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OPINION NO. 2012-09

EMPLOYEES; OVERTIME; WAGES:

When the variable workweek exception identified in NRS 281.100(3)(b)(2) is met, the criminal penalties of NRS 281.100(5) do not apply so long as the employee's hours of work do not exceed 80 hours in a bi-weekly pay period. An employee who chooses a variable work schedule and whose workweek does not exceed 40 hours is not statutorily entitled to overtime compensation.

Brandi Jensen, Esq.
City Attorney
City of Fernley, Nevada
595 Silver Lace Blvd.
Fernley, NV 89408

Dear Ms. Jensen:

You have asked this office to address several questions arising under NRS 281.100 relating to the hours of work and overtime provisions applicable to city employees. A clarification to your questions was received on October 23, 2012.

QUESTION ONE

If an employee chooses and is approved for a variable schedule workweek, and works more than ten hours in a work day, will that constitute a violation of NRS 281.100 so as to subject the City of Fernley to criminal sanctions?

ANALYSIS

NRS 281.100(5) states:

Any officer or agent of the State of Nevada, or of any county, city, town, township, or other political subdivision thereof, whose duty it is to employ, direct or control the services of an employee covered by this section, who violates any of the provisions of this section as to the hours of employment of labor as provided in this section, is guilty of a misdemeanor.

NRS 281.100(5).

Within the same statutory section, NRS 281.100(3)(b)(2) authorizes a variable schedule workweek if chosen by the employee and approved by the employer. This same subsection limits the hours of employment under a variable schedule workweek to "not more than 80 hours in a bi-weekly pay period." The other restrictions on an employee's hours of employment contained in NRS 281.100 do not apply to an employee who chooses and is approved to work a variable workweek. NRS 281.100(3)(b)(2). Under this exception, the hours worked on any particular workday are rendered irrelevant, as the applicable restriction is instead based upon the total hours worked in a bi-weekly pay period. Under this scenario, a workday in excess of ten hours will not subject City officials to criminal sanctions.

CONCLUSION TO QUESTION ONE

When the variable workweek exception identified in NRS 281.100(3)(b)(2) is met, the criminal penalties of NRS 281.100(5) do not apply so long as the employee's hours of work do not exceed 80 hours in a bi-weekly pay period.

QUESTION TWO

If an employee chooses and is approved for a variable workweek, and works more than ten hours in a workday, but not more than 40 hours in a workweek, will the employee be exempt from overtime requirements?

ANALYSIS

Cities such as the City of Fernley are subject to the Federal Fair Labor Standards Act (FLSA). 29 U.S.C. § 201. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The FLSA's overtime provisions are calibrated to the number of hours worked during the employee's workweek and do not require payment for overtime unless the employee's hours exceed 40 hours in a workweek. 29 U.S.C. § 207(a)(2). Under the FLSA, entitlement to overtime pay is generally not measured by the hours worked in a workday. 29 C.F.R. § 778.602(a).¹ Therefore there is no statutory obligation under federal law to pay overtime in these circumstances.

NRS 281.100(4) addresses a public employee's entitlement to overtime pay, and requires that any employee whose hours of employment are controlled by subsection 1 of that statute is entitled to overtime pay or compensatory vacation time. As set forth in the analysis to Question One above, the requirements of NRS 281.100 do not attach when any of the exceptions stated in subsection 3 of NRS 281.100 are met. This includes an employee who has chosen and been approved to work a variable workweek. NRS 281.100(3)(b)(2). Accordingly an employee who works a variable workweek is not subject to NRS 281.100(1), and the overtime entitlement provisions of NRS 281.100(4) are inapplicable in this scenario.

Additionally, if the employee is a member of a bargaining unit covered by a collective bargaining agreement, the employee's entitlement to overtime is not controlled by NRS 281.100. See NRS 281.100(3)(b)(5). Nevada law provides that employee compensation must first be treated through the collective bargaining process. NRS 288.150(2)(a). The Local Government Employee-Management Relations Board has determined that this includes treating overtime compensation as a mandatory subject of bargaining. *Truckee Meadows Firefighters, Local 2487 v. Truckee Meadows Fire Protection Dist.*, Item No. 448A, EMRB Case No. A1-045650 (July 23, 1999). Accordingly, neither federal nor state law directs overtime payment for an employee who chooses and is approved to work the variable workweek as stated in your question, but additional overtime requirements may arise under the terms of a given collective bargaining agreement.

CONCLUSION TO QUESTION TWO

An employee who chooses a variable work schedule and whose workweek does not exceed 40 hours is not statutorily entitled to overtime compensation.

¹ There are limited specialized instances under the FLSA that do account for the hours worked in a workday, however these exceptions do not apply to the scenario described in the question.

QUESTION THREE

In the event of a dispute regarding interpretation of NRS 281.100, what administrative agency, if any, would have jurisdiction over the matter?

ANALYSIS

This analysis assumes a dispute referring solely to a question of statutory interpretation. Administrative agencies are creatures of statute, and their authority to act is limited to those powers delegated or necessarily implied by statute. *City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006). One such implied power is the authority to initially construe a statute which the agency administers. See *State, Dep't of Bus. and Ind., Office of Labor Comm'r v. Granite Const. Co.*, 118 Nev. 83, 90, 40 P.3d 423, 428 (2002). However, NRS Chapter 281 does not designate any agency to administer or interpret NRS 281.100.

In the absence of a statutory grant of power to an administrative agency to administer or interpret NRS 281.100, the judicial branch will interpret the statute. See *Casazza v. A-Allstate Abstract Co.*, 102 Nev. 340, 344, 721 P.2d 386, 388 (1986) ("When a statute may be interpreted in varying ways, it is the duty of this court to select the construction that will best give effect to the intent of the legislature"). The Nevada Constitution vests original jurisdiction in such matters at the district court level. NEV. CONST. art. 6, § 6(1).

CONCLUSION TO QUESTION THREE

A district court would have original jurisdiction to interpret NRS 281.100.

Sincerely,

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By:



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