

LEGAL

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WAGE HOUR LAW

HEY, CAN I GET A FREE INTERN?

With a *soft* economy, the intern option appeals to those seeking free labor and those willing to work for free to gain resume enhancing experience. While the idea of an unpaid internship has existed for decades, the idea is more popular as employers are cutting back funded summer positions and students and recent graduates are having difficulties obtaining employment.

As with almost every other issue relating to the payment of employees, the Fair Labor Standards Act ("FLSA") and the Wage Hour Division of the United States Department of Labor provide the controlling authority for whether an intern (trainee) must be paid. The Wage Hour Division issued the following guidelines in 1969 to determine whether a trainee is covered by the FLSA and must be paid by the employer:

Whether trainees are employees of an employer under the act will depend upon all of the circumstances surrounding their activities on the premises of the employer. If all six of the following criteria apply, the trainees are not employees within the meaning

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CONSTITUTIONAL PROCESS **SUPREME COURT ADOPTS** **THE COMPARATIVE METHOD**

On June 26, 2003, in a 5-1-3 decision, the U.S. Supreme Court declared unconstitutional a Texas statute that criminalized private homosexual conduct between consenting adults. *Lawrence v. Texas*, 539 U.S. ____ (2003), Case No. 02-102. This article *is not* about the substance of that decision, which is quite controversial and is likely to generate innumerable law review articles in years to come. Rather this article focuses on the Court's reliance on foreign precedent to reach its decision. To the best of the author's knowledge, this is the first time the Supreme Court has decided a point of constitutional law using as authoritative sources *both* British law *and* Continental European law. Although at first sight this seems remarkable, further reflection indicates that this is a natural method to interpret our Constitution.

The Framers of the U.S. Constitution, indeed most of the Founders of our nation, were deeply steeped in European intellectual traditions; and, our written Constitution is based virtually in its entirety on the unwritten British constitution extant in 1787, on the writings of British and Continental political philosophers such as John Locke (1632-1704) and Charles de Montesquieu (1689-1755), and on the constitutions of the ancient Greek city-states and the Roman Republic. Many of the Founders, because they had a classical liberal education, extensive libraries and the leisure to pursue their interests, actually read many of these sources in their original French, Greek or Latin. Thus, the U.S. Constitution, that most *American* of documents, is actually European through and through.

In the past it has not been unusual for the Court to look to British sources, given that our law is but a continuation of British common law traditions. In the recently decided case the Court cited the report of

a committee advising the British Parliament which recommended in 1957 that laws punishing homosexual conduct be repealed. In 1967 Parliament enacted most of the recommendations. However, the Court's most striking citation is that of a 1981 case decided by the European Court of Human Rights, which is binding on all members of the Council of Europe. Justice Kennedy, author of the *Lawrence v. Texas* opinion, thought this case "of even more importance" than the British precedent. In the European Court case the tribunal struck down a law of Northern Ireland which criminalized consensual homosexual conduct as inconsistent with the European Convention on Human Rights. Justice Kennedy concluded that to "the extent *Bowers* [the case overruled] relied on values we share with a *wider civilization*, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere" (emphasis supplied).

Of course, none of the above is to suggest that the U.S. Supreme Court should slavishly follow British or Continental European precedent. Over the past two hundred years our legal institutions have followed an independent path and, therefore, not everything from across the Atlantic is applicable here. Nevertheless, the Court in the past has even overruled home-grown precedent when it became obvious that it was both unfair and impractical. For example, *Plessy v. Ferguson*, 163 U.S. 537 (1896), was good law for nearly sixty years until the Court reached the conclusion that "separate but equal" public schooling and facilities were anything but equal.

Finally, intellectual traffic seems to be a two-way street. I will cite only two examples. First, the Argentine Constitution of 1853 is modeled after our own and, therefore, the Argentine Supreme Court has held that U.S. Supreme Court decisions interpreting our Constitution are authoritative in Argentina to interpret their

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WAGE HOUR OVERTIME RULE CHANGES PROPOSED

Early in July, the United States House of Representatives, by a vote of 213 to 210, allowed the Bush administration to go forward with its plan to change the existing workplace rules governing overtime pay. Specifically, the House vote thwarted the Democrats' attempt to prevent the Department of Labor from redefining who qualifies for overtime pay. The proposed changes have sparked considerable debate and have fostered intense lobbying efforts.

Currently, the more commonly used short test for overtime exemption requires that the employee 1) earn a salary of at least \$250 in a week; 2) have as a primary duty the performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers; and 3) customarily and regularly exercises discretion and independent judgement. There has been significant criticism over the years that this test, in both its interpretation and in its application, is confusing to both employers and employees.

In general, The Department of Labor is proposing a redefinition of who qualifies for overtime by changing the applicable salary levels and the salient factors used to determine which employees must be paid overtime when they work more than a normal work day or work week. Specifically, the proposed test for overtime exemptions requires that the employee 1) earn a salary of \$425 in a week; 2) have a primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and 3) holds a "position of responsibility" with the employer, defined as either (a) performing work of substantial importance or (b) performing work requiring a high level of skill or training. Employers under the proposed law would have significantly greater latitude in classifying middle income workers as being managers or supervisors, effectively negating their rights to collect overtime pay.

Not surprisingly, most Republicans and employers are in favor of the proposed changes arguing that a large number of poorer Americans would become eligible for overtime pay. They also argue that the

often criticized tests for managerial and supervisory exemptions would be clarified, thus making it easier to determine which employees are exempt from overtime. On the other side of the fence, Democrats and union representatives claim that the proposed changes would deprive millions of American workers the benefit of receiving overtime pay.

We will attempt to keep you apprised of developments in this area in future Newsletter articles. If the proposed legislation is passed, it certainly will directly and dramatically alter the existing terrain in the workplace.

STEPHEN GRAEFF

WAGE HOUR LAW

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of the Fair Labor Standards Act:

- (1) the training even though it includes actual operation of the facilities of the employer is similar to that which would be given at a vocational school;
- (2) the training is for the benefit of the trainees;
- (3) the trainees do not displace regular employees, but work under close observation;
- (4) the employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion his operations may actually be impeded;
- (5) the trainees are not necessarily entitled to a job at the completion of the training period; and
- (6) the employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

Subsequent to issuance of the above guidelines, court rulings have determined that it was not necessary to satisfy all six parts of the test. Rather, the totality of the circumstances associated with the training program would be used to determine whether the trainee was in fact an employee who must be paid wages. The Wage Hour Division has also issued an opinion letter dealing with the issue of whether a summer intern will be considered a trainee. The summer intern will typically not be considered an employee who must be paid if he is hired through a school program, the internship involves education or training programs designed to provide the student

with professional experience relating to their education, and the internship is academically oriented for the student intern's benefit.

Based on the above, it is helpful to review potential internships to determine whether the intern should be paid. It would appear that an intern at an automotive repair shop, for instance, would be properly classified as an uncompensated trainee if he assists an experienced mechanic to gain knowledge and experience repairing cars. He would not, however, be properly classified as an unpaid trainee if he was performing repair services (even minor services) on his own without supervision. Similarly, a law student interning at a legal aid clinic for the indigent could be an unpaid intern if the program was academically related to their education and he or she is closely supervised by an attorney. Likewise, an interior design student interning in exchange for an opportunity to receive supervised practical design experience as part of a school curriculum would be exempt from the wage requirements of the FLSA. The common theme from these *permissible* unpaid internships is that the majority of the benefit falls on the unpaid intern and not the employer. These positions are contrasted by that of the unpaid retail merchandiser trainee. This position requires the trainee to go to retail establishments served by the employer to set up and maintain displays of the employer's products. As the primary benefit of this relationship falls on the employer, this position most likely would not allow the employer to forgo the payment of wages to the trainee.

Similarly questionable internships include internships with publishers and media companies where the intern provides research for the employer. While the intern gains experience researching the assigned topics, the primary benefit of the research is the employer; and, in many situations the research is largely unsupervised and the intern provides services similar to those provided by paid employees.

While the idea of an internship sounds appealing, employers are cautioned that they risk running afoul of the FLSA should they obtain substantial benefits from an unpaid intern or if the unpaid intern displaces a paid employee.

PHILIP SCHWARTZ

CORPORATIONS CORPORATE MINUTES NECESSARY BUT OFTEN OVERLOOKED

Many small business owners choose to incorporate their businesses. Among other advantages, the corporate form protects the individual business owner from personal liability in the event her business is sued. The benefits of doing business as a corporation are secured only by complying with the legal requirements of the corporate law in the state in which you are incorporated. Merely filing articles of incorporation is not sufficient. The articles of incorporation create the corporation; but, steps must be taken subsequent to filing to ensure that the corporate form is preserved.

Corporate *minutes* are an important, and often overlooked, statutory requirement. Virginia, Maryland and the District of Columbia require that corporations keep and maintain minutes of all meetings of shareholders and directors. The minutes are a permanent record of all resolutions and business undertaken by the business and should be kept for at least six years. While drafting and maintaining the minutes may seem like a futile exercise, there are many situations in which the corporate minutes come into play. For example, third parties dealing with a corporation may want proof that particular corporate actions were approved. Correct minutes may also be necessary to help preserve certain tax benefits and/or avoid liabilities and penalties. Finally, minutes are often necessary to prove that the corporation is operated as an entity separate and distinct from the individual owners. Without an accurate minute book, an individual or entity may be permitted to sue the business owner personally for the debts and actions of the corporation (the minutes of board meetings are not privileged). Corporate minutes are simply the best evidence that a certain act or action took place.

However, a word of caution. Corporate minutes, if done properly, can be an asset and can help protect the corporation when confronted with a lawsuit. Minutes that contain unnecessary information, though, can be harmful. The business judgment rule protects the decisions made by corporate officers and directors if made in good faith and for a rationale business purpose. This means that a court will not overturn the actions of the corporation and substitute its own judgments. Therefore, the minutes should reflect the *decisions* made by these

persons. Generally, it is not necessary to record all the detailed discussions or considerations that went into making the ultimate decision unless this information is needed to demonstrate the exercise of due care. Corporate minutes are a written record of what took place, not a transcript.

Minutes should be kept of all meetings—whether regular or special. Most jurisdictions require a corporation to have an organizational meeting when the corporation is first incorporated and annual meetings thereafter. Generally, the directors of a corporation do not actually meet for the organizational meeting but simply adopt resolutions affirming the actions taken on behalf of or by the corporation. At a minimum annual meeting minutes should address the election of officers and directors and any changes to the articles of incorporation or bylaws. Other matters, such as the adoption of benefit and retirement plans, health insurance, compensation, key tax, legal and financial decisions should all be recorded as well. Further,—“extraordinary actions,” including, but not limited to, large acquisitions and mergers should be noted in the corporate minutes.

DANA THERIOT

INTERNATIONAL ESTATE PLANNING PLANNING FOR NON-U.S. CITIZEN SPOUSES

Estate planning for couples with one or both non-U.S. citizen spouses is complicated by the denial of the estate and gift tax unlimited marital deductions, increased record keeping requirements and complex contribution rules for assets held in tenancy by the entirety. Moreover, if one or both spouses are citizens or domiciliaries of countries with which the U.S. has estate tax treaties, the rules we are about to discuss may be changed in other more peculiar ways.

U.S. citizens are entitled to receive unlimited amounts as bequests or gifts from their spouses. On the other hand, noncitizen spouses are entitled to receive only \$112,000 per year in gift tax-free donations from their spouses in 2003. This amount is indexed for inflation. They are not entitled to receive any amounts at all in estate tax-free bequests from their spouses. The estate tax can only be deferred by placing the legacy in a qualified domestic trust (QDOT). As the

surviving spouse invades the *corpus* of the trust, he or she pays the corresponding portion of the deferred estate tax to the government. Only in cases of hardship may principal be withdrawn free of estate tax.

Furthermore, the rules with respect to assets held in tenancy by the entirety are different. Generally, the entire value of the asset is taxed in the estate of the first spouse to die, unless the surviving spouse can prove with adequate records that he or she provided some or all of the consideration for the asset in question. This means that when one or both spouses are not U.S. citizens, they must keep very detailed and accurate financial records of sources of funds to purchase assets.

All of these rather absurd rules present many planning challenges which can usually be overcome only with a sufficient planning horizon. For example, in a situation where the poorer spouse is the noncitizen spouse and the estate is, say, \$1.5 million, it would take about five years to transfer enough assets to the noncitizen spouse to raise his or her estate to about \$500,000, reduce the estate of the other spouse to about \$1,000,000, thus funding two bypass trusts to totally eliminate estate taxes.

Many of our international estate planning clients come to us with the mistaken notion that a QDOT will solve all their estate tax problems. To the contrary, a QDOT is a last resort to *defer* taxes. The optimal solution is to avoid the necessity of a QDOT by titling half the assets in the name of each spouse, up to a \$1,000,000 per spouse, to take full advantage of the \$1,000,000 applicable exclusion amount available to U.S. citizens, residents and domiciliaries. Of course, we may very well incorporate a contingent QDOT in the documents in case one of the spouses dies before all the retitling can be accomplished.

Finally, we should mention the rather common case in this area of one spouse who is a U.S. person for estate tax purposes and the other spouse who is a nonresident alien (NRA) for estate tax purposes. Since NRAs are only allowed a \$60,000 applicable exclusion amount for U.S.-situs assets, planning becomes more complicated and, when there are substantial U.S.-situs assets, more urgent, in case of the premature death of the NRA spouse.

If you have any questions on these absolutely captivating and mesmerizing issues please call Roy Morris or the author.

NÉSTOR CRUZ

CARR, MORRIS & GRAEFF, P.C.

Carr, Morris & Graeff, P.C., was established in 1982 by the named principals—Lawrence Carr, Roy Morris and Stephen Graeff. It is a diversified firm structured primarily to meet the legal needs of businesses and their principals.

The firm strives to provide full service representation to its corporate and individual clients. It is designed to provide such service by organization and presentation of an array of attorneys with diverse backgrounds in specialized areas of the law as well as a generalized background which enables them to look beyond a narrow specialty or need. The academic and cultural backgrounds of the attorneys of the firm are as diverse as their experience and specializations.

Carr, Morris & Graeff, P.C., specializes in the following areas: Corporate/General Business; Taxation/Estate Planning; Civil/Commercial Litigation; Alternative Dispute Resolution; Employment/Labor; Discrimination; and Wage-Hour.

The firm maintains its office in the Metro Center region of downtown Washington. It has attorneys admitted to all of the local judicial jurisdictions—the District of Columbia, Maryland and Virginia.

STAFF NOTES

It's Summer, a time of less traffic, more tourists and, incredibly, more rain...also time to recount the sometimes dubious vacation planning of the CMG wanderers:

- Steve Graeff: Again setting the bar high with two weeks in Italy. *While rumors of Steve seeking dual citizenship are untrue, he has spent enough time in Italy that he scoffs at our favorite local restaurants: "That's not real Italian." Hey, we thought Little Italy in Baltimore really was part of Italy...*
- Roy Morris: A bicycle-camping excursion in New York, a beach week, then a tour of Italy. *I'll match your Italy and raise you a bike and a sunburn!*
- Phil Schwartz: A family vacation to the Bahamas; a guys golf outing in Alabama. *If this were liar's poker, that Alabama golf deal might get challenged.*
- Larry Carr: The beach, then a family gathering in West Virginia...*could do better.*
- Tim Feely: With a new baby, Tim thinks a full night's sleep is a vacation. *Talking smack about a vacation without the kids...*
- Dana Theriot: Holding off in anticipation of bigger things.
- Brenda Hankins: A Georgia beach week with family; more family in Orlando; hosting family visit here. *We see a theme..*
- Nestor Cruz: A week in Boca Raton, then a week on the left coast of Florida. *A syllogism: Steve is to Italy as Nestor is to _____?*
- Ray Jones: Time in the sun at Hilton Head.

CONSTITUTIONAL PROCESS

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constitution. A quick perusal of any volume of Argentine Supreme Court reports picked at random will reveal many citations with which a U.S. lawyer is quite familiar. Second, at this writing the European Union is wrestling with a new European constitution. Having achieved economic and currency integration, the next logical step is political integration. Some countries, like Great Britain, prefer a loose

association of sovereign states, similar to our initial Articles of Confederation. Other countries, mostly on the Continent, prefer a more "perfect Union" like our Constitution. One thing, however, we can predict with certainty. In the years ahead, while Europeans debate the merits of different types of federalism, they will look to our experience with these issues, which is probably unsurpassed in the "wider civilization" we share with our European cousins.

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