Employment Law Letter

Fall 2008

Misclassification of Workers Still a Chronic Problem

The rules for determining whether a worker is an employee or an independent contractor, and whether an employee is exempt from overtime requirements, haven't changed significantly for many years. You'd think employers would know them by heart, but apparently they don't. Even big companies like Microsoft and Fed Ex have gotten burned in well-publicized cases where courts have found they misapplied the rules.

One of the more colorful cases is pending in federal court in New Haven right now. Professional wrestlers employed by Stamford-based World Wrestling Entertainment are claiming WWE has wrongly labeled them as independent contractors for years, and as a result, has failed to provide benefits or make payroll tax payments. The hallmark of employee status is employer control, and the wrestlers claim that WWE controls everything from their hairstyles to their travel and appearance schedules to the dialogue for their trash-talk about their opponents.

The classic example of an independent contractor is your plumber. He provides his own tools, sets his own schedule, is paid by the job, and services many customers. If someone who works for you performs services at your facility using your tools and equipment, and is paid on an hourly basis during a schedule established by you, there may be a problem with treating him or her as an independent contractor. This is especially true if his or her work is directly related to the product or service you sell to your customers, and he or she doesn't work anywhere else.

IN SUMMARY:

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Even employers that are careful to avoid classifying workers as independent contractors unless they really are like the plumber often get into trouble when it comes to exempt versus non-exempt status. The executive, administrative and professional exemptions each have specific rules that have to be applied with care. The fact that an employee is fairly highly placed and fairly highly compensated may not be enough to pass the test. To further complicate matters, often a determination must be made about each individual employee, even in the same job class.

Aetna Services just settled such a case involving a large group of systems engineers. The litigation over whether or not they were exempt from overtime requirements went on for almost a decade. The settlement amount will be somewhere between $3 million and $11 million, depending on how many of a test group of twenty engineers are found to be non-exempt by an arbitrator who will hold hearings on each of the twenty. If half are found to be exempt, for example, the settlement will be halfway between the two extremes, or $7 million.

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Our advice to employers is to conduct a periodic audit, preferably with counsel, to make sure they are avoiding risky personnel practices. Independent contractors and wage and hour exemptions should certainly be on a checklist of things to review every five years, give or take. You may not spot every potential problem, but you will certainly be in a better position than those who never go through the exercise.

Workers Comp Recipients Get Smoked by Court

It has long been the case that if a worker gets injured and suffers more serious damage than others would because he has some pre-existing health problem, he gets compensated for the degree of damage done, even if someone else might not be entitled to the same award. The saying among lawyers is, "you take your plaintiff like you find him." But what if a claimant has no pre-existing conditions, but suffers two concurrent illnesses, one occupational and one non-occupational?

The Connecticut Supreme Court recently grappled with this issue in the context of a workers comp claim by an employee with asbestos-related lung disease, who also developed emphysema because of smoking. The claimant's attorneys made the "take your plaintiff like you find him" argument, but the court pointed out the worker didn't have emphysema when he was hired. The justices stated that as a matter of public policy, "employers should not have to bear the costs of their employees' smoking habits." They sent the case back for a determination of the percentage of the claimant's disability that was attributable to the effects of asbestos exposure versus the effects of smoking.

Workers comp proponents are not happy. What's the difference, they ask, between a claimant with an "eggshell skull," who is thus more prone to head injuries than his co-workers, and someone with a long history of smoking, who is therefore more susceptible to lung disease? And how can you tell with accuracy when that lung disease began relative to the onset of an occupational illness? Obviously, determinations will have to be made on a case-by-case basis.

Fine Line Between Complainers and Protected Whistle-Blowers

Let's face it, some employees are simply complainers, and putting up with them often seems more trouble than it's worth. The problem is that some complaints are protected by law, and employers who take action against workers who make them can find themselves with legal problems on their hands.

Take for example the nursing home that fired an employee for making a complaint to the police about alleged threats against her by a resident. When she was fired, she sued, alleging violation of a statute that protects employees who participate "in a police investigation related to a criminal case in which the employee is a crime victim." The employer moved to dismiss the case, pointing out that the resident was neither arrested nor charged, so there was no "crime" involved.

A Superior Court judge ruled that such remedial statutes should be read broadly, so the terminated employee could proceed with her case. He also held that the discharge of an employee for reporting a crime was a violation of public policy and therefore a "wrongful discharge," and could also violate the Whistle-Blower's Statute, which protects employees who report illegal or unethical behavior to the appropriate authorities.

In a separate case, another judge ruled a terminated employee could proceed with a lawsuit against the employer who fired him, allegedly because he complained to the police about threats by co-workers. He claimed he had repeatedly raised concerns about these incidents to his employer, who had taken no steps to remedy the situation. The judge said if the employee's claims were true, he could establish that he was wrongfully discharged in violation of public policy.

Even internal complaints may be subject to legal protection. A jury recently awarded a former secretary in the Griswold town hall close to $1 million because she was fired after speaking up about the circumstances surrounding a fire that destroyed an uninsured building. After the newly elected first selectman blamed others for the failure to maintain insurance coverage, the secretary confronted her about withholding information on the lack of insurance coverage from the other

Recent S&G Website Alerts:

New Connecticut Law Mandates Safeguards for Personal Information, July 2008

IRS Rethinks its Deferred Compensation Rules, July 2008

Reading Employee Text Messages - A Cautionary Tale, July 2008

Congress Expands Americans With Disabilites Act, October 2008

Freedom of Information Act Legislation Summary, October 2008

selectmen. The first selectman "went ballistic," and got the secretary fired, which resulted in the million-dollar verdict for violation of free speech rights.

Our advice to employers is to take this issue very seriously. The statute protecting employees who file reports of crimes or participate in criminal investigations carries criminal penalties. The Whistle-Blowers Statute, which is enforced by the CHRO, carries its own set of complications, including the fact that it is not altogether clear who is covered by the law. If you're thinking of firing someone who has recently made a complaint, you would be well advised to check with your lawyer first.

Employer Access to Worker Emails Questioned

Most companies think they can establish the right to police employee email simply by maintaining a policy that tells workers they should have no expectation of privacy when they use the company email system. That's certainly a good start, but recent litigation suggests it's less than foolproof as a defense against liability for invasion of privacy.

In a well-publicized decision by a federal court in California a few months ago, a police officer successfully sued his employer for accessing personal messages on his pager, including sexually explicit text messages. Although the police department had a policy allowing it to monitor computer use, the court found that policy didn't expressly apply to pagers. Also, there was evidence that the officer had been told his messages wouldn't be questioned as long as he paid his overage fees.

While we are tempted to discount decisions from California, where the judges are often seen as unusually liberal, even Connecticut courts are looking more carefully at email privacy. In one pending case, for example, a terminated employee has brought suit in part based on allegations that his employer viewed thousands of his emails, including about 400 sent or received from his home after his discharge, through the personal Yahoo account he accidentally left active on his computer at work. Allegedly, the 400 included messages to and from his lawyer.

Our advice to employers is that just maintaining an email monitoring policy may not provide enough protection. Periodic reminders to employees, perhaps by pop-up notices on their computers, may be helpful. Also, simply monitoring the number of personal messages or the names of websites visited, rather than actually reading messages or viewing web pages, may be a safer way of monitoring employee internet use. Reviewing the duration of employee visits to internet sites also provides a good indicator of misuse of working time, and involves minimal invasion of personal privacy.

LEGAL BRIEFS
. . . and footnotes

Congress Expands the ADA: Responding to concerns about court decisions that have narrowed the application of the Americans with Disabilities Act, Congress passed and the President signed legislation amending the ADA in various ways, including expansion of the list of "major life activities," as well as the definition of what "substantially limits" those

activities. More employees will now be able to refer to themselves as "disabled" or "regarded as disabled." An electronic alert providing more detail went out to clients and friends and was posted on our firm's website on October 1.

Minimum Wage to Rise: Connecticut's minimum wage, already one of the highest in the country, will rise to $8.00 an hour on January 1, and to $8.25 in 2010. Also on January 1, the "tip credit" that restaurants may use to offset the minimum wage will rise to $2.48 per hour. The state's maximum weekly workers compensation and unemployment compensation benefits have also been increased, starting in October.

Message Through Interpreter Not Hearsay: A federal appeals court dealt with a novel issue when a deaf job applicant claimed discrimination based on a phone conversation with a prospective employer's agent conducted through a "telecommunications assistance service." Such systems work by having the deaf person type a message that is read by a communications assistant to the recipient, and the recipient's spoken response is typed by the assistant so the deaf person can read it. The employer claimed the agent's statements couldn't be used as evidence because they came through a third party, which constituted hearsay. The judges disagreed. They saw no reason to distinguish this situation from the use of foreign language interpreters, which has long been accepted by courts.

Personal Information Privacy: A new Connecticut statute designed to protect people against improper disclosure of personal information has implications for employers. While the primary targets of this legislation presumably are banks, insurance and credit card companies, employers also collect personal information, for example employee social security numbers, in the course of their business. Our firm conducted seminars on this subject in September, but if you missed them you can obtain the materials by contacting any member of our labor and employment law department.

Union Must Pay Attorneys Fees: We love "man bites dog" stories, especially when we represent the "man" in the story. The International Brotherhood of Police Officers, which represents judicial marshals staffing court facilities around the state, negotiated a contract with the Judicial Branch that allowed all marshals to progress to the top of their wage scale as long as they could perform all the tasks in their job description. That required obtaining a CDL so they could drive prisoner transport vans. Several marshals filed a discrimination complaint, first with the CHRO and then in court, claiming the CDL requirement discriminated against them based on disabilities that prevented them from obtaining the license. When the Judicial Branch discovered the IBPO was financially supporting the litigation, it filed a charge with the State Board of Labor Relations asserting the union had bargained in bad faith. The SBLR agreed, and ordered the union to reimburse the Judicial Branch for its legal fees in defending the discrimination lawsuit and presenting the SBLR case, as well as the Branch's staff time in defending the CHRO complaint.

Wage Deferral Pacts are Risky: Certain obligations an employer has to his employees simply can't be waived, even through a written contract signed by the parties. A Superior Court judge recently ruled against an employer who failed to timely pay wages due, exposing him to

personal liability, both civil and criminal. The court held that a written agreement to defer payment of wages that have already accrued is void because it violates public policy. However, an agreement to defer payment of wages that have not yet been earned may well be enforceable.

S&G Notes: Our firm's annual fall seminar on labor and employment law developments will be held at the Hartford Marriott on October 31. If you haven't received your invitation to this event, for which there is no charge, please contact Maria Ramsay at (860) 251-5030 or mramsay@goodwin.com.

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