

LAWFACTS

& opinions

ALERTING MANAGEMENT TO BREAKING LABOR AND EMPLOYMENT LAW DEVELOPMENTS

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TOP 5 EMPLOYMENT LAW ISSUES TO WATCH FOR IN 2012

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1. Proper Payment of Wages and Overtime. 2011 saw a rise in wage and hour enforcement. In 2011, the Department of Labor (“DOL”) Wage and Hour Division’s budget increased by \$13 Million as did the number of cases against employers. Employers should resolve to review their pay policies and practices in 2012, including overtime. Seaton, Peters & Revnew recently successfully defended an employer in a collective action brought against it for an alleged violation of the Fair Labor Standards Act. In that case, seasonal employees were paid based on the DOL-recognized fluctuating workweek method for the payment of overtime. This method allows employers to pay employees a fixed salary for all hours worked (whether few or many) in addition to ½ time for overtime hours. While this method of payment is lawful if certain criteria are met, employees may still challenge the payment method – albeit not always successfully. To best defend a wage and hour claim, employers should keep accurate and up-to-date timecards for employees as well as payroll records for at least three years. The method of payment should be clear and understandable to the employee, set forth in a written document, preferably acknowledged by the employee. These simple steps may make all the difference in successfully defending a wage and hour claim.

2. Workplace Retaliation Claims. The U.S. Supreme Court handed down several notable cases in 2011 favorable to employees claiming retaliation. The Court held that third-parties (such as spouses) may have a cause of action under Title VII based on unlawful retaliation. The Court also held that oral complaints of the violation of the Fair Labor Standards Act are sufficient to trigger its anti-retaliation protections. The Court has made it clear anti-retaliation provisions should be construed broadly-in favor of employees. Employers are cautioned in 2012 to refrain from, and ensure, that employees are not retaliated against (change in terms and conditions of employment) for making workplace complaints, participating in an investigation, and otherwise exercising their legal rights. Certainly, poor-performing employees are not immune to termination if they make a complaint. Thus, it is important the employer carefully and thoroughly document poor work performance (of all employees), discussions with the employee regarding the same, and hold all employees to the same performance standards. Too often we see an employee with poor performance mid-year with a glowing previous end-of-year review. If the employee’s personnel file does not accurately reflect current job performance, the employer’s exposure to liability increases when an employee has made a complaint and the employer terminates the employee due to poor performance.

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3. Employee v. Independent Contractor Misclassification Issues. In addition to the increased enforcement for wage and hour issues, the DOL and Internal Revenue Service (“IRS”) have announced a “misclassification initiative” to enforce misclassification of employees as independent contractors. Seaton, Peters & Revnew will be holding a Webinar on February 15, 2012 at noon to discuss the classification issues for 2012. Additional information is below.

4. Tax Issues. The 2% payroll tax cut for wages earned in calendar year 2011 is set to expire on February 29, 2012. This cut dropped the employee share of the Social Security tax from 6.2% to 4.2% up to the taxable wage base of \$106,800. There was no change to the employer share, which remains at 6.2%. It is unknown whether Congress will extend the cut through 2012. Employers should continue to track this issue and adjust the employee share if the cut is not extended. On January 11, Governor Dayton announced a proposal offering a New Job Tax Credit to employers for hiring veterans, new graduates or unemployed workers in 2012. This, in conjunction with the new federal VOW Act, which encourages employers to hire veterans by offering federal tax credits, could offer significant state tax credit incentives for employers. We will continue to monitor this development.

5. Healthcare Reform. On November 14, 2011, the U.S. Supreme Court agreed to hear an appeal challenging the constitutionality of the healthcare reform law which requires certain individuals to purchase health insurance by January 1, 2014 or face a penalty. If it is held unconstitutional, the Court will either sever that mandate from the rest of the law, or invalidate the entire law. If the entire law is repealed, the question becomes how to handle the countless number of new requirements that have already been implemented as a result of the new law. The Court is expected to hear oral arguments after March 2012 and a decision is not likely until June 2012.

If you have any questions regarding this article or any other employment or labor law question, please contact Corie Tarara, Emily Ruhsam, or any attorney at Seaton, Peters & Revnew at (952) 896-1700.

**Webinar: Employee or Independent Contractor?
Wednesday, February 15 from 12:00 p.m. - 1:00 p.m.**

Join Seaton Peters & Revnew attorneys Martin Kappenman and Emily Ruhsam for a discussion regarding one of the most confusing (but frequently asked) questions in the workplace – Is an individual an employee or independent contractor? This discussion is perfect for owners, senior managers and human resources professionals struggling with classification of new employees as well as those who worry that their existing and past practices may give rise to significant liability. We will discuss the increased scrutiny the DOL, IRS and State authorities have placed on classification and steps employers can take to minimize potential liability, including the risks and benefits of participating in the IRS’s Voluntary Classification Settlement Program.

This webinar is free to anyone currently receiving our LawFacts but space is limited so sign up soon. Please visit our website at www.seatonlaw.com, click on “Training & Seminars” and follow the links to the **webinar** registration form. If you have any questions please call us at (952) 896-1700.

**7th Annual Upper Midwest
LABOR LAW FORUM
For HR and Labor Relations Professionals**

**Thursday, March 8, 2012
Registration begins at 7:30 AM
8:15 AM—4:30 PM
Doubletree by Hilton, Bloomington
\$295 per attendee (discount for early
registrations)
Continental Breakfast & Lunch in-
cluded**

For agenda and highlights of the program and to register, please go to www.seatonlaw.com, click on “Training & Seminars” and follow the links to the Labor Law Forum information and registration.

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