Fenwick Employment Brief

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Victor Schachter 650.335.7905
Saundra L. M. Riley 650.335.7170
Fenwick
FENWICK & WEST LLP

IRS PROGRAM PROVIDES AMNESTY FOR SETTLING CONTRACTOR MISCLASSIFICATIONS

The Internal Revenue Service ("IRS") recently announced a program to encourage employers to reclassify workers who were previously misclassified as independent contractors. Through the Voluntary Worker Classification Settlement Program, companies may voluntarily reclassify independent contractors as employees for future federal employment tax purposes and settle any past payroll taxes on such workers' compensation. To be eligible for the program, the company must have consistently treated the worker as a nonemployee, filed the required 1099 tax forms for the past three years, and not be under a worker classification audit. Participating companies will be required to pay 10% of the employment tax liability that may have come due on compensation paid to the reclassified workers in the past year – with no interest or penalties due and a guarantee of no employment tax audit of reclassified workers for the prior years. More information about the program and other conditions of participation is available at the IRS website.

The program appears to be part of a larger effort by the IRS to curb worker misclassification. Prior to announcing the program, officials from the Department of Labor, IRS, and several state agencies announced they would be partnering to reduce worker misclassification. In fact, IRS regulators have reportedly observed that, due to the availability of the program, the IRS will be more vigilant about worker misclassification in the future.

While participation in the program may favorably address past federal employment tax liability, employers are cautioned that reclassification will likely have other consequences, both intended and unintended. Thus, employers are advised to seek legal counsel before deciding whether to take advantage of the new IRS program.

IMPORTANT CALIFORNIA LEGISLATIVE DEVELOPMENTS

Governor Brown recently signed into law two bills that substantively change private employer obligations to their employees in California.

Maintenance of Medical Coverage During Pregnancy Disability Leave: SB 299

Effective January 1, 2012, all employers with at least 5 employees in California must maintain at the same level, and pay for, continued health care coverage for employees on pregnancy-related disability leave. Previously, while California law guaranteed up to four months of leave due to pregnancy-related disabilities (also referred to as "maternity leave"), it did not require employers to continue an employee's health care coverage during the leave. Such protections fell only within the realm of the federal Family and Medical Leave Act, which applies to employers with at least 50 employees, has employee eligibility requirements, and caps out at twelve workweeks. Employers should now review their handbooks, stand-alone policies, and practices regarding pregnancy-related disability leave and continued health care coverage to ensure compliance with SB 299 in 2012.

Signed, Written Commission Contracts: AB 1396

Effective January 1, 2013, all agreements to pay employees commissions based on services to be rendered in California must be in a writing signed by the employer and employee. Under AB 1396,

the employer is obligated to document in that written agreement "the method by which the commissions shall be computed and paid." The bill further provides that, where the parties continue to work under the terms of an expired agreement, the terms are presumed to remain in effect until the contract is superseded or employment ends.

Many employers already document their commission practices and policies, most often in a commission plan or through less formal ways. However, it is now incumbent on all employers with employees rendering services in California to ensure such practices and policies are captured in a signed agreement. From a best practices perspective, the agreement should not only include the topics required by the bill, but also other key terms such as when commissions are earned and payable and commission payout upon or after termination. Additionally, employers will need to proactively update their agreements – *in writing and in advance* – to ensure that annual or quarterly changes are effective at the start of the new term, since verbal or late notice of such changes that purport to apply retroactively from the beginning of the applicable period may run afoul of the new law.

Because the bill is not effective until 2013, employers have the next year to evaluate and bring into compliance their commission documentation practices.

NEWSBITES

"Meal Period" Issue Set For Oral Argument in Brinker: The "Provide" v. "Ensure" Saga Continues

On November 8, 2011, the California Supreme Court will hear oral argument in *Brinker v. Hohnbaum*, which poses whether employers must *ensure* that employees take meal periods or simply make them available to employees. Most courts, especially California state courts, have concluded that employers must *provide* – or make available – such periods, but not guarantee they are taken. Consistent with this approach, Judge James P. Kleinberg of the Santa Clara County Superior Court recently ruled in *Driscoll v. Graniterock* that the company met its meal period obligations by allowing drivers the opportunity to take a meal period, even though most drivers opted for an on-duty meal with attendant premium pay and earlier departure time. However, some other courts have gone a step further and required employers to force employees to take their meal periods. The ultimate decision in *Brinker*, which is expected to issue by February 2012, is anticipated to give employers much needed, conclusive guidance about their meal period obligations.

NLRB Pushes Deadline to Post Employee Notice to January 31

The National Labor Relations Board ("NLRB") has postponed the deadline by which most employers, whether unionized or not, must post a notice of employee rights under the National Labor Relations Act ("NLRA"). Originally, the deadline was November 14, 2011, but, after significant controversy and reactions from the employer community and attempts to block implementation through legal action and federal legislation, the compliance deadline has been postponed to January 31, 2012. The posters are available for download on the NLRB's website. For further information regarding the content of the notice and the posting requirement, refer to the September 2011 FEB and the NLRB's FAQs on the posting requirement.

Employer Defeats Challenge to Termination Over Facebook Post

With increasing NLRB scrutiny toward adverse action for employee social networking activities (*see* the September 2011 FEB), its General Counsel (who prosecutes charges for the NLRB) brought unfair labor

practices charges against Karl Knauz Motors, Inc. after it terminated a Chicago-area BMW employee for his Facebook post in which he commented on two work-related events. First, the employee mocked the "Ultimate Driving Event" – at which the dealership served hot dogs and water – as cheap and conveying the wrong message to potential customers. The post followed discussion with, and voiced the concerns of, co-workers whose salaries were based on commissions and who had access to and commented on the post. Second, the employee posted photos of an accident caused by a 13-year-old driving an LR4 into a pond at an adjacent (employer-owned) car dealership and commented: "This is your car: This is your car on drugs." The NLRB administrative law judge ruled that the commentary on the Ultimate Driving Event was protected activity, but concluded the termination resulted from the posting of the accident photos and, therefore, was not wrongful. In recognizing no protection for the accident-related post, the judge observed it was done "apparently as a lark, without any discussion with any other employee . . ., and had no connection to any of the employees' terms and conditions of employment."

Also of interest, the administrative law judge concluded that several provisions in the employer's handbook – seemingly innocuous as they prohibited use of language injurious to the employer's image or reputation, unauthorized interviews, and communications with non-employees regarding personnel matters – violated the NLRA because they were overbroad with the potential to chill lawful, employee concerted action.

Unsigned Sales Commission Plan Enforceable

The Seventh Circuit Court of Appeals (covering mid-western states including Michigan) recently upheld a trial court's dismissal of an employee's claims, finding the commissioned sales representative, Matthew Carroll, bound by an unsigned commission plan. *See Carroll v. Stryker Corporation*. As an initial matter, the court recognized Carroll accepted the terms through his continued employment. The court then rejected several challenges Carroll raised to the commission plan. It found that the employer's express right to modify the contract did not eliminate the employer's promise and obligation to pay commissions on services rendered prior to any changes, so the contract contained mutual promises and was enforceable. The court further found that the disclaimer in the company's employee handbook – that the *handbook* was not a contract – was not relevant to evaluating the plan's enforceability.

Retaliation Claims Survive, Even as Underlying Sexual Harassment Claims Dismissed

Serving as an important reminder to employers everywhere, in *Moore v. Third Judicial Circuit of Michigan*, a federal district court in Michigan allowed a court administrator to pursue her retaliation claim against her employer, even as her underlying claims of sexual harassment were thrown out. Applying a federal standard to her harassment claims, the court rejected the administrator's contention that any employment benefits were conditioned upon her submission to (or rejection of) unwelcome advances and observed that the conduct, "while perhaps awkward, impolite, and even unpleasant, [had] not risen to the level of frequency or severity to be deemed extreme." Still, the retaliation claim survived. Thus, the court permitted the administrator to pursue her claim that, after her complaints, several of her superiors commenced a pattern of retaliatory action toward her, including impugning her integrity and chastity, deprivation of authority previously held, barring her from accessing areas within the employer's offices, and refusal to consider her as a replacement for her supervisor following his departure.

Appellate Court Rules Employment Arbitration Agreement Unenforceable Since Employees Cannot Waive PAGA Representative Actions

In the second California appellate decision to address class action waivers in employment arbitration agreements since the U.S. Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion* (*see* the April 2011 Litigation Alert) upholding the enforceability of class action waivers in arbitration agreements, the court refused to enforce an arbitration agreement due to its purported waiver of representative actions under California's Private Attorneys General Act ("PAGA"). *See Urbino v. Orkin Services of California, Inc.* Following the reasoning of *Brown v. Ralphs Grocery Co.* (*see* the August 2011 FEB), the court determined such waivers contradict "the fundamental purpose of a representative enforcement action under PAGA" and are therefore "unconscionable and unenforceable." Consequently, the court refused to extend the *AT&T Mobility* holding to PAGA representative actions. Many employment law practitioners question the viability of the *Urbino* and *Ralphs Grocery* decisions in light of the U.S. Supreme Court's *AT&T Mobility* broad ruling and await further direction as case law continues to develop in this area.

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Victor Schachter is a partner in the Litigation Group and co-chair of the Employment practices group. Saundra L. M. Riley is an Associate in the Litigation and Employment Practices group.

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