masuda funai

News & Types: Employment, Labor & Benefits Update

Employment, Labor & Benefits Update - October 2015

10/14/2015

Practices: Employment, Labor & Benefits

EMPLOYMENT—RELIANCE ON E-LAW WEBSITE MAY SUPPORT FINDING OF WILLFULNESS UNDER THE FLSA

By Jiwon Juliana Yhee

In *Miles v. HSC-Hopson Services Company*, an employee alleged that his employer had not paid him all of the overtime wages he was owed under the Federal Labor Standards Act (FLSA). Under the FLSA, a non-exempt employee must be paid one-and-a-half times the employee's regular pay rate for overtime hours (generally for hours in excess of forty hours per week). Generally, the statute of limitations under the FLSA for unpaid overtime compensation is two years; however, if an employer is found to have "willfully" violated the FLSA, the statute of limitations is extended to three years. Additionally, liquidated damages for a FLSA violation depends on a determination of whether the employer acted in good faith. In the case at bar, the employer argued that its violation of the FLSA was not willful because it had relied upon an "E-law website" to put together its company policies on employee compensation, but the appeals court affirmed that the employer had willfully violated the FLSA.

In *Miles v. HSC-Hopson Services Company*, no. 14-11237, 2015 U.S. App. LEXIS 16216 (5th Cir. 2015), Donald Miles brought suit against employer HSC-Hopson Services Company ("HSC") and Dannis Hopson ("Hopson"), the owner of HSC, for not paying all of the overtime wages that he was owed during his employment. From 2005-2013, Miles worked as a plumber for HSC, which was a 24-hour plumbing business located in Dallas County, Texas. During his employment with HSC, Miles was directed to arrive at HSC's shop at 7:30 a.m. to load the work truck and receive his first assignment, but Miles was never paid for the time between 7:30 a.m. and 8:00 a.m. Miles was also not paid for his time after the last job of the day, even though he was required to drive the work truck back to the shop, unload the equipment, and lock up HSC's shop.

During the jury trial, Hopson testified that HSC employees reported to work at 7:30 a.m. but, pursuant to company policy, were not paid for the half hour between 7:30 a.m. and 8:00 a.m. Additionally, the company policy stated that employees were not paid after they had completed the last job of the day. Hopson further testified that, in attempting to comply with the FLSA, he had accessed an "E-law" website and, based on the information there, determined that his company's policy complied with FLSA guidelines. He did not consult with a lawyer; nor did he contact the Department of Labor for guidance on FLSA compliance. An action under the FLSA for unpaid overtime, unpaid minimum wages, or liquidated damages generally has a statute of limitations of two years.

The statute of limitations can be extended to three years, however, if the jury finds that the employer acted "willfully". An employer acts willfully if the employer "either knows or showed reckless disregard for…whether its conduct was prohibited by statute."

A finding of "willfulness" may affect the liquidated damages that an employer must pay to its employee for a FLSA violation. 29 U.S. Code § 260 of the FLSA states that if an employer shows to the satisfaction of the court that its actions (or omissions) were performed in "good faith" or based on "reasonable grounds", for believing that the actions or omissions were not violations of the FLSA, the court may choose to award no liquidated damages or other penalties exceeding the amounts specified in § 216 of title 29. Although a lack of "willfulness" is not equivalent to "good faith," the majority of courts have held that a finding of "willfulness" precludes a finding of "good faith."

What Hopson was trying to demonstrate when he testified to his reliance on a "E-law" website was that, if HSC had violated the FLSA, HSC had not done so willfully. Regardless of Hopson's testimony, the jury determined that HSC had, in fact, willfully violated the FLSA. HSC and Hopson appealed, contending, amongst other things, that the trial was unfair because Hopson had "acted in good faith reliance on the U.S. Department of Labor regulations to comply with the FLSA." The Court of Appeals was not persuaded by the Defendants and, in its September 8, 2015 opinion, the Court affirmed that the Defendants had willfully violated the FLSA. In explaining the reasoning behind its determination of "willfulness," the Court noted that Hopson had not consulted an attorney or the Department of Labor, but had only used an E-law website. This evidence supported the jury's verdict that Hopson's conduct was a willful violation of the FLSA.

With the rise of the Internet, the information that we need is often only a click away. Indeed, the Internet is a wonderful resource for employers and employees, clients and attorneys alike. However, employers should exercise caution when relying on internet websites as the basis for company policies regarding minimum wage, overtime pay, liquidated damages, and other topics that fall within the scope of the FLSA.

LABOR – BE PREPARED FOR MORE HELP FOR UNIONS
By Alan M. Kaplan

The percentage of employees who are members of unions is at an all-time low. However, unions are still active in trying to organize employees. According to LRI Online, during the one-year period ending July 31, 2015, unions that represent employees in the auto industry were among the most active unions. The Electrical Workers Union was the second most active union after the Teamsters. The Electrical Workers Union won 62% of its elections. The Machinists Union was the third most active union, winning 69% of elections. The Auto Workers Union won 58% of its elections.

The organizing process starts with a union obtaining signatures of employees who want union representation. According to policies in place since the 1930's, employees wrote out their signatures on union authorization cards or added their signatures to a list of signatures. The union filed the signatures with the NLRB. The employer had the right to submit the employees' W-4 forms, so that the NLRB's investigator could compare the signatures on the W-4 forms with the signatures on the authorization cards. By taking this step, employers could ask the NLRB to ensure that one employee did not sign other employees' names on the authorization cards.

Now, however, the NLRB will accept electronic signatures. According to the NLRB's General Counsel's Memorandum, there must be evidence that the employee electronically signed a "document purporting to state the employee's views regarding union representation." The NLRB will find that the electronic signatures are presumptively valid. Although the General Counsel has set forth requirements which he states will ensure that the signatures are valid, nothing compares to the actual comparisons the NLRB's investigators performed. [As a former NLRB attorney, this author performed those comparisons and believes that the requirement of signatures acted as a deterrent against fraud.] One only hopes that the directors of each regional office will scrupulously implement the General Counsel's guidelines.

The latest action follows the NLRB's action earlier this year in which it enacted a series of new procedures, which allow unions quicker elections. Rather than an employer having up to 6 weeks to campaign against a union, an election may take place in 21 days! Therefore, there is even more need for every employer to implement Masuda Funai's Ever Ready Anti-Union Campaign™.

BENEFITS – CONTROLLED GROUPS AND THE ACA REPORTING REQUIREMENTS
By Mary W. Shellenberg

The Affordable Care Act (the "ACA") imposes several responsibilities on employers which vary depending on the employer's size. Two important provisions of the ACA are now in effect and apply only to "applicable large employers" ("ALEs"), namely the employer shared responsibility mandate under Section 4980H of the Internal Revenue Code (the "Code") and the information reporting requirements implementing the employer shared responsibility mandate under Section 6056 of the Code. The first reports under Section 6056 are due in 2016. The due dates are the same as the due dates for the Form W-2; namely, January 31, 2016 for the employee statement (Form 1095-C), and February 29, 2016 (or March 31, 2016, if filed electronically) for the transmittal form (Form 1094-C) that must be filed with the IRS, along with copies of each employee statement (Form 1095-C).

ALE's have been working feverishly to prepare for the new reporting requirements. However, in speaking with clients, we are still concerned that there is a lack of understanding regarding the application of the controlled group rules under Section 414(c) of the Code in determining an employer's status as an ALE.

An ALE, with respect to a calendar year, is an employer that employed an average of at least 50 full-time employees (including full-time employee equivalents) or more full-time and full-time equivalent employees on business days during the preceding calendar year. The determination of whether an employer is an ALE is made on a "controlled group" basis. In other words, the entire "controlled group" is considered a single employer for purposes of determining whether the 50 full-time employee threshold is met. If the threshold is met, both the employer shared responsibility mandate and the reporting requirements apply to each member in the controlled group, regardless of whether the member itself has 50 full-time employees.

A detailed discussion of the rules for determining whether a company is part of a controlled group is beyond the scope of this newsletter. However, a brief summary is as follows:

There are three types of controlled groups.

1. **Parent-Subsidiary Controlled Group.** A parent-subsidiary controlled group exists when one or more companies are connected through stock ownership with a common parent corporation, and

   a. 80% of the stock of each company (except the common parent) is owned by one or more corporations in the group, and
   b. the common parent company owns 80% of at least one other company.

2. **Brother-sister controlled group.** A group of two or more companies where five or fewer common owners (including individuals, estates, or trusts) own directly or indirectly (through the attribution rules under the Code) a controlling interest of each group and have "effective control":

   a. Controlling interest: generally means at least 80% of each company (but only if such common owner owns stock in each company), and
   b. Effective control: generally means more than 50% of the stock of each company, taking into account the ownership only to the extent such ownership is identical with respect to each company.

3. **Combined group.** A group of three or more corporations, each of which is a member of a group of corporations described in paragraph (1) or (2) above, and:

   a. Each company is a member of either a parent-subsidiary or brother-sister group, and
   b. At least one company is the common parent of a parent-subsidiary and is also a member of a brother-sister group.

It is important to note that the controlled group rules apply regardless of whether or not the common parent or owner is located outside of the U.S. For example, if a foreign company has several U.S. subsidiaries and the parent and the subsidiaries meet the definition of a controlled group, the U.S. subsidiaries must aggregate their U.S. based employees in order to determine whether the U.S. employers meet the definition of an ALE. If yes, then each U.S. based employer will be subject to the reporting requirements. This may be problematic for some companies that are part of a large and diverse foreign-owned group and who have limited knowledge of the group's corporate structure, as well as smaller group companies which individually do not meet the threshold but, in the aggregate, surpass the 50 employee threshold.

If you have any questions regarding the application of the controlled group rules and the determination of ALE status, please call a member of the Employment, Labor and Benefits Practice Group.

For more information about this or any other employment law topic, please contact Frank Del Barto, Chair of the Employment, Labor & Benefits Group, at 847.734.8811 or via email at fdelbarto@masudafunai.com.