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What Issues Will Employers Face in 2013?

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What issues employers will face with the federal government in 2013 depends in large part on the results of the presidential election. One area of focus in 2013 will be the National Labor Relations Act. It is likely that the National Labor Relations Board (NLRB) in 2013 will continue to target non-unionized employers, unless the agency has new leadership. Since 2012, the NLRB's message to employees is: "We can protect you, even if you are not represented by a union." Their hook is the National Labor Relations Act's Section 7 protection of an employee's right to engage in "concerted protected activity for mutual aid and protection." It is unlawful for an employer to interfere with such conduct or to retaliate against an employee because he or she has engaged in such conduct. The NLRB has recently used this argument to attack routine employer policies and agreements as violating the NLRA including, among others, at-will, social media and contact with media policies in handbooks, confidentiality and privacy agreements, employer codes of conduct requiring a "good" or "positive attitude," arbitration agreements providing for a waiver of class or collective actions, and terminations of employees who received or were parties to any of the foregoing or who raised any concerns about the treatment of fellow employees.

The NLRB has gone so far as to add a section to their website for the ostensible purpose of informing non-unionized employees of their rights and inviting contact from potential claimants. Some have called it "trolling." In light of the NLRB's new focus, Section 7 protected activity should be added to the employer's checklist of protected employee statuses to be considered before terminating a non-supervisory or non-managerial employee. (NLRA protections generally do not apply to supervisors or managerial employees, as defined by the NLRA.) Employers should also review their handbooks, policies and agreements to identify policies or language that might be of concern to the NLRB as arguably infringing on Section 7 rights.

Another area of focus in 2013 will be the employee/independent contractor issue. During the economic downturn many employers chose to use independent contractors rather than employees because of the independent contractor's perceived temporary engagement and lower costs. Recently, government agencies (both federal and state) have been pushing back, claiming that many of these alleged independent contractors are actually misclassified "employees." This is in part fueled by revenue lost to the governments due to misclassification of who were really employees. In 2013, we can expect continued attention by taxing authorities and others to the classification of workers as independent contractors.

A July 2012, Washington Supreme Court decision changed the rules of the game for Washington companies. *Anfinson v. FedEx Ground Package Sys., Inc.* was a class action by 320 FedEx delivery drivers which was filed in 2004, seeking overtime and reimbursement for uniform expenses. The primary dispute was whether the drivers were correctly classified as independent contractors (not owed OT) or were employees (owed OT). After a four week trial the jury found they were independent contractors. The drivers appealed, arguing that the wrong legal standard had been used for determining whether they were employees or independent contractors. Both the Washington Court of Appeals and the Washington Supreme Court agreed with the drivers. Both appellate courts said the "economic dependence" test and not the "right to control" test used by the trial court was the proper test to use. The relevant inquiry according to the Court is "whether, as a matter of economic reality, the worker is economically dependent on the alleged employer or is instead in business for himself." This is a more inclusive (employee friendly) test than "right to control" and will lead to more findings that workers classified as independent contractors are really employees. Such findings are very expensive for employers since former independent contractor employees will generally be due unpaid overtime compensation, benefits, penalties, interest, attorney fees and additional taxes, interest and penalties may be due to the government.

This "economic dependence" test will be used in Washington in 2013 and on, at least in wage and hour matters. Companies that have independent contractor relationships should reevaluate them in light of this decision to make sure the classification is still viable. At the same time, employers need to remember that other agencies, such as the IRS, EEOC, Employment Security, etc. utilize different tests for independent contractors and may come to conflicting conclusions, each of which is controlling for their particular agency.

Another wage and hour classification that will receive significant scrutiny in 2013 is that of "intern," and, in particular unpaid interns at for-profit companies where there is no connection to any academic program. During the economic downturn, the "unpaid intern" has become a common phenomena as unemployed graduates seek to gain experience and a foot in the door. Companies have utilized unpaid interns as a way to screen potential job candidates, to perform otherwise unprofitable work, and perhaps to pay social debts. Some interns are now questioning whether these unpaid work arrangements, particularly those that did not transition to paying jobs, comply with the law. If they do not these "free" employees could turn into class action plaintiffs and be very expensive in terms of back pay, interest, taxes, benefits, and attorney fees and possibly penalties.

The classification of workers as exempt or non-exempt will also continue to receive scrutiny in 2013, often with significant financial costs for employers. In September 2012, the employers prevailed in the Washington Court of Appeals in *Litchfield v. KPMG* when the Court ruled KPMG's audit associates could be exempt professional employees and therefore exempt from overtime requirements even though they were not licensed as CPAs and had not fulfilled the requirements to apply for licensing as CPAs if they had the requisite educational background and duties.

Another development which will continue to affect businesses in 2013 is the recent implementation of the Seattle Paid Sick and Safe Leave Ordinance. It will take a while before employers are able to fully assess the impact of this ordinance on their daily operations.

The proponents of the Paid Sick and Safe Leave Ordinance are now pushing a new ordinance which would ban discrimination in employment against those with arrests or criminal convictions within the City of Seattle. The only proposed exceptions to employer consideration of an applicant or employee's criminal conviction(s) would be where: (1) there is a direct relationship between the conviction and the job; (2) there would be an unreasonable risk of substantial harm to property or safety; (3) the convicted person would be working with children, developmentally disabled persons or vulnerable adults where the conviction is for certain crimes of violence, abuse or financial exploitation; (4) the hiring is by law enforcement agencies; (5) employment of those with criminal convictions is prohibited by law; or (6) there was intentional misrepresentation in connection with the application. Employers need to keep any eye on this ordinance and provide input about concerns they might have.

These are some of the issues employers will face in 2013.

However, as in previous years, employers must remain vigilant because issues can arise that are not yet on the radar.

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