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Employment Law Newsletter

HEALTH CARE REFORM: WHAT IT MEANS FOR EMPLOYERS

By: Philip M. Keating

The Patient Protection and Affordable Care Act, otherwise known as the health reform bill, was signed in to law by President Obama on March 23, 2010. The provisions of the law will be implemented in stages over the next few years and many of them directly impact employers.

Starting 90 days from the date of enactment, individuals who presently lack insurance due to preexisting conditions will be eligible to participate in high risk pools. In 6 months, insurers will be barred from denying coverage to individuals when they get sick, denying coverage to children who have pre-existing conditions, and from imposing lifetime caps on coverage. In addition, insurers must allow young people to remain on the policies of their parents until age 26. New plans must provide coverage for preventive services without co-pays (all plans must do so by 2018). Finally, businesses with fewer than 50 employees will receive tax credits equal to 35 percent of the cost of health care premiums. This tax credit increases to 50 percent by 2014.

In 2012, procedures will be created to allow small businesses to offer tax free benefits. Obviously the details need to be worked out on this matter.

The most direct impacts on employers under the health reform law become effective in 2014 at which time most employers will be required to provide insurance coverage to their employees. Specifically, employers with 50 or more employees must offer coverage to employees. Employers who do not provide insurance coverage or who provide what would be considered inadequate coverage will be required to pay penalties of $2,000 or $3,000 per employee, depending on the precise factual situation, after their first 30 employees. The mandate requiring individuals to obtain health insurance also becomes effective in 2014. Furthermore, the health insurance exchanges will open in each state and be available to small employers.

In 2018, the tax on so called "Cadillac" plans become effective. This tax will be imposed on employer provided health plans valued at more than $10,200 for single coverage and $27,500 for family coverage.

The changes in health care insurance undoubtedly will be a major topic in coming months and years. We will provide more detailed information in future issues of the Employment Law Newsletter about employer specific provisions as more details become known.

If you have any questions concerning these issues, please contact Philip Keating at pkeating@beankinney.com.

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U.S. Department of Labor Rules That Mortgage Loan Officers Are Non-Exempt and Should Receive Overtime Pay
By: Philip M. Keating

The Wage Hour Division of the U.S. Department of Labor (DOL) reversed course and ruled on March 24, 2010 that mortgage loan officers do not qualify for the administrative exemption to overtime under the Fair Labor Standards Act (FLSA). In so doing, the DOL overruled and withdrew two prior decisions, one in 2001 and one in 2006, granting the overtime exemption. As a result of this ruling, it is the position of the DOL that mortgage loan officers should receive overtime compensation at one and one half times their regular rate of pay for all hours worked over 40 in a week.

The way the FLSA is structured is that all employees are presumed to be entitled to overtime unless they fit into one of the several overtime exemptions, which are the executive, administrative, professional, computer employee, and outside sales exemptions. There also is a highly compensated employee exemption that involves individuals performing office or non-manual work who earn $100,000 or more, but who receive at least $455 per week on a salary or fee basis. Each of these exemptions has a series of tests that must be satisfied in order for the exemption to be applicable. The burden is on the employer to prove the applicability of the exemption.

The DOL decision on mortgage loan officers involves the administrative exemption which requires the following: (1) that the employee be compensated on a salary or fee basis of at least $455 per week; (2) that the employee's primary duty be the performance of office of non-manual work directly related to the management of general business operations of the employer or the employer's customers; and, (3) that the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. The DOL decision focused on the second factor.

The DOL decision concluded as follows: "... a careful examination of the law as applied to the mortgage loan officers' duties demonstrates that their primary duty is making sales and, therefore, mortgage loan officers perform the production work of the employers. Work such as collecting financial information, entering it into the computer program to determine what particular loan products might be available to that customer, and explaining the terms of the available options and the pros and cons of each option, so that a sale can be made, constitutes the production work of an employer engaged in selling or brokering mortgage loan products. Such duties do not relate to the internal management or general business operations of the company ..." U.S. Department of Labor, Wage and Hour Division, Administrator's Interpretation 2010-1.

In a footnote to the decision, the DOL states that the decision " ... applies to employees who spend the majority of their time working inside their employer's place of business, including employees who work in offices located in their homes, rather than mortgage officers who are customarily and regularly engaged away from their employer's place of business. " U.S. Department of Labor, Wage and Hour Division, Administrator's Interpretation 2010-1, footnote 1. This opens the possibility that the outside sales exemption may be available provided the employee is in fact "customarily and regularly engaged away from the employer's place or place's of business."

A second possible solution, albeit one that is the subject of federal litigation all over the United States, is an exemption for retail or service employees whose regular rate of pay is greater than one and one-half times the minimum wage and who receive more than half of their compensation by commission. The difficulty is that traditionally the DOL has taken the position "... that a variety of financial institutions such as banks (both commercial and savings), personal loan companies, trust companies, building and loan associations, and insurance companies were not within the scope of the exemption for retail or service establishments." In re Wells Fargo Home Mortgage Overtime Pay Litigation, 2008 U.S. Dist LEXIS 46595, 156 Lab. Cas (CCH) P35, 447 (N.D. CA 2008). This conclusion has continued to be the prevailing opinion in courts, but remains an area of significant litigation due to the changing nature of the financial services industries.

At a minimum, employers with mortgage loan officers need to review the compensation plan under which they are operating and determine whether changes need to be made. The risk of doing nothing is that if it is determined that the mortgage loan officers are in fact entitled to overtime, the law allows them to go back two years and will award double compensation for the half time that should have been paid for all hours worked over 40 in a week. The amount of the award and the length of time for back pay may be increased if it is proven the employer acted willfully. Finally, and this is a major incentive for the filing of law suits, the law awards attorney's fees to the plaintiff's attorneys to be paid by the employer.

Please contact Philip Keating at pkeating@beankinney.com if you have any questions on these matters.

Government Agencies Investigating Independent Contractor Designations
By: Philip M. Keating

Partly due to the need for increased tax revenues and partly as a result of an enhanced regulatory environment, government agencies on the federal and state level are aggressively investigating whether individuals classified as independent contractors should in fact be considered employees. There are obvious tax implications to this distinction, as employers are required to pay social security, unemployment and other taxes for employees. In addition, workers compensation insurance

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coverage must be provided for employees.

For many years, the Internal Revenue Service ("IRS") utilized what was known as the "Twenty Factor" test to make the independent contractor versus employee determination. Those twenty factors have been reformulated and now are an eleven point list of factors that are explained in detail in IRS Publication 15-A. http://www.irs.gov/pub/irs-pdf/p15a.pdf These eleven factors are the following:

Behavioral Control

- Instructions the business gives the worker. The more the business provides instruction to the individual about where, when and how to do the work, the more likely the individual is an employee. According to the IRS, "the key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right."

- The amount of training the business gives the worker. Employees may receive training as to how to perform a job. Independent contractors typically use their own methods.

Financial Control

- The extent to which the worker has unreimbursed business expenses. Independent contractors typically are responsible for their own expenses.

- The extent of a worker's investment. Employee's generally have no investment in the work other than their own time. Independent contractors frequently have significant investments in equipment and facilities.

- The extent to which the worker makes services available to the relevant market. Independent contractors typically are free to sell the services as they see fit in the market.

- How the business pays the worker. Employees generally receive a regular wage, whether hourly or salary, and are paid at set times (weekly, twice a month, etc.). Independent contractors generally are paid a flat fee for a job.

- The extent to which the worker can realize a profit or loss. Employees generally do not have the opportunity to make a profit or loss on a given job.

Type of Relationship

- Written contracts describing the relationship the parties intended to create. The actual working relationship is what actually matters. But a well drafted independent contractor agreement is helpful.

- Whether the business provides the worker with employee type benefits, such as insurance, pension, vacation pay, or sick pay.

- The permanency of the relationship. If the relationship appears to be enduring or indefinite, it more likely will be consider that of an employer-employee.

- The extent to which the services performed by the worker are a key aspect of the regular business of the company. The example used is that of a law firm hiring an attorney. In that case, the provision of legal services is the primary service provided by the business and it is more likely that the business will control key details of the individuals work.

As stated above, the improper classification of an individual as an independent contractor can have serious consequences for a business. These obviously include the payment of back taxes, but also could include back wages for violation of wage-hour laws, liability under the Immigration Reform and Control Act (IRCA) for I-9 violations, and liability under employment laws such as the various discrimination statutes.

Businesses should review their existing independent contractor relationships and be certain that they satisfy the existing standards as set forth by the IRS. In addition, businesses should be certain they utilize appropriate and effective independent contractor agreements.

Please contact Philip Keating at pkeating@beankinney.com if you have any questions about this issue.

REFERENCE CHECKS STILL CAUSE TROUBLE FOR EMPLOYERS

By: Philip M. Keating

A recently filed lawsuit in Massachusetts reminds employers of the peril in responding to reference checks or making any comments to the potential future employers of current or past employees. The Massachusetts case involves a former vice president of Dunkin Donuts who left his employment in 2007. The separation from employment was accompanied by a severance agreement that included confidentiality provisions.

The former employee alleges in his law suit that high level executives at Dunkin Donuts told prospective employers that the former employee was involved with "excessive drinking, inappropriate conduct with female employees, chronic inability to meet deadlines, and a misleading and dishonest character." Obviously the former employee did not obtain the

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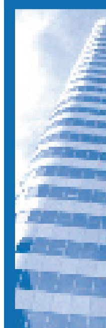

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positions he was seeking.

Whether or not the allegations are true, the lesson for employers is that they need to provide a very limited amount of information about former employees. Specifically, our advice is that employers only confirm that the individual was employed, the position held, and the dates of employment. Employers should not answer questions such as whether the individual is eligible for rehire. It also is important that reference checks be directed to a designated person in the company, such as a Human Resources Manager. Insofar as Employers can be liable for statements of other members of management, company personnel need to be educated about the reference check policy.

If you have any questions concerning these issues, please contact Philip Keating at pkeating@beankinney.com.

This newsletter was prepared by Bean, Kinney & Korman, P.C. as a service to clients and friends of the firm. The purpose of this newsletter is to provide a general review of current issues. It is not intended as a source of specific legal advice. © Bean, Kinney & Korman, P.C. 2009.

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