BRESSLER, AMERY & ROSS

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NJ Mandates Notice of Employers' Recordkeeping and Reporting Duties

The New Jersey Department of Labor and Workforce Development (NJDOL) recently issued a six-page notice, Form MW-400 (11/11), which New Jersey employers were to immediately provide to all persons newly-hired on or after Monday, November 7, 2011. Employers were to provide the MW-400 to current employees by Wednesday, December 7, 2011.

The notice, entitled "Employer Obligation to Maintain and Report Records," details employers' recordkeeping and reporting requirements under New Jersey's wage and hour, unemployment, family leave, workers' compensation, disability, and tax laws.

Specifically, employers must (1) post the MW-400 in each of their locations in a conspicuous area, and (2) distribute a written copy of the notice to each current employee. Pursuant to N.J.A.C. 12:2-1.3, employers may fulfill their posting and distribution requirements electronically. Employers may, for example, use an internet or intranet site to post the notice if the site is exclusively for employees and all employees have access to the site. Employers may also use email to distribute the MW-400. As a best practice, employers should document their compliance with the distribution requirement by obtaining signed acknowledgments from employees.

The final page of the MW-400 sets forth contact information for the state agencies to which employees can complain or question an employer's recordkeeping and reporting practices. Employers who fail to post or distribute the MW-400 may be fined up to $1,000 and may incur criminal penalties.

A copy of form MW-400 is available on the internet at http://lwd.dol.state.nj.us/labor/forms_pdfs/EmployerPosterPacket/ MW-400.pdf. Copies of all the required wage and hour postings may be found at http://lwd.dol.state.nj.us/labor/wagehour/content/forms_publications.html.

OSHA Issues Notice to Retailers for the Upcoming Holiday Sales Season

The Department of Labor's Occupational Safety and Health Administration ("OSHA") recently issued a Fact Sheet providing retail employers with crowd control guidelines to protect employees during the upcoming holiday sales events, which at the time included last month's Black Friday. OSHA's role is to promote safe and healthy working conditions for employees by setting and enforcing standards and providing training, outreach, and education.

The issuance of this Crowd Management Safety Guidelines Fact Sheet comes as a consequence of a 2008 fatality involving the death of a Wal-Mart employee in Long Island, New York, who was trampled during a Black Friday sales promotion when excited shoppers rushed through the doors. According to acting Assistant Secretary for OSHA Jordan Barab, "crowd-related injuries during special retail sales and promotional events have increased during recent years." Many of these incidents could be prevented, and this fact sheet provides retail employers with guidelines for avoiding injuries during the holiday shopping season.

The Crowd Management Safety Guidelines are accessible on the Department of Labor's website. They provide retail employers with OSHA-recommended crowd management plans that include: (1) setting up barricades or rope lines for pedestrians and crowd control well in advance of customers' expected arrival at the store, and making sure that the line does not start directly in front of the entrance to the store; (2) assigning trained security personnel or police officers to supervise the lines of customers; (3) establishing emergency procedures; and (4) directing employees to announce entrance procedures to waiting customers. OSHA also suggests keeping exit doors unlocked and unblocked, and strictly enforcing maximum occupancy levels. Finally, OSHA recommends providing numbered tickets or wristbands to customers as they arrive, to regulate access to sale items.

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New Jersey's Department of Labor and Workforce Development to Publish Proposed Rule Restoring "Inside Sales" Overtime Exemption

New Jersey's Department of Labor and Workforce Development, Wage and Hour Compliance Division ("NJDOL"), announced that it is publishing a proposed rule on November 21 which will restore New Jersey's "inside sales" employee overtime exemption. A hearing is scheduled for December 13.

As our September 2001 Alert informed you, New Jersey's regulations on exemptions from overtime requirements for persons employed in bona fide executive, administrative, professional, or outside sales capacities were replaced by "an adoption by reference" of the federal rules. This replacement inadvertently eliminated the New Jersey-specific regulatory overtime exemption for "inside sales" employees. Under New Jersey law, "inside sales" employees are those whose primary duties consist of sales and who receive at least half their compensation from commissions. Their total compensation must be at least $400 weekly. Prior to September 5, 2011, the "inside sales" exemption regulation, then located at N.J.A.C. 12:56-7.2(b), had been based on the Department's characterization of "inside sales" employees as "administrative," thereby exempting them from overtime requirements

under state law. This change was meant to simplify state law by conforming it to federal standards in an employer-friendly way.

As a result, however, New Jersey employers may now be required to pay overtime to "inside sales" employees, even though they were never previously entitled to overtime pay, nor would they be entitled to overtime pay under the federal Fair Labor Standards Act. The good news is that the NJDOL admitted in a recent press release that it never intended that the new regulation would remove New Jersey's inside sales overtime pay exemption. The NJDOL stated that it intends to reverse this aspect of the regulation as soon as possible. This unintended consequence comes as retailers are preparing for the busiest and most profitable month of the year. Resolution of this error may, however, take some time, and many New Jersey employers have been left vulnerable to plaintiffs' lawyers and the NJDOL over potential unpaid overtime claims.

The Bottom Line. Employers with "inside sales" employees should reexamine their overtime policies and consult experienced employment counsel to develop plans for moving forward.

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Pippins: Wage and Hour Meets Document Preservation

In the discovery dispute before him in *Pippins v. KPMG LLP*, No. 11-cv-0377, 18 Wage & Hour Cas. 2d 532 (S.D.N.Y. Oct. 7, 2011), U.S. Magistrate Judge James L. Cott decided, on October 7, 2011, that KPMG has a duty to preserve the computer hard drives of an estimated 9,000 former and departing employees nationwide, even though these employees are not parties to the case's underlying wage and hour dispute. A global accounting firm with 87 offices in the U.S., KPMG estimates that the putative class would exceed 9,000 people and that preserving the hard drives will cost the company $600 per person. That's $5.4 million!

Two former KPMG auditors ("Audit Associates") commenced the underlying case in January 2011 as a collective action under the Fair Labor Standards Act ("FLSA") in the Southern District of New York. They alleged that KPMG willfully misclassified and denied overtime to them and to all similarly-situated Audit Associates throughout the U.S. In March 2011, three more former Audit Associates filed a class action in the Southern District of New York, alleging that they had been misclassified and denied overtime in violation of New York labor laws. The two actions were eventually consolidated in a "hybrid" collective and class action on behalf of all "similarly-situated" Audit Associates who worked in KPMG's U.S. offices between January 2008 and January 2011 and, as to New York employees, those who worked from March 2005 until the date of final judgment. The named plaintiffs then moved

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to certify their hybrid collective class and provide notice to potential members; discovery has been stayed while presiding Judge Colleen McMahon considers the Motion to Certify.

The instant discovery dispute arose when the parties attempted to define the scope of KPMG's duty to preserve documents. The plaintiffs wanted KPMG to preserve the electronically stored information ("ESI") on the computer hard drives of all former and departing Audit Associates nationwide. KPMG countered that it had no duty to preserve the hard drives of former or departing employees until a collective or class action was certified. Nonetheless, the company offered to preserve, for this action, a sample of 100 hard drives of former Audit Associates, which could be culled from the 2,500 hard drives already being preserved pursuant to KPMG's litigation holds in unrelated cases. As a result, KPMG pursued a protective order to limit the scope of its duty to preserve the aforementioned sample of 100 computers.

In deciding that KPMG had a duty to preserve all of the computer hard drives, Magistrate Judge Cott applied the standard from *Zubulake v. UBS Warburg, LLC* ("Zubulake IV"), 220 F.R.D. 212 (S.D.N.Y. 2003), *e.g.*, parties have a duty to preserve all non-duplicative documents containing potentially relevant information whenever they "reasonably anticipate litigation." *Zubulake IV at 218*. In the context of an employment dispute, employers must preserve the documents of "key players," *e.g.*, "those employees likely to have relevant information." *Id*.

The judge characterized much of KPMG's hardship as "self-inflicted" and the result of its purported unwillingness to disclose the contents of its hard drives and to work with plaintiffs in establishing a mutually agreeable sample group. *Id*. at 539. KPMG is appealing.

This decision has important implications for employers who will incur great costs to preserve documents on behalf of claimants without knowing who will eventually comprise the certified group or whether a group will be certified at all. Additionally, in view of FLSA's requirement under 29 U.S.C. Section 216(b) that claimants "opt in" to the collective action, it is possible that an employer may incur great expense needlessly, because many claimants may choose not to opt in to a collective action. Needless to say, if it is upheld, *Pippins* has the potential to redefine the discovery process, particularly for large employers.

Regardless of the outcome of KPMG's present appeal, employers should exercise caution and be proactive in developing documents that will be most relevant and informative in setting out employees' job duties and hours worked. Employers should make sure their documents provide a clear "road map" to employees' work hours and duties, as well as the relevant employer policies. This caution will reduce or eliminate the need for a court to look to "unofficial work materials" to capture employees' duties. Regularly maintain and update time records, overtime policies, job

descriptions, and job classifications to ensure their ongoing accuracy and the compliance of employees and managers. Clearly document regional, titular, or other individual differences among employees who might otherwise appear to be "similarly-situated" under the FLSA standard for collective actions. Such documentation may assist an employer in limiting an extensive review of their computer hard drives to the extent the equivalent information may be derived from these less-costly alternative sources.

Upcoming Speaking Engagements:

December 20, 2011: Jed Marcus will be participating in a panel discussion on Litigating and Trying Employment Cases, *The Sheraton Meadowlands Hotel in Secaucus, NJ, 9:30 am to 12:30 pm*. Sponsored by the New Jersey State Bar Association.

For more information about any of the topics covered in this issue of the Labor and Employment Law Alert, please contact:

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