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MANAGEMENT RIGHTS

A Labor Relations newsletter for clients of ROEMER WALLENS GOLD & MINEAUX LLP designed to provide relevant information to public sector managers on matters relating to the labor relations environment in government.

Fall (October) 2016

Performance of Duty Under the General Municipal Law § 207-c

A Corrections Officer ("CO") was on duty and working in the Jail's Control Room. This position controls all ingress and egress to secure access in the Jail facilities. In addition, the Control Room CO may log inmate movements and perform a variety of data entry functions. The CO notified her supervisor that she needed to go to the breakroom/bathroom. On her way to the breakroom/bathroom, the CO trips on a step and claims injury to her knee. She reports the "injury" immediately upon her return to the Control Room post, completes the Jail's paperwork claiming "injury" and visits an urgent care facility once her shift ended; the CO missed four (4) days of work. The Sheriff denies the CO's claim for benefits under GML § 207-c as "not incurring an injury in the performance of duty." The CO grieves and at Arbitration the Arbitrator (Howard G. Foster) upholds the Sheriff's denial of benefits. The Arbitrator held that

> The fact that the [CO] was on the clock and was not on a formal break does not change the nature of the activity in which she was engaged when she was hurt. The activity was not within the scope of her job duties.
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> * * *
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> While it may be true … that the [CO] need not be specifically performing an assigned task at the time of the injury, it seems clear that the [CO] must be doing something that falls within the scope of her job duties, other than being 'on duty.'

(emphasis in original) (In the Matter of the Arbitration between Greene County and CSEA, Local 1000, AFSCME, Local 820; PERB No.: A-2015-311).

Vacating an Arbitration Award

It is a rare moment when the Courts will vacate an Arbitration Award. The general principle is that the Arbitrator acts as the finder-of-fact and the Court is reluctant to put itself in the place of this important role. However, the NYS law provides a basis for seeking to vacate an Award if it is believed that an Arbitrator:

> Exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter … was not made. CPLR § 7511(b).

Monroe County terminated a Deputy Sergeant who was found to have been driving while intoxicated with a blood alcohol level of 0.18 percent. He was charged with five (5) violations of state law and Sheriff's Department policy. The controlling Collective Bargaining Agreement ("CBA") provided that the disciplinary hearing be held before a panel. That panel unanimously sustained all of the charges against the Deputy Sergeant and terminated him. The CBA allows for an appeal of the panel's determination to Arbitration. Under the CBA the Arbitrator is to "review the record of the disciplinary hearing and determine if the finding of guilt was based upon clear and convincing evidence." In this case, Arbitrator Paul Caffera was found by the Court to have exceeded the authority granted to him by the CBA.

At the arbitral review, the Arbitrator determined that certain evidence was "inadmissible" and then went on to compare this termination with others in the Sheriff's Department for the offence of DWI and similar rule violations. The Arbitrator concluded that those other matters resulted in a penalty different from termination, replaced his judgment with that of the panel, and ordered reinstatement, demotion and back pay.

The Award was appealed by the County. The Court found that because the Arbitrator improperly neglected to consider certain evidence there was not a fair and complete way to compare this termination with any other cases; and the CBA did not allow for

the action or role the Arbitrator assumed for himself. The Arbitrator, said the Court, exceeded his authority. The Award was vacated and a re-hearing ordered before a different Arbitrator (Matter of O'Flynn and Monroe County Deputy Sheriff's Assn., Inc., 141 A.D.3d 1097, 4th Dept. 2016)).

Federal Overtime Rule Update

On May 18, 2016, the U.S. Department of Labor issued a final rule making changes to the Fair Labor Standards Act ("FLSA") regulations which define which employees are exempt from the Act's overtime and minimum wage requirements. Most notably, the new rules provide that, **effective December 1st of this year**, all salaried employees earning **less** than $913/week ($47,476/year) will be **eligible for overtime**, regardless of the nature of the duties they perform.

This article is intended to provide an overview of the changes in order to help you determine:

- Which employees are affected;
- What steps will be needed to ensure compliance;
- Whether there are managerial or operational decisions or considerations to be made in light of the effects of implementing the new rule.

The scope and nature of the rule's effect will vary amongst employers. We encourage you to seek specific guidance from RWGM for any questions that arise.

White Collar Exemptions ("EAP Exemptions").

To qualify for an "executive, administrative or professional" exemption from the FLSA's overtime requirements, an employee must be salaried, and meet the requisite salary level and "duties test" for one of the three "white collar" categories. The new rule increases the requisite salary level. NOTE: certain professions are not subject to the salary tests and will be exempt as professional employees if performing work which requires the application of certain advanced degrees – including teachers, academic administrative personnel, judges, lawyers, physicians and outside sales workers. Therefore, the new rules will not affect the exempt status of these employees.

Under the new rule, an employee qualifies for an EAP exemption from the overtime requirements IF they:

(1) Are salaried employees; AND
(2) Receive a salary of **$913/week ($47,476 per year)**; AND
(3) Satisfy the "duties test" for an executive, administrative and/or professional employee.

Each of the three "white collar" exemptions has its own duties requirements. The "duties tests" for executive, administrative and professional employees *have not* been changed by the new rule. Therefore, there should be no need to re-assess or re-analyze the duties performed by any employees to determine eligibility for an exemption *if* it has previously been determined that the employee satisfies one of the EAP duties tests.

Affected Employees: Salaried EAP employees who earn between $455/week ($23,660/year) and $913/week ($47,476/year) will now be entitled to overtime. The salary level requirement was previously $455/week ($23,660/year.) Employees earning less than $47,476/year will no longer be eligible for an EAP exemption from overtime, *regardless of the duties they perform*. Previously exempt salaried employees who satisfy the "duties tests" and earn between $23,660/year and $47,476/year will now become overtime eligible.

Note on the Inclusion of Nondiscretionary Bonuses and Incentive Pay in the Salary Level: The rule provides that up to 10% of the salary threshold may be met by non-discretionary bonuses, incentive pay, or commissions, as long as these payments are made at least quarterly. Note that payments which an employer is required to make under policy or collective bargaining agreement are considered non-discretionary bonuses – including things such as contractual longevity pay. Therefore, this portion of the rule may necessitate an examination of current collective bargaining agreements to determine whether there is additional compensation, other than the employee's salary, which may be considered when determining if the employee meets the new salary level requirement.

Highly Compensated Employee Exemption ("HCE Exemption").

Alternatively, an employee may be exempt from overtime as a "highly compensated employee" IF they:

(1) Are salaried employees; AND
(2) Receive a salary of at least **$134,004/year;** AND
(3) Satisfy a less stringent "duties test."

Affected Employees: Current HCE employees who earn between $100,000/year and $134,004/year will need to be analyzed under the EAP "duties tests" to determine if they are eligible for overtime. The prior salary level requirement for an HCE exemption was $100,000/year. Employees earning less than $134,004/year will no longer be eligible for an HCE exemption. However, employees who were previously exempt as HCE employees *may* be eligible for an EAP exemption if they meet one of the EAP "duties tests." This is a higher standard, and

it will require the employer to look more closely at the duties performed by these employees to determine if they qualify. If they do not qualify for an EAP exemption, they will become overtime eligible.

Automatic Updates to Compensation Thresholds.
The rule provides that the requisite salary amount for EAP and HCE exemptions will be updated every three years. The EAP salary level will be equal to the 40th percentile of full-time salaried workers, and the HCE salary level will be equal to the 90th percentile.

Impact on Employers.
The new rule becomes effective **December 1, 2016.** Employers should begin taking steps to ensure compliance by this date. The first step is to identify the employees who are affected. That is, identify which employees, who are currently not entitled to or receiving overtime, will become overtime-eligible under the new rule.

Once identified, the employer should consider the operational effects of these employees' overtime eligibility. Consider the following:

- **Employers will be required to track hours worked for new overtime eligible employees to ensure they are receiving overtime as required under the FLSA.**

  - This is true *even though* the employee is paid on a salaried, as opposed to hourly, basis.
  - PERB has held that despite an employer's recordkeeping responsibilities under the FLSA, requiring employees to participate in recordkeeping may trigger negotiability issues. If implementing a new system of tracking employee hours worked requires increased participation by unionized employees, these changes may need to be negotiated and may not be unilaterally implemented.

- **Newly overtime eligible employees who may have regularly worked more than 40 hours per week will now be entitled to overtime compensation for those hours.**

  - These employees may alternatively be entitled to compensatory time for those hours if an agreement is in place providing for compensatory time in lieu of overtime compensation.
  - Employers who do not offer compensatory may wish to consider whether entering into an agreement for the provision of compensatory time would beneficial in light of increased overtime hours and the cost of that overtime.
  - This overtime compensation will be due in addition to an employee's salary.

- **If the employer seeks to cap newly overtime eligible employee's hours at 40 hours per week to avoid overtime costs, the employer should consider the extent to which that will affect the amount and/or type of work the employee is able to perform.**

  - Employers may wish to evaluate the employees' hours and perhaps consider changes to the distribution of employee duties and workloads.
  - Employers may also consider raising the salary level of certain employees who are close to the salary level where it is more cost effective to do so rather than pay the overtime which the employee would otherwise be owed.
    - This is an option which should be discussed and considered with input from RWGM negotiation representative.

Please contact Elena P. Pablo, Esq., ext. 306 at our offices with any additional questions.