

Winter 2006

Employment Law Update

In this Issue:

Misclassified Employee? Sort it Out Carefully
_____ Page 2

Supreme Court Ruling on Working Time Will Have Coast-to-Coast Impact
_____ Page 3

Revised USERRA Poster
_____ Page 3

6 Tips to Avoid Employer Liability in '06

This is the time of year when many of us consider New Year's resolutions. So why not consider some business-related resolutions. The following six tips might help avoid employer liability in '06:

1. Encourage effective communication among all employees. Sometimes employers forget that one of the most important components of communication is effective listening. Employees should be encouraged to raise concerns internally and employers should be open to listen.

If your company does not have an open-door policy or internal complaint procedure, consider implementing such policies. If you don't listen, sometimes employees who feel they cannot raise concerns with their employers become frustrated and take their complaints to an outside agency or attorney.

2. Stress consistency in all aspects of employment. The best defense against claims of discrimination is that all comparably situated employees are treated the same. Employers should make sure that any policy or practice is applied consistently, and remember that a policy that isn't followed, or is followed only some of the time, is worse than no policy at all.

3. Make sure that all employment decisions are appropriately documented. Even if an employer does all the right things, contested actions may ultimately need to be proven. Without proper documentation, an employee's claims before an outside agency or in court may present employers with a much greater risk of liability. Remember that challenges before the EEOC or in court may take place years after a decision is made. Memories fade, but documentation will allow an employer to "put its best foot forward" in defending against employment claims.

4. Train supervisors. The employer representatives most likely to make decisions that could lead to disciplinary action and subsequent complaints are front-line supervisors. Supervisors

should be trained on a number of employment topics, including applicable employment laws, company policies, how to handle employee complaints, documentation and communication techniques, and how to avoid workplace harassment. Not only should supervisors be trained when hired, but refresher training should be offered periodically.

5. Use common sense and don't react. Before disciplining or discharging an employee, take time to review the "big picture" to make sure that a decision is consistent with how similar situations have been handled in the past. Then, use common sense to avoid unnecessary legal risk. Note whether the employee is in a protected class and make sure you avoid discharging an employee at an inappropriate time like the day before a holiday, on his/her birthday, or the day he/she returns from protected leave.

6. Avoid overtime liability by properly classifying non-exempt and exempt employees. Lawsuits alleging wage-hour violations are becoming the favorite choice for lawyers who sue employers. With the recent FairPay regulations, all employers should make sure their employees are properly classified as either exempt or non-exempt. Remember that just because someone receives a salary does not automatically make that individual exempt from overtime. Also, be sure to keep records of precisely how much time non-exempt employees work in any work week.

Misclassified Employee? Sort it Out Carefully

On August 23, 2004, the Department of Labor's (DOL) new FairPay regs went into effect. These regs revised the "white-collar" exemption rules that apply to certain salaried, management, administrative, and professional employees as to eligibility for overtime compensation when they work more than 40 hours in a given work week. Opponents of these regs predicted that they would have the effect of exempting many more employees from overtime compensation. In fact, the FairPay regs appear to have had the effect of causing employers to reclassify more employees to non-exempt status, thus entitling more employees to overtime compensation.

Whatever the results, prudent employers are well-advised to examine how they have classified employees to make sure they are not in violation of the FairPay regs. The DOL is enforcing these rules, and lawyers who represent employees are regularly suing employers for violations. Mistakes made in classifying employees may lead to two or three years' backpay for entire categories of employees. Because mistakes can be very costly, care should be taken to understand and apply the new rules, reclassifying employees when appropriate.

Practical Pointer

To classify employees properly, employers should consider the following steps:

- 1. Double-check all facts relevant to making the classification decision.** These include the job duties performed by the worker, the employee's method of compensation, and the exemption rules that are being applied. If there is a misclassification, care should be taken to determine the various types of jobs that may be misclassified and the number of employees involved. Because the rules are somewhat technical, employers should not hesitate to obtain assistance from legal counsel.
- 2. Communicate precisely with employees regarding any change in their classification.** When informing an employee of a change, the employer should note that the DOL recently clarified certain exemption provisions and explain any changes in a non-defensive manner. The employer should not state that it made a mistake with earlier classifications, but should stress the employer's desire to take a conservative approach to ensure compliance with all wage-hour laws.
- 3. Consider the employee's viewpoint.** Even when employees may gain overtime-pay rights, the employer should be prepared for employees to resist any changes to their exempt status. Particularly with long-time exempt employees, there may be a view that a change amounts to a loss of prestige. Employers should be sensitive to such viewpoints and make sure employees understand that the employer is in no way devaluing their contribution but merely desires to comply with the legal rules.
- 4. Decide whether to pay backpay for past overtime.** Employers who discover exemption misclassifications may be liable for backpay of two or three years, depending upon whether the violation is "willful." However, this liability may depend upon many issues and may ultimately only attach following lengthy litigation. Many employers do not provide back-overtime pay when they reclassify employees, but that is a decision that should be made after carefully balancing the costs and benefits involved. This decision is complicated when former employees may be involved who are potentially entitled to backpay if they were employed during the prior two to three years.

COBRA Notice Mistake Costs Employer \$113,000

A recent Minnesota case emphasized the high cost of failure to document timely mailing of the COBRA election notice. In *Starr v. Metro Systems*, the employer could not prove that its standard procedures were followed regarding the sending of a timely COBRA notice. The HR Director could not specifically recall sending the notice to Mr. Starr and there was insufficient documentation to establish that the company followed its normal procedures – a defense that generally will absolve an employer from liability even if it is established that the notice was not received.

The employer in this case found that failure to follow COBRA's notice requirements can be extremely costly. The Court required Metro Systems to pay medical expenses incurred during the period Mr. Starr did not have COBRA coverage. In this case, damages exceeded \$113,000.

Practical Pointer

Most employers have procedures in place to provide COBRA notices on a timely basis. The lesson of this case is that employers should maintain paper and/or electronic records of the notice documents and mailing dates. Employers must be able to establish consistent application of their COBRA procedures.

Supreme Court Ruling on Working Time Will Have Coast-to-Coast Impact

In a case involving the Fair Labor Standards Act ("FLSA"), *IBP Inc. v. Alvarez*, the Supreme Court looked at what time would be compensable at the beginning and ending of the work day for production line employees in a meat and chicken packing plant. The employer contended that time spent donning protective clothing needed for these positions and for walking to the actual place of work in the morning was a "preliminary activity" and need not be compensated. Similarly, the employer contended that the time required to walk back to a changing area and the time to doff protective clothing was "postliminary" to work activity and also need not be paid. The employees at the plant contended that the donning of the protective clothing was an **"integral and indispensable portion of their work"** and was accordingly compensable under federal law.

The Supreme Court in *IBP, Inc.* ruled in favor of the employees. The Court agreed with their argument that donning protective clothing was a principal activity. Therefore, that time and the time spent walking from the changing room to the production line was compensable. Following this analysis, the time spent walking back to the changing room in the evening as well as the time spent changing clothes was also compensable.

Employers in many other industries and workplaces may have a beef about this fowl ruling. The Court's rationale may affect virtually any workplace where employees must perform some routine, preparatory activity prior to actually beginning productive work. Similarly, time spent after shut down getting ready to leave or tidying up a workplace so that it will be ready the following morning may also be considered compensable.

Revised USERRA Poster

Effective January 18, 2006, the Department of Labor has revised the poster for providing notice to persons entitled to rights and benefits under the Uniformed Services Employment and Reemployment Rights Act of their rights, benefits, and the obligations of such persons and such employers under USERRA. Different posters are now available for private sector and state government employers and for federal executive agencies. The posters are available at www.dol.gov/vets/programs/userra/. Employer representatives may also obtain a copy of these new posters by attending the 22nd Annual Employment Law Update, sponsored by Kaufman & Canoles, on March 23, 2006, at the Greater Richmond Convention Center.

2006 *On the Job*: Supervisory Training Clinic

The *On the Job*: Supervisory Training Clinic is back. This clinic is designed to provide focused training for supervisors. Our 2006 Clinic series features three topics: Employee Time Management & Compensation Issues for Supervisors, Effective Employee Communication and Documentation Strategies, and Workplace Harassment Refresher. These topics will be presented on a variety of dates in Norfolk and Richmond. The first showing will be held February 16, 2006, at the Norfolk offices of Kaufman & Canoles. For further information, please contact Nicole Naidyhorski at 624-3232 or visit www.kaufmanandcanoles.com.

22nd Annual Employment Law Update: *Rules of the Game*

Last November, the K&C Employment Law team held the first showing of the 22nd Annual Employment Law Update at the Chesapeake Conference Center. This year's game show theme features K&C's very own game, The Prize is Right! A special thank you to all of our contestants, drawn randomly from our Update audience, for their cooperation and sense of humor. A special congratulations to our Showcase Showdown winner, David Campbell of the NRHA, who won a combined prize package worth over \$350. The next showing of the 22nd Annual Employment Law Update is scheduled for March 23, 2006, at the Greater Richmond Convention Center from 8:30 a.m. – 4:45 p.m. Reserve your seat now! For more information or to register, please contact Nicole Naidyhorski at (757) 624-3232.

This program has been approved for 5 credit hours toward PHR and SPHR recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI homepage at www.hrci.org.



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Inside This Issue

- 6 Tips to Avoid Liability in '06
- 22nd Annual Employment Law Update
- Supreme Court Ruling on Working Time Will Have Coast-to-Coast Impact
- COBRA Notice Mistake Costs Employer \$113,000

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