KANE KESSLER, P.C.
Our Business Is You® | April 2012

ABOUT KANE KESSLER...

Kane Kessler is a midsized law firm located in Midtown Manhattan, serving clients throughout the United States and globally. Kane Kessler has been in the business of providing exceptional legal services to its clients for over 80 years, with experienced and specialized lawyers practicing in many areas of the law. At Kane Kessler, we take pride in delivering personal attention to each and every client and in our ability to offer a wide range of experience and knowledge in many legal specialties to help your business grow and prosper.

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For more information about the Firm, please visit our website at www.KaneKessler.com or call us at (212) 541-6222.

The Editors,

Judith A. Stoll
Gary E. Ostroff

EXEMPT OR NONEXEMPT?
A CRITICAL QUESTION FOR EMPLOYERS

In the past few years there has been a significant increase in the number of individual and class action lawsuits against employers alleging a failure to pay overtime as required by the Fair Labor Standards Act ("FLSA"). Recoveries in these lawsuits can be ruinous because they can include not only unpaid overtime for an entire class of employees for up to three (3) years (or up to six (6) years under some state statutes), but also liquidated damages equal to 100% of the unpaid overtime, interest and attorneys' fees. Many of these cases are based on the employer's unintentional misclassification of employees as "exempt" from the overtime requirements. Because of the enormous stakes involved and the increased focus on potential FLSA recoveries, it is more important than ever for employers to be sure they properly classify employees as either exempt or nonexempt from overtime.

The FLSA, a federal law that was enacted in 1938, requires that all employees be paid one and one-half times their regular hourly rates of pay for all hours worked in excess of 40 in a single workweek. However, the FLSA also establishes several categories of employees who are exempt from the overtime requirements and do not have to be paid premium pay for a longer workweek. Unless an employee's job duties qualify him/her for one of these exemptions, he/she is nonexempt and must be paid overtime.

The following are the basic requirements for exempt status:

SALARY BASIS: Even if an employee qualifies for one of the exemptions described below, he/she must be paid at least $455 per week ($23,600 annually) and must be paid on a "salary basis" in order to be exempt. An employee paid on a salary basis must receive the same predetermined salary each workweek, regardless of the

quantity and quality of work performed. However, an employer may deduct for an employee's full-day absences (but never partial-day absences) for a disciplinary suspension, or personal or sick leave without losing the exemption.

If an employee passes the salary basis test, he/she must fit into one of six (6) basic categories of exempt employees to be exempt from overtime.

EXECUTIVE: An employee is an exempt executive employee if (1) his/her primary duty is the management of the enterprise or a department of the enterprise, (2) he/she customarily and regularly directs the work of two or more other employees, and (3) he/she has the authority to hire or hire or effectively recommend hiring or firing.

ADMINISTRATIVE: An employee is an exempt administrative employee if (1) his/her primary duty is performing office or nonmanual work directly related to management policies and general business operations of the employer, and (2) his/her primary duty includes customarily exercising discretion and independent judgment with respect to matters of significance. Administrative employees do not need to supervise other employees in order to be exempt.

LEARNED PROFESSIONAL: An employee is an exempt learned professional if his/her primary duty requires knowledge of an advanced type in a field of science or learning generally requiring an advanced course of study (e.g., doctor, nurse, attorney, architect).

CREATIVE PROFESSIONAL: An employee is an exempt creative professional if his/her duties require invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

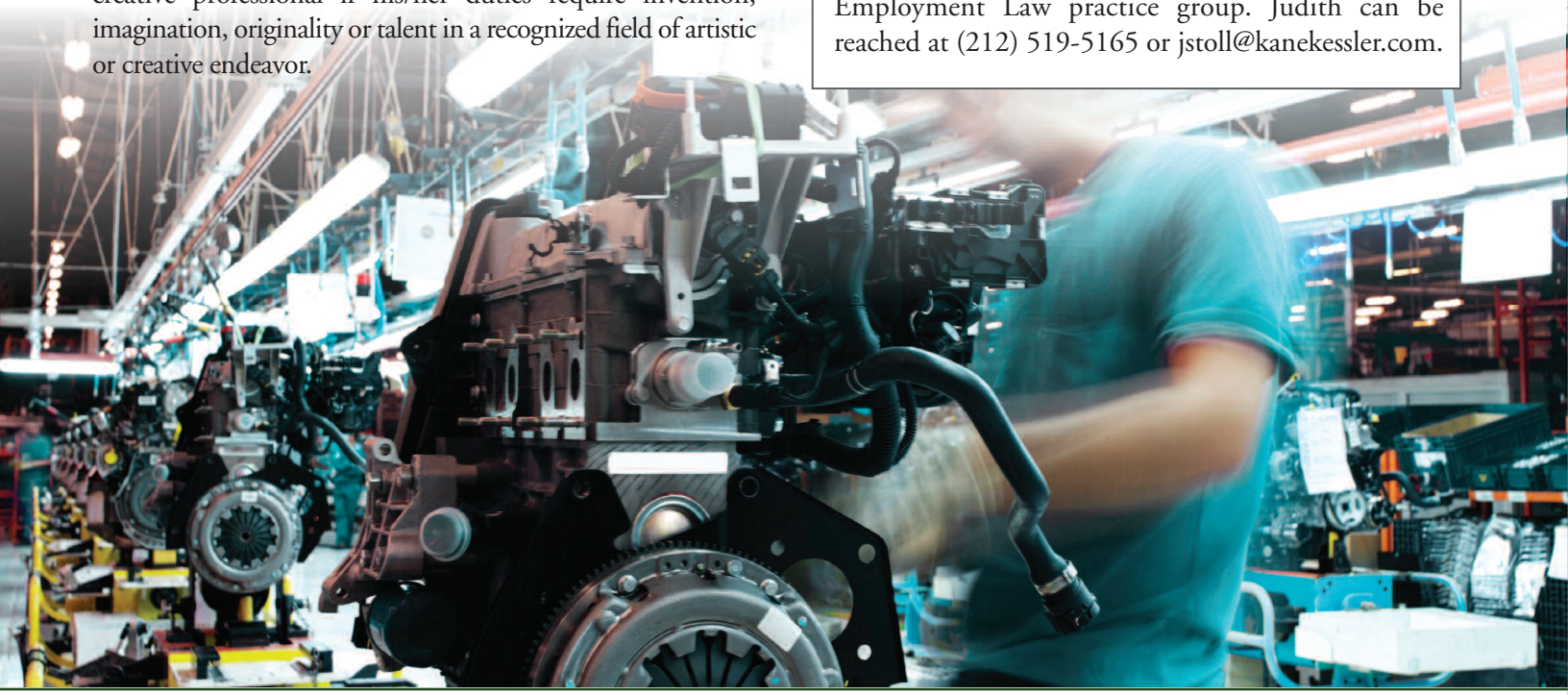
COMPUTER: An employee is an exempt computer employee if his/her primary duty consists of the (1) application of systems analysis techniques or procedures; (2) design, development, documentation, analysis, creation, testing or modification of computer systems; or (3) design, documentation, testing, creation or modification of computer programs related to machine operating systems.

OUTSIDE SALESPERSON: An employee is an exempt outside salesperson if his/her primary duty is "making sales" or obtaining orders and the employee is customarily and regularly engaged away from the employer's place of business.

Unfortunately, despite the critical importance of accurately classifying employees, it is not always easy to determine whether a particular job qualifies as exempt. Accurate classification depends not on the employee's title but on his/her actual duties and responsibilities and requires a careful, factual analysis of each job. For example, an administrative assistant may be exempt if he/she truly exercises independent judgment with respect to matters of importance, but an administrative assistant who merely takes direction and/or follows standard procedures is not exempt. We strongly recommend that employers consult with legal counsel before classifying an employee as exempt.

Kane Kessler has extensive experience advising employers on compliance with the FLSA and representing employers in FLSA litigation.

Judith A. Stoll is a Partner in the Firm's Labor and Employment Law practice group. Judith can be reached at (212) 519-5165 or jstoll@kanekessler.com.



COOPERATIVE AND CONDOMINIUM INSURANCE

Who Pays for Damages?

Attorneys representing cooperative corporations and condominiums receive urgent calls on a regular basis from managing agents and unit owners demanding that damage to an apartment caused by bursting pipes inside building walls or from another unit be immediately repaired by the coop/condo, and that the building assume liability for all damages incurred. When unit owners are told to contact their insurance brokers to report the loss and seek payment from their insurers, the usual response is "I did not cause the damage, and I don't want to report the loss to my insurer and have my premiums rise."

When unit owners are informed by building management that the building is not liable for the loss nor is it responsible for the repair or restoration of wall coverings and personal property and that recovery for damage should be coming from the unit owner's property insurance carriers, anger often overtakes frustration caused by the damage.

When water damage occurs, two basic issues arise: (1) Who is liable for the damage? and (2) Who is responsible for paying for restitution and repair of personal property caused by the water damage?

The first advice for the party sustaining damage is to promptly notify his/her property insurance carrier to report the loss. Failing to so notify the insurance company may result in the insurance company denying a claim due to failure to timely notify the company of the loss, a requirement under most policies.

The next step is to determine what damage the property insurance policy covers. This determination is often based upon the provisions of the coop/condo's governing documents (the bylaws and proprietary lease in the case of a coop and the bylaws and declaration in the case of a condominium), which usually provide that the unit owner is responsible for everything inside the interior walls of the unit, including wall coverings, furniture, floors and other improvements. Thus the responsibility for restoring these items is the unit owner's, and property insurance should cover these costs. When a unit owner's insurance company pays the unit owner to repair, restore or replace damaged property and for improvements, the insurance company may then step into the shoes of the insured and, if that carrier believes another unit owner or the building is responsible for the damage, seek to recover amounts it paid to the unit owner from the parties responsible for the damage and their insurance carriers.

Liability for damage is often a tricky question, since liability is based upon damage caused by acts of unit owners, failure of the building's responsibility to maintain common elements or, in the rare cause, an intentional act that caused the damage.

Therefore, the best way for coop/condo unit owners to protect their interests is (1) to understand what the coop/condo governing documents provide as to responsibility for repairing damaged property and (2) to maintain appropriate insurance coverage that covers their apartments and the contents thereof.

Kane Kessler advises numerous coop and condo boards on issues affecting their fiduciary duties to their unit owners.

Ronald L. Nurnberg is a Partner and **Bruce M. Schloss** is Counsel in the Firm's Real Estate practice group. Ronald can be reached at (212) 519-5127 or rnurnberg@kanekessler.com. Bruce can be reached at (212) 519-5197 or bschloss@kanekessler.com

ALERTS

Estate Planning and Proposed Changes to the Federal Estate and Gift Tax Laws

Taxpayers have approximately nine (9) months to take advantage of the current lifetime federal gift exemption of $5,120,000 before it is scheduled to decrease to $1,000,000.

The current transfer tax rules governing gift and estate tax are scheduled to "sunset" on December 31, 2012. Unless new rules are enacted, as of January 1, 2013, the lifetime gift tax exemption and the estate tax exemption will decrease from the current $5,120,000 to $1,000,000 and the top estate tax bracket will increase from 35% to 55%.

The current administration has proposed new transfer tax rules to take effect on January 1, 2013, but the prospect of such proposals being enacted is uncertain at this time. The proposed changes to the transfer tax rules are as follows:

- Reduce the lifetime gift tax exemption from $5,120,000 to $1,000,000
- Reduce the estate tax exemption from $5,120,000 to $3,500,000
- Increase the top federal gift and estate tax bracket from 35% to 55%
- Eliminate valuation discounts for intrafamily transfers, thus making discounts for minority interest and lack of marketability unavailable
- Require that the term of grantor retained annuity trusts be a minimum of 10 years
- Eliminate perpetual dynasty trusts
- Eliminate the estate planning benefits of the grantor trust rules

If you have any questions or wish to discuss taxes and estate planning matters, please contact **Michael Zimmerman**, Esq., Counsel to the Firm in the Tax and Estate practice group. Michael can be reached at (212) 519-5137 or mzimmerman@kanekessler.com

New NLRB Posting Requirement Enjoined by Court

The National Labor Relations Board ("NLRB") issued a rule requiring all private sector employers who are covered by the National Labor Relations Act ("NLRA") (i.e. businesses with revenue of more than $500,000 annually or engage in interstate commerce of more than $50,000), to post a notice in conspicuous places where other similar notices are posted. The purpose of the notice is to advise employees of their rights to organize and bargain collectively through unions under the NLRA, or to refrain from so doing, will provide examples of unlawful employer and union conduct, and will give contact information for the NLRB.

However, because of legal challenges to the posting requirement, the original posting deadline of November 14, 2011 was delayed by the NLRB until January 31, 2012 and then delayed again until April 30, 2012. Recently, the U.S. District Court in South Carolina issued a decision striking down the NLRB's authority to issue the notice posting rule and finding the rule invalid. On April 17, 2012, the D.C. Circuit Court of Appeals issued an injunction, staying the implementation of the posting rule and ordering a hearing for September 2012 on whether the NLRB has authority to promulgate the rule. We will provide further updates on the Firm's website and in memoranda to clients when the D.C. Circuit issues its decision.

When and if the notice becomes effective, it will have to be posted not only in conspicuous places in the workplace, but also on internet or intranet sites if personnel rules are normally posted in that manner. Failure to post the notice will be considered an unfair labor practice. The notice will also have to be posted in English and other languages if 20% or more of the workforce speak that language. The notice and translations of the notice are currently available via link to the NLRB website, http://www.nlrb.gov (click on "Employee Rights Poster").

If you have any questions, please contact **David R. Rothfeld**, Esq. or **Judith A. Stoll**, Esq., partners in the Firm's Labor & Employment practice group. David can be reached at (212) 519-5154 or drothfeld@kanekessler.com, and Judith can be reached at (212) 519-5165 or jstoll@kanekessler.com.

FAILURE TO PROPERLY MAINTAIN E-MAILS AND OTHER ELECTRONIC DATA COULD COST YOU MONEY

Attorneys in the Litigation department at Kane Kessler received a favorable decision from the Supreme Court, New York County, helping shape the law in New York state regarding the costs that a party to a litigation may bear when searching for and producing e-mails and other electronic data.

In *Silverman v. Shaoul*, 30 Misc.3d. 491, 913 N.Y.S.2d 870 (N.Y. Co. Sup Ct., 2010), Kane Kessler represented plaintiffs who had purchased a newly constructed, multimillion-dollar condominium unit in Manhattan. Immediately after closing, water began leaking into the apartment every time it rained. After several months, the apartment was rendered completely uninhabitable due to mold caused by the water infiltration. Kane Kessler commenced a lawsuit against the sponsor/developer in the Supreme Court of the State of New York, New York County, alleging breach of contract and negligence in the design and construction of the building.

During discovery, our attorneys served a document demand seeking all of the defendant's e-mails and other electronic data pertaining to the lawsuit.

Negligent Maintenance of Data Insufficient to Warrant Cost Shifting

In addition to the building at issue in our case, the defendant was also engaged in developing and constructing numerous other projects throughout Manhattan but failed to maintain its e-mail accounts and other electronic files in a manner that allowed it to distinguish easily between the various projects. As a result, defendant claimed it was required to hire an outside vendor to cull through the thousands of e-mails and other electronic files to gather and produce the information – at a cost of almost $70,000.

In its motion to the court seeking to have those costs borne by Kane Kessler's client, defendant argued that the information sought was "dispersed throughout several repositories," and, therefore the plaintiffs' request was unreasonable and burdensome. The court, however, rejected defendant's argument, holding that a company's failure to properly maintain electronic data in an organized or otherwise nonnegligent manner precludes that party from passing the costs for the production of those materials onto the other side.

> ***"... a company's failure to properly maintain electronic data in an organized or otherwise nonnegligent manner precludes that party from passing the costs for the production of those materials onto the other side."***

Electronic Information Must Be Preserved in an Organized, Easily Retrievable Manner

Every business operating in today's world must be aware that if it becomes involved in litigation, the discovery process will require it to produce e-mails and other electronic documents and data. Since the cost of searching for, reviewing and producing electronic materials is extremely expensive, it is imperative that all businesses maintain their electronic data in an organized and easily retrievable fashion. If not, they will likely have to suffer the time, distraction and costs, including in many instances paying exorbitant fees to third-party vendors, to produce the files.

Arthur M. Rosenberg is a Partner and **Gerard Schiano-Strain** is an Associate in the Firm's Litigation practice group. Arthur can be reached at (212) 519-5147 or arosenberg@kanekessler.com and Gerard can be reached at (212) 519-5164 or gstrain@kanekessler.com.

CAN COLORS BE TRADEMARKS

Colors have long been capable of acting as trademarks. Some well-known examples of color trademarks are Tiffany's robin's egg blue, UPS's brown and John Deere's green. All these colors are well-known as identifying the source of the goods and services of the mark owners, just as the Nike swoosh and Coca-Cola identify the sources of products. In fact, the United States Supreme, in *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159 (1995), recognized that color can function as a trademark if it has acquired "secondary meaning" (in other words, the consuming public recognizes the color as an indicator of the source of particular goods). So it is clear that single colors can act as trademarks, right?

No – at least not in the fashion industry, according to a recent federal district court ruling.

In *Christian Louboutin S.A. et al v. Yves Saint Laurent America, Inc. et al*, 778 F. Supp. 2d 445 (S.D.N.Y. 2011), United States District Court Judge Victor Marrero of the Southern District of New York recently denied Louboutin's request for a preliminary injunction prohibiting YSL from selling its monochromatic red women's shoes. Although Louboutin has adorned his women's high-fashion footwear styles with "Louboutin red" outsoles for the past 20 years, and although the U.S. Trademark Office in 2008 granted Louboutin a federal trademark registration for a "lacquered red sole" used in connection with "women's high-fashion designer footwear," Judge Marrero held that the red-soled mark of Louboutin was not likely to be entitled to trademark protection and YSL did not have to stop selling its red shoes (at least during the pendency of the case).

"... in the fashion industry – as in the art world – colors are 'aesthetically functional' and to enjoin YSL from selling red-soled shoes essentially would deprive fashion designers of the tools of their trade."

While Judge Marrero acknowledged that the red outsole is closely associated with Louboutin (and thus that the red soles had acquired "secondary meaning"), he nonetheless held that in the fashion industry – as in the art world – colors are "aesthetically functional" and to enjoin YSL from selling red-soled shoes essentially would deprive fashion designers of the tools of their trade. Judge Marrero painted a grim picture where color is usurped by a single source, finding that "[p]lacing off-limit signs on any given chromatic band by allowing one artist or designer to appropriate an entire shade and hang an ambiguous, threatening cloud over a

IN THE FASHION INDUSTRY?

swath of other neighboring hues … would unduly hinder not just commerce and competition but art as well."

The Louboutin decision is currently on appeal to the Court of Appeals for the Second Circuit. The case has been argued and a decision is pending. Many industry players, including Tiffany & Company, the International Trademark Association and legal scholars have filed amici (friend of the court) briefs attempting to sway the decision one way or the other. The relevance of the decision, of course, is that if color can function as a trademark, the owner of the color trademark could exclude all others from using the color in connection with the specified goods and services.

Although the Louboutin decision is understandably disconcerting to brand owners that have expended significant time, effort and resources in developing color trademarks, all is not lost even assuming affirmance of the district court Louboutin opinion. First, the decision very likely would not apply to industries other than fashion where color is used "primarily to advance expressive, ornamental and aesthetic purposes." Second, even within the fashion industry, Judge Marrero acknowledged that colors may be protectable as trademarks for fashion items where the color is part of a "distinct pattern or combination of shades" as opposed to a single, specific color. Third, Louboutin may have made an error in how broadly it characterized its mark; its registered trademark was characterized as "a lacquered red sole on footwear." If the mark had been more narrowly characterized, for instance as "a lacquered sole on footwear in the color 'Chinese red,' Pantone No. 18-1663 TP," the outcome may have been different. Meanwhile, the fashion industry holds its breath to see whether the Second Circuit will join Judge Marrero and give the boot to Louboutin's appeal or whether it will reverse and find that the Louboutin red soles are protectable.

Kane Kessler's Intellectual Property practice group has extensive experience in Trademark registration and litigation.

Adam M. Cohen is a Partner of the Firm and Chair of the Intellectual Property practice group. Adam can be reached at (212) 519-5146 or acohen@kanekessler.com

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Firm News...

KANE KESSLER LAWYERS' SPEAKING ENGAGEMENTS

Adam Cohen, Chair of the IP Group, will be a panelist on the "Trademark Troll" panel at the annual meeting of the International Trademark Association to be held in Washington, D.C., in May.

ACHIEVEMENTS

David R. Rothfeld, a Partner of the Firm and Chair of the Labor and Employment practice group, was the lead negotiator on behalf of the Hotel Association of New York City, Inc., during contract talks with the New York Hotel & Motel Trades Council, AFL-CIO. The negotiations resulted in the successful settlement of a new seven-year collective bargaining agreement. The collective bargaining agreement covers approximately 30,000 employees working in more than 150 hotels in the New York metropolitan area.

The Firm's **Corporate and Securities practice group** successfully represented:

- A NASDAQ-listed company in its successful public offering with a national underwriter of 8,912,500 shares of its common stock (including the exercise in full of the underwriters' over-allotment option shares) with net proceeds to the company, after underwriters' discounts, of approximately $63.4 million
- A NYSE publicly traded company complete a $300 million facilities increase under an existing senior credit facility
- A NYSE publicly traded company in the successful completion of a Dutch tender offer to purchase up to $500 million of its own common stock
- A partner of multibillion dollar investment management organization in the withdrawal of his partnership interest from the fund
- A strategic partner in his acquisition of a multi-tiered equity interest in a national title insurance company
- A group of equity funds restructure their operating agreements to address capital contribution deficiencies

The Firm's **General Business practice group** successfully represented:

- A restaurant group in its private placement of equity, commercial debt financing, lease negotiation and commercial matters in connection with its funding and opening of its newest restaurant in South Florida
- A multiconcept restaurant group with respect to its raising of venture capital equity, related venture financing, and related structuring and lease negotiation in connection with the launch of its first fast-casual restaurant concept in New York City

The Firm's **Labor and Employment Law practice group** was also successful in obtaining:

- Dismissal of a complaint filed in New York State Supreme Court, New York County, alleging retaliation for alleged whistle-blowing in violation of Section 740 of the New York Labor Law and intentional infliction of emotional distress, on the grounds that the complaint failed to state a cause of action
- Dismissal of a complaint filed in New York Supreme Court, Queens County, of a race and national origin discrimination and retaliation case under New York State and New York City laws, on the grounds that the complaint was barred by the doctrine of res judicata

The Firm's **Litigation practice group** was successful in obtaining:

- Dismissal on grounds of personal jurisdiction over a Tennessee communications firm that was alleged to have interfered with an exclusive advertising sales representative agreement
- Dismissal of a New Hampshire state court lawsuit against a billion-dollar specialty risk insurance company and its affiliates, in which plaintiff alleged that the clients engaged in fraud, breach of contract, damage to business reputation, unfair and deceptive practices, unjust enrichment and promissory fraud
- A reversal on appeal to the First Department, reinstating a claim for misappropriation of confidential information that had been dismissed by the lower court

The Firm's **Real Estate practice group** successfully represented:

- A high-end retail tenant in connection with lease negotiations and build-out of its flagship store on Madison Avenue

PRACTICE GROUPS

Bankruptcy, Reorganization and Creditors' Rights
Corporate and Securities
Corporate Investigations
General Business
Intellectual Property
Labor and Employment Law
Litigation
Matrimonial
Mediation
Real Estate
Trusts, Estates and Taxation