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EMPLOYEE RELATIONS BRIEFING



Agenda

- Introductions
- Discussion Topics
 - Wage & Hour – FLSA Compliance
 - Don'ts & Do's of Good Documentation
 - Medical Marijuana Act-Is There a Duty to Accommodate?
 - Understanding Furloughs
 - Should You Check Out Potential Employees on Social Networking Websites?
- Q&A



Wage & Hour FLSA Compliance

Linda Dumas



Fair Labor Standards Act

Recent Actions by Congress

- Minimum Wage Increases
 - July 24, 2008 \$6.55
 - July 24, 2009 \$7.25
- Don't forget: state and local laws may impose a higher minimum wage or other different wage & hour rules



NOT Your Employee

- “True” Independent Contractor
- Student-Trainee
- Volunteer



Overtime Pay

- Count hours worked over 40 in a workweek
- Pay 1.5 times the “regular rate” of pay (all pay ÷ all hours the pay covers)
- Include in the regular rate things like bonuses, commissions, incentive pay, and other kinds of extra pay



Overtime Pay

- Some payments can be excluded from the “regular rate.” for example:
 - Pay for Unworked Holidays
 - True Gifts
 - Pay for Unworked Vacation Time
 - “Discretionary” Bonuses (Be careful with this!)



Overtime Pay

- The Rule on “Comp” Time?
 - There’s no such thing!!
 - Not for private-sector (non-governmental) employers, at least;
 - Each workweek stands alone; can’t average workweeks.



Timekeeping & “Hours Worked”

- Keep an accurate record of all time a nonexempt employee works each workday and each workweek.
- Include all time the employer knows or has reason to know about – not just time the employer required or asked the employee to work.



Timekeeping & “Hours Worked”

- DOL’s View: If you don’t want to pay for the work, you must prevent it from being done.
- “No Overtime” Policies
- Signing Timecards



“Hours Worked”

- **Common Trouble Spots:**
 - Meals
 - Breaks
 - On-Call Time
 - Meetings/Training
 - Early Work/Late Work
 - Work at Home
 - Travel Time



“White Collar” Exemptions

- The FLSA provides an exemption from both minimum wage & overtime pay for employees who are employed in a bona fide:
 - Executive;
 - Administrative;
 - Professional; or
 - Outside Sales capacity.
- Certain computer employees may also be exempt professionals.



Other Exemptions

- In certain industries or occupations for example:
 - Agricultural work
 - Automotive dealership sales, parts, or mechanical work
 - Commission-based work in “retail” establishment
 - Transportation work subject to DOT regulation



Exemption Basics

- Specific criteria apply for each exemption
- It's the employer's burden of proof
- Exemptions relate to individuals – not to job titles, job descriptions, pay classifications, job groups, etc.



Tests for Exemption

- Salary Level
- Salary Basis
- Job Duties



Salary Level

- For most employees, the minimum salary level required for exemption is \$455 per week
- Must be paid “free & clear”
- The \$455 per week may be paid in equivalent amounts for periods longer than one week:
 - Biweekly \$910
 - Semimonthly: \$985.83
 - Monthly: \$1,971.66



Executive Exemption

1. “Salary basis” of pay (at least \$455 per week), and
2. “Primary duty” test (management), and
3. Supervises (2 or more full-time employees or the equivalent), and
4. Authority to hire or fire (or makes influential suggestions and recommendations as to such things).



Administrative Exemption

1. “Salary basis” or “fee basis” of pay (at least \$455 per week), and
2. “Primary duty” test (work related to management or general business operations), and
3. Discretion and judgment in matters of significance.



Learned Professional Exemption

1. “Salary basis” or “fee basis” of pay (at least \$455 per week), and
2. “Primary duty” test (work requiring advanced knowledge; a field of science or learning; customarily prolonged course of specialized intellectual instruction), and
3. Consistent exercise of discretion and judgment; work is predominantly intellectual.

(Note: Teachers, doctors, and lawyers have different test and no minimum-pay requirement. “Creative professional” has different duties test.)



Computer Employee Exemption

1. “Salary basis” or “fee basis” of pay (at least \$455 per week), OR, hourly basis of pay (at least \$27.63 per hour), and
2. Works as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, and



Computer Employee Exemption

3. Has as “primary duty”:

- a. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; OR
- b. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; OR
- c. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; OR
- d. A combination of these duties, the performance of which requires the same level of skills.



Outside Sales Exemption

1. “Primary duty” test: making sales, or obtaining orders or contracts for services or for the use of facilities for which the customer or client will pay; and
2. Customarily and regularly engages in this activity away from the employer’s place or places of business.



Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed.
- Must be paid the full salary for any week in which the employee performs any work.
- Need not be paid for any workweek when no work is performed.



Permitted Salary Deductions

1. For full-day absences for personal reasons
2. For full-day absences for sickness, disability, or accident if there is a bona fide sick-pay plan, policy, or practice
3. To impose a penalty in good faith for violating safety rules of major significance
4. To offset amounts received as jury fees, witness fees, or military pay



Permitted Salary Deductions

5. To pay a pro-rata salary for working a partial week in the first or final week of employment
6. To provide unpaid leave under the federal Family and Medical Leave Act
7. For unpaid disciplinary suspensions of one or more full days “imposed in good faith for infractions of workplace conduct rules”, but only under “a written policy applicable to all employees”



Improper Deductions-Examples

- Deduction for a partial-day absence to attend a parent-teacher conference
- Deduction of a day of pay because the employer was closed due to inclement weather
- Deduction of 3 days of pay because the employee was absent from work for jury duty, rather than merely offsetting any amount received as payment for the jury duty.
- Deduction for a 2 day absence due to a minor illness when the employer does not provide wage replacement benefits for such absences.



Effect of Improper Deductions

- An actual practice of making improper deductions from salary will result in the loss of the exemption.
 - During the time period in which improper deductions were made
 - For employees in the same job classifications
 - Working for the same managers responsible for the actual improper deductions
- Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee



Actual Practice

- Factors include, but are not limited to:
 - The number of improper deductions, particularly as compared to the number of employee infractions warranting discipline
 - The time period during which the employer made improper deductions
 - The number & geographic location of both the employees whose salaries were improperly reduced and the managers responsible
 - Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions



Safe Harbor

- The exemption will not be lost if the employer:
 - Has a clearly communicated policy prohibiting improper deductions & including a complaint mechanism;
 - Reimburses employees for any improper deductions; and
 - Makes a good faith commitment to comply in the future
- *Unless* the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints



Payroll Practices That Do Not Violate the Salary Basis Test

- Taking deductions from exempt employees accrued leave accounts
- Requiring exempt employees to keep track of & record their hours worked
- Requiring exempt employees to work a specified schedule
- Implementing bona fide, across-the-board schedule changes



Child Labor

- **18** or older for occupations declared “hazardous” (which includes regular driving on public roads)
- **16** or older for general occupations
- **14** and **15** for limited occupations, with strict hours and times-of-day limitations



Don'ts & Do's of Good Documentation

Mike Bourgon



Don'ts of Good Documentation

When it comes to documentation, we suggest you adhere to the following don'ts:

- Don't express personal opinions, accusations or judgments.
- Don't use generalities, overstatements or exaggerations.
- Don't reach conclusions without all the facts.
- Don't ever attempt to reach a legal conclusion in your documentation.



Don'ts of Good Documentation

- Don't use descriptive words such as “weakness”, “inadequacy” or “failure” – focus instead on the actual behavior.
- Don't use absolute expressions such as “always”, “never”, “every time” and “invariably” unless they are completely accurate.
- Don't record anything that you have not already communicated to the employee.



Do's of Good Documentation

The more documentation that you substantiate, the higher your credibility. Here is the list of documentation do's::

- Do create contemporaneous documents, including full name and full date at least once before using shorthand and never, ever back-date documents.
- Do obtain employee's signature to verify the discussion and goals, wherever possible.



Do's of Good Documentation

- Do keep the documents themselves clean and fresh.
- Do use a professional tone both in the writing and in the document itself.
- Do avoid bias.



Medical Marijuana- Is There a Duty to Accommodate?

Mike Bourgon



Status

- A number of states (13 as of 11/08) have enacted a model medical marijuana act or similar statutes. In MN, the bill was passed overwhelmingly by the legislative but was vetoed at the 11th hour on 7/14/09 by the Governor.
- While the effort has been slowed, in such states as MN, there's still serious potential for a state constitutional amendment which in MN is scheduled to appear on the 11/10 ballot.



What Questions Does This Act Generate?

Several questions are opened up by the medical marijuana act including:

- To what extent must an employer accommodate an employee who notifies the employer that they use medical marijuana appropriately pursuant to statute?
- How does an employer with a zero tolerance for substance abuse enforce that policy against a covered employee who tests positive for marijuana?



What Questions Does This Act Generate?

- Must they disregard the test results?
- Do employers have to allow covered employees to possess marijuana in the workplace?
- Will the discharge of a medical marijuana act covered employee pursuant to employer's drug free workplace policy violate public policy and therefore become illegal?



What Questions Does This Act Generate?

- These are the questions that need to be filled in by regulation state courts or the Dept. for Community Health. To date, non have been directly addressed. There are, however, some answers that surface indirectly.
- It is clear that the employer need not accommodate an employee's use of medical marijuana while working or working while under the influence of marijuana. However, what constitutes being under the influence will need to be determined on a case-by-case basis.



What Questions Does This Act Generate?

- Yet to be determined is the way in which the employer may take disciplinary action or discharge an employee that tests positive for marijuana regardless of whether they are qualifying patients under the Act and regardless of whether there is any evidence of being under the influence in the workplace.
- Employers do not have a duty to accommodate an employee's desire to ingest medical marijuana in the workplace or to work under the influence of marijuana to the extent that the employer's drug free workplace program which includes drug testing is violated.



What Questions Does This Act Generate?

- Employers will need to be prepared to deal with medical marijuana users who test positive for marijuana. However, it still needs to be determined, and this is a large issue, whether the medical marijuana act requires the employer to accommodate the employee who tests positive or if the act proposes other limitations in the workplace. We will keep everybody apprised as to what happens next.



Understanding Furloughs

Mike Bourgon



Understanding Furloughs

A furlough, typically defined as a temporary layoff for work, is often considered by employers as a layoff alternative.

- Furloughs allow employers to keep people employed & maintain institutional knowledge during a time of financial hardship. They can result in much-needed cost savings without having to incur financial & emotional costs of layoffs and can leave an organization better prepared to take advantage of an anticipated upswing in financial performance.



What is a Furlough?

A furlough is either a voluntary or involuntary unpaid leave of absence from employment. In the private sector, assuming that the targeted workforce terms and conditions of employment are not governed by a collective bargaining agreement or individual payment contracts, employers may choose to utilize furloughs as a means to saving money for their company through planned or emergency procedures to reduce payroll costs. This reduction is normally effectuated on an hourly, daily or weekly basis.



How Does This Differ from Layoffs?

Generally a workforce layoff constitutes a group termination and the employees selected to participate in the layoff are usually not expected to return to work; in contrast, furloughs contemplate that the employees will remain with the company but at a reduced labor cost.

Why do employers turn to furloughs rather than other practices such as layoffs? Furloughs allow employers to retain its experienced workforce while appreciating the savings associated with the reduced labor costs.



How are Furloughs Implemented?

For private employers there are no special implementation procedures. Rather, furloughs can be planned as a means of saving money or utilized in an unexpected emergency. However, an employer is wise to provide employees with an advanced notice. Many states require such an advanced notice under the general notice requirements of their wage payment laws and some specify the amount of notice for their reduction in compensation.



Should You Check Out Potential Employees on Social Networking Websites?

Mike Bourgon



Social Networking Sites

- Is it legal to search social networking sites on the internet as part of a background check?
 - No law actually prohibits employers from searching these websites, however, employers need to be aware of potential federal & state discrimination claims and invasion of privacy claims.
- Can employer's terminate an employee or refuse to hire a job applicant based on information found on the internet?
 - Yes, as long as the employer does not use the information learned from the internet in a discriminatory manner or in a way otherwise prohibited by law.



Social Networking Sites

- Can employers use background screening firms to conduct background checks on all applicants or job candidates?
 - In general, it's a good idea to at least do a criminal background check on all viable job applicants. Background screening firms will work with employers to comply with federal & state background check laws and make recommendations as to the types of background checks employers should have done based upon the job requirements and duties.



Social Networking Sites

- Once you've done the balancing test described above and decided whether information discovered online is something you're going to seek, here are 10 recommendations that should be kept in mind for use of the information gleaned:
 1. Make an informed decision based on the internet searches used for applicants.
 2. Include a release/authorization on applications.
 3. Don't be cute.
 4. Retain necessary information.



Social Networking Sites

5. Focus on job-relatedness of information.
6. Ensure the right person is involved.
7. Evaluate the use of certain parties to conduct searches.
8. Consistently apply the search.
9. Check terms & conditions of the website being accessed.
10. Increase support for job actions.



Questions & Answers



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