A Timely Analysis of Legal Developments

ASAP®

August 27, 2013

New Nevada Employment Law Developments Affect Social Media, Overtime

By Roger Grandgenett, Rick Roskelley, Dustin Clark and Kristina Gilmore

There have been several notable and recent developments in Nevada employment law both through enacted legislation and advisory opinions issued by the Nevada Labor Commissioner. Specifically, the legislature has passed a law limiting employer access to employee and applicant social media information. Additionally, Nevada's Office of the Labor Commissioner (Labor Commissioner) recently issued two advisory opinions regarding time clock rounding and the "4 10s" exception to the state's overtime laws.

Employee Social Media Information

During the most recent legislative session, Governor Brian Sandoval signed into law Assembly Bill 181, which makes Nevada the eleventh and latest state to enact employment-related provisions limiting employer access to employees' and applicants' social media information.

Under the law, an employer cannot:

- Directly or indirectly require, request, suggest, or cause an employee or prospective employee to disclose a user name, password, or other information providing access to his or her personal social media account; or
- Threaten to or actually discharge, discipline, discriminate in any manner, or deny employment or promotion to an employee or prospective employee who refuses, declines, or fails to disclose a user name, password, or any other information providing access to his or her personal social media account.

The new law defines "social media account" as "any electronic service or account or electronic content, including, without limitation, videos, photographs, blogs, video blogs, podcasts, instant and text messages, electronic mail programs or services, online services or Internet website profiles."

The law is far less detailed than some other analogous state laws, but lacks certain employer protections set forth in other state statutes. For example, unlike California's statute, Nevada's social media provision does not include an exception that allows an employer to request that an employee divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct. However, Nevada's new law does allow an employer to require an employee to disclose a user name, password, or other information to an account or

service (other than a personal social media account), to access the employer's internal computer or information system. Further, the law does not prevent an employer from complying with state or federal statutes or regulations.

In response to the new law, employers should review and revise, if necessary, policies and procedures concerning access to social media. Employers lacking policies that address the new law should consider implementing social media policies. Further, employers should train supervisory, managerial, and human resources personnel not to ask employees for their log-in credentials for personal social media and not to discipline employees who refuse to provide those credentials.

Nevada Labor Commissioner Advisory Opinions

Rounding Opinion

The June 21, 2013 advisory opinion focused on whether the use of time clock rounding to calculate employee pay is appropriate under Nevada law. Apparently reversing his previously-held position indicated in an article last year, the Labor Commissioner now asserts that "time clock rounding is appropriate so long as the rounding policy is used in a manner that does not result, over a period of time, in a failure to compensate employees properly for all the time actually worked." In reaching this conclusion, the Labor Commissioner relied on the fact that (1) federal law permits time clock rounding, (2) other states follow federal law, and (3) time clock rounding is not inconsistent with Nevada law.

The Labor Commissioner explained that the Fair Labor Standards Act (FLSA) permits employers to use time clock rounding under certain circumstances. In fact, the applicable federal regulation specifically states that time clock rounding is permissible "provided that that it is used in such a manner that it will not result, over a period of time, in a failure to compensate the employees properly for all the time they have actually worked."[1] The Labor Commissioner noted that pursuant to this regulation, courts will not find a violation of federal law if an employer uses time clock rounding, "as long as the time clock rounding policies do not result, over time, in a failure to compensate employees for all time actually worked."

In addition to the FLSA permitting time clock rounding, the Labor Commissioner noted that there are several other states, in addition to Nevada, that do not have a specific statute, regulation or case law regarding this long standing practice. However, these states often rely on the FLSA when interpreting their wage and hour laws. By way of illustration, in *East v. Bullocks, Inc.*,[2] an Arizona court reasoned that because the state did not have a law that was inconsistent with the federal regulation regarding time clock rounding, it was reasonable to interpret Arizona law in a manner consistent with the federal regulation. California also gave time clock rounding its stamp of approval in *See's Candy Shops, Inc. v. Superior Court*,[3] and noted that time clock rounding allows employers to efficiently calculate hours worked without being overly burdensome on employees.

Finally, the Labor Commissioner stated that time clock rounding is not inconsistent with Nevada's wage and hour laws. For the reasons set forth above, the Labor Commissioner held that employers that "utilize a time clock rounding policy that will not result, over time, in failure to compensate employees properly for all time worked" will not be in violation of Nevada law.

"4 10s" Opinion

Under Nevada law, an employer is required to pay 1.5 times an employee's regular wage rate when an employee works more than 40 hours in any scheduled week of work or more than eight hours in any workday (if the employee earns less than 1.5 times the applicable Nevada minimum wage rate), whichever occurs first.[4] There is an exception to the requirement for daily overtime. If the employee and employer mutually agree to a schedule where the employee works a scheduled 10 hours per day for four days within any work week, the employer is NOT obligated to pay overtime for the two hours exceeding eight in a workday. This exception is known as the "4 10s" exception.

---

1 29 C.F.R. § 785.48(b).

2 34 F.Supp.2d 1176, 1184 (D. Ariz. 1998).

3 210 Cal. 4th 889, 907 (Cal. App. 4th Dist. 2012).

4 *See* N.R.S. 608.018; N.R.S. 338.020.

On July 25, 2013, the Labor Commissioner issued another advisory opinion that addressed this "4 10s" exception to Nevada's overtime law under N.R.S. 608.018 and N.R.S. 338.020. In this opinion, the Labor Commissioner clarified his position and held "that an employer is not required to pay overtime when it is a decision of the employee that results in an employee failing to work a scheduled '4 10s.'"

The Labor Commissioner noted that there are several benefits to the "4 10s" exception, such as providing a flexible work week alternative for employees while at the same time ensuring that employers can still operate efficiently and effectively. Despite the "4 10s" exception, there were still several scenarios in which an employer may have been required to pay overtime—for example, when an employee does not work a complete 10 hour shift on the employee's fourth 10 hour day. A strict interpretation of the law in this example requires the employer to pay two hours of overtime for each of the three previous days and therefore defeats the purpose of the exception. In the advisory opinion, the Labor Commissioner stated that in situations such as this, the employer incurs an additional and unexpected expense, which is often passed on to the employer's customers. Further, these types of situations often negatively affect the employer-employee relationship.

In an effort to rectify this unintended consequence under the "4 10s" exception, the Labor Commissioner clarified that "[i]f an employee does not work a scheduled '4 10s' due to a decision made by the employee or for reasons within the employee's control or to the employee's benefit, the employer is only required to pay the employee's regular wage for the hours the employee actually worked during that work week." However, employers should be aware that the key to this opinion is a factual premise that the employee made the decision not to work the "4 10s" schedule. If the employee is unable to work his "4 10s" schedule as a result of action by the employer or for reasons outside of the employee's control, then the employer is required to pay overtime for any day during the work week where the employee worked more than 8 hours.

Roger Grandgenett is the Office Managing Shareholder of Littler Mendelson's Las Vegas and Reno offices; Rick Roskelley is a Shareholder, and Dustin Clark and Kristina Gilmore are Associates, in the Las Vegas and Reno offices. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Grandgenett at rgrandgenett@littler.com, Mr. Roskelley at rroskelley@littler.com, Mr. Clark at dclark@littler.com, or Ms. Gilmore at kgilmore@littler.com.