Holiday
2016

MONROE MCDONOUGH
BRENT & MORALES, PLLC
ATTORNEYS AT LAW

Welcome to the MMB&M Newsletter

From All of us at MMB&M!

It is a pleasure doing business with you! Thank you for all the trust you've placed in us and we look forward to the new year filled with peace and opportunity. The entire staff at MMB&M wishes you a happy and prosperous Holiday Season!

MONROE MCDONOUGH BRENT & MORALES, PLLC
2500 N. Tucson Blvd., Suite 140 Tucson, Arizona 85716 ♦ 520-292-2500
www.mmbmazlaw.com

SOUTHERN ARIZONA'S REAL ESTATE LAW FIRM

Substantial New Wage Rules Enjoined from December 1, 2016 Effective Date

By: Heidi Rib Brent
hbrent@mmbmazlaw.com

The new rules were/are to apply to employees - not business owners or independent contractors (see Spring Newsletter for an analysis of employees versus independent contractors and Summer Newsletter for the new Arizona law with safe contract provisions for independent contractors) - for overtime pay. The rules were to take effect on December 1, 2016, significantly raising the cost of human resources for many employers. Then, a week before its effective date, a federal judge in Texas issued an injunction to consider the legality of the federal Department of Labor's new rules.

The Background: Since the Fair Labor Standards Act (FLSA) was adopted in 1938, the law has been that any employee who works more than 40 hours in a work week shall be paid overtime at a rate of time and ½. There is no provision exempting small employers; the law applies for even one employee. There are exemptions to the requirement for overtime for various white-collar salary positions. However, those exemptions are specific and limited. The exemptions from overtime include a duties component and a salary component. The 2016 changes impact only the salary component; the duties component remains the same.

The Duties Exemptions: There are exemptions from overtime for the following:
Executives, whose primary duties are management and supervision of at least two other full-time employees and must have authority relating to hiring and firing https://www.dol.gov/whd/overtime/fs17b_executive.pdf
Administrators, whose primary duties must be the management or general business operation and include the exercise of discretion and independent judgment https://www.dol.gov/whd/overtime/fs17c_administrative.pdf
Professional, whose primary duties involve advanced intellectual knowledge in a field of science or learning and which involves specialized instruction https://www.dol.gov/whd/overtime/fs17d_professional.pdf
Computer Employees, whose primary duties in those areas of computer systems sound foreign to mere mortals https://www.dol.gov/whd/overtime/fs17e_computer.pdf
and
Outside Sales, whose primary duties are obtaining orders away from the employer's place of business https://www.dol.gov/whd/overtime/fs17f_outsidesales.htm

The Changes: In addition to the duties component, for employees to be exempt from overtime pay, they had to earn at least $23,660/year or $455/week. This amount has not increased since 2004. If the new rules go into effect the catch-up applies: employees must earn at least $47,476/year or $913/week to be exempt from overtime provisions. Wow! More than a 200% increase! The salary is based on the standard salary level equal to the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). And, the salary will be evaluated every three years. So it may increase again in 2020.

The Impact: So what do employers do now?! If the Department of Labor prevails and the rules are allowed, employers must evaluate each job description and determine how to proceed. If an employee already was hourly, there is no change. If employees were validly exempt from overtime provisions under one of the exceptions discussed above, but earned less than a salary of $47,476/year, employers must make decisions quickly. Either the employer must increase the employees' salary to $47,476 or change the employees to hourly.

(Continued next page)

The change of salaried employees to hourly involves several complications. Salaried workers are not used to tracking their time. While this law is supposed to prevent the employees from working excessive hours without additional compensation, employees may be offended by the perceived reduction in status. In addition, it is the employers' obligation to accurately track the employees' hours. Employees must be compensated for time they are "permitted or suffered to work." So they cannot just put down 8 hours/day even if they work more or less. If the Department of Labor or Arizona Wage and Hour Division of the Industrial Commission conducts an investigation (because any employee becomes disgruntled and complains or they conduct an industry-wide investigation), it does not matter if the individual employees are not upset (or even cover their ears and say "la, la, la" every time you insist on accurately paying for their time). If there is evidence that the employee worked and was not compensated, the employer will have to pay the employee for the time worked, plus may be penalized in an amount equal to the unpaid wages. The employer will be responsible for two years' corrections to wages or three years if the violations are found to be "willful." If an employee sues for a wage and hour violation, in addition to the wages and penalties, the employer may be charged for the employee's attorneys' fees.

What to do: For now, plan but wait. If the rules are allowed, employers will need to utilize some accurate time reporting system. For employees who always work in the office, the system need not be complex, but for employees who work remotely, some program where employees sign in by phone or computer would be beneficial. Time reporting gets complicated for off-hours work telephone calls, email and text messages. Wages for time between tasks is based on whether the employees are "waiting to be engaged" (not compensated) or "engaged to be waiting" (compensated). For employees who were salaried and become hourly, these rules will need clarification.

Employers also will need to adopt a policy stating that they intend to compensate employees for ***all*** of their work time and requiring employees to record ***all*** of their work time. There cannot be a presumption. Employers can require supervisor approval for employees to work overtime, but, even if employees violate that policy, they must be paid for the overtime. The violating employees can and should be disciplined for violating the employer's rule, but they must be paid for the hours worked. As for compensatory time, it must occur within the same work week or the employee must be paid for the overtime.

For employers who are having difficulty with the transition, I recommend you make a plan to deal with the new rules just in case. We don't yet know how the federal court will rule or what the Department of Labor will do under the new administration, but it is best to be ready.

We were so happy to see these familiar faces during a recent visit – (from left to right) Nancy Monroe, Susan Smith and Mike Monroe.

What's Happening in Tucson

Winterhaven Festival of Lights - Fort Lowell & Country Club - December 15 thru 26

Butterfly Magic at Gardens - Tucson Botanical Gardens - December 15 thru May 17

New Year's Eve Bash at Hotel Congress - December 31

Tucson Rodeo Parade Museum Tours - Tucson Rodeo Grounds - January 2 thru April 8

The Fab Four: Ultimate Beatles Tribute - Fox Theatre - January 21

Tucson Gem, Mineral and Fossil Showcase - Downtown Tucson - January 28 thru February 12

Tucson Rodeo and Parade - La Fiesta de los Vacqueros -Tucson Rodeo Ground - February 18 thru 26

But I Won't Pay the Rent!

A Primer on the Rights of a Residential Tenant

By: Anne Terry Morales
amorales@mmbmazlaw.com

(Part II of a two-part series on the Arizona Residential Landlord and Tenant Act. For Part I: "But You Must Pay the Rent! An Eviction Primer for the Residential Landlord," please see our Fall 2016 Newsletter at Residential landlord .)

The Arizona Residential Landlord Tenant Act (the "Act") requires every landlord to maintain "fit premises." That requirement includes complying with applicable building codes materially affecting health and safety, making necessary repairs, maintaining common areas in clean and safe condition, maintaining all utilities in good and safe working order, etc. Given this duty, what rights does a residential tenant have when the landlord fails to provide "fit premises" or otherwise does not perform under the lease? Can the tenant just terminate the lease, withhold rent or deduct the cost of repairs from the rent? The answer is NO, not without following the applicable requirements of the Act. The following is a basic outline of those requirements.

Material breach of the lease by the landlord

If the landlord materially fails to comply with the lease (i.e. lying to the tenant about the condition of the premises) the tenant must first give written notice to the landlord. The notice must state (a) the nature of the breach and (b) that the lease will terminate after ten days (five days if the breach materially affects the health and safety of the tenant) if the breach is not remedied. If the landlord adequately remedies the problem prior to

(Continued next page)

the date specified in the notice, the lease will continue. However, if the breach is not remedied by the applicable date then the tenant has the right to:

(1) terminate the lease and obtain all recoverable security deposits,
(2) obtain injunctive relief (i.e. have the court force the landlord to remedy the breach), and/or (3) collect damages for any amounts expended or lost due to landlord's breach.

Failure to deliver possession

In general, if the landlord does not deliver physical possession of the property to the tenant, rent abates until possession and the tenant may:

(a) Five days after written notice, terminate the lease and recover any prepaid rent and security OR
(b) Demand performance and sue for possession and damages (up to twice the actual damages if the failure was willful and not in good faith.)

Tenant repair of minor defects

Under the Act, for any repair or defect not caused by the tenant that can be remedied for the lesser of $300.00 or one-half of the monthly rent, the tenant may:

(1) After giving proper notice of the defect, recover damages for the breach as set forth above OR
(2) Notify the landlord in writing that tenant intends to correct the defect at the landlord's expense.

If the landlord does not fix the defect within 10 days of the notice (or as promptly thereafter as reasonably required in the event of an emergency), the tenant may have the work performed by a licensed contractor, submit an itemized statement and a waiver of lien to the landlord, and then deduct the actual cost of the work (up to the greater of $300.00 or one-half the rent) from the rent.

Failure to supply heating, cooling, air conditioning, water, hot water or essential services

If the landlord fails, whether intentionally or negligently, to supply running water, gas or electrical service, reasonable amount of hot water or heat, air-conditioning or cooling (where offered) or essential services, after giving the landlord "reasonable" notice specifying the breach, the tenant may:

(1) Procure the services and deduct the actual reasonable cost from the rent; or
(2) Recover damages for the decrease in the fair rental value of the unit; or
(3) Obtain substitute housing until the breach is fixed, withhold rental payments and charge the landlord for any increase in cost (not to exceed 25% of the applicable rent, provided, however, if the landlord's breach is deliberate the tenant can recover the full amount of the applicable rent.)

In any event, if the landlord terminates utility services or transfers the responsibility for payment to the tenant without tenant's consent, the tenant may recover damages, costs, reasonable attorneys' fees and obtain injunctive relief.

Landlord's breach as defense in eviction action

If the tenant has given proper notice to the landlord and otherwise followed the requirements of the Act, the landlord's breach can be used by the tenant as a defense and counterclaim in an eviction action brought by the landlord. At the hearing, the court may require the tenant to pay any undisputed rent into the court until the matter is fully adjudicated.

(Continued next page)

Fire or casualty damage

If the property is substantially destroyed, the tenant can immediately vacate the premises and then, within 14 days, give written notice to the landlord of the intention to terminate the lease as of the date the tenant vacated the residence. If the property is still habitable, the tenant can "vacate" the unusable portion of the property and the rent is then reduced proportionately.

Unlawful eviction, exclusion or diminution of services

If the tenant is unlawfully removed or excluded from the premises or if the landlord willfully diminishes or cuts off electric, gas, water or other essential services, the tenant can choose to either recover possession or terminate the lease. In both cases the tenant can recover the greater of the amount of up to two month's rent or twice the actual damages tenant incurred.

Conclusion

While the Act gives the tenant many rights, it is essential that all legally required steps are followed before exercising any remedies. Failure to follow any of the steps can cause the tenant to forfeit those rights; therefore we highly advise that you seek legal counsel prior to terminating a lease and/or reducing or withholding rent.

California Dual Agency Case: Fiduciary Duty to Buyers as Well

By: Heidi Rib Brent
hbrent@mmbmazlaw.com

The California Supreme Court ruled in November that a real estate agent, who worked for a brokerage with agents that represented both the seller and the buyer in a transaction, owed the buyer a fiduciary duty to learn and disclose all material information affecting the value of the property. *Horiike v. Coldwell Banker Residential Brokerage Co.* (Cal. 2016) involved the sale of a luxury home in Malibu for $12.25 million, which was advertised as "approximately 15,000 square feet of living areas," while the tax assessor's office actually indicated a total of 11,050 square feet, including the main house, guest house and garage. The buyer learned of the 3950 square foot discrepancy years later when obtaining a building permit and sued the seller's agent.

Under California law, a broker may act as dual agent with disclosure to and consent from both parties, and then the broker owes a fiduciary duty to both parties. The ruling in this case is that the individual salespeople, who operate under the broker's license, also owe a fiduciary duty to both parties. Thus, the case will return to the trial court to determine if the listing agent, in his fiduciary duty to the buyer, should have been responsible for the accuracy of the representation of square footage.

The agent's responsibility in real estate transactions is evolving. Not long ago, cooperating agreements between the listing agent and the agent who brought the buyer, established both agents to be agents of the seller. Recent developments have created "buyer's agents," who owe their fiduciary duty to the buyer. Then, when the listing agent and buyer's agent both operate under the same broker, the dual agency must be disclosed, and the broker, owes each party a fiduciary duty. But until this California case, the individual agents had no notice that they may owe a fiduciary duty to both parties. The question will be whether California's extension of fiduciary duty will carry over to other jurisdictions.

WHAT HAPPENS IF A NONPROFIT FILES LATE FOR FEDERAL TAX-EXEMPT STATUS?

By: Anne Terry Morales *amorales@mmbmazlaw.com*

We're late! We're late! For a very important date!

For a variety of reasons a nonprofit entity may file as a nonprofit under Arizona law, but then not apply for status as a Section 501(c)(3) tax-exempt organization for federal tax purposes. If Internal Revenue Service ("IRS") Form 1023 is not filed within 27 months of the date of the entity's formation, what options are available to the entity if it later wants to apply for federal tax-exempt status?

First, the entity has the option of filing the Form 1023 and indicating its willingness to accept the postmarked date of the application as the date of its designation as a Section 501(c)(3) federally tax-exempt entity. In that instance, the income of the entity prior to the postmarked date will be taxable and any donations made to the entity prior to that date will not be deductible.

Second, the entity can file Form 1023 and then on Schedule E of Form 1023 ask for an extension of time. A detailed written statement explaining the reasons for the request must be attached. The statement needs to include, among other things: the date the application was required to have been filed and the date it is actually being filed; an affidavit detailing the events that led to the entity's failure to meet the deadline; and a declaration made under penalty of perjury by an authorized officer or agent of the entity assuring the veracity of the information in the statement and any accompanying documents. The IRS will review the request and if in its discretion the request is granted, the entity will be designated as tax-exempt under Section 501(c)(3) from the date of its formation. If the request is denied, the postmarked date of Form 1023 will be the date of designation.

Finally, the entity can file Form 1023, accept the postmarked date as the date of recognition under Section 501(c)(3), and then request designation under Section 501(c)(4) for the period of time from the date of its formation to the postmarked date. To make that request, the entity must not only file Form 1023 and Schedule E to Form 1023, but must also file page 1 of Form 1024. If this request is accepted by the IRS, the entity will be treated as a civic organization under Section 501(c)(4) from the date of formation to the postmarked date and its income will be exempt from federal income tax during that period. Contributions made to the entity during that period, however, will not be deductible as charitable contributions.

Navigating the myriad of additional IRS requirements applicable to entities applying for exemption under Section 501(c)(3) 27 months or more after their formation can be both complex and frustrating. Given that fact, the entity would be best advised to enlist the aid of an experienced legal professional.