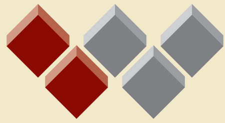

Wimberly Lawson
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Briefly

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"ROUNDING TIME" MUST WORK IN BOTH DIRECTIONS

Jerome D. Pinn

"[T]he DOL will look at what the employer is doing both in theory and in actual practice."

Many employers use computer software programs to track non-exempt employees' time worked and how much they should be paid. Most of these employers use rounding to determine hours worked. The most common rounding practice is to round time to the nearest quarter hour, which is up to 7 minutes in either direction (ex. 7:52 am rounds to 7:45 am, whereas 7:53 am rounds to 8:00 am).

Unfortunately, some employers intentionally or unintentionally misuse the rounding features of their payroll software. Any rounding done by software or manually must be neutral. It must round time in both directions, both in the employee's favor and the employer's favor.

The U.S. Department of Labor's (DOL) regulations for the Fair Labor Standards Act (FLSA) address the use of rounding in 29 CFR Section 785.48(b):

> <u>"Rounding" practices.</u> It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

In an opinion letter issued by the DOL on July 1, 2019, DOL stated that:

> It has been our policy to accept rounding to the nearest five minutes, one-tenth of an hour [or] one-quarter of an hour … as long as the rounding averages out so that the employees are compensated for all the time they actually work.

If called upon to review an employer's time rounding policy or practices, the DOL will look at what the employer is doing both in theory and in actual practice. Even if an employer's policy/practice to round time is neutral on its face, DOL will examine whether, in practice, rounding appears to average out so that it fully pays employees for all of the time that they work.

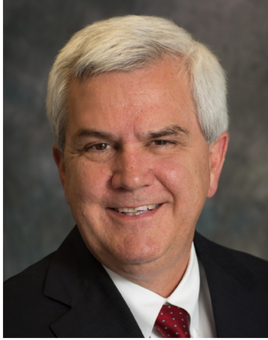
As provided in the above regulation, an employer's rounding practice should not result, over a period of time, in failing to compensate employees for all the time they actually work.

Sometimes employers sincerely believe that their rounding policy is neutral, but upon actual inspection, time is usually rounded in the employer's favor, either through a software option or manually. If this is done with multiple employees, it could easily result in 6-figure liability for the employer.

Employers would be well-advised to audit and verify that any rounding being done for their non-exempt employees' time worked is being done correctly (as a real-life example: 7:58 am does not round to 7:45 am) and even-handedly (in both directions). Having an adequate written policy is not enough, since problems may occur in actual practice and being unaware of them is not a defense. Therefore, if something is amiss with rounding, it should be proactively identified by the employer at the earliest possible opportunity - such as by an audit with qualified legal counsel - and corrected promptly, in order to avoid a costly lesson.

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, 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.

LESS ANIMAL EXUBERANCE IN THE FUTURE?



Howard B. Jackson

"The [NLRB] does not want employees to be unduly restricted when expressing their views or concerns and so has ruled that conduct which might ordinarily warrant discipline must be overlooked in [certain circumstances]."

The National Labor Relations Board ("NLRB" or "Board") has long granted a certain amount of leeway for employee misconduct when it takes place at a time when the employee is engaged in conduct that is typically protected under the National Labor Relations Act ("Act"). Examples of such ameliorating contexts include when employees are debating issues during a union organizing campaign, or when an employee is protesting wages or working conditions to a member of management. The Board does not want employees to be unduly restricted when expressing their views or concerns and so has ruled that conduct which might ordinarily warrant discipline must be overlooked in this setting. This has been referred to as the "animal exuberance" rule.

In various cases over the past three or four years under the previous Administration, the Board issued decisions that showed an increasing tolerance for misbehavior under this doctrine, and a trend to protect such conduct. However, the current Board is apparently inclined to modify the rule in a pending case. On September 5, 2019 the Board issued an invitation to submit briefs on the topic of "whether the Board should reconsider its standards for profane outbursts and offensive statements of a racial or sexual nature."

The Notice specifically seeks comments on the following three cases. These cases were decided by the previous Board in favor of the employees (i.e., granting them the protection for extreme instances of "animal exuberance" due to special circumstances) and the current Board is looking for constructive public feedback as to whether this policy has gone too far and should be reconsidered and restrained.

- In *Plaza Auto Center*, a 2014 case, the Board found that extremely profane name calling toward a supervisor did not involve conduct that was menacing, aggressive or belligerent, and therefore did not lose protection of the Act.
- In *Pier Sixty, LLC*, a 2015 case, a frustrated employee described a supervisor in foul terms on a Facebook post and in that same post urged employees to vote for the union in an upcoming election. The Board noted that language such as that used by the employee in the post was common in that workplace, and found that the employee did not lose the protection of the Act based on that post.
- In *Cooper Tire*, a 2016 case, a picketer yelled racially oriented comments toward replacement workers who were entering the plant. The comments referred to fried chicken and watermelons. The company discharged the employee. But the Board found that the comments did not lose the protection of the Act.

The invitation to briefing likely signals the current Board's intent to find that extremely profane and certainly racially and sexually-oriented conduct will tend to be found unprotected under the Act and therefore may rightfully be prohibited by employers and subject to employer discipline. Expect a new formulation of the rule for how to analyze such misconduct. To find out exactly what that rule will be, stay tuned.

ARE GIGGERS EMPLOYEES?

Howard B. Jackson

"[The DOL's Opinion Letter] provides useful guidance for how the DOL and the courts will analyze the *employee v. independent contractor* question in the 'gig' setting."

The answer, of course, is: "It depends." The acting Administrator of the Department of Labor ("DOL") Wage and Hour Division recently issued an Opinion Letter ("Letter") that sheds light on the subject in the context of the ever-evolving "gig" economy. (***Note:*** *the Wage and Hour Division, which is the federal agency that enforces the Fair Labor Standards Act ("FLSA"), sometimes issues Opinion Letters based on fact scenarios submitted by the inquiring employer. The Opinion Letters often provide useful insight and guidance with respect to how the Wage and Hour Division interprets questions of law under the Act and its implementing Regulations.*)

The employer was a virtual marketplace company ("VMC"). A VMC is an online-based referral service that connects service providers to user consumers. A VMC may provide a wide variety of services such as transportation, shopping, moving, and household services of many kinds.

The employer in question had service providers submit their name, contact information, and social security number. Service providers self-certified their experience and qualifications, completed a background check through a third-party, and underwent an identity check via a different third-party. They also executed a terms-of-use and service agreement with the VMC.

Service providers could communicate directly with the end user consumer. A default price was set for services but the provider can negotiate changes. Service providers can

Continued on page 3

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also arrange for future work for the consumer outside the VMC.

Service providers can accept, reject or ignore opportunities. Service providers supply their own tools and any helpers.

Service providers can "multi-app," which means use another app to get work on a competitor VMC platform to determine the most profitable opportunity at any time. Service providers do this often.

The VMC did not set schedules or require any amount of work or jobs completed, nor did the VMC inspect any work performed. The VMC would cancel its arrangement with a service provider if the provider breached its agreement, or engaged in misconduct such as inappropriate conduct toward consumer, or a pattern of cancellations on short notice. The VMC would also cancel the consumer rating for the service provider if it fell below a set threshold.

The Administrator analyzed the question of employee versus independent contractor status using the six factors from U.S. Supreme Court precedent. Interestingly, the analysis section of the Letter includes a preliminary paragraph that makes the following comment: "[I]t appears that your clients service providers do not fit any traditional employment paradigm covered by the FLSA." (Quotations omitted). Indeed.

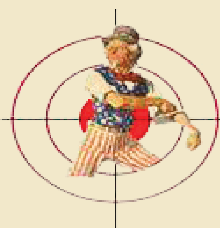
A summary of the Administrator's view regarding each factor is set out below:

- **Control.** The VMC did not exert control over the service providers. The providers can accept, reject or ignore requests, as much or as little as they desire, negotiate prices with consumers and use VMC competitor apps. The VMC did not inspect work for quality, or rate service provider performance.
- **Permanence**. The VMC did not have a permanent working relationship with the service providers. The service providers had a high degree of flexibility to leave. The Letter emphasized that the service providers could interact with and work through competitors of the VMC.
- **Investment.** The service providers, not the VMC, provided any tools needed to do the work. The VMC provided the platform that connected the service providers with the end consumers, but nothing related to the work performed for the end consumer.
- **Skill, Initiative, and Judgement.** The service providers choose when to accept or reject work. They exercise discretion in this regard in order to maximize their profits.
- **Opportunity For Profit And Loss.** The service providers did not receive a predetermined amount of compensation for their work. They could negotiate prices, determine the nature of work they would accept, impact profit by the number and type of jobs accepted, and by toggling between VMCs were able to find the most profitable work.
- **Integration.** The VMC's business is connecting service providers and consumers. The service providers' business is providing services to the end consumers. The VMC and service providers plainly had a mutual interest. But, the Administrator found, they were in distinct businesses and not operationally integrated.

Based on the analysis above, the Administrator concluded that the VMC's service providers were not employees.

As the gig economy develops, fact scenarios for it will multiply. This Letter provides useful guidance for how the DOL and the courts will analyze the *employee v. independent contractor* question in the "gig" setting. It further illustrates a reality that has been the case for years: employers should engage in a detailed, fact-specific analysis before venturing to classify a group of persons as independent contractors.

The 2019 Wimberly Lawson Labor and Employment Law Update Conference



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ANTI-ARBITRATION BILL PROPOSED IN CONGRESS

Jerome D. Pinn

On September 10, 2019, the U.S. House Judiciary Committee approved a bill entitled the *Forced Arbitration Injustice Repeal Act* (FAIR Act). If enacted, the FAIR Act would prohibit pre-dispute arbitration agreements in employment and civil rights cases. The bill is expected to be passed by the full House, as it has 222 House cosponsors, a majority of House members.

As expected, employer-friendly groups strongly oppose the bill. If passed by the House, the bill will almost certainly not be enacted in the Republican-controlled U.S. Senate. The bill still bears watching, because if power changes hands in the 2020 elections, a Democratic President & Congress may well enact a similar law.

A WORD TO THE WISE

Many claims employers face *are insured*. These can include workers' compensation, employment practices, or a variety of commercial or general liability disputes. If you are interested in making sure that your insurer permits you to work with your Wimberly Lawson attorney when claims come up, there are various steps you can take. ***When a claim is filed***, ask for us. We are on many panels. ***When you renew your coverage***, specify in the policy that you can use our Firm. Many insurers are open to this. ***When you are considering new coverage***, ask your broker or the insurer in advance whether we are on the panel. We love working with you, and sure hope you will want to work with us when needs arise. So we wanted to offer some tips for how you can make sure that happens.

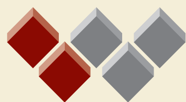
Tennessee Workers' Compensation Law and Practice

Wimberly Lawson Wright Daves & Jones, PLLC, is the exclusive Tennessee member of the *NATIONAL WORKERS' COMPENSATION DEFENSE NETWORK*, a nationwide network of independent AV-rated law firms providing employers and insurers with access to the highest quality representation, education, expertise, counsel and advice in workers' compensation and related employer liability fields.

The Firm also authors the ***Tennessee Workers' Compensation Handbook*, 10th Edition,** published by M. Lee Smith, which is the essential desk reference for Tennessee attorneys and workers' compensation claims professionals.

The Tennessee workers' compensation lawyers of Wimberly Lawson understand the challenges an employer faces in a workers' compensation claim. Our attorneys provide aggressive representation, and our reputation for integrity, coupled with our concern for your bottom line, ensures your best interests will be protected.

Respectfully, *Fredrick R. Baker*, Member



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