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This issue contains two articles addressing timely employment topics: employee/independent contractor misclassification; and record requirements for employer-provided cell phones. Summaries of some recent Oregon cases and a federal Ninth Circuit case addressing issues important to both public and private sector employers are also included. Employers with questions about these articles and case summaries are encouraged to contact Mark Amberg, Sharon Rudnick, Andrea Nagles, or Kate Watkinson Wright.

Independent Contractor or Employee?

How to Stay Prepared for a Workplace Audit

Most employers are aware of the importance of properly classifying their workforce, especially the need to draw an accurate distinction between independent contractors and employees. Whether a worker is an employee or independent contractor has a significant effect on an employer's legal obligations, implicating labor and tax laws at the local, state, and federal level. Additionally, employee misclassification (that is, improperly classifying a worker as an independent contractor instead of an employee), can result in a number of adverse employer consequences, including employer liability for back taxes and insurance premiums, employee wage claims for overtime and back wages, lawsuits and costly litigation, and potential criminal liability. Given the renewed focus by federal and state agencies on employee misclassification through workplace audits and ramped up enforcement efforts, now is a good time for employers to review their workforce classification practices.

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For employers in business and government alike, employees are your most valuable, and often most expensive, asset. How you handle employment issues can have a significant impact on your bottom line. Our labor and employment attorneys provide creative, strategic legal counsel – targeted to your mission and business environment. We can help ensure the most proficient use of human resources, prevent costly disruptions, and help you identify and address issues before they become costly claims or lawsuits.

We specialize in providing labor and employment advice, counseling and litigation services to public and private employers.

Labor and Employment Team:

Mark Amberg, Chair
Sharon Rudnick
Jens Schmidt
Jeffery Matthews
Joshua Stump
Hwa Go
Andrea Nagles
Kate Watkinson Wright
John C. Rake
Andrea Coit
Kate Grado

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Much to the frustration of employers, there is no bright-line test for what constitutes an "independent contractor." Federal and state courts and agencies use a variety of different tests to determine worker classification. For example, the Internal Revenue Service (IRS) traditionally employs a 20-factor test, while the U.S. Department of Labor (DOL) applies an "economic reality" test. However, a common theme throughout the tests is that of employer control and worker independence. An independent contractor has his or her own business and works free from the direction and control of an employer. He or she dictates the means and methods of their work, while the employer retains control over the final result.

Despite the unfortunate ambiguity in the definition of an independent contractor, employers can, with the help of legal counsel, take control through the following steps:

Be Proactive

Employers should perform an internal self-audit and consult with their legal counsel to ensure proper employee classifications and that their business practices (such as payroll practices, hiring practices, reporting procedures, and record-keeping requirements) are compliant with applicable federal and state laws.

Carefully Draft your Independent Contractor Agreements

Employers who use independent contractors should have a well-drafted independent contractor agreement in place that clearly outlines the independent contractor relationship. If you are already using a form of independent contractor agreement, have your legal counsel review the agreement to ensure that it contains the proper language.

Develop a Strategy

Employers should educate themselves on the governmental agency audit process and develop a strategy for responding to an agency's request to conduct a workplace audit. For example, an employer should have a plan in place for responding to an investigator's requests for information and should know what to expect when an investigator conducts an on-site audit.

Understand the Risks

Employers should be aware of and understand the potential penalties they may face if a government agency's investigation uncovers a violation.

Don't Ignore a Mistake

If you think you have improperly classified an employee as an independent contractor, don't panic or ignore the issue. If misclassification has occurred, your legal counsel can help you take prompt, remedial action to prevent or limit employer liability. The laws in this area are continually developing. For instance, the IRS recently announced a voluntary federal tax settlement program, referred to as the Voluntary Classification Settlement Program (VCSP), for employers with misclassified workers. Employers who qualify for the program have the opportunity to correct worker misclassifications with minimized federal employment tax consequences.

NLRB Postpones Deadline for Notice of Employee Rights under the NLRA

The National Labor Relations Board (NLRB) has once again postponed the implementation date for its notice-posting rule, which requires all private sector employers subject to the National Labor Relations Act (NLRA) to post a notice informing employees of their rights under the NLRA. The new effective date is **April 30, 2012**.

Employee Cell Phones: IRS Spares Employers from Burdensome Record Requests

In September 2010, the federal Small Business Jobs Act was signed into law with the goal of providing support, tax cuts, and other opportunities for small business owners. Part of the Act contains tax provisions, which exempt employer-provided cell phones from an employee's taxable income, provided the phone is used primarily for business purposes and is not a form of compensation to the employee. However, the Act is ambiguous as to whether employees are required to keep records of their business-related use of such cell phones in order to receive the tax-free treatment.

The IRS recently issued guidance clarifying that it would not require an accounting of an employee's business versus personal use of an employer-provided cell phone in order for the employee to avail him or herself of the tax-free treatment. This clarification is good news for small business owners, sparing both owners and employees from being inundated with requests for phone billing and accounting records.

Noteworthy 9th Circuit and Oregon Employment Law Cases

Employer Not Obligated to Assist Disabled Employee in Meeting Job-Related Qualifications

Johnson v. Bd. of Trustees of Boundary County Sch. Dist. No. 101, __ F.3d __, 2011 WL 6091313 (9th Cir. Dec. 8, 2011)

Johnson was a public school teacher who let her certification lapse when she failed to timely comply with certain educational requirements. Johnson had five years to complete the educational requirements and waited until the last several months to complete them, but was unable to do so when she suffered a major depressive episode due to her disability (bi-polar disorder). Johnson asked the Board of Trustees to petition the state board of education for a provisional authorization in order to give her additional time and allow her to teach in the interim, but the Board declined.

Johnson's teaching contract was ultimately terminated when her teaching certification lapsed due to her failure to meet the educational requirements. Johnson sued the Board under the Rehabilitation Act, the Americans with Disabilities Act (ADA), and its state law equivalent for its refusal to petition the state board for provisional authorization.

The court rejected Johnson's disability discrimination claim and held that she was not a "qualified individual with a disability" entitled to protection under the ADA at the time she asked the Board to petition for provisional authorization. This is because Johnson did not satisfy "the requisite skills, experience, education and other job-related requirements of the employment position," namely, the job-related educational requirement.

The court concluded that an employer is not generally obligated to provide reasonable accommodation to a disabled employee in order to assist that employee in becoming "otherwise qualified," unless the employee can show that the job requirement is itself discriminatory in effect. The court noted that this conclusion is consistent with the Equal Employment Opportunity Commission's (EEOC's) interpretive guidance, which states that "the obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of Section 1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection criteria."

Johnson is a rare victory for employers in the realm of ADA cases. It also serves as a reminder that employers should carefully analyze any request for reasonable accommodation and seek legal advice, particularly when denying such requests. Employers are cautioned against

reading *Johnson* as a bright line rule that assisting a disabled employee in meeting job requirements is never required. Each request must be evaluated on a case-by-case basis, taking into account all relevant facts and circumstances.

Union President Held to be Exempt Union Employee, Rather than Non-Exempt State Employee Entitled to Overtime Pay Under FLSA

DiNicola v. State of Oregon, ___ P.3d ___, 246 Or. App. 526 (Nov. 9, 2011)

In a November 9, 2011 decision, the Oregon Court of Appeals held that a state employee who was working full-time as a union president while on time release from his state job was an "employee" of the union (rather than an employee of the state or a joint employee of both the state and the union).

DiNicola worked as a tax auditor for the Oregon Department of Revenue since 1987. In 1997, DiNicola's position was reclassified to nonexempt, entitling him to receive overtime. From 2004 to 2008, DiNicola went on time release from his state tax auditor job. During his time release, DiNicola served two terms as the president of the union for state government workers. DiNicola's union president position was full-time and he often worked over forty hours per week. In contrast, DiNicola only spent about nine hours per week performing tasks related to his state tax auditor job. During this time, DiNicola received pay and benefits from the state and remained formally classified as a non-exempt state employee.

DiNicola sued the state, demanding nearly $110,000 in unpaid overtime under the Fair Labor Standards Act (FLSA) and analogous state wage and hour laws for overtime worked during the time DiNicola served as the union president.

The trial court rejected DiNicola's overtime claims and granted summary judgment in favor of the state, and on appeal, the Oregon Court of Appeals affirmed. In concluding that the union, and not the state, was DiNicola's "employer" for purposes of overtime compensation, the court focused on "the reality" of DiNicola's employment situation, rather than "formal titles." The court also concluded that as the union's employee, DiNicola was an exempt administrative professional and not eligible for overtime pay. The court examined the actual work DiNicola performed for the union, rather than his formal job classification.

DiNicola illustrates that courts will look beyond formal job classifications, job descriptions and paycheck arrangements to determine whether an individual is an "employee," and, further, whether the employee is a non-exempt employee entitled to overtime pay. *DiNicola* also reminds employers with unionized workforces to be aware of potential overtime pay issues associated with employees who assume union leadership roles while maintaining their employment status with the employer.

Collective Bargaining Agreement Permitted Employer's Unilateral Change to Employees' Work Schedules

Association of Oregon Corrections Employees v. State of Oregon and Department of Corrections, ___ P.3d ___, 246 Or. App. 477 (Nov. 9, 2011)

In another November 9, 2011 decision from the Oregon Court of Appeals, the court held that the language of a collective bargaining agreement between the correctional employees' union and the Oregon Department of Corrections (DOC) unambiguously allowed the DOC to unilaterally change the employees' shift and day-off bid schedule.

The case arose from the union filing a complaint with the Employment Relations Board alleging that the DOC committed an unfair labor practice by making unilateral changes to the employees' posted work schedule system in violation of the

collective bargaining agreement. The Employment Relations Board determined that the collective bargaining agreement's language was ambiguous, and looked at the parties' prior course of conduct. In doing so, the Employment Relations Board concluded that the parties did not intend for the employer to make such unilateral changes without bargaining and found that the DOC committed an unfair labor practice.

The DOC petitioned the Oregon Court of Appeals for review of the Employment Relations Board's decision. In reversing the Employment Relations Board's ruling, the court found that two articles of the parties' collective bargaining agreement, when read together, unambiguously authorized the DOC to unilaterally amend the employees' posted work schedule. The first article was a management rights clause giving the DOC the authority to "schedule work," and stated that the DOC retained all rights to direct the work of its employees, except as otherwise limited by the terms of the collective bargaining agreement. The second article was a working conditions provision that required the employer to provide seven days' notice of future work schedule changes. The court determined that these two articles permitted the DOC to amend the work schedule without bargaining so long as the DOC met the requirement of posting notice at least seven days before implementing the schedule.

This case illustrates the importance of having a management rights clause in a collective bargaining agreement that clearly recognizes and defines an employer's right to control its employees work (including work schedules) in order to meet the employer's operational needs.

Portland
1001 SW Fifth Avenue
16th Floor
Portland, OR 97204-1116
503.242.0000
503.241.1458 (fax)

Eugene
360 E 10th Avenue
Suite 300
Eugene, OR 97401-3273
541.485.0220
541.686.6564 (fax)

Salem
333 High Street, NE
Suite 200
Salem, OR 97301-3632
503.371.3330
503.371.5336 (fax)

harrang.com
800.315.4172