

relationship is greatly jeopardized by an all-comers policy.

- Timothy M. Burke

- 1 *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Opportunity Commission*, 565 U.S. _____, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012).
- 2 *Christian Legal Society of the University of California, Hastings College of Law v. Martinez*, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010).
- 3 "Legal or not, the Vanderbilt policy is wrong," Justin P. Gunter, *The Tennessean*, February 4, 2012.

- 4 "The Fallout from Christian Legal Society," Robert Shibley, Senior Vice President of FIRE, the National Review on Line, February 6, 2012.
- 5 20 U.S.C. 1681.
- 6 *Chi Iota Colony of Alpha Epsilon Pi v. City University of New York*, 502 F.3d 136 (2nd Cir. 2007).
- 7 20 U.S.C. 1681, *et seq.*

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FLSA Compliance for House Directors: Monitor Overtime with Caution and Care

Sorority and fraternity house directors typically live where they work, which makes wage and hour compliance exceptionally challenging. The line between working and not working is hard to draw, and, when a dispute arises, it can be difficult for a local housing corporation to prove the number of hours a house director actually worked. Clear job expectations and detailed recordkeeping are essential to successfully defend against a claim brought by a disgruntled house director.

To further complicate matters, some house directors may be exempt from the minimum wage or overtime pay provisions of the Fair Labor Standards Act ("FLSA"), but exemption determinations are fact-specific and the penalties for underpayment of wages can be severe, often including liquidated damages and attorneys' fees that far exceed the original wage underpayment. One common misconception is that all employees who are paid a salary are exempt; in fact, only employees who meet a certain salary threshold (\$455 per week) and also have certain job duties that are executive, professional or administrative qualify for these salary-based exemptions. Generalizations in this area of the law are difficult because the specific job duties of house directors vary widely from organization to organization and among different local housing corporations affiliated with the same organization. Furthermore, the availability of the exemption may vary from year to year depending on the level of oversight by local volunteer leaders.

In recent years, the Department of Labor has increased its staff of investigators which, in turn, has allowed increased Wage and Hour Division scrutiny of employer compliance with the FLSA. Local housing corporations that classify their house director employees as exempt (or would like to do so) should discuss the FLSA exemption status of their employees with legal counsel. FLSA determinations must be made on a case-by-case basis and exempting employees from minimum wage and overtime pay is not without risk.

The most conservative approach is to treat house director employees as non-exempt under the FLSA and develop and adopt policies and best practices to ensure these employees work only 40 hours per workweek and are paid at least the

applicable minimum wage (currently at least \$7.25 per hour and higher under some states' laws).

Best practices and policies for local housing corporations to eliminate or reduce overtime for house directors include:

- Developing and adopting a written wage and hour policy that is distributed to and signed by house directors upon hire.
- Keeping a signed copy of the wage and hour policy in the house director's employee file.
- Establishing a weekly schedule for house directors that requires 40 or fewer hours of work per workweek.
- Agreeing to a certain amount of "off-the-clock" time for sleeping, meals, or purely personal pursuits inside or outside of the local chapter house.
- Requiring house directors to secure advance approval for all work in addition to or outside the weekly schedule, except in emergencies.
- Clearly communicating that all unscheduled work will be compensated, with or without pre-approval, but that failure to secure pre-approval may subject the house director to discipline.
- Requiring subsequent paperwork (i.e., an "exception report") to record unscheduled work or overtime.
- Requiring house directors to accurately record all time worked and sign their time cards each week or pay period.

Mandatory recordkeeping under the FLSA includes identifying information (full name, social security or other identifying number, address, birth date, sex and occupation) and pay stub information (time and day workweek begins, daily and weekly hours worked, rate and basis of pay, regular hourly pay rate, total daily and weekly "straight" earnings, total weekly overtime, additions or deductions from wages,

total wages paid each pay period, and date of payment and pay period covered). We recommend that you also keep a signed copy of the local housing corporation's wage and hour policy and any records requesting or approving unscheduled or overtime work. As discussed in the November 2011 issue of *Fraternal Law*, it also is a good idea to develop and implement a document retention policy. The FLSA requires employers to maintain certain employee records for at least three years, but you may consider keeping wage-related records for seven years for tax purposes.

A robust wage and hour policy will help local housing corporations comply with the FLSA and help protect against employment litigation.

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Tennessee Court Holds That National Fraternity Does Not Owe a Duty to Third Parties

In July 2006, Jeffrey Callicutt attended a party hosted by E.J. Cox, a member of the Tennessee Zeta Rho Chapter of Alpha Tau Omega Fraternity at the University of Memphis. The party occurred at the home of Cox's parents, over twenty miles from the University of Memphis. Cox's party had been announced at a summer meeting at the local chapter house and was attended by approximately five fraternity members. At the time, Callicutt had been offered a bid to pledge with the Chapter, but was not a pledge or a member.

During the party, Callicutt and others consumed alcoholic beverages from a common container, which were provided by Cox. Towards the end of the party, Callicutt's then girlfriend arrived. Members of the fraternity, who were at the party, had requested that Callicutt find a ride home and not drive himself. After staying for a few minutes, Callicutt and his girlfriend left the party. Unknown to the members, each left in separate vehicles. Callicutt proceeded to follow his girlfriend down a two-lane winding country road in Shelby County, Tennessee. While driving, Callicutt crossed the center line, veering into oncoming traffic and struck Davey and Teresa Mann, causing severe injuries. The Manns' medical bills exceed one million dollars.

The Manns sued Callicutt and his parents, Cox and his parents, who were the homeowners, Alpha Tau Omega Fraternity Inc., Tennessee Zeta Rho Chapter of Alpha Tau Omega, and several individual members of the local chapter. The Manns asserted claims of negligence and vicarious liability against the National Fraternity. Alpha Tau Omega Fraternity Inc. filed a Motion for Summary Judgment.

The trial court granted this motion and Tennessee joined the growing number of states that have held that without the ability to control the day to day operations and activities of the local chapters or its members, a national organization does not owe a legal duty of care to third parties. In its ruling, the trial court relied upon the fact that the national fraternity cannot enforce discipline until *after* a violation of its policies occurs. The trial court went on to find that the failure to enforce discipline following a previous, unrelated policy violation, does not create a duty in a separate and subsequent

case. The trial court also held that any amendment to the complaint to allege an agency relationship between ATO national and the local chapter would be futile due to the lack of control.

The trial court relied heavily upon *Pingeton v. Erhartic*, No.991407, 2001 WL 292992, at *3 (Mass. Super. Ct. Feb 5, 2001), which held that, based upon its lack of control over the local chapter, Alpha Tau Omega Fraternity Inc. did not owe a legal duty to the Plaintiffs. In *Pingeton*, the undisputed facts showed that ATO national headquarters was located in Indiana, while the chapter at issue was in Worcester, Massachusetts; that ATO national representatives only visit the chapter once or twice per year; ATO national was unaware of the drinking on the date in question; and ATO national did not have any interest in the house where the incident occurred. The *Pingeton* Court also recognized that ATO had alcohol policies that its local chapters were expected to abide by, but that ATO representatives could not be present at every social event to ensure compliance. Moreover, the *Pingeton* Court found that ATO could only enforce discipline *after* a violation of its policies due to its absence from the day to day activities of the chapter. Based upon these factors, the *Pingeton* Court declined to impose a duty on the national fraternity. Notably, despite the existence of questions of fact as to whether the fraternity or its members provided the alcohol, the *Pingeton* Court explicitly held that such a fact was immaterial to whether a duty would be imposed on the national fraternity.

For the same reasons as the *Pingeton* Court, the court in the *Mann* case and others are finding that national organizations do not owe a duty of care to third parties. Due to their lack of day to day control and supervision, national fraternal organizations do not have a special relationship with local chapters or members that would create such a duty. See e.g. *Shaheen v. Yonts*, 394 Fed. App'x 224 (6th Cir. Aug. 31, 2010) (no duty based upon no ability to control and public policy analysis); *Grand Aerie Fraternal Order of Eagles v. Carneyhan et al*, 169 S.W.3d 840 (Ky. 2005) (no duty based upon no ability to control and excessive burden such duty would create); *Walker v. Phi Beta Sigma*, 706 So.2d 525 (La. Ct. App. 1997) (no duty owed based upon no ability to control); and *Alumni Assoc. v. Sullivan*, 572 A.2d 1209 (Pa. 1990) (no