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Employment Law Alert®

Legal developments affecting human resource management

A publication of Nixon Peabody LLP

ISSUE 113 • MARCH 2005

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NIXON PEABODY LLP
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EEO

Employer Can Require Employee To Remove Facial Jewelry Despite Her Religious Objections

Many businesses have dress and grooming codes, particularly for employees who deal directly with customers. These companies strongly believe the workforce they present to their customers must convey a neat, clean and professional image. Enforcing corporate dress and grooming codes, as any personnel director will tell you, is a never-ending battle between corporate image conformity and employees' highly individualized style and fashion preferences. Add to this mix employees who seek special exemptions on religious or other grounds covered by Title VII and embattled personnel directors become not only fashion police but also potential discrimination action defendants.

The employee who does not want to follow the corporate dress and grooming code can be a formidable opponent. Kimberly Cloutier began working for Costco in West Springfield, Massachusetts in July 1997. Although Kimberly had eleven earrings (and four tattoos on her upper arms), she raised no concerns until she was transferred to Costco's deli department, and Costco, in 1998, revised its dress code to prohibit food handlers including deli employees from wearing facial jewelry. Kimberly refused to remove her earrings and asked to be transferred to the front of the store where the no-jewelry rule did not apply. Costco approved this transfer and soon thereafter promoted Kimberly to cashier.

Styles (and Kimberly) changed. She added eyebrow piercing and cutting without objections. Then, in March 2001, Costco once again revised its dress code prohibiting all facial jewelry, except earrings, store-wide. Kimberly continued wearing her eyebrow piercing until June 2001 when Costco began to enforce its new policy. Kimberly and a coworker, Jennifer Theriaque, were told to remove their facial piercings. This time Kimberly responded that she had joined the Church of Body Modification (CBM) and eyebrow piercing was part of her new religion. Jennifer, also a CBM member, asked Costco if she could wear clear plastic retainers in place of her jewelry to prevent the piercings from closing. Costco finally agreed.

Kimberly, then 27 years old, met with Costco to explain her religious objection. CBM, formed in 1999 with over 1,000 members, asks members to be "confident role models" in learning, teaching and especially displaying body modifications (see www.uscobm.com). Kimberly interpreted the

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CBM teaching to be a confident role model for body modification as requiring her eyebrow piercings to remain visible at all times. However, she did not take that position in June 2001 and instead suggested to the store manager that she be allowed to cover up her eyebrow piercings with a flesh-colored band-aid. She had been covering her four upper arm tattoos with a shirt. This suggestion was rejected by the manager. He told Kimberly she had to go home if she wouldn't remove her eyebrow piercings.

During an EEOC mediation session less than a month after Kimberly's termination, Costco offered to let Kimberly return to work if she either wore a plastic retainer (as Jennifer was doing) or covered her jewelry with a band-aid (the identical suggestion Kimberly herself had made). Kimberly now took a hard line, announcing the only accommodation she would accept was a blanket exemption from Costco's no-facial-jewelry policy. Anything else, she said, would require her to compromise her religious convictions.

The EEOC ruled in Kimberly's favor and Kimberly went to court seeking $2,000,000 in damages. The district judge granted summary judgment to Costco on the ground that its post-termination accommodation offer at the EEOC mediation session was a reasonable accommodation. When the case reached the First Circuit (Boston), that court was reluctant to hold that an accommodation offered after an adverse employment action shielded Costco from Title VII liability as the district court had held. Instead of deciding that interesting question (the alternative is that the offer is relevant only to mitigate damages), the First Circuit sustained Costco's summary judgment victory on a totally different ground; namely, that the only accommodation Kimberly would finally accept (the blanket exemption from the Costco policy) "would impose an undue hardship on Costco."

Employer dress and grooming policies are frequently upheld against Title VII attacks. Courts view these minimally-intrusive policies as affecting basic employment only slightly since accommodations are usually available and employees with serious personal objections can always go to work for employers with different policies. Also, Kimberly's religious objection brought the Supreme Court's 1977 *TWA v. Hardison* decision, 432 U.S. 63, into play. Unlike other discrimination statutes, under Title VII an employer can demonstrate "undue hardship" to overcome a religious objection by a simple showing that the employee's proposed accommodation imposes more than a de minimis cost. The First Circuit quickly held that Kimberly's insistence on a personal blanket exemption from Costco's no-facial-jewelry policy would indeed compromise the integrity of that policy, *Cloutier v. Costco,* 2004 U.S. App. LEXIS 24763 (December 1, 2004).

Employers will welcome the First Circuit's broad language upholding Costco's policy. The court stated:

> It is axiomatic that, for better or for worse, employees reflect on employers. This is particularly true of employees who regularly interact with customers as [Kimberly] did in her cashier position. Even if [Kimberly] did not regularly receive any complaints about her appearance, her facial jewelry influenced Costco's public image and, in Costco's calculation, detracted from its professionalism.

The court recognized that many employers adopt personal appearance standards to protect and promote their all-important "public image."

In different circumstances, customer preferences could not influence employer conduct. In these dress and grooming cases, however, employers can lawfully presume that their customers prefer to deal with neat, clean and professional-looking employees and enforce neutral dress and grooming policies to that end. To quote the First Circuit in *Cloutier* once again:

> We are faced with the similar situation of an employee who will accept no accommodation short of an outright exemption from a neutral dress code. Granting such an exemption would be an undue hardship because it would adversely affect the employer's public image. Costco has made a determination that facial piercings, aside from earrings, detract from the 'neat, clean and professional image' that it aims to cultivate. Such a business determination is within its discretion.

Kimberly's hard-line blanket exemption stand based on her religious beliefs set up a classic confrontation that resulted in a unanimous victory for her employer and its public image. Yes, Costco missed a golden opportunity to avoid four years of litigation when its store manager rejected Kimberly's initial band-aid accommodation but the case, for employers at least, had a very happy ending.

Ninth Circuit Blocks Employer Inquiries into Employees' Immigration Status

When lawsuits are filed, parties usually engage in pre-trial discovery seeking information about the other party's claims and defenses. The information gleaned through discovery can position a lawsuit for a dispositive motion, and often helps the parties reach settlements.

The Ninth Circuit surprised employers when it upheld a lower court's protective order prohibiting an employer from asking immigration status questions. During depositions of twenty-three former employees bringing national origin discrimination claims, the employer, NIBCO, asked the former employees where they were born. The twenty-three Latina and Southeast Asian female employees worked at NIBCO's Fresno, California factory. They alleged NIBCO required them to take job skills tests in English although their jobs did not require proficiency in English and then demoted, transferred and eventually fired them when they scored poorly on those tests. Their national origin, Title VII and California state law claims sought either reinstatement or front pay in lieu of reinstatement.

NIBCO asked one plaintiff during her deposition where she was born and where she was married. Her attorney directed her to state only that she was of Mexican ancestry and ordered her not to answer further questions about her immigration status. Her lawyer then obtained a protective order from the district court arguing that (1) NIBCO had an opportunity to verify the plaintiffs' immigration status when they were hired and (2) NIBCO's questions, if allowed, would have a chilling effect on employees asserting workplace rights. The district court disallowed NIBCO's "where were you born" question. It allowed NIBCO to ask the plaintiffs where they were married, their date of birth, their educational background, and about current or past employers. The court ordered that the plaintiffs' answers to those allowable questions be placed under seal and available only to the parties and their attorneys.

NIBCO objected. It argued the immigration status questions were certainly relevant in a national origin discrimination case especially as to the plaintiffs' possible remedies. In 2002, the Supreme Court held that the NLRB could not award back pay to undocumented workers even though they may have been discriminated against in violation of the National Labor Relations Act, *Hoffman Plastics Compounds Inc. v. NLRB,* 535 U.S. 137. The "after-acquired evidence" rule similarly limits employee remedies once an employer gains knowledge of a limiting event.

NIBCO appealed to the Ninth Circuit. In April 2004, a panel of that court in an opinion written by liberal Circuit Judge Stephen Reinhardt, affirmed the district court's protective order, 364 F.3d 1057. The panel conceded that the prohibited immigration status questions could conceivably limit the plaintiffs' damages. However, the panel held NIBCO had no right to use the discovery process to obtain that information.

The panel stuck to its guns even after NIBCO proposed that the plaintiffs' answers to the immigration status questions similarly be placed under seal and restricted to the parties and their counsel. The panel noted the plaintiffs' counsel's proposed stipulation that no back pay would be sought for any undocumented plaintiffs. Counsel for plaintiffs also proposed that the lawsuit be bifurcated (i.e., separated into liability and damage phases) with immigration status and other "damage" questions deferred to the damages phase provided liability was found. While the panel did not rule on that bifurcation proposal, it called it "a good idea."

The Ninth Circuit panel was concerned that disclosure of the plaintiffs' immigration status would render any undocumented plaintiff subject to immediate criminal prosecution and possible deportation. Like the district court, the panel held that requiring answers to immigration status questions would deter the plaintiffs and future plaintiffs as well from bringing meritorious claims. The panel also questioned whether *Hoffman Plastics* applied in Title VII cases and distinguished those cases from NLRB proceedings. This was more than an "open" question as the panel, in dicta, stated it was "unlikely" that *Hoffman Plastics* would be extended beyond the NLRA to apply to Title VII cases. Finally, the panel questioned whether the "after acquired evidence" rule would apply since NIBCO had an opportunity to verify the plaintiffs' immigration status when they were hired and also had not shown it had an existing practice of firing employees it discovered were undocumented.

NIBCO sought rehearing. This produced another surprise. While rehearing was denied, four circuit judges took the highly unusual step of filing a strong dissent, 384 F.3d 822 (September 20, 2004). They protested that the plaintiffs' place of birth was certainly relevant since national origin under Title VII is either the country where a person is born or, more broadly, the country from which her or his ancestors came.

There is a lot to criticize in the Ninth Circuit's ruling. NIBCO's immigration status questions were unquestionably potentially relevant or likely to lead to relevant evidence, the liberal test that applies during pre-trial discovery. Under either *Hoffman Plastics* or the after-acquired evidence rule, those questions are directly relevant to potential damages.

This is, as the four dissenters argued so forcefully, a terrible pre-trial discovery ruling. The protective order should, at best, have protected the plaintiffs' answers rather than prohibiting this employer from asking relevant questions. Courts other than the Ninth Circuit will now have an opportunity to take sides in this surprising debate.

Labor Relations

Employer Plant Closing Threats—Another NLRB Policy Reversal

When the Democrats surrendered the White House to George W. Bush after the 2000 elections, they gave the incoming Republican administration the right to appoint a majority of the members of the National Labor Relations Board. That new Republican majority has, in turn, overruled many precedents established by the previous Clinton Board. Non-union workers lost Weingarten rights. Graduate student assistants once again became students rather than employees protected by the Act. Temporary agency employees jointly employed by a temporary agency and a user employer no longer can share a single bargaining unit without consent by both employers.

On November 29, 2004, the Republican majority overruled yet another Clinton Board precedent, the September 2000 decision in *Springs Industries, Inc.* 332 NLRB 40. By the now-familiar 3-to-2 vote, the Republican majority held an employer's threat to close its plant if the union won a pending election will not be presumed disseminated throughout the bargaining unit, *Crown Bolt, Inc.,* 343 NLRB No. 86. The employer threat remains unlawful under Section 8 (a) (1) but, absent proof by the union that lost the election that this threat was actually disseminated, the employer's election victory will not be set aside. The new *Crown Bolt* rule removes a presumption of dissemination that employers could defeat only by producing employees who did not hear the threat.

Teamsters Local 848 lost an April 2000 election at Crown Bolt's Cerritos, California plant by 182 to 148. Local 848's objections to this election were all dismissed except for a March 2000 conversation between the plant manager and a warehouse employee. According to the employee, the plant manager said the company's owner would close and move the plant when the company's lease expired if the union won the election. The warehouse employee told two other co-workers, one a union organizer, about this threat. He didn't tell anyone else and there was no proof the other two employees told anyone either. Thus, the proof was that, at best, three of the plant's 330 bargaining unit employees heard the plant manager's threat. As noted, the union lost this election by thirty-four votes.

The ALJ set aside Crown Bolt's election victory because, a few months earlier, the Clinton Board had decided *Springs Industries* holding that an employer's plant closing threat would be presumed disseminated to the entire voting unit. Although the 2004 Republican Board has now overruled *Springs,* it departed from its usual rule of applying policy reversals retroactively and announced the no-presumption *Crown Bolt* rule would apply only prospectively. This meant Crown Bolt's election victory was judged under the now-overruled *Springs* rule. A new election was directed over four years after the original election.

Under the new no-presumption *Crown Bolt* rule, the union objecting to the election has the burden of proving the employer's plant closing threat was disseminated widely enough to have impacted the election results. If the union cannot marshal that proof, it loses. The overruled *Springs* rule gave the losing union the benefit of a presumption of dissemination and required the employer to prove a negative, i.e., that the plant closing threat was either not disseminated or not disseminated widely enough to have affected the election.

The losing union's new production burden is a heavy one. Consider the *Springs* facts. Three different supervisors each made plant closure threats to three different employees and one of those employees testified she told "everyone" about the threat during the next work break. The *Springs* Board vacated the employer's election victory (305 to 219) utilizing the now-overruled presumption of dissemination. Board Member Wilma Liebman was part of the 3-to-1 Board majority in *Springs* and, four years later, was part of the two-person dissent in *Crown Bolt.*

Springs itself overruled the Board's prior no-presumption rule established in *Kokomo Tube Company,* 280 NLRB 357 (1986). In that case, a supervisor told two unit employees in separate conversations one month before the election: "I guarantee Kokomo will shut down if the union comes in." The employer won the resulting election 40 to 35, a five-vote margin. There were two challenged ballots that were never counted. One more vote for the union could have changed the election result. However, the 2004 no-presumption rule of *Crown Bolt* was then in effect as well and that employer election victory stood.

The dissemination presumption never made much sense other than as a means of giving the losing union a second chance in a rerun election. After all, as former Board Chair Peter Hurtgen stated in his *Springs* dissent, if it is "all but inevitable" that a plant closure threat will indeed spread widely throughout the voting unit the union should have little difficulty producing employees who would so testify.

Personnel Law

Another Trap for the Unwary in Non-Competes

An executive recruiter calls upon your company representing a former executive of a competitor who left the competitor six months ago. The meetings go well, you decide this executive will likely be an asset to your company, and you decide to hire him. You now discover he had an employment agreement at his former job, and it has a number of covenants severely restricting his future employment, including contact with suppliers, vendors and his former fellow employees.

You seek counsel experienced with the enforceability of these agreements to provide an analysis regarding applicable state law regarding the reasonableness of the restrictions in time, place and space. You expect you will have to make a risk/reward decision once you are given the advice, knowing that enforceability of these convenants is fundamentally an equitable decision made by judges who bring their own sense of fair play to arrive at a result, and then find applicable precedent to support it.

But wait! Your counsel starts asking you some questions about the circumstances of the executive's departure from the former employer. You discover that he was terminated "without cause," and in support of that, his former employer just completed paying him a six-month severance payment in accord with the terms of his agreement covering terminations without cause.

Now, the former employer gets wind that you want to hire the executive, and retains a large and distinguished law firm, which sends you a detailed letter threatening to sue your company and the executive if he is hired. This development naturally gives you some pause.

But, wait again! Your own experienced counsel tells you under the applicable law in New York, you can tell the former employer's law firm to get lost (actually your counsel will do this for you using an emphatic, yet professional approach).

Under these facts, the former employer can forget about enforcement of the restrictive covenants. New York courts consistently apply a per se rule that termination without cause destroys the mutuality necessary to support such restrictions. Ergo, these post-employment restrictions are unenforceable. The former employer's counsel either was unaware of the circumstances of the termination, or unaware of the per se rule. Or perhaps he felt a threatening letter would simply chill the hire of the employee. Or perhaps he felt that the new employer's counsel was unaware of the per se rule. In any event, if he goes to court in New York State, he loses.

Courts have essentially taken three approaches to the enforceability of restrictive covenants in discharge cases (see "You're Fired! And Don't Forget Your Non-Compete . . ." Kenneth Vanko, 1 *De Paul Business & Commercial L.J.* (2002)).

The first approach, and in the minority, is the New York per se rule. A second approach, representing the majority position, adopts a middle ground. Rather than creating a per se rule in favor of either an employee or employer, these courts require a "plus factor" to determine enforceability. In true equitable fashion (for these courts do "sit in equity"), they examine the nature of the employer's conduct in effectuating the termination. In Pennsylvania, for instance, a non-compete is presumptively invalid in a termination case, but can be enforced in certain circumstances. In other states, such as Minnesota, Massachusetts and Texas, courts are concerned as to whether the termination was conducted arbitrarily or in bad faith. Still other states, such as South Dakota and Missouri, give the trial judge the discretion to consider the involuntary nature of the discharge through a flexible balancing of the equities approach.

The third and final analysis, which only the Florida courts have adopted thus far, is decidedly pro-employer and holds that a court cannot consider an involuntary termination in determining the enforceability of a non-compete clause.

In sum, the lessons in these cases are that they are controlled by state law. Judges generally impose their sense of fundamental fairness in arriving at a decision (except when there is a per se rule as in New York), and then find the state law precedent to support it.

The All-Important Reason for an Employee's Termination

Stating the reason for an employee's termination requires care and attention. If the reason stated turns out to be wrong or incomplete, the employer faces a possible pretext finding. The stated reason may also have unintended adverse consequences under non-compete, severance or stock option agreements. Additionally, the stated reason is certain to anger a terminated employee who disagrees and plans to contest that conclusion before agencies and/or the courts.

Jimmie Small was angry and unemployed after Quincy Travelodge fired him. He applied for unemployment benefits and congratulated himself on defeating the company's effort to deny him those benefits through their "false" statement that he was fired for harassing other employees. A few years later, Jimmie brought a discrimination claim (ultimately dismissed) against his former employer. He became very angry after the employer's attorneys submitted another copy of the employer's response to the Illinois unemployment bureau containing the same "false" accusation.

Jimmie, acting as his own attorney, filed a new lawsuit claiming the company attorneys' submission of this false unemployment response form (1) violated his constitutional rights to privacy and free speech and (2) was unlawful retaliation under Title VII, ADEA and ADA. Jimmie's theory was that the company was brandishing this false form only because it was upset that he had obtained unemployment benefits over its objections.

Jimmie, as we said, was very angry. He sued the company, a company executive, the company's outside law firm and the attorney at that firm who submitted the "false" unemployment form. His retaliation claims were dismissed for two reasons. First, retaliation claims cannot be brought against individual executives and agents of the employer, such as the company's outside lawyers. Second, retaliation claims under Title VII, the ADEA and the ADA can only be brought by individuals opposing or complaining about discrimination under these laws. "Successfully applying for unemployment benefits," the Seventh Circuit held, "is not an activity protected" under those laws, *Small v. WW Lodging Inc.,* 2004 U.S. App. LEXIS 15974 (7th Cir., July 29, 2004).

Angry employees bring lawsuits. Those are costly even if, as here, the employer wins. One wonders if Jimmie would have been as angry (and litigious) if the employer's stated reason for termination had been the less provocative "inappropriate conduct" instead of "harassment."

Picking Up The Pieces After a Botched Background Check

Background checks are very common in our security-conscious society. Mistakes still occur, however, and when they do the wronged applicant can end up suing both the prospective employer and the agency it hired to conduct the flawed background check.

Derek Wilson was a happy man. He had just been offered a job as relocation counselor by Prudential Financial. Prudential's offer letter said Derek's offer was contingent on a background check. Prudential hired the CARCO Group, which reported Derek had a "pending" criminal matter in Oklahoma. Prudential sent Derek a copy of the CARCO report, as the Fair Credit Reporting Act requires, and a second letter denying him employment. Derek contacted Oklahoma authorities himself. He confirmed that he had a clean record. Derek also learned CARCO apparently confused him with other "Derek" and "Derrick" Wilsons with pending criminal matters in Oklahoma.

Derek sent his clean report to CARCO which, in turn, sent Prudential an amended report confirming what Derek had discovered. Prudential promptly acknowledged receipt of the new clean report and told Derek they would contact him when a suitable position became available. Not satisfied with this response, Derek sued both Prudential (breach of contract) and CARCO (negligence and defamation).

Derek's breach of contract claim against his prospective employer, Prudential, foundered because he was offered an at-will position. The law in the District of Columbia and in many other jurisdictions is that, in general, an employer can freely retract an offer of at-will employment any time before that employment begins. Since the employer could terminate the at-will employment minutes after it began for any reason or even for no reason, applicants for at-will positions do not have a remedy in contract for lost wages.

CARCO did not escape as easily. Derek's FCRA claim was dismissed because he had not alleged malice or willful intent. Such allegations are necessary to defeat the qualified immunity credit reporting agencies enjoy under FCRA. Derek's defamation claim against CARCO was also dismissed on statute of limitations grounds. Derek's remaining negligence claim survived CARCO's dismissal and summary judgment motions, *Wilson v. Prudential Financial,* 2004 U.S. Dist. LEXIS 21786 (D.D.C., October 18, 2004).

Privacy Rights Cannot Hamper Connecticut Employer's Workers' Compensation Claim Investigation

Connecticut is one of many states recognizing common law privacy rights. However important those rights may be in the abstract, they cannot overcome an employer's right to investigate workplace claims such as workers' compensation claims. Employees asserting such claims must anticipate their employer will do everything it can to defeat those claims.

Deborah Fiorillo filed a workers' compensation claim against her employer, the City of Bridgeport, Connecticut, when she was injured on the job. The City sprang into action with several "countermeasures" including a private investigation firm's detailed surveillance of Deborah's daily activities. Over a 21-month period, Deborah was observed outside her home, on public streets, and even (more on this later) attending church services. The investigator videotaped Deborah driving her car, walking, driving her children to school and shopping.

When the City finally revealed its extensive surveillance activities, an angry Deborah ran to court to file an invasion of privacy lawsuit. She protested that the City's surveillance intruded on her seclusion, a common law privacy right recognized in Connecticut. The court rejected Deborah's privacy claim, *Fiorillo v. Berkley Administrators,* 2004 Conn. Super. LEXIS 1210 (Super. Ct., Conn., May 2004). Once Deborah filed her workers' compensation claim, the court held, "she must expect that the employer and its insurers, adjusters and administrators would make an investigation of the claim to determine its validity."

The City's investigators limited their surveillance to Deborah's movements "that took place in public." The investigators visited her church, spoke to her pastor to find out when Deborah might be attending services, and then stationed themselves outside the church to videotape Deborah as she came and went. While Deborah claimed these church visits were highly offensive, the court noted the church was a public place and open to the public. The court cited an Indiana case, *Creel v. I.C.E. Associates,* 771 N.E. 2d 1276 (Ind. App. 2002), where the employer's private investigators actually entered the employee's church during services and videotaped the employee playing the piano.

Employees and their advocates refuse to concede employers have rights too. If employees can file claims against their employers, those employers can certainly fight back by investigating both the claim and the employee. Surveillance of workers' compensation claimants should not shock anyone's conscience let alone the claimant's. The same is true for employees who file administrative or judicial claims against employers and then protest when those employers investigate not only the claim but the background of the employee-claimant. Employee privacy rights may grab the headlines but they can be and often are overcome by countervailing employer rights.

No Overtime in the Animal Kingdom—Veterinarians Are Exempt Professionals

Although the Fair Labor Standards Act is nearly seven decades old, no court had determined whether veterinarians are exempt until the Ninth Circuit's December 7, 2004 decision in *Clark v. United Emergency Animal Clinic, Inc.,* 2004 U.S. App. LEXIS 25049. The Court rejected overtime claims by two veterinarians employed by the clinic, which provides emergency care for animals at night and on weekends. The veterinarians worked twelve-hour shifts and were paid only for each shift and not for hours worked over forty in their workweek.

Professional employees who practice "medicine" can be exempt under the FLSA. This exemption "applies to physicians and other practitioners licensed and practicing in the field of medical science or any of the medical specialties practiced by physicians or practitioners," 29 C.F.R. Sec 541.314(b)(1). The regulation defines "physician" and then gives examples ("may include") of "other practitioners" such as podiatrists, dentists and optometrists.

The two veterinarians had some good arguments: (1) any FLSA exemption must be narrowly construed, (2) veterinarians are never mentioned in the examples given in the regulations and (3) most people don't use the term "physician" when referring to their veterinarian. The district court and the Ninth Circuit disagreed. First, veterinarians "are doctors of medicine." Medicine is the science and art of healing and maintaining health and "can be and is practiced on animals as well as humans." Second, clearly-exempt practitioners such as pathologists, neurologists, oncologists, surgeons and pediatricians are also not listed in the regulations. Finally, veterinarians are licensed to practice medicine and have an advanced degree.

Most veterinarians are independent contractors who cannot qualify for overtime in any event. However, this ruling may assist employers who hire other medical practitioners who are similarly licensed to practice medicine, have advanced degrees and yet, like veterinarians, are also not listed in the regulations. Although the Clark case involved overtime claims for 1995-2002 work, the revised August 2004 regulations did not change things. The Labor Department concluded substantive changes in this "medicine" exemption were not necessary and carried over the former regulations' language. The opportunity to further expand the "medical" exemption still exists.

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