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NEWSLETTER

Davis & Cannon, LLP

Attorneys At Law

We Know Wyoming

Offices in Sheridan, Cheyenne, and Gillette

THE MYTH OF COMP TIME AND HOW THAT MAY SOON CHANGE

The Fair Labor Standards Act, 29 U.S.C § 201 et seq., commonly referred to as "FLSA," is the federal statute that generally requires most employers to pay a set minimum wage and overtime at the rate of time-and-a-half to employees that work in excess of forty hours per week. The law is complicated, with a myriad of not always clearly definable exceptions. Confusion about FLSA is often compounded by the misconception that private employers are allowed to provide compensatory time, or "comp time," to their employees in lieu of paying overtime. Many of the employers we work with indicate that their employees often request comp time instead of overtime, but even if the employee prefers the comp time, FLSA prohibits its use by private employers.

Under the current version of FLSA, while public employers have some limited ability to pay comp time instead of overtime, private employers do not have this same right. However, if the current Republican-led Congress has its way, that may soon change. In May of this year, the House passed the "Working Families Flexibility Act of 2017," H.R. 1180, which would allow private employees to receive and accrue up to 160 hours of comp time in lieu of overtime pay. The employee and employer would have to agree prior to the performance of work to comp time instead of payment of overtime, and any unused comp time within a twelve month period would have to be paid to the employee. Critics of the Act complain that employers could force employees to accept comp time instead of overtime, and it could lead to employees losing control over their schedules. However, the Act does specifically prohibit employer coercion,

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Welcome to the second edition of our newsletter! This edition focuses on several new laws of particular interest to Davis & Cannon, LLP clients.

CLINT A. LANGER ASSUMES POSITION OF MANAGING PARTNER

As of this May, Clint A. Langer assumed the position of firm managing partner, which is a firm leadership position that rotates to different partners from time to time. Clint has worked with the firm for over fifteen years in its Sheridan offices. In the years ahead, he looks forward to working to ensure the continued success of all Davis & Cannon, LLP lawyers, and the satisfaction of each and every client.

The firm would like to thank John C. McKinley for his tenure and service as former managing partner. John will have more time to focus on his real estate practice and service to the University of Wyoming as a member of the Board of Trustees.

WE KNOW WYOMING

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BREAKING BREAD TOGETHER

Before it burned to the ground in March, 1987, The Maverick Supper Club on the banks of Little Goose Creek off of Highway 87 halfway between Sheridan and Big Horn was an old log roadhouse with a colorful history. For at least the last 20 years of its existence, it stood as the premier steakhouse in northeastern Wyoming, if not the whole state. Few visitors to Sheridan escaped without at least one dinner at the Maverick. Among its most cherished traditions was the Sheridan County Bar Association meeting attended religiously every month by nearly every member of the Bar. Think of it: dinner and drinks—and usually way too many drinks—every month. Everybody was there in person and no one could avoid answering letters or returning phone calls. Discovery disputes, scheduling difficulties, personal annoyances all got resolved magically.

These were the days before mediation when lawyers settled cases in civil discussions sitting across the table from each other. That required the kind of strong, permanent, respectful personal relationships that could have only been developed through hours of personal contact at these kind of gatherings. While we convened initially in the bar for an hour or so before dinner we were always herded into a separate log room with a massive table which we all sat around. Separating us from the others insured that whatever profanity erupted would be kept among ourselves. Besides our shared values of due process and fairness and keeping our word with one another we all understood that civility and profanity were not mutually exclusive. Although there were occasional spirited discussions about issues of common concern to the Bar (e.g. providing pro bono services for the poor), most of the conversation was marked by barbs and bon mots hurled like tennis balls across the table. And then there were the stories told masterfully. It was a master class on the intersection of observation, humor and wisdom.

The more people like one another, the more they are willing to engage and respond positively to small logistical requests that we make of each other to get matters brought to final resolution.

The bonds those long nights created insured levels of communication among lawyers of all ages that facilitated the resolution of many disputes. In short, we learned to really talk to each other with respect and humor. We left those meetings with a determination to fully and promptly perform the little oral agreements we made.

Kim D. Cannon

The more people like one another, the more they are willing to engage and to respond positively to the small logistical requests that we make of each other to get matters brought to final resolution. Toward that end in the days before email, text messages, social media in all forms and long recorded voicemails we had to talk to each other. The most important means of communication was the simple phone call. More could be resolved in that call than 10 emails which often sounded flat notes when nuance and humor were intended. Opportunities for brain-storming—collaborating with opposing counsel to improvise new solutions to problems—only occur in real conversation in real time.

A senior lawyer in a large Denver law firm once described the joy he feels in composing an email to an associate or an opponent, pushing the "send" button and walking out the door. "No one can talk back," he told me gleefully, "And I can just leave." While he may have enjoyed the confusion and sinking feelings he cast on associates and opponents alike, that approach is counterproductive. None of our communications should be shots across the bow. Instead, all of them should be genuine efforts to solve problems. Not only does that save time and money, but it preserves the kind of lifelong professional relationships that form the foundation of our professional satisfaction.

THE MYTH OF COMP TIME (CONT'D)

and provides for employer penalties if the Act is violated.

The Bill is currently pending before the Senate. If it is ultimately passed, it could prove a useful tool for employers, and benefit employees who would prefer to enjoy more days off instead of overtime pay.

If you have questions about FLSA, or the myriad of other state and federal statutes and regulations that govern employer conduct, contact Amanda F. Esch, Clint A. Langer, Leah C. Schwartz, Ben N. Reiter, or Holly L. Tysse.

ACCURATELY CLASSIFYING "CLERICAL OFFICE EMPLOYEES"

Employers in Wyoming are always looking for ways to reduce fees, taxes, and overhead costs. One major area of costs for employers is workers' compensation premiums. This article is intended to highlight a commonly misused classification that may get employers in trouble in the event of an audit.

Workers' compensation premium rates are dependent on the nature and classification of the business. There is a separate classification and premium, however, for "clerical office employees," which is much less than most other classifications. According to the Wyoming Workers' Compensation Division's latest proposed "Injury Base Rates By Classification" Schedule, a clerical office employee will have a base rate of 0.41 in 2017. https://tinyurl.com/baserates

Many employers take advantage of this lower premium and classify what may commonly be referred to as "office staff" under this category to reduce their overall premiums. However, some of these employees may not actually fit under this classification.

The Wyoming Workers' Compensation Division ("Division") has a very specific definition for "clerical office employee," which it narrowly interprets. A "clerical office employee" is one "whose duties are confined to keeping the books and records of the business or who are engaged wholly in office work where such books and records are kept, having no other duties of any nature in or about the premises of the business." Wyo. Admin. Code WSD WCD Ch. 1, § 4. If the employee engages in any other duty away from the business premises, he/she is disqualified from the classification, unless the employee is traveling directly to and from a local post office or bank. The Division has taken the approach that "travel to any location other than the post office and bank is thereby disqualified to be reported under the Clerical/Office classification code for the reporting period when this travel occurs." See Affidavit for Clerical/Office Classification Coverage Sample, https://tinyurl.com/yce5x6o2

In other words, if your employee runs any sort of errand other than trips to the post office or bank, you cannot classify them as "clerical." For example, if you ask a receptionist to pick up printing material or flyers from a local store, you cannot classify him or her as "clerical" for the quarter in which you asked them to run that errand. As difficult as it may be to discern any meaningful distinction between a trip to the bank and a trip to the print shop, it is important employers carefully track and comply with the Division's interpretations. Otherwise, employers may face costly and unplanned delinquent premiums during an audit. It is far better to budget premiums than get an unexpected bill.

IF THE EMPLOYEE ENGAGES IN ANY OTHER DUTY AWAY FROM THE BUSINESS PREMISES, HE/SHE IS DISQUALIFIED FROM THE CLASSIFICATION...

For more information regarding classification of employees or discount programs, contact the Department of Workforce Services, or Amanda F. Esch, Clint A. Langer, or Holly L. Tysse.

Davis & Cannon, LLP lawyers, Holly L. Tysse, Codie D. Henderson, and Amanda F. Esch participate (and coordinate) as firm representatives at "The Branding Iron Classic" golf tourney, presented by the Wyoming Stock Growers Land Trust and the Wyoming Stock Growers Association's Young Producers Assembly.

LEGISLATIVE UPDATES TO ESSENTIAL ESTATE PLANNING STATUTES

The Wyoming legislature was busy this past session updating or adopting several statutes that govern key estate planning documents. The most significant development came with the unanimous passage of the Uniform Power of Attorney Act ("UPOAA"). 2017 WYO. SESS. LAWS 273-304. The Governor signed the bill into law on March 6, 2017 and it will become effective on January 1, 2018. The UPOAA has been adopted by 23 other states and covers many issues Wyoming's current and rather thin Durable Power of Attorney Act ("DPOA") fails to address. See Wyo. Stat. § 3-5-101 et seq.

A power of attorney ("POA") is a legal document that allows another person, the agent, to act on behalf of and sign for the person appointing the agent, the principal, in certain specified legal and financial matters. For a POA to be valid under the UPOAA it must be signed by the principal before a public notary or have been executed prior to the adoption of the UPOAA. A POA is effective until it is revoked in a manner prescribed by the UPOAA or as stated in the POA.

Unlike the previous DPOA, the UPOAA provides principals with more explicit options regarding how their agent should act, gives important guidance to principals and agents on how a POA may be exercised, and imposes certain requirements on agents, courts, and third party's dealing with a POA. For example, the UPOAA provides a long list of powers that a principal may elect to have the agent perform and some powers the agent may not perform unless the power is specifically stated in the POA. A principal may also now nominate his agent as his guardian or the conservator of his estate in the event a judicial proceeding is commenced and a court must generally accept this nomination and appoint the agent. The UPOAA requires agents to act in good faith, be loyal to the principal, and refrain from creating "a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest." Third parties refusing to accept a valid POA may be compelled to accept it by court order and be responsible for the agent's costs and attorney fees. These are just a handful of the options and requirements created by the UPOAA.

THE UPOAA REQUIRES AGENTS TO ACT IN GOOD FAITH, BE LOYAL TO THE PRINCIPAL, AND REFRAIN FROM CREATING "A CONFLICT OF INTEREST THAT IMPAIRS THE AGENT'S ABILITY TO ACT IMPARTIALLY IN THE PRINCIPAL'S BEST INTEREST."

The Governor also signed into law several amendments to the Wyoming Uniform Trust Code.

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(UPOAA cont'd)

See WYO. STAT. §§ 40-10-111, 4-10-201, 4-10-205, and 4-10-816. The amendments generally clarify a trustee's power to make distributions to defined beneficiaries and provide that trust documents may be sealed in court proceedings so that they remain private and not part of the public record. These amendments became effective July 1, 2017.

Whether you are just beginning to think about estate planning or reviewing/updating your estate planning documents, these legislative developments are a good reminder that it is important to regularly revisit your estate plan to take advantage of legal developments. Those interested in learning more about these pieces of legislation and how they may affect your estate plan, should contact Richard M. Davis, Hayden F. Heaphy, Jr., or Ben N. Reiter.

NEW LIMITS ON POLICE RECORDINGS
MORE QUESTIONS FOR MUNICIPAL RECORDS CUSTODIANS

On March 13, 2017, Governor Mead signed into law Wyoming Senate File No. 32, which limits third-party access to audio and video recordings of peace officers. (The law does not limit inspection by law enforcement personnel or public agencies conducting official business.)

The law applies to all recordings captured by peace officers via worn cameras or cameras attached to law enforcement vehicles. See W.S. 16-4-201 (a)(xi). For better or worse, recent recordings of interactions between police officers and persons under investigation have sparked national attention and concern. In many cases, recordings go "viral" before an incident is even investigated, oftentimes leading to public backlash against the police. Supporters of the bill say it will prevent sensitive audio and visual recordings from being aired to the public at large—contrary to the interests of law enforcement and/or the subjects of the recordings. Critics raise concerns about government transparency.

In many cases, recordings go "viral" before an incident is even investigated, oftentimes leading to public backlash against the police.

Whatever view one may have regarding the role of peace officer recordings in national discourse, there is little question that Senate File No. 32 will present several new challenges for municipal records custodians caught in the middle of the debate. Under the law, municipal custodians must generally deny the right of inspection to any third party requesting a peace officer recording. There are, however, at least four circumstances under which custodians may allow the right of inspection: (1) where the request is made by "the person in interest;" (2) where the recording "involves an incident of deadly force or serious bodily injury;" (3) where the inspection is "[i]n response to a complaint against a law enforcement personnel and the custodian of the information determines inspection is not contrary to the public interest;" and (4) where the inspection is "[i]n the interest of public safety." W.S. 16-4-203(d)(xviii)(B).

Municipal records custodians may face difficult questions in carrying out these provisions—particularly as the news media and others attempt to "test" the law's limits. For example, who is "person in interest" potentially entitled to inspection? Under what circumstances is allowing inspection in the "public interest"? Who determines when inspection is "in the interest of public safety"? And, more generally, what internal policies and procedures should municipalities adopt to minimize liability while ensuring the law is followed in all respects?

Those interested in learning more about Senate File No. 32 and the best practices for responding to municipal records requests should contact J. Mark Stewart, Amanda F. Esch, or Leah C. Schwartz.

CONGRATULATIONS TO CODIE D. HENDERSON

The firm would like to congratulate Codie D. Henderson on becoming a partner effective January 1, 2017. Codie grew up in southern Colorado but has called Wyoming home for nearly a decade. He enjoys spending time hunting and fishing with friends and family, and can often be found on the golf course. Codie is married to Jamie Jakes Henderson.

Since joining the firm in 2012, Codie has developed his civil litigation practice with special interest in the areas of products liability, construction law, property law/land use, and personal injury. Codie also enjoys family law and continues to represent individuals in divorce and child custody proceedings. The firm is thrilled to name Codie as a partner.

SUMMER ASSOCIATE

Davis & Cannon, LLP would like to thank Paul Graslie for serving as our 2017 Summer Associate. Paul is a rising third year law student at the University of Wyoming. He comes to law after careers as a banker, nonprofit program manager, development consultant and small business owner. He has a degree in Finance from Montana State University and an MBA from Concordia University – Portland. Paul moved back to Wyoming after years in Oregon, Wisconsin, and Montana to enjoy our people, places and culture. When not in the office or at school he can be found fishing, climbing, hiking, or skiing with his wife and son.

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