

February 2015

Six Employment Law Issues to Watch in 2015

Several legal developments occurred in 2014 that suggest relationships amongst employers and employees will continue to become more complicated as employment laws evolve, additional regulations are enacted and government agencies increase their investigative efforts. Six of the more significant issues to watch in 2015 are noted below.

1. Misclassification of Workers

The alleged misclassification of workers as independent contractors, rather than employees, continues to be the most persistent issue facing employers today. Similarly, classification of employees as exempt, rather than non-exempt, is also under strict scrutiny.

The federal, state and local governmental agencies are keen to investigate employers for alleged misclassification due to the financial windfall that such agencies may reap from a successful investigation. A recent study of audits of New York employment records found that up to 10% of the employees covered by the audits may have been misclassified. Researchers found that misclassifying just 1% of workers as independent contractors would cost the Unemployment Insurance Trust Fund \$198 million annually, and that 95% of workers who claimed to be misclassified as independent contractors were reclassified as employees following review. In 2013, the New York State Department of Labor (“DOL”) completed over 2,200 fraud investigations, discovering nearly \$271.2 million in unreported wages and nearly \$10 million in unemployment insurance contributions due,¹ demonstrating the considerable revenue generated by unemployment insurance audits. The DOL will continue to aggressively pursue the investigations of these claims and audits should be taken seriously to prevent an adverse and costly outcome.

The New York State Joint Enforcement Task Force on Employee Misclassification, which includes the state’s Department of Taxation and Finance, Worker’s Compensation Board, Office of the Attorney General, the Comptroller of the City of New York and the Department of Labor (the “Task Force”), has increased enforcement of state labor standards. Wage and hour claims currently outpace all other types of workplace litigation, and have increased by over 500% since 1990.² In 2013, the Task Force identified nearly 24,000 instances of employee misclassification, discovered over \$333.4 million in unreported wages, and assessed nearly \$12.2 million in unemployment insurance contributions (in addition to the DOL investigations).³

¹ <https://www.labor.state.ny.us/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2014.pdf>

² <http://www.wecomply.com/post/2144174-aggressive-flsa-enforcement-efforts-expected-to>

³ <http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2014.pdf>

{11044590:1}

A striking example of how far New York is willing to go to enforce proper classification of workers occurred in October of last year when a New York restaurant owner was *arrested* for failure to pay more than \$35,000 in required minimum wage and overtime pay to five former employees, including cooks, cleaners, and cashiers.⁴ Elisa Parto, owner of restaurant Elisa's Food & Plus, Inc. in Port Chester, NY, and Elisa's Good & Plus, Inc., faces multiple counts of Failure to Pay Wages under Labor Law Section 198-a(1), an unclassified misdemeanor, as well as a maximum jail term of one year.

New Jersey authorities place similar emphasis on investigating claims of misclassification and, on January 14, 2015, the New Jersey Supreme Court clarified the analysis to be used in determining whether a worker is an employee or an independent contractor for purposes of resolving a wage-payment or wage-and-hour claim. The Court ruled that New Jersey will utilize the commonly known "ABC" test, which puts the onus on the employer someone classified as an independent contractor (a) is free from control or direction over the performance of his services, both under a written agreement and in fact; (b) the services performed are outside the usual course of business for the company receiving the services, or the worker performs the services outside of all of the company's places of business; and (c) the worker is customarily engaged in an independently established trade, occupation, profession or business.⁵ If one of these factors is not met, the worker should be classified as an employee.

In light of the foregoing, employers must continue to be mindful of applicable law to remain in compliance and to stave off potential investigations, audits, litigation, or even criminal prosecution.

2. Social Media, Email and the Employee Handbook

In December 2014, the National Labor Relations Board (the "NLRB") held that employees have the right under Section 7 of the National Labor Relations Act (the "NLRA") to communicate with one another at work regarding self-organization, pay, workplace conditions and other terms and conditions of employment.⁶ The NLRB held that, in certain circumstances, employees have the right to use their employer's e-mail system for non-business purposes, including discussion about union organizing. In reaching this decision, the NLRB found that the workplace is "uniquely appropriate" and "the natural gathering place" for such communications, and the use of email as a common form of workplace communication has expanded dramatically

⁴ <http://www.waiterpay.com/2014/10/restaurant-owner-arrested-for-failure-to-pay-minimum-wage-and-overtime-pay/>

⁵ *Hargrove v. Sleepy's, LLC*, (A-70-12) (072742) (Decided January 14, 2015), citing N.J.S.A. 43:21-19(i)(6).

⁶ *Purple Communications, Inc. and Communications Workers of America, AFL-CIO*, 361 NLRB No. 126.

{11044590:1}

in recent years, such that employers who have chosen to give employees access to their email systems on nonworking time must permit employees' use of such email on nonworking time for such statutorily protected communications. Employer policies and handbooks that attempt to limit an employee's use of company resources and property, including e-mail, for non-work-related reasons or communications should be reviewed and revised in light of the NLRB's recent decision.

In addition, the NLRB recently determined that a company violated the NLRA for terminating two employees who engaged in a Facebook discussion concerning claims that they unexpectedly owed additional state income tax due to the company's mistakes.⁷ The NLRB was relied upon Section 7 of the NLRA to order the company to discontinue its social media policy barring employees from "engaging in inappropriate discussions about the company, management, and/or co-workers". Employers must permit employees to discuss their workplace terms and conditions. Although employers have a legitimate interest in prohibiting disparagement of their products, services and reputation, these interests will be weighed against employees' Section 7 rights, and social media policy that interferes with such rights are subject to invalidation by the NLRB.

3. Severance Agreements

The Equal Employment Opportunity Commission (the "EEOC") now routinely takes the position that severance agreements cannot affect an employee's right to file a charge with the EEOC or participate in an EEOC investigation or prosecution. Recently, the EEOC has prioritized its enforcement of this position. In its Strategic Enforcement Plan for FY 2013-2016, the EEOC declared it planned to "target policies and practices ... [including] settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination." The EEOC has exhibited its commitment to this position by pursuing legal actions against employers whose severance agreements are alleged to be overbroad and interfere with an employee's right to file charges and/or communicate and cooperate with the EEOC.⁸ All employers should review their severance agreement to ensure compliance and prevent unwelcomed investigation or litigation in this regard.

⁷ *Three D, LLC d/b/a Triple Play Sports Bar and Grille*, 361 N.L.R.B. No. 31, 2014-15 NLRB Dec. ¶ 15855 (Aug. 22, 2014).

⁸ *See, e.g., EEOC v. Baker & Taylor*, 1:13-cv-03729 (N.D. Illinois); *EEOC v. CVS Pharmacy*, 1:14-cv-00863 (N.D. Illinois), both filed in the Northern District of Illinois, and *EEOC v. CollegeAmerica*, 1:14-cv-01232-LTB-MJW (D. Colorado).

{11044590:1}

4. Background Checks

The EEOC and many state agencies have also cited criminal background checks as a hot button issue for 2015. Although performing a background check on an applicant during the hiring process is lawful if consent is first obtained, employers should be mindful of the manner in which they use the results of such checks when making employment decisions to avoid claims of discrimination in hiring. The EEOC requires that employers “apply the same standards to everyone”, and advises employers to “take special care” when basing employment decisions on background problems that may have a disparate impact on people of a certain protected class.⁹ The EEOC requires that employers “show that the policy operates to effectively link specific criminal conduct and its dangers with the risks inherent in the duties of a particular position.”¹⁰ Thus, employers must make an “individualized assessment” before relying upon criminal history to make employment decisions, rather than refusing to hire all persons with criminal backgrounds.

5. Modification of the New York Wage Theft Prevention Act

On December 29, 2014, Governor Cuomo signed a bill eliminating the requirement that, before February 1 of each year, employers notify and receive written acknowledgment from every worker about their rate of pay, allowances, pay day, etc.¹¹ This change is effective immediately and the NYS DOL has announced that it will not require annual statements in 2015. Employers, however, remain obligated to issue wage notices to new employees at the time of hire.

6. Expansion of NYS and NYC Workplace Protection Laws to Unpaid Interns

Following a New York federal court decision denying the protections of the federal laws against sexual harassment and discrimination to unpaid interns because they are not employees, in March 2014, New York City amended the NYC Human Rights Law, and in July 2014, New York State amended the NYS Human Rights Law, to include unpaid interns as covered persons entitled to the protections of state law. Although it should go without saying, in light of these specific amendments, employers should be careful not to harass or discriminate against unpaid interns.

* * * * *

⁹ http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm

¹⁰ http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

¹¹ <http://www.labor.ny.gov/workerprotection/laborstandards/employer/wage-theft-prevention-act.shtm>

{11044590:1}

CONTACT

Please do not hesitate to contact Scott R. Matthews at (212) 237-1025, or smatthews@windelsmarx.com, or Jasmine K. Le Veaux at (212) 237-1112, or jleveaux@windelsmarx.com, with any questions or comments.

ABOUT EMPLOYMENT & EMPLOYEE BENEFITS

Windels Marx takes an interdisciplinary approach to this fast-growing area of the law, teaming corporate, tax, fiduciary, regulatory, and litigation attorneys in a best-practices approach to meeting our clients' needs. We provide technically sophisticated, solution-oriented services to employers, fiduciaries, financial institutions, and senior executives, ranging from counseling and compliance planning to internal investigations and litigation before federal and state courts and regulatory agencies. We also provide our clients with timely in-house training programs and seminars for management, human resources, and legal professionals. Learn more at www.windelsmarx.com.

DISCLAIMER

In some jurisdictions, this material may be deemed as attorney advertising. Past results do not guarantee future outcomes. Possession of this material does not constitute an attorney / client relationship.