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"Every day is a training day and every event is a training event."
— James Pritchert

FEDERAL

US DEPARTMENT OF LABOR (USDOL)

Independent Contractor: On July 15, 2015, the USDOL issued Administrator's Interpretation No.2015-1 (attached) regarding the misclassification of employees as independent contractors. The FLSA defines "employ" as "suffer to work." In order to make the determination whether a worker is an employee or an independent contractor under the FLSA, courts use the multi-factorial "economic realities" test, which focuses on whether the worker is economically dependent on the employer or in business for him or herself. A worker who is economically dependent on an employer is suffered or permitted to work by the employer. Thus, applying the economic realities test in view of the expansive definition of "employ" under the Act, most workers are employees under the FLSA. The application of the economic realities factors must be consistent with the broad "suffer or permit to work" standard of the FLSA.

The factors typically include: (A) the extent to which the work performed is an integral part of the employer's business; (B) the worker's opportunity for profit or loss depending on his or her managerial skill; (C) the extent of the relative investments of the employer and the worker; (D) whether the work performed requires special skills and initiative; (E) the permanency of the relationship; and (F) the degree of control exercised or retained by the employer.

In undertaking this analysis, each factor is examined and analyzed in relation to one another, and **no single factor is determinative**.

Overtime Rule: By now businesses are aware that the USDOL has proposed an increase in the minimum salary for employees to qualify for the "white collar" exemption tests for the administrative, executive, learned professional or computer exemptions pursuant to the Fair Labor Standards Act (FLSA). Qualifying for one of the exemptions means that the employee is exempt from the minimum wage and, significantly, the overtime requirements of the FLSA.

The proposed increase in minimum salary for these exemptions would go from the current $455 per week ($23,660 per year) to $970 per week ($50,440 per year). Keep in mind that the poverty level for a family of four is $24,008. This new salary represents the 40th percentile of earnings for all full-time salaried workers throughout the United States. The USDOL is also proposing to increase the minimum salary and employee must earn to meet the highly compensated exemption, from $100,000 to $122,000, which is tied to the 90th salary percentile. The USDOL recommends that the salary amounts be increased annually tied either to the Consumer Price Index or the Current Population Survey. This means that each year employers may need to modify their payrolls to ensure their employees are properly classified as exempt. Currently, there are no proposed changes to modify the standard duties tests for the exemptions.

Businesses often believe that if they pay an employee a salary, the employee is not eligible for overtime pay: that is not always accurate. The FLSA controls which employees are exempt from overtime according to its exemption categories: administrative, executive, learned professional, computer, sales, and highly compensated. If the employee's wages and job responsibilities do not fit within an exemption, he or she must be paid overtime for time actually worked over 40 hours in a work week. With these changes to the minimum salary, workers who meet the duties tests (described below), but no longer meet the new salary basis will no longer meet the exemption and must be paid overtime.

For example, in order to qualify for the **administrative** exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis ($455 per week changing to $970);
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

To qualify for the **executive** exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis ($455 per week changing to $970);
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

While the proposed changes have not been implemented yet, it is expected that they will go into effect sometime in early 2016. The USDOL estimates that the new regulation will eliminate the exempt status for approximately 21.4 million employees. The proposed rule will have more of an impact on certain geographical regions and industries, in particular retail and hospitality. Therefore, it is important that businesses take the opportunity, while not under pressure, to conduct wage audits, review their wages scales and handbook policies to identify employees whose status may change to non-exempt in order to prepare for any financial impact.

Office of Federal Contract Compliance (OFCC): The OFCC issues a final rule that prohibits federal contractors from discharging or discriminating against employees or applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant. An exception exists where the employee or applicant makes the disclosure based on information obtained in the course of performing his or her essential job functions. The rule requires that federal contractors incorporate a prescribed nondiscrimination provision into their existing employee manuals or handbooks and disseminate the nondiscrimination provision to employees and to job applicants.

As a reminder, this rule generally applies to any business or organization that (1) holds a single federal contract, subcontract, or federally assisted construction contract in excess of $10,000; (2) has federal contracts or subcontracts that have a combined total in excess of $10,000 in any 12-month period; or (3) holds government bills of lading, serves as a depository of federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount.

Employers that enter into a new covered federal contract, or modify an existing covered federal contract, on or after January 11, 2016 will be subject to the Final Rule.

EQUAL EMPOLOYMENT OPPORTUNITY COMMISSION (EEOC)

EEO-1 Filing: Deadline for filing extended to October 30, 2015.

Pregnancy Discrimination: On June 25, 2015, the EEOC updated its Enforcement Guidance: Pregnancy Discrimination and Related Issues to make it consistent with the decision in *Young v. United Parcel Service, Inc. (UPS)*, the most recent U.S. Supreme Court case on pregnancy discrimination.

The *Young* court analyzed under what circumstances the Pregnancy Discrimination Act ("PDA") requires an employer to provide work accommodations it provides to non-pregnant employees to pregnant employees who are "similar in their ability or inability to work."

Before *Young v. UPS*, the EEOC's interpretation of the PDA was that it required employers to treat pregnant workers with work limitations more favorably compared to non-pregnant employees with work limitations due to reasons other than pregnancy. Based on this interpretation, the EEOC previously advised in its guidance:

[A]n employer is obligated to treat a pregnant employee temporarily unable to perform the functions of her job the same as it treats other employees similarly unable to perform their jobs, whether by providing modified tasks, alternative assignments, leave, or fringe benefits.

An employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job).

In *Young,* the U.S. Supreme Court rejected the EEOC's guidance and held that the PDA does not grant pregnant workers a "most-favored-nation" status. The majority of the guidance remains unchanged, and only the portion that was criticized by the *Young* court was amended.

Although the Court in *Young* rejected the EEOC's literal interpretation of the PDA, an employer may still be found to have violated the PDA if its seemingly nondiscriminatory, harmless work accommodation policy poses a significant burden on pregnant workers. Therefore, employers should review their workplace accommodation policies to assess whether the administration of such policies may result in unfair treatment of pregnant workers.

This was written by Shima Walker, Esquire, for the Employment Law Blog for Business.

STATE

NEW NH LAWS

NH "HANDS FREE" LAW:

RSA 265-79-c took effect on July 1, 2015. The new law prohibits New Hampshire drivers from using "any hand-held mobile electronic device capable of providing voice or data communication" while driving or while temporarily halted in traffic, at a stop sign or red light, or any other momentary delay. "Use" is defined broadly, and includes calls, reading or composing text messages or emails, accessing the internet on a device, and inputting information into a GPS. Drivers will still be permitted to use their devices in emergencies or to call 911 and may use a Bluetooth or other hands-free function to send or receive information while driving, provided that the driver does not have to divert their

attention from the road ahead. The exception for hands-free devices only applies to adult drivers, as teens under the age of 18 are not permitted to use electronic devices while driving except to report emergencies. The statute carries fines for violations of the law, which increase in amount for each offense.

Although many employers have already implemented policies barring use of devices on the road, it is important to review and update cell phone or electronic device policies to confirm compliance with this change in the law. An employer's restriction on employees' use of electronic devices while driving should be consistent with safety and require compliance with the law in the state of use. Employers that do not currently have cell phone or electronic device use policies should implement such policies now. Given the trend across the country to adopt similar legislation, those companies which have drivers engaged in interstate travel should confirm that the employees are also aware of the laws which govern driving in other states.

In addition to the fines which may be imposed upon employees who violate the law, businesses may be subject to liability for accidents or injuries which occur as a result of unsafe driving practices

This was written by Charla Stevens, Esquire, for the Employment Law Blog for Business.

NH DEPARTMENT OF LABOR

Wage and Hour Decisions: http://www.nh.gov/labor/decisions/wage-claim/2015/index.htm

NH COMMISSION FOR HUMAN RIGHTS

50th Anniversary Celebration of CHR: October 7, 2015 at the State House.

MCLANE MIDDLETON

OTHER STATES

MASSACHUSETTS SICK LEAVE LAW

You have probably heard that effective July 1, 2015, Massachusetts enacted a new sick time law. There has been much discussion about its impact on companies located in Massachusetts. However, one aspect that has been overlooked is its impact on out-of-state businesses which have employees in Massachusetts. Any company with employees performing work in Massachusetts must consider this issue or face the consequences of non-compliance with the law.

The new law applies to businesses with employees whose "primary place of work" is Massachusetts. The final regulations of the Earned Sick Time Law, M.G.L. c. 149, § 148C, specify that an employee does not have to spend 50% of his/her work time in Massachusetts for it to be considered his/her primary place of work.

The regulations give the following example: A painter with a single employer works 40% of her hours in Massachusetts, 30% in New Hampshire and 30% in other states. Massachusetts is her primary place of work. In this example, all the hours the painter worked would be applied toward accrual of earned sick time, regardless of the location of the work or of the employer.

The first step in determining whether a company not located in Massachusetts is covered by the law is to review its total number of employees. Unpaid sick leave must be provided to employers with 11 or fewer employees, and paid sick leave must be provided to employers with more than 11 employees. The regulations state that in determining the number of employees for purposes of the sick leave law, "All of an employer's employees, including full-time, part-time, seasonal, and temporary employees, whether working in or outside Massachusetts and regardless of their eligibility to accrue and use earned sick time, shall be counted for the purpose of determining employer size."

Therefore, a New Hampshire (or any out-of-state) business that has employees who work primarily in Massachusetts must count all of its employees to determine whether it must offer paid or unpaid sick time to its Massachusetts employees.

For example, ACME manufacturing has its head office in New Hampshire where 20 people work, 5 employees in Connecticut and 2 salespeople in Massachusetts. The 2 salespeople in Massachusetts report to the New Hampshire head office, but primarily work in Massachusetts. What is ACME's obligation under the Massachusetts sick leave law? Answer: ACME must count all employees to determine whether it must offer the 2 salespeople unpaid or paid leave. In this case, ACME has 27

employees and must offer paid sick leave to its 2 salespeople in Massachusetts and otherwise comply with that law as to those 2 employees.

Businesses are strongly encouraged to determine what, if any changes, must be made to their existing sick leave or paid time off (PTO) policies and whether the safe harbor applies.

CASES

Federal District Court, interpreting New Hampshire law, granted summary judgment for defendant finding no public policy for firing someone who suffers from a disability or physical ailment because wrongful termination requires focus on conduct in which the plaintiff engaged. *Faulkner v. Dartmouth Hitchcock Medical Center, et al*, 2015 WL 4759425, 8 (D.N.H. August 12, 2015).

"Any other people skills, besides 400 Facebook friends?"

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