What You Need to Know About State & Federal Wage and Hour Laws Volume 2, Issue 1

Wage & Hour Compliance Monitor

More States Join in DOL's Agreement to Reduce Misclassification of Employees

The U.S. Department of Labor and multiple state agencies will embark on new efforts to protect the rights of employees and level the playing field for responsible employers by reducing the practice conducted by some businesses of misclassifying employees. Memorandums of understanding with state government agencies arose as part of the U.S. Department of Labor's Misclassification Initiative, which was launched under the auspices of Vice President Biden's Middle Class Task Force with the goal of preventing, detecting and remedying employee misclassification. As of February, a total of 13 states including California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Utah and Washington have signed such agreements.

Employee misclassification is a growing problem. In 2011, the Wage and Hour Division collected more than $5 million in back wages for minimum wage and overtime violations under the Fair Labor Standards Act that resulted from employees being misclassified as independent contractors or otherwise not treated as employees.

The misclassification of employees as something other than employees, such as independent contractors, presents a serious problem because these employees often are denied access to critical benefits and protections, such as family and medical leave, overtime compensation, minimum wage pay and Unemployment Insurance, to which they are entitled.

In addition, misclassification can create economic pressure for law-abiding business owners, who often find it difficult to compete with those who are skirting the law. Employee misclassification also generates substantial losses for state Unemployment Insurance, workers' compensation funds, Treasury and the Social Security and Medicare funds.

The Department's Misclassification Initiative is making great strides in combating this pervasive issue and to restoring these rights to those denied them. In September 2011, Secretary of Labor Hilda L. Solis announced a major step forward with the signing of a Memorandum of Understanding (MOU) between the Department and the Internal Revenue Service (IRS). Under this agreement, the agencies will work together and share information to reduce the

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Wage and Hour Division Issues Retaliation Fact Sheets

The Department of Labor's Wage and Hour Division (WHD) has issued three new fact sheets on unlawful retaliation under the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

Fact Sheet number 77A, *Prohibiting Retaliation Under the Fair Labor Standards Act (FLSA)*, briefly discusses the prohibitions, coverage and enforcement issues related to section 15(a)(3) of the FLSA, which makes it a violation for any person to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." The fact sheet explains that covered complaints may be made orally or in writing, and that most courts have concluded that the FLSA's retaliation protections extend to oral complaints as well.

In addition, the fact sheet states that all employees of an employer are protected by the FLSA's retaliation provisions, including those instances in which the employee's work and the employer are not covered by the act. Moreover, section 15(a)(3) protections extend to employees who are no longer in an employment relationship with the employer. With respect to enforcement, the fact sheet explains that an aggrieved individual may file a complaint with the agency or pursue a private cause of action in court.

> While the laws that these fact sheets address are by no means "new" infomation, the DOL wants to increase awareness and clarification.

Protection for Individuals under the FMLA outlines Section 105 of the FMLA and section 825.220 of the FMLA regulations, which prohibit employers from retaliating against an individual for exercising his or her rights or participating in matters protected under the FMLA, and provides examples of prohibited conduct. The fact sheet points out that the FMLA applies to all public agencies, including state, local and federal employers, local education agencies (schools), and private-sector employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including joint employers and successors of covered employers. Retaliation complaints under section 105 can be raised within two years of the date of violation.

Examples of prohibited conduct include:

- Refusing to authorize FMLA leave for an eligible employee,
- Discouraging an employee from using FMLA leave,
- Manipulating an employee's work hours to avoid responsibilities under the FMLA,
- Using an employee's request for or use of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, or,
- Counting FMLA leave under "no fault" attendance policies.

Prohibiting Retaliation Under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) discusses the protections and enforcement procedures under the retaliation provisions of the MSPA, which establishes employment standards related to wages, housing, transportation, disclosures, and recordkeeping requirements for migrant and seasonal agricultural workers, and mandates that farm labor contractors register with the U.S. Department of Labor.

Under MSPA, agricultural employers, agricultural associations, and farm labor contractors who engage in at least one named activity as it relates to a migrant or seasonal agricultural worker are required to provide basic protections to those workers unless otherwise exempt.

Named activities are:

The furnishing, employing, soliciting, recruiting, hiring, and transporting one or more migrant or seasonal agricultural workers.

- An agricultural employer is any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, or nursery, or who produces or conditions seed.
- An agricultural association is any non-profit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable state law.
- A farm labor contractor is any person (other than an agricultural employer, agricultural association, or an employee of either an agricultural employer or association) who is paid or promised money or other valuable consideration in exchange for engaging in at least one of the named activities.

Section 505(a) of MSPA states that it is a violation for any person to "intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause, filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this Act, or has testified or is about to testify in any such proceedings, or because of the exercise, with just cause, by such worker on behalf of himself or others of any right or protection afforded by this Act."

If a migrant or seasonal agricultural worker believes, with just cause, that he has been discriminated against, the worker may file a complaint with the Secretary of Labor within 180 days of the alleged discriminatory action. When an employer is found to be in violation, the Secretary may bring a civil action, which may seek to restrain violation of section 505(a) and order the reinstatement of the worker, with back pay or damages.

While the laws that these fact sheets address are by no means "new" information, the DOL wants to increase awareness and clarification. Employers should take this opportunity to review their policies and practices under existing rules, as well as take steps to decrease exposures to retaliation claims.

DOL Proposal Expands Eligibility of FMLA Leave for Military Family Members

The Department of Labor (DOL) has issued proposed new rules regarding the eligibility of military family members and airline flight crews under the Family and Medical Leave Act (FMLA). This Notice of Proposed Rulemaking (NPRM) proposes regulations to implement amendments to the military leave provisions of the FMLA made by the National Defense Authorization Act for Fiscal Year 2010, which extends the availability of FMLA leave to family members of members of the Regular Armed Forces for qualifying exigencies arising out of the servicemember's deployment; defines those deployments covered under these provisions; and extends FMLA military caregiver leave to family members of certain veterans with serious injuries or illnesses.

The NPRM also proposes to amend the regulations to implement the Airline Flight Crew Technical Corrections Act, which established new FMLA leave eligibility requirements for airline flight crewmembers and flight attendants. In addition, the proposal includes changes concerning the calculation of leave; reorganization of certain sections to enhance clarity; the removal of the forms from the regulations; and technical corrections of inadvertent drafting errors in the current regulations.

The major provisions of the NPRM include:

- the extension of military caregiver leave to eligible family members of recent veterans with a serious injury or illness incurred in the line of duty;
- a flexible, three-part definition for serious injury or illness of a veteran;
- the extension of military caregiver leave to cover serious injuries or illnesses for both current servicemembers and veterans that result from the aggravation during military service of a preexisting condition;
- the extension of qualifying exigency leave to eligible employees with covered family members serving in the Regular Armed Forces;
- inclusion of a foreign deployment requirement for qualifying exigency leave for the deployment of all servicemembers (National Guard, Reserves, Regular Armed Forces);
- the addition of a special hours of service eligibility requirement for airline flight crew employees; and
- the addition of specific provisions for calculating the amount of FMLA leave used by airline flight crew employees.

In addressing the proposed rules and provision, the DOL's Secretary Hilda Solis said, "Keeping the basic promise of America alive means ensuring that workers, from our servicemen and servicewomen who keep us safe at home to the flight crews who keep us safe in the skies, have the resources, support and opportunities they need and have rightfully earned."

Additionally, as part of the Veterans Opportunity to Work (VOW) Act signed Nov. 21 by President Obama, the Uniformed Services Employment and Reemployment Act (USERRA) has been amended to provide protection against harassment for servicemembers in their civilian jobs. Prior to VOW, courts had found it unclear if USERRA offered harassment (hostile work environment) protection to service members as a protected class. Now, this has been clarified and amended by VOW.

Both of these amendments demonstrate the Department's commitment to protect the rights of those servicemembers who have been away defending our country. Employers can take steps towards compliance by training their supervisors on the rights protected by USERRA, revising their equal opportunity policies to include military and veteran status, updating their FMLA policies to reflect changes to leave under the FMLA for families of servicemembers and implementing procedures for reporting and investigating USERRA-covered complaints.

Recent State Notification and Posting Changes

MICHIGAN: The Michigan Youth Employment Standards Act has been amended to reflect changes on working hours of minors 16 years of age or older. Under the memorandum, Section 11.1 (of the Act) adds a provision that: A person shall not employ a minor 16 years of age or older in an occupation subject to this act (e) if the minor is a student in school and school is in session, 24 hours in 1 week.

MISSOURI: The Department updated their Minimum Wage Poster to reflect that the minimum wage may increase on 1/1/13 if the cost of living, as measured by the Consumer Price Index, rises. Additionally, information stating that complaints must be filed by affected employees has been removed and the web address has been changed. The new poster has a revision date of 1/12.

MONTANA: Effective January 1, 2012, the minimum wage increased from $7.35 per hour to $7.65 per hour. The minimum wage is subject to a cost-of-living adjustment based on the Consumer Price Index calculated in August. According to the agency, the minimum wage poster is not a required posting. The Montana Minimum Wage Poster has been updated to reflect these changes.

WASHINGTON: Effective January 1, 2012, the Washington state minimum wage rate increased from $8.67 per hour to $9.04 per hour. Washington currently has the highest state minimum wage in the nation. The wage rate for workers ages 14 and 15 also increased from $7.37 per hour to $7.68 per hour. 14 and 15 year old workers are paid 85 percent of the state minimum wage. Washington's minimum wage is adjusted each year for inflation, as measured by the Consumer Price Index for the past 12 months.

According to the agency, the Department of Labor & Industries will no longer publish a separate poster listing the new minimum wage change each time the rate increases. Employers are still required to post the "Your Rights as a Worker" notice that explains wage and hour requirements for the state.

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incidence of misclassification of employees, to help reduce the tax gap, and to improve compliance with federal labor laws.

Additionally, labor commissioners and other agency leaders representing thirteen states have signed MOUs with the Department's Wage and Hour Division, and in some cases, with its Employee Benefits Security Administration (EBSA), Occupational Safety and Health Administration (OSHA), Office of Federal Contract Compliance Programs (OFCCP), and the Office of the Solicitor. The Department is actively pursuing MOUs with additional states as well.

These MOUs will enable the Department to share information and to coordinate enforcement efforts with participating states in order to level the playing field for law-abiding employers and to ensure that employees receive the protections to which they are entitled under federal and state law. The Department hopes that this initiative sends a message to employers that the issue of misclassification is being taken very seriously and that increased enforcement of wage and overtime laws in cases where employees have been misclassified should be expected.

Cautionary Tale: Company Settles Unpaid-Overtime Lawsuit for $15 Million

A recent $15 million wage and hour settlement by a major sporting goods chain highlights potential pitfalls in using automated software to track non-exempt employees' time on and off the clock.

The settlement, which must be approved by a federal judge overseeing the multi-state, class-action lawsuit, concerns the Company's employees and former employees in at least 22 states, who alleged they were shortchanged when time-tracking software automatically deducted break and lunch periods while they were still working or were called back to work early.

The lawsuit was initiated by an employee in the Rochester, N.Y., suburb of Brockport. The firm of Dolin, Thomas & Sullivan LLP began the legal action in 2005 for the sales clerk, Tamara Barrus, and a year later, after dozens of other employees had stepped forth with the same allegation of being shortchanged on overtime pay, the court certified the case as a class action.

The 68 plaintiffs brought claims under the Employee Retirement Income Security Act (ERISA), the Fair Labor Standards Act (FLSA), and statutory and common laws of the 36 different states where the Company operates. They accused the retailer of not paying hourly employees for all the time worked and encouraging off-the-clock work with promises of reward and punishment.

The FLSA mandates overtime pay of one-and-a-half times the normal hourly rate for employees who work more than 40 hours in a week. In addition, a few states mandate that overtime pay be awarded for anything over eight hours in a day. The FLSA also establishes categories of overtime-eligible workers, known as non-exempt employees, and salaried, overtime-ineligible workers known as exempt employees. The employees in the lawsuit were all non-exempt.

The settlement also involves a sporting goods store in Indianapolis which was acquired by the nationwide chain.

Even as the settlement had been announced and forwarded to the Securities and Exchange Commission (SEC) for filing for the publicly traded sporting goods chain, new trouble brewed on the legal front. An amended complaint was filed, alleging employees had been forced into unpaid overtime work. The complaint added several of the Company's executives, including the President and CEO, into the proceedings as defendants.

The chain's top executives "put pressure on management of all levels, including at the district and store level, to encourage and allow hourly employees to perform off-the-clock work. This is achieved by the promises of reward and punishment. Defendants set payroll budgets that can only realistically be met if hourly employees are performing work off the clock," the complaint alleged.

The Barrus complaint is one of two filed by the Dolin firm against the sporting goods chain in 2005. The other complaint represented in-store golf instructors, who claimed similar underpayment. A $1.5 million settlement on that complaint was reached in February 2010.

The use of automated time-clock systems that deduct for lunch periods and rest breaks automatically if the employee fails to do so is fairly widespread. This case was the first legal test of such automated software, highlighting the need for human oversight and intervention into the systems' record-keeping – and also underscoring the potential for management abuse.

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