a great morning or afternoon jaunt for those who want to get a brisk hike in, or for families who want an easy stroll through the beautiful landscape."

Others spots:

- Enchanted Rock: Fredericksburg, Texas
- Hike Through The Vines: Napa, California
- The Narrows: Zion National Park, Utah
- Long Trail South: Stowe, Vermont
- The Kalalau Trail: Kauai, Hawaii
- West Maroon Trail: Aspen To Crested Butte, Colorado

Cheekwood adds nights to LIGHT exhibit



Due to its record-setting popularity of the exhibit LIGHT: Bruce Munro, Cheekwood has added nighttime opportunities before the installation closes Sunday, Nov. 10. That includes a celebration of the Fall Equinox on Saturday, Sept. 21, with live music in the gardens. This fall, visitors will be able to view LIGHT in the dark until 11 p.m. every Tuesday in September and Oct. 1, 15 and 29. Visitors can purchase tickets in advance at Cheekwood.org.

Workshop explores changes in workplaces

Baker Donelson will host the next program at 8 a.m. Thursday, Aug. 15, in its regular series of Third Thursday Labor & Employment Law Breakfast Briefings. In "Nothing New in the World of Wage and Hour? Think Again,"

Shareholder Ken Weber will present a strategic look at new areas of liability created by new technologies, generational differences among employees, economic trends and food for thought based on the U.S. Supreme Court's recent decision affirming the use of mandatory arbitration agreements to defeat class actions. The program and breakfast are free, but advance registration is requested; email rsvp@bakerdonelson.com to register or for more information. Address: 211 Commerce Street, First Floor Special Events Center.

Wage and Hour Litigation, The Great White Shark of Employment Law

- Federal court filings of wage and hour class and collective actions have increased more than 300% since 2000
- Wage and hour cases far outpace all other types of employment law class actions
- Wage and hour settlements and verdicts have reached into the hundreds of millions of dollars
- Locally, more wage and hour cases are getting filed on a daily basis than any other kind of employment lawsuit

Why is This Happening?



The Fair Labor Standards Act (“FLSA”) - 101

- FLSA cases are often easier to win than discrimination, harassment or retaliation cases
- “Conditional certification” of collective actions is often very easy to obtain
- Collective actions often include hundreds or even thousands of plaintiffs, i.e., everyone employed in the job category in question for the preceding 3 years
- Courts often award prevailing plaintiffs all of their attorneys’ fees, which the employer pays

Just When You Thought It Couldn't Get Any Worse . . .

O'Brien v. Ed Donnelly Enterprises, Inc., 575 F.3d 567
(6th Cir. 2009)

- Court approves combining FLSA claims (3 year statute of limitations) with state law claims for unpaid wages (6 year statute of limitations), in the same lawsuit
- Federal District Courts throughout the Sixth Circuit, including Tennessee, now almost routinely approve FLSA collective actions with **6 year** statutes of limitations
- Of course, most plaintiffs in new wage and hour cases now assert FLSA claims and state law breach of contract and unjust enrichment claims

But Employers Are Not Defenseless

Consider These Shark Repellants:

- An Off-the-Clock Policy;
- A Mobile/Remote Access Device Policy;
- A Safe Harbor Policy; and
- A Mandatory Arbitration Agreement (with a class/collective action waiver)

An Effective Off-The-Clock Policy:

- Prohibits non-exempt (hourly) employees from working off-the-clock
- Commits to paying non-exempt employees for any work they perform for the benefit of the company
- Prohibits supervisors from explicitly or implicitly instructing non-exempt employees from working off-the-clock

An Effective Off-The-Clock Policy (Cont.):

- Prohibits non-exempt employees from voluntarily working off-the-clock
- Establishes a complaint procedure
- Prohibits retaliation against employees who complain

Sounds Familiar, Doesn't It?

- An off-the-clock policy is essentially trying to accomplish the same thing as an anti-harassment policy, i.e., reducing your liability for rogue employees that violate company policy (and encouraging employees to complain so you can take remedial action)
- Consider using your anti-harassment policy as a form for your off-the-clock policy

And if You Get Sued ...

- Some courts have viewed off-the-clock policies as evidence of an employer's good faith or evidence to rebut the plaintiffs' "willfulness" arguments
- **A sample policy is provided in your written materials**

The Mobile Device Policy

- An emerging area of wage and hour liability is the use of smart phones, tablets, laptops, home computers, etc. by non-exempt employees
- Many employers are not even aware they are exposed to this liability due to computer programs like Webmail or Citrix

The Mobile Device Policy (Cont.)

- Some employers suffer from a disconnect between Operations, IT and HR, which allows non-exempt employees to use remote access devices without the knowledge or approval of HR
- Other employers allow non-exempts to use such devices, but without any policies to restrict their use or to communicate the employer's expectations

Consider These Generational Factors:

- Younger employees have been raised in a hyper-connected world with 24/7 internet access, smart phones, email, and social media
- The lightning-quick evolution of technology make it increasingly difficult to restrict non-exempt employees from accessing work-related materials after hours (whatever that means)
- If you don't already have a mobile/remote access policy, you need one ... like now.

An Effective Mobile Device Policy Should:

- Clearly define whether your non-exempt employees may use mobile devices for work related reasons
- If not, then make sure the policy is clear and does not allow exceptions
- If you decide to permit non-exempt employees to use mobile devices, then you've got a lot of ground to cover in your mobile device policy ...

A Permissive Mobile Device Policy Should:

- Reaffirm that non-exempt employees must be paid for all time they spend performing work-related tasks
- Restrict the use of mobile devices to work that cannot be performed during regularly scheduled hours
- State that the policy applies whether or not the device in question is provided by the company or is owned by the employee

A Permissive Mobile Device Policy Should:

- Require employees to record the time they spend using such devices outside of their usual work hours
- Define a time frame in which employees are expected to record their time in the company's time tracking system
- State that employees who fail to follow the policy will be subject to disciplinary action
- **A sample policy is provided in your written materials**

The Safe Harbor Policy

- Gives an employer a “mulligan” if an improper deduction is made from an exempt employee’s salary
- But only if the employer has a written policy in their employee handbook with:
 - A statement that improper deductions are prohibited;
 - A complaint procedure;
 - A commitment that improper deductions will be reimbursed; and
 - A good faith commitment to comply in the future.
- **A sample policy is provided in your written materials**

American Express Co. v. Indian Colors Restaurant, 133 S. Ct. 2304 (2013)

- An agreement between AmEx and merchants who accepted their cards required that all disputes be resolved by arbitration and required the merchants to waive their right to arbitrate claims on a class action basis
- The merchants sued over the class action waiver, claiming that it effectively eliminated their ability to challenge the fees that AmEx was charging them
- SCOTUS: The Federal Arbitration Act requires courts to enforce arbitration provisions as written, including class action waivers, even if the cost of individually proving the claims at issue in arbitration will exceed the plaintiffs' potential recovery

Okay ... why are we talking about this?



Mandatory Arbitration Agreements with a Class/Collective Action Waiver

- An open issue in wage & hour law was whether employers could force employees to arbitrate wage and hour claims and waive their right to sue in class or collective actions
- Wage and hour defense lawyers have been encouraged by the *AT&T* case and its strong endorsement of mandatory arbitration and class action waivers
- There are no guarantees, but it seems likely that the SCOTUS would uphold mandatory arbitration of wage and hour claims with a class/collective action waiver

An Effective Wage & Hour Arbitration Agreement Should:

- Define the claims covered by the agreement, such as: “any dispute, claim or controversy arising from or in connection with my wages or compensation due, hours worked, or the amount or form of my compensation under state or federal law ...”
- State that the agreement applies to all such claims that arose or will arise during the entire term of the employee’s employment
- Define the consideration supporting the agreement -- but be careful, this may vary from state to state

An Effective Wage & Hour Arbitration Agreement Should (Cont.):

- Contain standard arbitration provisions, such as which arbitration rules will apply, where the arbitration will take place, how fees and costs will be handled, etc.
- Exempt state or federal administrative claims from the scope of the agreement (i.e., EEOC, THRC, DOL, NLRB) and workers' comp claims

Despite Your Best Efforts, Your Company Gets Sued -- What Now?

Genesis HealthCare Corp. v. Symczyk, 133 S. Ct. 1523 (2013)

- SCOTUS: Employer “mooted” a plaintiff’s FLSA claims by offering the full amount the employee was owed
- *Symczyk* approved the use of offers of judgment to settle FLSA claims, but many questions remain unanswered
 - Many courts (including the 6th Circuit) currently do not allow employers to “moot” named plaintiffs’ claims if a motion to conditionally certify a collective action is pending
- Other considerations:
 - The “hidden plaintiffs” phenomenon, and
 - The “blood in the water”

Unpaid Interns – The New Feeding Frenzy?

- The *Black Swan* lawsuit: On June 11, 2013, a federal court in New York made national headlines when it ruled that Fox Searchlight Pictures violated federal wage and hour law when it employed two unpaid interns on the movie set for *Black Swan*
- Cases like this are being filed throughout the country
- Google the words “unpaid internship” and the first result is: <http://www.unpaidinternslawsuit.com/>, a website hosted by a plaintiffs’ law firm
- See also [To Pay or Not to Pay? The Test for Unpaid Internships](#), Nashville Business Journal, June 28, 2013

The U.S. DOL's Six-Part Test:

1. The internship is similar to training that would be given in an educational environment
2. The internship experience is for the benefit of the intern
3. The intern does not displace regular employees, but works under close supervision of existing staff ...

The U.S. DOL's Six-Part Test (Cont):

4. The employer derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impaired;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand the intern is not entitled to wages for the time spent in the internship

Questions?



“OFF-THE-CLOCK” WORK AND COMPLAINT PROCEDURE

In accordance with applicable law, **(Company Name)** prohibits non-exempt employees who are paid on an hourly basis from performing work for **(Company Name)** without being paid for their work, commonly known as working “off-the-clock.” The law requires **(Company Name)** to compensate non-exempt employees for any work that they perform for the benefit of **(Company Name)** and **(Company Name)** is committed to honoring its legal obligations to do so.

It is a violation of this policy for any **(Company Name)** employee with supervisory authority to explicitly or implicitly instruct any non-exempt employee to perform any work “off-the-clock,” to suggest to non-exempt employees that performing work for **(Company Name)** without compensation is acceptable, or to adjust any non-exempt employee’s time records to deny them compensation for time worked. In addition, it is also a violation of this policy for non-exempt employees to voluntarily work “off-the-clock” for whatever reason. Finally, although overtime may be discouraged or forbidden occasionally or overtime may require approval by a supervisor, it is never acceptable for a non-exempt employee to work “off-the-clock” in order to avoid working overtime.

Complaint Procedure - **(Company Name)**’s complaint procedure provides for an immediate, thorough, and objective investigation of any claim of conduct in violation of this policy. If any employee believes they have been required to work “off-the-clock,” or if they are aware that other non-exempt employees have been required to work “off-the-clock,” they should provide a written or verbal complaint to their immediate supervisor, senior management, or the Human Resources Department as soon as possible. The complaint should be as detailed as possible, including the names of individuals involved, the names of any witnesses, direct quotations when language is relevant, and any documentary evidence. Disclosure of the information contained in the employee’s complaint will remain confidential as much as reasonably possible.

Applicable law prohibits retaliation against any employee by another employee or by **(Company Name)** for using this complaint procedure or for filing, testifying, assisting, or participating in any manner in any investigation, proceeding, or hearing conducted by a governmental enforcement agency. Additionally, **(Company Name)** will not knowingly permit any retaliation against any employee who complains of conduct prohibited by this policy or who participates in an investigation.

All incidents of conduct prohibited by this policy that are reported will be investigated. **(Company Name)** will immediately undertake or direct an effective, thorough, and objective investigation of the allegations. The investigation will be completed and a determination regarding the reported conduct will be made and communicated to the employee who complained and to the person(s) accused of violating this policy.

If **(Company Name)** determines that conduct in violation of this policy has occurred, it will take effective remedial action commensurate with the circumstances. Appropriate action will also be taken to deter any future misconduct. If a complaint of prohibited conduct is substantiated, appropriate disciplinary action, up to and including immediate termination, will be taken. Whatever action is taken against the wrongdoer will be communicated to the employee who complained.

Consequences of Policy Violation - Any employee, whether a manager or non-exempt employee, who is found to have engaged in conduct prohibited by this policy is subject to disciplinary action, up to and including immediate discharge from employment.

Sample Safe Harbor Policy:

The law requires that the company make certain deductions from every employee's compensation, including, but not limited to, applicable federal, state, and local income taxes. Social Security taxes also must be deducted from each employee's earnings. The company matches the amount of Social Security taxes paid by each employee.

The company offers programs and benefits beyond those required by law. Eligible employees may voluntarily authorize deductions from their paychecks to cover the costs of participation in these programs. Contact your supervisor with questions concerning deductions and how they are calculated.

The company prohibits deductions from the salary of a salaried-exempt employee based on the quality or quantity of work performed or any other reason that is inconsistent with pay on a salary basis under federal wage and hour regulations. Subject to certain exceptions, a salaried-exempt employee must receive his or her full salary for any week in which he or she performs any work without regard to the number of days or hours worked. Exceptions to this general rule include the following:

1. The company need not pay the salary of a salaried-exempt employee for any workweek in which the employee performs no work.
2. The company may make deductions from salary for an exempt employee's absence for one or more full days for personal reasons, other than sickness or disability.
3. The company may make deductions from salary for absences of one or more full days occasioned by sickness or disability so long as the company maintains a bona fide leave plan that provides compensation for loss of pay occasioned by such sickness or disability. (Deductions for such full day absences may be made, for instance, before the employee has qualified under the plan or after the employee has exhausted his or her leave under the plan.)
4. The company will not make deductions from salary for absences of an exempt employee occasioned by jury duty, attendance as a witness, or temporary military leave. The company can offset any amounts received by an employee as jury fees, witness fees, or military pay for a particular week against the salary due for that particular week.
5. The company may make deductions from the salary of exempt employees for penalties imposed in good faith for infractions of safety rules of major significance.
6. The company may make deductions from the salary of exempt employees for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules.
7. The company is not required to pay the full salary of a salaried-exempt employee in the initial or terminal week of his or her employment if the employee works a partial week during such week.

8. The company is not required to pay the full salary of a salaried-exempt employee for weeks in which an exempt employee takes unpaid leave under the Family Medical Leave Act.

If a salaried-exempt employee believes that the company has made an improper deduction from his or her salary, he or she should report the alleged improper deduction to_____. An employee may also report an improper salary deduction by _____. The company will in no way retaliate against any employee for making a good faith complaint about any payroll discrepancies or problems.

REMOTE ACCESS DEVICE POLICY FOR NON-EXEMPT EMPLOYEES

Non-exempt employees are permitted to use Remote Access Devices for work-related reasons outside of their regularly scheduled hours in certain approved circumstances. However, non-exempt employees must be paid for all of time they spend performing work-related tasks, including work performed outside of their regularly scheduled hours. **(Company Name)** has implemented this policy to reconcile these concerns.

The term "Remote Access Device" as used in this policy includes cell phones, smart phones, tablet computers, lap top computers, home computers, or any other device with which an employee can use to work remotely.

General Provisions

Non-exempt employees who wish to use a Remote Access Device for any work-related reason must obtain the written consent of their immediate supervisor prior to using the device, and all such requests must be approved in advance by the Human Resources Department. In addition, supervisors or managers who want any non-exempt employee that they supervise to use a Remote Access Device for work-related reasons must obtain permission from the Human Resources Department prior to asking any non-exempt employee to use such a device.

Approved non-exempt employees who use Remote Access Devices for work-related reasons shall limit their usage of such devices to work that either cannot be performed during their regularly schedule hours or that cannot be performed while they are on the **(Company Name)** premises.

This policy applies to all work that is related in any way to **(Company Name)** business performed by a non-exempt employee while using a Remote Access Device, regardless of whether or not the device was obtained from **(Company Name)**.

All non-exempt employees must sign and date the attached Acknowledgement Form whether or not they intend to use a Remote Access Device for work-related reasons.

Tracking and Recording Time

Approved non-exempt employees who use Remote Access Devices outside of their regularly scheduled hours for work-related reasons are responsible for accounting for their time and recording it in **(insert name of the Company's time tracking system)** by the next business day after the work is performed, or as soon thereafter as is practicable in situations where entering time the next day is impossible. Exceptions to this next-business-day time entry requirement should be rare.

Approved non-exempt employees who fail to accurately record the time they spend performing work-related tasks on a Remote Access Device outside of their regularly scheduled hours will be subject to discipline up to and including termination, depending on the severity and frequency of the infraction. This is an important requirement of this policy because federal wage and hour laws require **(Company Name)** to compensate non-exempt employees for the work they perform on behalf of **(Company Name)**, regardless of whether the work is performed during regularly scheduled hours.

**ACKNOWLEDGEMENT OF REMOTE ACCESS DEVICE
POLICY FOR NON-EXEMPT EMPLOYEES**

I hereby acknowledge that I have received a copy of the **(Company Name)**'s Remote Access Device Policy for Non-Exempt Employees, I have read the Policy and understand it, and I understand that any questions that I may have about the Policy in the future should be directed to the Human Resources Department.

Signature

Print Name

Date