

LABOR & EMPLOYMENT

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IN THIS NEWSLETTER:

After a year in office, the current administration has sprung into high-gear with respect to employment matters. This issue highlights a key federal policy issue and an important new federal law. Also included are reminders and practical tips regarding employment contracts and addressing disability issues.

Increased Enforcement of Misclassified Independent Contractors.....1

Automatic Renewal for Term Employment Agreements.....1

Tax Benefits for Companies that Hire Unemployed Workers.....2

D&G Breakfast Seminar Series2

Interactive Process Obligations with Respect to Disabled Employees.....3

Calendar of Events.....4

D&G Labor & Employment Practice Group Contacts4

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FEDERAL GOVT. PROMISES INCREASED ENFORCEMENT OF MISCLASSIFIED INDEPENDENT CONTRACTORS

On February 1, 2010, President Obama released his fiscal year 2011 budget for the federal government. Of note to employers, the President's budget provides \$14 billion for the Department of Labor (DOL). More specifically, the budget will provide \$25 million, and 100 additional enforcement personnel, for the DOL, in conjunction with the Treasury, to identify and penalize employers who misclassify employees as independent contractors. As part of this, the budget will fund competitive grants to boost states' incentives and capacity to address such misclassification.

In addition, the budget will provide \$1.7 billion – a \$67 million increase – for the DOL's worker protection agencies to make sure they have the resources to meet their responsibilities under the more than 180 laws they enforce. The budget will also provide \$573 million for the Occupational Safety and Health Administration, an increase of \$14 million, a portion of which will be used to add 60 enforcement staff and conduct 9% more inspections.

>> The Bottom Line

The President's budget should lead to increased enforcement across a variety of employment laws. Employers are well advised to review their employment policies, especially those with respect to classifying workers as employees or independent contractors, and to seek counsel if they have concerns about misclassifications.

BE CAREFUL OF AUTOMATIC RENEWAL FOR TERM EMPLOYMENT AGREEMENTS

Although not common, employers will occasionally hire an employee pursuant to an employment agreement stating that the employee would be employed for a term expiring on a certain date (often a number of years following hire). Most employers (and employees) assume in this situation that if a new employment agreement is not signed by the end of the term, the agreement simply ends. However, unless properly worded, these employment agreements may actually renew, automatically.

Under New York law, when a one year or longer contract term expires for an employee with an annual salary, and the employee continues working for the employer, there is a rebuttable presumption that the agreement is automatically renewed for an additional year. This is the case regardless of how many years the original term lasted (due to a legal doctrine called the statute of frauds). Where the agreement stipulates a weekly or monthly salary, however, the agreement is presumed to be renewed for successive weekly or monthly increments, respectively.

In order to rebut this presumption, employers must either:

1. draft the contract with a clause that specifies the terms of the employee's employment when the contract term expires (usually at-will), or
2. send the employee notice of the intention not to renew the agreement before its expiration.

Similar automatic renewal doctrines apply in many other states.

>> The Bottom Line

Employers should check their employee files to avoid continuing an employee's employment pursuant to what the employer considers to be an expired agreement.

NEW LAW PROVIDES TAX BENEFITS FOR COMPANIES THAT HIRE UNEMPLOYED WORKERS



FOR QUALIFIED EMPLOYEES, THE EMPLOYER WILL NOT HAVE TO PAY THE EMPLOYER'S SHARE OF THE FEDERAL SOCIAL SECURITY TAX (6.2% OF THE EMPLOYEE'S FIRST \$106,800 WAGES EARNED IN A CALENDAR YEAR) FROM MARCH 18, 2010 THROUGH THE END OF THE YEAR.

Under a newly-enacted law, companies that hire unemployed workers in 2010 to fill new or open positions may be eligible for two new tax benefits. Companies that hire qualified individuals will not have to pay part of the employer's share of social security taxes in 2010, as of the enactment of the law. These companies may also be eligible for an additional general business tax credit of up to \$1,000 per qualified worker that they retain for at least 52 weeks. These benefits are part of the Hiring Incentives to Restore Employment (HIRE) Act, which was signed into law on March 18, 2010.

The benefits will apply with respect to employees who:

1. begin employment after February 3, 2010, and before January 1, 2011;
2. certify by signed affidavit, under penalties of perjury, that they have not been employed for more than 40 hours during the 60-day period ending on the date they begin employment;
3. are not employed to replace another employee unless the other employee separated from employment voluntarily or for cause; and
4. are not a "related person" as defined in the Internal Revenue Code (generally, an immediate family member of a person who owns at least half of the company).

The IRS has developed a form affidavit for qualified employees to sign to satisfy the certification requirement, which is available at <http://www.irs.gov/pub/irs-pdf/fw11.pdf>.

For qualified employees, the employer will not have to pay the employer's share of the federal Social Security tax (6.2% of the employee's first \$106,800 wages earned in a calendar year) from March 18, 2010 through the end of the year. Employers will still have to pay the other part of FICA - the 1.45% Medicare tax. In addition, employers will still have to withhold and pay the

>> *continued on pg. 4*

DAVIS & GILBERT LABOR & EMPLOYMENT BREAKFAST SEMINAR SERIES

Health Care Reform Legislation: Navigating the Key Provisions

MAY 2010

The Patient Protection and Affordable Care Act (the Act) was signed into law on March 23, 2010 by President Obama. This far-reaching law overhauls our nation's health care system and provides both significant new challenges, as well as opportunities, for employers and individuals. For example, an opportunity exists for an employer providing retiree medical coverage to receive a subsidy to offset the cost of this coverage. While numerous provisions of the Act will not apply until 2014, some provisions become effective sooner and will require immediate attention.

Join us for a program that will discuss the "high impact" provisions of the Act, as amended by the Health Care and Education Affordability Reconciliation Act. Among other topics, the program will cover:

- > Health care plan reforms effective January 1, 2014 and earlier
- > Is your plan grandfathered and what it means to be grandfathered
- > The new non-discrimination rules applicable to insured plans
- > New employer responsibilities: auto-enrollment, free choice vouchers, reporting and disclosure
- > The government giveth: tax credits and subsidies
- > The government taketh: income, penalty and excise taxes

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EMPLOYERS HAVE “INTERACTIVE PROCESS” OBLIGATIONS WITH RESPECT TO DISABLED EMPLOYEES



The Americans with Disabilities Act (ADA), and many similar state and local laws, require that employers provide reasonable accommodations to disabled employees so that they can perform the essential functions of their job. Therefore, employers are expected to engage in an interactive process with disabled employees to determine their precise limitations and how the employer can reasonably accommodate them. Despite this expectation, there is no separate cause of action under the ADA for failure to engage in the interactive process. However, as recent cases have highlighted, under certain state laws, such as the New

York Human Rights Law and the California Fair Employment and Housing Act, simply failing to engage in the interactive process will expose the company to liability.

In addition, recent case law has held, in certain jurisdictions, including New York City, that employers (as opposed to employees as is the rule under the ADA) now bear the burden of proving that an accommodation requested by an employee is unreasonable, which may make it more difficult to negotiate accommodations for disabled employees.

Based on these recent interpretations, employers in New York City must (and employers elsewhere may want to) be sure not only to engage in an interactive process with every employee who requests an accommodation, but also to provide alternatives to employee requests rather than merely rejecting them as “unreasonable.” As such, here are some tips for all employers to follow when approached by an employee requesting an accommodation for his or her disability:

- Determine the essential functions of the employee’s position, so you can distinguish between accommodations that enable performance of the essential functions (required) from accommodations that obligate you to change the essential functions (not required).
- Discuss the individual’s limitations.
- Ask the employee to suggest accommodations that do not require you to change the essential functions.
- If the employee’s request is unreasonable, propose alternatives that would be a better fit.
- If the employee refuses the counter-proposal, you may want to correspond with the employee’s physician, so that you can determine what the employee can and cannot do.
- Keep a written record of all steps taken during this process.

>> The Bottom Line

Ultimately, employers need to work with their employees to determine the appropriate accommodation for their disability. But employers need to remember that if they reject all of an employee’s requests, or take the position that there is only one reasonable accommodation for a given employee, they should envision telling their story to a jury and having to prove that the employee’s request was unreasonable. Employers should always contact counsel before rejecting an employee’s accommodation request or making a “final offer.”

New York Payroll:

Important Reminder

As noted in our Fall Alert, as of October 26, 2009, New York employers are required to inform all new employees in writing of their:

1. Regular rate of pay (even where employee is not paid hourly);
2. Regular pay day; and
3. Overtime pay rate (for non-exempt employees).

With regard to exempt employees, employers should consider including a statement such as: “Your position is ‘exempt’ and therefore you are not eligible to receive overtime pay.” Employers must also obtain a signed acknowledgement from the new hire, confirming his or her receipt of this wage information.

Employers who have not already done so should revise their offer letters to include this information. In addition, as always, be careful to properly classify exempt and non-exempt employees. If you have concerns about employee classifications or the new pay notification requirements, contact your legal counsel.

NEW LAW PROVIDES TAX BENEFITS FOR COMPANIES THAT HIRE UNEMPLOYED WORKERS >> *continued from page 2*

employees' full FICA taxes for all qualified employees. The Treasury will contribute the lost employer taxes to the Social Security fund so that the HIRE Act does not have any effect on Social Security benefits.

In addition, the HIRE Act provides an incentive for employers to retain the qualified workers that they hire. For each worker retained for at least a consecutive 52-week period, businesses may claim an additional general business tax credit of 6.2% of the wages paid to the worker during the one-year period, up to a maximum of \$1,000. To take advantage of this credit, the retained employee's wages during the last 26 weeks of this period must equal at least 80% of the wages for the first 26 weeks of this period. Because qualified workers are those hired after February 3, 2010 through December 31, 2010, this credit will only be available in 2011.

>> The Bottom Line

Employers may want to review their recruitment procedures, as hiring a person who has been unemployed for at least 60 days, as opposed to hiring someone away from another company, may result in savings to the company. Employers should also consult their tax professionals to make sure that they are taking advantage of the HIRE Act with respect to any qualified workers that they may hire.

CALENDAR OF EVENTS

Marcus Evans 2nd Annual Employment & Labor Law Conference

June 7-8, 2010

Speaker: Gregg A. Gilman, Co-Chair

Topic: Overview of the Changing Landscape of Employment Law

Speaker: Daniel A. Feinstein, Partner

Topic: Exploring and Dealing with Termination Issues

Location: Crowne Plaza Washington National, Arlington, VA

Register: Visit www.marcusevans.com

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These summaries are provided for informational purposes only and are not exhaustive. They should not be considered to be legal advice. Accordingly, you should consult an attorney with any questions regarding any of the issues referenced.

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