



Alliance of the Ports of Canada, the Caribbean, Latin America and the United States

Employment Issues – The Current Reality (Part 2)

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Family Medical Leave Act

FMLA Recent Developments

- DOL Issued Final FMLA Regulations – effective January 16, 2009
 - Changes to “Serious Health Condition”
 - Fitness for Duty Certifications
 - Employer Notification Obligations
 - Medical Certification Process
- Military Leave
 - Online Toolkit

Family Medical Leave Act

- Birth of a son or daughter of the employee
 - *In loco parentis* (in place of a parent)
 - Employee provides day-to-day care for the child OR
 - Employee is financially responsible for the child.
- Placement of a son or daughter with employee for adoption or foster care
- To provide care for son, daughter, spouse, or parent with serious health condition (*not the only source of care*) OR
- Due to serious health condition of the employee that prevents employee from working.

Family Medical Leave Act – Serious Health Condition

Illness, injury, impairment, or physical or mental condition that involves:

- Period of incapacity of more than three consecutive calendar days, **and** any subsequent treatment *or* period of incapacity *that also involves* two or more treatments by health care provider or treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under supervision of health care provider
 - **Two visits must be within 30 days of start of incapacity**
 - **First visit in either two visit situation or “regimen of continuing treatment” must occur within 7 days of the start of incapacity.**

Family Medical Leave Act – Serious Health Condition

Illness, injury, impairment, or physical or mental condition that involves:

- Any period of incapacity or treatment of such incapacity due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy)
 - Required periodic visits to health care provider
 - Periodic visits: At least two visits to a health care provider per year.

Health Care Provider Certification

- Serious health condition
- Date on which condition commenced
- Duration of condition
- Employee needed to care *or*
- Employee unable to perform functions of position.

Health Care Provider Certification

- Employer may contact health care provider for clarification and authentication after the employer has given employee opportunity to cure deficiencies.
- NOT the supervisor – only health care professional, HR professional, leave administrator, or management official

Health Care Provider Certification

- Must allow employee 15 calendar days to submit certification
- Must advise employee of consequences of not providing certification.
- May require second opinion if doubt validity
 - Failure to cooperate is fatal
- May require third opinion if conflict, must be mutual
 - Third opinion is final and binding

Family Medical Leave Act

- Attendance Policies:
 - FMLA covered absence may not be considered as an “incident” under neutral absence control policy
 - Can Deny A “Perfect Attendance” Award To An Employee Who Takes FMLA Leave As Long As Employees Taking Non-FMLA Leave Are Treated In An Identical Way

Light Duty?

- Cannot require employee to work in light duty position
- If employee chooses light duty, time at work does not count towards FMLA entitlement.



Fitness-For-Duty Certification

- Can require to certify ability to perform essential functions
 - Only with regard to condition at issue
 - Only if uniformly applied policy or practice
 - Must give notice with initial notice of leave
 - (DOL form)
- On intermittent or reduced schedule, can require every 30 days (or less frequently) if “reasonable safety concerns” regarding performance of job duties



Fair Labor Standards Act

Department of Labor

- DOL released its 2012 budget information on February 14, 2011
 - Proposed FY 2012 budget seeks **\$12.8 billion** in discretionary budgetary authority, of which **\$1.8 billion** is for worker protection agencies (e.g., Wage & Hour Division, OSHA, Office of Federal Contract Compliance Programs, etc.)
 - Misclassification Initiative: DOL will “redouble its efforts” to combat worker misclassification by investing **\$46 million** for a multi-agency initiative which will fund state grants that address worker misclassification

Department of Labor

- Wage & Hour Division
 - **\$241 million** budget, an increase of \$13.3 million from FY 2011
 - Increase from 1582 to **1677 FTE**, and from 898 to 1038 investigators
 - **\$15 million** to support additional 107 FTE to support initiative to detect and deter the misclassification of employees as independent contractors

DOL Policy and Enforcement Initiatives (cont.)

- On April 1, 2010, DOL launched “WE CAN HELP”
 - Special focus on low-wage workers in construction, retail, restaurants, home health care, hotels and motels
 - Purpose: Inform employees of workplace rights, services offered by DOL, and how to file a complaint
 - Includes public service announcements, videos, publications, billboards
 - New website (<http://www.dol.gov/wecanhelp/>) and toll-free hotline (1-866-4USWAGE)



DOL Policy and Enforcement Initiatives (cont.)

- Decreased cooperation with employers
 - No more opinion letters
 - No more partnership agreements with employers
 - No more supervision of back wage payments
- Unannounced policy changes
 - Mandatory penalties for repeat/willful minimum wage and overtime violations (up to \$1,100 per employee)
 - Investigators may not allow employers to self-audit

FLSA Amendment

- Amendment to Section 7 of the FLSA.
 - “Reasonable Break Time For Nursing Mothers” for up to one year after birth “each time such employee has a need to express the milk.”
 - Requires an employer to provide a private-shielded place (other than a restroom).
 - Does not apply to businesses with 50 or fewer employees if it would impose a undue hardship.

New Rulemaking on the Horizon

- DOL is planning rulemaking to update employer recordkeeping requirements under the FLSA
 - Proposed rule originally scheduled for release in August 2010 - now scheduled for 2011
 - Would require employers to notify workers of their rights under the FLSA, and to provide information regarding hours, how pay was computed and whether the proper wages and overtime were paid
 - Would require any employers that seek to exclude workers from FLSA's coverage to perform a classification analysis, disclose that analysis to the worker, and retain that analysis to give to WHD enforcement personnel who might request it
 - Significant administrative burden on employers

Wage and Hour Class Action Growth

- FLSA Lawsuits Have Become a Cottage Industry
 - www.overtimelawyer.com
 - www.paymyovertime.com
 - www.overtimepay.com
 - www.overtimecases.com
 - www.overtimelawyer.net
 - www.flsa.com
 - www.texasovertime.com
 - www.flsalaw.com
 - www.overtimewageclaims.com

Wage and Hour Class Actions: Frequently Litigated Issues

- Miscalculation of overtime
- Rounding
- Meal and rest break violations
- Off-the-clock work
- Misclassification of non-exempt employees
- Improper deductions
- Untimely wage payments

White Collar Exemption Issues

- **Computer Professionals**

- **Primary Duty:**

- **Application of Systems Analysis Techniques and Procedures, or**
 - **Design, Development, Documentation . . . of Computer Systems or Prototypes, or**
 - **Design, Documentation, Testing, Creation or Modification of Computer Programs**

White Collar Exemption Issues

- **Help Desk Employee**
- **“Programmer” -- Receive a business design from business analyst; research technical steps needed to design and develop program; code and test program; document program**
- **IT Support Specialist**

What Can You Do? Training

- Should be integrated into employment relationship.
- Should be done regularly to reinforce policies and understanding:
 - *e.g.*, Employee orientation; New manager training.
- Employee training should focus on the basics, such as:
 - (1) Review of key policies; (2) Define hours worked; (3) No off-the-clock work; (4) Meals and rest periods; (5) Rules relating to OT; (6) Reporting errors and misconduct
- Manager training should focus on employee topics, plus:
 - (1) Compliance responsibilities; (2) Handling employee complaints; (3) Prohibition against retaliation; (4) Good record keeping practices.

Independent Contractors

- Independent Contractor classification is under assault
- Congress, the Obama Administration, and states are targeting employers who misclassify employees as independent contractors
 - Claims that misclassification leads to lost government revenue and deprives workers of benefits and protections

Independent Contractors: DOL's "Misclassification Initiative"

- Proposed FY 2012 budget for Department of Labor includes "misclassification initiative"
 - Additional \$25 million to target misclassification of workers as independent contractors and 100 enforcement personnel
 - FLSA Recordkeeping Rule
 - Competitive grants to states
 - Legislative changes to Section 530 safe harbor
 - Would generate an estimated \$7 billion in 10 years
- IRS audit of 6,000 employers over the next three years to study employment tax compliance

Independent Contractors: Fair Playing Field Act

- Introduced by Sen. John Kerry (D-MA) and Rep. Jim McDermott (D-WA) on September 15, 2010
 - Curtails use of Section 530 Safe Harbor
 - Directs Secretary of Treasury to issue prospective guidance on worker classification for federal employment tax purposes
 - Companies must provide written statement to independent contractor, including right to seek status determination from IRS

Independent Contractors: Employee Misclassification Prevention Act

- Introduced on April 22, 2010 in the Senate and House
 - Would require records be maintained which correctly classify employee
 - Impose penalties of \$1,100 to \$5,000 per employee
 - Allow double liquidated damages for misclassification
 - DOL targeted audits on misclassification
 - State Unemployment Insurance agencies must conduct audits

Upcoming Issue to Watch For

- In July 2008, American Trucking Association filed suit, challenging the Port of Long Beach and Port of Los Angeles' "concession plans," which limit access to only those trucking companies that have entered into concession contracts approved by the port program administrator
 - Port of Long Beach settled in October 2009 by agreeing to replace its entire concession plan for motor carriers with a registration agreement
 - ATA continued its lawsuit against the Port of L.A.
 - Key issue: Plan bans the use of independent contractors (ICs); requires drayage companies to convert to all-employee workforce over three years
 - Port of L.A., backed by Teamsters, environmentalists and city of L.A., argue that ICs who serve the ports cannot afford newer trucks, as required by the program, and should therefore become employees
 - ATA opposes making ICs employees, and therefore potential Teamsters members
 - Trial is scheduled to begin April 20



National Labor Relations Act: Current Issues



National Labor Relations Board

- Chairman of the NLRB:
Wilma Liebman
 - Originally appointed to NLRB by President Clinton
 - Former attorney for Bricklayers and Teamsters Unions
 - Strong advocate of collective bargaining



Labor's Legislative Agenda

- **Hasn't changed since Obama was elected:**
 - Increase Union membership
 - Simplify Union representation process

NLRB – What To Expect

- Move to overturn controversial Bush-era rulings, such as:
 - Use of employer e-mail system for union solicitation
 - Exclusion of temporary workers from bargaining units
 - Weingarten rights for non-union employees
 - Secret-ballot election to reverse card check

NLRB – What To Expect (cont.)

- Administrative action to promote union organizing
 - Shorten the current 42-day petition to election timeframe
 - Card check as the basis for certification
 - Further limit employer speech in election campaigns
 - Grant union equal (or more) access to employees
 - Change employee/voter eligibility rules
- NLRB contracting office has solicited requests for “industry solutions” on electronic voting

NRLB – Rulemaking

- December 22, 2010 – NLRB published proposed rule that would require private sector employers covered by NLRA to post a notice informing employees of their NLRA rights
 - Notice would be similar to that required for federal contractors
 - Failure to post considered an unfair labor practice; could constitute evidence of discrimination; and could toll the limitations period for other unfair labor practices.

NLRB – Dana Decision

- On December 6, 2010, the NLRB issued decision in Dana Corp, 356 NLRB No. 49
 - In 2-1 decision, Board approved broader use of card check and neutrality agreements designed to encourage the organization of an employer’s non-represented workforce
 - Negotiating a “framework” for future bargaining is not unlawful support of a labor organization.

Top Predicted Changes That May Facilitate Unionization

- Union access to employer private property to organize
- Inclusion of temporary workers in bargaining/voting units
- Change in definition of supervisor
- Electronic or web-based voting
- Invalidation of employer work rules
- Use of e-mail and other company IT systems for solicitation
- Greater use of social media to assist organizing
- Expedited elections

Recommended Response

- Evaluate supervisor status and assess your ability to respond to an organizing campaign
- Reconsider the Company's approach to solicitation and social networking
- Determine management's ability to identify the early signs of union organizing
 - Employers will likely be facing a shorter period of time to respond, further restrictions on their ability to respond and increased penalties (including bargaining orders) for alleged misconduct
 - Increased need in training managers and front-line supervisors before an organizing campaign is underway
- Remain vigilant and informed about administrative changes

AAPA



**American Association
of Port Authorities**

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THANK YOU

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