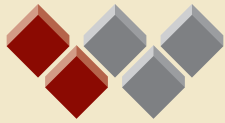
Wimberly Lawson
Wright Daves & Jones, PLLC
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Briefly

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UPCOMING CHANGES ON OVERTIME REQUIREMENTS AND MINIMUM WAGE?

Carol R. Merchant

"Under the concepts being discussed, as many as one-fifth of the nation's salaried workers who are currently exempt from overtime, may become qualified for overtime …."

President Obama has made many public announcements over the last few months expressing a desire to implement significant legal change in this country based on his Executive Powers as President, without the need to rely on Congress for approval. The President has also expressed concerns about income inequality. Some recent developments under these plans pertain to the federal minimum wage, the minimum wage required for government contractors, and the overtime exemption for salaried employees.

The Administration and Democrat lawmakers in Congress are trying to raise the federal minimum wage to $10.10 an hour, from the current level of $7.25. It is highly unlikely that Congress will approve such a change. In February of 2014, the President signed an Executive Order raising the minimum wage for employees of federal contractors to $10.10 an hour. The Executive Order is No. 1658, and appears to apply primarily to contracts covered by the Service Contract Act (generally for services), the Davis-Bacon Act (generally construction contracts), contracts for concessions, and certain procurement contracts. The executive order generally does not apply to contracts for goods, as contracts under the Walsh-Healey Public Contracts Act are not included. The Order applies to covered contracts where the solicitation of such contracts is issued on or after January 1, 2015. However, governmental agencies are encouraged to take steps to insure that individuals working under existing contracts are paid an hourly wage of at least $10.10 per hour even prior to the effective date.

On March 13, 2014, President Obama signed a Presidential Memorandum directing the Department of Labor to "propose revisions to modernize and streamline existing overtime regulations," including changes to the so-called "white collar" worker classifications that have long been exempt from being paid time-and-a-half for working more than 40 hours per week. In particular, the President wants to raise the threshold level for the salary-basis exemption from the current $455.00 per week to a higher but unstated

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WIMBERLY LAWSON RECEIVES DISTINGUISHED HONORS

Top Ranked Law Firms – Fortune Magazine

Wimberly Lawson Wright Daves & Jones, PLLC, has been distinguished as one of the Top Ranked Law Firms by LexisNexis® Martindale-Hubbell®. The Firm first appeared in Fortune's "2012 Investor's Guide" and was one of 965 firms out of 254,000 to receive this honor. This list of Top Ranked Law Firms features U.S. law firms with 21 or more attorneys in which at least one in three of their lawyers earned the AV® Preeminent™ Peer Review Rating, the highest possible rating. An AV® Preeminent™ certification is a significant accomplishment – a testament to the fact that a lawyer's peers rank him or her at the highest level of ethical standards, professional conduct, and legal ability.

U.S. News & World Report and Best Lawyers

Wimberly Lawson has also been honored by U.S. News & World Report and Best Lawyers with a 2014 "Best Law Firms" ranking. Firms included in the 2014 "Best Law Firms" list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise. "U.S. News has more than two decades of experience in providing the public with the most accurate and in-depth rankings of a wide range of institutions," says Tim Smart, Executive Editor of U.S. News & World Report. To be eligible for a ranking, a firm must have a lawyer listed in The Best Lawyers in America, which recognizes the top 4 percent of practicing attorneys in the US. Over 12,000 attorneys provided over 330,000 law firm assessments, and almost 7,000 clients provided close to 20,000 evaluations. The 2014 "Best Law Firms" rankings can be seen in their entirety by visiting bestlawfirms.usnews.com.

Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville, Chattanooga and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.

level, as currently a salaried worker can be exempt if the other tests are met and the manager earns as little as $24,000.00. Some say the threshold for the overtime exemption is likely to be doubled under the new rules, which hits retail and restaurant businesses particularly hard. It is also expected that the changes will go beyond simply raising the income threshold and may require that a specified percentage of a worker's day be spent performing managerial duties in order to exempt that employee from earning overtime pay.

In a fact sheet accompanying the Memorandum, there is reference to a convenience store manager or fast food shift supervisor or an office worker being expected to work 50 or 60 hours in a week without receiving overtime pay. Under the concepts being discussed, as many as one-fifth of the nation's salaried workers who are currently exempt from overtime, may become qualified for overtime, which may open up overtime to those making as much as $1,000.00 a week.

The implementation of these proposals will take some time even without the need for Congressional approval, probably several months.

Currently, to be exempt from overtime under the FLSA's "Executive Exemption," the employee must be a "bona fide executive" whose "duty" is "managing" the business, and managing the business or a recognized subdivision of the business must be the "principal, main, major or most important duty that the employee performs." The employee must also supervise "two or more full-time employees" and have authority to "hire or fire" employees. Many small businesses contend that under the proposed changes their managers will no longer be exempt employees, since the managers have to help employees stock shelves or perform other "physical work" in addition to performing their "primary" duty as a manager. These opponents of the changes suggest that, in addition to turning managers into hourly employees, they will deprive them of managerial training and benefits and hurt job growth. Opponents also say that the changes will result in reduced hours, reduced salaries, or reduced bonuses.

NEW AFFIRMATIVE ACTION RULING HAS LIMITED EFFECT

Jerome D. Pinn....

"[T]he Court has stated … that while racial quotas may be prohibited, the goal of achieving a diverse student body may be sufficiently compelling to justify consideration of race in admissions decisions in some circumstances."

No doubt one of the main public debates of our time is the legality and desirability of affirmative action, designed to offer opportunities to groups that have been the subject of discrimination in the past. Some say that we should strive for a "color-blind" society, in which color simply does not matter. Others say that to achieve true equality, affirmative steps need to be taken to improve the lot of protected minorities. The debate goes on, and recent rulings reflect the debate.

On April 22, 2014, the U.S. Supreme Court upheld the 2006 Michigan Ballot Initiative whereby voters ended race-based admissions in state schools. *Schuette v. Coalition to Defend Affirmative Action* (April 22, 2014). Justice Kennedy wrote the main opinion in the 6-2 ruling, stating that the decision is "not about the constitutionality or merits" of affirmative action generally. Justice Kennedy's opinion in pertinent part states:

> "The electorate's instruction to governmental entities not to embark upon the course of race-defined, and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this nation seeks to put behind it."

Justice Sotomayor, herself admittedly a product of affirmative action in education, wrote a 58-page dissent, characterizing as "out of touch with reality" the statement of Chief Justice Roberts in a 2007 desegregation decision that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Justice Sotomayor wrote that "race matters."

Currently some eight states, including Michigan, California and Florida, have outlawed affirmative action in public schools. However, the ruling does not address whether racial preferences may be used by public colleges and other state institutions. In the past, the Court has stated on various occasions that while racial quotas may be prohibited, the goal of achieving a diverse student body may be sufficiently compelling to justify consideration of race in admissions decisions in some circumstances. Last year, in a 7-1 decision, a University of Texas case was remanded to lower courts to re-examine whether a race-based admissions program at the University of Texas could survive constitutional scrutiny. The Court found that one of the critical issues is whether race was used as a decisive factor in admissions or just one of many factors considered.

The varying opinions of the Justices in the current case reflect the legal and philosophical debate concerning the merits of affirmative action. The current ruling really does not, however, address whenever a school may use affirmative action where not expressly prohibited by state law.

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DISCRIMINATION PLAINTIFF MUST PAY BACK SETTLEMENT PROCEEDS DUE TO VIOLATING CONFIDENTIALITY PROVISION

Edward H. Trent

"For one plaintiff, a generic comment to his daughter that turned into a posting on her Facebook page cost him $90,000 …."

In settlement agreements, it is quite common for the parties to insert confidentiality provisions. The purpose is to avoid publication of the terms of a settlement, which is not necessarily limited to the amount paid, but may even include the mere fact that a settlement was reached. Violations of such provisions can have significant consequences on the parties who breach them. For one plaintiff, a generic comment to his daughter that turned into a posting on her Facebook page cost him the $90,000 he was to receive as part of his settlement.

In *Gulliver Schools, Inc. v. Snay*, -- So. 3d --, 121 Fair Empl. Prac. Cas. (BNA) 1421, 39 Fla. L. Weekly D457 (Fla. 3d DCA Feb. 26, 2014), the court found that the plaintiff, Mr. Snay, was not entitled to the settlement proceeds under his settlement agreement because he breached the non-disclosure provision of that agreement. Mr. Snay had filed a claim for age discrimination and retaliation after his contract as headmaster for the private Gulliver School was not renewed. The parties ultimately settled the case and in their agreement, the following provision was included: "**Confidentiality** . . . [T]he plaintiff shall not either directly or indirectly, disclose, discuss or communicate to any entity or person, except his attorneys or other professional advisors or spouse any information whatsoever regarding the existence or terms of this Agreement . . . A breach . . . will result in disgorgement of the Plaintiff's portion of the settlement Payments."

Four days later, Mr. Snay told his college-aged daughter, who was once a student at the school, that his case was settled and he was happy with the result. He did not disclose the amount. His daughter then made the following post on her Facebook page, "Mama and Papa Snay [plaintiff] won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT." The comment went out to approximately 1200 "friends" on Facebook, many of whom were either current or past Gulliver students.

The school notified the plaintiff that it would not pay his portion of the settlement given the breach of the confidentiality provision. The plaintiff then moved to enforce the settlement. On appeal from an order compelling the school to pay the settlement proceeds, the court of appeals reversed, finding:

> Because Snay's deposition testimony that "[m]y conversation with my daughter was that it was settled and we were happy with the results," establishes a breach of this [confidentiality] provision, the court below should have denied his motion for enforcement of the agreement. The fact that Snay testified that he knew he needed to tell his daughter something did not excuse this breach. There is no evidence that he made this need known to the school or to his or its attorneys so that the parties might hammer out a mutually acceptable course of action in the agreement. Rather, before the ink was dry on the agreement, and notwithstanding the clear language of section 13 mandating confidentiality, Snay violated the agreement by doing exactly what he promised not to do. His daughter then did precisely what the confidentiality agreement was designed to prevent, advertising to the Gulliver community that Snay had been successful in his age discrimination and retaliation case against the school.

As a result, the plaintiff lost his case, and was unable to collect any of the settlement monies. The lessons here are to make sure confidentiality provisions are clear and unambiguous with clear consequences for violating the terms of the provision. Here, the agreement specifically said the plaintiff would lose his portion of the settlement proceeds (although his lawyers still got paid). Additionally, it is a lesson to plaintiff's counsel to make sure their clients fully understand the terms of the agreement and abide by them. Thus, negotiating what can be said and to whom and including those terms in the agreement are important factors to consider before executing any settlement agreement and making sure everyone is willing to live by those terms.

KNOW YOUR ATTORNEY
ANDREW J. HEBAR

ANDREW J. HEBAR is a Senior Associate in the Knoxville, Tennessee office of the firm, joining in June 2008. His law practice includes an emphasis on workers' compensation defense, employment law, general civil practice and subrogation. Andrew is a native of Black Creek, Wisconsin and a 1997 graduate of the National Academy of Railroad Sciences in Overland Park, Kansas. He worked several years with the Burlington Northern and Santa Fe Railway as a switchman, foreman, conductor, and locomotive engineer. Andrew graduated summa cum laude with a B.B.A. in Business Management from the University of Memphis in 2002, as the top student in the Business Management program. He obtained his Doctor of Jurisprudence degree from the University of Tennessee College of Law in Knoxville, Tennessee, graduating in 2005. Andrew is a member of the Knoxville Bar Association and the Blount County Bar Association.

NLRB INVITES COMMENT ON WHETHER EMPLOYERS CAN BAN UNION EMAILS FROM COMPANY SYSTEMS

Howard B. Jackson

"[T]he NLRB's General Counsel is asking the Board to … adopt a rule that employees who are permitted to use their employer's email for work purposes must be permitted to use it to exercise their Section 7 rights …."

The National Labor Relations Board's (NLRB) current rule is that an employer can lawfully maintain a policy prohibiting personal use of its electronic equipment and systems, including prohibiting the use of those systems to communicate union-related solicitations along with other non-job-related solicitations, unless on its face the policy discriminates against employees exercising rights granted to them under Section 7 of the National Labor Relations Act (NLRA). Such rights include, for example, the right to engage in union organizing activity, or other concerted activity for mutual aid and protection related to wages, hours and working conditions. These are commonly called "Section 7 rights." (Well, commonly called that by the NLRB and labor attorneys.)

Although this is the current law, as set forth in the NLRB *Register Guard* case from 2007, the NLRB's General Counsel is asking the Board to overrule *Register Guard* and adopt a rule that employees who are permitted to use their employer's email for work purposes must be permitted to use it to exercise their Section 7 rights, subject only to a narrow exception where a prohibition on doing so is needed to maintain production and discipline. On April 30, 2014, the NLRB took the unusual step of inviting the public as interested parties the opportunity to address the following questions:

1. Should the Board reconsider its conclusion in *Register Guard* that employees do not have a statutory right to use their employer's email system (or other electronic communications systems) for Section 7 purposes?
2. If the Board overrules *Register Guard*, what standard(s) of employee access to the employer's electronic communications systems should be established? What restrictions, if any, may an employer place on such access, and what factors are relevant to such restrictions?
3. In deciding the above questions, to what extent and how should the impact on the employer of employees' use of an employer's electronic communications technology affect the analysis?
4. Do employee personal electronic devices (e.g., phones, tablets), social media accounts, and/or personal email accounts affect the proper balance to be struck between employers' rights and employees' Section 7 rights to communicate about work-related matters? If so, how?
5. Identify any other technological issues concerning e-mail or other electronic communications systems that the Board should consider in answering the foregoing questions, including any relevant changes that may have occurred in electronic communications technology since *Register Guard* was decided. How should these affect the Board's decision?

Any brief filed may not exceed 25 pages and must be filed with the Board in Washington, D.C. on or before June 16, 2014. The brief may be filed electronically at http://mynlrb.nlrb.gov/efile.

If the NLRB overturns the *Register Guard* standard and adopts a rule granting employees some right of use in their employer's electronic communication systems, employers will need to examine their no-solicitation policies, and consider their discipline decisions carefully where they are based to any extent on an employee's use of the employer's system to communicate concerns related to wages, hours and working conditions.

TARGET OUT OF RANGE

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