Law Offices of

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EMPLOYMENT LAW MATTERS

Welcome!

Welcome to my first newsletter! Despite the title, this is not a review of the 1986 movie with John Cusack, Demi Moore and Bobcat Goldthwait where they steal Teddy's engine to win the sailboat regatta. We are here to talk about the major developments over the summer addressing employment law and how they may shape employment decisions moving forward. From interns, to independent contractors, to exemptions, the summer seemed to have it all! So let's start summarizing some of these developments …

Salary Basis Test Doubled For White Collar Exemption

One of the major changes that hit the employment landscape this summer was the United States Department of Labor's (the "DOL") proposed rule change for the "white collar" exemptions (i.e. the executive, administrative, professional and highly-compensated employee exemptions) under the Fair Labor Standards Act (the "FLSA"). On June 30, 2015, the DOL published its proposed rule change, which seeks to more than double the salary that white collar employees must receive in order to be exempt, from $455 per week (or $23,660 per year) to about $970 per week (or $50,440 per year) in 2016. This is based on the DOL's finding that this increase "at the 40th percentile of weekly earnings for full-time salaried workers represents the most appropriate line of demarcation between exempt and nonexempt employees." With the change, the DOL is not looking to fall behind again and constantly come up with a salary level to meet by implementing a new rule each year. Instead, the proposal seeks to establish a mechanism for automatically updating the salary levels on a going forward basis (such as using a consumer price index or fixed percentile of wages). Finally, the proposal also increases the salary for highly compensated employees from $100,000 to about $122,000 in 2016.

The rule is not yet final, with comments to the rule due by September 4, 2016. Absent additional changes to the rule, the proposal in its current form would not affect the current duties test for the exemptions (which vary from exemption to exemption).

With the implementation of the new rule, for those properly classified exempt employees who fall below the new salary threshold, employers are going to have to decide whether they want to convert those employees to hourly or increase their salaries to keep up with the minimums.

Most Independent Contractors Are Not Independent Contractors

On July 15, 2015, the DOL issued an Administrative Interpretation Memorandum stating that most workers are "employees" under the FLSA, meaning that companies who classify workers as independent contractors should be very careful to ensure that such workers are properly classified. Often, both the worker and employer will come to an agreement that the worker will be classified as an independent contractor, which allows the worker to control payment of his/her taxes while also allowing the employer to avoid certain obligations, such as minimum wage, unemployment insurance and worker's compensation. However, if misclassified, the penalties an employer faces can become insurmountable, as employees can go back three (3) years under the FLSA (and six (6) years under New York Labor Law) to try and recover unpaid minimum and overtime wages, which will be difficult to defeat if there are no contemporaneous time records.

The memorandum states that a true independent contractor relationship exists only if the worker is not economically dependent on the employer, but is "in business for him or herself." The "economic realities" test contains factors to determine if an independent contractor is properly classified as such, which include: (i) whether the work performed is an integral part of the employer's business; (ii) whether the worker's managerial affect the worker's opportunity for profit or loss; (iii) the worker's relative investment compared to the employer's investment; (iv) whether the work requires special skill and initiative; (v) the duration of the relationship between the worker and employer (whether permanent or indefinite); and (vi) the degree of control exercised by the employer over the worker. Surprisingly, although the degree of control exercised over the worker was the focus of misclassification cases in recent years, the DOL de-emphasized this factor in the memorandum, with the primary inquiry being the "suffer or permit to work" definition in the FLSA. The memorandum acknowledges that this is extremely broad and, thus, is more likely to make a worker an "employee" rather than independent contractor.

The DOL guidance should serve as a wake-up call to employers who use independent contractors to perform work as it is clear that this area is one that the DOL will prosecute and punish employers who misclassify their workers.

Interns – Who Is The Primary Beneficiary?

On July 2, 2015, the United States Court for the Second Circuit issued a decision on two consolidated intern cases for appeal - *Glatt v. Fox Searchlight Pictures* and *Wang v. The Hearst Corporation*. The cases involved the issue of when an unpaid intern becomes an "employee" under the FLSA and New York Labor Law.

The Second Circuit rejected the "rigid" six-factor test previously laid out by the DOL in favor of a "primary beneficiary" test. With this new test, the Second Circuit identified seven non-exclusive factors for courts to consider in determining whether the individual truly qualified as an intern, which include: (i) whether there is a clear understanding that there is no expectation of compensation between the parties; (ii) whether the internship provides training similar to that which would be given in an educational environment; (iii) whether the internship is tied to the intern's formal education program by including integrated coursework or providing academic credit; (iv) whether the internship corresponds with the academic calendar and if accommodations are provided to the intern's academic commitments; (v) whether the internship's duration is limited to the period in which the intern is provided with beneficial learning; (vi) whether the intern's work complements, rather than displaces the work of paid employees; and (vii) whether the parties understand there is no entitlement to a paid job at the conclusion of the program. No single factor is dispositive and they call must be balanced when deciding the issue of intern or employee.

The "primary beneficiary" test is very helpful in advancing the interests of those seeking work-related experience while going through schooling. Employers who truly wish to provide a learning experience in a work environment

no longer have to fear class actions from interns who claim they are employees, while interns are still protected from being exploited by companies who are simply looking for free labor.

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