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Employment Law Outlook

Fall 2011

NLRB REQUIRES EMPLOYERS TO POST EMPLOYEE RIGHTS NOTICE

William M. Furr

On August 25, 2011, the National Labor Relations Board (NLRB) issued a Final Rule requiring employers to notify employees of their rights under the National Labor Relations Act (NLRA). Among other things, the NLRA establishes the right of employees to join labor unions, collectively bargain, and engage in concerted activity.

The NLRB's Final Rule requires most private employers to post an employee rights notice in a location where the employer posts other workplace notices. Additionally, if an employer customarily posts human resources policies on-line, it must also post the NLRB's notice on-line. The posting requirement applies to both union and non-union employers. The deadline for posting the notice is January 31, 2012. Copies of the notices are available at www.nlrb.gov.

Agricultural, railroad and airline employers are exempt from this rule. Although employers cannot be fined for failing to post a notice, employers who refuse to post the notice, are subject to an unfair labor practice claim by employees, labor unions, or other individuals.

On September 19, 2011, the U.S. Chamber of Commerce announced that it had filed a lawsuit alleging that the NLRB's new notice posting requirement violates federal law in that the NLRB lacked jurisdiction to issue the Final Rule. In its lawsuit, the Chamber of Commerce alleges that the Final Rule violates the Administrative Procedure Act, the Regulatory Flexibility Act and the First Amendment to the U.S. Constitution. As of the date of this article, there has been no ruling from the Court on the Chamber of Commerce's lawsuit. ■

In This Issue...

IRS ENCOURAGES EMPLOYERS TO RECLASSIFY INDEPENDENT CONTRACTORS

David A. Kushner

Employers are required to withhold a variety of employment taxes from the wages of their "employees," and even to make certain employer contributions toward these taxes. On the other hand, employers need not make such contributions and withholdings from compensation paid to "independent contractors." Thus, many employers attempt to classify certain workers as independent contractors, often without evaluating whether these workers qualify for this classification under the legal standard applied by the IRS. When an employer misclassifies a group of workers as independent contractors, it can face the potential of an IRS audit and, worse yet, liability for back-employment taxes, penalties and interest for prior years.

To assist employers in this predicament (and recently to encourage employers to voluntarily re-classify workers as employees), the IRS announced a new Voluntary Classification Settlement Program (VCSP), whereby employers can agree to treat a group of erstwhile independent contractors as employees going forward, in exchange for significantly reduced prior year employment tax. The new VCSP will allow employers to resolve compliance issues by making a minimal payment covering past payroll tax obligations rather than waiting for an IRS audit, and the potential of substantial penalties and back taxes.

Benefits of the Program

Eligible employers that agree to convert a group of workers to employment status for future tax periods will get the following relief:

- The employer only will be required to pay 10 percent of the employment tax liability that may have been due on compensation paid to the workers, and only for the most recent tax year (in other words, unpaid taxes for prior years will be forgiven);
- No interest or penalties will be due on that tax liability; and
- Employers will not be subject to payroll tax audits related to these workers for prior years.

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TRUSTED TRAVELER PROGRAM REDUCES U.S. RE-ENTRY WAIT TIME BY 70%

Susan R. Blackman

If you have employees who travel to other countries on business, they probably encounter long lines for customs and immigration inspections when they return to the United States. Now they may be able to enter on the fast track. Travelers who have a clean record with no criminal or immigration violations can apply for a pass from the U.S. government that would entitle them to use the fast lane at customs and immigration inspections at 20 major U.S. airports. The fast lane utilizes a self-serve kiosk that is usually reserved for airline crews and diplomats.

The U.S. Customs and Border Protection (CBP) recently announced expansion of the Global Entry Trusted Traveler Program. The program is currently open to U.S. citizens, Lawful Permanent Residents of the United States (*i.e.*, green card holders), and qualifying citizens of Canada, Mexico, and The Netherlands. Other countries may be added in the future. Applicants undergo a rigorous background check based on fingerprints and other information provided in the application process and then must be interviewed in person by a CBP Officer at a participating airport. Those who qualify will get expedited clearance through a self-operated kiosk that saves time upon arrival at the U.S. airport. **Tests of the pilot program were shown to reduce wait times by 70 percent**.

Applicants can apply online through the Global Online Enrollment System (GOES) at https:/goes-app.cbp.dhs.gov/. Approved applicants may receive a Global Entry Radio Frequency Identification (RFID) card, valid for five years. Some participants may receive Global Entry stickers placed on their passports. Possession of the card or sticker does not guarantee that the traveler would never encounter a delay in the immigration process. For example, if a Trusted Traveler's name wound up on a watch list, or other circumstances raised questions about the person's admissibility or compliance with customs, immigration or other legal requirements, then the traveler would be required to go through an inspection by a CBP officer. Barring such developments, use of this program could dramatically expedite passage through customs and immigration each time the Trusted Traveler returns to the United States. The program may also grant access to expedited entry benefits in other participating countries.

More information, including the location of the Global Entry kiosks at participating airports, is available at the Global Entry website: http://www.globalentry.gov/. ■

In the past two months, bills have been introduced in both the U.S. House of Representatives and the U.S. Senate to prohibit employers from discriminating against unemployed applicants. The Fair Employment Opportunity Act of 2011 makes it unlawful for employers or staffing agencies to refuse to hire applicants based on their unemployed status.

The unemployment rate in the United States was 9.1% in July and has hovered over 8.5% for more than two years. Over 6.2 million Americans have been out of work for six months or more. These bills were introduced to address a recent trend across the country in which employers post job advertisements, but ask unemployed individuals not to apply.

The House and Senate bills seek to impose penalties on employers who refuse to consider unemployed applicants. The bills allow employers to hire an employed applicant over an unemployed applicant provided the applicant's employed status was not the motivating factor in the hiring decision. The House version of the bill also contains a whistleblower clause protecting employees who report violations of the statute. Stay tuned to see whether these bills are ultimately passed into law.

IRS ENCOURAGES EMPLOYERS TO RECLASSIFY INDEPENDENT CONTRACTORS

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These benefits may be particularly attractive to employers with a large number of workers who work exclusively for the employer as alleged contractors, or to other employers utilizing large numbers of questionably classified contractors.

Eligibility Requirements

To be eligible for the VCSP, an applicant must:

- Have treated the workers consistently in the past as nonemployees;
- Have filed all required Forms 1099 for the workers for the previous three years; and
- Not be under audit by the IRS, the U.S. Department of Labor or a state agency concerning the classification of these workers.

Interested employers can apply for the program by visiting IRS.gov and filing Form 8952, "Application for Voluntary Classification Settlement Program." This form must be submitted at least 60 days before the employer wishes to begin treating the workers as employees. Further details about the VCSP are available on the Employment Tax pages of IRS.gov.

Beware of the Unintended Consequences of Accepting the Benefits of the VCSP

While the VCSP offers an attractive opportunity for some employers to decrease federal tax liability related to misclassified workers, federal tax liability is only one area in which misclassification carries serious consequences.

For example, if an employer chooses to convert workers to employment status under the VCSP, it may be liable for unpaid overtime to contractors who worked over 40 hours per week. Potential liabilities may also exist under an employer's retirement plans and health and welfare benefit plans. Finally, while the VCSP offers a major limitation of liability for back *Federal* taxes, it provides no relief relating to back *state* taxation.

In short, prior to participating in the VCSP, it is important that you carefully evaluate the program's benefits and risks with your employment and employee benefits attorneys. ■

EMPLOYERS SHOULD UTILIZE GINA'S SAFE HARBOR PROVISION

Bryan C. R. Skeen

The Genetic Information Nondiscrimination Act (GINA) generally prohibits employers from acquiring genetic information from employees. According to the Act, "genetic information" includes (1) information about an employee's genetic tests, (2) the genetic tests of an employee's family members, (3) an employee's family medical history, (4) an employee's or a family member's participation in clinical research related to genetic services, or (5) the genetic information of a fetus or embryo related to the employee. Thus, for example, an employer generally is prohibited from acquiring information about an employee's DNA or predisposition for developing certain hereditary conditions (*e.g.*, certain cancers, Huntington's Disease, etc.).

Although many employers may wonder how they could run afoul of these restrictions (indeed, how often do employers have the need to request an employee's genetic profile?), employers could find themselves unintentionally requesting such information from employees while engaging in the interactive process with respect to a reasonable accommodation under the Americans with Disabilities Act (ADA) or evaluating a request for leave under the Family and Medical Leave Act (FMLA). If an employee responds to a request for additional medical information by providing protected genetic information, an employer risks potential GINA liability.

Fortunately, GINA contains a safe harbor provision which provides specific language that employers may include in any request for health-related information. Employers who include this language in a request who later receive unwanted genetic information from an employee will not be liable for such acquisition under GINA. Accordingly, employers should include the following language, in writing, for any requests for health-related information:

> *The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.*

29 C.F.R. § 1635.8(b)(1)(i)(B)

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EMPLOYERS SHOULD UTILIZE GINA'S SAFE HARBOR PROVISION

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An employer who includes this language in a request for information that later results in production of protected genetic information will not be in violation of GINA. Employers who fail to include this language, however, are not without hope. They can avoid liability by showing the acquisition was "inadvertent" if the request was "not likely to result in a covered entity obtaining genetic information." Because this second avenue requires further proof and factual analysis, employers are best served to include the safe harbor language in all requests for health-related information. ■

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