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Labor & Employment Law Department

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Misclassification Feeding Frenzy Continues

It seems there's no end to the lawsuits, class actions, and Department of Labor investigations based on allegations of employee misclassification, either treating non-exempt workers as exempt or treating true employees as independent contractors. Here is a recent example of why there's no shortage of lawyers to take wage and hour cases.

A group of 26 employees of Hartford Fire Insurance brought a collective action in California claiming that the company's policy of keeping track of employee hours in 15 minute increments often resulted in periods of up to 7 minutes for which they were not compensated. The lawsuit alleged violations of state and federal law. A federal judge recently approved a settlement under which each employee received a payout of only about $400, but their lawyers were awarded $315,000.

Of course, the plaintiffs don't always prevail in these cases. A few weeks ago a federal jury in Connecticut ruled in favor of SNET in a case involving allegations that the Company improperly classified a group of managerial employees as exempt from overtime. While pretrial rulings by the judge indicated she thought the employees' position had merit, the jury apparently disagreed. Such an outcome may be the exception rather than the rule, however. Another federal court decision in Connecticut recently went against Schering Corporation, concluding that sales representatives exercised little discretion or independent judgment with respect to "matters of significance," which is a requirement to qualify for the wage and hour exemption applicable to administrative employees.

Not all such cases are class actions. A Stamford pizzeria is being sued by a delivery man who worked as many as 60 hours a week for a "mom and pop" pizza parlor, but was treated as an independent contractor for wage and hour purposes. An attempt to have the case thrown out failed when the judge noted that the plaintiff was totally dependent on the pizzeria for work, and had no control over how he performed his job or what he was paid.

Private lawyers aren't the only ones pursuing employers on misclassification issues. Officials from the Connecticut Department of Labor have targeted various segments of the economy for enforcement efforts. This summer, they shut down 6 construction sites and hit 19 companies with fines for misclassifying construction employees as independent contractors in order to avoid workers' compensation costs and various taxes. Officials claim they have collected over $80,000 in civil penalties so far.

Our advice to employers is to be more conscious than ever of misclassification concerns. It is much easier to correct a problem before an investigation is commenced or a suit is filed. The Connecticut Department of Labor currently has an "amnesty" program that might be worth considering in certain circumstances.

Reminder: Personnel Policies Should Include Disclaimers

When an employee asks an attorney whether there are grounds for a lawsuit against the boss, the first thing the lawyer looks for is whatever supporting evidence can be found in the employer's own records and documents. These include offer letters, employment contracts, employee performance reviews, and perhaps surprisingly, the employer's own personnel policies.

It would seem easy to avoid violating personnel policies that you developed yourself, but consider the following situation. A hospital executive resigned after the CEO expressed some dissatisfaction with her performance. When the hospital declined to pay any severance, she sued, alleging violation of the hospital's employment manual, which said that executives "who are terminated without cause are eligible to receive up to 12 months (52 weeks) severance pay in keeping with their length of service."

The hospital argued that this did not constitute a binding promise, and that in any event the employee was not terminated. However, the judge ruled that a jury could find that the executive was in effect compelled to resign, and that she justifiably relied on the severance provision in the employment manual when she made that decision. Sure enough, the jury awarded the plaintiff over $41,000.

Even when such claims are not successful, it can be expensive to defend them. In a recent wrongful discharge case against another Connecticut health care entity, one of the grounds for the employee's complaint was that she didn't receive a performance review as required by the employee handbook. The employer dodged this bullet by pointing out that she had not yet been employed for a full year. The case was dismissed, but not before the employer had incurred substantial defense costs.

Our advice to employers is to make sure that their personnel policies and handbooks have a prominently displayed disclaimer that makes it clear their contents do not constitute a binding contract, or a guarantee of employment for any specific period of time.

NLRB Polices Personnel Policies

You have probably heard enough from us about the NLRB's activist stance on what constitutes "concerted protected activity," and its efforts to overturn discipline of employees who engage in such conduct. (For example, "Badmouthing the Boss on Facebook," Fall 2010). Recently, however, it has become clear that the NLRB does not wait until an employee has been disciplined before finding a violation.

Many employers, both union and non-union, maintain personnel policies that prohibit employees from engaging in public criticism of the employer's personnel, customers or products. In a number of cases, the NLRB has

Recent S&G Website Alerts

NLRB Requires Posting of Employees' Rights, Published September 1, 2011

Union Organizing in Health Care Made Easier, Published September 7, 2011

NLRB Postpones Requirements for Employers to Post Employees' Rights, Published October 7, 2011

taken the position that such policies are illegal if they could reasonably be read to prohibit protected activity. It doesn't matter whether the policy has actually been enforced in a manner that produces such a result; simply maintaining such a policy has been found to be illegal.

Examples of situations in which a policy has been declared illegal include:

- A prohibition against engaging in "inappropriate discussions" about the company, its management, or its employees.
- A provision prohibiting employees from posting pictures of themselves in any media depicting the company in any way (such as a company uniform or logo).
- A prohibition against disparaging comments when discussing the company, coworkers, or competitors.
- A policy forbidding employees from using social media in a manner that would violate the privacy or confidentiality of any person or entity.
- A prohibition against social media postings that embarrass, harass or defame the employer or any employee, that are untrue, or that might damage the reputation of the employer.

To demonstrate just how broadly the NLRB construes employee rights in this area, the Regional Director of the Hartford Office recently bragged at a luncheon meeting that of all the company policies that had been the subject of complaints in his office, not a single one was found to be unobjectionable.

Our advice to employers is to review their personnel policies, narrow their scope and focus as appropriate, and if necessary add language that makes it clear they will not be interpreted or applied so broadly as to prohibit concerted activities that are protected under the National Labor Relations Act.

Legal Briefs
and footnotes...

Courts Read USERRA Liberally: Federal law requires returning veterans to be reinstated to positions of like "seniority, status and pay." That seems clear enough, but what about a commissioned salesman who returns from the Air Force and finds his territory and accounts have been diminished, so while his commission rate is unchanged, his earnings are reduced. A federal court in Connecticut considered this issue of first impression, and ordered Wachovia Securities to reimburse the officer for his losses. Wachovia appealed, but the Appellate Court upheld the decision, expressing disapproval of the employer's apparent attempt to evade the clear purpose of USERRA, which is to assure that service personnel aren't penalized when they return to their former job.

Teasing Doesn't Equal Harassment: A manager told her subordinates that if they were going to be out of work because of illness, they were expected to call in unless they were "in a coma." One employee took offense, because she had once been in a coma herself, and berated the manager in threatening terms, for which she received a one-day suspension. She sued, claiming harassment

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based on her history of disability and retaliation for opposing discriminatory actions. A federal judge in Connecticut rejected her claims, ruling that "simple teasing, off-hand comments, and isolated incidents (unless extremely serious) do not create a hostile work environment or constitute harassment."

EPLI Can Have Big Gaps: Many clients find out too late about problems with their employment practices liability insurance. These include high deductibles, carrier participation in settlement decisions, and mandatory assignment of bargain basement law firms to defend cases. Here's one more: An insurance carrier successfully defeated in court a claim by an insured employer based on the carrier's denial of coverage for a discrimination lawsuit brought by the EEOC. The policy stated that it covered claims brought by "an employee," and a judge ruled that did not include claims brought on behalf of employees by agencies such as the EEOC.

Pregnancy Discrimination Can Occur After Childbirth: An employee of Schick Manufacturing brought a lawsuit alleging that her termination shortly after returning from maternity leave constituted pregnancy discrimination. Schick sought to get the case dismissed based on the fact that the employee was no longer pregnant, and had been granted a maternity leave as required by law. A federal judge in Connecticut ruled that pregnancy discrimination can include any adverse action against "women affected by pregnancy, childbirth or related medical conditions," not merely women who are pregnant.

Public Policy Revisited: As we have observed more than once, whether or not an arbitration award violates public policy is a subjective question, to which the answer is often unpredictable. The latest head-scratcher involved a Hartford police officer who was terminated after punching out a prisoner who he learned was in a group of people who attacked his brother. A Superior Court Judge said the decision of the arbitration panel changing the discharge to a lengthy suspension did not violate public policy.

Sick Leave Sleepers: As the January 1 date for implementation of Connecticut's new sick leave law approaches, people keep finding hidden pitfalls in the legislation. For example, the non-discrimination provisions apply to non-covered employees (those who are not service workers) of covered establishments (most employers of over 50 people other than manufacturers). They also prohibit employers from penalizing workers for using leave available under an employer's own policies, not just the leave available under the new law. Other "sleepers" include the fact that the 50 employee threshold for coverage is a cumulative headcount over a calendar quarter rather than a snapshot, and the statutory leave can be used in increments of as little as an hour, even if an employer's policy says otherwise. The Labor Department plans to issue guidance before January 1 that may help to clarify these and other issues.

Save the Dates

Because our annual Fall Seminar took place during the week when many of you were without power, we are going to offer a couple of shorter seminars covering excerpts from the November 2nd original:

Stamford Office: November 29th
Highlights of Our Annual Labor & Employment Fall Seminar
8:15 a.m. - 10:00 a.m.

Hartford Office: Date To Be Announced

To register, visit www.shipmangoodwin.com.

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