Topics

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- Update on Smart Meter Litigation
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- Employee Benefits Legal Issues
- Did That Cubicle Just Growl at Me?
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Fuel Surcharge Litigation

If you drive a car, I'll tax the street;  
If you try to sit, I'll tax your seat;  
If you get too cold, I'll tax the heat;  
If you take a walk, I'll tax your feet  
The Beatles, Taxman
Fuel Surcharge Litigation

- Effective July 1, 2015, the Legislature imposed a new fuel surcharge on all gallons of liquid fuel sold in Alaska, except aviation fuel

- The Department of Revenue says this new surcharge applies to utilities

- The Department of Revenue admits that this is a tax even though it is called a surcharge
Fuel Surcharge Litigation

- Cooperatives and municipalities should be exempt from this type of tax:
  - Alaska cooperatives are exempt from all state and local taxation because of the tax they pay on gross kwh sold under AS 10.25.540(b)(2)
  - Alaska municipalities also have a very broad exemption from state taxation under AS 29.71.030

- The Legislature never discussed these cooperative and municipal exemptions and the surcharge bill did not amend them

- This tax will ultimately be paid by utility customers, particularly customers of utilities that have to rely on expensive diesel and other liquid fuels for power
Fuel Surcharge Litigation

What are we going to do about it?
- A coalition of cooperative and municipal utilities are going to apply for refunds
- Will share costs of pursuing refund

Things your cooperative or municipal utility should do:
- Make sure that your supplier is assessing this tax and showing it as a separate line item
- Make sure you are providing invoices to legal counsel for refund filings
Update On Smart Meter Litigation

I always feel like somebody's watching me
And I have no privacy

Rockwell, Somebody’s Watching Me
According to the National Conference of State Legislatures, about half of all states have laws governing smart meters.

Alaska still has no laws or regulations regarding smart meters.

- In Docket R-06-05, the RCA declined to adopt federal standards for smart metering.
  - Federal standards would have required utilities to provide smart meters to customers who wanted them.

- Economically deregulated utilities have freedom to implement.
- Economically regulated utilities still potentially subject to RCA review.
Update on Smart Meter Litigation

- Tanner Electric Cooperative - lawsuit in Washington where property owner sued over cooperative’s smart meter program
  - Cooperative billed member for refusing smart meter
  - Member sued
  - Cooperative won and got attorney’s fees
Plumas Electric Cooperative – In rural California, at member request, cooperative replaced smart meter with analog meter
- Cooperative billed customer opt-out charge and monthly fees
- Eventually disconnected customer for failure to pay opt out fees (member paid for electricity)
- Member filed small claims court and presented letter from physician stating member had EMF Hypersensitivity
  - Headaches and other symptoms when exposed to smart meter radio frequency

So what happened?
Update on Smart Meter Litigation

- California Public Utility Code prohibits different rates because of medical conditions.

- Cooperative lost because:
  - Cooperative permitted some remote members to self-read meters instead of using smart meters.
  - Cooperative did not present evidence to dispute medical condition.
  - Court said member could self read and cooperative could terminate service if the member doesn’t read accurately.
Update on Smart Meter Litigation

- **Firstenberg v. Monribot**, NM App March 2015: found that plaintiff’s 93 studies showing adverse effects of EMF were not scientifically reliable

- **City of Naperville**, US District Court for Illinois: City smart meter program
  - As a government entity, subject to constitutional limits that generally would not apply to cooperatives, but certainly could to municipalities
  - Court has dismissed most claims, but not equal protection claim

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Capital Credit Class Actions

With my mind on my money and my money on my mind
Snoop Dog, Gin and Juice

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Since 2009, there have been a total of 44 lawsuits filed against cooperatives in the Lower 48

- Most have been settled or gone away, but none on the merits
- Shift over time from governances to capital credits

Late 2013, settlement of lawsuit against one Georgia electric cooperative for former and current members

- Cooperative agreed to retire capital credits from 1957-1988
- Voluntary discount and retirement for 1988-2012 at 12% for 24.6 year period
- Plaintiff’s attorneys got $20 million

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Recent lawsuit filed March 2014 in Georgia

- Alleges that when a member terminates service, the cooperative must retire capital credits immediately, or alternatively, on a 13 year cycle
- Says former members have no service, no vote and are forced to subsidize current members
- Claims directors have conflict of interest because only current members pay bills and vote in elections
- Claims bylaw provisions giving directors great discretion over retiring capital credits are unfair and unenforceable
- Claims bylaw provisions prohibiting capital credit retirements that financially impair cooperative are unenforceable
- Trying to pull in most Georgia electric cooperatives
- Attorneys overlap with prior capital credit lawsuits
Capital Credit Class Actions

- Allegations in other cases
  - Improper discounting of retirements for deceased member estates
    - Lack of informed consent
    - How would your cooperative prove you obtained informed consent for a discounted retirement?
Changes to Federal Overtime Regulations

I've been takin' care of business, it's all mine
Takin' care of business and working overtime, work out
Bachman-Turner Overdrive, Takin’ Care of Business

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Changes to Federal Overtime Regulations

- This summer the federal Department of Labor proposed extensive changes to overtime regulations
  - These are proposed changes, but they will almost certainly come into effect in 2016
  - Not much impact on blue collar employees
  - White collar exempt employees – professionals, managers and administrative – are the targets
Changes to Federal Overtime Regulations

- Currently, for most federal overtime exemptions:
  - must pass the “duties” test and the minimum weekly compensation test
  - or be a highly compensated employee and regularly perform some work that counts towards the duties test

- Proposed regulations increase:
  - The minimum weekly comp would go to the 40th percentile of full time wage earners = $54,440 annually in 2016 (est.)
  - The highly compensated threshold would go to 90th percentile = $122,148 annually in 2016 (est.)
Changes to Federal Overtime Regulations

- Nothing else is changing, FOR NOW
  - But DOL soliciting comments on whether to change the duties test and still could do so
  - DOL will likely only give employers a few months to comply

- Things to consider
  - Annual review of exempt employee pay as minimum pay will now increase every year
  - Impact on Alaska overtime rules – changes likely incorporated by reference
  - Could you prove an exempt employee’s primary duties?
Vaping in the Workplace

Smoke on the water
A fire in the sky
Smoke on the water
Deep Purple, Smoke on the Water
How many of your utilities operate in an area that specifically prohibits vaping?
- Palmer, Haines, Petersburg, and Nome
- Other locations?

How many have a utility policy that restricts vaping?

AS 18.35.300 bans “smoking in any form” in a “place of employment” where the owner or manager has posted a sign prohibiting smoking
Vaping in the Workplace

- In 2014, a bill to ban smoking and vaping in public places statewide died in committee
  - Sponsor has indicated may re-introduce without ban on vaping

- So for now, utilities are generally free to set their own policies on vaping
  - Considerations – health claims, liability for minors
Employee Benefits Legal Issues

Going to the chapel
And we're gonna get married
The Beach Boys, Chapel of Love
Employee Benefits Legal Issues

- US Supreme Court ruled that states must perform and recognize same sex marriages
  - Likely impact for health and welfare plans is that all spouses, regardless of sex, must be treated the same

- ACA and Cadillac Tax
  - The Cadillac Tax is tax on 40% of the value of all health care benefits that exceed $10,200 for individuals and $27,500 for families, subject to adjustments for inflation; potential higher limits for electric and telephone utilities
  - 48% of large employer plans will hit the threshold in 2018, 82% by 2023
  - 2018 tax due is determined off of 2017 benefits
Did That Cubicle Just Growl at Me?

Who let the dogs out
Woof, woof, woof, woof, woof, woof
Baha Men, Who Let the Dogs Out?
Did That Cubicle Just Growl at Me?

- The new era of “service” animals is here
  - Used to be just dogs, primarily to assist the blind or deaf
  - Now we see emotional support monkeys, miniature horses, cats and pigs
    - For anxiety, hypoglycemia, PTSD, and just general comfort
  - This year a City in Wisconsin passed an ordinance defining service animals as only dogs or miniature horses after a woman brought her therapy kangaroo to a local McDonalds
  - The day before Thanksgiving, US Airways asked a woman and her 70-80 pound “emotional support pig” to leave the plane

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Did That Cubicle Just Growl at Me?

- Anyone can buy vests, tags or certificates for “service” animals
- There is no official body that licenses legitimate service animals
- There are organizations out there that will tell you businesses are required to allow nontraditional service animals for nontraditional reasons

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Did That Cubicle Just Growl at Me?

- Did That Cubicle Just Oink at Me? Maybe.

- If a disabled employee asks to bring a service dog to work, does your utility have to let the employee do it?
  - What about a request to bring a service pig?

- If a customer comes to your front counter, can you require the customer not to bring a dog inside?
  - What about a kangaroo?
Did That Cubicle Just Growl at Me?

- Legal Background
  - For public accommodations, under the Americans with Disabilities Act guidance, DOJ requires service animal to be a dog or miniature horse that is “individually trained to do work or perform tasks for a person with a disability.”
  - Specifically excludes “dogs whose sole function is to provide comfort or emotional support”
  - Air Carrier Access Act allows emotional or psychiatric support dogs on commercial flights
  - Airlines can ask for note from mental health professional
Did That Cubicle Just Growl at Me?

- So what is required for employers?
  - The trend seems to be towards animals going to all the places people go
  - For employers, there is currently no obligation to allow pets or service animals to come to work unless the employee has a disability
    - Proving disability has gotten easier since Congress revised the Americans with Disabilities Act in 2012
  - So then it’s a question of whether or not it’s a “reasonable accommodation”
    - A guide dog for the blind seems like an easy case
    - Beyond that, it’s case-by-case and who knows

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America’s Least Popular Game Show: Legal or Illegal

Hey now you better listen to me everyone of you
We got a lotta lotta lotta lotta work to do
Forget about your woman and that water can
Today we’re working for the man
Roy Orbison, Working for the Man
Legal or Illegal?

- Employment policy requiring that employees “Be courteous, polite and friendly.”
- Employment policy requiring that employees “No one should be disrespectful or use profanity or any other language which injures the image or reputation of the [Employer]”
Legal or Illegal?

- “Off-duty employees are prohibited from entering the workplace except to conduct employer-related business.”
- “Off-duty employees are prohibited from entering the workplace, except to attend employer-sponsored events.”
Legal or Illegal?

- “Employees are prohibited from walking off the job or willfully restricting production.”
- “Employees who disclose their participation in this internal investigation will be subject to immediate termination”
“Statements posted electronically . . . that damage the [Employer], defame any individual or damage any person’s reputation, or violate the policies outlined in the [Employee Handbook], may be subject to discipline, up to and including termination of employment.”
Legal or Illegal?

- “The at-will relationship cannot be amended, modified or altered in any way.”

- “No representative of the company has any authority to enter into an agreement that is contrary to the “employment at will” relationship.”
In accordance with utility policy, utility denies a CSR permission to miss a day of work for a Jehovah’s Witness Convention because 3 of the other 6 CSRs in the office have already had leave approved for that day.

When CSR fails to report to work on Friday, she is terminated the following Monday.
Legal or Illegal?

- An employee upset about tax withholding issues posts on a personal Facebook account that, “Maybe someone should do the owners of Triple Play a favor and buy it from them. They can’t even do the tax paperwork correctly!!! Now I OWE money…Wtf!!!”
- Another employee clicks the “Like” button
- Both fired
Employment Policy says, “When internet blogging, chat room discussions, or other forms of communication extend to employees engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. **In the event state or federal law precludes this policy, then it is of no force or effect.**”
Legal or Illegal?

- You are hiring a new utility employee and reviewing the applications. You decide to login to Facebook and also to do a web search on the applicant. You ultimately decided not to hire the applicant
  - What if you see that the applicant is interested in bird-watching?
  - What if you the applicant lists “going to the opera” as favorite hobby?
  - What if you see a photo of the applicant and can see she is an ethnic minority, or is wearing a “Union Yes” button?
  - What if you see all three?
Legal or Illegal?

- Employee’s mother has end stage congestive heart failure
  - Employee is mother’s primary care giver
  - Mother wants to go to Las Vegas before she dies
  - Employee uses FMLA leave for the trip and takes her there
  - You treat the leave as an unexcused absence and fire her because you can’t use FMLA leave to go on a vacation
During labor negotiations with AT&T, union encouraged employees to wear shirts that said “INMATE” on the front and “Prisoner of AT$T” on the back. AT&T allowed them to wear them in offices and other non-public spaces, but not when in public or interacting with customers. Gave 1 day suspensions to 183 employees who refused to comply.
The End

This is the end, my only friend
The end
The Doors, The End