

RESOURCES

Three Trending Developments in Employment Law

Employment law is a hot topic these days, with new orders, rules and regulations that employers should have on their radar screen. Here are three in particular that may impact your business:

1: Employee or Independent Contractor?

A recent Executive Order issued by N.C. Governor Pat McCrory created the Employee Classification Section of the North Carolina Industrial Commission, which is tasked to act as a “watchdog against unethical businesses that attempt to skirt our state’s laws.” This new section builds on efforts by the North Carolina and the U.S. Departments of Labor to target what they contend to be misclassification of employees as independent contractors.

Regulators typically apply the “economic realities” test to determine an individual’s true status. Factors include:

- Is the work an integral part of the employer’s business? If so, the worker should probably be qualified as an employee.
- Does the worker’s managerial skill affect the worker’s opportunity for profit or loss? If not, the worker should likely be classified as an employee.
- How does the worker’s relative investment compare to the employer’s investment? If the worker is not making an investment or is not at risk, the worker likely should be classified as an employee.
- Does the work require business skills, judgment and initiative, rather than technical skills? If not, the worker should likely be classified as an employee.
- Is the relationship between the worker and the employer long term or indefinite? The longer term the relationship, the more likely the worker should be classified as an employee.
- What is the nature and degree of the employer’s control? To the extent a worker does not have meaningful control over aspects of the work consistent with conducting his or her own business, the worker likely should be classified as an employee.

If *your* business uses independent contractors, carefully examine each relationship in light of the economic realities test. Failure to properly classify workers can expose your company to substantial financial liability, including penalties for failure to provide worker’s compensation coverage and properly withhold, as well as penalties and back wages to compensate for minimum wages and overtime not paid.

2: White Collar Overtime Exemptions

New rules are on the way regarding overtime exemptions. A Notice of Proposed Rule Making published in the Federal Register updates the minimum salary levels necessary to qualify for exemptions from the overtime requirements of the Fair Labor Standards Act.

In addition to a “duties” test to qualify for the exemption, executive, administrative and professional positions also need to meet a “salary” test. The current minimum threshold is \$455 per week/\$23,660 per year. As proposed, the new rule would raise the minimum salary threshold to approximately \$970 per week/\$50,440 per year. The proposal would also automatically update the standard salary threshold in the future to insure the level remains meaningful for distinguishing bona fide executive, administrative and professional workers who are not entitled to overtime from overtime-protected white collar workers.

Although the rule has not yet been made final, employers who are treating salaried employees earning less than \$970 per week as exempt will likely need to re-evaluate whether to raise the salary level, limit overtime or convert those salaried employees to hourly employees entitled to overtime.

3: E-Verify - In Case You Missed It

Effective WAY back on July 1, 2013, all employers in North Carolina with 25 or more employees were required to use the online federal E-Verify system to check whether new hires are authorized to work in the U.S. The North Carolina Department of Labor enforces this statutory obligation to use E-Verify and has recently been contacting employers to determine compliance. Failure to comply with the law (N.C.G.S. §64-25 *et seq.*) can result in substantial financial penalties.

The web-based E-Verify system is operated by the U.S. Department of Homeland Security in partnership with the Social Security Administration. The website (www.uscis.gov/e-verify) includes everything an employer needs to sign up for the program, including a detailed tutorial, information on creating an account and “do’s” and “don’ts” in use of the system. It’s easy to use – and costly not to.

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