



LEGAL NOTES

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OVERTIME - TO PAY OR NOT TO PAY

By Burt J. Blustein, J.D.

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In 1938 the United States Government enacted the Fair Labor Standards Act, which was designed to protect employees from abusive employment practices. Over the past 72 years, the law itself has been amended countless times, and thousands of pages of Federal Regulations have been enacted to interpret and implement the Act.

The question often asked by employers is “when is an employer responsible for paying overtime under the Fair Labor Standards Act”? An easy question to ask, but one that is often difficult to answer.

Over the last 72 years, the federal regulations and the courts have attempted to establish guidelines for entitlement to overtime. Due to the enormity of this subject, this article can only describe some basic guidelines as promulgated by the courts, the Federal Regulations and the Fair Labor Standards Act itself.

The Fair Labor Standards Act (“FLSA”) provides that employees must be paid time-and-a-half for work in excess of 40 hours a week.

However, the FLSA provides for exemptions from the overtime pay requirement for persons “employed in a bona fide executive, administrative, or professional capacity.” It is the obligation of the employer to prove that the employee qualifies for an exemption from overtime. In examining the question of whether an employee is exempt from overtime entitlement, there is a “short test” and a “long test.” The short test is two-fold: (i) does the employee earn more than \$450 per week, and (ii) does the employee’s primary duty consist of the management of the enterprise in which the employee is employed or other customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein. (*see* Code of Federal Regulations 29 CFR Section 541.1). The first criterion is straightforward. The difficulty in interpretation comes with regard to the individual employee’s job duties and responsibilities. As a rule of thumb, in examining whether an employee’s position is considered executive or management, the employee must devote more than 50% of his or her time to these management duties. Other pertinent factors must be considered. Among those factors are (1) the relative importance of the management duties as compared with other types of duties; (2) the frequency with which the employee exercises discretionary powers; (3) the employee’s relative freedom from

supervision; and (4) the relationship between the employee's salary and the wages paid other employees for the kind of non-exempt work performed by the supervisor.

As you might gather, the difficulty in parsing out the employee's duties and responsibilities, what portion is considered executive, management or supervisory and what is regular labor presents some very intriguing and very difficult to answer factual questions; each case stands on its own separate set of facts. Take the common situation of the designation of an employee as a foreman. Just because the person is designated as a foreman and has some oversight responsibilities with respect to his co-workers does not automatically classify the foreman as exempt from overtime. A "working foreman," for example, works alongside his subordinates and performs the same kind of work that is performed by those subordinates, but carries an additional supervisory function. The working foreman who would not be exempt from overtime pay is deemed less than a manager of a recognized subdivision, and is considered more a supervisor of subordinate employees who he or she works alongside of, while having little or no discretionary responsibility.

The rules also classify certain types of administrative work as exempt work. Again, there can be a very fine distinction between the definition of a manager and an administrative person. Some administrative personnel are exempt from overtime payments, while others are not. In one pertinent Federal Circuit Court of Appeals case, a useful guideline is provided. The Court described a person employed as a statistician. The Court stated that if all that person does is tabulate data, then that person is clearly not an exempt employee. However, if that person makes analyses of data and draws conclusions that are important to the determination of, or which in fact determines financial policy, then that person is doing management work and is an exempt employee. In summary, an exempt employee must provide some intellectual function that furthers the management processes of the company, while a non-exempt person performs tasks that are non-discretionary and which do not affect the policy of the management of the company. Each job must be scrutinized based upon its own set of facts to make a determination as to whether the employee is administrative or management and exempt from overtime or whether the employee is overtime eligible. It is often very difficult to arrive at a conclusive determination. ■

***BUYING OR SELLING YOUR HOME?
WHAT YOU NEED TO KNOW ABOUT THE
PROPERTY CONDITION DISCLOSURE
STATEMENT***

By Rita G. Rich, J.D.

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Effective March 1, 2002, the New York State Legislature passed Real Property Law Section 462, a statute that requires the seller of residential real property to provide a buyer or buyer's agent (defined as a real estate broker)

with a signed statement of conditions and information, known to the seller, concerning the property. It has been my experience, representing either buyer or seller, that neither party is fully aware of the pros and cons of the statement. There hasn't been very much case law on the subject, and the little that exists provides widely divergent interpretations of the law.

The statute reads as follows:

1. Except as is provided in section four hundred sixty-three of this article, every seller of residential real property pursuant to a real estate

purchase contract shall complete and sign a property condition disclosure statement as prescribed by subdivision two of this section and cause it, or a copy thereof, to be delivered to a buyer or buyer's agent prior to the signing by the buyer of a binding contract of sale. A copy of the property condition disclosure statement containing the signatures of both seller and buyer shall be attached to the real estate purchase contract. Nothing contained in this article or this disclosure statement is intended to prevent the parties to a contract of sale from entering into agreements of any kind or nature with respect to the physical condition of the property to be sold, including, but not limited to, agreements for the sale of real property "as is."

The disclosure statement form itself is provided in paragraph 2 of Section 462. Your broker or this office can provide you with a copy of the statutory form, which requires the seller to provide general, environmental, structural, and mechanical information about the property. It is essentially a multiple choice questionnaire – yes, no, unknown or n/a. The form clearly states that if the seller does not deliver a disclosure statement prior to the signing by the buyer of a binding contract of sale, then at closing the buyer is entitled to a credit of \$500 against the purchase price. There are exceptions to the required provision of a disclosure statement, and they include estates, foreclosures, uninhabited new construction, and transfers between spouses, among others.

As a seller, you may base your negotiations on the \$500 that you may be crediting to the buyer. As a buyer, if you don't get a disclosure statement, not only are you entitled to the \$500 credit, but you should also make sure your due diligence of inspection and investigation is

complete, inasmuch as the doctrine of "buyer beware" may be applied.

Generally, New York courts have rendered opinions as follows:

- Since a property disclosure statement was not provided, the Seller and broker did not have a duty to disclose the property's water problems.
- Buyer waived claims for defects in areas of the disclosure statement that were answered "unknown" because unknown indications triggered purchaser's duty to investigate.
- Neither Seller nor Seller's real estate broker had an affirmative duty to disclose water problems when those questions on the disclosure statement were left unanswered.
- Sellers who, on the disclosure statement, misrepresented that the alarm system was working were held liable even though before closing they told the purchaser about the defect. The statute requires a written amendment to the disclosure statement to change an answer.
- The disclosure statement supersedes the "as is" clause in the contract of sale.
- A claim based on failure to disclose in the statement was dismissed because the buyer did not produce independent evidence that the water problem was caused by the seller prior to closing.
- The court's words of wisdom in one decision were that the \$500 credit is a more prudent course for sellers to take.

We recommend that sellers and buyers of residential real property become familiar with the disclosure statement before entering negotiations to buy or sell a home, and that they discuss its ramifications with counsel. ■

MAY A TRUST BE TERMINATED IF ALL BENEFICIARIES AGREE?

By James G. Yastion, J.D.

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Imagine this scenario: an individual creates a trust in his will (legally referred to as a “testamentary trust”) naming his wife as trustee and also as income beneficiary during her life. The trust further provides that the testator’s children from his first marriage will receive the trust assets when their step-mother dies. The testator passes away and it appears that the trust will exist for many years. Unfortunately, after the testator’s death such severe conflict develops between the second wife and the stepchildren that litigation may not be far off!

A question then arises – if the wife and stepchildren agree, can the trust simply be terminated so that the children can receive the remainder free of trust? If the trust terminated is permitted, the estate will be promptly settled and the parties will go their separate ways, avoiding the cost and emotional toll of a drawn-out litigation. Seems like a reasonable solution for all concerned.

Not so fast....

Even though in this example all the parties agreed to terminate the trust prior to the trust’s “triggering” event – the surviving spouse’s death -- one key individual was left out of the discussion -- the testator. Courts in New York will not permit the testator’s intent to be supplanted by the survivors, notwithstanding their unanimous agreement.

Courts have uniformly held that a testamentary trust is an “irrevocable expression of the testator’s intent,” and that the trust’s duration cannot be “foreshortened by judicial fiat or by act of the interested parties.”

At first the rule seems illogical because it appears at odds with reason and efficiency. However, it is a matter of public policy that a last will and testament is the expression of a person’s intent and, once the person dies, his or her intent cannot be second-guessed.

The prohibition on early termination of a testamentary trust can make an already tenuous situation worse. It is not uncommon for family members to experience friction in dealing with a decedent’s estate, but this tension can be heightened by the unique trustee/beneficiary dynamic. Often, beneficiaries will resent trustees controlling ‘their’ money, while on the other hand trustees feel justified asserting control because trustees are vested with sole legal authority to administer the trust. With this friction already part of the equation, adding a lengthy trust administration can put the participants over the tipping point.

The question then is what to do. First and foremost, through careful estate planning, these likely “friction points” can be planned for. The will can, for example, grant the trustee power to withdraw principal from the trust and pay it to the beneficiaries, even ‘to the full extent thereof,’ which can have the same effect as terminating the trust. Alternatively, the testator must carefully select the trustee with a mind toward personalities, existing relationships, and possible conflicts. The testator may even nominate a financial institution to act as trustee or co-trustee. The will may also specifically grant the trustee the authority to terminate the trust provided the trustee does not act arbitrarily, unreasonably or with some improper motive.

If it is too late and the testatrix dies without including these types of provisions in her will, post-death options include the trustee voluntarily resigning his or her post to be replaced by a trustee more suitable for the beneficiaries. In this case, the trustee must sign a formal renunciation, but must attempt do so

prior to being appointed by the court. Obtaining court permission to resign after appointment is much more difficult.

There is a narrow exception to the rules barring an early termination where the trust has become “uneconomical.” This would be the case where, for example, the trust assets are \$38,000 and the trust incurs \$1,000 in expenses.

Unlike a testamentary trust, a “living” trust – whether revocable or irrevocable -- *can* be terminated prior to the trust’s stated triggering event, *provided* that the creator, trustee and beneficiaries consent. However, after the creator dies, the living trust becomes irrevocable and is subject to the same termination prohibitions as a testamentary trust created under a will.

All of the above should highlight the importance of working with an experienced and knowledgeable estate planning attorney to create your estate plan. While the use of “protective” trusts can provide the beneficiaries with such valuable protections as divorce protection, creditor protection and catastrophic health protection, it is critical that your attorney provide the right counsel to help you to select the type of trust and the appropriate trustees to carry-out your intent. Our estate planning attorneys work closely with each client to make sure that the client’s trusts combine trust protections with appropriate flexibility to meet the client’s objectives *and* reduce the likelihood of disputes among the family members after the client’s death. ■

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EDUCATIONAL WORKSHOPS

Blustein, Shapiro, Rich & Barone, LLP offers complimentary educational workshops to our clients and friends. Here's our upcoming workshop schedule:

Estate Plans That Work™

July 15, 2010 – 3:00 p.m. to 6:00 p.m.

Protecting Your Assets from Nursing Home Costs

July 20, 2010 – 3:30 p.m. to 5:30 p.m.

To register for a workshop, call Donna at 291-0011 x.242, or register online at www.mid-hudsonlaw.com by going to the "Event Calendar" link.

All workshops will be held in the BSRB Education Center at our 10 Matthews Street location.