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Employment Law Updates: What's Hot for 2016

July 14, 2016

Presented by: Jason Kearnaghan

Overview

- EEOC Activity
- Minimum Salary Test
- Employee v. Independent Contractor
- Email Spoofing
- NLRB Activity

EEO-1 REPORTING

EEO-1 Reports

- Covered employers must file an annual EEO-1 report, containing employment data categorized by job category, gender, and race/ethnicity
- The EEOC has proposed a rule to change the EEO-1 reports to include wage data (to identify potential discrimination) for 12 different “pay bands,” beginning with the September 2017 report
- The EEOC has a “Questions and Answers” page online
- A proposed version of the new form is available on its website at www.eeoc.gov

EEO-1 Reports

- Takeaways:
 - If implemented, employers should audit pay structures and analyze any pay differences that may be flagged in their EEO-1 report

EEOC INVESTIGATIONS

EEOC Investigations

- Recent changes to EEOC investigation procedures
- Old system: position statement procedures were set by each EEOC District Office
- New system: nationwide procedure for all position statements requested on or after January 1, 2016

EEOC Investigations

- Key Changes:
 - At the time a Charge is filed, the Charging Party is advised that they may request a copy of the employer's position statement
 - Charging Party may submit a verbal or written response to the position statement within 20 days of receipt
 - Employer is *not* given a copy of the response
 - The EEOC may request additional evidence from the employer based on the Charging Party's response

EEOC Investigations

- Strategic Considerations:
 - Employers should carefully consider any statements that are made in a position statement
 - Refrain from sharing non-essential information
 - Position statement may preview an employer's strategy for subsequent civil litigation
 - Plaintiffs may use this information to tailor civil complaints and circumvent or defeat anticipated defenses

EEOC Investigations

- Confidential Information:
 - Employers may provide confidential information to the EEOC in a *separate attachment*, but must justify the need to segregate information
 - The EEOC will not produce and/or will redact confidential information before providing information to the Charging Party
 - Employers may wish to provide a “redacted version” of evidence as an added precaution

EEOC Investigations

- Takeaways:
 - The EEOC is expected to be more active in its investigations and enforcement
 - Litigating against the EEOC may be significantly different from defending claims brought by an individual
 - Retain experienced labor counsel to assist in preparing position statements
 - Provide a concise and well-supported position statement, while keeping extraneous/confidential information to a minimum

WELLNESS PROGRAMS

Wellness Programs

- Title II of the Genetic Information Nondiscrimination Act of 2008 (“GINA”), which prohibits genetic information discrimination in employment, took effect on November 21, 2009
- Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information

Wellness Programs

- In October 2015, the EEOC announced that it was issuing a proposed rule to amend the regulations
- The goal was to seek a balance between the Affordable Care Act's encouragement of workplace wellness programs and GINA

Wellness Programs

- The proposed regulations would permit employees to provide certain health information about a spouse's current or past health status in exchange for various financial and other incentives as part of employer wellness programs

Wellness Programs

- More than 90 individuals and organizations, including senators, advocates for persons with disabilities and groups representing employers and health benefit plan administrators, submitted comments on the GINA proposal during a public comment period that ended January 28, 2016
- The EEOC issued final rules regarding wellness plan incentives under GINA and the Americans with Disabilities Act on May 16, 2016, which will take effect in 2017

Wellness Programs

- Takeaways:
 - Employers should review their wellness programs and ensure compliance with the new rules

MINIMUM SALARY TEST

Minimum Salary Test

- The FLSA guarantees minimum wages and overtime pay for non-exempt employees
- To qualify for certain exemptions, employees must meet minimum duties tests and be paid on a salaried basis no less than a specified minimum amount
- Since 2004, the standard salary level for federal exemption has been \$455 a week, which is \$23,660 per year

Minimum Salary Test

- The increase for federal minimum salary test:
 - From \$455 to \$913 per week/\$47,476 per yer
 - From \$100,000 to \$134,004 per year for “highly compensated employees”
 - December 1, 2016 implementation date

Minimum Salary Test

- Takeaways:
 - The proposed change would greatly affect employers with low-paid exempt employees
 - Employers should review the new rule, and raise the minimum salary if required

**EMPLOYEE
MISCLASSIFICATION**

Independent Contractor or Employee?

- Still a widespread phenomenon
 - Not considered employees when hired to perform a service
 - Often seen in a consultant capacity
- Financial advantages to company
 - Reported on IRS Form 1099
 - No tax withholding, Medicare/Social Security contributions or unemployment/workers' compensation premiums
 - Employee benefits not extended to independent contractors

Independent Contractor or Employee?

- The financial advantages gained can be eliminated due to employee misclassification and the litigation costs, fines and penalties

Independent Contractor or Employee?

- DOL (Wage and Hour Division) is working with the IRS
- Entered into partnerships with 30 states
 - Sharing information
 - Coordinated enforcement
 - Fiscal Year 2015: 102,000 workers received \$74 million in back wages

Independent Contractor or Employee?

- IRS Test: Looks at a number of factors that fall into the three following categories:
 - Behavioral
 - Financial
 - Type of Relationship

Independent Contractor or Employee?

- DOL Economic Reality Test:
 - The extent to which the services rendered are an integral part of the principal business
 - The permanency of the relationship
 - The amount of the contractor's investment in facilities and equipment
 - The nature and degree of control
 - The contractor's opportunities for profit and loss
 - The amount of initiative, judgment or foresight in open market competition
 - The degree of independent business organization and operation

Independent Contractor or Employee?

- Avoid misclassification issues:
 - Conduct an audit/assessment of independent contractor positions
 - Analyze the employer's right to control
 - Reclassify and make whole

EMAIL SPOOFING

Email Spoofing

- Email spoofing is the creation of email messages with a forged sender address
- For employers, this means the message will appear to have originated from inside the company
- Cyber criminals often use email spoofing to obtain confidential employee information, such as Social Security numbers and W-2 forms
- Email recipients are deceived into disclosing protected information, which is then used to submit employees' tax returns to the IRS, transferring company funds into irretrievable accounts, etc.

Email Spoofing

- Many employers are investing in innovative information security technologies
- But even sophisticated technology can be defeated where an employee is fooled into transferring company files, money, or passwords
- Information Security is every employee's responsibility

Email Spoofing

- Takeaways:
 - Educating employees about the risks of email spoofing is essential to prevent an information breach
 - Create and enforce policies and protocols related to the transfer of important company information in order to protect yourself from phishing and spoofing scams

**NLRB HANDBOOK
CHALLENGES**

NLRB Handbook Challenges

- March 18, 2015: Memorandum GC 15-04
- Targeted handbook policies
- Stated purpose was to protect Section 7 rights
- Impacts union and non-union workplaces

NLRB Handbook Challenges

- Non-disparagement provisions
- Confidentiality provisions
- Employee conduct provisions
- Media contact
- Photographs and recordings
- Use of logos/trademarks
- Walk-outs

NLRB Handbook Challenges

- April 13, 2016 decision William Beaumont Hospital
- Affirmed 2004 decision in Lutheran Heritage Village, which rendered in part work rules and handbook provisions unlawful if employees would “reasonably construe” them to prohibit Section 7 activities
- Dissent: NLRB should start considering employers’ justifications for implementing rules as part of the test to determine if valid

NLRB Handbook Challenges

Takeaways:

- Audit handbooks to ensure NLRA compliance
- Revise policies that:
 - Restrict employees from discussing wages, labor violations and other terms/conditions of employment
 - Limit employees' rights to be critical of supervisors/management
 - Explain purpose of the policy

NLRB PROTECTED ACTIVITY

Protected Activity

- Staffing Network Holdings, LLC v. NLRB, 7th Circuit, March 2016
 - Supervisor told employees to work more quickly
 - One employee responded that he could not work any faster for \$8.25/hour
 - Supervisor sent him home because of his attitude and because he was not keeping up with his work
 - Other employees reacted and confronted the supervisor, protesting the action, stating it was unfair and the employee was new

Protected Activity

- Supervisor responded that it was not their concern and to return to work or they would also be sent home
- One employee continued to protest, so the supervisor stated he would send her home if she had an issue
- Other employees came to her defense and she stated that she knew her rights
- Supervisor instructed her to leave but she refused, with other employees again coming to her defense

Protected Activity

- She ultimately left when the supervisor stated that security would escort her out
- She assumed she had been terminated and filed an unfair practice charge with the NLRB
- Employer argued that it acted lawfully due to the employee's insubordination, claiming employee used abusive language and embarrassed the supervisor in front of other employees
- ALJ and NLRB rejected these arguments

Protected Activity

- Court stated that brief, on-the-job work-stoppage is a form of economic pressure protected by the NLRA, and found that the employee was terminated because of the *protected, concerted activity* of protesting her supervisor's dismissal of the first employee
- The Court upheld the NLRB's order that the employer must offer reinstatement to the employee and make her whole for lost wages
- The Seventh Circuit upheld the decision

Protected Activity

- Takeaways:
 - Remember that non-union employees are protected by the NLRA
 - Train management how to avoid inciting this type of insurgence
 - An employee's bad attitude when participating in protected activities is often protected, unless there is a safety risk or violation of the law



Any Questions?

Thank you for attending!

Contact Information:

Jason Kearnaghan

213.617.5516

jkearnaghan@sheppardmullin.com



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