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Public-Sector Employment and Labor Law Focus for 2016

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Public-sector employers face significant challenges unique to their status as government entities. As 2016 rings in, public-sector employers should prepare for another year of escalated regulatory and legal scrutiny. We have identified four areas that will require public-sector employers' attention and planning in 2016:

FLSA Exempt Classification Regulatory Changes. In summer 2015, the U.S. Department of Labor proposed regulatory changes that will result in the reclassification of many current salaried exempt employees to non-exempt and thus eligible for overtime under the Fair Labor Standards Act. The proposal significantly increases the threshold salary required to qualify as an exempt white collar employee from $455.00 per week ($23,660 per year) to a regularly adjusted amount of approximately $970.00 per week ($50,440 per year). While DOL has not finalized the changes to the regulations, an increase in the salary basis (termed the "salary test") is a near certainty. Additionally, while the proposed regulations did not include a change to the "duties test," it is a possibility that the final regulations will contain changes to the duties tests for the various exemptions that further restrict which employment positions may qualify for salaried-exempt status. We anticipate implementation of these changes will occur in 2016. Because of the delay that resulted in the DOL extending the comment period on the proposed regulations last year, when the final regulations are issued, employers may only have a short time period to address compliance. Thus, in anticipation of these certain changes, public-sector employers are encouraged to assess and develop a full understanding of potential exposure, and develop plans to ensure they are immediately able to comply with the final regulatory changes. We recommend the following steps:

- Analyze existing exempt classifications and immediately identify any "fringe" exempt positions and potentially affected employees and job classifications;
- Update job descriptions to reflect the reality of the work environment, job performance, and additional exempt duties;
- Ensure accurate tracking of hours worked and paid. Accurate records are key to defense, but also to understanding whether restructuring the position is necessary if it can no longer be classified as salaried exempt;
- Identify and quantify the scope of off-duty "work" by salaried employees;

- Evaluate current recordkeeping capabilities and available options in anticipation of a change in the duties test to a new division of labor test that will require recordkeeping of duties;
- Develop a structured plan and the related budget for addressing anticipated changes to nonexempt classifications and positions and possible compensation plan discrepancies;
- Determine whether departments and positions will require restructuring to eliminate overtime exposure and develop plans for doing so;
- Consider "fluctuating work week" agreements where applicable;
- Update employer policies regarding overtime and exempt status to ensure FLSA compliance and train supervisors regarding compliance; and
- Develop the organization's message to employees for anticipated changes.

Constitutionality of Fair Share/Agency Shop Agreements. The U.S. Supreme Court will issue a decision this year in *Friedrichs v. California Teachers Association*. The case involves whether "fair share" provisions in public-sector collective bargaining agreements—requiring non-union employees to pay a "fair share fee" to cover the costs of the union's collective bargaining activities—violate the First Amendment constitutional rights of freedom of association and freedom of speech. If the Supreme Court finds "fair share" fees are unconstitutional, then public-sector employees will be able to choose whether they wish to pay union dues and also can no longer be compelled to pay a fair share or agency fee required under a collective bargaining agreement. Based upon communications from the Supreme Court indicating that it may very well invalidate the fair share/agency provisions in public-sector collective bargaining agreements, we recommend that Wisconsin public-sector employers with police, fire, or transit unions develop contingency plans now to educate workers and also to immediately implement holds on dues deductions in the event the U.S. Supreme Court finds that such provisions are illegal to enforce.

Escalating Independent Contractor Status Enforcement. Since 2011, regulatory enforcement of independent contractor compliance has been expanding on the federal and state level. We expect this trend of heightened enforcement of independent contractor status compliance to accelerate even further in this final year of the Obama administration. In its 2016 budget request to Congress, the DOL asked for an additional $50 million and 300 additional investigators to assist its efforts to "detect and deter" independent contractor misclassification. In addition, in 2015, Wisconsin joined 19 other states entering into memoranda of understanding with the DOL to identify misclassification. The DOL MOU facilitate information sharing among the DOL and state agencies to identify all types of misclassification of independent contractors and step up wage and hour enforcement among employers. For example, if a state agency finds that an employer is misclassifying workers as independent contractors for purposes of evading state unemployment taxes, then that information will be shared with the DOL, which then can investigate and determine whether the employer also has misclassified workers to evade federal wage and hour laws.

This is a problematic area not only because of this relatively recent crackdown by federal and state regulators, but because of the inherent difficulty experienced by employers in trying to comply with the various tests for independent contractor status under federal and state laws, the costly consequences of misclassification, a proliferation of private lawsuits on the issue and the potential for unionization of workers re-characterized from independent contractors to employees.

Misclassification of workers as independent contractors can lead to the failure to withhold employment taxes, the failure to include workers on various benefits plans including medical coverage under the Affordable Care Act, the failure to complete I-9 forms, the failure to pay unemployment and workers compensation insurance and the failure to provide required statutory leave such as Family and Medical Leave Act leave. Any such violations could result in significant penalties to the employer. Public-sector employers should consider auditing their relationships with independent contractors—sometimes referred to as consultants, per diems, contractors, project workers, temps, specialists—to ensure compliance under the various Wisconsin and federal law tests.

More Discrimination, Retaliation, and Harassment Claims. Litigation of discrimination, harassment, and retaliation claims is likely to increase in certain areas of the law that saw change or renewed Equal Employment Opportunity Commission focus in 2015. While Wisconsin law has protected individuals against discrimination based upon sexual orientation for years, based upon the federal government's 2015 pronouncement, that treating lesbian, gay, bisexual and transgender workers less favorably based on sex or gender stereotypes is discrimination under Title VII of the Civil Rights Act, may influence an expansion of suits regarding treatment of LGBT workers. Additionally, claims under the Americans with Disabilities Act, and specifically regarding denial of reasonable accommodation, may increase based in part upon heightened awareness of employer accommodation responsibilities stemming from a 2015 U.S. Supreme Court decision concerning pregnancy accommodation. The Court ruled that workplace policies that deny accommodations to pregnant workers that are provided to other employees may violate the Pregnancy Discrimination Act. Together with anticipated increased litigation and enforcement on wage and hour classification issues, we envision regulatory enforcement efforts and related litigation of Family and Medical Leave Act claims. In DOL's 2016 budget to Congress, the agency identified FMLA enforcement as a priority. Finally, we also envision that EEOC will continue to aggressively pursue discrimination claims via a strategy of trying to broaden the spectrum of viable claims through new and unique legal theories.

The best approach to viable claim defense and deterrence is to have consistent compliant policies and procedures in place and ensure supervisors are trained on the policies so that they make well-documented, legitimate, non-discriminatory decisions. Through proper planning and management of employees, supervisors will make sound decisions that support employers in successfully defending against these claims.

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