CHICAGOLAWBULLETIN.COM

Serving Chicago's legal community for 158 years

TUESDAY, FEBRUARY 12, 2013

Chicago Daily Law Bulletin®

Volume 159, No. 30

Employers can change workweek to limit OT

Redland Energy Services LLC drills and services natural gas wells in Arkansas. Several employees worked as operators of Redland's drilling rigs. Each crew of operators worked 12-hour shifts for seven consecutive days, followed by seven days off. Redland used a Tuesday-to-Monday workweek to calculate overtime owed to drill rig employees.

In May 2009, Redland reduced the size of drill rig crews from five operators to four and changed the designation of their workweek from Tuesday-to-Monday to a Sunday-to-Saturday workweek used for other employees.

Five employees later filed a lawsuit on behalf of themselves and similarly situated employees. They alleged that, after this change, they were only paid 20 hours overtime within the same workweek, even though they actually worked 84 or more hours in each work week.

The employees argued to the district court that the Fair Labor Standards Act prohibits an employer from changing an existing workweek for the purpose of reducing employee overtime. The district court ruled in favor of Redland and the employees appealed.

The FLSA does not define the term "workweek," but the Department of Labor's regulations have long provided that it means:

" ... a fixed and regularly recurring period of 168 hours — seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. ... Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him.

BY MICHAEL R. LIED

Michael R. Lied of Howard & Howard Attorneys PLLC focuses his practice on labor and employment law, representing employers. He also specializes in related immigration law issues.

Courts have concluded that an employer does not violate the FLSA merely because, under a consistently designated workweek, its employees earn fewer hours of overtime than they would if the workweek was more favorably aligned with their work schedules.

The issue on appeal was whether the FLSA limits an employer's freedom to change an existing workweek designation.

The appeals court noted that the Department of Labor's regulations directly addresses the issue: The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. 29 C.F.R. Section 778.105.

The plaintiffs argued that Redland changed the workweek for the purpose of reducing the number of overtime hours in their normal work schedules and therefore the change was designed to evade the overtime requirements of the act.

> ***"(S)o long as the change is intended to be permanent ... the employer's reasons for adopting (it) are irrelevant.***

The appeals court recognized that the same issue had been presented in a case applying the Illinois Minimum Wage Law. *Kerbes v. Raceway Assocs., LLC*, 961 N.E.2d 865, 870 (Ill. App. 2011).

There, the Illinois Appellate Court found the employer's modification of its workweek did not violate the overtime requirements of the FLSA. The FLSA does not require a workweek schedule that maximizes an employee's accumulation of overtime pay. Thus, a schedule whereby an employee's actual work schedule is split between two workweeks does not violate the federal legislation.

If such a schedule does not itself violate the FLSA, the Illinois court could not see how a change to such a schedule could be viewed as having been designed to evade the overtime requirements of this act.

The court of appeals pointed out that an employer's effort to reduce its payroll expense is also not contrary to the FLSA's purpose.

The court of appeals rejected the employees' contention that an employer's permanent change in the designated workweek violates Section 207(a)(1) of the act unless it is justified by a legitimate business purpose. To the contrary, so long as the change is intended to be permanent, and it is implemented in accordance with the FLSA, the employer's reasons for adopting the change are irrelevant. The judgment of the district court was affirmed.

Abshire v. Redland Energy Services, LLC, ____ F.3d ____, 2012 WL 4795897 (8th Cir. 2012).

Copyright © 2013 Law Bulletin Publishing Company. All rights reserved. Reprinted with permission from Law Bulletin Publishing Company.