

Employee or Independent Contractor? Proposed Legislation Addresses Misclassifying Employees

By Sally A. Piefer

On April 22, 2010, the U.S. House and Senate introduced legislation addressing attempts to misclassify employees as independent contractors. The *Employee Misclassification Prevention Act* is a proposed amendment to the Fair Labor Standards Act (FLSA). The Act imposes compliance and record-keeping requirements on employers in an effort to prohibit the misclassification of employees, including:



1. Requiring employers to provide written notice to each individual hired alerting the individual whether he or she is an employee or an independent contractor.
2. Requiring employers to keep records, similar to the work and wage records, for each contractor hired.
3. Imposes civil penalties up to \$5,000 for each violation where an employer does not comply with the notice and record-keeping requirements or where there has been misclassification.
4. Providing for triple damages in the event that a willful misclassification occurs.

If passed, employers would have six months from the bill's effective date to notify current employees and independent contractors of their status, and future workers would need to be informed of their status *at the time of hire*. If an employer failed to provide the notice, workers would be presumed to be employees unless the employer showed clear and convincing evidence to the contrary.

It has been reported that the DOL has spent millions to hire new Wage and Hour Division investigators to target employee misclassifications. Employers should ensure that they know what factors are considered to determine whether an individual is an employee or an independent contractor. Simply having an agreement saying the individual is an independent contractor is not sufficient.

If you have questions or concerns regarding workers who you are treating as independent contractors, please seek legal counsel to ensure that your treatment of that individual is consistent with the law.

Wisconsin Bans Texting While Driving

By Cindy L. Fryda



On May 5, 2010, Wisconsin joined a growing number of states in passing legislation which makes texting while driving illegal. Under the new law, effective December 1, 2010, first-time violators face fines between \$20 and \$400, along with being assessed four points on their driving records. Second-time violators face fines between \$200 and \$800. The law is primary, meaning police officers can stop motorists suspected of this offense alone without another violation.

Employees who have company cars or who drive vehicles as part of their employment should be made aware of your Company's position on safe driving and compliance with the new law when it becomes effective. A policy on cell phone use while driving can be instrumental in reducing accidents and resultant workers compensation claims. Now is a good time to implement a company policy restricting this activity and making certain that employees understand that they will be responsible for any fines received as a result of this new law.

Is Your Intern an Employee? DOL Releases New Standards Governing Internships

By Sally A. Piefer

Many students and college graduates who have been unable to locate employment are opting to serve as interns to gain valuable "employment" experience. Do you have to pay those interns for the work they perform?

The DOL recently released a new set of standards to help employers determine whether interns must be paid the minimum wage and overtime for the services they provide. These standards apply to interns who perform work for "for-profit" private sector employers.

The word "employ" is defined broadly by federal law and therefore most internships involving the "for-profit" private sector are considered to be employment rather than training. If your intern is an employee, the intern must be paid at least the minimum wage and must also be paid overtime compensation for work when the individual works more than 40 hours in a week.

There are limited circumstances under which interns at "for-profit" private sector employers can work without compensation. The DOL has issued a fact sheet listing 6 criteria which must be satisfied to determine whether an internship can qualify as training:

- The internship is similar to training that would be given in an educational environment.
- The internship experience is for the benefit of the intern.
- The intern does not displace regular employees and works under close supervision of staff.
- The employer providing the training derives no immediate advantage from the activities of the intern and on occasion its operations might be impeded.
- The intern is not necessarily entitled to a job at the conclusion of the internship.
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

An intern relationship will exist only if **all** of these factors apply. Otherwise the individual is an employee and is subject to minimum wage and overtime laws.

What steps can you take to ensure that your intern does not become your employee?



1. Make the internship a fixed duration established prior to the outset of the internship.
2. Do not use the internship as a trial period for individuals seeking employment.
3. If the internship will be sponsored by an educational institution, coordinate with the school to determine if the school has particular requirements.
4. Do not allow the intern to perform productive work – and clearly define who the individual reports to and what kinds of projects will be assigned.
5. Provide a greater level of supervision for the intern than you provide for your employees.
6. Do not use interns as a substitute for regular workers or to augment your workforce during busy seasons.
7. If your intern will be paid, discuss time-keeping requirements at the outset – interns should be told what constitutes “working hours” so that the intern can be properly compensated.

Employers using interns need to review all aspects of the relationship before determining that the intern is not an employee, and any internship programs should be reviewed by employment counsel prior to implementation.

Is Prison A Possibility for Willful Workplace Safety Violations?

By Sally A. Piefer



The *Protecting America's Workers Act*, if passed, would allow OSHA to implement more severe penalties for willful safety violations that result in serious injury or death. It appears that the bill would use intent to determine whether standard penalties will apply for OSHA violations or whether criminal charges will be issued. For example, if a dump truck driver backed over a co-worker, criminal charges could be issued if the company's CEO, safety director or other responsible person knew that the dump truck had problems with its brakes and instructed the employee to operate the truck anyway.

The bill also increases the penalties associated with certain safety violations. Under the current rules, if a violation of the type described above occurred, the maximum penalty (if considered willful) would be \$70,000. The bill proposes that penalties increase to \$120,000 or 10 years in prison. The bill also proposes increased criminal sentences of up to 20 years for repeat offenders. These criminal penalties would apply to safety directors, project managers or other company executives.

While OSHA does not require all employers to adopt formal safety and health policies, employers should consider implementing a workplace safety and health policy. Poor safety practices lead to accidents and injuries with resulting costs for lost work time, workers' compensation, staff replacement and training, equipment repair, work stoppage, and even liability for damage suffered by nonemployees. A well-designed safety policy that provides regular safety training for all employees, addresses job-specific hazards, and requires regular monitoring and enforcement by managers or workplace safety committees can significantly reduce the risks and costs associated with unsafe work practices.



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Waiver of Family and Medical Leave Act Claims

By Cindy L. Fryda

A recent Federal court decision clarified the FMLA regulations implemented in 2009. In *Whiting v. The Johns Hopkins Hospital, et al.*, the court pointed to the recent regulations to conclude that an employee can waive an FMLA claim either in a Separation Agreement at termination or in a settlement agreement after termination.

Prior to the implementation of the 1999 regulations, the courts disagreed about whether an employee could waive an FMLA claim in a severance agreement because the regulations provide that "employees cannot waive, nor may employer induce employees to waive their rights under the FMLA."

However, the preamble to the current version of regulations now clearly say that "an employee could waive ... FMLA claims based on past conduct by the employer, whether such claims are filed or not filed, or known or unknown to the employee as of the date of signing the settlement ... agreement."

In *Whiting*, the court looked at whether a claim which arose prior to the implementation of the 1999 regulations could be waived. The court found that the claim could be waived because the 1999 regulations were simply a clarification of the prior version of regulations.

Employers can now feel much more confident that their separation or settlement agreements will, in fact, successfully waive FMLA claims. However, employers should recognize that employees cannot waive any claims that may arise in the future under the FMLA or under other laws. When considering termination of any employee who you believe may file an employment claim, employers should continue to contact counsel to ensure that they have minimized the risk of liability.

OSHA Requires Employers to Provide Safety Training in a Language Workers Understand

By Sally A. Piefer

OSHA recently issued an enforcement memorandum directing compliance officers to ensure that workers receiving required OSHA training are receiving the training in a language they understand. The directive is directed toward Latino and other non-English speaking employees.

If you have non-English speaking employees, you should ensure that your safety training programs comply with this new directive. You may need to locate translators to ensure your policies are appropriate for your specific workforce.

If you have questions about the subjects discussed in this Issue, or if you need help with any employment matters, please contact your TSG attorney or one of the members of our Employment Law Team: Sally Piefer at (262) 754-1325, or by e-mail at sap@tsqglaw.com; Cindy Fryda at (262) 754-1332, or by e-mail at clf@tsqglaw.com.

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