LAW OFFICE OF LORI A. GOLDSTEIN, LLC

CLIENT BULLETIN Labor Day 2015

Labor Day Law List – 10 Employment Law Changes

On September 7, 2015, we will commemorate more than 120 years since the national Labor Day holiday was created. Held on the first Monday of September, the annual holiday is dedicated to the social and economic achievements of workers toward the strength, prosperity, and well-being of our country. In honor of the holiday, I have highlighted 10 key recent or proposed legal changes that will significantly affect employees and employers.

1. Who's Really an Independent Contractor These Days?

The U.S. Department of Labor (DOL) had a busy summer. Two important recommendations could change how workers are classified and increase employer risk of misclassification claims. First, the agency narrowed the definition of independent contractor, signifying that many "contractors" are actually employees. DOL's interpretation of the Fair Labor Standards Act (FLSA) is significant on many levels:

- It states DOL's unequivocal opinion that **"most workers are employees"** under the FLSA, pointing to the FLSA's broad definition of "employ" as "to suffer or permit" an individual to work.
- It **de-emphasizes the significance** of an employer's exertion of **control** over the tasks performed by the worker.
- It highlights the **"economic realities" test** as the preferred approach to determining whether a worker is an employee or a contractor. Factors to be considered include whether the work is integral to the company's business, to what extent the worker is invested in the company's business, how permanent the work relationship is, and the degree of control the company exercises over the worker **(**no longer the key factor.) The goal is not simply to list factors met, but to determine the **whether the worker is economically dependent on the employer** (and therefore an employee) or is really in business for herself (an independent contractor).

2. Expansion of Employees Eligible for Overtime Comp – Just Around the Corner?

The second important action by DOL this summer was its release of proposed changes to the "white collar" overtime exemption for executive, administrative, and professional employees. After a comment and review period, the new regulations are anticipated to go into effect in 2016. Major changes include:

- **Increasing the minimum salary** an employee must earn to be **exempt** from overtime pay from $455 per week ($23,660 annually) to $970 per week ($50,440 annually.) Currently exempt employees (an estimated 5 to 15 million employees nationwide) may lose their exempt status, entitling them to overtime pay for working more than 40 hours in a week.

- Increasing the exemption threshold for highly compensated employees from $100,000 to $122,148 per year.

Employers will need to budget for salary increases and/or increased overtime costs and **consider cost-saving measures,** such as reducing hours, hiring part-time hourly workers, and converting salaried employees to hourly employees at a lower hourly rate.

Illinois employers should also note **new obligations regarding exempt** employees. Enacted last year with little publicity, amendments to the Illinois Wage Payment and Collection Act require employers to maintain for exempt employees accurate records of the hours worked and vacation earned. Failure may impede an employer's ability to defend claims that non-exempt employees were misclassified as exempt.

3. Feds May Follow Illinois' Establishment of Pregnancy Accommodation Law

Discrimination laws prohibit pregnancy discrimination and harassment and require reasonable accommodations for pregnancy-related and other disabilities. But most do not require employers to provide **accommodations to pregnant, non-disabled workers.** That's all changing. On January 1, 2015, Illinois' Pregnancy Accommodation Act amended the Illinois Human Rights Act, offering enhanced workplace rights to pregnant employees. The law requires "**reasonable accommodations"** for "conditions related to pregnancy, childbirth, or related medical conditions" unless the employer can show **"undue hardship."**

At the federal level, pregnancy workplace fairness has been a focus of case law and pending legislation. In the controversial case of Young v. UPS involving light-duty accommodations, the **Supreme Court declared a new test**: was the pregnant employee denied a requested accommodation, which the employer gave to similarly situated non-pregnant employees?

Additionally, the Equal Employment Opportunity Commission has updated its pregnancy discrimination guidance supporting accommodations. Finally, the federal Pregnant Workers Fairness Act, which failed in Congress in 2012 and 2013, was recently introduced on a bipartisan basis, increasing the likelihood of a new federal law.

4. Same Sex Marriage Update – Benefits Hampered by Detriments

The Supreme Court's landmark decision giving same-sex couples the right to marry anywhere in the U.S. provided new rights in the workplace – including family and medical leave benefits and tax parity for same-sex partners. But there remain questions and perhaps additional risks of asserting same-sex couple status. For example, when an employee requests the employer to update his file to add a same-sex spouse, the employee can be fired based on his sexual orientation in many venues where sexual orientation is not a protected class. **Most states have no LGBT protection from discrimination** (no sexual orientation and/or gender identity protection) and even **federal law** prohibits such discrimination only by **public employers**. Outside of the workplace, individuals can be lawfully evicted from their apartments, denied loans, and even have their children expelled from college when a same-sex parent is disclosed.

5. Gender Identity and Orientation – Federal and Local Progressive Policies

This year saw much media and public focus on transgender orientation, thanks to Caitlin Jenner. But even though last year President Obama added sexual identity and orientation as categories protected from discrimination by **federal contractors**, federal and many state laws have not extended the protection to private employees.

Fast forward to July 2015, when Senate and House Democrats introduced the **Equality Act**, considered to be the first comprehensive and inclusive federal legislation to cover the entire LGBT community. It would amend the 1964 Civil Rights Act (CRA) to include gender identity and sexual orientation. The bill is different from the previously proposed Employment Nondiscrimination Act (ENDA), because it covers not only **employment,** but also **public accommodations and public education.**

Locally, Chicago Mayor Rahm Emanuel announced plans to include sex reassignment surgery for the city's employees as part of their health benefits package. The change first will be implemented for non-union employees effective October 1, while the city works with labor representatives to remove an exclusion of sex-change treatment for union members. In August, Metra announced it would no longer require riders to designate their gender on their train passes.

6. Medical Marijuana Gets "Tested" in the Courts

By now, 23 states and D.C. have legalized the use and possession of marijuana for medical purposes, and 4 states have legalized recreational use. But because marijuana remains illegal under **federal law, the conflict is giving employers headaches**.

Testing the laws in the courts has resulted mostly in **decisions favoring the employer**, based on federal law. A disabled employee who was fired for testing positive lost his challenge in the Colorado court, because the state's "lawful activities" law did not cover a federally illegal action. Similarly, courts are **denying unemployment compensation** to employees fired for medical marijuana use. A Michigan court limited the protection of its medical marijuana law as a defense against criminal prosecution but not applicable to private employment.

Another Colorado court found that an employer is not required to accommodate medical marijuana use under disability discrimination laws. But Nevada amended its medical marijuana law to require employers to make **reasonable accommodations** for employees holding valid registration cards. Whether other states follow suit remains to be seen.

7. Non-competes - the Illinois 2-Year Rule Reaffirmed

In mid-2013, Illinois changed the tune on non-competes and other post-employment restrictions, which previously could be supported simply by the promise of new or continued employment. In Fifield v. Premier Dealer Services, Inc., 993 N.E. 2d 938 (Ill. App.Ct. 1st Dist. 2013), pet. for leave to appeal denied (Ill. S. Ct. 2013), the appellate court ruled that without giving other significant consideration such as a signing bonus, an employer **cannot enforce post-employment restrictions until an at-will employee has worked at least two years** after signing the restrictive covenant agreement.

Since then, the federal court has declined to use a bright-line 2-year rule in a couple of cases (finding 15 months to be sufficient where employee resigned.) However, both the federal court and the Illinois appellate court recently confirmed the 2-year rule. Instant Technology, LLC v. DeFazio, 40 F. Supp. 3d 989 (N.D. Ill. 2014); McGinnis v. OAG Motorcycle Ventures, Inc., 2015 Ill. App (1st) 130097 (6/25/15.)

8. College Athletes – A Team but not "Teamsters"

The National Labor Relations Board issued a long-awaited decision this summer, declining jurisdiction and dismissing a petition filed by the College Athletes Players Association seeking to become the collective bargaining representative of Northwestern University football players who receive scholarships. The Board specifically did not determine if the players were statutory

employees under the NLRA. The agency instead decided not to rule, claiming that asserting jurisdiction over one team would not promote labor stability across the league.

9. Joint Employment – Will New NLRB Rule Be a Norm for All Employers?

A landmark NLRB decision **significantly altering the standard for "joint (unionized) employers"** may lead to similar application to non-union employers. The new rule makes it easier for unions to establish that two or more companies are "joint-employers" for bargaining obligations and unfair labor practices under the National Labor Relations Act (NLRA). Until recently, the NLRB required one entity to actually exercise control over employees' terms or conditions of employment in order to find it was a joint employer. Frequently applied to **franchise, staffing agency and temporary and "leased employee" situations**, usually the entity that pays the employees was considered the sole employer, thereby insulating the company for whom the work was performed.

The new standard was applied in Browning-Ferris Industries of California, Inc., 32-RC-109684 (August 27, 2015), where the NLRB found Browning-Ferris to be a joint-employer of workers who were provided to it by a staffing agency. In evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer, the **Board will now consider exercise of control indirectly through an intermediary.** If a similar test is applied to non-union employers, it could make companies jointly liable for discrimination and other statutory employment violations against employees leased by temp agencies.

10. RIFs and Transitions

While unemployment rates have improved this year, we continue to see companies small and large, including Kraft and Hospira locally, drastically reduce headcount through large reductions in force. Many individuals are facing job searches and career transition for the first time, others have unfortunately gotten used to the pattern. Networking and effective use of social media are the name of the game. Experts encourage even employed workers to be constantly networking, marketing themselves, and always looking for the next opportunity. Think outside the box and create a career that you are passionate about.

Announcements

- ✓ *Speaking of RIFs, transitions and career changes,* ***Career Resource Center is celebrating its 25th anniversary*** *at a fabulous gala at Viper Alley on September 25, with food, drinks, entertainment, music and auction. Please join my fellow CRC Board members, CRC clients, alums, supporters and staff, or consider a donation. Details at careerresourcecenter.org.*

- ✓ *I look forward to* ***presenting at CRC*** *on* ***"Difficult Conversations in the Workplace"*** *at 7 p.m. on September 29. Contact careerresourcecenter.org to reserve a spot.*

- ✓ *Thank you to* ***Next Act for Women*** *for featuring me in its* ***blog on August 20****, discussing legal issues affecting employers and employees, trends in employee rights, and employment transitions. Check it out at:* **http://nextactforwomen.com/**