masuda funai

News & Types: Employment, Labor & Benefits Update

Employment, Labor & Benefits Update - December 2015

12/8/2015

Practices: Employment, Labor & Benefits

EMPLOYMENT – OVERTIME RULE TO BE FINALIZED IN JULY 2016
By Frank J. Del Barto

In August 2015, we reported that the U.S. Department of Labor ("DOL") issued a Proposed Rule that seeks to increase the salary level required before an employee can be considered exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act ("FLSA"). The DOL received over 250,000 comments on the impact of the Proposed Rule from various stakeholders. Last week, the DOL indicated that the Final Rule will be issued in July 2016.

Under current regulations, an exempt employee must be paid at least a minimum salary of $455 per week / $23,660 per year. In contrast to the lower salary-level, the Proposed Rule seeks to raise the minimum salary level for an exempt employee from $455 per week / $23,660 per year to $970 per week / $50,440 per year. The Proposed Rule also provides a mechanism to automatically update this minimum salary level on an annual basis using either a fixed percentile of wages or the Consumer Price Index. Assuming the Proposed Rule is adopted as written, unless an employee earns $970 per week / $50,440 per year, employers must classify the employee as a non-exempt employee and pay him or her overtime pay for all hours worked in excess of forty in a given workweek.

With time to plan before the Final Rule is released in July 2016, all employers should (1) identify all positions classified as exempt on the organizational chart and be prepared to begin paying these employees overtime pay or adjust their salaries to meet the new salary level, (2) review all timekeeping procedures to ensure that formerly exempt employees now record their time on a daily basis, (3) review all off-the-clock time and travel time requirements for newly non-exempt employees, and (4) consider how to communicate these changes to employees who feel that they are "professionals" who have "earned" the designation "exempt employee" because of their education, training, or experience.

LABOR – EMPLOYMENT POLICIES THAT SINK THE SHIP OF STATE
By Alan M. Kaplan

Does a company's confidentiality provision or agreement mention personnel documents? Does the employee handbook prohibit employees from talking about their working conditions? Does the company prohibit solicitations and distributions during working hours?

Does the company terminate employees for violating these rules? If the answer to any of the above questions is yes, a company's risks include reinstatement and back pay if one of its employees files a legal action against it.

The start of a new year is the perfect time to set a human resource professional's goals for the company. Now is the time to have the annual review of the employee handbook and ensure that the policies are not unlawful. One of those goals should include a review of the company's employee handbook with respect to the National Labor Relations Act ("NLRA").

Besides the EEOC and OSHA, the National Labor Relations Board ("NLRB") continues to speak loudly. Section 7 of the NLRA protects employees' right to support and participate in a union as well as their right to act together to try to improve their pay or working conditions. This latter is called "protected, concerted activity," and it is a right that can be exercised with or without union representation. Thus, the NLRB, the government agency charged with enforcing the NLRA, may have jurisdiction over almost all companies in the United States regardless of whether a company's employees are represented by a union or not. Further, lawyers that represent employees are smart enough to file actions in a number of forums in an effort to recover lost wages and damages for current and former employees. If a rule of the company is deemed unlawful, disciplining or terminating an employee for violating that rule is also unlawful, and the company will have to pay the price for its mistake. In the light of the above, human resource professionals should review and be aware of potential legal ramifications of provisions in their employee handbooks and take action to mitigate the liability that their companies may face under the NLRA.

What are some problematic provisions that employment lawyers encounter in employee handbooks and that they are forced to defend? The following are examples of language in employee handbooks that may lead a company to trouble:

1. "Confidential information includes proprietary trade secrets and information about customers, vendors and employees."

This rule is unlawful, because it is overly broad. By using the word "employees," the company is prohibiting employees from talking about their wages, benefits and working conditions. When employees are unsure how to interpret a handbook's provision, the provision interferes with, coerces, and restrains their rights.

2. "Employees should respect their supervisors."

This rule is unlawful. If an employee talks about her supervisor to other employees, the employee may well be talking about her working conditions. For example, these working conditions may include how a supervisor delegates assignments. Complaints are concerted, protected activity because they may encourage activities by two or more employees to take action about those working conditions.

3. "Employees should not solicit other employees or distribute materials during working hours."

This provision is unlawful. The NLRB makes a distinction between "working hours" and "working time." Working hours are the hours that a company is open for business. Although a company may require an employee to be present at the company during "working hours," the employee works during "working time." During non-working time — lunch, breaks and before and after work — employees are not working. During these times, employees have the to solicit other employees for contributions to charitable organizations. If an employee has the right to solicit donations for a charitable organization, a company may not discriminate and must allow solicitations for unions and all other organizations. Exceptions may apply, however, in hospitals and nursing homes, where the circumstances are much different than those in offices, sales organizations and manufacturing environments.

4. "Employees may not discuss company matters with the news media and must direct all media inquiries to the Marketing Department.

By using the words "company matters," employees may interpret this policy as prohibiting them from discussing their wages, hours and working conditions with the media. Such a broad restriction violates an employee's right to encourage other employees to join a group effort to improve their working conditions. The language interferes with, coerces and restrains employees.

These are just a small number of examples. Each year, every human resource professional should become familiar with the latest legal decisions affecting the policies stated in their employee handbooks. When disciplining or terminating an employee, the human resource professional's risk analysis must include all possible claims an employee may bring, including whether the adverse action is based upon an unlawful policy in an employee handbook.

Mr. Kaplan is a member of the American Bar Association's Subcommittee on Practice and Procedure before the National Labor Relations Board.

BENEFITS– END OF YEAR POTPOURRI
By Frank J . Del Barto

ACA Reporting: Subject to certain 2015 transition relief, beginning in 2015, all employers who employ at least 50 full-time employees (or a combination of full-time and part-time employees that is equivalent to 50 full-time employees) will be subject to the ACA Employer Shared Responsibility (the "ESR") provisions under Section 4980H of the Internal Revenue Code (the "Code"). An employer that employs 50 full-time employees is referred to as an "applicable large employer" ("ALE"). It is important to note that companies with a common owner or that are related pursuant to the rules under Section 414 of the Code (the controlled group rules) are generally combined and treated as a single employer for determining ALE status. Therefore, if the combined number of full-time employees and full-time-equivalent employees of a controlled group is large enough to meet the definition of an ALE, then each employer that is part of the group (an "ALE member") is subject to the ESR provisions of the Code, even if the employer would not, on a stand-alone basis, be an ALE.

An ALE member will be liable for an ESR payment if either (a) the ALE member does not offer health care coverage or offers health care coverage to fewer than 95% of its full-time employees and their dependents (70% of full-time employees and their dependents in 2015) and at least one employee receives a premium tax credit to help pay for coverage on a Marketplace, or (b) the ALE member offers health care coverage to 95% of its full-time employees and their dependents (70% of full-time employees and their dependents in 2015) but the coverage offered is considered unaffordable to the employee or it did not provide minimum value and the employee receives a premium tax credit to help pay for coverage on a Marketplace.

Under special transition relief available for 2015, no ESR payment under section 4980H(a) or (b) will apply for any calendar month during 2015. If the employer has a non-calendar-year plan, no ESR payment will apply for the portion of the 2015 plan year that falls in 2016 that the employer is an ALE or is part of a controlled group that had at least 50 to but fewer than 100 (50 to 99) full-time employees, including full-time equivalent employees.

In order to enforce the ESR payment provisions, ALE members are required to provide certain informational reports to the IRS and employees in early 2016. For 2015, if an employer had between 50-99 full-time employees (including full-time equivalent employees), the ESR mandate and penalties do not apply under special one-time 2015 transition relief. However, employers of 50-99 employees must still comply with the reporting requirements under Code Section 6056 summarized above and Code Section 6055 (if the group health plan is self-insured). After 2016, the special transition relief will expire and these employers will be subject to the ESR mandate and penalties, and will continue to be subject to the reporting requirements under Code Section 6056 and Code Section 6055 (if the group health plan is self-insured).

For 2015, if an employer had 100 or more full-time employees (including full-time equivalent employees), the ESR mandate, the reporting requirements under Section 6056 and the reporting requirements under Code Section 6055 (if the group health plan is self-insured), as well as the penalties for failure to comply as mentioned above will all apply to the employer and to each member of the controlled group of corporations (if applicable).

Boeing settles 401(k) fee lawsuit for $57 million: In 2006, plan participants sued Boeing alleging that plan fiduciaries breached their fiduciary duty to participants by causing the plan to pay excessive fees, thereby reducing their potential investment returns. After nine years of litigation, the parties submitted a motion with the court to approve the class settlement for $57 million. As we have discussed many times in this forum and during our annual seminars, all plan sponsors should review their 401(k) plans (administration, investments, fees, and expenses) on a regular basis and document all actions taken regarding the plan. Moreover, because 401(k) plan expenses and fees are often difficult to measure and benchmark, we often recommend that an outside plan consultant be retained by asset plan sponsors to evaluate the plan and to help reduce the risk of any breach of fiduciary duty claims by participants or former participants.

Disability Benefits – DOL Issues Proposed Amendments to Claim Procedures

The DOL issued a Notice of Proposed Rulemaking for plans providing disability benefits under ERISA. Noting the fact that current regulations governing the processing of disability claims and appeals were published 15 years ago, the constant litigation of such claims, and the advancements in claims processing technology, the DOL elected to revisit and revise these regulations to ensure that claimants receive a fair review of any denied claim. Many of the proposed enhancements mirror those claims and appeal guidelines previously adopted for claimants under the ACA which were intended to ensure independence and impartiality of the claims examiners and improve the disclosures made to claimants so that they understand exactly why their claim was denied.

For more information about this or any other employment law topic, please contact Frank Del Barto, Chair of the Employment, Labor & Benefits Group, at 847.734.8811 or via email at fdelbarto@masudafunai.com.