



ALASKA SHRM STATE COUNCIL



***AK Wage and Hour Update:
AK Supreme Court & Burden of Proof
Developments for Exemptions***

Presented by Gregory S. Fisher

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**ASHRM WEBINAR
DEVELOPMENTS IMPACTING THE ALASKA
WAGE AND HOUR ACT**

February 28, 2020

*Alaska Supreme Court to review
burden of proof for exemptions*

Gregory S. Fisher



What is the Issue?



- Currently, in Alaska (and only in Alaska) the burden of proof to establish a wage and hour exemption is Beyond a Reasonable Doubt



Why is that an issue?



- It's a train wreck—a job-stifling catastrophe that increases risk and liability for employers, discourages growth and investment, and results in employees losing jobs and opportunities



Beyond a Reasonable Doubt



- This is the burden of proof used in criminal cases
- It is never used in civil cases
- Private businesses lack resources to meet this standard



So who cares?



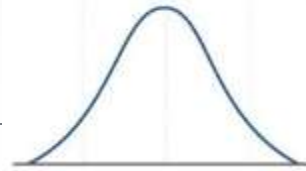
- Everyone should
- Increases risk and costs for employers
- Decreases job opportunities for employees
- Depresses business investment and growth
- Creates inconsistent legal standards between state and federal law

Wage and Hour review



- All employees are either exempt or non-exempt
- Exempt employees are higher compensated professionals, executives, administrative employees, computer professionals, and other management or higher level employees
- Non-exempt employees are everyone else, and are entitled to Overtime (time and a half normal hourly rate) for work over 8 hours in a day or 40 hours in a week

“All life is a bell curve”



- Employees on either extreme are easy to classify (CEO vs. new kid in the mailroom).
- However, things get “gray” as one approaches the vast middle ground.
- The regulatory definitions are dense, lengthy, and subject to varying interpretations.
- It is quite like the tax code—different people can interpret same facts differently.

Examples?



- Key concepts such as “management” or “primary duty” or “customarily and regularly” or “discretion and independent judgment” are defined in opaque terms.
- There is an “Alice in Wonderland” like quality to the definitions and their application.

“Management”



- Includes traditional concepts such as hiring, supervising, and disciplining employees
- BUT also includes duties that a filing clerk or receptionist could perform (determining supplies or equipment to be used, controlling distribution of materials)



The result?



- It is not easy to determine when and whether many employees are exempt or not
- In many instances, you can provide wage and hour lawyers or investigators the same set of facts, and get different conclusions



So, who cares?



- Wage and hour is all about damages and attorneys' fees.
- Overtime claims get base damages and liquidated damages (the base damages are doubled up). So, an overtime claim alleging \$10,000 is worth \$20,000.
- Then, attorneys are eligible for full, actual fees (which typically run in 6 figures).

Why is the BRD standard a problem?



- Multiple reasons
- Increases claims and makes settlement difficult
- Businesses cannot meet the standard
- Results in conflicting and contradictory law
- Employees lose jobs and benefits as businesses seeking to minimize risk outsource jobs
- Employees lose opportunities for professional growth as businesses cut training/mentoring
- Discourages business investment and growth

Why is the BRD standard a problem?



- Increases wage and hour claims, and makes it more difficult to settle claims.
- No incentive for plaintiffs to act reasonably.
- Businesses facing claims are held hostage to a system that makes no sense.



Why is the BRD standard a problem?



- Private employers lack resources or means to collect evidence to establish anything BRD.
- Private businesses don't have search warrant powers, or the powers that the Government has in criminal procedure to compel and collect evidence .



Why is the BRD standard a problem?



- Federal wage and hour law applies the normal and customary preponderance of the evidence standard.



- State law is based on federal law and principles (has been since 2005). ***The same law should be governed by the same standards.***

Why is the BRD standard a problem?



- Employers outsource labor to avoid potential OT problems because they know that they cannot surmount the BRD standard.
- Computer professionals (IT Departments) a good example.
- Outsourced employees lose jobs and benefits.



Why is the BRD standard a problem?



- Employers face inconsistent laws.



- The same law should be governed by the same standards.
- However, that is not happening now.
- Consequently, same facts and same claims can lead to different results depending upon the burden of proof.
- Increases legal risks and costs for business for no reason.

Why is the BRD standard a problem?



- Employees lose potential training and advancement opportunities.
- Negative impact on growth.
- Employers are reluctant to allow “gray area” mid-level managers the opportunity to work more hours to learn and get necessary mentoring because of OT risk.
- Bank tellers are a good example.



Why is the BRD standard a problem?



- It chills business growth and development.

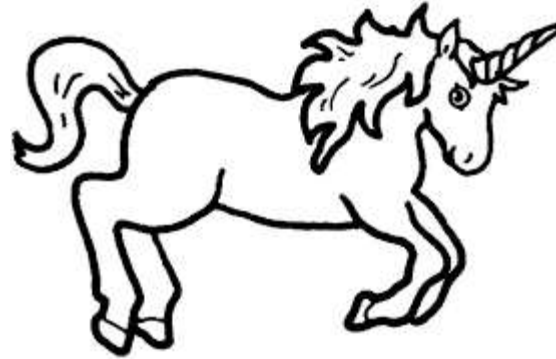


- Businesses looking to expand or develop in Alaska study the employment and labor laws.
- Investment discouraged.

Biggest Myth—but the BRD standard helps Employees, right?



- WRONG



- Federal law (remember—same law and same legal principles are used) works great with a preponderance of the evidence standard.
- The BRD standard is actually a job-stifling catastrophe. Employees lose jobs, benefits, and opportunities for advancement.

Another Myth—but the BRD standard is necessary to protect rights, correct?

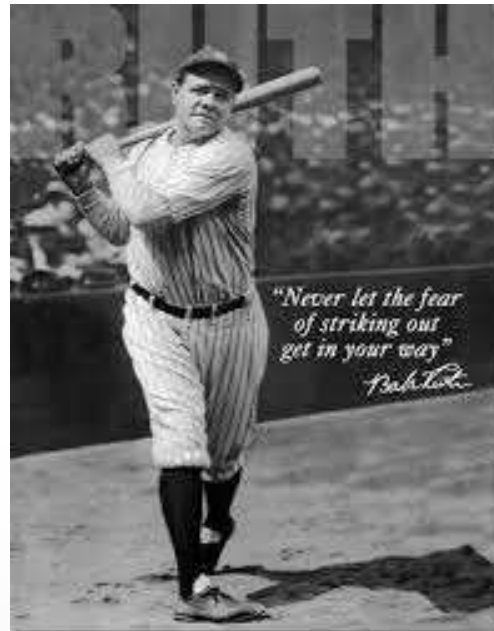


- WRONG
- All other employment-related defenses are governed by a preponderance of the evidence standard.
- This includes defenses in employment discrimination and civil rights cases (which are more important from a public policy perspective than wage and hour OT claims)

Okay, so why does Alaska have a BRD standard?



- Actually, there is no good reason. The Court imposed the BRD standard in 2004 based on dicta (no briefing, analysis, or even argument).
- Not bashing the Court—even Babe Ruth struck out now and then.



The BRD “rule” just “sort of happened”



- See Gregory Fisher, Alaska Law Review article



So Mr. Smarty Pants . . .



- Your solution?
- Could be an Easy fix. AS 23.10.060 could be amended to add one subdivision: “(k) In an action to recover unpaid overtime compensation or unpaid minimum wages, the defendant shall have the burden of proof to establish the existence of any claimed exemptions by a preponderance of the evidence.”

However . . .



- Legislative Gridlock



Update!



- U.S. District Court certified the burden of proof issue to the Alaska Supreme Court
- Case is *Travis Buntin v. Schlumberger*
- Alaska Supreme Court accepted case
- Briefing is now in final stages

When will a decision be made?



- State Council, Alaska Society Human Resource Management filed a “friend of the court” (or amicus) brief, urging court to adopt preponderance of the evidence standard
- Uncertain if the Alaska Supreme Court will hold oral argument
- Hopefully we will have a decision by the end of this year (perhaps sooner)

Why should I care?



- Because it's right.
- Because it promotes job growth.
- Because it protects employees and helps them achieve their potential.
- Because it protects employers from facing inconsistent legal standards.
- Because it protects employers from facing unfair and unreasonable legal costs and risks.
- Because it brings state law into line with federal law, which was the whole point of the 2005 amendments to the Wage and Hour Act.

Where can I get more information?



- Questions?
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