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Starting Off The New Year Right

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As we all begin 2016 with resolutions for a better year, it is also a prime time to review your company's policies to help avoid employment-related minefields. In addition to certain new obligations beginning this year, there were many headline-making developments over the past year that are informative in ensuring compliance going forward.

Increased New York Minimum Wage

On December 31, 2015, the New York minimum wage for non-exempt employees increased from $8.75 to $9.00 per hour, and the minimum weekly salary for exempt executive and administrative employees increased from $656.25 per week to $675.00 per week. In addition, employers in certain industries, such as hospitality, must also be aware of other industry-related changes such as modifications to the tip credit for tipped workers.

Proposed FLSA Regulations

Perhaps one of the biggest developments of 2015, which will likely have a significant impact on employers this year, was the issuance of new proposed Fair Labor Standards Act (FLSA) regulations. These regulations, once implemented, will be the biggest change to the nation's wage and hour laws in more than a decade. The intention of the revised regulations is to extend overtime protection to lower-level management employees. Under the current rule, lower-level managers earning as little as $23,660 per year may be ineligible for overtime compensation. The new rule would more than double the maximum income a salaried worker can earn and still be eligible for overtime pay.

The proposed rules also seek to set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers. The main goal is to minimize the risk that employees who are legally entitled to overtime will be misclassified solely because they receive a salary.

While final regulations have not yet been published, they are expected to be issued sometime in 2016. As a result, companies should be considering the potential impact on their business when they do take effect, and consider whether classification changes should be made.

Employee v. Independent Contractor

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Another classification issue that received a great deal of attention in 2015, and which will continue to be a thorn in the side of employers, is the distinction between employees and independent contractors. In 2015, the Department of Labor (DOL) issued guidance on the determination of whether a worker is an employee or an independent contractor. Specifically the report analyzed the FLSA's definition of "employ" and the application of the "economic realities" test, used by federal district courts. The DOL's guidance is important as the misclassification of independent contractors has significant financial implications.

The FLSA defines "employ" as "to suffer or permit to work." The economic realities test focuses on six factors to determine if the worker at issue is economically dependent on the employer or is actually in business for him or herself.

The six factors which make up the economic realities test are:
1. Whether the work performed is an integral part of the employer's business;
2. Whether the worker's opportunity for profit or loss is affected by his or her managerial skills;
3. The extent of the worker's investments relative to those of the employer;
4. Whether the work performed requires special skills and initiative;
5. The level of permanence in the relationship; and
6. The degree of control the employer exercises or retains over the workers.

The DOL has emphasized that all six factors must be considered and that no single factor is dispositive of a worker's employee status. Interestingly, the sixth factor, the "degree of control" is the common law test; nevertheless, the DOL has advised that it should not be given "undue weight."

Employers must be aware of all six factors and cognizant that despite a written agreement and regardless of label given to the individual, the working relationship must satisfy the economic realities test. Best-practices mandate that the employer reevaluate their independent contractor relationships for continuing compliance. Finally, employers must know that employee status under the FLSA is broadly construed in favor of the worker being considered an employee.

Religious Accommodations

Last summer, the Supreme Court of the United States issued its opinion in a case brought by the Equal Employment Opportunity Commission (EEOC) against Abercrombie & Fitch Stores, Inc. This case affected the standard by which an employer may be held liable under Title VII for refusing to hire an applicant based on a religious observance or practice.

Abercrombie & Fitch required its employees to comply with a "Look Policy" which reflects the brand's clothing style and forbids all black articles of clothing. An applicant who wore a headscarf and was a practicing Muslim sought a position at an Abercrombie store. Though the interviewer did not mention the headscarf during the interview, the interviewer lowered the applicant's "appearance" rating which ultimately caused her not to be hired.

The issue before the Supreme Court was whether Abercrombie could be liable under Title VII for refusing to hire an applicant based on a religious observance or practice if the employer did not have direct knowledge that a religious accommodation was required. The Court held that an employer could be liable even without such direct knowledge. Specifically, an applicant must only show

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that her need for an accommodation was a motivating factor in the employer's decision not to hire her. As a result of this decision, if an applicant can show that the employer's decision not to hire was based on a desire to avoid having to make an accommodation, the employer has violated Title VII.

With the never-ending list of changes taking place in the employment laws applicable to employers, it is essential that all companies routinely review and revise as necessary their policies and procedures. Please feel free to contact us with questions regarding any of these issues, or if we can assist with any employment-related issue.

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