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THE JOB DESCRIPTION

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In This Issue:

Five Steps to Reduce the Risk of Employee Misclassification

Misclassification of workers as independent contractors, when they should be treated as employees, remains one of the biggest risks and hot button topics facing employers. Many government agencies are working together to pursue businesses for alleged misclassification, and the financial – and possible criminal – risks are huge.

A business considering classifying new or existing workers as independent contractors should carefully consider whether that arrangement is appropriate in the first place. An independent contractor is necessarily a worker who is in business for himself or herself. A business that is unable to surrender the degree of control consistent with independent contractor status will be better off classifying the individuals as employees. While this may not seem like the best option at the time, it would eliminate the risk of certain private lawsuits, government investigations, and substantial financial liability down the road.

A company that decides to proceed with an independent contractor arrangement should take concrete steps to establish the worker's independence from the organization. A business that is thoughtful and thorough in analyzing its workers' independent contractor status in light of each of the above factors is more likely to survive the government's heightened scrutiny.

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The Cavanaugh Law Firm, LLC is committed to your company's success. We are available to provide you knowledgeable advice on the full range of labor and employment law issues and to defend your company and its managers in lawsuits and agency proceedings. If you have any questions about the contents of this newsletter or about any issue affecting your company, please contact us.

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EEOC Signals Renewed Focus on "Caregiver Responsibilities" Discrimination

"Caregiver responsibilities" is not a protected category under federal employment protection laws, meaning it is not *per se* unlawful to discriminate against individuals with caregiving responsibilities. Nevertheless, the EEOC has taken the position that such discrimination *may* be unlawful if the employer acts on a stereotype that implicates a protected characteristic. The EEOC has taken a renewed interest in pursuing claims related to caregiver responsibility discrimination. Discrimination against an employee with caregiver responsibilities could implicate gender and/or disability discrimination in some of the following instances:

- harsher treatment of female caregivers, focusing on gender-based stereotypes
- harsher treatment by acting on stereotypes of pregnant workers
- harsher treatment of male caregivers, such as the denial of childcare leave that is available to female workers
- harsh treatment of a worker with caregiving responsibilities for a child or parent with a disability.

Employers should review their policies and practices, audit their employment decisions, and train managers to recognize their legal obligations and to respond appropriately to complaints of discrimination or unfair treatment.

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Companies that run afoul of the relevant statutes and regulations will face private lawsuits, regulatory fines, back tax implications, wage and hour claims, workers' compensation issues and a host of other problems.

Here is a list of five steps that can help reduce the risk of misclassification in the workplace:

1. Sign written agreements with all independent contractors. A written independent contractor agreement allows the business to clearly define the individual's contractor status. However, a written agreement is not the final word.

2. Do not impose employment practices or detailed work rules on independent contractors. Many organizations distribute policies to their independent contractors setting forth various rules of conduct. These policies necessarily control the manner in which the individuals perform their work and restrict the individual's independent initiative and judgment. Courts are more likely to deem individuals as employees, rather than independent contractors, if the company maintains a set of work rules, guidelines, or performance standards for its independent contractors.

3. Do not attempt to prohibit independent contractors from working for or with others. It is difficult to show an individual's independence when a company dictates for whom the individual can and cannot work. Noncompete agreements should be avoided.

4. Require all independent contractors to provide their own transportation and equipment. A key factor in any analysis of contractor status is whether the individual maintains his or her own facilities and/or equipment. If the individual has made the investment in these items, he or she is more likely to be an independent contractor.

5. Require all independent contractors to be separately incorporated business entities. A worker can demonstrate his or her independence from the company by establishing a separately incorporated business through which to perform his or her work. This includes carrying his or her own insurance and paying all required federal and state taxes, as well as independently obtaining the necessary certifications and licenses to perform the work.

Recent Ruling that Class Action Waivers are Illegal Shows NLRB Remains Active

Can employers limit employees from launching potentially costly class actions? As employers continue to seek more certainty and control over their litigation risks, some employers require employees to sign arbitration agreements in which the employee agrees to arbitrate any employment-related claims instead of filing lawsuits. Sometimes, those arbitration agreements contain addition terms, such as the agreement not to join in any class action or collective action against the employer. These companies apparently hope that arbitration, and the avoidance of a jury trial, will be less costly than defending a lawsuit if a dispute arises. They also hope to eliminate the attraction and risk of class actions and collective actions, which often are seen as providing undue leverage and a larger total payday to claimants and their attorneys.

In a decision certain to invite legal challenges, the National Labor Relations Board (NLRB) recently held in D.R. Horton, Inc. and Michael Cuda, 357 NLRB No. 184 (2012) that employment arbitration agreements that require employees to waive their rights to collective or class actions are illegal because they violate Section 7 of the National Labor Relations Act (NLRA). In D.R. Horton, the employer required its employees to sign mandatory arbitration agreements covering employment-related claims. Part of the agreement required the employees to pursue any such claims individually and not as a part of any class or collective action. One employee filed an unfair labor practice charge with the NLRB, claiming that his collective action claim was protected "concerted activity" under the NLRA, and that by disallowing the claim, the company violated the NLRA.

This decision comes less than a year after the U.S. Supreme Court upheld such a waiver in a consumer arbitration agreement. Further, even after the D.R. Horton decision was published, the Supreme Court again upheld a consumer arbitration agreement that contained a class action waiver. Until this issue is settled, agreements with employees not to join class or collective actions may not only be invalidated, but the employer requiring such agreements may be held to have committed an unfair labor practice.

NLRA Posting Requirement Delayed

The National Labor Relations Board (NLRB) issued a new notice-posting requirement, mandating that virtually all private-sector employers (even non-union employers) display a large Notice of Employee Rights, informing employees about rights under the National Labor Relations Act (NLRA). The poster informs employees of their right to act together to improve wages and working conditions, to form and join a union, to bargain collectively, or to choose not to do any of these things.

Employer groups have objected to this new posting requirement in that the notice blatantly promotes unionization, and have challenged the posting requirement on the basis that the requirement exceeds the NLRB's authority to enforce existing law. Opponents of the notice-posting rule further point out that the notice contains selected information about employee rights that seem to suggest a bias toward unionization instead of an unbiased statement of legal rights.

Because of challenges to the new rule, its implementation date has been pushed back several times. The most recent deadline had been April 30, 2012, but a federal court ordered the posting requirement postponed. The NLRB said on April 17, 2012 that it would not implement the April 30, 2012 posting requirement while the current legal battle was ongoing.

Failure to post the required notice may be construed as an unfair labor practice charge.

Legislative Update

Several Labor & Employment Bills Introduced in Congress

Here are summaries of four pieces of labor and employment-related legislation:

National Right-to-Work Act. (S. 2173) The National Right-to-Work Act would legally protect the free choice of individuals to join, or not join, labor organizations. Employees would still have the right to form a union, providing that no one is forced to join or compelled to pay dues. Members of the union can still strike, but they cannot prevent other employees from working. The union can still negotiate contract terms for their own members, but they cannot bind employees who do not belong to the union.

Working Families Flexibility Act. (S. 2142 & H.R. 4106) Introduced in both the House and Senate, this bill would effectively create a statutory right for employees to request flexible work terms and conditions. Specifically, employees would be able to request changes to:

- the number of hours they are required to work
- the time of day they are required to work or be on call
- where they are required to work, and
- how far in advance they must be notified of schedule assignments.

Employers with 15 or more employees who receive such requests must then engage in an interactive dialogue with the employee.

Predispute Arbitration Agreements. (H.R. 4181) This bill would amend the Federal Arbitration Act (FAA) by invalidating predispute arbitration agreements if they require arbitration of an employment dispute.

Fair Playing Field Act of 2012. (H.R. 4123 & S. 2145) This legislation would prevent employers from being able to use the federal "safe harbor" provision, which permits employers to classify employees as independent contractors for tax purposes regardless of the fact that the employer may be required to withhold appropriate taxes and pay employment taxes for the independent contractor. The current "safe harbor" provision protects employers' classification of employees if the classification was based on a published ruling or judicial precedent, a practice in the industry, or a past IRS audit. The legislation would increase the penalties to employers for misclassification and require them to inform the independent contractors of their rights and ability to request a determination from the IRS.

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