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## LEGAL AND LEGISLATIVE UPDATE

The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.

### *Labor Law*

#### **Effective Date of NLRB Posting Postponed**

Last month we reported that the NLRB was requiring virtually all employers to post a notice by November 14, 2011 to make employees aware of their right to organize a union and engage in other actions protected by the National Labor Relations Act regardless of whether the employer's employees are unionized. The effective date for posting this notice has been postponed until January 31, 2012 possibly in response to several lawsuits that have been filed to prohibit the Board's action. The Board's stated reason is to allow time for "enhanced education and outreach to employers, particularly those who operate small and medium-sized businesses." If the NLRB follows through with the posting requirement and an employer fails to post the notice, the

NLRB can find that the employer committed an unfair labor practice under Section 8(a)(1) of the NLRA by interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by §7 of the Act. A copy of the poster can be found at the end of the September, 2011 *Legal & Legislative Update*.

### *Independent Contractors*

#### **IRS Voluntary Classification Settlement Program**

The IRS introduced a voluntary classification settlement program on September 21, 2011. This initiative followed a joint statement from the Department of Labor and IRS announcing that they have agreed to share information with each other and a handful of states as they crack down on businesses that improperly label workers as independent contractors. (See September *Legal and*

*Legislative Update*) The plan is to share any misclassification information they find so that the IRS, U.S. Department of Labor, state unemployment compensation, and workers' compensation agencies can use it to subject businesses to multiple fines and taxes from various state and federal agencies.

The problem with trying to determine whether a worker is properly classified as an independent contractor is that every state and federal agency has a different test for what constitutes an independent contractor. The IRS uses a 20-factor test, the Fair Labor Standards Act uses the Economic Reality Test, Florida's Unemployment Compensation agency utilizes factors set forth by the Florida Supreme Court in 1966, and the Workers' Compensation Division uses yet another test outlined in its statute.

The information that follows from the IRS website about the settlement program explains what is involved. The Voluntary Classification Settlement Program (VCSP) is a voluntary program described in Announcement 2011-64 (PDF) that provides an opportunity for taxpayers to reclassify their workers as employees for employment tax purposes for future tax periods with partial relief from federal employment taxes. To participate in this new voluntary program, the taxpayer must meet certain eligibility requirements, apply to participate in VCSP by filing Form 8952, Application for Voluntary Classification Settlement Program, and enter into a closing agreement with the IRS. The VCSP is available for taxpayers who want to voluntarily change the prospective classification of their workers. The program applies to taxpayers who are currently treating their workers (or a class or group of workers) as independent contractors or other nonemployees and want to prospectively treat the workers as employees. A taxpayer must have consistently treated the workers as nonemployees, and must have filed all required Forms 1099 for the workers to be reclassified under the VCSP for the previous three years to participate in VCSP.

Additionally, the taxpayer cannot currently be under audit by the IRS and the taxpayer cannot be currently under audit concerning the classification of the workers by the Department of Labor or by a state government agency.

A taxpayer participating in the VCSP will agree to prospectively treat the class or classes of workers as employees for future tax periods. In exchange, the taxpayer:

- Will pay 10 percent of the employment tax liability that may have been due on compensation paid to the workers for the most recent tax year;
- Will not be liable for any interest and penalties on the amount; and
- Will not be subject to an employment tax audit with respect to the worker classification of the workers being reclassified under the VCSP for prior years.

In addition, as part of the VCSP program, taxpayers will agree to extend the period of limitations on assessment of employment taxes for three years for the first, second and third calendar years beginning after the date on which the taxpayer has agreed under the VCSP closing agreement to begin treating the workers as employees.

We have found nothing that would prohibit the IRS from sharing information provided to them voluntarily by the business taking part in this program with the Department of Labor or state agencies. It is possible that a business could settle with the IRS then have to face an audit by the Department of Labor to pay overtime to misclassified workers and still be liable to state agencies for unpaid taxes and fines for failing to properly classify workers as employees. This new program should be researched carefully and any business interested in taking advantage of the IRS's offer to help them, should discuss it in advance with a tax attorney or CPA.

## **Congress Reintroduced the Employee Misclassification Prevention Act**

This Act would make misclassification of employees as independent contractors a federal offense. Similar legislation was introduced in 2010 but failed.

### *Disabilities Law*

## **ADA Commute Assistance**

A new unpublished opinion from the United States Court of Appeals for the Second Circuit reminds employers that requests by disabled employees for assistance with their commute to work are not inherently unreasonable under the Americans with Disabilities Amendments Act ("ADA"). An employer has an affirmative obligation to examine whether a reasonable accommodation exists that could assist an otherwise qualified disabled employee with his or her commute to work.

In this case, the Second Circuit reversed the lower court and allowed a claim by a municipal employee who alleged that her employer had failed to provide her with a reasonable accommodation by not assisting

her with getting to work. The lower court held that commuting fell outside the scope of the plaintiff's job and was thereby not within the province of an employer's obligations under the ADA. The Second Circuit, however, disagreed and ruled that "there is nothing inherently unreasonable in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work." According to the Court, depending on the circumstances, "an employer may have an obligation to assist in an employee's commute." This case was remanded back to the lower court for a determination as to whether it would have been reasonable for the employer to provide assistance under the specific facts. In addition, the lower court was asked to consider factors including the reasonableness of allowing her to work without on-site supervision. While an employer does not have to provide an accommodation that would cause an "undue hardship," determining whether a proposed request meets that standard normally involves a fact-specific inquiry. *Nixon-Tinkelman v. N.Y. City Dep't of Health & Mental Hygiene*, 2011 WL 3489001 (2d Cir. 2011)