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ATTORNEYS AT LAW

August 19, 2010

Via Electronic Mail

Mr. Derek Sherry
Timber Creek Sewer Co.
Platte City, Mo 64079

Re: Risk analysis for tracking employee time

Dear Mr. Sherry:

Our firm was retained by your company to deliver an opinion regarding what exposure to liability the company would have under the Fair Labor Standards Act regarding time sheets for your employees. We have not been retained to determine whether any employee of the company is exempt or non-exempt, and no opinion is made as to that question.

First Question Addressed: If employees who are currently salaried and not compensated based upon the number of hours actually worked begin tracking their time, will the mere fact of time tracking remove their exempt status under the FLSA?

Opinion: No. As you know, much of the exempt vs. non-exempt status of an employee is governed by regulations promulgated by the Secretary of Labor. The mere fact that an employer keeps track of an employee's time does not, in itself, remove the employee's exempt status. The Eighth Circuit holds, "the regulations do not prohibit employers from requiring employees to work a specific number of hours per week and track their time to ensure they have worked the requisite number of hours." *Guerrero v. J. W. Hutton, Inc.*, 458 F.3d 830, 836 (8th Cir. Iowa 2006).

Second Question Addressed: If the company begins tracking the actual hours worked by employees, could the employee use those records to rebut the company's classification of the employee as exempt under the FLSA? And if so, would the time tracking bring to the employee's attention a possible claim under the FLSA?

Opinion: Yes and yes. First, these records would be front and center in any action by an employee against the company. These time records would likely result in irrefutable proof that the employee is working more than 40 hours per week. The burden of proving that the employee is exempt rests upon the employer, and whether any one employee is exempt is a question to be determined through significant legal process. As to the second

question, maintaining time records of employees who are currently not receiving overtime puts the employee on notice that they may be entitled to overtime pay. Again, whether the employee is exempt or not exempt is not the main exposure the company has at this point. The exposure lies in the employee seeking the determination in the first place. In order to defend such an action, the company would have to employ experienced employment law attorneys and a host of experts in the fields of occupational analysis and economics. So whether the company was ultimately successful or not on the exemption question is secondary to the substantial cost in defending the action in the first place. I believe that the defense of such an action would easily exceed \$30,000.00.

As always, if you have any questions or concerns, please feel free to contact my office at your convenience.

Sincerely,

JASON DAVEY

Jason Davey,
Attorney at Law

Cc: file