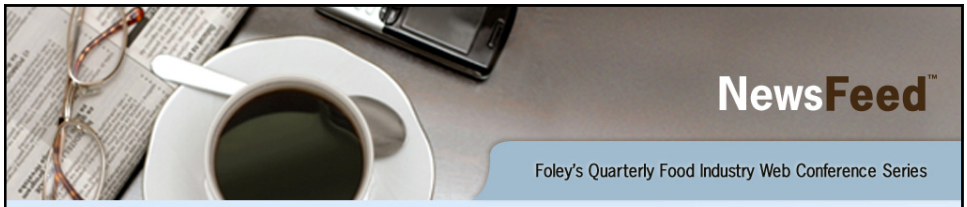

NewsFeed™

Foley's Quarterly Food Industry Web Conference Series

Presenters:

Bernard Bobber, Labor & Employment Practice

Richard McKenna, Intellectual Property Department

David Ralston, Litigation Department

Thursday, April 19, 2007

FOLEY

FOLEY & LARDNER LLP

Today's Presenters

Bernard Bobber
Milwaukee

Richard McKenna
Milwaukee

David Ralston
Washington, DC

FOLEY

FOLEY & LARDNER LLP

Housekeeping

- We will take questions throughout the program via the Q & A box at the bottom of your screen and live questions at the end of the program
- Foley will apply for CLE credit after the Web conference. If you did not supply your CLE information upon registration, please e-mail it to mlopez@foley.com
- Today's program is being recorded and will be available on our Web site
- For audio assistance please press *0
- For full screen mode, go to "View" on your toolbar and select "Full Screen" or press F5 on your keyboard

FOLEY
FOLEY & LARDNER LLP

Current Wage & Hour Issues Facing Food Manufacturers

FOLEY
FOLEY & LARDNER LLP

Wage & Hour Law - General

- Federal: Fair Labor Standards Act (1938)
  - Amended 1947 ("Portal-to-Portal Act")
  - Numerous regulations: Chapter 29 C.F.R.
  - Covers all employers with >1 employee engaged in interstate commerce
- Fundamental Purposes:
  - Sets minimum hourly wage for all hours worked
  - Requires overtime pay for all hours worked > 40 in a work week
  - But: does not define "work" or "work week"

Wage & Hour Law – General (cont'd)

- State and Local Laws
  - Most states have some laws on wages and/or hours
  - FLSA does **not** preempt state laws or municipal ordinances
  - Critical because workers are entitled to most favorable treatment—federal, state or municipal
- State and Local W&H Laws Vary
  - May replicate federal law
  - Can add extra protections; *e.g.* rest break requirements, higher minimum wages, deadlines for wage payments, and other things

What Counts As "Hours Worked"?

- Non-exempt employees must be compensated for all "hours worked"
  - At min. wage or more (if by agreement) for all hours worked < 40/wk.; and at overtime rate for all hours worked > 40/wk
- "Hours worked" generally = time spent for the benefit of the employer, with employer's knowledge, and that is considered a "principal activity," *i.e.*, all duties, tasks, or actions that are an integral part of the employee's job

What Counts As "Hours Worked"? (cont'd)

- Can include time spent in:
  - Unassigned activities self-motivated by employee (if known by employer)
  - Waiting (if primarily for benefit of employer)
  - On-call (if employee's freedoms too restricted)
  - On breaks less than 20 minutes
  - Traveling
  - Sleeping
  - Training
  - **KEY:** ***Preparatory and concluding activities***

What Counts As "Hours Worked"? (cont'd)

- Single biggest wage/hour problem for food manufacturers = properly identifying, and paying for, "hours worked"
  - Specifically: which preparatory and concluding activities are "compensable"

Preliminary and Postliminary Activities

- Activities before or after regular shift are compensable (as "hours worked") if they are an integral and indispensable part of the employee's principal activities
  - "Principal activity" is not defined, but generally includes activities that are performed as part of the regular work of the employees and are in the ordinary course of business

Preliminary and Postliminary Activities (cont'd)

- All the following can be "hours worked" and therefore compensable, if required by the employer and necessary for the performance of the job
  - Changing into and out of required uniforms, sanitary gear, safety gear
    - Known as "donning and doffing"
  - Cleaning up (self or equipment)
  - Walking to/from work station

Steiner v. Mitchell, (U.S. Sup. Ct. 1956)

- Facts:
  - Workers in a battery plant used caustic and toxic materials
  - In the interest of "health and hygiene," workers showered and changed clothes after shift in facilities that state law required the employer to provide
- Ruling: showering and changing time was compensable as "hours worked"
  - "Clearly an integral part of the principal activity of the employment"

Mitchell v. King Packing Co., (U.S. Sup. Ct. 1956)

- Facts:
  - "Knifemen" in meat packing plant were required to sharpen their knives; "off the clock"
- Ruling: sharpening time was compensable as "hours worked"
  - The knives had to be razor-sharp to achieve proper performance of the knifemen's butchering duties, the sharpening activities were an integral part of, and indispensable to, the principal duties for with the knifemen were employed

IBP v. Alvarez, (U.S. Sup. Ct. 2004)

- Facts:
  - Production workers required to wear outer garments, hard hats, hairnets, ear plugs, gloves, sleeves, aprons, leggings and boots
    - Some also required to wear protective gear like Plexiglas armguards and special gloves
  - Employer paid for four minutes of changing time on the front and back end of shifts, but not time spent walking to and from the work station
- Class action seeking wages for walking time

IBP v. Alvarez (U.S. Sup. Ct. 2004) (cont'd)

- Ruling (unanimous)
  - Walking time is compensable as part of the "continuous workday" concept because it occurred after the principal activity of donning the required gear (on the front end of the shift), and still before the last principal activity of doffing the required gear (on the back end of the shift)

FOLEY
FOLEY & LARDNER LLP

IBP v. Alvarez (U.S. Sup. Ct. 2004) (cont'd)

- Consequences:
  - "Donning and doffing" issues refocused in minds of the public, including employees and plaintiffs lawyers
  - More lawsuits filed seeking wages for time spent in these and other preliminary or postliminary activities, including walking
  - Creates new arguments for more compensable time as part of the "continuous workday"

FOLEY
FOLEY & LARDNER LLP

Employer Defenses

- "*De Minimis*"
  - Insubstantial periods of time beyond scheduled work hours may be disregarded if they cannot be recorded as a practical administrative matter
    - Only applies when time at issue is uncertain and indefinite periods of a few minutes of duration
  - May apply if time spent by each employee on activity in question is less than 10 minutes/day
    - However, DOL's position is that all preliminary/postliminary activities must be aggregated
  - Harder to apply in work of electronic timekeeping

Employer Defenses (cont'd)

- "Custom or practice" under a CBA
  - FLSA section 203(o): exempts from "hours worked" clothes and gear changing time if pursuant to terms of a labor contract or "custom or practice" under a labor contract
  - May not be reflected in state laws
- ***Arcadi v. Nestle´ Food Corp.***, 38 F.3d 672 (2d Cir. 1994)
  - Even in absence of written contract terms, practice of no compensation for time spent changing into and out of required uniforms made time that time noncompensable

Other Hot W&H Issues

- Class action cases abound, because:
  - Pay policies and practices often affect groups of employee in a similar way; thus, claims challenging these are often suitable for class treatment
  - The FLSA (and state laws) provide for penalties on back pay (50% federal; 100% in some states)
  - The FLSA (and state laws) allow the prevailing plaintiffs to recover their attorneys fees from the employer who has failed to pay all wages due

Other Hot W&H Issues: OT Exemptions

- FLSA exempts employees who are:
  - Executives
  - Administrative
  - Professional
  - Outside Sales
  - Computer professionals
- And, who are paid on "salary basis" at a rate of least $455/week ($23,660/yr)

Other Hot W&H Issues : OT Exemptions (cont'd)

- New Federal Regulations effective August 2004
  - Refocused regulators, workers and plaintiff's lawyers on this issue
- Overtime lawsuits abound
  - Often asserted as class actions
  - Liability can be large

FOLEY
FOLEY & LARDNER LLP

Other Hot W&H Issues: OT Pay

- "Regular rate" is the hourly rate,
  - ***plus*** other pay
- So, simply multiplying hourly rate by 1.5 to calculate overtime pay is usually incorrect
  - Underestimates overtime pay required, subjecting employer to liability for back pay, penalties, interest and attorneys fees

FOLEY
FOLEY & LARDNER LLP

Action Plan

- Assess, then heal, thyself
- Foley & Lardner wage and hour self-audit tool:
  - User friendly, but specific enough to help you identify vulnerabilities
  - Can be accessed at:
    http://www.zoomerang.com/recipient/survey.zgi?p=WEB2254L9WWQN9
- Then, thoughtfully implement changes

FOLEY
FOLEY & LARDNER LLP

Patent Protection: A Business Necessity in the Food Industry

FOLEY
FOLEY & LARDNER LLP

Strategic Value of Patents

- Patent provides the holder the ability to **exclude** a competitor from:
  - making
  - using
  - selling
  - offering for sale

  the protected innovation

- Well known patent exclusions – Blackberry patent infringement dispute with RIM

Strategic Value of Patents (cont'd)

- What can be patented?
  - Recipe or combination of ingredients
  - Particular chemical formulation of individual component
  - Process for making food product
  - Process for packaging of food product
  - Nanotechnology integrated into food products and processes

Importance of Patents in Food Industry

- 1897 – Arthur Dorrance invents and patents a process for condensing canned soup.
- Result – creation of Campbell's Soup Company, likely the single best known soup manufacturer in the world.

FOLEY
FOLEY & LARDNER LLP

Importance of Patents in Food Industry

- Many key players in the Food Products industry are extremely active in protecting innovations via US patents
  - Over 800 patents secured by well known manufacturer of shelf stable food products
  - Over 200 patents secured by processed meat manufacturer
  - Over 400 patents and applications by manufacturer of animal feed products
  - Over 900 patents held by Chinese researcher on nanotech medicinal herb formulations

FOLEY
FOLEY & LARDNER LLP

Recent Public Announcements on Awarded Food Patents

- Soylink secures patent for method to remove bean flavor from soybeans
- Cargill secures patent for starch used to texturize treated food products
- Chrysantis secures patent for carotenoid ingredients for prevention of age-related macular degeneration
- Burcon NutraScience secures patent for canola protein extraction purification technology

Enforcement of Patents in Food Industry

- P&G sued Coca-Cola for infringement of patents directed to calcium fortified juice – just settled
- Leprino Foods and Land 'O Lakes embroiled in multi-year dispute over patented process for making pasta filata cheese
- Tate & Lyle bring action against Chinese manufacturers asserting infringement of sucralose patent
- TurboChef Technologies sued for infringement of oven control patents by Food Automation Service Techniques
- Sabinsa takes action against DNP International for infringement of patent directed to black pepper extract

Effective Patent Strategies

- IBM Method
  - Aggressively patent a wide range of developments and innovations to create a portfolio of assets which can be used defensively

Effective Patent Strategies (cont'd)

- Qualitative Approach
  - Review all innovations and proceed with protection on only those which are truly innovative and provide competitive advantage
- Ostrich Approach
  - Stick your head in the sand, ignore all this "patent speak" and worry about other issues

Harvesting Innovations

- Develop process for submission of innovations
  - Invention Submission form (online or paper)
- Evaluate and report back to inventors on each specific submission
- Encourage and reward submissions
- Create innovative environment to encourage technical staff's efforts

Food Products and the Berry Amendment

The Berry Amendment: Requirements and Products Covered

- Federal law mandating that the Department of Defense (DoD) buy certain items from American or qualifying country sources
- "[F]unds appropriated or otherwise available to the Department of Defense may not be used for the procurement of [specified items] . . . if the item is not grown, reprocessed, reused, or produced in the United States." 10 U.S.C. § 2533a(a)
- Covers food, clothing, tents, cotton and other natural fiber products, hand or measuring tools, and specialty metals
- Ostensibly designed to ensure domestic sources of supply for specific items Congress deems important to the US military

Berry Amendment Background

- Originated in 1940/1941 at advent of WWII, focused then only on food and clothing
- Since inception, scope has broadened significantly
- From 1941 to 1993, Berry Amendment restrictions imposed via annual DoD appropriations acts
- Codified in 1993 as a note to 10 U.S.C. § 2441
- Recodified in 2002 at 10 U.S.C § 2533a after the Army beret controversy
- Implemented by DoD at DFARS 225.7002
- Implementing clause for food products is DFARS 252.225-7012

Overview as to Food Products

- Food must be manufactured/processed in the US
  - US manufactured/processed food (except seafood) may be grown/produced anywhere
- Fish, shellfish and seafood must be caught *and* manufactured/processed in US
- No exception for commercial items
- End product= CLIN. Component includes subcomponents

Overview as to Food Products (cont'd)

- Exceptions:
  - Below simplified acquisition threshold.
  - DNADs under FAR 25.104(a).
  - DNADs under DFARS 225.7002-2(b).
  - Acquisition outside US for combat operations.
  - Perishable foods by/for agencies outside US and used outside US.
  - Contingency operations.
  - Other than competition procedures approved.
  - Emergency acquisition by agencies located outside US/for use outside US.
  - Vessels in foreign waters.
  - Commissary resale

Food Other Than Seafood

- DFARS 252.225-7012(b)(1) says: Food, end products **and** components, must comply
- But, 7012(c)(4) **excepts** food, **other than** fish, shellfish and seafood, from the clause provided the food product has been either **manufactured or processed** in US
- Result: DoD can acquire food products manufactured or processed in US without regard to content, origin of components, where grown, etc.
- If food product is not manufactured/processed in US (*i.e.* raw agricultural products), DoD can acquire only if grown or produced in US, and all components comply
- 7012(c)(4) applies only to prime contractor
- Manufacturing/processing requires a transformation in character or use; more than packaging.

Fish, Shellfish and Seafood

- If taken from the sea, must be taken by US-flag vessels
- Or, if not taken from the sea, must be obtained from fishing in US
- **And**, under all circumstances, any processing or manufacturing of fish, shellfish or seafood must be performed on US-flag vessel or in US
- Covers direct sales to DoD **and** seafood used by contractors as components of other foods (including foods manufactured/processed in US)
- Result: Fish, shellfish and seafood have a complete domestic content requirement, both as end products and components

General Exceptions

- Exceptions specified in DFARS 225.7002-2, with one also in 7012 clause
- Acquisitions below simplified acquisition threshold ($100,000/$5 million for CI) by DoD
- DNADs under FAR 25.104(a)
- DNADs under DFARS 225.7002-2(b)
- Acquisitions outside US for combat operations
- Perishable foods by/for agencies outside US and used outside US

General Exceptions (cont'd)

- Contingency operations
- Urgent and compelling circumstances
- Emergency acquisition by agencies located outside US and for use outside US
- Vessels in foreign waters
- Used for commissary/exchange/NAFI resale

Penalties for Berry Amendment Violations

- Prime contractors:
  - Breach of contract if 7012 clause incorporated, leading to CDA claim
  - Potential False Claims Act violation:
    - Good news: No express certification required (unlike Buy American/Trade Agreements Acts); government must rely on implied certification
    - Treble damages
    - Per invoice penalty up to $11,000
- Subcontractors:
  - Breach of subcontract with prime/higher-tier sub, if clause incorporated; state law breach of contract claim
  - False Claims Act exposure theoretically possible

Penalties for Berry Amendment Violations (cont'd)

- Contracting Officers:
  - Anti-Deficiency Act violation
  - Personal liability for unlawful payment
- Criminal exposure possible

Berry Amendment Violations & Bid Protests

- Berry Amendment compliance usually viewed as contract administration matter
- Contract administration issues can't be protested
- But, can become a protest issue if offeror makes reasonable showing to CO that competitor is not Berry compliant
- Once reasonable showing made, CO has duty to investigate and reach reasoned determination

Questions & Answers

Contact Us

Bernard J. Bobber
Partner
777 E. Wisconsin Ave., Suite 3800
Milwaukee, WI 53202
Tel: 414.297.5803
bbobber@foley.com

Richard J. McKenna
Partner
777 E. Wisconsin Ave.,
Suite 3800
Milwaukee, WI 53202
Tel: 414.297.5723
rmckenna@foley.com

David T. Ralston
Partner
3000 K St., NW, Suite 500
Washington, DC 20007
Tel: 202.295.4097
dralston@foley.com

FOLEY
FOLEY & LARDNER LLP