WILLCOX SAVAGE

Employment Law Outlook

Fall 2015

WARNINGS ISSUED FOR COMPANIES USING INDEPENDENT CONTRACTORS

William M. Furr

On July 15, 2015, the U.S. Department of Labor issued an Administrator's Interpretation warning companies that (contrary to standard practices in some industries) most workers are employees under the Fair Labor Standards Act. On June 2, 2015, the Virginia Department of Labor issued a Public Service Announcement that it is implementing a new policy to prevent the misclassification of workers as independent contractors.

The U.S. DOL's Administrator's Interpretation provides that the ultimate test of whether a worker is an employee or not is whether the worker is "economically dependent" on the employer or whether the employer is truly in business for himself or herself. If the worker is economically dependent on the employer, then the worker is an employee.

The DOL looks to the following factors:

1. Is the work an integral part of the company's business? If so, this suggests employee status.

2. Does the worker's managerial skills affect the worker's opportunity for profit or loss? If not, it suggests employee status.

3. How does the worker's relative investment compare to the company's investment? If the worker is not making some investment (and thus undertaking some risk of loss) then s/he is likely an employee.

4. Does the work performed require special business skills, judgment and initiative? If not, it suggests employee status.

5. Is the relationship between the worker and the company permanent or indefinite? The more permanent the relationship, the stronger the implication that the worker is an employee.

6. What is the nature and degree of the company's control? The DOL takes the position that, to be an independent contractor, the worker must control meaningful aspects of the work so that the worker is conducting his or her own business.

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JOIN OUR SEMINAR

2015 EMPLOYMENT LAW UPDATE

Thursday, October 29

8:00 a.m. - 12:00 p.m.

8:00 a.m. continental breakfast
8:30 a.m. program begins

DoubleTree by Hilton Norfolk Airport

Complimentary Seminar

Agenda

Top Developments in Employment Law
William M. Furr/Phillip H. Hucles

Affordable Care Act Reporting Requirements
Cher E. Wynkoop

FLSA Overtime Exemptions: Recent Changes and Future Developments
Susan R. Blackman

A Real Headache: Tips for Dealing with Employees with Medical Conditions
David A. Kushner

Register by October 23

www.willcoxsavage.com
(Seating is limited)
Approved for 3.5 hours HRCI credit

POSTING SPD ON COMPANY'S INTRANET FLUNKS DOL REGULATIONS

Cher E. Wynkoop & Corina V. San-Marina

A recent ruling in *Thomas v. Cigna Group Ins.,* 2015 WL 893534 (E.D.N.Y. 2015), underscores the potential perils of relying on the electronic distribution of summary plan descriptions to participants.

In 2002, Judith Thomas began working for Countrywide. As part of her benefits package, she received an automatic life insurance policy and also enrolled in an elective policy underwritten by Cigna. In 2004, Thomas became disabled and stopped working and in 2008, she passed away. Both life insurance policies stated that benefits and coverage ended if a beneficiary left the company, but exceptions were made for those workers who became disabled, as long as proof of their disability was provided to Cigna within nine months after leaving the job.

In 2008, Thomas' beneficiary on both policies submitted a claim for $104,000 from each contract. The claim was denied later that year, on the grounds that Thomas had failed to provide proof of her disability upon leaving the company in 2004. The beneficiary sued, asserting that the premium waiver requirements had not been appropriately communicated to the participant due to inadequate distribution of the summary plan description (SPD).

The court held that the denial was arbitrary and capricious because there was no evidence that the plan administrator had provided the participant with an SPD—and the insurer never considered the appropriateness of the SPD distribution method. The court also noted that the SPD's premium waiver provisions were unclear.

The court explained that ERISA's electronic disclosure rules require notice each time a new electronic document is furnished.

The court explained that ERISA's electronic disclosure rules require notice each time a new electronic document is furnished. Even if (as the insurer suggested) the employment confirmation letter referencing the company intranet provided notice of the SPD when Thomas was hired, a different SPD was in effect when she stopped working. There was no evidence that notice of the new SPD was ever provided or that the SPDs were furnished in any manner other than intranet posting.

According to the court, intranet posting is akin to simply placing materials in a location frequented by employees, which is not an acceptable method under the DOL's SPD distribution regulations. For participants with work-related work access, the regulations require, among other things, that the plan administrator provide a written or electronic notice to employees directing them to the website and describing the SPD's significance and the right to request a paper copy.

The court remanded the issue to the insurer for reconsideration. Typically, employer life insurance policies obligate the employer to provide copies of the SPD to all participants. Because this employer did not do so, the insurer may expect the employer to reimburse it for some or all of the policy proceeds. The next step might be a lawsuit between the insurer and the employer to determine the party responsible for the $208,000 claim.

There are several takeaway points from this case:

- Merely placing SPDs on a website, without notifying participants of their availability and significance (and the right to a paper copy), does not satisfy ERISA's requirement that the distribution method be reasonably calculated to ensure actual receipt and result in full distribution.

- If the applicable document is being distributed to active employees for whom computer access is not an integral part of their employment duties, terminated employee participants, and/or plan beneficiaries, DOL rules generally require the plan administrator to obtain affirmative consent to electronic disclosure from each such individual. Prior to providing consent, the individual has to be provided with a statement that explains: the types of documents that will be provided electronically; that consent can be withdrawn without charge; the procedures for withdrawing consent and updating information (e.g., address for receiving electronic disclosure); the right to request a paper version and whether a charge applies; and the electronic delivery system and what hardware and software will be needed to use it.

- Employers should be aware of any waiver of premium provision in case of disability, as it may impose an obligation on the employer to take an affirmative action, such as notifying the insurer that a participant is no longer an active employee and that a disability claim has been filed. Also, a good practice would be to remind participants who go on disability to consult the terms of their policy for actions required on their behalf in order to qualify for the premium waiver.■

PUBLIC ACCOMMODATION AND FAIR HOUSING PRACTICE AND AN UPDATE ON FAIR HOUSING LAW

David A. Kushner & James B. Wood

Anyone who receives our newsletter already knows that Willcox Savage represents employers in a wide range of employment matters, including those arising under Title I of the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964. However, many of our clients may not realize that we also assist various businesses with compliance and litigation related to *Title III* of the ADA (which relates to the obligations of places of public accommodation) and *Title VIII* of the Civil Rights Act (more commonly known as the Fair Housing Act or FHA).

Title III of the ADA applies to places of public accommodation, including over five million private establishments such as hospitals, shopping centers, restaurants, and nearly all other private businesses which are open to the public. Title III prohibits these places of public accommodation from discriminating against individuals with disabilities with regard to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations provided by the public accommodation. Under the ADA, public accommodations must provide individuals with disabilities an equal opportunity to participate and benefit from their services. Public accommodations must also provide goods, services, and benefits in the most integrated setting appropriate to the needs of a given person's disability. Depending on the age of the commercial property, this often includes an obligation to comply with regulations related to "accessible design." In recent years, we have seen an uptick in lawsuits against private businesses alleging failure to comply with accessible design requirements, and we have successfully defended a variety of businesses against such claims.

In recent years, we have seen an uptick in lawsuits against private businesses alleging failure to comply with accessible design requirements, and we have successfully defended a variety of businesses against such claims.

We are also frequently called on to represent clients in the real estate industry against claims alleging violations of the Fair Housing Act. The FHA was enacted by Congress in 1968 "to provide…fair housing throughout the United States" by eliminating discrimination in housing related activities, including renting apartments and obtaining mortgages. The FHA provides protections to seven protected classes of individuals on the basis of race, color, religion, gender, national origin, disability, and/or familial status. Specifically, individuals and businesses cannot discriminate against a member of a protected class on the basis of their standing in the class by refusing to rent or sell, denying services, making housing unavailable or denying housing, or establishing different housing terms or conditions. Additionally, like the ADA the FHA requires housing providers to make reasonable accommodations to individuals with disabilities.

In late June, the risk of class-wide litigation under the FHA was increased when the U.S. Supreme Court issued its long-awaited decision in T*exas Department of Housing and Community Affairs v. Inclusive Communities Project.* In this split 5-4 decision, the Court upheld the "disparate impact" theory of liability under the FHA. As with employers under Title VII, housing providers are now liable not only for intentional discrimination (commonly referred to as disparate treatment), but also for *unintentional* discrimination through policies that have a disparate impact on certain protected classes. Although courts in many jurisdictions had already recognized the disparate impact theory under the FHA, there is no question that the Supreme Court's recent decision increases the risk of class-wide disparate impact litigation. Against this backdrop, we suggest that our clients in the residential real estate industry review their policies and procedures, including those related to tenant screening, to ensure that they are narrowly tailored to promote legitimate interests.■

WELCOME JAY JONES

We are pleased to welcome Jay Jones to the Willcox Savage Employment Law group.

Jay graduated from the University of Virginia School of Law. He received his B.A. degree in Government and History from the College of William & Mary.

Prior to law school, Jay worked as an Analyst with Goldman Sachs & Co. in New York City.

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WARNINGS ISSUED FOR COMPANIES USING INDEPENDENT CONTRACTORS

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These developments at the national and state level suggest that companies are going to face increasing scrutiny of their independent contractor classifications. Based on this elevated risk, we recommend that you review your independent contractor relationships to ensure that you can pass a DOL audit. We recommend that you keep records establishing independent contractor relationships with your contractors.

Independent contractors should not be held out as your employees. They should not have business cards or uniforms with your company's name on them, should not have email accounts, should not use your tools, should not have company expense accounts or credit cards, and should not receive any employee benefits such as vacation, sick pay, health benefits, or retirement plans etc.■

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