Interview with Richard J. Simmons

02.23.2002

Employers Group: *There has been a flurry of activity in California this past year surrounding the issues of wage orders, overtime, exemptions, and the fixed salary rules. To what do you attribute this attention?*

Richard Simmons: The passage of AB 60, which reinstituted daily overtime after 8 hours, certainly led to many changes to California law. The statute also changed the "monthly remuneration" requirement in California to a "monthly salary" requirement. The confusion about the definition of monthly salary has caused a major upheaval, which has the potential to impact how every California business treats every exempt employee.

EG: *How did this eventually result in the IWC being sued?*

RS: The issue becomes clearer by reviewing a series of events that took place over the past 2 years. In January 2000 AB 60 was enacted and changed the existing language from "monthly remuneration" to "monthly salary". In October 2000, new wage orders took effect using the "monthly salary" language. Despite the use of the term "monthly", which had been part of California law for over 50 years, the state had historically viewed it to create a weekly standard, just as in the federal law.

On May 30, 2001, Miles Locker, then Chief Counsel for the Division of Labor Standards Enforcement (DLSE), wrote an 'unsolicited' letter to me interpreting the silence of the IWC and the legislature as to the meaning of "monthly salary". In this letter, he stated that a salary could no longer be interpreted according to the salary standards of federal law. He stated that, in California, salaried employees must be paid a full monthly salary, even if they work only a portion of the month. In addition, unlike federal law, deductions ordinarily would not be allowed for time missed. Most alarming, his letter would have made the monthly salary standards he adopted retroactive. His opinion letter had the potential to change California law and completely reverse the rules in the area.

EG: *How great of an impact would Miles Locker's opinion have had on employers?*

RS: The impact of this opinion would have been devastating. I testified before the IWC detailing 12 reasons why every worker in California would be non-exempt under this opinion. The reason why? No employee I know of in California is paid a monthly salary for working one day of the month. And again, common deduction practices that have been allowed under federal and California law would result in a loss of the exemption status.

I was invited by the IWC to address the flaws I found in the DLSE's interpretation. About 7 days later, Labor Commissioner Arthur Lujan withdrew the May 30th Locker letter at a public hearing, held on June 15, 2001 and suggested that the IWC issue a clarification before the DLSE would issue an interpretation. On October 29, 2001, the IWC held a hearing on the issue and, by a 4-1 vote, affirmed their true intent. They confirmed their original intent to follow federal law. On December 7, 2001, they held a second hearing and, once again, by a 3-2 vote, adopted a Statement as to the Basis, which explained amendments to Wage Order 5 that included a new overtime exemption. In doing so, the IWC clarified its original intent to follow federal law.

Following that action, this past January, the IWC was served with a lawsuit brought by several unions, including the California Labor Federation (AFL-CIO).

EG: *There are quite a few contradictions in Miles Locker's opinion letter. Can you speak to these?*

RS: Well, first of all, the standard is not like federal law. Under federal law, exempt employees ordinarily must satisfy a salary test that is measured on a weekly basis. Under the Locker letter, employers would be required to pay a fixed monthly salary. There are other problems. The Locker letter places enormous restrictions on the use of vacation and other paid leave benefits to meet the salary test. These restrictions create severe problems for employees who want flexibility (e.g., to work a modified schedule due to medical needs) and for employers faced with issues of sick leave, holiday time, vacation pay, shutdowns and trying to have a business succeed. Many employers reserve the right to force use of vacations during temporary shutdowns. However, under the Locker letter, this would be impermissible. In addition, under federal law, you are not required to pay someone if they take military or jury duty beyond one week. Similarly, an employee need not be paid for reduced leave or medical leave. However, under the Locker opinion, an employer would be forced to pay the full monthly salary if any part of the month was worked. You almost have to ask yourself who could afford to run a business in California under these terms.

EG: *Are you working with any precedents on this case*?

RS: We believe that the IWC did nothing wrong and, in fact, provided more than enough information and clarification on this issue. It is part of the IWC's job to provide clarification so that courts, employees, and employers will understand the IWC's intent. There have been three distinct instances when the Supreme Court and other appellate courts have sided with arguments I am making on behalf of the IWC. In 1979, the Supreme Court ruled on the 1976 Wage Orders (Hotel-Motel Association case) and found that not enough information was provided in the Statement of Basis. In 1998, California repealed daily overtime in five Wage Orders. The same union sued the IWC to challenge those amendments and lost.

EG: *How big is this case for employers, and for California?*

RS: The impact is enormous and would be staggering for employers and the State of California if the IWC lost. Frankly, winning this case will not eliminate all of the exemption problems that employers face. Employers still have to satisfy a stricter exempt duties test than the federal law imposes. However, losing this case would shake the lid off of class-action suits. No one will be safe. Things will spiral completely out of control and rock an already fragile state economy.

EG: *Richard, representing the IWC is quite a coup. Did you solicit this case?*

RS: I did not ask for this case, I was called by the state to defend the IWC. I obviously have a passion for Wage Hour issues and have dedicated thousands of hours to this area of the law. This is an opportunity to eliminate the sea of confusion in which employers remain trapped as a result of the Miles Locker opinion letter.

EG: *How exciting is this for you?*

RS: This is a very interesting case. It is intellectually challenging, it is a solid case, and the stakes are quite high. This issue may end up in the Supreme Court.

EG: *It's assuring to know you are on our side. Thank you for your time.*

RS: Thank you.

Attorneys

Richard J. Simmons

Practice Areas

Labor and Employment