



Insurance Industry Update

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Insurance Industry Update

- Follow-Up From Insurance Industry Roundtable
- First of Hopefully Regular Calls
- Highlight Recent Important Decisions/Developments
- Provide a Forum for Discussion
- Need Industry Involvement
- Expand Beyond Just Employment Compliance/Litigation

Exemption Status of Insurance Industry Employees

- Insurance Industry is Squarely in the Sights of the Plaintiff's Bar
- Broadening Scope of Challenges
 - Geographic Scope
 - Types of Employees
 - Types of Claims (exemptions, deductions, independent contractors, other)



Categories of Employees

- Adjusters/Appraisers
- Fraud Investigators/SIU
- Insurance Agents
- “Back Office” Employees
- “Call Center” Employees

New Adjuster/Appraiser Decisions

- *Neary v. MetLife Property & Casualty* (D. Conn.) (Auto Adjusters)
 - Summary Judgment Denied to Employer
 - Production/Administrative Dichotomy at Issue
 - Discretion & Independent Judgment at Issue

New Adjuster/Appraiser Decisions *(continued)*

- *In re American Family Mutual Ins. Co.* (D. Colo.) (Auto Adjusters)
 - Summary Judgment Denied to Employer
 - But Found Adjusters Performed Administrative Work Because Adjusters “Service” the “Claims Handling Process”
 - Discretion & Independent Judgment at Issue

New Adjuster/Appraiser Decisions *(continued)*

- *Harris v. Liberty Mutual Ins. Co.*
(Cal. App.) (All Adjusters)
 - Reversed Summary Judgment for Employer
 - Entered Summary Judgment for Adjusters

New Adjuster/Appraiser Decisions *(continued)*

- *Harris v. Liberty Mutual Ins. Co.*
 - Found Adjusters are Production Workers. Work is Only Administrative if Policy Making. Claims Adjusting is “day-to-day operation” – Thus Production.
 - No Discussion of Duties Aspect Because Ruled Production Employees

New Adjuster/Appraiser Decisions *(continued)*

- *Gaglione v. Allstate Ins. Co.*
(D. Ariz.) (Property & Casualty)
 - Summary Judgment for Employer
 - Work is Administrative as Ancillary to Sale of Insurance Productions
 - Sufficient Discretion and Independent Judgment Found In Many Duties Including Coverage, Liability, Reserves, Subrogation, Negotiations, Reservation of Rights, Identifying Fraud, etc.

Insurance Agents

- What Exemption?
 - Most Cases are Administrative Exemptions
 - Salary Basis Test
 - Commissions Only
 - Poor Performers Not Making Draw
 - Sales or Financial Consultant

Insurance Agents *(continued)*

- Outside Sales
 - How Much Time Outside?
 - Sales or Financial Consultant?
- Inside Sales
 - Carve Out Section 7(i)



Insurance Agents *(continued)*

- Combination Exemption
- Highly Compensated (\$100k)

Questions/Issues for Discussion

- Particularly regarding auto adjusters, can they remain exempt?
- Which exemption applies to insurance agents? Which is safest?

Independent Contractor/Statutory Employee Issues

- DOL Focus on Issue
- State's/Attorney's General Focus on Issue
- Cornerstone Financial Decision
- Bankers Life Decision

Independent Contractor/Statutory Employee Issues *(continued)*

- *Hopkins v. Cornerstone America*
(N.D. Tex.)
 - Agents/Managers Sued for Unpaid Overtime
 - Summary Judgment Based on Independent Contractor Defense Denied
 - Extremely Broad and Liberal Interpretation of Economic Reality Test

Independent Contractor/Statutory Employee Issues *(continued)*

- Troubling Factors That Court Said Showed Employee Status
 - Company Dictated What Policies Could Be Sold
 - Company Set Price of Insurance Policies
 - Company Had Right to Review Advertisements
 - Contracts Required Agents to Exclusively Sell Company Policies
 - Company Developed and Controlled Proprietary Lead Distribution System
 - Company Required Attendance at Meetings and Training

Independent Contractor/Statutory Employee Issues *(continued)*

- 5th Circuit Has Accepted Interlocutory Appeal
- ACLI Litigation Committee Considering Amicus Filing

Independent Contractor/Statutory Employee Issues *(continued)*

- *Walker v. Bankers Life & Casualty Co.*
(N.D. Ill.)
 - Class of 1300-1900 Insurance Agents Certified
 - Focus on Contracts Agents Signed
 - Contract Affirmed IC Relationship
 - Disavowed Employment Relationship
 - Existence of Contracts Satisfied Commonality and Typicality Tests

Questions/Issues for Discussion

- Reaction to Cornerstone Decision
- How Can Independent Contractor Defense Be Strengthened?
- How Should Companies Use/Structure Agreements with Agents?
- View Regarding Amicus Filing

Wage Deduction/Expense Indemnification Issues

- Insurance Agent Expense Cases
 - Financial Services Industry Model Suits
 - Wage-Deduction Laws
 - Indemnification Laws
- Second Circuit Certification of Deductions Issues
 - Who Is an Employee?
 - When are “Monies” Wages?

Wage Deduction/Expense Indemnification Issues *(continued)*

- Outside Sales Exemption
 - Travel Expenses/Reimbursement

How Can Companies Avoid Wage Deduction Claims?

- *Levy v. Verizon Information Servs. Inc.* (E.D.N.Y.)
 - Sales Representatives Selling Advertising Space
 - Paid Base Salary Plus Incentive Compensation
 - Written Compensation Plan Said Commissions are Advances

Important Lessons From Decision

- Motion to Dismiss Granted
- Deductions are Only Improper from “Wages”
- Incentive Compensation and Bonuses ≠ Wages
- Spell Out in Writing When Monies Become Earned/Vested Wages
- “Contract” Between Employer/Employee Governs

Meal and Rest Break Claims

- Laws Exist in Many States
- Mandatory Meal and Rest Breaks
- California a Major Issue
- Laws Apply to Inside and Outside (Home-Based) Employees

Meal and Rest Break Claims *(continued)*

- *White v. Starbucks Corp.* (N.D. Cal.)
 - Court held that California Wage Orders only required making breaks available. Did not require that employers make sure they are taken.
 - No Liability for Voluntarily Missing Breaks if:
 - Employer Makes Breaks Available
 - Employer Does Not Encourage Employees Not to Take Them

Steps to Take to Avoid Liability

- Create Written Policy Mandating Meals/Breaks
- In Policy, Establish Reporting Obligation if Anyone Tries to Interfere with Breaks
- Promptly Investigate Complaints/Rumors About Breaks Not Being Taken
- Periodic Reminders About Policy



Questions?

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