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Workplace Notes

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Avoiding Employee Wage Claims

The state and federal Departments of Labor (DOL) in Connecticut are continuously active in pursuit of employee claims for unpaid wages or unpaid overtime. No employer is spared; a recent vigorous investigation involved a small professional office with one employee. Employers must be constantly vigilant to conform their payroll practices to the wage and hour laws and regulations to avoid the possibly unpleasant consequences of an investigation.

The most dramatic efforts of the wage investigations are directed to employers who not only seem to be in violation of wage laws, but who also defy the investigative efforts of the DOL. A Connecticut statute (Section 31-59) allows wage hour investigations "to enter the place of business or employment of any employer of persons in any occupation for the purpose of examining and inspecting any and all books, registers, payrolls and other records of any such employer that in any way appertain to or have a bearing upon the question of wages." State agents respect the operating needs of businesses, and although they may appear unannounced, they will usually schedule their review of records in a way that is reasonably convenient for the employer.

However, in one highly publicized case of a Trumbull company, the DOL alleged that the employer hindered an investigation, continually failed to provide records and provided false records, so that the DOL had to execute a search warrant. The DOL is prosecuting this employer for criminal violation of wage payment requirements, and last July arrested the general manager, charging him with 230 counts of failure to provide accurate records, which cost a maximum of $46,000 in fines. According to the newspaper reports, the arrested manager was released upon $10,000 bail.

There are two areas of perennial confusion in which even conscientious employers find themselves in violation of the law. One is the classification of workers as employees or independent contractors. In another recently publicized case, a youth soccer team association is being investigated for treating its coaches and referees as independent contractors rather than employees. (This particular investigation is by the Internal Revenue Service, but the DOL has the same concerns). Distinguishing between employees and independent contractors involves a multitude of factors, but generally speaking, an employee is directly controlled by the employer, whereas independent contractors tend to operate their own businesses, work for a variety of clients, supply their own materials and have the right to refuse a work assignment. Employers who misclassify

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employees as independent contractors may not have any unpaid wage exposure if they have paid an appropriate amount and if the individual has not incurred overtime, but the employer can still be exposed to fines by the DOL for failure to keep accurate records, as well as IRS enforcement for failure to withhold.

The other major area of concern is the classification of employees as exempt or non-exempt. A recent DOL investigation involves a small professional office where the owner employed one person as the office jack-of-all-trades: research assistant, secretary, receptionist, computer systems administrator, bookkeeper, scheduler and so on. Since the professional owner was out of the office for a good part each day, she regarded her employee as the person in charge of the office, exercising discretion and independent judgment, and paid a salary rather than by the hour.

The DOL took the position that the employee was non-exempt, in part because unlike the federal wage-hour regulations, state regulations incorporate the "20 percent rule," which prohibits exempt classification for employees who devote more than 20 percent of their work hours to

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non-exempt tasks, such as clerical work.

The major issue for any employer who misclassifies a non-exempt employee as a salaried exempt employee is that the employer will likely not have accurate time records. The standard scenario is that an ex-employee files a complaint and makes a vastly inflated claim for unpaid overtime. In addition to the risk of fines for failure to keep records, the employer is at a disadvantage in disproving the inflated overtime claim because there are no time records.

A simple review of employee classifications and of recordkeeping practices can help prevent the major distraction and possible monetary exposure resulting from a wage-hour investigation. Believe it or not, DOL investigators are happy to find an employer in compliance, and rather than search for minor mistakes, will often close their investigation when the first review reveals no issues. Since the government investigators will always be able to keep busy, the sooner an employer demonstrates compliance and returns to its own business, the better.

For more information, please contact Michael N. LaVelle at 203-330-2112 or by email at mlavelle@pullcom.com.

Michael N. LaVelle is a member of the firm's Labor & Employment Law Section where he concentrates his practice in the areas of labor and employment law including employment discrimination, labor board and other administrative agency practice and wrongful discharge litigation and municipal law.

The Retaliation Trap

What turns an otherwise unreasonable and baseless discrimination claim into a risky piece of employer liability exposure? RETALIATION! Although it is natural to feel unhappy with a person who has accused you of law-breaking discrimination (all the more so if the accusation is unfounded), NEVER engage in retaliation with the accuser.

Retaliating against an employee for complaining about unlawful discrimination is just as illegal as unlawful discrimination itself, and may be even more so. The U.S. Supreme Court recently told us that retaliation does not have to take the form of an adverse employment action to be actionable (although actual discrimination does). Anything that would discourage the reasonable person from making a complaint of discrimination can be the basis of a retaliation claim. In the Supreme Court case, a woman on a train-track maintenance crew supported her retaliation claim with evidence of an unpaid suspension (for which she was subsequently fully reimbursed) and reassignment to less desirable duties within her job's parameters. While this did not amount to an adverse employment action, it was enough to state a retaliation claim.

A Connecticut Superior Court took a similar position in a recent state law case, finding sufficient evidence to go to jury on a retaliation claim in allegations of discontinued break-room use, truncated personal phone-call privileges, increased oversight at work and a revised mail delivery procedure expressly designed to cut off the plaintiff's access to managerial offices. Although this plaintiff's underlying sex discrimination and sex harassment claims failed, the retaliation case survived.

For more information, please contact Margaret M. Sheahan at 203-330-2138 or by email at msheahan@pullcom.com.

Margaret M. Sheahan is chair of the firm's Labor & Employment Law Section where she concentrates her practice in representing private and public sector management in employment and labor matters including litigation.

New Statute Allows Unemployment Compensation for Claimants with a Disability

Since, until recently, a person claiming unemployment compensation had to be physically and mentally able to work and actively seeking work to collect benefits, an employee who could no longer work because of a disability resulting from non-work related illness or injury would have to wait until he recovered his health to make a claim for unemployment compensation. But with an amendment to the unemployment compensation act effective October 1, 2006 (Public Act 06-171), a disabled claimant may collect, even if limited to seeking part-time work, if he presents documentation from a physician that he is not completely removed from the labor force. This new law seems to be an indirect way of moving Connecticut one step closer to mandating disability pay for non-work related incapacity.

For more information, please contact Michael N. LaVelle at 203-330-2112 or by email at mlavelle@pullcom.com.

Remember Unions?

The past quarter century has seen a steady decline in unionization in the American private sector. Recent developments, including the breakup of the AFL-CIO, point to a continuation of that trend. The non-union employer that hopes to stay that way, however, should not be lulled into a false sense of security. A unionization campaign can still happen to your company and knowing the modern tools available to both sides is still important. Here are some important facts of recent vintage.

- UNITE-HERE, the AFL-CIO defection group, left to focus more on ***organizing efforts***. Service workers in health care, hospitality and other industries are their most particular targets.
- ***Neutrality agreements*** are a favorite current union tactic. These commit an employer not to campaign against union-organizing efforts. Sometimes these are pledges in a collective bargaining agreement for a single, small unit in an otherwise union-free organization. Other times, these pacts are sought through public pressure campaigns or even as provisions of government contracts. Many employees mistake employer neutrality for employer endorsement. The ideal of a union election is supposed to be employee free choice. Employers should not readily give up their right to a role in making informed employee choice possible.
- ***Indirect approaches*** to organizing are more and more common. Lawsuits alleging wage and hour violations, workplace safety hazards and even antitrust violations based on price-fixing via sharing of wage-plan information among competitors are recent examples of union efforts to position themselves as heroes who save employees from demonized employers.

Employers concerned about union organizing should also be aware that the National Labor Relations Board recently issued a ruling finding that a group of charge nurses who did not have the power to hire and fire (but who still had considerable work direction authority) qualified as "supervisors" and were thereby not authorized to unionize. How broad an impact this ruling will have and how long it will survive are unknowable now. Nevertheless, the decision highlights the need for employers to understand their defenses as well as their vulnerability to union organizing campaigns.

Guidance on how to create an environment where employees won't feel the need for third-party representation either during or prior to organizing attempts is always available from Pullman & Comley's labor and employment attorneys.

For more information, please contact Margaret M. Sheahan at 203-330-2138 or by email at msheahan@pullcom.com.

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Attorney Notes

Pullman & Comley's **Labor & Employment Law Section** is hosting a series of roundtables on labor and employment issues. For more information, please visit our website at www.pullcom.com. Details are located at Info Center / News and Events.

Joshua A. Hawks-Ladds is presenting "Effective Selection and Coaching - Using Assessment Tools to Make Your Process More Effective" at the CBIA's HR Council Seminar in Hartford on **October 31, 2006**.

Joshua A. Hawks-Ladds, Michael N. LaVelle, Robert B. Mitchell and Margaret M. Sheahan will participate in a two-day seminar entitled "Employment Law Update." The seminar will take place **January 24 - 25, 2007**, at the Trumbull Marriott, and is being presented by the Council on Education in Management.