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HR Update

Is Your Company Engaging in "Payroll Fraud?"

By Deborah S. Brenneman

Congress has reintroduced legislation that could put businesses employing independent contractors on the hook for hefty "payroll fraud" fines. The Payroll Fraud Prevention Act of 2013, co-sponsored by Ohio Senator Sherrod Brown, was introduced to a Senate subcommittee earlier this month. The bill is yet another effort to introduce legislation at the federal level dealing with the issue of misclassification of independent contractors.

The bill comes in the wake of a continued crackdown by the Department of Labor and the IRS on businesses that misclassify independent contractors. The legislation would impose stiff fines not just for misclassification, but also for not following certain notice requirements. What's more, even a good faith misclassification would still constitute a violation.

The Payroll Fraud Prevention Act would make it a federal labor offense for employers to misclassify individuals who are truly employees as independent contractors, and it would expand the Fair Labor Standards Act to cover non-employees, making it a prohibited act to wrongly classify an employee as a non-employee.

Stringent notice requirements also included in the bill would require businesses to provide workers performing labor or services with written notices indicating whether they have been classified as employees or non-employees. The notices must also direct workers to the Department of Labor's website for information about employees' rights under the law, and specifically inform them that they should contact the Department of Labor if they suspect they have been misclassified. These notice requirements would apply to all businesses, including those that do not use independent contractors and those whose independent contractors are properly classified. The penalty for violating the notice

For more details on any of the topics covered in *The Law At Work*, please contact the authors via the links at the end of each article or Tim McDonald, editor-in-chief. For information on our Labor & Employment practice, please contact Stephen Richey, practice group leader.

requirements would be hefty: $1,100 for the first offense and up to $5,000 for a subsequent offense or a willful violation **for each employee or independent contractor who did not receive the required notice.** Simply put, the impact to large employers could be staggering.

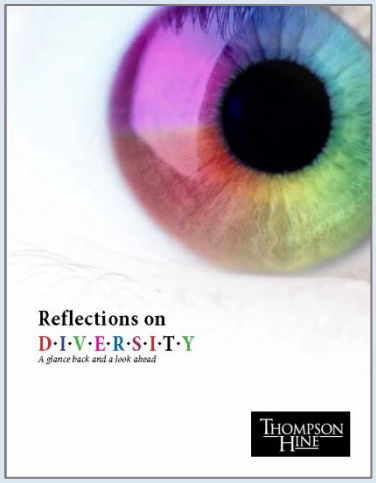
The employer would face more than a monetary penalty for failing to give the required notice; failure to do so would also create a presumption that the non-employee is actually an employee of the business, which could only be rebutted by clear and convincing evidence that the individual is not an employee.

If an individual is found to be improperly classified as an independent contractor, the bill would impose triple damages for willful violations of minimum wage or overtime laws.

Further, the new bill would authorize the Secretary of Labor to impose additional penalties upon employers who misclassify employees for unemployment compensation purposes, authorize the Department of Labor to report misclassification information to the IRS, and direct the Department of Labor to conduct targeted audits of industries with "frequent incidence" of misclassification.

While the bill is still in its infancy, it represents just the latest attack by the federal government on this issue, and demonstrates the ever-increasing need for employers to take a tough look at how they utilize and classify independent contractors.

For more information about classification of workers, contact Deborah S. Brenneman.



Reflections on Diversity

A diversity lens acts as a filter affecting the way people view the world and interact with others. It is through this lens we see beyond our own perspectives to embrace different ideas and diverse voices.

"At Thompson Hine, we understand diversity is more than statistical data. It is, in fact, crucial to our ability to conduct business in today's increasingly interconnected world. Embracing an inclusive environment is simply the smart thing to do." – Robyn Minter Smyers, Partner and Chair, Diversity & Inclusion Initiative

Access this year's report here.

Best Practices When Working With Transgender Employees

By Nancy M. Barnes

On November 7, 2013, by a bipartisan vote of 64-32, the Senate passed the Employment Non-Discrimination Act (ENDA), which would provide basic protections against workplace discrimination on the basis of sexual orientation or gender identity. Although it appears that the bill is unlikely to get a vote – much less be passed – by the House of Representatives, it is clear that the law regarding the rights of transgender employees is evolving. Although case law is rather sparse at this point, the EEOC has taken the position that discrimination based on gender identity is impermissible under Title VII. As the law continues to develop in this area, more employers are being confronted with the issues raised by transgender employees and applicants who are often very candid about their status. As a result, employers are wise to implement some best practices to address the issues that may arise in the workplace and to insure that transgender employees are treated equally.

Review and revise the employee handbook. Your existing policies and practices should be drafted to apply equally to all employees. When identifying the list of protected categories, consider adding "gender identity or expression." While gender identity is not explicitly covered by Title VII, numerous courts have held that sexual stereotyping is a form of gender discrimination. You may also want to update your anti-harassment policy to include gender identity.

Provide workforce sensitivity training. Some discrimination is rooted in reactions from employees to individuals who do not fit their expectations of what is "normal." Sensitivity training in this area is obviously a key to avoiding liability and reducing your exposure to potential claims. Employers should also try to make their managers and employees more sensitive to gender identity and expression by incorporating these topics in EEO and harassment training programs.

Update personnel records. Once an employee announces a gender transition and begins to present as a member of the opposite gender, you should take appropriate measures to recognize that "new" identity. That includes changing the employee's name and gender on all personnel records, emails, directories and business cards, and updating photos on identification badges and promotional materials, including your website.

Treat transgender employees' status confidentially. A number of federal laws, including the Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), Health Insurance Portability and Accountability Act (HIPAA) and Genetic Information Nondiscrimination Act (GINA), all limit your ability to request medical information and require you to maintain employees' medical information in confidence. Apply the same principles when you learn that an employee is transgender.

Consider restrooms and other gender-specific areas. In general, employees must use the facilities that match their full-time gender presentation, regardless of their stage of transition. If an employee is entering the transition process, you should use that opportunity to determine when the employee is comfortable making the switch to using the bathroom assigned to the other gender.

Review your dress code. An employer is entitled to have reasonable dress and grooming codes that serve a legitimate business purpose. You should, however, review your dress and grooming codes to avoid gender stereotypes. For instance, policies that specifically define the kinds of attire that males and females may wear in the workplace tend to be based on sexual stereotypes and gender expectations. A better statement is to require all to dress professionally.

Given that one of the EEOC's key objectives in its Strategic Plan for 2012–2016 is to address emerging and developing issues, it is safe to expect that the EEOC will likely give special attention to charges that raise claims of discrimination based on gender identity. As a result, potential claims of discrimination from transgender individuals should be considered using the same fact-finding investigation process and response as a traditional sex discrimination complaint. By being proactive and anticipating that gender identity issues may arise in the workplace in the near future, employers can avoid being the target of a potentially high-profile, precedent-setting claim while fostering a culture of respect for all employees.

For more information about transgender employees, contact Nancy M. Barnes.

FLSA

Supreme Court Refuses to Hear Unpaid Externs' Wage Suit

By M. Scott Young

In November 2013, the Supreme Court of the United States declined to review the United States Court of Appeals for the Eleventh Circuit's decision that two unpaid externs for two Florida health administration firms were not employees and therefore not entitled to wages from those companies under the Fair Labor Standards Act (FLSA). *Kaplan v. Code Blue Billing & Coding, Inc.*, U.S., No. 13-179 (cert. denied 11/12/13).

This case involved two individuals who had completed externships with two separate companies as a required part of a formal degree program at a school in which they were then enrolled as students. At the time of their externships, neither of the externs expected nor received payment for the work they performed. Sometime after completing their externships, each filed a complaint under the FLSA seeking minimum wage for the work they performed, contending that given the lack of formal structure and the repetitive nature of the work they were assigned, they received little educational benefit from the externships and instead primarily conferred economic benefit upon the defendants. On that basis, they asserted that they qualified as employees under the FLSA and were entitled to minimum wage.

The district court granted the defendants' motions for summary judgment, finding that the externs were not employees within the meaning of the FLSA. The court also found the externs' claims were barred by the statute of limitations because they had filed their claims for minimum wage more than two years after they had worked as externs but before three years. The statute of limitations for a wage claim under the FLSA is two years unless there is a willful violation, in which case that period is then three years.

On appeal, the Eleventh Circuit determined that the externs were not employees of the defendants and therefore not entitled to wages under the FLSA. The claims were also found to be barred by the applicable statute of limitations. The Eleventh Circuit determined that whether an employer-employee relationship exists under the FLSA depends on the "economic realities" of the relationship, including whether a person's work confers an economic benefit on the entity for whom they are working. A person who works for his or her

own advantage or personal purpose and provides no immediate advantage for his or her alleged employer is not an "employee" under the FLSA.

The court noted that while the externs argued that their externship experiences were of little educational benefit, they did engage in hands-on work for their formal degree program, making them eligible to earn degrees. Also, the court found that the defendants' staff spent time away from their own regular duties training the externs and supervising and reviewing their work. The court also found that its determination was supported by a six-part test set forth by the Department of Labor's Wage and Hour Administrator, namely that:

A trainee is not an "employee" if these six factors apply:

1) The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.

2) The training is for the benefit of the trainees.

3) The trainees do not displace regular employees, but work under close supervision.

4) The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded.

5) The trainees are not necessarily entitled to a job at the completion of the training period.

6) The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

When petitioning the Supreme Court, the externs contended that there is a substantial split between the various circuits on the analysis applied to classifying someone as an unpaid extern/intern/trainee or an employee entitled to wages. The petition contended that the Fourth, Fifth and Sixth Circuits apply a primary benefit test, focusing on whether it is the extern/intern/trainee or the employer who is the primary beneficiary of the labor for purposes of determining whether the extern/intern/trainee must be paid as an employee. Decisions by the Fourth and Sixth Circuits criticize the Department of Labor's above test and do not follow it. On the other hand, the petition contended that courts in the Tenth and Second Circuits apply a totality of circumstances directly rooted on the Department of Labor's six-factor test above.

Employers, especially those with interns working in different areas of the country, should be mindful of the different analyses used by these circuits in determining whether someone is appropriately classified as an unpaid extern/intern/trainee or an employee entitled to wages. Cases of this nature are presently cropping up around the country, and we expect additional court decisions on this subject in 2014.

For more information, please contact M. Scott Young.

Immigration

Supporting a Global Workforce: Considerations for HR Professionals

By Sarah C. Flannery

Responsibility for managing a company's immigration issues often falls within a company's human resources department. These issues are not as intuitive as the employment laws HR professionals implement. This article addresses immigration principles of which HR professionals should be aware as the talent pool becomes increasingly global.

Work Authorization

Not all foreign national employees require sponsorship to work for a U.S. employer. For instance, foreign national graduates of U.S. colleges and universities are usually eligible for 12 months of optional practical training (OPT). Students with a science, technology, engineering or math (STEM) degree may be eligible for a 17-month extension of OPT if working for an E-Verify employer. This allows recent graduates to gain experience within their fields of study, and it gives employers the opportunity to determine if there is a business case for investing further in the employee by securing an employer-sponsored visa. When companies employ individuals with OPT or other forms of work authorization that are not sponsored by the company, it is important for the company to track the expiration dates so it can take steps to continue the work authorization.

Job Changes

Many work-authorized visa classifications are employer-specific, job-specific or even location-specific. Therefore, a change to any of these terms of employment can impact maintenance of status. The company may need to amend the petition.

Impact of Layoffs

The H-1B program strictly limits when an H-1B worker can be on an unpaid leave. The program precludes "benching," which is when the employer puts an H-1B worker on an unpaid leave of absence due to a lack of available work. When a company is contemplating a mandatory reduction in hours or furlough, it will have to take additional steps with regard to H-1B workers, either paying H-1B workers their full compensation despite the reduced workload or amending the H-1B petition to reflect the reduced level of hours.

Impact of Corporate Restructuring

The employer's corporate structure is material to some employment-sponsored visas. For instance, the L-1 visa requires a qualifying relationship between a company abroad for which the foreign national worked, and the U.S. employer. The E-1 and E-2 visas require that the company through which the visa is obtained share the same nationality as the employee seeking the visa (and only certain nationalities are eligible). When a company is contemplating restructuring, it should consider the impact the restructure may have on the visa status of its employees and analyze whether work authorization for its key employees can be continued post-restructure.

Change of Address Reporting

Foreign national employees in the United States should be reminded by their sponsoring employers that changes of address need to be provided to USCIS. This can be done through an online program. A best practice would be to set in place a mechanism through which this reminder is generated when a foreign national employee alerts HR or the benefits department of a change of address.

International Travel

When foreign national employees travel internationally, whether for business or personal reasons, they need certain documentation to return to the United States. Foreign national employees other than Canadian citizens need a visa to return to the United States. If HR is aware of the travel, it can help ensure that the foreign national has a valid visa for his or her current status, or is taking steps to secure it before returning from the trip. Upon returning to the United States, a foreign national used to be issued an I-94 card, which noted his or her status and time for which he or she was admitted to the United States. Now, the I-94 information is maintained electronically. A foreign national needs to verify the I-94 information to make certain that the officer did not make an error in the type of status under which he or she was entered into the United States or the period of stay allowed. The information can be accessed online.

For more information about supporting a global workforce, contact Sarah C. Flannery.

FMLA

Special Considerations for Remote Employees

By Tim McDonald and Allison M. Kendall

The Family and Medical Leave Act (FMLA) requires that employers with at least 50 employees provide their employees with up to 12 weeks of unpaid leave during a 12-month period for qualifying family and medical reasons. The law also forbids an employer from filling an employee's position while he or she is on leave, and prohibits the employer from terminating or in any way retaliating against employees who take the leave. The FMLA's requirements can cause particular difficulty for companies with remote sales individuals who each cover a large sales territory.

The law excludes certain individuals who are not eligible for FMLA leave, including any employee working at a worksite where the employer employs fewer than 50 employees if the total number of employees within 75 miles of that worksite is fewer than 50. The question then arises: What defines an employee's worksite?

When employees report to a facility and perform their job duties from that facility, the answer is simple: An employee's worksite is the location where the employee performs his or her job-related duties. However, the question becomes more complicated when the employee performs duties remotely. The regulations explain that, for remote employees, "the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report." 29 CFR § 825.111(a)(2). The regulations also state, "An employee's personal residence is not a worksite in the case of employees, such as salespersons, who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting. Rather, their worksite is the office to which they report and from which assignments are made." 29 CFR § 825.11(a)(2).

It is more and more common, however, for one remote employee to report to yet another remote employee. Thus, remote employees often report to and receive assignments from yet another remote workplace. In this instance, it may be more likely that the employee cannot, therefore, make

the requisite showing to be eligible for leave when they work remotely and report to another employee who works remotely. While the situation is not uncommon, the case law in this area is sparse at this time.

On top of this, of course, many states also have leave laws that in some cases mimic, and in others do not, the structure of the FMLA. In general, the employer needs to comply with the stricter of the two laws, which means that similar employees may have different leave eligibilities based on the relevant worksite as determined for them. Each situation involving remote employees should be given careful attention to ensure compliance with the applicable law.

For more information about FMLA and sales or traveling employees, contact Tim McDonald or Allison M. Kendall.

Traditional Labor

Believe It or Not, Ohio Employers Might Be Forced to Pay Striking Employees

By Jennifer R. Asbrock

Picture it: You employ a union workforce, and your labor negotiations are not going well. The old labor agreement expired weeks ago. Employees have continued to work under the expired contract terms, although neither party has offered a formal extension for any fixed period. The parties are approaching stalemate, so you make a last, best and final offer. The union rejects your final offer but makes no counteroffer in return. You notify the union that you plan to implement your final offer, and in turn, the union votes to strike. The next day, rather than reporting to work, bargaining unit members instead band together to form a picket line outside your facility. They march around with protest signs held high, ranting and raving at all vehicles passing through your gates. The strike continues 24 hours a day, while you continue operations using salaried staff and temporary workers. Amidst all this friction and stress, you receive a Labor Dispute Questionnaire from the Ohio Department of Job and Family Services (ODJFS) seeking information about the work stoppage to determine whether the strikers are eligible for unemployment compensation. You are puzzled, and you ask yourself: "Is it really possible that the same employees who are refusing to work may also force me to subsidize their strike?" The answer is, yes, it is indeed possible under Ohio's unemployment laws, depending on the facts of the case.

Lockouts are the only type of labor dispute whereby employees are unemployed through no fault of their own. In contrast, employees who participate in an organized strike have intentionally become unemployed in a calculated effort to put economic pressure on the employer.

Ohio's unemployment compensation scheme is intended "to provide financial assistance to an individual who had worked, was able and willing to work, but was temporarily without employment through no fault or agreement of his own." Irvine v. Unemp. Comp. Bd. of Review, 19 Ohio St. 3d 15, 17 (1985). To promote this policy, Ohio law disqualifies employees from receiving unemployment compensation if they are unemployed "due to a labor dispute other than a lockout...." Ohio Rev. Code § 4141.29(D)(1)(a). Lockouts are the only type of labor dispute whereby employees are unemployed through no fault of their own. In contrast, employees who participate in an organized strike have intentionally become unemployed in a calculated effort to put economic pressure on the employer.

Lockouts differ greatly from strikes. The Ohio Supreme Court defines a lockout as "a cessation of the furnishing of work to employees or a withholding of work from them in an effort to get for the employer more desirable terms." Zanesville Rapid Transit, Inc. v. Bailey, 168 Ohio St. 351, 354 (1958). Under federal labor law, a lockout traditionally means the employer has physically barred employees from the workplace or otherwise made it impossible for employees to perform work. While federal labor law gives employers the right to lock out employees after making a wholehearted effort to bargain in good faith, employees who are locked out in this literal sense will almost always be entitled to unemployment compensation.

The Ohio Supreme Court defines a strike as "a cessation of work by employees in an effort to obtain more desirable terms...." Leach v. Republic Steel Corp., 176 Ohio St. 221, 224 (1964). Though they are able, strikers refuse to work because they are trying to put economic pressure on the employer. They are therefore unemployed due to their own volition, and Ohio unemployment compensation "does not exist to protect employees from themselves, but to protect them from economic forces over which they have no control. When an employee is at fault, he is no longer the victim of fortune's whims, but is instead directly responsible for his own predicament." Tzangas v. OBES, 73 Ohio St. 3d 694, 698-99 (Ohio 1995). Therefore, as valid as their bargaining position may be, employees who go on strike should not be entitled to unemployment benefits to fund their cause.

But Ohio's unemployment compensation scheme recognizes a third type of labor dispute – a legal fiction known as a "constructive lockout." Here, the employer does not actually prevent employees from working but instead unilaterally implements new terms "that the employees could not reasonably be expected to accept." Id. at 354-55. Employees who go on strike to avoid and protest these new employment terms are found to be constructively locked out from their jobs, and they will be eligible for unemployment compensation.

Whether a particular labor dispute constitutes a strike or a constructive lockout may be determined by considering one of two seminal standards: (1) the "status quo" test announced in Bays v. Shenango, which involves a determination of which party first changed the status quo by refusing to continue the terms of the expired labor agreement; or (2) the "reasonableness" test announced in Zanesville Rapid Transit v. Bailey, which involves a determination of whether a party who changed the status quo nonetheless acted reasonably under the circumstances. See 53 Ohio St. 3d 132 (1990); 168 Ohio St. 351 (1958).

To reconcile Bays and Zanesville, courts have held that the Bays status quo test applies when negotiations are ongoing and each party sees movement to be made, while the Zanesville reasonableness test applies when negotiations have ceased and the parties have reached impasse. See, e.g., Johnson v. Ohio Bur. of Emp. Serv., 82 Ohio App. 3d 293 (1993). In Bays, the employer created a lockout when during ongoing negotiations it discontinued a cost-of-living adjustment that had been required under the expired contract; the employer was the first party to "refuse to allow work to continue for a reasonable time under the existing terms and conditions of employment while negotiations continue[d]." Bays, 53 Ohio St. 3d at 135. Conversely, in Zanesville, the employer did **not** create a lockout after it unilaterally implemented its final offer after negotiations had ceased because the change in terms was reasonable given the employer's financial situation. 168 Ohio St. at 355-56.

In any labor dispute, an ODJFS hearing officer will conduct a full evidentiary hearing and issue a global decision on the issue of benefit eligibility, which will apply to all strikers. If strikers are awarded unemployment compensation, at least two undesirable consequences will result. First, the award will likely make the employer's unemployment tax rate soar to new heights because long-term labor disputes can result in the payment of hundreds of thousands of dollars (and in some cases, millions of dollars) in benefits. Second, the award will likely prolong the labor dispute, as strikers have less of an incentive to compromise at the bargaining table when their protest is being subsidized. Employers who work closely with legal counsel during the collective bargaining process will be in the best position to contest an application for unemployment benefits should a strike situation arise.

For further information about how to handle striking employees, contact Jennifer R. Asbrock.

Employee Benefits

New Health Care Flexible Spending Account Carryover: Is it Right for Your Organization?

By Stephen R. Penrod

Employers who offer health care flexible spending accounts under their cafeteria plans were given a "treat" on October 31, 2013, when the Internal Revenue Service released Notice 2013-71 permitting employers to implement a $500 carryover. However this "treat" may be "tricky" to implement.

The Notice permits employers to amend their cafeteria plans to add an exception to the use-it-or-lose-it rule for health care flexible spending accounts (FSAs). The use-it-or-lose-it rule prohibits any money remaining in an employee's FSA from reverting to the employee or being used for medical expenses incurred after the end of the plan year in which it was contributed. One exception to this rule permits a cafeteria plan to provide a grace period that allows employees to use amounts left in FSAs to pay for medical expenses incurred during the first two and one-half months of the plan year following the year in which they were contributed.

Under Notice 2013-71, a cafeteria plan may be amended to permit up to $500 remaining in each employee's FSA at the end of the plan year to be carried over into the following year, as long as the plan does not also use a grace period. The carryover provision is optional for cafeteria plans and may be implemented for the 2013 plan year, the 2014 plan year or any future plan year.

Employees will likely view an FSA carryover feature favorably as it takes some of the pressure off when deciding how much to elect to contribute to an FSA on an annual basis. However, as employers evaluate whether to implement a carryover feature and if so, when, there are factors that should be considered before making a plan amendment.

First, is the FSA administrator able to administer the requirements of Notice 2013-71? The Notice sets forth how expenses submitted for reimbursement are to be paid and how reimbursements affect both the FSA values for the prior year and the current year. An FSA administrator's system may not be able to handle the additional requirements of Notice 2013-71. Prior to deciding whether to implement the carryover feature, an employer should confirm that its third-party administrator can administer the plan in time for the effective date of the amendment.

In addition, if the employer also sponsors a high-deductible health plan with a health savings account, consideration should be given to how the FSA carryover will affect an employee's eligibility to make deductible contributions to a health savings account. Under Notice 2005-86, an employee cannot make deductible contributions to a health savings account during any month the employee is eligible to have medical expenses reimbursed from an FSA from a prior year during a grace period. While not covered by Notice 2013-71, there is a risk that future IRS guidance will provide a similar limitation on employees who have amounts carried over from a prior year. An employee who decides to begin participating in a high-deductible health plan with a health savings account contribution may not be eligible for the health savings account contribution during the entire first year he or she participates in the health plan if the employee has an FSA account with money carried over from the prior year.

While the IRS likely intended the FSA carryover feature to provide a benefit to employers and employees alike, there are many pitfalls to avoid in its implementation.

For more guidance on FSAs, contact Stephen R. Penrod.