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Welcome to Mohajerian Law Corp’s monthly Franchise Newsletter. Each month we will provide our readers with pertinent industry, legal, and business information related to the Franchise industry. Your suggestions and interests are always valued; please forward all comments or suggestions to:
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Overtime Obligations of Employers Exempt & Non-Exempt Employees

BASED ON THE FAIR LABOR STANDARDS ACT (FLSA), THE INDUSTRIAL WELFARE COMMISSION (IWC), AND THE A.B. 60.

“This is a quick summary of the overtime provisions of federal and state requirements. For an in-depth analysis of the specific requirements applicable to you, please contact Mohajerian Law Corp. at www.mohajerianlaw.com. This newsletter is not intended to be legal advice and is for informational purposes only.”

Overtime computations and the requirements regarding who should be paid overtime have always been a point of difficulty for employers. The rules by which some people are entitled to overtime payment and some are not can be extremely challenging to understand. Failure to pay overtime is one of the leading causes of claims against employers, probably more than wrongful discharge, harassment, and stress combined.

Starting Point

An important mind-set for business owners is to start with the premise that everyone is entitled to payment of the overtime they have worked. There are numerous rules that apply based on the industry you are in. However, the most common include:

- Hours worked in excess of 8 in one day are paid at time and a half.
- Hours worked in excess of 40 a week are paid at time and a half.
- Hours worked in excess of 12 a day are paid at double time.

What is the difference between exempt and non-exempt?

What about Seventh Day Work Rules?

Are there general overtime rules I should follow to be safe?

Which Work Order Applies?

General Recommendations



Further, if you have employees who work alternative schedules, such as 10 or 12-hour shifts, you need to determine further the rules which may apply.

Who Is EXEMPT From Overtime Payment Requirements?

The rules that govern the exemptions from overtime payment requirements are often narrowly interpreted by the labor commissioner, and should be given extreme care in application to avoid expensive mistakes. Exempt positions are not subject to payment for overtime requirements. While employer policy may allow for overtime payment, there are no restrictions on rates used or the number of hours for which payment is required. There are seven exemption categories under the FLSA and IWC orders.

1. Executive Exemption

- Receives at least two times the state's minimum wage as a salary for full-time employment – also known as the “minimum salary level test.”
- The position has a primary responsibility for the management of the company or a recognized department of the company.
- The position has direct supervisory role for two or more persons.
- The position has the authority to hire and fire, give consideration of pay, or make a recommendation on either.
- The position can handle employee complaints and discipline issues.
- The position devotes less than 50% of their time focusing on tasks other than that are managerial.
- The position has the ability to use discretionary power on a regular basis.
- OR, owns at least 20 percent of equity interest in the company and actively assists in its management.

2. Learned Professional Exemption

- The position has the primary duty of performing work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized study.
- In most cases, only certified or duly licensed occupations are exempt under state law. This can include: law, dentistry, medicine, optometry, engineering, teaching and accounting.
- Wage Orders 1 (Manufacturing), 4 (Professional, Technical, Clerical, Mechanical, and Similar Occupations), 5 (Public Housekeeping), 9 (Transportation) and 10 (Amusement and Recreation) allow for exemptions for the positions that require learned professionals.
- The minimum salary test must be met.

3. Creative Professional Exemption



- Position's primary duties include performing work requiring invention, imagination, originality, or talent recognized in a field of artistic or creative in nature.
- The position's minimum salary meets the 'Minimum Salary Test.'

4. Administrative Exemption

- Position's primary duty of performing office or non-manual work that is directly related to the management or operations of the company.
- Regularly exercises discretion and independent decision-making in the performance of intellectual work.
- Regularly assists a proprietor or other exempt administrator only under general supervision or duties that require special training and knowledge.
- Position devotes more than 50% of time to the above activities.
- Position meets the 'Minimum Salary Test' requirement.

5. Outside Sales Exemption

- Primary duty of position is to make sales, obtain orders, or solicit contracts for services.
- The person filling the position is 18 years or older.
- Position usually works outside of office selling items or services.
- Position performs outside sales more than 50% of time.

6. Computer-related Occupational Exemption

- Job titles of position can include: computer programmer, systems analyst, computer systems analysts, applications systems analysts, and systems engineer and systems specialist.
- Position is primarily engaged in intellectual or creative work that requires the exercise of judgment.
- The position is highly skilled and proficient in highly technical applications related to computer systems.
- Position is paid; at least, \$44.63 per hour (may change every year).
- Position is primarily engaged in one of the following:
 - The application of systems analysts techniques.
 - The design, development, documentation, analysis, creation, or otherwise of computer systems.
 - The design, development, documentation, analysis, creation, or otherwise of computer software applications.
- A combination of these duties.

7. Highly Compensated Positions



- Any position that is guaranteed a total annual compensation of \$100,000 or above.
- Position regularly performs functions under exemptions listed above.
- Excluded from this exemption are “blue collar” workers – police, fire, other emergency and the like.
- Total base salary for this position can include base salary, commission, non-discretionary bonuses, and more.
- Total annual compensation can not include:
- Medical insurance payments.
- Life insurance payments.
- 401k pension plan payments.
- Retirement plan contributions.
- Other fringe benefit costs.

NOTE: If you have employees who perform exempt functions part of the time and non-exempt the other part, anytime spent in non-exempt functions must adhere to overtime requirements.

What About Seventh Day Work Rules?

There are requirements on how employers can treat overtime on the seventh day work week, according to A.B. 60. These requirements include:

- Employees must be paid time-and-a-half the regular rate for the first eight hours worked on the *seventh consecutive day worked* in a work week.
- Double time must be paid for all hours worked beyond eight on *any seventh consecutive day of a workweek*.
- Part-time exemption is eliminated. Part-time employees who work on the seventh consecutive day must be paid according to the rules.
- Workweeks must remain constant. If the workweek runs from Monday to Sunday, the seventh workday in the workweek will be Sunday.

Are There General Overtime Rules I Should Follow?

- Only straight time hours apply toward computing overtime hours worked in excess of 40 hours in a week.
- Only work hours actually work count toward computation.
- An employee’s regular pay rate is used for overtime calculations.

Which Work Order Applies to My Company?



California employers are subject to both state and federal wage and hour laws. Typically, whichever law is more favorable to the employee will prevail. In California, there are 17 wage orders that may apply to your company.

Wage Orders set forth information such as the minimum wage, hours, overtime requirements and limitations, and meals/rest periods. Employers are generally classified by the main function/purpose of the company. To comply, it is very important to determine the appropriate Wage Order that is applicable to your company. However, determining the correct Order can be difficult and costly if mistakes are made. Any Wage Order determination should be made with your company's legal counsel to ensure you are in full compliance of all laws and orders.

General Recommendations

- Have a detailed job description in the employee manual that outlines the status of the position, its functions, and other pertinent information.
- Keep detailed written time records for all employees, exempt or non-exempt.
- Pay for all overtime worked, as required by applicable IWC regulations.
- Post the required IWC Order that pertains to your industry.

||| Case Law Review |||

California Case Law Review

None to report.

Non-California Case Law Review

Summary Judgment Denied - Gasoline Dealers Covered by Indiana Acts Fee Exception:

Ayers v. Marathon Ashland Petroleum, LLC

In a decision made by a federal district court in Indianapolis, a group of gasoline dealers could proceed with their claims against an oil company and its subsidiary for unfair competition and unfairly discriminating against its franchisees – a violation of the Indiana Deceptive Franchise Practices Act. The oil company and its subsidiary's request for summary judgment was denied because there were questions of fact over whether the dealers satisfied the Act's definition of "franchise" by operating under a marketing plan or system prescribed by the oil company and its



subsidiary. The subsequent claim by the dealers of unfair competition was time-barred by the Act's two-year statute of limitations.

The summary judgment was denied, in part, because the oil company failed to show that the dealers were not "franchises" under the meaning of the Act. The oil company contended that the dealers did not pay a franchise fee to the company and the Act's exception to the franchise fee requirement did not apply. The court determined that the language of the Act, pertaining to the exception, was ambiguous in nature and not clear whether the Indiana legislature intended for the exception to apply only to those who sold both motor vehicles and fuel. One interpretation, according to the court, was that only businesses selling both were relieved of the franchise fee requirement. However, the court determined that interpretation in this manner would be absurd, because the exception would be applied so narrowly that no business would receive the exception. The court ruled that the legislature must have meant for the exception to apply to both motor vehicle dealers and gasoline dealers. Therefore, because it was undisputed that the dealers were engaged in the sale of gasoline, there were covered by the exception.

The oil company further disputed the fact that the dealers were "franchises" because they did not have adequate control over the dealers' marketing plans or systems for the parties' agreement to constitute "franchises." The act itself does not provide for a list of factors to use in determining if the control was sufficient over the marketing plans or system to constitute a "franchise." The Indiana Court of Appeals, in Master Abrasives Corp. v. Williams, did provide guidance by listing five factors to consider making the determination. These five factors included: (1) it divided the state into marketing areas, (2) it authorized the establishment of sales quotas, (3) it gave the franchisor approval rights for any sales personnel hired by the franchisee, (4) it established mandatory training for the franchisee's sales personnel, and (5) it required the franchisee to elicit information from customers regarding how they would use the products so that the franchisor could determine which products to sell.

According to the district court, the five factors presented did not constitute an exhaustive test. Rather, a court would need to examine the nature of the obligations that an agreement imposed on a putative franchisee. In particular, the nature of the mandates regarding the sales of goods or services put forth by the franchisor. The dealers argued that most were required to pay rent based on sales volume. The court held that a reasonable jury could view the oil company's policy of correlating rent to sales volume as a *de facto* sales quota. The dealers also argued that other applicable company mandates included: (1) gasoline station owners were required to travel to Indianapolis for company training if they had no previous experience, (2) the oil company conducted quarterly mystery shop programs to assess the performance of the service stations, and (3) the oil company mandated operating hours for its service stations. Given the five factors and the dealers' arguments, it is reasonable to determine the dealers operated under a marketing plan and system prescribed by the oil company, the court determined.

The last claim of the dealers regarding unfair competition on the part of the oil company, was time-barred, the court determined. The dealers filed their lawsuit on October 28, 2003, and each knew of the possibility of unfair competition prior to October 28, 2001. The court determined



that under the continuing wrong doctrine, the statute of limitations continued to run if the plaintiff learned the facts that should lead to discovery of a cause of action.

Report-Letter, Business Franchise Guide, Letter No. 313, CCH (www.business.cch.com/network)

Motor Vehicle Dealers' Claims of Violations to the Indiana Deceptive Franchise Act Time-Barred:

Kahlo Jeep Chrysler Dodge v. DaimlerChrysler Motors, Co.

An Indian appellate court has decided that a group of motor vehicle dealer cause of action against a manufacturer for violation of the Indiana Deceptive Franchise Practices Act was time-barred by the Act's two-year statute of limitations. The dealers contended that the manufacturer violated the act by including a provision in their franchise agreements that permitted them to amend the arguments unilaterally.

In May 2004 the manufacturer gave notice to its dealers within the United States of an amendment to the franchise agreement concerning dealer sales performance requirements. In June 2004, the dealers filed suit claiming the amendment violated the Act. The Act's statute of limitations is an occurrence-based statute that began to run with any violation, not when a franchisee suffered injury due to the franchisor's actions. According to the court, because all of the dealers' franchise agreements had been executed more than two years before the suit was filed, their complaints were time-barred.

In addition, the dealers argued that even though the agreements reserved the right of the manufacturer to unilaterally amend the agreement at any time, it was not feasible to determine whether the modification provision permitted "substantial" modification as prohibited by the Act until the manufacturer actually attempted a "substantial" modification. The court rejected this argument stating that the modification provision in the franchise agreements permitted the manufacturer to make any modification to the agreement so long as it did so unilaterally.

Report-Letter, Business Franchise Guide, Letter No. 313, CCH (www.business.cch.com/network)

Illinois Dealer Law Deemed Not Unconstitutional:

General Motors v. Illinois Motor Vehicle Review Bd.

An Illinois appellate court ruled that the Illinois motor vehicle dealer law was not unconstitutional on any of the grounds contended by a manufacturer and dealer. The complaint challenged the constitutionality based on due process, the Commerce Clause, the Sherman Act, and the Illinois constitution's prohibition of special legislation.



The court ruled that the Illinois motor vehicles dealer law's "good cause" standard was not unconstitutionally vague – a violation of due process. The complaint filed did not cite any cases where a "good cause" standard was determined to be unconstitutionally vague. Further, the court reasoned that the dealer law went beyond other laws which had been found to not be unconstitutionally vague. Additionally, the dealer law did not violate due process simply because it failed to provide a prompt post-deprivation hearing. The court reasoned that even if due process required a hearing, the manufacturer and dealer failed to cite any cases in which a court found a statute facially unconstitutional because it did not provide for a prompt post-suspension hearing. Lastly, the court held that the complaint failed to demonstrate a constitutional violation of due process based on the facts of the case.

With regards to the Commerce Clause, the court deemed the dealer law did not place an excessive burden on interstate commerce. As previously recognized by the U.S. Supreme Court, where a statute regulated evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce were incidental, it should be upheld, unless the burden imposed on such commerce was clearly excessive in relation to the putative local benefits. The manufacturer and the dealer failed to demonstrate that the statute had any other effect beyond only a restriction on interurban competition. Thus, the dealer law did not place an excessive burden on interstate commerce.

The court also ruled that the dealer law did not violate the Sherman Act because the manufacturer and dealer failed to distinguish the present circumstances from a case in which the U.S. Supreme Court rejected an argument that the California motor vehicle dealer law barred by the Sherman Act in New Motor Vehicle Board of California v. Orrin W. Fox Co.. In *New Motor*, the Supreme Court ruled that the California law fell under the Sherman Act's state-action exemption.

The special-legislation clause of the Illinois Constitution prohibited the legislature from conferring special rights, privileges, or immunity, or imposing a specific burden on a specified portion of the population to the exclusion of others who were similarly situated. The complaint attacking the statute's validity was required to demonstrate the classification's unreasonableness or arbitrariness. By prohibiting the addition of new franchises when good cause did not exist, the dealer law protected the equities of existing dealers. Accordingly, the manufacturer and the dealer failed to satisfy the burden of proving that the classification was unreasonable.

Report-Letter, Business Franchise Guide, Letter No. 313, CCH (www.business.cch.com/network)

Refusal to Grant Dealer Approve Not Antitrust Violation:

Care Heating & Cooling, Inc. v. American Standard, Inc.

The U.S. Court of Appeals in Cincinnati has decided that an agreement between a heating and cooling equipment manufacturer and its authorized dealer to not approve a competing dealer as an authorized dealer did not violate the Sherman Antitrust Act or the Ohio Antitrust statute. The



complaint argued that the agreement between the manufacturer and authorized dealer should be considered a *per se* violation of the antitrust laws due to its destruction on free competition, without providing any redeeming benefit, that its legality should be presumed. According to the court, the agreement satisfied the test for vertical restraint on trade and was *per se* legal because a manufacturer had a right to select its customers and refuse to sell its goods to anyone, for reasons sufficient to itself. Because it was a vertical restraint, the complainant was required to establish the unreasonableness of the alleged trade restraint under the rule of reason. The complaint failed to satisfy the rule of reason test, the court ruled.

The court also noted that the complaint failed to establish adverse effects on the market as a whole. The Sherman Act was read narrowly to prohibit only unreasonable restraints on trade, the court observed. Because protecting competition was the *sine qua non* of the antitrust laws a complaint alleging only adverse affects suffered by an individual competitor could not establish an antitrust injury.

Report-Letter, Business Franchise Guide, Letter No. 312, CCH

U.S. Supreme Court

U.S. Supreme Court Hears Price Discrimination Claims:

Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc. Dkt. No. 04-905

The U.S. Supreme Court heard price discrimination claims by a group of dealers who claim heavy-duty truck manufacturer Volvo violated the Robinson-Patman Act by charging one dealer lower wholesale prices than another dealer when there was no evidence that the dealers were competing for the same customers. Arguments were heard on October 31. The decision at issue, by the U.S. Court of Appeals in St. Louis, upheld a jury verdict in favor of a complaining dealer of heavy commercial trucks, which bid for the trucks in a competitive bidding process common in the industry.

The complaining dealer presented evidence that it had lost a specific sale to another Volvo dealer that was given a larger discount by the manufacturer. Volvo's discriminatory pricing policy resulted in a dramatic loss of business and the eventual loss of the complaining dealer's Volvo franchise. It is likely the case will hinge on the central issue of how Volvo supplied vehicles to dealers – specifically, the fact that the dealers did not keep inventory in stock for sale to customers. Volvo's lawyer argued that courts have laid down the rule that at least two purchases are needed to violate the Robinson-Patman Act. When dealers, such as the complaining dealer, received unfavorable price concessions from Volvo, they did not make a sale to a customer and therefore did not purchase a vehicle from Volvo for resale – mere offers did not violate the Act.

Report-Letter, Business Franchise Guide, Letter No. 312, CCH



Injunctive Relief

Non-compete Agreement

KJ Loughery, Inc. v. KRK, Inc.

A home inspection business franchisor was entitled to a preliminary injunction enforcing the terms of a restrictive covenant in its agreement with a former franchisee. The franchisee was previously enjoined from operating a home inspection business for the period of two years in Delaware County, Pennsylvania, and any adjacent county. He was also enjoined from continuing to use his presently utilized form for home inspections.

The injunctive relief was granted because the franchisor was likely to succeed in demonstrating that the franchisee knowingly breached the agreement by ceasing operation of the franchise and, following termination, continuing to utilize the benefits of the agreement. The franchisor would be irreparably harmed if the franchisee's actions continued and the restrictive covenant in the agreement was not enforced. As well, the business interest and public interest was larger than the inconvenience to the franchisee that would be caused by enforcing the restrictive covenant.

Report-Letter, Business Franchise Guide, Letter No. 312, CCH

Likelihood of Success

Brighton Optical, Inc. v. Vision Service Plan, Inc.

A federal district court denied a motion for a preliminary injunction enjoining the termination of their membership in a vision insurance plan and the optometrists proceeded with an interlocutory appeal. According to the court, the optometrists only demonstrated a possibility of success on the merits of their claims and the dispute was not a "rarest of cases" requiring a reversal of the federal district court's balancing of equities. In addition to their motion for injunctive relief, the optometrists alleged that the administrator violated their right to due process by terminating them arbitrarily, breached their agreements, attempted monopolization in violation of the Sherman Act, and violated the Michigan antitrust laws.

Report-Letter, Business Franchise Guide, Letter No. 312, CCH

Permanent Relief

Planet Smoothie Franchises, LLC v. Massey

A smoothie franchisor terminated the parties' agreement and brought suit against the franchisees and two limited liability companies after they failed to satisfy their obligations under the agreement. The terminated franchisee and LLCs were held jointly and severally liable for



\$50,000 to the franchisor and were permanently enjoined from using the franchisor's trademarks or confusingly similar trademarks on smoothie products and from causing any products with the franchisor's trademarks from entering commerce.

Additionally, the franchisee and the companies were 'permanently enjoined from: (1) representing that they or their business operations were connected with the franchisor; (2) using any trade dress logos, or other commercial symbols associated with the franchisor's marks, and from operating a smoothie business on any premises using décor in the color purple, except that they could continue to use the purple countertops currently in use at their business; (3) using or adopting any manuals or materials delivered to them by the franchisor; and (4) making any statement about the franchisor apart from "We were a franchisee of Planet Smoothie and that relationship has ended."

Report-Letter, Business Franchise Guide, Letter No. 312, CCH

Liquidated Damages

Enforceability

Days Inn Worldwide v. Mandir, Inc.

A provision in a hotel franchise agreement which required a franchisee to pay the franchisor \$200,000 in the event of the franchisee's breach was determined to be reasonable and enforceable. The actual damages that would be incurred with a breach are impossible to determine at the time of execution and the amount was not disproportionately large to the amount of damages anticipated to result from the agreement's early termination. In fact, several factors are highly unpredictable making the amount a reasonable estimation of potential losses.

Report-Letter, Business Franchise Guide, Letter No. 312, CCH

Trademark Infringement

Lanham Act

Ramada Franchise Systems, Inc. v. Bridgeton, Inc.

A hotel franchisee violated the Lanham Act by continuing to display a franchisor's trademarks without the franchisor's consent after the termination of their franchise agreement. The franchisor terminated the agreement in April of 2003 for the franchisee's failure to pay the amounts due under the franchise agreement. The franchisee did remove some of the trademarks being used, but continued to the franchisor's trademarks until they eventually closed in October



of 2004. The franchisee's unauthorized use of the marks was clearly likely to cause confusion as to the hotel's association with the franchisor.

Report-Letter, Business Franchise Guide, Letter No. 312, CCH

Non-compete Agreement

Post-Termination Duties

O.J. Distributing, Inc. v. Hornell Brewing Co.

The issue of material fact over whether a beverage distributor breached its agreement with a manufacturer by failing to comply with the agreement's post-termination provision following the manufacturer's termination of the agreement. The manufacturer claimed that the distributor failed to provide it with sales and customer information, as required by their agreement, and although the distributor eventually supplied the information, it was not "immediately" in accordance with the agreement. The court did not agree with the manufacturer and denied the claim.

Report-Letter, Business Franchise Guide, Letter No. 312, CCH

Arbitration Awards

Arbitrator Partiality

Doctor's Associates, Inc. v. Dhalwal

A court denied the motion of a sandwich shop franchisee to vacate an arbitration award in favor of the franchisor on the grounds the arbitrator failed to disclose the nature of prior dealings with the franchisor. The franchisee made the conclusory assertion that the "evidence will demonstrate that this disclosure was incomplete and inaccurate." The franchisee failed to show the extent of the disclosure and why it only became an issue after the award was made. The court reasoned that failure to provide evidence left the franchisee's claims unlikely and the award could not have been made in an impartial manner.

Report-Letter, Business Franchise Guide, Letter No. 312, CCH

Procedure

First-Filed Rule

Valpak Direct Marketing Systems, Inc. v. Valpak of Cincinnati, Inc.



A franchisor of direct mail advertising businesses' action for a declaratory judgment determining the rights and liabilities of itself and a franchisee of five units was stayed pursuant to the first-filed rule. The parties' dispute concerned the franchisee's proposed ownership transfer notice. The franchisor filed an action 14 minutes before the franchisee, in different courts. The court determined that the first-filed rule applied, when parties filed competing or parallel claims in separate federal courts, the court in which the case was first filed should hear the case.

Report-Letter, Business Franchise Guide, Letter No. 312, CCH

Common Law - Fraud

Sufficiency of Pleading

John Deere construction and Forestry Co. v. Mahnen Machinery, Inc.

A construction equipment dealer's counterclaim against a manufacturer for fraud was sufficiently pled to survive the manufacturer's motion to dismiss. The court reasoned that although fraud claims are subject to more stringent standards than other claims, that standard applied to the facts surrounding the fraudulent statement, not the reasonableness of the complaining party's reliance on those statements. Further development of the facts surrounding the dealer's fraud claim should be sought in discovery.

Report-Letter, Business Franchise Guide, Letter No. 312, CCH

Antitrust Law

Distributor Termination

Campbell v. Austin Air Systems, Ltd.

A distributor of air cleaners did not adequately allege a concerted action between a manufacturer of air cleaners and its other distributors in support of his claim that the manufacturer violated the Sherman Act. According to the federal district court in New York, the manufacturer was entitled to summary judgment on the distributor's claim. The court determined, construing the evidence in a light most favorable to the complaining distributor, there was no direct or circumstantial evidence that tended to prove the claim made. It was unlikely the manufacturer and the competing distributors shared a conscious commitment to a common scheme designed to fix prices.

Report-Letter, Business Franchise Guide, Letter No. 312, CCH

Contract Interpretation



Agreement to Agree

Kosher Provisions v. Blue & White Food Prod., Corp.

A federal district court in New York City has concluded that a kosher food products manufacturer did not breach a 2002 security agreement promising to use commercially reasonable efforts to conclude a distribution agreement with the distributor. The court reasoned that in no way did the agreement

S language suggests that the manufacturer was required to offer the distributor a distribution agreement; it reflected only an agreement to agree, binding the parties in good faith negotiations. Also, the court concluded that any resulting agreement be “mutually acceptable” also provided an “unmistakable” indication that the manufacturer did not intend for either party to be bound by the agreement.

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