

MANAGEMENT *Insight*

A NEWSLETTER ON EMPLOYEE RELATIONS
FROM THE LABOR RELATIONS, CLASSIFICATION, AND COMPENSATION UNIT

HUMAN RESOURCE SERVICES DIVISION, DEPARTMENT OF ADMINISTRATIVE SERVICES

APRIL 2004

ITEMS OF INTEREST

STATE WINS SECOND INTEREST ARBITRATION AFFIRMING STEP FREEZE

The second interest arbitration of the 2003-2005 biennium was between the Oregon Department of Administrative Services, on behalf of the Oregon Department of Corrections (State), and the Association of Oregon Correctional Employees (AOCE). The AOCE bargaining unit includes 510 corrections officers, corporals and sergeants, as well as 130 non-correctional employees, at four correctional facilities.

In her decision, Arbitrator Jane Wilkinson awarded the State's Last Best Offer (LBO) package, citing internal equity with other state employees as the consideration that tipped the scales in favor of the State. She stated, "When sacrifice is required, it goes down much better when all employees are affected equally, rather than having certain employees having to bear the brunt of the sacrifice." She went on to say, "This in turn lessens the damage to moral that occurs when there is a wage and step freeze. It also is an important consideration to the public, who no doubt wants the State to make its difficult fiscal decisions in a rational and even-handed manner." Arbitrator Wilkinson further concluded that the Association's proposals for approximately 20 other changes to the agreement were overreaching, stating, "... suffice it to say I was not convinced of the need for most of them."

Both parties agreed in bargaining to a wage freeze lasting the duration of the contract. They also agreed, in principle, to a step freeze, with only the duration in question. The State's LBO package included extending the step freeze from the date of the award for 24 months. The Union argued that the State's proposal, to extend the freeze beyond the collective bargaining agreement's term, was a permissive subject of bargaining and, therefore, something the arbitrator could not lawfully consider. Arbitrator Wilkinson disagreed, stating, "I

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understand that [the 24-month extension] is needed for reasons of fairness ... if bargaining unit employees were to have a step increase [mid 2005], they would fare better than the great majority of other State employees, whose step increases have been frozen for 24 months."

The State's package also included a one-time payment of \$350 (or optional time in lieu of payment) to employees as a "workload adjustment."

MEDICAL MARIJUANA USE MAY BE PROTECTED

The following article, written by Dan Grinfas of the Oregon Bureau of Labor and Industries (BOLI), originally appeared in the Eugene Register-Guard. It is reprinted here with Mr. Grinfas' permission.

Q: One of our employees tested positive for marijuana on a random drug screen we conducted last week, and our company policy is to terminate employees for using illegal drugs. However, when presented with the test results, the employee showed us a medical marijuana card and told us his use of the drug has been legally authorized because he's undergoing chemotherapy. Are we required to ignore our drug-free workplace policy?

A: In general, you're free to enforce a drug-free workplace policy, because an employee's current use of illegal drugs is not protected under Oregon or federal disability laws. However, you may have to make an exception to your policy in this case.

Oregon's medical marijuana law (ORS 475.300 to 475.346) provides that a person who possesses a properly issued registry identification card may engage in the medical use of marijuana as justified to treat symptoms of a debilitating medical condition.

Also, Oregon civil rights laws protect employees with disabilities who are otherwise qualified to perform the essential functions of their jobs. Therefore, the Bureau of Labor and Industries takes the position that a job applicant or employee with a disability should not be disqualified from protection simply by virtue of medical use of marijuana, when it's properly authorized.

Your employee is apparently being treated for cancer, a condition that's covered as a disability when it is permanent or long-term and substantially affects the employee in one or more major life activities.

Even though you're required to make reasonable accommodations for a qualified individual with a disability, nothing in the medical marijuana law requires you to accommodate an employee's use of marijuana while in the workplace.

So you can discipline an employee for possessing, selling or smoking marijuana in the workplace. And you don't have to keep your employee on the job if he can't perform the essential job functions, if his presence poses a direct threat to himself or others in the workplace, if his behavior is disruptive, or if he is observably "under the influence" at work.

But if the employee's underlying condition is a qualifying disability and he makes authorized medical use of marijuana outside the workplace, you may be required to make accommodations, to the extent that it wouldn't pose an undue hardship to your organization.

For example, if it's medically recommended that your employee use marijuana to relieve discomfort following Monday morning chemotherapy treatments, it might be a reasonable accommodation for you to allow him to take Mondays and Tuesdays off at the doctor's direction to accommodate authorized use of the drug.

And if the employee screens positive on a drug test that you administer on Thursday because the marijuana is still detectable in his system, you shouldn't pursue discipline when the evidence suggests the employee is only making authorized use of the drug and isn't under the influence or posing an imminent safety risk while at work. A statute in Oregon's disability laws, CR5 659A.112(2)(c), makes it unlawful for an employer to use standards, criteria or methods of administration that have the effect of discrimination based on disability.

To obtain a registry card, a person must produce written documentation from a physician that he or she has a debilitating condition or medical condition whose symptoms or treatment produce severe pain, nausea or seizures. Not everyone issued a marijuana card necessarily has a condition that qualifies as a protected disability, so you're entitled to require medical certification from your employee's doctor.

Also, the federal Americans with Disabilities Act defines "illegal use of drugs" based on whether substances are unlawful under the federal Controlled Substances Act, and marijuana is one such substance. Therefore, the position of the federal Equal Employment Opportunity Commission is that use of marijuana disqualifies an individual from protection under the ADA.

For further information, you may visit the BOLI web page at <http://www.boli.state.or.us/technical/>, or contact BOLI at:

Technical Assistance for Employers Program
800 NE Oregon Street, #32
Portland, OR 97232
503-731-4200x4, then press 4 again

ALLEGED AGE DISCRIMINATION AGAINST YOUNGER WORKERS

On February 24, 2004, the U.S. Supreme Court held that the Age Discrimination in Employment Act (ADEA) does not prohibit an employer from favoring an older worker over a younger worker. *General Dynamics Land Systems, Inc. v. Cline*.

In this case, the employees worked for General Dynamics. They were represented by a union, who had a collective bargaining agreement with the employer. Under the terms of their collective bargaining agreement, the employer agreed to provide continuing health insurance upon retirement. During contract negotiations in 1997, the employer and the union agreed to eliminate

the employer's obligation to provide retiree health insurance benefits, except that benefits would continue to be provided to then-current employee's who were at least 50 years old. A group of employees, who were all over 40 but under 50 years of age, filed a lawsuit claiming that the elimination of benefits, as applied to them, violated the ADEA because the benefits were still provided to older workers.

The US Supreme Court disagreed. The Court held that the ADEA was never meant to protect against "reverse age discrimination." The Court concluded that the simple purpose behind the passage of the ADEA was that "the enemy of 40 is 30, not 50." Therefore, the employer did not violate the ADEA when it favored the older workers over the younger workers with regard to the terms and conditions of employment.

In Oregon, the law is more protective. Oregon law prohibits discrimination based on age for *all employees 18 years of age and older*. According to the Oregon Bureau of Labor and Industries, Oregon law does not allow an employer to favor an older employee over a younger employee.

ARBITRATION & CASE SUMMARIES



Nass vs. State of Oregon, Employment Department (ERB Case No. MA-6-03; February 13, 2004)

Although the cause necessary to remove a management service employee is less than that required to dismiss a classified employee, in both instances the employer's action must be "objectively reasonable." The case in question involved a management service employee who allegedly violated a rule which was neither contained in a written policy nor expressly stated as a job expectation. It was also not the sort of rule which is so basic and universally known that it need not be contained in a written policy or expressly stated as a job expectation (such as, no stealing). Under these circumstances, the "objectively reasonable" standard requires that the employer make the rule clear to the management service employee before disciplining the employee for violating it.

Facts: The Employee had been employed by the State of Oregon, Employment Department (Employer) since 1987. From July 1999 until her removal, she worked as a recruitment officer, Human Resource Analyst 2. In the course of an Oregon State Personnel Management Association meeting, the Employee told a human resource analyst from another agency [Other Analyst] that someone from the other agency [Applicant] had applied for a job with the Employer. The disclosure included the Applicant's name and the circumstances of the application. She also disclosed information to the Other Analyst about her own unsuccessful job application.

Later, during the course of an investigation, both employees were questioned about what they had said to each other. They were the only witnesses to what they had said. The Other Analyst stated that the Employee had told her "not to tell anyone" about the *Applicant's* application. The Employee denied this. At the Employment Relations Board (ERB) hearing, the Employee explained that she had told the Other Analyst not to tell anyone about her *own* unsuccessful application (since she was embarrassed by her rejection).

The Employee was subsequently removed from management service (and therefore dismissed from state

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service since she had no prior classified service) for allegedly releasing confidential information and being untruthful during the investigation regarding the incident.

JAPI, a computer database used to store and retrieve information about applications for employment with the State's executive branch, can be accessed by most executive branch human resource offices.

Question Presented: Did the Employer violate ORS 240.570 (3) when it removed the employee from management service?

Discussion and Ruling: ORS 240.570 (3) allows the State to remove an employee from management service, "... if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." Under this standard, noted the ERB, the State's actions are not "unfettered," but "... must be objectively reasonable." Applying this standard, the ERB has, "... frequently held that a reasonable employer defines performance expectations and expresses those expectations clearly to its employees."

In this case, the Employee was removed from management service because she allegedly revealed confidential information and then lied during the investigation of the incident. Under ERB rules, the Employer has the burden of proving these allegations.

Noting that there is no dispute that the disclosure in question occurred, the ERB explained that, "The question then is whether [the Employee] knew, or should have known, that this action violated a reasonable performance expectation, policy, rule, or law." The position of the Employer was that while there is no written rule or policy which prohibited the disclosure, "any damn fool should know better." The ERB agreed that the "any damn fool rule" exists: "We agree that some rules of workplace conduct are so basic and universally known that they need not be contained in a written rule or expressly stated as a job expectation. [citation] For example, there is no need to inform employees that they cannot steal from the employer or punch their boss." The ERB found, however, "Based on this record, the nondisclosure requirement the [Employer] seeks to enforce is not such a rule. It does not strike us as so obvious that there is no need to articulate an expectation that an HR manager in one State agency may not disclose personnel information to an HR manager in another State agency, especially when the disclosed information is otherwise available to both parties through a computer program." This conclusion was supported by testimony that it is common for personnel employees from different agencies to

exchange confidential information. The ERB also pointed to two specific instances in the record, "... which indicate that other employees were also unaware of the purported rule."

Clarifying that it is not holding that the Employer is prohibited from adopting the type of nondisclosure rule in question, the ERB explained: "The focus instead is on the [Employer's] obligation to make the rule known before it can remove or otherwise discipline an employee for violating it."

As to the assertion that the Employee lied during an investigation, the ERB found the evidence contradictory: "Both witnesses seem credible on this point. We believe there was a communication mix-up, and that both honestly reported what they understood the conversation to mean." The ERB found that when the Employee asked the Other Analyst "not to tell anyone," the Other Analyst understood the Employee to be referring to information *about the Applicant*. The Employee, in fact, was referring to her own unsuccessful application. Left with "equally persuasive evidence" on this issue, the ERB ruled against the party with the burden of proof, the Employer.

Since the Employer failed to meet its burden of showing that its actions were "objectively reasonable" and "failed to prove its allegations," the ERB ordered that the removal be set aside.

 **HELPFUL HINT . . .**

Dismissal of Management Service Employees With Immediate Prior Classified Service

The opinion summarized above concerns the removal from management service of an employee without immediate prior classified service. A different standard, set forth in ORS 240.570 (5), applies to management service employees with "immediate prior former regular status in the classified service." Such employees may be dismissed from state service only, "... for reasons specified by ORS 240.555 and pursuant to the appeal procedures provided by ORS 240.560." The reasons specified by ORS 240.555 are the so-called "seven deadly sins": misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service.

In the Matter of the Arbitration Between the Oregon State Police Officers Association and the State of Oregon, Department of State Police (Arbitrator, Sherman B. Kellar, Esq.; March 8, 2004)

The employer changed certain criteria for promotion without first notifying and bargaining with the union regarding the impact of the change. In doing so, the employer did not commit an unfair labor practice since it made the change applicable only to employees hired after implementation of the change. Such criteria, however, may not be applied in an arbitrary or unreasonable manner. The Arbitrator found that the employer was not arbitrary or unreasonable in applying the new criteria for early promotion based on experience in a lower classification to one of the grievants. As to the second grievant, the Arbitrator found that the employer did apply the criteria in an arbitrary and unreasonable manner, by failing to take into consideration the fact that the grievant had previously passed a DAS test which found him qualified for the promotional position.

Facts: On March 11, 2000, the State of Oregon, Department of State Police (Employer) changed the criteria for promotion from Forensic Scientist Entry (FSE) to Forensic Scientist 1 (FS 1). The change added an extra year of FSE-level experience to qualify for promotion (increasing the total required time from two to three years). This change was not communicated to the Oregon State Police Officers Association (Association) prior to implementation. The two grievants were hired as FSEs after implementation of the change. Each of the grievants applied for promotion from FSE to FS 1 prior to having three years of FSE experience. The criteria for promotion from FSE to FS 1 allow for substitution of prior lab technician experience for a portion of the required three years' experience. Each of the grievants relied on such prior lab technician experience to meet the promotional criteria. The grievants' requests for early promotion were denied.

Question Presented: Did the Employer violate the Collective Bargaining Agreement by denying the grievants' requests for promotion?

Discussion and Ruling: The grievants first argued that the Employer committed an unfair labor practice by changing the requirements for promotion to FS 1 without

giving prior notice to the Association and bargaining the impact of the change (citing the 2002 ERB case, *Beaverton Police Association vs. City of Beaverton* [summarized in the November 2002 *Management Insight*]). The Arbitrator, however, distinguished the Beaverton case from the fact situation presented by this grievance: "The two police officers [in Beaverton] who were denied promotions because of the additional educational requirements were employees in the bargaining unit at the time the change was implemented. That is not the case here. Neither of the grievants was in the bargaining unit when the change was implemented. This occurred some three months before Grievant Grover was hired as a FSE and some nine months before Grievant Borngasser was hired as a FSE." The Employer's division director, furthermore, "... testified that the change applied only to new hires and not to any FSEs employed at the time of the new standard." Since neither of the grievants was in the bargaining unit when the change was implemented, the change had no impact on them. The Arbitrator thus concluded: "As the Employer rightly points out, it has no duty to bargain with respect to potential employees. Consequently, there was no unfair labor practice committed by it."

Addressing application of the new criteria to each of the two grievants, the Arbitrator explained that each would be addressed separately since different fact situations apply. Grievant Grover was hired by the Oregon State Police as a Lab Technician II in January 1999 (Lab Technicians are members of a different bargaining unit than FSEs and FS 1s). In June 2000 he was promoted to FSE. After two requests for early promotion to FS 1 were denied, Grievant Grover filed this grievance.

The new criteria for promotion to FS 1 allow prior analytical lab experience to be substituted at the rate of one year lab experience for six months of FSE experience, up to a maximum of two of the required three years. In such cases, the Employer adopted the approach of determining, by critical review, whether the level of analytical lab experience rises to the level of FSE experience (which the Employer defined as "independently performing casework, signing off on reports and testifying in court"). Only FSE-level lab experience is credited. Applying this approach to Grievant Grover's lab technician experience, the Employer found that it did not rise to the FSE level and thus declined to credit it toward the three years of required experience.

In reviewing the Employer's approach, the Arbitrator explained that the management rights provision of the contract is clear, the Employer has the right to establish

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standards for promotion. However, "... once the criteria are established, the Employer cannot apply them in an arbitrary or unreasonable manner." Reviewing the experience gained by Grievant Grover as an LT II, the Arbitrator determined that it was limited to one specific area "integrated ballistic inspections." However, continued the Arbitrator, "In order for Grievant's experience to qualify he must have performed all three of the functions the Employer required and not just one." As such, Arbitrator Kellar concluded, "... I do not find that the Employer was arbitrary and unreasonable in declining to apply Grievant's experience as a setoff against the three year requirement. ... the Employer was warranted in not crediting the LT II experience."

As to Grievant Borngasser, in addition to his 61 months experience as an LT II (and 20 months as an FSE), he had been tested by DAS in September, 2000 in response to a previous application for a FS 1 position. He passed

the test and was rated by DAS as "qualified" for the FS 1 position (but was not selected after an interview). Moreover, noted the Arbitrator, "There was no evidence submitted at the hearing that the basic functions of the FS 1 had changed in the period from Grievant's passing the FS 1 qualification test and his filing of this grievance The Employer in evaluating requests for promotion certainly can apply their criteria to determine if the request is appropriate but they cannot do so in a vacuum with blinkers on." Arbitrator Kellar concluded: "In the circumstances presented with respect to this Grievant, I find that the Employer's denial of his promotion was an unreasonable and arbitrary application of its criteria in the face of the DAS certifying that Grievant was qualified for the FS 1 position" As such, the Arbitrator ordered that Grievant Borngasser be promoted to FS 1 and awarded back pay to the date of his request for early promotion (September 17, 2002).



NOTES FROM JUSTICE

by The Labor and Employment Section, Department of Justice



CONTENTS OF LAST CHANCE AGREEMENTS

Having decided that a last chance agreement is an appropriate agreement under the circumstances, what should state employers include in such agreements?¹ This article addresses the contents of various last chance agreements and the language that should be used in preparing such agreements. The article addresses first the contents of a last chance agreement used to resolve the discipline of an employee whose unacceptable performance is due to substance abuse. Second, are the contents of a last chance agreement resolving the discipline of an employee whose unacceptable performance, whether minor misconduct or incompetent performance of duties, is unrelated to substance abuse.

In entering into last chance agreements with employees whose deficient performance is due to substance abuse, the state employer should focus on the employee's successful participation in and completion of a treatment program for alcohol or drug abuse. Such last chance agreements should always include the following provisions at the minimum:

- The employee's agreement to enter into an identified inpatient or outpatient treatment program (the state employer should know the identity of and approve the treatment program before signing the agreement);
- The employee's agreement to successfully participate in and complete the identified drug treatment program;
- The employee's agreement to allow random testing for the substance abused during the treatment program and during the term of the last chance agreement;
- A release from the employee for the state employer to contact the treatment program for progress reports during treatment and during any aftercare treatment program;
- The employee's agreement that, upon successful completion of the treatment program, he or she will return to the workplace and refrain from the conduct that caused the discipline for the term of the last chance agreement (no tardiness; acceptable attendance; accrual of leave; competent performance of duties; appropriate interaction with clients, supervisors, peers; any other conduct causing the discipline);
- The employee and union's agreement that, should the employee violate the terms of the agreement regarding either the participation, completion and other requirement of the treatment program or the workplace expectations, the state employer may terminate the employee without grievance or arbitration;

¹ This is the second part of a two-part article. The first—"When is a Last Chance Agreement Appropriate?"—appeared in the February 2004 *Management Insight*.

- A statement that the last chance agreement is not a contract for continued employment and that the employer reserves the right to discipline/dismiss the employee for conduct outside the scope of the last chance agreement and warranting discipline/dismissal;
- The union's agreement that the last chance agreement establishes no precedent either in bargaining or in resolving other disciplinary grievances and arbitration.

All agreements, whether they are last chance agreements or any other agreement, set out actions that the parties agree to undertake in compliance with the negotiated agreement. Each paragraph of the agreement, therefore, should state the act that the party is to do or refrain from doing in carrying out the terms of the agreement. The author of the provisions of the last chance agreement thus should phrase the employee and the union's obligations using words such as "the employee must enter into," or "the employee shall successfully participate in," or "the union agrees that this last chance agreement establishes." The author should not use phrases such as "the employee understands that" unless that phrase is used in combination with a sentence stating that, with this understanding, the employee is to do or refrain from doing an act, such as not filing a grievance or appeal of a dismissal action. An agreement drafted to state that a party understands an action or the consequences of conduct is not an agreement drafted to legally obligate that party to carry out the terms of an agreement. A party signing an agreement stating that he or she understands the terms of an agreement has agreed only that he or she understands those terms but has not agreed to actually carry out the terms of that agreement. The duration of the last chance agreement is a subject of negotiation between the parties but should be a reasonable time and should have a finite ending date.

The contents of those last chance agreements resolving disciplinary disputes that do not involve substance abuse would not, of course, contain the provisions addressing participation in and completion of a treatment program. The contents of a last chance agreement resolving a discipline for repeated minor misconduct, unacceptable attendance, or incompetent performance of duties should focus on the deficient performance at issue in the discipline. Such last chance agreements should always include the following provisions:

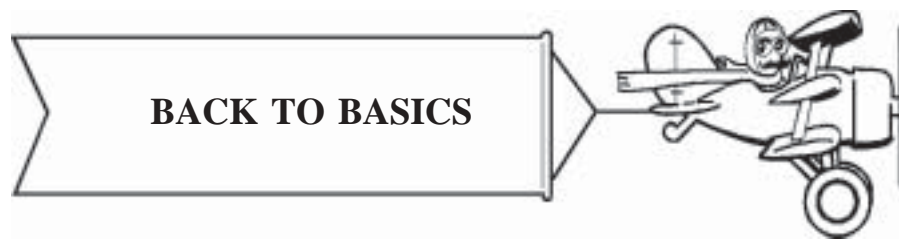
- If the state employer will impose a lesser discipline in lieu of the dismissal set aside for the last chance agreement, the employee and the union agree that they will accept the lesser discipline—a pay reduction for example—without grievance or appeal of that discipline;
- The employee's agreement that he/she will not engage in the conduct for which dismissed. The conduct should be set out with specificity so that the employee knows the conduct that will result in dismissal, e.g., incurring no more unauthorized absences from work; reporting to work on time; accruing paid leave time; not using obscene language in the workplace, especially directed toward others; not taking breaks or lunch periods in excess of the time set for them; not entering into lengthy discussions of non-work matters with peers during work time; limiting personal telephone calls in a manner specified by the employer; and so on and so forth;
- The employee and union's agreement that should the employee engage in the conduct prohibited by the agreement, the state employer may or will dismiss the employee;
- The employee and union's agreement that should the state employer dismiss the employee, neither the union nor the employee will grieve that dismissal action or submit it to arbitration;
- The union's agreement that the last chance agreement establishes no precedent either in bargaining or in other disciplinary grievances or arbitrations;
- A statement that the last chance agreement is not a contract for continued employment and that the employer reserves its right to discipline/dismiss the employee based on the employee's conduct outside the scope of the last chance agreement and warranting discipline/dismissal action;
- The parties may *optionally* agree that the state employer will impose a dismissal action for violation of the last chance agreement only after an investigation conducted by the state employer's human resources personnel and that the employee and the union may participate in that investigation and contribute information to it.

As with other agreements, these last chance agreements addressing repeated minor misconduct or incompetent performance set out actions that the parties agree to do or refrain from doing. The conduct agreed to in these last chance agreements should, therefore, be phrased as obligatory acts. The author of the agreement should write the terms using language such as, "The employee must not engage in the following conduct in the workplace," or "The

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employee and the union will neither grieve nor appeal to arbitration, etc.,” or “Prior to imposing a dismissal action, the agency must assign an individual from its personnel section to review the facts, etc.” As with other last chance agreements, the author should avoid using the word “understand” in drafting the terms of the agreement for the reasons previously addressed. The author may state that the employee understands that, if he or she engages in the conduct prohibited in the last chance agreement, he or she will be dismissed, but the author should then state that the employee and union are not to appeal that dismissal action.

In drafting all agreements, state employers are well advised to consult with legal counsel to ensure that the terms of the last chance agreement achieve the intended result, include all necessary parties to the agreement, and conform to the collective bargaining agreement, if applicable.



THE FLSA ADMINISTRATIVE EXEMPTION

Federal and state laws mandate that, in appropriate circumstances, overtime wages be paid to “nonexempt” employees. The federal law requiring this—the Fair Labor Standards Act (FLSA)—is enforced by the US Department of Labor (DOL). Oregon’s wage and hour laws are enforced by the Oregon Bureau of Labor and Industries (BOLI). In general, unless required by an applicable collective bargaining agreement, employees who qualify for one of the three “white collar” exemptions—executive, professional or administrative—need not be paid overtime.

Dan Grinfas, a lawyer with BOLI’s Technical Assistance for Employers unit, recently categorized misclassification of exempt and nonexempt employees as “No.1” on the list of most common employer mistakes.¹ The consequences of such misclassification can be significant, including exposing the employer to potential overtime liability going back two and, under some circumstances, three years.

In addition to the requirement that an exempt employee be paid on a “salary basis,” federal and state regulations require that an exempt employee meet a series of tests, called the “duties tests.” Of the three white collar exemptions, the duties tests for the administrative exemption win the prize for “most misunderstood.” A well-known FLSA handbook refers to them as, “the most vague and subject to differing interpretation.”² The duties tests for the administrative exemption—among other things—require that:

- The employee’s primary duties are related to management policies or general business operations of the employer or the employer’s customers³;
- The employee exercises discretion and independent judgment; and
- The employee performs work in at least one of three categories: advisory specialists or department heads, assistants to executives, or personnel who perform special assignments.

Of these tests, it is the connection with management policies or general business operations that is most difficult to apply. As noted in the Thompson Group FLSA handbook: “Historically, whether an individual was an ‘exempt’ or a ‘nonexempt’ administrative employee turned on whether the individual exercised discretion and independent judgment in performing job duties. However, in recent years, the administrative exemption, particularly for public employers,

¹ “In the Workplace,” *Statesman Journal*, March 27, 2004.

² *Fair Labor Standards Handbook for States, Local Governments and Schools* (Thompson Publishing Group), Section 243. p. 58.

³ A different rule applies to administrative functions in educational institutions.

has centered on whether the employee's work is directly related to management policies or general business operations of the employer."⁴

Part of this problem stems from the fact that the FLSA did not initially apply to public employers. Instead, when enacted in 1938, the FLSA was aimed at the major employment sector of that time—the manufacturing industry. Predictably, applying regulations designed for employees engaged in private sector manufacturing to those working in the public sector has proved to be a challenging exercise. For instance, when BOLI states—"If employees are mainly working in 'production' or 'sales' work they are nonexempt"—BOLI is stating the general rule for administrative employees in the private sector. Since public agencies generally do not have products or sales, how is this rule applied to them?

One way the regulations have reconciled the difference between the private and public sectors has been to characterize a public agency's mission or function as synonymous with a private sector employer's products or sales. The DOL has thus stated that for public agencies, to determine whether work is related to general business operations, "... it is essential to consider the nature of the mission and function of the government agency. ... activities that carry out the ongoing mission and day-to-day functions of the agency—rather than its management policies ... cannot be viewed as the types of duties contemplated by the regulations for exemption." *This means that state employees whose primary duties carry out an agency's mission or function generally would not qualify for the administrative exemption.*

The applicable DOL regulations also make it clear that this requirement, "limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers."

What types of state employees would meet the "directly related to management policies or general business operations" requirement? In general, according to the DOL, those engaged in "staff" functions or in "servicing the agency," as well as those whose duties concern an agency's administrative or management policies or its general management. This would include, according to DOL regulations, employees who affect management policy or have the responsibility to execute it or carry it out (and not just those who participate in formulating such policy). Examples of employees who *may* qualify for this exemption (depending on assigned duties) include: staff employees such as tax experts, wage-rate analysts, statisticians, personnel directors and labor relations directors; employees who perform special assignments which service the agency, such as lease buyers and special organization planners; certain computer system analysts and administrators; and office managers who do not supervise two or more employees but who exercise discretion and independent judgment.

An excellent resource that includes an explanation of these requirements is the BOLI handbook, *The White Collar Exemptions*. Another source of useful information regarding the FLSA is the DOL's web page: <http://www.dol.gov>.

Initial questions about application of FLSA exemptions should be directed to agency Human Resource departments. For legal advice regarding these issues, authorized agency personnel should contact the Department of Justice, Labor and Employment Section.

⁴ *Fair Labor Standards Handbook for States, Local Governments and Schools, supra.* p. 62.

About the Management Insight...

The *Management Insight* is produced periodically by the Labor Relations, Classification, and Compensation Unit, Human Resource Services Division, Department of Administrative Services, and is distributed to Executive and Management Service employees of the State of Oregon. Back issues and a cumulative articles index may be accessed through the HRSD website: <http://egov.oregon.gov/DAS/HR/>. Material covered in this newsletter may be reproduced without special permission. Please credit the *Management Insight*, DAS, Labor Relations, Classification, and Compensation Unit.

For questions, or if you have an item of interest which you would like considered for an issue of the *Management Insight*, please contact Pamela Murdock, Labor Relations Section . . .

Call: 503-378-2616 Fax: 503-373-7530 E-mail: Pamela.Murdock@state.or.us

About the Labor Relations, Classification, and Compensation Unit . . .

The Labor Relations, Classification, and Compensation Unit is a part of the Human Resource Services Division in the Department of Administrative Services. The Administrator of the Division is Sue Wilson. Currently, the Labor Relations Section negotiates and administers 32 collective bargaining agreements with 11 different labor organizations, covering over 27,000 employees in the Executive Branch of Oregon State Government. The Labor Relations Section also negotiates an agreement with SEIU covering a bargaining unit of approximately 13,000 Homecare Workers. The Classification Section maintains the State's classification plan and provides consultative advice in all areas of job classification development. The Compensation Section maintains the state-wide compensation system; recommends compensation changes to existing, new, and revised classifications; assesses statewide market competitiveness; and gathers and analyzes market comparators data relative to the State. The following is a list of the Labor Relations, Classification, and Compensation Unit staff and contact phone numbers for your convenience.

Scott Allan, State Labor Relations Manager	503-378-3967
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