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Stronger Together: Labor and Employment Update

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In a seminar focused on recent updates to labor and employment laws, Will Oden, of Ward and Smith's labor and employment practice group, provided an overview of employee and independent contractor classification guidelines, restrictive covenants, enforcement actions, the NLRB, and more.

Employees and Independent Contractors

It is not uncommon for an employee to be misclassified as an independent contractor as opposed to an employee by their employer. The United States Department of Labor ("DOL") has made enforcement and proper classification a priority for the agency. To ensure that a worker has been properly classified for compliance purposes under the Fair Labor Standards Act ("FLSA"), businesses should consider the following factors:

- The nature and degree of the individual's control over the work
- The individual's opportunity for profit or loss
- The amount of the individual's investment in facilities and equipment
- Degree of permanence of the working relationship
- The amount of initiative, judgment, or foresight by the individual as compared to others in the open market
- The degree of independent business organization and operation
- Whether the services rendered by the worker are an integral component of the company's business

This year, the factors to consider over proper classification have shifted on a number of occasions. In fact, under the Biden Administration, the DOL has proposed a new rule to rescind and replace current regulations that were published towards the end of the Trump Administration for determining whether a worker should be classified as an employee or independent contractor, which has caused a degree of confusion for employers and workers. "Historically, regardless of the factors applied, if you distill it

down, much of it boils down to control," said Oden. "Also, generally speaking, if it walks like a duck and quacks like a duck, it's probably a duck."

The analysis may, on the surface, appear straightforward, yet many businesses still misclassify workers. The reason that businesses should be careful about classification is that failing to classify a worker appropriately carries along with it significant liability that directly impacts an employer's bottom line.

"If you misclassify a worker as an independent contractor and the worker sustains a workplace injury, your insurance company is not going to cover the worker's compensation claim," noted Oden. "You may have to pay the claim out of pocket."

Misclassification brings with it other risks: "The DOL can require employers to repay any employment benefits the worker should have received if classified properly as an employee," commented Oden. "For example, if you have a 401K plan for your employees, the independent contractor was obviously not able to participate. The value that individual should have received is going to be recompensed by a penalty from the government."

Additionally, in many instances of misclassification, it is not just one individual but possibly an entire class of misclassified workers. "It can get very expensive very quickly," said Oden, "so if your business engages independent contractors, it is worthwhile to have an employment attorney take a look at those relationships to make sure the classifications of such workers are accurate."

Exempt vs. Non-Exempt

Similarly, the misclassification of a "non-exempt" employee as an "exempt" employee can result in a variety of consequences. The FLSA allows employees to file suit to recover unpaid wages, including overtime, liquidated damages (*i.e.*, double the employee's actual back wages), and attorney's fees in some circumstances. In addition, if your business does not have adequate time records, the DOL will generally defer to the employee's recollection of hours worked over the employer's records.

Under the FLSA, the baseline rule for non-exempt employees involves paying at least the federal minimum wage, which is currently $7.25 per hour, and paying overtime at a rate of one and one-half times the employee's regular rate of pay for all hours worked over 40 in a given workweek. Employees may be exempt from these requirements if they are employed in very specific categories:

- Bona fide executive, administrative, and professional employees;
- Certain employees in computer-related occupations;
- Outside sales employees; and
- Highly compensated employees.

There are specific tests that must be satisfied for employees to qualify as "exempt" under the above categories. "Additionally, most 'exempt' employees must be paid on a salary basis at not less than $684 per week," noted Oden.

Restrictive Covenants

Many employers also use various restrictive covenants to protect their trade secrets, confidential information, goodwill, and customer relationships. The more common types of restrictive covenants include non-competition, non-solicitation and nondisclosure provisions. For many clients interested in enforcing a restrictive covenant, litigation can become expensive and the outcome may not be satisfactory, advised Oden.

For a restrictive covenant to be enforceable in North Carolina, it should be:

- In writing;
- Part of a contract of employment or sale of a business;
- Based on valuable consideration (*g.,* monetary amount or job promotion);
- Reasonably necessary for the protection of a legitimate business interest; and
- Reasonable as to time and territory restrictions.

Enforcement of restrictive covenants can be difficult and expensive. Enforcement typically begins with a cease and desist letter to the individual or entity violating the restrictive covenant. After that, the party seeking enforcement goes to the courthouse to attempt to obtain a temporary restraining order (TRO). “If the TRO is granted, it might be in place for 10-15 days and during that period, often depositions are taken and written discovery exchanged…a lot of your time and a lot of money,” added Oden.

A non-solicitation agreement may be preferable to a non-compete agreement, as non-solicitation agreements/provisions have higher potential to be upheld as valid restrictive covenants in North Carolina courts. Business owners should also keep in mind that certain states prohibit or limit the enforceability of restrictive covenants. Consequently, choice of law clauses *may* not work if the state’s public policy outweighs the contract.

Employers also should familiarize themselves with President Biden's "Promoting Competition in the American Economy" Executive Order and the potential, upcoming regulations by the Federal Trade Commission in this area.

The National Labor Relations Act (NLRA)

Employers also should be mindful of the protections afforded to employees under the National Labor Relations Act ("NLRA"). Contrary to popular belief, the NLRA covers more than just unions. Section 7 of the NLRA applies to virtually all private employers despite union status. The National Labor Relations Board ("NLRB"), which is generally very employee-friendly, is responsible for enforcement of the NLRA. The NLRA protects employees for engaging in concerted activity for mutual aid and benefit, including:

- On behalf of an employee and *only* one other employee (interpreted broadly)
- Concerns about any working conditions (*g.*, safety, wages, bonuses, etc.)

- Employees that disparage the company on social media

Many of the decisions that come from the NLRB can have non-monetary adverse effects, including:

- Potential reputational damage as all NLRB decisions are made available to the public
- Written and/or verbal notice to employees
- Reinstatement of terminated employee(s)

Similar to the EEOC, the NLRB, under the Biden administration, is much more aggressive now in terms of enforcement than in previous administrations. “If someone shows up with a claim, I would advise you to seek counsel immediately,” Oden said. “It is also advisable to have a well-drafted social media policy in your handbook. If an employer's social media policy is not well drafted, then it is better not to have one at all.”

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