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Gina Kellogg, President
Valley Society for Human Resource Management
P.O. Box 5448
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Dear Gina:

Thank you again for the opportunity to speak to the members of the Valley Society for Human Resource Management on September 8, 2009. I enjoyed meeting you and other members at that meeting.

In response to your questions, my clarifications are set forth below:

1. Fair Labor Standards Act Question – i.e., under the new regulations may an exempt employee be disciplined, without pay, for a period of a week or more or only for a “full shift or more?”

Response: The new regulations provide that exempt employees may be disciplined, without pay, for varying periods without loss of the employee’s exempt status. As such, it is the nature of the employee infraction which caused the discipline which will control the permissible period of such discipline. More specifically, as set forth on pages 2 and 3 of the materials which I provided:

1. Absenteeism/performance issues/violations NOT based upon a written workplace conduct policy – suspension without pay must be at least for one full workweek.
2. Workplace conduct violations pursuant to a written rule – suspensions may be as short as one full day or may be longer. However, the suspension may not be less than one full day. A “workplace conduct” suspension covers only major types of inappropriate workplace conduct, including infractions such as harassment, violence, drug or alcohol violations, and violations of state or federal laws (it does not include absenteeism or employee performance issues).

Thus, both understandings of your members may be correct, dependant upon what the nature of the exempt employee’s infraction giving rise to the suspension.

2. “Garrity Rule” – Does the Garrity Rule apply only to public sector employees, or may it apply to private sector employees?

Response: It is true that, as applied, the Garrity Rule is generally applied to certain public sector employees. However, the United States Supreme Court and other Courts have made clear that the Garrity Rule may – in very limited circumstances – apply to private sector employees:

Turning to the merits, petitioner first urges, principally on the basis of *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), and *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967), that his incriminating admissions were the inadmissible product of economic coercion imposed by an agent of the state (Bewick), since Sanney's continued employment at Reid Petroleum Corporation was conditioned upon his submitting to the second polygraph test, during the course of which he furnished the damaging evidence. In *Garrity* the Court held that statements obtained by the State of New Jersey from police officers under the threat that, unless they waived their privilege against self-incrimination, they would be removed from office pursuant to a state statute, were involuntary and inadmissible in state criminal proceedings later instituted against them, since the statements had been obtained by unconstitutionally coercive means. *Spevack* extended the same principle to a state's threatened disbarment of a practicing attorney for refusal to furnish incriminating statements and documents. The district court held *Garrity* and *Spevack* inapplicable to the present case on the ground that they applied only to threatened “forfeiture of a governmental benefit, public employment” **and not to the loss of private employment**. Although we agree with the result reached by the court we cannot, in view of the Supreme Court's more recent decision in *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973), share its reasoning, which restricts the principle of these cases too narrowly.

In *Lefkowitz* the Supreme Court held that a state could not compel incriminatory answers from independent contractors under the threat that unless they waived immunity they would be disqualified from contracting with state agencies for a period of five years. **It found no constitutional significance in the fact that the statements were sought or obtained through coercion practiced upon members of the private, as distinguished from public, sector. The controlling factor is not the public or private status of the person from whom the information is sought but the fact that the state had involved itself in the use of a substantial economic threat to coerce a person into furnishing an incriminating statement. Nor do we perceive any consequence flowing from the fact that the threat in the present case was conveyed through a private employer, admittedly acting as an agent for the police, rather than through a person on the public payroll. The state's involvement is no less real for having been indirect and no less impermissible for having been concealed. The state is prohibited in either event from**

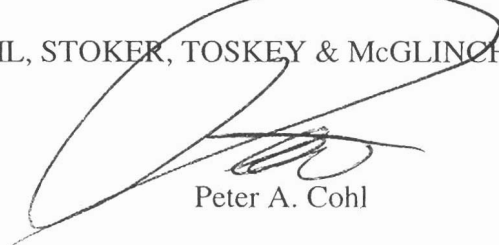
compelling a statement through economically coercive means, whether they are direct or indirect. (Emphasis added.)

U. S. ex rel. Sanney v. Montanye, 500 F.2d 411 (C.A.N.Y. 1974). Thus, while the “Garrity Rule” normally is applied to certain classes of public sector employees, the fact remains that under some circumstances – where a governmental entity is seeking admissions from a private sector employee (either directly or indirectly, through the private sector employee’s employer) the “Garrity Rule” may apply.

If you have any additional questions, please do not hesitate to contact me.

Very truly yours,

COHL, STOKER, TOSKEY & McGLINCHEY, P.C.

A handwritten signature in black ink, appearing to read 'Peter A. Cohl', is written over a light gray rectangular background. The signature is fluid and cursive, with a large loop at the top.

Peter A. Cohl

PAC/hsk

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It is rather complex knowing how to handle employees who refuse to cooperate in their employer's investigation of their misconduct when that misconduct may also have constituted a crime. (Sometimes, the private sector employer just wants the person terminated and chooses not even to pursue criminal prosecution.) There are significant constitutional protections afforded public sector employees in this situation and these are less restrictive for private sector employers acting on their own and not to forward some state purpose.

Our guest speaker from September, attorney Peter Cohl, has been kind enough to clarify some of those differences in a letter that we have posted to the VSHRM website. His letter also provided some useful further guidance on the partial work week suspension of exempt employees.

If you find yourself in a situation where your private sector employee is refusing to cooperate in your investigation on Fifth Amendment grounds (and where you are not acting in concert with or on behalf of the state or a governmental agency), it might be useful to contact your labor counsel for guidance or to "crack the books" to determine how to handle the situation.

One such good book to consult, is Discipline and Discharge in Arbitration (BNA, American Bar Association, Chicago, IL 1998 at pps 179-181.

In that treatise, the authors clarify as follows:

“The Fifth Amendment is not directly applicable to private sector employers because it is a restraint on governmental action. There is a split among arbitrators about whether the constitutional protections should be applied to private sector arbitrations. Some arbitrators simply refuse to apply constitutional protections. Other arbitrators believe that constitutional principles are properly part of the notions of fairness incorporated into just cause.” (Id. At 182)

The treatise went on to share certain factors used by one arbitrator for determining when an arbitrator would have just cause for discipline against a [private sector] employee who failed to cooperate during an investigatory interview.

1. If incidents(s) took place during work hours while on a work assignment which relate to possible infractions of Company rules and/or policies.
2. Where there is evidence suggesting the employee's involvement.
3. When the employee refused to answer questions or otherwise cooperate in the legitimate investigation conducted by the Company.

In summary, study up on this carefully, or call your labor counsel. In this esoteric area, the rules differ in a significant fashion for public and private sector employers. As always, if you do end up in arbitration on such an issue, the selection of your arbitrator can make the outcome determinative. Very experienced arbitration practitioners will know how the various arbitrators offered on a panel may likely decide based on prior awards or experience with them. This is research time well spent.