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Employment Law Client Update

APRIL 2008

Current Issues and Changes in Employment Law

Recent Amendment to the Family and Medical Leave Act

President Bush recently signed into law the National Defense Authorization Act ("NDAA"), which includes an amendment to the Family and Medical Leave Act ("FMLA").

Prior to the amendment, an eligible employee was entitled under the FMLA to a total of 12 unpaid workweeks of leave during any 12-month period for the following reasons: (a) the birth of a child and the need to care for the child; (b) the placement of a child for adoption or foster care; (c) the need to care for a spouse, child, or parent if such spouse, child, or parent has a serious health condition; or (d) a serious health condition that makes the employee unable to perform the functions of his or her job position. The NDAA has now created two new types of military-related leaves under the FMLA.

First, an eligible employee who is the spouse, child, parent, or next of kin of a "covered service member" is now entitled to a total of 26 workweeks of leave during a 12-month period in order to care for the covered service member. The term "covered service member" means "a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." The term "next of kin" of a particular individual means the nearest blood relative of that individual. The term "outpatient status" means that the service member is assigned either to a military medical treatment facility as an outpatient or is assigned to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. Although the pending

Employment Law at Davis Malm

The Employment Law Group at Davis Malm counsels business and individual clients on a wide range of employment-related issues. The group's attorneys are experienced trial lawyers and are prepared, when necessary, to litigate employment issues in all administrative and judicial forums. The group works with business clients to develop and implement comprehensive employment policies, personnel manuals and affirmative action plans, and strategies on hiring and termination decisions. The group's attorneys also represent both employers and executives in the negotiation of executive employment and compensation agreements, stock option agreements, noncompetition agreements, intellectual property agreements, and severance agreements. They regularly conduct audits of clients' employment practices and provide training to management and employees on discrimination, harassment, accommodation, and other issues.

Department of Labor ("DOL") regulations will provide more comprehensive guidance regarding rights and responsibilities under this new legislation, the caregiver-leave provision is currently in effect, and employers are now required to comply in good faith when providing this type of leave.

The second type of FMLA leave created by the NDAA is for a "qualified exigency." An eligible employee will be able to take 12 weeks of FMLA leave "because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." Although, by its express terms, this provision is not effective until the DOL issues its regulations, the DOL is encouraging employers to begin providing this type of leave to qualifying employees. The proposed regulations have defined "qualifying exigency" as including tasks that need to be performed in preparation for a spouse, son, daughter, or parent of the employee to leave for military duty or to handle issues that might arise due to having a family member in active duty. These may include making child care arrangements, financial planning, and preparing for and dealing with the possible death of the service member.

If, within the same 12-month period, an employee requests both a leave under the service member caregiver provision and a leave to address a qualified exigency or to deal with one of the other customary reasons for FMLA leave, an employer is only required to provide a combined total of 26 workweeks during any given 12-month period. Service member caregiver leave can be taken intermittently or on a reduced leave schedule. If spouses are employed by the same employer, the aggregate number of workweeks that can be taken under the FMLA will be limited during any given 12-month period to either 12 or 26 weeks, depending upon the basis for the leave.

Similar to other types of FMLA leaves, an eligible employee may elect or an employer may require the employee to substitute any of his or her accrued paid vacation leave, personal leave, medical or sick leave for the unpaid caregiver leave or leave for a qualified exigency. An employer can also require that an employee provide supporting certification issued by his or her health care provider, or may require such certification from the health care provider of the son, daughter, spouse, parent, or next of kin of the employee in the case of leave taken under the service member caregiver provision. It is expected that the DOL's pending regulations will provide additional information on the type of certifications that will be allowed.

Finally, employers need to update their FMLA leave policy to reflect these recent changes. Please contact us if you would like more information on how to obtain an updated policy.

"Independent Contractor" A Common Misclassification That Could Have Dire Consequences

It has become very common for companies to employ workers and to classify these workers as "independent contractors." This type of classification might be made for a variety of reasons, including convenience, a preference to keep the relationship temporary, the worker's request, or as standard procedure in the employer's field or industry. There are benefits to the independent contractor classification, such as not having to pay certain payroll taxes and not having to provide workers' compensation, unemployment insurance, or other employee benefits.

However, even if both parties have agreed in writing to this type of working arrangement, the independent contractor arrangement is valid only if the worker and the services he or she is to perform comply with a three-part test provided under the Massachusetts independent contractor law. It is the employer's burden to show that all three prongs of the following test are met.

First, *the individual must be free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact.* For example, does the worker set his own hours? Is the worker subjected to discipline by the employer? Does he use his own tools and materials? Does he complete the job using his own approach

with minimal instruction? The worker does not have to be entirely free from direction and control; however, there must be a significant degree of autonomy.

Second, *the service is performed outside the usual course of the business of the employer.* Under this prong, the employer must demonstrate that the work performed by the individual is different from the work regularly undertaken by the employer. One example might be a clothing retailer who hires an independent contractor to fix the retailer's computer system. The clothing retailer is not in the computer business; therefore, the independent contractor is not performing work that would be regularly performed by the retailer's employees. However, a delivery company hiring a delivery driver would have trouble meeting this prong, even if the driver was hired on a temporary basis, worked independently, and had his own business.

Finally, *the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.* In other words, does the individual have his own separate enterprise (e.g., is the individual incorporated) and can the worker perform his services to other entities, or does the worker depend on a single employer for the continuation of services.

Simply misclassifying a worker by failing to meet one of the prongs does not by itself violate the independent contractor law. The employer must also violate either the Massachusetts wage and hour laws or the workers' compensation law. For example, if because of the misclassification the employer fails to pay minimum wage or overtime, fails to pay wages in a timely fashion, fails to keep true and accurate payroll records, or fails to provide workers' compensation, the employer would then be in violation of the independent contractor law. When a violation occurs, the Massachusetts Attorney General is in charge of enforcement and has the authority to impose substantial civil and criminal penalties and, under certain circumstances, to debar violators from public works. The injured worker himself can also bring a civil claim for damages and if successful, he could collect triple damages, the cost of litigation, and his attorneys' fees. Both business entities and individuals, including officers and managers, can be liable.

Finally, when an employer misclassifies an individual as an independent contractor, the employer may also violate other laws, such as unemployment compensation laws, state and federal tax laws, and the Commonwealth's new health care reform law and could face additional consequences under these laws as well.

The Massachusetts Attorney General's Office has informally announced plans to step up enforcement in this area. Accordingly, employers should make sure that all their independent contractors are correctly classified under the three-prong test described above. If an employer is unsure about a particular classification an employer should, as a precautionary measure, comply with the Massachusetts wage and hour laws and pay the worker in a timely fashion, at a rate of pay equal to or more than minimum wage, pay the worker overtime pay for hours worked over 40 (unless the worker falls under one of the exemptions for overtime pay), and consider including the worker under its workers' compensation policy. Even if an employer takes these precautions and is not in violation of the independent contractor law, the employer could still be in violation of other federal and state tax laws and the state unemployment laws.

Unfortunately, there is no clear demarcation under the law as to when a worker is accurately classified as an independent contractor versus when a worker is actually an employee. In many cases it is not always clear whether the worker has been properly classified. In an attempt to provide some additional clarification, the Attorney General plans to release an updated advisory some time in the near future. We will keep you updated on the status of this advisory. In the meantime, if you have any concerns or questions about the independent contractor classification issue, please feel free to contact us.

Massachusetts Minimum Wage

As of January 1, 2008, the minimum wage in Massachusetts is now $8.00 an hour. The minimum cash wage payable to a tipped employee remains at $2.63 per hour if the cash wage ($2.63) plus the tips earned by the employee equal at least $8.00 per hour. The minimum overtime rate payable to a tipped

employee whose tips total at least $5.37 per hour is $6.63

I-9 Documentation Requirements Change

As of December 26, 2007, all employers are required to use the new I-9 form to verify eligibility and authorization to work for all applicants for employment. The list of acceptable documents for both identity and employment eligibility has also been updated. Please contact us for more information regarding these forms.

Massachusetts Employers Are Strictly Liable when Supervisors Engage in Sexual Harassment

A recent case in Massachusetts found an employer liable for a supervisor's actions, even though the court also found that the employer had properly handled a complaint of sexual harassment and, under the circumstances, had performed a reasonable investigation of the complaint. This is a reminder to all employers that in Massachusetts an employer is strictly liable if their supervisors engage in sexual harassment in the workplace. Employers should ensure that their supervisors are fully aware of what conduct might constitute sexual harassment, and that sexual harassment in the workplace will not be tolerated. Although not required, the law specifically encourages employers to conduct education and training programs on sexual harassment for all employees on a regular basis and employers are further advised to conduct additional training for supervisory and managerial employees. Please contact us if you would like information on workplace harassment prevention training.

Bias Cases Filed by Workers Increase 9 Percent

Complaints made under federal discrimination laws (e.g., Title VII, Americans with Disabilities Act, and the Age Discrimination in Employment Act) against private employers shot up 9 percent last year. This was the biggest annual increase since the early 1990s. Discrimination based on race was the leading category of complaints; retaliation was the second most frequent complaint, followed by sex discrimination.

Contact

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