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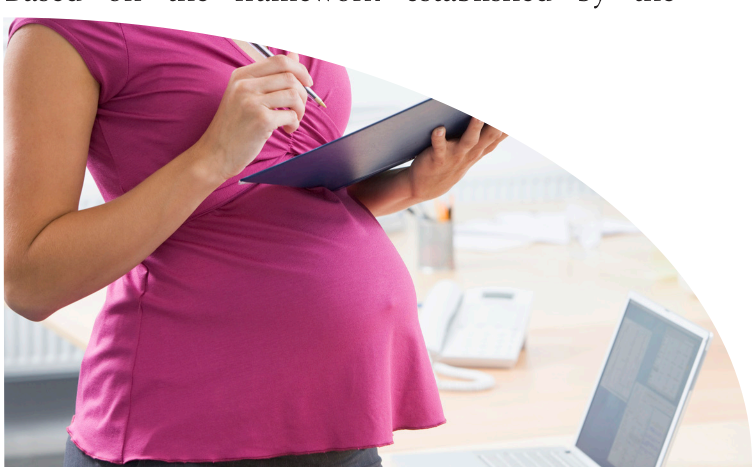
The Labor of Accommodation. Your Obligation to Pregnant Employees.

By Shane P. Swilley, Employment Law Group

On March 25, 2015, the U.S. Supreme Court issued its decision, *Young v. UPS*, interpreting the federal Pregnancy Discrimination Act. This decision provides a framework to determine when employers may have a responsibility to provide light duty and other workplace accommodations to pregnant employees in the same manner as they provide accommodations to employees with disabilities or who are injured on the job. This decision impacts Oregon's law against pregnancy discrimination as well, because that law is often interpreted in conjunction with federal law.

The Court declined to say that employers *always* have a duty to accommodate a pregnant employee. Instead, employers need to accommodate work restrictions for pregnant employees if the employer accommodates other non-pregnant employees who are "similar in their ability or inability to work," unless the employer has a "legitimate, nondiscriminatory reason" to deny the accommodation.

The Court did not explicity define what is and is not a "legitimate, nondiscriminatory reason." Based on the framework established by the Court a "legitimate, non-discriminatory reason" appears to be a reason that does not impose a "significant burden" on pregnant employees unless the employer's explanation for the reason is "sufficiently strong" to justify the burden. The fact that it may be more expensive or less convenient to accommodate the employee is *not* a "legitimate, non-discriminatory reason."



The Court made it a point to clarify that the law does *not* require employers to provide an accommodation simply because the employer provided the same accommodation to one or two non-pregnant employees in the past. Instead, the Court pointed to an employer who accommodated a large percentage of non-pregnant employees while failing to accommodate a large percentage of pregnant employees as an example of a situation when the employer's reason may not be "sufficiently strong."

Because of this decision, and the expansion of the ADA to include shorter-term medical complications arising from pregnancy, employers should review their accommodation policies and practices. Employers that provide accommodations or other types of benefits to categories of employees need to decide whether to extend those same accommodations to pregnant employees, or ensure they have legitimate, nondiscriminatory reasons for not doing so. If a substantial number of employees are being offered accommodation, but pregnant employees are excluded, then there is a greater risk that denying accommodation to pregnant employees would be considered unlawful discrimination.

IMPORTANT THINGS YOU NEED TO KNOW ABOUT HOW YOU PAY YOUR EMPLOYEES

By Shane P. Swilley, Employment Law Group

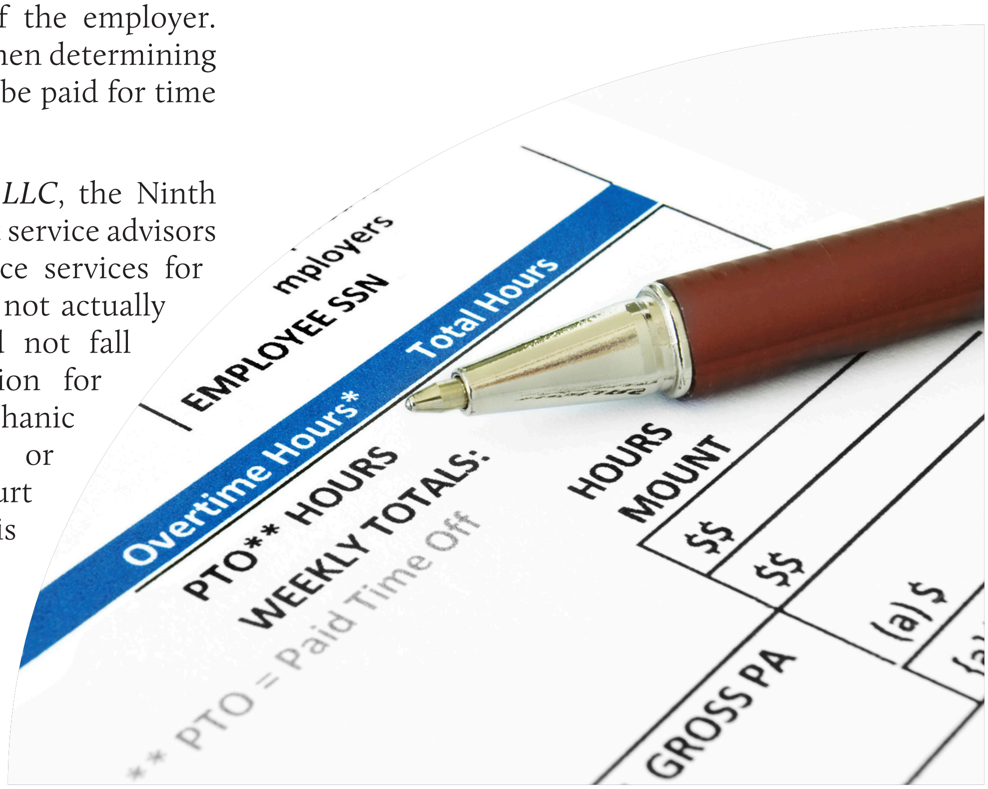
First, here's what's already happened - two recent court decisions interpreting the Fair Labor Standards Act (FLSA) that may be noteworthy for your business.

In *Integrity Staffing Solutions, Inc. v. Busk*, the U.S. Supreme Court concluded that time spent by employees waiting to undergo security screenings before leaving the workplace is *not* compensable time under the FLSA. Meaning, they don't need to be paid for that time. The Court reasoned that waiting to be screened was not "integral and indispensable" to the employees' job duties (a requirement for an activity to be compensable under the FLSA). The employees were not hired to undergo screenings but rather to retrieve products from warehouse shelves and package the products for shipment, and the employer could have eliminated the screenings without impairing the employees' ability to perform their work. The Court clarified that the "integral and indispensable" test for determining whether an employee's pre- or post-work activity is compensable under the FLSA is tied to the productive work that the employee is employed to perform, not on whether the activity is for the benefit of the employer. This is important to remember when determining whether your employees need to be paid for time spent waiting.

In *Navarro v. Encino Motorcars, LLC*, the Ninth Circuit Court of Appeals held that service advisors who sold repair and maintenance services for cars at a car dealership, (but did not actually sell or repair the vehicles), did not fall within FLSA overtime exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." The Court stated that the exemption is limited to the salesmen who sell the vehicles, and the partsmen and mechanics who service the vehicles. The service advisors did neither, and so did not qualify for the exemption.

Now, let's talk about what's on the horizon. Any day now, the Department of Labor (DOL) is expected to issue new rules proposing changes to the "white-collar" overtime pay exemptions under the FLSA. This impacts your administrative, executive, and professional employees who are classified as "salary-exempt." The new rules are expected to raise the minimum salary required for employers to classify qualifying employees as exempt, and to create more stringent and detailed "duties tests" to restrict who may qualify as exempt under the law. The retail and service industry is expected to feel the largest impact from these changes because those industries often employ lower paid supervisors who currently qualify as exempt.

In closing, it is important to remember that, when deciding whether Oregon or federal wage and hour laws apply, you must apply the law that is most beneficial to the employee. This means that if an employee is exempt from overtime under one law, and not exempt under another, then the employee cannot be classified as exempt.



PROTECTING AGAINST “PREFERENCE “ CLAIMS IN BANKRUPTCY

By Daniel C. Peterson, Business Litigation Practice Group

Any business that sells goods or provides services runs the risk that it may become a “creditor” in a customer’s or client’s bankruptcy. A common scenario is as follows:

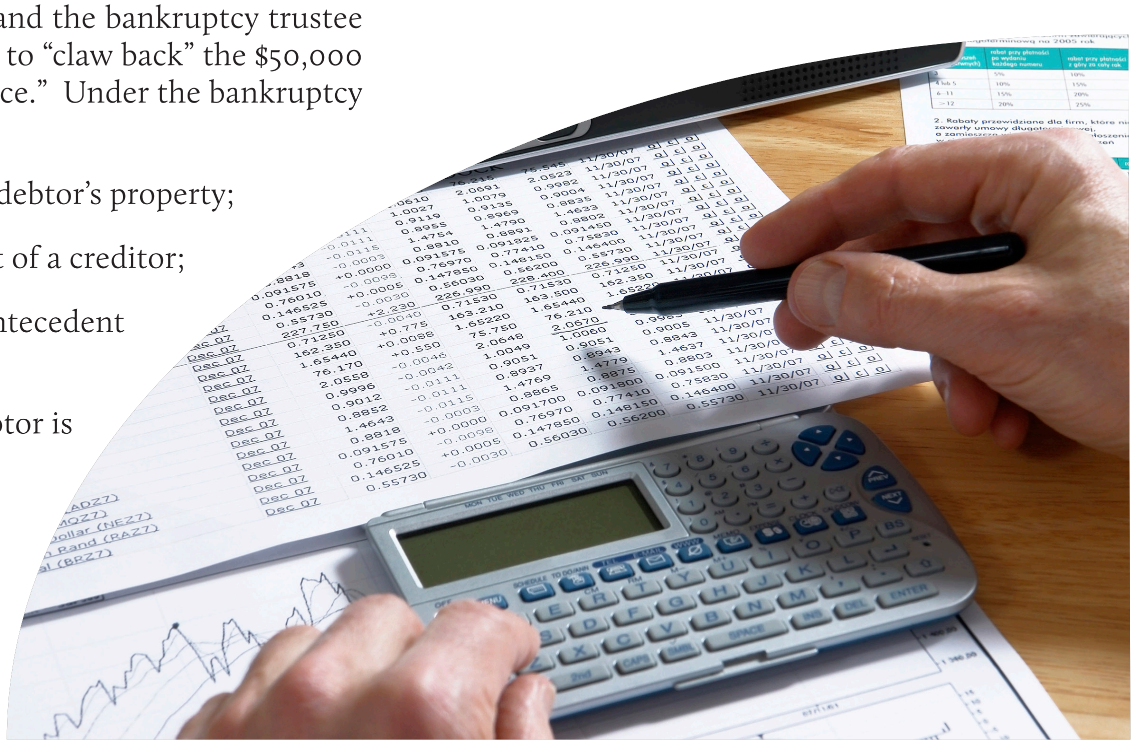
World Wide Widgets, Inc. (“WWW”) provides custom made widgets to Acme Construction Co. (“Acme”). WWW has provided widgets to Acme for years. Acme had always been a promptly paying customer. Lately, however, they’ve become a bit of a “slow pay.” When reviewing the books, WWW’s president was surprised to learn that outstanding receivable for Acme’s account was $100,000, some of which had been on the books for many months. WWW brought the amount past due to Acme’s attention and informed Acme that WWW could not provide Acme with any more widgets until Acme brought its account current. Acme provided WWW with a $50,000 payment with the promise that the remaining $50,000 would be paid in two weeks. However, instead of receiving the expected second payment, WWW received notice of Acme’s bankruptcy.

Under the scenario above, WWW is now a creditor in Acme’s bankruptcy and the bankruptcy trustee will likely come calling to “claw back” the $50,000 payment as a “preference.” Under the bankruptcy code, a preference is

- any transfer of the debtor’s property;
- to or for the benefit of a creditor;
- on account of an antecedent debt;
- made while the debtor is insolvent;
- within 90 days of the debtor’s bankruptcy filing;
- which gives the creditor more than its fair share.

The bankruptcy code gives the bankruptcy trustee broad latitude to require the creditor who received that payment to return the preferential payment to the bankruptcy estate so that it can be “fairly” distributed pro rata among all the debtor’s creditors. In the case above, WWW would almost certainly be required to return the $50,000 payment to the bankruptcy estate or otherwise reach a settlement with the trustee. So, what can you, the business owner, do to guard against having to disgorge such preferential payments?

First and foremost, the danger and hassle of getting caught up in a customer’s bankruptcy should reemphasize the importance of staying on top of accounts receivable and refusing to allow customers to fall behind – if the account is not in arrears, than the payment from a debtor/customer is not on account of an “antecedent” debt, and



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is therefore outside the scope of the preference statute. Of course, that is not always the reality of business.

If you find yourself collecting "old debts" the bankruptcy code provides several defenses that you can use if faced with a preference claim, but they take some pre-bankruptcy planning. Two of the most common (and relevant to the scenario above) defenses are (a) the "ordinary course of business" exception and (b) the "contemporaneous exchange" exception. Both of these exceptions are intended to encourage creditors and suppliers to continue doing business with distressed companies.

Under the ordinary course exception, if faced with a preference claim a creditor need only proof that the payment was made either (i) consistent with the ordinary course of dealings between the debtor and creditor, or (ii) was made within the ordinary course of business in the industry. In order to set up this defense, it is important that you collect from your customers at regular intervals and that you keep clear documentation for the payments. For example, at least one court has found that late payments met the "ordinary course" exception when the prior course of conduct between the companies demonstrated that payments were ordinarily made late.

The "contemporaneous exchange" exception provides a defense where the payment for the debtor is intended by the parties to be in exchange for new value and is, in fact, substantially contemporaneous. For this reason, if you are dealing with a distressed customer, but are still supplying goods and services, applying any payments received to the most current invoices, rather than the oldest, will bolster your argument that the payment you received is a contemporaneous exchange for new value provided.

Bankruptcy can be a complex and confusing world, especially when you are dragged there unwillingly as part of a customer's financial problems. However, with proper counseling, the adverse effects for your business can be mitigated.

ACTION ALERT:

City of Portland Looking To “Ban The Box”

You may have heard in the news recently about “ban the box” laws popping up around the country. These laws prohibit or restrict employers from questioning job applicants about their criminal history. The City of Portland is now looking to pass its own “ban the box” ordinance. The proposed ordinance would require employers to wait until after a conditional offer of employment has been made before they can run a criminal background check. If criminal history is discovered, the employer cannot simply choose to not hire the applicant. The employer would need to conduct an “individualized assessment” of the criminal history and “determine in good faith that a specific offense of conduct has a direct relationship to the person’s ability to perform the duties or responsibilities of employment.” Only then could the employer decide not to hire the applicant. Additionally, the employer would need to notify the applicant in writing of the decision not to hire them, and provide a copy of the criminal history used to make the decision. The applicant could then request reconsideration, which would require the employer to conduct another individualized assessment, taking into account any additional information provided by the applicant. The City is still receiving comments on the proposed ordinance from the community. If you wish to comment, contact the City of Portland.

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If you have any questions about the content of this newsletter, please contact Shane P. Swilley at (503) 276-6074 or swilley@cosgravelaw.com.

Take advantage of our free consultation to review the current state of your employment policies and procedures. This service is invaluable to ensure compliance with current employment laws. For more information or to schedule an appointment, contact Shane Swilley.

If you or your company has been threatened with litigation, or a lawsuit or complaint has been filed, then contact the head of Cosgrave’s Employment Law Group, Tim Coleman, at (503) 219-3810 or tcoleman@cosgravelaw.com for a consultation.