LAW OFFICE OF LORI A. GOLDSTEIN, LLC

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Employment Tricks and Treats

As employment laws change and become trickier for business owners, and treat employees with more legal protection, it is essential to dust off those cobwebs, get those skeletons out of the closet and make sure your policies, practices and legal documents are in tip-top shape.

CLOCK IS TICKING...DO YOU KNOW WHO YOUR EXEMPT EMPLOYEES ARE?

EXEMPTION CHANGES COMING DECEMBER 1

By now, you may be tired of hearing about the December 1 changes to the Fair Labor Standards Act, which will add more than 4 million employees to the "nonexempt" roll, entitling them to overtime compensation. But this is one of the most **significant and drastic changes** in employment law and employers should not wait to prepare. While a few recent lawsuits and a House of Representatives bill seek to delay the December 1 effective date supported by Pres. Obama, these challenges may be futile or too late, so employers must be prepared. Over the last few months, I've been working with employers to **audit their "exempt" employee lists, job descriptions, and salaries**.

The salary minimum for the executive, administrative, and professional exemptions will increase from $23,660 ($455 per week) to $47,476 ($913 per week). The total annual compensation requirement for "highly compensated employees" will increase from $100,000 to $134,004. But employers beware: **salaried** employees whose compensation is **above the new minimum,** but who do **not meet the strict duties tests** for **executive, administrative, professional or other exemptions are not exempt** from overtime.

PREPARE OR BEWARE

Employers need to **review** their employee lists, **budget** for salary increases and/or increased overtime costs and consider **cost-saving measures**, such as reducing hours, hiring part-time hourly workers, converting salaried employees to hourly employees at a lower hourly rate, or considering independent contractors. (But remember: worker **misclassification** also occurs when **employees are treated as independent contractors.**)

Policies will need to be implemented/modified and strictly enforced to comply with overtime laws, control overtime hours worked, and maintain accurate record-keeping. Remember that Illinois employers must keep **time records on all employees (both exempt and nonexempt.)** But there are some "tricks" available to employers:

- The salary basis test will permit employers to **use non-discretionary bonuses and incentive payments** like commissions, to satisfy up to 10 percent of the salary threshold.

- The new rules **don't apply** to b**usiness owners**, certain c**omputer professionals, teachers**, licensed doctors and lawyers, or outside salespersons.

USE IT OR LOSE IT VACATION POLICIES BANNED BUT...

Many employers require employees to use their earned vacation time within a calendar year and prohibit carryover. The Illinois Department of Labor has decided that an employer cannot cause employees to "forfeit" earned vacation, so many employers must **modify** their **vacation policies** and employee handbooks to comply. But there is a lawful trick to achieve the same goal: a **rule capping the accumulation** of vacation hours. Once the employee reaches her maximum, she must use some vacation in order to continue accruing. Because this policy does not result in the "forfeiture" of earned vacation time, it complies with IDOL regulations.

HAVE FEAR: EMPLOYEE HANDBOOKS NOW ENFORCEABLE "AGREEMENTS"

IDOL has begun to **enforce employee handbooks** and other "agreements" despite the presence of disclaimers. Per IDOL regulation, now "the manifestation of mutual assent on the part of two or more persons" is all that is required for an enforceable "agreement." Employers can no longer rely on employee handbook disclaimers to defend against statutory wage claims. Whether this will allow employees to enforce other handbook policies through breach of contract claims remains to be seen.

BLOOD RELATIVES NOW PROTECTED BY VESSA

The Illinois **Victims Economic Security and Safety Act**, which previously applied to employers with at least 50 employees, now covers **employers with 15** or more. The statute provides employees who are victims of domestic or sexual violence unpaid leave (12 weeks/year for 50+ employers and 8 weeks for smaller employers.) The rights extend to a victim's family members, to others "jointly residing in the same household" as the victim, and to any person related by blood, by present or prior marriage, or who shares a relationship through a son or daughter.

TORTURE ENDS HERE: MANDATORY DIRECT DEPOSIT PROHIBITED

Another IDOL regulation restricts employers from requiring that employees enroll in direct deposit or accept wages through payroll cards. Direct deposit can only occur after the **employee voluntarily accepts** this form of payment and designates a bank or a financial institution." Similarly, payroll cards cannot be used absent the employee's voluntary written consent.

NEW WARNING LANGUAGE: SEVERANCE AGREEMENTS AND COBRA FORMS

Employers that **subsidize** all or a part of a terminated employee's **COBRA coverage** should consider providing **notice to terminating employees** that electing to receive subsidized COBRA coverage could **affect their ability to elect coverage** under the public health exchange or "Marketplace" established under the Affordable Care Act.

Specifically, if **subsidized coverage ends mid-year**, an individual generally **can't drop COBRA** coverage and enroll in cheaper coverage through the Marketplace **until January 1** of the following year. This is because an individual can only elect to elect medical benefits through the Marketplace (i) upon losing job-based coverage, (ii) during an "Open Enrollment" period (which typically begins in November and ends on January 31), or (iii) upon exhausting his or her eligibility for COBRA coverage (generally after 18 months). Those employers should consider **revising their COBRA or severance election forms** to alert severance eligible employees of the possible trap.

NDA'S AND NONCOMPETES – More Employee "Treats"

Lawmakers nationwide continue to expand employee protection from restrictive covenants. The federal Defend Trade Secrets Act requires that **agreements with confidentiality/trade secret provisions**

contain an immunity notice permitting trade secret disclosures to the government or in a legal complaint. Companies with current agreements signed by employees need not amend the agreements (and could face serious enforcement issues based on lack of legal "consideration" or something of value.) Instead, you can simply provide a supplemental notice to the employee referencing the agreement. If you are entering new agreements (or have templates for new or continuing employees), you will need to update these.

At the same time, a number of states are looking to untangle workers from noncompete agreements, which currently affect 30 million Americans — nearly one fifth of the nation's work force. California generally bans noncompetes altogether. Hawaii banned noncompete agreements for technology jobs and New Mexico prohibits noncompetes for health care workers.

Now, Illinois has gotten into the act, enacting the **Illinois Freedom to Work Act** to **outlaw** such agreements for **low-wage workers**. Effective January 1, 2017, employers are prohibited from entering into or enforcing such agreements with employees who earn $13 per hour or less (or the local, state or federal minimum wage if greater than $13.)

LINKEDIN PROFILES – KEEP CURRENT OR FACE PENALTIES

LinkedIn rules require that profiles be **truthful and current. Employers often monitor** the profiles of former employees, checking whether someone **continues to represent himself as a current employee** or **discloses confidential** employer or client information. Employers can send a cease and desist letter, demanding the former employee to remove the false information. If the conduct causes a severance agreement to be breached, the employee risks repaying the severance and other penalties. LinkedIn also has a process for complaints.

Employees should keep your profiles current. Not only will you **avoid risk with former employers** and LinkedIn, but **prospective employers** will appreciate that you have accurate information AND that you are respecting former employers.

ANNOUNCEMENTS

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- ✓ *I am happy to announce that I am a new* ***Presenter for HR Training Center.com****, a nationwide company providing training, education and certification to HR professionals.* ***Ask me*** *about attending the upcoming conference on* ***January 11-13, 2017,*** *when I will present the* ***HR Generalist seminar.***