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ILLINOIS STATE BAR ASSOCIATION

ADMINISTRATIVE LAW

The newsletter of the Illinois State Bar Association's Section on Administrative Law

Chair's comment page, April/May 2010*

By Marc C. Loro; Chairman, Administrative Law Section Council

April 2010 has started like the proverbial lamb; flowers and trees are blooming almost two weeks ahead of schedule here in Springfield. Some flowering trees are already losing their petals! Pat and Ron are almost whining about how warm it is at Wrigley Field, where the Cubs are hosting the Brewers today. The warm weather we have experienced so far this month gives credence to those who proclaim that the planet is over-heating. And the earthquakes! Another one in China this week. Perhaps the end times are upon us. Perhaps this is the last thing that you will ever read. If not, then my guess is that the temperatures will drop like a rock before the end of the month.

Speaking of whining, did you catch Blago's final appearance on "*Celebrity Apprentice*"? We were channel-surfing a couple of Sundays ago and came across it. We watched for a few minutes and, when it was apparent that he was in the bottom three, or whatever, we kept watching to see if he would get fired. Given the opportunity to argue why he should not get the boot, he gave the nation a classic Blago performance, full of excuses and blame shifting. It did not save his hide. Give Donald Trump some credit; he saw it for what it was and held the former governor accountable. Good riddance. Next stop is Judge Zagel's courtroom. I don't think the judge will cut him any slack either.

Shortly thereafter, the federal prosecutors asked Judge Zagel to enter an order that William Quinlan, one of Blago's former general counsels, be compelled to produce certain documents and testify at the impeached governor's upcoming trial. It seems that there is some kind of attorney-client privilege issue. See the Springfield *State Journal-Register*, 8 April 2010, p. 11 ("Blago-

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Summary of recent decisions and PLAs

By Hon. Edward Schoenbaum and William A. Price and J.A. Sebastian

These summaries were prepared by Susan M. Brazas for the ISBA Illinois E-Mail Case Digests, which are free e-mail digests of Illinois Supreme and Appellate Court cases available to members soon after the cases appear on the Internet, with a link to the full text of the slip opinion at the Court's Web site. These have been downloaded and reorganized according to topic by Ed Schoenbaum for members of the Administrative Law Section, with permission.

Illinois Supreme Court PLAs

The Illinois Supreme Court granted petitions for leave to appeal in the following cases on March 24, 2010.

Elections

***Hossfeld v. State Board of Elections,* No. 109725.**

This case presents questions as to whether Steven J. Rauschenberger could properly run as Republican for State Senate in February 2010 primary where Rauschenberger had voted as Democrat in February 2009 primary. Election Bd., in tie vote, allowed Rauschenberger's name to remain on Republican ballot, and Appellate Court

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INSIDE

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Chair's comment page

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jevich's ex-counsel may testify"). Really? I thought that question was settled by the U.S. Supreme Court when it decided *U.S. v. Nixon* (1974) 418 U.S. 683, 94 S.Ct. 3090. Or perhaps when the 7th Circuit Court of Appeals ruled against George Ryan when he tried to claim the privilege in order to prevent one of his general counsels, Roger Bickel, from testifying at his corruption trial. The article quotes Blago's attorney, Sheldon Sorosky, as saying that "As far as we're concerned there was an attorney-client relationship."

Unfortunately, the Illinois Rules of Professional Conduct are silent on the nature of the government attorney-government client privilege. See Rule 1.6: Confidentiality of Information. The *Restatement of the Law Third* (The Law Governing Lawyers), ALI (1998) §74, is much more helpful. Once again, we call upon the Illinois Supreme Court to take up the challenge to clarify this issue. The relationship should not be a personal one. While the rules regarding the executive privilege should apply, they should not shield a government official from the testimony of a government lawyer regarding the conduct of government affairs or corrupt practices impacting government affairs.

We note that the ongoing budget crisis impacts all aspects of government and the lives of Illinois' citizens. Two recent developments are worth noting this month: the Illinois State Police announced 460 layoffs and the closure of five (5) regional headquarters. Including retirements, the number of troopers on duty will be reduced by about 600, or 30 percent. See the *State Journal-Register* of 24 March 2010, p. 1 ("State police to lay off 460"). Second, our Executive Mansion is falling apart. See the *State Journal-Register* of 6 April 2010, p. 1 ("Executive Mansion's condition deteriorates"). Among other problems, the roof leaks, some days there is no hot water, and the elevator breaks down regularly. I guess that we should not have been so hard on Patti and Rod for not wanting to live there.

Among the feedback on our administrative adjudications seminar was a question about whether the seminar qualified as a formal training program for hearing officers that is required by the Municipal Code. See 65 ILCS 5/1-2.1-4(c). This provision was added to the Municipal Code by P.A. 90-518 back in 1998 and, I suspect, has gone largely unnoticed. The ALSC did not seek to "qualify" the program because no one has ever heard of this requirement. This raises the question of how does a program get qualified? If you are asking me, then I think our program did qualify, but we would be interested in hearing from anyone who can answer this question or knows of other programs that do qualify. We will make this information available to our membership.

In this issue of the Administrative Law newsletter, you will find an interesting comment by co-editor William A. Price on the question of whether the client is always right. He shows us how things have not changed much over the centuries. We are also reprinting an article from another newsletter that we think administrative lawyers will find very useful: An article by James B. Zouras from the December issue of *The Bottom Line*, the newsletter of the ISBA's Section on Law Office Management and Economics, vol. 31, no. 2. Last month, you will recall that we reprinted articles by the Hon. Brian L. McPheters from the December 2009 issue of the General Practice, Solo and Small Firm newsletter, and by Damian Capozzola from the December 2009 issue of *The Corporate Lawyer* newsletter. Our thanks to these attorneys for letting us share their research with you.

We encourage you to consider and to take every opportunity to share your research and scholarship with your fellow members by submitting articles for publication in your newsletter. You would be performing a great service for your colleagues and maybe earn some CLE credit as well. We hope that you are enjoying a healthy and pleasant spring. Please let us know how we are doing and how we can improve our service to you. ■

***** The views and opinions expressed here are those of the author and are not intended to represent the views and opinions of the Illinois State Bar Association or the Office of the Secretary of State.

Summary of recent decisions and PLAs

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affirmed, after rejecting objector's claim that Rauschenberger was locked in as Democrat until after February 2010 primary due to his prior act of voting as Democrat in February 2009 primary. (Dissent filed.)

Elections

***Goodman v. Ward,* No. 109796.**

This case presents question as to whether candidate seeking office of Circuit Court Judge representing subcircuit of Twelfth Judicial Circuit was required to be resident of subcircuit on date he submitted nominating petitions to Will County Officers Electoral Board. Appellate Court, in removing candidate from ballot, found that under Article VI, section 11 of Ill. Constitution, said candidate was required to be resident of subcircuit in order to seek election in primary for judgeship of subcircuit.

Taxation

***First American Bank Corp. v. Henry,* No. 109711.**

This case presents question as to whether trial court properly granted summary judgment to defendants in instant case where plaintiffs-taxpayers objected to Forest Preserve District's levy for its annual contribution to Ill. Municipal Retirement Fund where levy was made in 1999 to pay for District's fiscal year 2000 contribution to said Fund. While plaintiffs argued that District had no authority to make said levy where District had not yet passed any appropriation for 2000 contribution, Appellate Court found that instant levy complied with sections 13.1 and 13.3 of Forest Preserve Act.

Unemployment Compensation

***Williams v. Bd. of Review,* No. 109469.**

This case present question as to whether IDES properly denied plaintiff trade readjustment allowance benefit where plaintiff had already exhausted full allotment of unemployment insurance benefits, and where plaintiff had missed applicable 8/16 week deadline for enrolling in job training program that would have made her eligible for said benefits. Appellate Court, in reversing IDES, found that good cause exception to application deadline applied where plaintiff had never been given notice about 8/16 week deadline. In its petition for leave to appeal, IDES argued, among other things, that Appellate Court's decision was inconsistent with federal legislation and jeopardized tax credits available to Illinois employers.

Illinois Supreme Court decisions

Insurance

***Schultz v. Illinois Farmers Insurance Company,* No. 108038 (March 18, 2010) Cook (KARMEIER) Appellate court affirmed.**

Statutory requirement of Illinois Insurance Code that "permissive users" shall be covered for underinsured motorist (UIM) coverage includes not only permissive drivers, but permissive occupants of vehicle. Provision of insurance policy which excludes occupants from UIM coverage is contrary to public policy, thus void and unenforceable. Insurers cannot define insureds for UIM purposes differently than for purposes of liability and uninsured motorist (UM)coverage.

Illinois Appellate Court Decisions

Requests to Admit

***Oelze v. Score Sports Venture* , No. 1-09-1476 (March 30, 2010) Cook (KARNEZIS) Affirmed in part, reversed in part; remanded.**

(Editorial note: Although this decision relates to a negligence case, the analysis of the Court concerning Requests to Admit should be reviewed by any practitioner. Many administrative agencies permit the Request to Admit during discovery. For example, the Rules of the Illinois Human Rights Commission expressly authorize Request for Admission of Fact and Request for Admission of Genuineness of Document, providing that each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 28 days after service, the party to whom the request is directed serves either (1) a sworn statement denying specifically the matters or setting forth in detail the reasons why she or he cannot truthfully admit or deny those matters, or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or otherwise improper.

Plaintiff injured when she caught her foot on a rope exercise ladder hidden underneath curtain behind tennis court while playing at indoor tennis club where she was member. Plaintiff had duty to read release, which she signed as part of her membership agreement. Ladder was "equipment," thus covered by release, and injury was foreseeable, thus grant of summary judgment on negligence count proper. Question of fact precluded summary judgment on willful and wanton count as to Defendant's efforts to prevent danger. Responses to request to admit, which are boilerplate lack of information responses but without further explanation are admissions.

Arbitration, Collective Bargaining Agreements

***Department of Central Management Services v. Ndoca,* No. 1-09-1052 (March 23, 2010) Cook Co., 2nd Div. (CUNNINGHAM) Affirmed.**

Teamsters Union member was terminated by IDOT after random drug test showed marijuana in his system. Arbitrator conditionally reinstated him, requiring he complete treatment and rehab, and pass a drug and alcohol test. Arbitrator was within her authority to construe meaning of CBA for lesser penalty, emphasizing just cause required for termination, even though CBA mandates 30-day suspension pending discharge of employee who tests positive for marijuana.

Class Actions

***Village of Deerfield v. Commonwealth Edison Co.,* No. 2-08-0917 (December 15, 2009) Lake Co. (HUDSON) Reversed and remanded. (Supplemental court opinion filed 3/30/10).**

Circuit court has jurisdiction over Village's complaint against electrical utility provider for chronic electrical outages, but under doctrine of "primary jurisdiction," circuit court should defer to ICC to allow it to consider case, especially given technical nature of data involved and that how utility provides its service is in issue. Moorman doctrine applies to

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bar Plaintiff's claims which are of purely economic losses, seeking compensation for temporary housing and sump pumps purchased during power outages, but not those claims which are not clearly for economic damages alone. A plaintiff may recover in tort for economic losses that accompany personal injury or property damage resulting from a sudden or dangerous occurrence; however, Plaintiff filed as a class, and only class members who have suffered property damage are entitled to proceed under the Moorman doctrine.

Disability Benefits, Municipalities

***Lemmenes v. Orland Fire Protection District,* No. 1-09-1133 (March 23, 2010) Cook Co. (CUNNINGHAM) Affirmed; modified upon denial of rehearing.**

Public Safety Employee Benefits Act Section 10(b) requirements were satisfied, such that firefighter who suffered catastrophic injury during emergency training exercise was entitled to receive continuing health insurance benefit after he was unable to return to full-duty work and was on line-of-duty disability. Act does not differentiate between "actual" and "simulated" emergencies, and firefighter was told that a fellow firefighter was in urgent need of rescue and that he was to respond as if it were real emergency, thus he reasonably believed that it was an emergency.

Elections, Administrative Law

***Hossfeld v. Illinois State Board of Elections,* No. 1-09-3598 (Feb. 24, 2010) Cook Co. (COLEMAN) Affirmed.**

Republican candidate for State Senate, for upcoming 2010 primary, voted a Democratic ballot in 2009 consolidated primary election, after which he voted in general township election for that primary. Election Code no longer has express time limitations on party-switching for candidates, but only very limited requirements that a candidate declare party affiliation and refrain from participating in opposing party's activities within 45 days of primary. Candidate has declared his affiliation and is a qualified Republican Party, thus his "Statement of Candidacy" is valid.

Elections 1st Dist.

***Mitchell v. The Cook County Officers Electoral Board,* No. 1-10-0002 (March 5, 2010) Cook Co. (TOOMIN) Affirmed.**

County Officers Electoral Board struck tainted nominating petitions, but allowed candidate for circuit judge, who was part of a ticket with two other candidates, to remain on ballot. Even where nominating petitions found tainted were not counted, candidate still had sufficient number of proper petition signatures. Even though Plaintiff made several detailed objections to Electoral Board, including statement of candidacy, none related to notarization of that document, thus issue was not clearly before the Board. Election Code instructs

Board to decide objections before it, not to *sua sponte* raise issues or objections; thus Board acted within its authority, and as supported by record, in not terminating candidacy.

Medicaid, Estates

***Zander v. Adams,* No. 1-09-0979 (March 15, 2010) Cook Co. (GARCIA) Affirmed.**

IDHS imposed 60-month penalty period to Plaintiff's ineligibility for Medicaid assistance, because of her transfer of her beneficial interest in an Illinois land trust to her daughters 37 months prior to applying for Medicaid benefits. Plaintiff's transfer of her beneficial interest in land trust was a "payment" from a revocable trust because it was a non-cash disbursement or disbursement of property rights as to the real estate parcels which were principal of land trust, thus 60 month look-back period applied to her Medicaid application.

Municipalities, Injunction

***P&S Grain, LLC v. County of Williamson,* No. 5-09-0079 (April 2, 2010) Williamson Co. (STEWART) Reversed and remanded.**

Grain company and oil company filed declaratory judgment action challenging constitutionality of County School Facility Occupation Tax Law in Counties Code, which allows county governments to impose 1% sales tax for school facility use, and validity of two county ordinances that authorized imposition of the 1% sales tax in Williamson County. Plaintiff corporations met common law requirements for standing, as claim of injury is distinct and palpable, is fairly traceable to Defendants' actions, and is substantially likely to be prevented or redressed by grant of relief requested. Corporations do not lack standing by fact that they may pass school facility tax on to their customers, as it does not negate effect of tax upon them. Section 11-301 of Code of Civil Procedure does not preclude corporations, which are corporate citizens, from filing actions under that Section.

DCFS and applicable standard of review

***Bolger v. Department of Children and Family Services,* No. 2-08-0958, (March 29, 2010) DuPage Co. (SCHOSTOK) Affirmed.**

Department of Children and Family Services (DCFS) denied plaintiff Daun Bolger's request to expunge an indicated report of medical neglect. On November 30, 2007, the plaintiff filed an action for administrative review in the circuit court of Kane County. On September 15, 2008, the trial court affirmed the DCFS decision, and the appellate court affirmed the trial court.

On appeal, the plaintiff argued that the ALJ erred in quashing the subpoenas of two independent witnesses who were going to testify that Robert's burns did not appear to be significant. Specifically, the plaintiff argued that "there is no provision contained in the Illinois Administrative Code, nor the DCFS rules of procedure, that allows an administrative agency to quash a properly issued subpoena."

Whether the ALJ had the legal authority to quash the properly issued subpoenas is a legal question that we review *de novo*. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008). The Court held that because this argument had not been raised before DCFS, the argument was forfeited. The court noted that the administrative hearing and review process that DCFS guarantees to persons requesting to expunge an indicated finding from the State Central Register is governed by the Illinois Administrative Code, Title 89, chapter III, subchapter B, part 336. See 89 Ill. Adm. Code §336.10. Section 336.120(b)(8) of Title 89 of the Illinois Administrative Code expressly authorizes an ALJ to "quash or modify subpoenas for good cause, including but not limited to relevance, scope, materiality and emotional harm or trauma to the subpoenaed witness." 89 Ill. Adm. Code §336.120(b)(8), amended at 24 Ill. Reg. 7660, 7681, eff. June 1, 2006. Thus, the ALJ properly quashed the subpoenas because the testimony of two teachers that Robert's burns did not appear to be significant one week after he was hospitalized would not be relevant to a determination of medical neglect pursuant to the Illinois Administrative Code. The teachers were not qualified to assess the proper medical treatment or to give an opinion on the serious or long-term harm. See 89 Ill. Adm. Code

§300 app. B, amended at 24 Ill. Reg. 12781, 12806, eff. October 1, 2001. As such, the ALJ properly quashed the subpoenas as a matter of law.

The plaintiff's second contention on appeal was that DCFS and the trial court erred in denying her request to expunge the indicated finding against her for medical neglect. When DCFS enters an indicated finding against a person for medical neglect, that person may administratively appeal the determination by requesting in writing that DCFS "amend the record or remove the record of the report" from the central register. 325 ILCS 5/7.16 (West 2008); see also 89 Ill. Adm. Code §336.40(c), amended at 24 Ill. Reg. 7668, eff. June 1, 2000. On appeal, DCFS carries the burden of proof in justifying the refusal to expunge and it must prove that a preponderance of the evidence supports the indicated finding. 89 Ill. Adm. Code §336.100(e), amended at 24 Ill. Reg. 7675, eff. June 1, 2000.

A determination of whether DCFS erred in denying the plaintiff's request to expunge the indicated finding against her for medical neglect involves a determination of whether the facts satisfy the agency's legal standard for medical neglect. Accordingly, the DCFS determination is reviewed under the clearly-erroneous standard. Upon review of the record, the Court held that the agency's decision was not clearly erroneous. The ALJ's findings of fact, adopted by DCFS, are not against the manifest weight of the evidence. The Court cannot reverse administrative findings on the "mere fact that an opposite conclusion is reasonable or that [we] might have ruled differently," citing *Abrahamson*, 153 Ill. 2d at 88. Bound by the applicable standard of review, the Court concluded the DCFS decision denying the plaintiff's request to expunge the indicated finding against her for medical neglect was not clearly erroneous.

Schools, Insurance

***Haake v. Board of Education for Township High School Glebard District,* No. 2-09-0103 (March 15, 2010) DuPage Co. (SCHOSTOK) Affirmed.**

School Board cannot decrease health insurance benefits provided to retirees under collective bargaining agreements after expiration of agreements. Federal common law applies to action filed by 107 retired teachers, who have standing to sue for benefits granted under previous collective bargaining agreements.

School Districts, Property Tax

***Board of Education of Auburn Community Unit School District No. 10 v. Illinois Department of Revenue,* No. 4-09-0806 (March 10, 2010)Sangamon Co. (MYERSCOUGH) Reversed.**

Only the county can conduct referendum to remove itself from Property Tax Extension Limitation Law (PTELL) because it adopted PTELL per referendum; law does not contain revocation provision for districts acquiring property via annexation, and court cannot read it into statute absent statutory authority. Thus, portion of school district within Sangamon County must remain subject to PTELL, but portion of district in Montgomery County is not.

Unemployment Insurance, Administrative Law

***Thompson v. Department of Employment Security,* No. 1-08-2875 (March 19, 2010) Cook Co. (McBRIDE) Affirmed.**

IDES Board of Review mailed to Plaintiff its denial of unemployment benefits, to the address which Plaintiff had confirmed was correct at hearing the previous day. Plaintiff filed untimely appeal of decision, 75 days after mailing, and claimed he lived at different address and did not receive denial letter. Service by mail not invalid just because a party denies receiving it. Board properly found it lacked authority to review untimely appeal.

7th Circuit Decisions

Attorney-client privilege/work-product doctrine

***Sandra T.E. v. S. Berwyn Sch. Dist. 100*, No. 08-3344,** involved a law firm's appeal from the district court's order requiring it to produce documents it created in an internal investigation of a school district. The court of appeals reversed, holding that 1) factual investigations performed by attorneys as attorneys fell comfortably within the protection of the attorney-client privilege; and 2) the work-product doctrine also protected the materials at issue from disclosure; and 3) to the extent some of the witnesses interviewed by the attorneys were not district employees, this was an independent rather than a duplicate source of protection.

Due Process

***Leavell v. Illinois Dept. of Natural Resources,* No. 09-2590 (April 6, 2010) S.D. Ill. Affirmed.**

District Court did not err in dismissing for failure to state valid cause of action plaintiff's lawsuit alleging that defendants violated his due process rights by conducting administrative hearing to cap oil wells without providing plaintiff with notice of said hearing.

Plaintiff's lawsuit essentially asserted random and unauthorized conduct by state actor, and plaintiff did not allege that state failed to provide adequate post-deprivation state procedure to address any lack of notice claim. Moreover, Ct. found that dismissal of plaintiff's action should be with prejudice since plaintiff's failure to avail himself of adequate state court remedies is substantive failure that defeats cause of action.

Labor Law

***Fleszar v. U.S. Dept. of Labor,* No. 09-2423 (March 23, 2010) Petition for Review, Order of Administrative Review Board Petition, denied.**

Record contained sufficient evidence to support ALJ's decision in favor of defendant-employer in plaintiff's action under Sarbanes-Oxley Act, alleging that defendant discharged plaintiff on account of her whistle-blowing activities. ALJ could properly find that Sarbanes-Oxley's provisions did not apply where defendant was non-profit membership association that did not issue stock. Court rejected plaintiff's argument that ALJ should have directed Secretary of Labor to conduct more complete investigation on behalf of plaintiff to discover whether defendant had relationship with another entity that did issue stock, so as to subject defendant to liability under Sarbanes-Oxley Act.

***Schmidt v. Eagle Waste & Recycling, Inc.,* No. 09-1902 (March 22, 2010) W.D. Wisc. Affirmed.**

Dist. Ct. did not err in granting defendant-employee's motion for summary judgment in plaintiff's Fair Labor Standards Act claim alleging that defendant had wrongfully failed to pay her overtime wages. Plaintiff's job duties, which required that she contact potential commercial customers to use defendant's waste and recycling services, and which paid her salary and commissions, qualified plaintiff for exemption under Act as outside salesperson that excused defendant from paying her overtime wages. Ct. alternatively found that plaintiff fell within administrative/salesperson combination exemption under Act where plaintiff's other duties included development of customer database and advertising/marketing plans.

***Truhlar v. U.S. Postal Service,* No. 09-1652 (April 12, 2010) N.D. Ill., E. Div. Affirmed.**

Dist. Ct. did not err in granting defendants' motion for summary judgment in hybrid action under section 301 of LMRA alleging that defendant-employer terminated plaintiff without just cause in violation of collective bargaining agreement, and that defendant-union breached duty of fair representation by withdrawing plaintiff's grievances stemming from plaintiff's removal from his job for failure to report outside income while collecting disability payments. While Employee Compensation Appeals Bd. ultimately determined after plaintiff's termination that plaintiff was not required to return his disability earnings, Dist. Ct.'s grant of defendants' summary judgment motion was proper as to both defendants where plaintiff failed to show that union's lack of pursuit of plaintiff's grievances was arbitrary in light of fact that union official made rational decision to withdraw grievances given existence of original decision to require plaintiff to return his disability payments and U.S. Attorney's decision for not bringing criminal action against plaintiff because of requirement (at that time) that plaintiff return said payments.

OSHA

***Menominee Tribal Enterprises v. Solis,* No. 09-2806 (March 24, 2010) Petition for Review, Order of Occupational Safety and Health Review Commission Petition, denied.**

Dept. of Labor did not err in citing petitioner-Indian tribe for violations of certain OSHA provisions arising out of tribe's operation of sawmill. Ct., in finding that OSHA applied to sawmill and tribe's related commercial activities, rejected tribe's argument that OSHA did not apply to tribe, after noting that there was no support in legislative history that Congress wanted to exempt tribe's sawmill from OSHA. Ct. also rejected tribe's claim that OSHA infringed on rights granted to tribe by other statutes or treaties.

Taxation

***Vainisi v. Commissioner of Internal Revenue,* No. 09-3314 (March 17, 2010) U.S. Tax Court Reversed.**

U.S. Tax Court erred in finding that taxpayers (owners of qualified subchapter S subsidiary corporation, i.e., QSub bank) could only deduct 80 percent of interest expenses incurred in borrowing money to purchase certain tax-exempt bonds. Taxpayers were entitled to 100 percent deduction of said expenses where record showed that instant QSub bank had been QSub for more than three years, and thus Section 291 of Tax Code, which would have required 80 percent deduction, did not apply.

Taxation

***Wellpoint, Inc. v. Commissioner of Internal Revenue,* No. 09-3163 (March 23, 2010) U.S. Tax Court Affirmed.**

U.S. Tax Ct. did not err in affirming IRS's disallowance of taxpayer's deduction from its taxable income $113,837,500 settlement it paid to third-parties, who had filed underlying lawsuit against taxpayer, as well as its $827,595 in legal expenses that taxpayer incurred in defending underlying lawsuit, where underlying lawsuit alleged that taxpayer was improperly using recently acquired nonprofit entities to make profits. Taxpayer could not deduct instant costs as ordinary business expenses, and therefore was required to treat said costs as capital expenditures, since: (1) origin of underlying lawsuit was essentially dispute over taxpayer's ownership of capital assets; and (2) $133.8 million that taxpayer had paid in underlying lawsuit was not in form of damages, but rather was sum in lieu of third-parties' recovery of subject entities

Aliens

***Benaouicha v. Holder,* No. 09-3083 (April 6, 2010) Petition for Review, Order of Bd. of Immigration Appeals Petition, denied.**

Board did not err in affirming Immigration Judge's (IJ) order denying alien's request for cancellation of removal based on alien's allegation that he was battered spouse as contemplated under 8 USC section 1229b(b)(2)(A). Court rejected alien's contention that IJ failed to give him opportunity to establish that he was person of good moral character, so as to potentially qualify for said cancellation since alien conceded that he was deportable under section 1227(a)(2)(A)(i) for having been convicted of crime of moral turpitude. ■

Legislation from the 96th General Assembly

Illinois Legislation from the 96th General Assembly reviewed to date and position taken by the members of the Section Council, noted below:

Senate Bill (SB) SB2630—Electronic Records Act: Moved and seconded that we take no position on this bill. Motion carried unanimously.

House Bill (HB) HB4985—Companion bill; same position.

SB3591—Smoke Free Illinois Act Amendment: No position - died in committee.

HB4569—Ethics Act Amendment: Moved and seconded that we support with a request that the bill specify who is responsible for producing the "writing." Motion passed with one abstention.

HB5191—Amends APA: Moved and seconded that we oppose. Motion carried with one abstention.

HB5695—Amends Whistleblower Act: Moved and seconded that we take no position. Please advise if bill is revived.

HB6053—Accurate Government Records Act: Moved and seconded that we support this bill only if money is appropriated to fund the costs.

Proposed amendments to the FOIA:

HB5007 exempts juvenile death documents from FOIA; **HB5154** as amended on 3/3/10 prohibits disclosure of performance evaluations; **SB3040** considered, but dead. Chairman Marc Loro recommended that in general we oppose tinkering with the FOIA until the law has time to shake out but that we have concerns about privacy matters with respect to personnel evaluations. Motion made moved to that effect, duly seconded; motion carried with one abstention. ■

News you can use

On **May 15, 2010**, the section council will hold its business meeting. The ISBA Board of Governors liaison, Carl Draper, has offered his offices for the meeting.

On **May 17, 2010**, the Illinois Law Conference for ALJs will be presented at the Chicago Bar Association. Call the CBA for more information (312) 554-2056.

On **June 2 through 4, 2010**, the ISBA will host the second annual **CLE Fest Classic.** Don't miss the **Wednesday, June 2nd** CLE devoted to ethics issues for government lawyers, titled *ETHICS IN TODAY'S GOVERNMENT AGENCIES*, or the **Friday, June 4th** Bench & Bar Section annual civil practice CLE titled: *Pleadings and Practice: PREPARING FOR STATE COURT TRIALS AND WHAT APPEALS TO THE APPELLATE COURT,* starting at 8:00 a.m. and held at the Chicago regional office of the ISBA, 20 South Clark, Room 900. Check the Web site for more details, speaker and program information, and registration deadlines. As a member of the ISBA Administrative Law Section, you may be entitled to a discount for the ethics program. The ISBA offers further discounts for early registration and online registration. See page 11 of this issue for details. ■

Flinn Report extracts

By William A. Price, Co-Editor, wprice@growthlaw.com

One of the more important ways of finding out what Illinois government is doing is the Illinois Register, which the Index Department of the Secretary of State's office publishes regularly. That volume gives full text of new and proposed and changed rules and other administrative agency actions. It is, like the Federal Register, excellent bedtime reading, and suitable for use as a doorstop, once a month or two of paper has been accumulated.

For those of us with less time and less brains every month, there are some alternatives to reading the whole thing. The Department of Commerce and Economic Opportunity summarizes business regulations. The Joint Committee on Administrative Rules summarizes just about everything in the Illinois Register, in their publication titled "The Flinn Report." This note is the "Twitter" version (less than 140 characters per item, I hope) of their most recent issue. The significance and range of issues that our agencies address should be obvious, once you look at the new and changed rules they have most recently proposed:

- New nursing home regulations are at the adoption stage, to limit financial abuse of the disabled and aged;
- New cemetery regulations are, also, at the announcement stage, per the current Flinn, and the *Tribune's* investigation of many bodies dumped at a SW Cook cemetery.
- Food assistance would be made easier by a coordination of eligibility standards.
- Parents will be able to make more money and still qualify for child care assistance.
- University-based healthcare provider payment rates from Medicare will increase.
- Paper, film, and foil coatings, metal furniture coatings, and large appliance coatings, as well as cleaning processes for the latter two, will be affected by new volatile organic materials limits for the Chicago and St. Louis areas.
- Hospitals will have to implement federal treatment protocost for multidrug resistant organisms.
- Changes are proposed in the treatment of sexually abused persons.
- Teacher learning standards have changed.
- Grants will be available for multi-organization work to encourage high school dropouts to go back to school.
- The Commerce Commission proposes changes in internal review of hearing officer decisions.
- The Department of Revenue created some multi-township tax assessment districts.
- The Department of Children and Family Services will garnish assistance payments from parents owing child support.
- There will be no more special fall turkey hunting in the Savanna Army Depot -- and there were other hunting and fishing area changes. You may want to avert your eyes. The state apparently runs a "Mt. Vernon Propagation Center." Thousands of cloned George and Martha Washingtons are probably not what they encourage to reproduce down there.

For more, and better details, see: <http://www.ilga.gov/commission/jcar/flinn/reg15.pdf>. ■

Win or lose, the client may not always be right

By William A. Price, Co-Editor, wprice@growthlaw.com

The legal profession hasn't changed much over the years. Neither have our clients. Ammianus Marcellinus, a historian of the later Roman Empire, described their typical reactions in his "Liber Curtius" (Short Book), pp. 334-335, which is available online at <http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Ammian/home.html> The translation, and the original, are both old enough to be well beyond copyright restrictions.

Ammianus was a soldier, one of 10 officers the Emperor would send to various places around the Empire to find out what troubles were actually happening, and to provide accurate reports. His description of client ingratitude follows. If you want to see what he thought of the types of lawyers, and the delays of courts, look at the online reference.

> Finally, the profession of advocate has, with the rest, this serious and dangerous evil, which is native to almost all litigants, that although their cases may be lost by a thousand accidents, they think their ill-success lies wholly in the ability of their advocates, and they are accustomed to attribute the outcome of every contest to them; and they vent their anger not on the weakness of their case or the frequent injustice of the magistrate who decides it, but only on their defenders. ■

Pay your law firm employees properly or risk falling into a financial snakepit

By James B. Zouras

As wage-and-hour practitioners who have represented thousands of employees in actions against employers of every size, from multi-billion-dollar corporations to small businesses, our firm is well-versed on the ways employers violate the labor laws.[1] Many do so through calculated design, others through sheer ignorance or neglect. Unfortunately for the employer, the FLSA is a strict liability statute and the legal consequences are essentially the same. And they can be serious. The preeminent federal labor statute, the Fair Labor Standards Act (FLSA), is among the most rigid on the books. In almost all instances, a prevailing plaintiff is entitled not only to every dime in unpaid compensation, but liquidated (double) damages along with attorney fees and costs.[2]

Law firm employers, particularly small-to-midsized ones, often give only passing thought, if any, to whether their pay practices comply with the strict letter of the law. Surely lawyers have an inherent understanding of whether a pay practice, like those relating to the payment of overtime, is legal or not? Think again. Lawyers are hardly immune from the potential pitfalls of wage and hour compliance. In fact, when it comes to paying their paralegals, legal assistants, office managers, administrative assistants, interns and other employees, law firms ironically end up violating the law as much, if not more, than other employers. In the past few years, FLSA actions against lawyers and law firms have become one of the "causes du jour" in the field. The recent proliferation of layoffs in these down economic times will likely do little to slow the trend.

Trust me, the last thing you want is to find yourself defending one of these cases. But friends, there is no need to fret. This article will provide insight into the basics of the FLSA, the most common ways it is violated by law firms and how to protect yourself while keeping your employees economically happy.[3]

You, yes YOU, are personally responsible for violations of the FLSA

Let's begin with a few words of wisdom and warning. The FLSA is a remedial statute which contains one of the broadest definitions of "employer" known to the law. Unlike other employment laws, the FLSA applies to all employers without regard to the number of employees. The Act defines "employ" to mean "suffer or permit to work,"[4] which covers persons who might not qualify under traditional agency law principles and are not even considered employees by the Internal Revenue Service.[5] Thus, you should assume you, your firm and your employees are subject to the broad umbrella of FLSA coverage regardless of how large or small your law firm is, solo practitioners included.

There is no "corporate shield" for violations of the FLSA, something many individuals, much to their dismay, learn only after they are sued. FLSA actions have been successfully brought against the presidents, executives and board members of a number of Fortune 500 companies. Partners, even those of the largest law firms, are no less vulnerable. Under the FLSA, all persons "acting directly or indirectly in the interest of an employer in relation to an employee" are subject to its requirements.[6] Any individual with sufficient authority to control the workers in question can qualify as an "employer" under the FLSA's expansive definition and held jointly and severally liable for violations.[7]

Under the "economic reality" test, courts consider a number of non-exhaustive factors including whether the alleged employer had the authority to: 1) directly or indirectly hire and fire employees; 2) supervise, control or modify employee work schedules or conditions of employment; 3) determine the rate and method of payment; and, 4) prepared or maintained payroll or employment records.[8] No single factor is dispositive and employer status under the FLSA does not require continuous monitoring or absolute control over the employee. Thus, you can face liability even if you have no direct involvement in the hiring process and only have the authority to oversee an employee.

Ignorance of the FLSA's requirements is

no defense, especially if you are a lawyer. The FLSA is quite unforgiving even where the employer had the best of intentions. Even if the employer carries the heavy burden of proving their failure to pay was in good faith—which is rarely successful in practice—the court must award the full amount of unpaid wages along with attorneys' fees and costs, and retains the discretion to award liquidated (double) damages.[9] In the far more likely event that the employer fails to prove an honest intention to comply and that they had objectively "reasonable grounds" for believing the failure did not violate the FLSA, liquidated damages are mandatory.[10]

To have even a snowball's chance of proving good faith, an employer must prove they made significant inquiries and took other affirmative steps to ensure FLSA compliance. Even under the most favorable circumstances, this is an exceedingly difficult task.[11] But it is nearly impossible when it comes to lawyers paying their paralegals, administrative assistants and other employees. Think about it. You are a lawyer. You have easy access to judicial opinions, legal periodicals and fellow attorneys who practice in the field; resources above and beyond those available to the typical employer.

In sum, what this means to you as a legal employer is: (1) most, if not all, of your support staff are likely covered by the FLSA; (2) you will likely be deemed to have knowledge of its requirements; and, (3) you, your partners and perhaps even your supervisory employees may be *personally* on the hook for violations. If violations are found, it is a virtual certainty you will incur liability for all unpaid wages, liquidated damages and attorney fees. And it is unlikely that any of your insurance policies provide coverage. Now that I have your attention …

Your paralegal is not exempt

Do not waste your time, energy or credibility trying to challenge the non-exempt status of your paralegal. Arguments that paralegals and other legal assistants are exempt based upon the "professional," "administrative" and "executive" exemptions have been repeatedly been made and just as consistently rejected by the U.S. Department of Labor (DOL) and the courts. The DOL has issued an impressive seven Opinion Letters in the last 15 years which reaffirm this fact as does a specific regulation.[12] Do not allow your paralegal's sense of professionalism in being paid a salary stop you from paying more for work beyond 40 hours in a week

Your paralegal may have an advanced degree, perform many critical duties and be smarter than you. But if you ask her to stay late to clean up those jury instructions or finalize the appendix on your appellate brief over the weekend, you should pay her time and a half for every minute she works in excess of 40 hours a week. While there are always exceptions, she is in all likelihood subject to the protections of the FLSA.

Simply paying your paralegal or anyone else a salary does not make her exempt

Do not make the common mistake of assuming that paying a salary somehow transforms your non-exempt paralegal into an exempt one. While it is true that all hourly-paid employees are entitled to overtime, it is not the case that all salaried employees are exempt. Paying a salary is only one part of the two-part test to determine whether an employee is exempt from overtime. For example, few would claim that paying a receptionist an annual salary of $30,000 means an employer can lawfully make him work 70 hours a week without overtime. And it is no different with your paralegal. Even if you pay her $85,000 a year, understand that you must pay for extra time worked beyond 40 each workweek.

Your office manager and other administrative employees may not be exempt

Your salaried office manager and other members of your staff may (I emphasize *may*) qualify for one or more exemptions. The burden will fall on you as the employer to prove a particular employee "plainly and unmistakably" falls within the terms and spirit of one of the exemptions, which are narrowly construed.[13] That will prove much harder than you think.

A comprehensive analysis of the administrative,[14] executive[15] and professional[16] exemptions as applied to your other support staff could consume a lengthy treatise. Suffice it to say, do not think that merely giving these employees a little additional authority or responsibilities will do the trick. The FLSA is complicated, the analysis is heavily fact-driven and the case law is in a constant state of evolution and flux.

Each exemption contains its own specific criteria which may appear deceptively simple at first blush. For example, you might think what constitutes "compensable time" is an easy question. In reality, there have been hundreds of legal death matches over phrases like "primary duty," "manage" and "regularly and customarily," and what it means to have "discretion," "independent judgment" and supervise "the equivalent of two or more other full-time employees." And even if you meet every requirement for an exemption, a seemingly innocuous pay deduction can nullify it.[17]

Your interns may not be exempt

Legal employers often assume student interns are automatically exempt from the requirements of the FLSA. Not so. There is no *per se* FLSA exemption for interns. Instead, the DOL has promulgated stringent requirements an employer must meet before it can lawfully claim student interns are "trainees," not "employees" entitled to minimum wage, overtime and other protections of federal law:

1. The training is similar to what would be given in an academic setting;
2. The training is for the benefit of the students;
3. The students do not displace regular employees, but work under their close observation;
4. The employer that provides the training derives no immediate advantage from the activities of the students, and on occasion the employer's operations may actually be impeded;
5. The students are not necessarily entitled to a job at the conclusion of the training period; and,
6. The employer and the students understand that the students are not entitled to wages for the time spent in training.[18]

Even firms with well-established internship or externship or programs rarely consider whether they could realistically meet all of these factors. If your firm does not have a formal written training program or a specific agreement with the students outlining your relationship, or if your firm allowed students to perform actual productive work (as opposed to "training"), you may have a problem. Unless you have carefully analyzed your program for FLSA compliance, do not assume you are doing the students a favor by taking them under your wing. Do yourself a favor and consider paying them at least the requisite minimum wage and overtime if worked.

The bottom line is that while there may be more room for debate than with your parale-

gal, properly paying your other legal support staff can still present a potential minefield for the unwary law firm employer. At the very least, the employee can likely raise a host of legal and factual issues which could keep you tied up in costly and protracted litigation for a long time. The remainder of this article will suggest ways your can prevent this from happening.

How can you protect yourself?

Now that you have some familiarity with the FLSA, you should be sufficiently motivated to initiate meaningful measures to comply. Some law firm employers take the drastic step of assuming all their support staff are *not* exempt. While this may sound a bit extreme, it is not necessarily a bad idea especially in the context of a small firm. Occasionally paying a few hours of overtime and keeping track of time worked by a relatively small number of employees may be less burdensome or costly than obtaining a comprehensive analysis from an experienced professional or the DOL. However, because all jobs typically change over time the analysis should be periodically reviewed and updated.

Once you know to a reasonable certainty how your support staff are properly classified for FLSA purposes, there are a number of ways you stay out of trouble or at the very least, minimize the exposure when it comes to non-exempt employees:

1. Pay for all time worked.

Determining what constitutes compensable "work" under the FLSA was once a relatively simple issue. But no more. For example, if your staff members attend meetings or training, or use e-mail, text, cell phones or other similar devices to perform work-related tasks during off hours or on the weekends, the FLSA likely requires payment for all this time. While the occasional e-mail or phone call may be considered "de minimis" and therefore not compensable, time spent by employees performing such tasks on a more regular and customary basis can add up fast. Because this work is likely performed in addition to a standard 40-hour workweek, this time is compensable at the overtime rate.

2. Keep accurate time records.

Under the FLSA, you as an employer have an affirmative duty to maintain detailed and accurate records of all time worked by your employees for at least three years. If time records incomplete or inadequate, the employee need only set forth a reasonable estimate of time worked to support their claim for damages. Employers who fail to maintain adequate records face serious challenges attempting to refute the employee's estimates and "cannot be heard to complain" that there is no evidence of the exact amount of time worked.[19]

3. Don't get cute.

You are well-advised to leave your "advocate" hat in the closet and resist the temptation to seek creative ways to skirt the requirements of the FLSA. Any maneuvers you might come up with will likely backfire. So do not give your paralegal or legal secretary important-sounding titles like "litigation manager" or "legal analyst." Such efforts are frowned upon by the DOL and the courts, which ignore titles and look to the nature of the actual job duties to determine exempt status.[20]

Similarly, do not try to classify your legal staff as "independent contractors." Even a seemingly concrete written agreement between an employer and employee which purports to set forth an "independent contract" arrangement is essentially meaningless when it comes to the FLSA. As is true when determining whether someone is an "employer" for purposes of compliance, courts apply a multi-factor test to capture the "economic realities" of the relationship in deciding whether the worker in question legitimately is independent enough to relieve the employer from FLSA compliance.[21] More often than not, the employer's efforts are not only unsuccessful, but actually make matters worse by giving ammunition the employee's "willfulness" arguments; i.e., you were fully aware of the FLSA's requirements and deliberately tried to dodge them.

4. Don't pretend you are a charity.

For God's sake, don't ever ask your employees to "volunteer" or "donate" their time or otherwise waive their right to minimum wage, overtime or the other protections of the FLSA. It is legally impossible for an employee to waive FLSA rights by contract or otherwise.[22] Thus, if your paralegal comes in over the weekend to complete a project, you are obligated to compensate her even if you did not request, desire or authorize the work.[23]

5. Treat Your Employees Well.

The DOL estimates that as many as 70 percent of employers are not in compliance with the FLSA. Yet only a small fraction are ever sued. The reason is because happy employees rarely take legal action against their employer even if their compensation plan would not pass muster under the FLSA. Oftentimes these cases come about because an employee is upset about something unrelated to an FLSA claim which causes them to seek legal advice. For example, a client may walk in to a lawyer's office with a perceived wrongful termination or discrimination case, and walk out with a slam dunk and potentially far more viable FLSA action. So what may begin as a simple misunderstanding, a poorly-handled layoff or even a workers' compensation matter can turn into an unexpected and costly nightmare for the employer. As is often the case, a small nugget of prevention can equal a goldmine of cure.

One final word of advice

Even the best lawyers make mistakes. Finding out you may have made one with respect to the manner in which you compensated (or did not compensate) one of your current or former staff members can add fuel to what is probably already a volatile relationship. Although private releases of FLSA rights are invalid,[24] there are ways to minimize the damage. If a concern is raised, it makes sense to obtain an early, informed and objective assessment of the situation. With a complex statute like the FLSA, which carries serious consequences for its violation, emotions can run high. It is vital that decisions are made based on logic and careful consideration of all the facts. ■

James B. Zouras, along with his partner Ryan F. Stephan, are the principals of Stephan Zouras, LLP, a Chicago-based law firm concentrating in individual, class and collective action litigation. Together they have recovered tens of millions of dollars in unpaid wages on behalf of aggrieved employees throughout the United States.

1. In addition to the outright failure to pay overtime and minimum wage, these methods include failing to pay for compensable work away from the office, "floating" employee time from one week to the next to avoid overtime hours, "shaving" employee time off submitted time records, and refusing to pay for rest breaks.

2. 29 U.S.C. §216(b). There are compelling policy considerations behind the FLSA. Congress enacted the Act in 1938 to provide a "minimum" level of acceptable employment conditions and "protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc*., 450 U.S. 728, 739 (1981).

3. While this article focuses on the FLSA, Illinois and other states have enacted their own statutes which provide similar, and sometimes greater, protections than federal law. See Illinois Minimum

Save the date: June 2, 2010

Ethics in Today's Government Agencies*

Presented by the ISBA State & Local Tax Section
Co-Sponsored by the ISBA Administrative Law Section, the ISBA Bench & Bar Section,
and the ISBA Standing Committee on Government Lawyers

ISBA Regional Office
20 South Clark Street, Suite 900
Chicago

Wednesday, June 2, 2010
in conjunction with the ISBA ANNUAL CLE FEST

Wednesday, June 2, 2010

12:00 – 1:00 p.m. —Check-In/Registration

1:00 – 3:10 p.m.—SESSION 1: Ethics in Today's Government Agencies – Part 1
2.0 hours MCLE, including 2.0* hours PMCLE credit

- **Ex parte Communications and Conflicts of Interest**
  This segment examines the ex parte communications between parties and the judicial officer, as well as several state and local adjudicative bodies and the proper rules of conduct within each. Unique ethical features of busy adjudicative functions in Illinois are also discussed, with a focus on particular agency hot spots.

- **Ethical/Privilege Issues and Conflicts of Interest between Public Officials and Their Agency Lawyers**
  What if your boss asks you to "paper" a file by giving a legal opinion that something is lawful when it is not? When can you become a whistleblower without violating the attorney-client privilege? What are the possible consequences if you simply "go along" with something you feel may be unlawful? These are ethical and personal risk issues that many lawyers face in their careers. This segment explores the rules, guideposts, and dangers in this area minefield.

3:10 – 3:30 p.m.—Break

3:30 – 5:40 p.m.—SESSION 2: Ethics in Today's Government Agencies – Part 2
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- **Whistle Blowing: Should I – Do I Have To?**
  This segment explores the federal and state whistle blowing statutes, as well as the rights, protections, and rewards of the whistle blower. The mandatory obligations imposed on lawyers by the Code of Professional Responsibility are also examined.

- **Civility and Professionalism**
  This segment explores the contemporary issues of civility within the context of administrative agency disputes and contests. Topics include: the boundaries of civility toward the agency tribunal and opposing counsel; repeated acts of unprofessional conduct; unprepared lawyers presenting their client's case; and unprofessional conduct rising to *Himmel* heights.

- **Duties to Clients and Duties to Opposing Counsel and the Tribunal**
  This segment offers a comprehensive discussion of potential conflicts and the duty to be forthright. An analysis of the duties to clients regarding settlement decisions, appeal rights, and fee splitting are also examined.

*Attend On-site or via Live Webcast. On-Site seating is limited, so register early!! Go to www.isba.org/cle for more details and registration information.

Wage Law, 820 ILCS 105/1, et seq., and the Illinois Wage Payment and Collection Act, 820 ILCS §§115, et seq.

4. 29 U.S.C. §203(g).

5. *United States v. Rosenwasser*, 323 U.S. 360, 363 n. 3 (1945); *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 326 (1992); *Ling Nan Zheng v. Liberty Apparel Co*., 355 F.3d 61, 67 (2d Cir.2003).

6. 29 U.S.C. §203(d).

7. *Goldberg v. Whitaker House Coop., Inc*., 366 U.S. 28, 33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961)

8. *Villarreal v. Woodham*, 113 F.3d 202, 205 (11th Cir.1997); *Torres-Lopez v. May*, 111 F3d 633, 640 (9th Cir1997); *Carter v. Dutchess Comm'y Coll.,* 735 F.2d 8, 12 (2d Cir.1984); *Watson v. Graves*, 909 F.2d 1549, 1553 (5th Cir.1990).

9. 29 U.S.C. §§216(b) & 260.

10. *Alvarez v. IPB, Inc*., 339 F.3d 894, 909 (9th Cir.2003); *Herman v. RSR Servs. Ltd*., 172 F.3d 132, 142 (2d Cir.1999).

11. *Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 941-42 (8th Cir. 2008).

12. 29 C.F.R. §541.301(e)(7). The DOL Opinion Letters are available online free of charge at <www.dol.gov/esa/whd/opinion/flsa.htm>.

13. *Arnold v. Ben Kanowsky, Inc*., 361 U.S. 388, 392 (1960); *Piscione v. Ernst and Young*, LLP, 171 F.3d 527, 533 (7th Cir.1999); *Klein v. Rush-Presbyterian St. Luke's Med. Ctr*., 990 F.2d 279, 282 (7th Cir.1993).

14. 29 C.F.R. §541.2.

15. 29 C.F.R. §541.1.

16. 29 C.F.R. §541.300.

17. 29 C.F.R. § 541.118(a).

18. See Wage and Hour Opinion Letter May 17, 2004.

19. *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 688 (1946).

20. 29 C.F.R. §541.2.

21. *Schultz v. Capital Intern. Sec., Inc*., 466 F.3d 298, 304-05 (4th Cir. 2006).

22. *Barrentine v. Arkansas-Best Freight Sys., Inc*., 450 U.S. 728, 740-41 (1981).

23. 29 C.F.R. §785.13; *Chao v. Gotham Registry, Inc*., 514 F.3d 280, 288 (2nd Cir. 2008).

24. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945).

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June

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Monday, 6/7/10- Webinar—Conducting Legal Research on FastCase. Presented by the Illinois State Bar Association. *An exclusive member benefit provided by ISBA and ISBA Mutual. Register at <https://www1.gotomeeting.com/register/773109137>. 12-1

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Friday, 6/18/10- Chicago, ISBA Regional Office—ISBA's Reel MCLE Series: Michael Clayton--How Many Ethical Breaches Can You Spot? Master Series Presented by the Illinois State Bar Association. 2-5:15.

Friday, 6/18/10– Quincy, Stoney Creek Inn—Legal Writing: Improving What You Do Everyday. Presented by the Illinois State Bar Association. 8:30-12:45. ■

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