masuda funai

News & Types: Employment, Labor & Benefits Update

Employment, Labor & Benefits Update - February 2016

2/5/2016

By: Nancy E. Sasamoto, Jennifer R.M.C. Watson

Practices: Employment, Labor & Benefits

EMPLOYMENT – NEW GUIDANCE MAKES CLEAR THAT DOL WILL LOOK FOR, AND LIKELY FIND JOINT EMPLOYMENT UNDER FLSA
By Nancy Sasamoto

Last July, the U.S. Department of Labor (DOL) declared that, for purposes of the Fair Labor Standards Act (FLSA), it presumes that workers are employees entitled to the protections of the FLSA. Additionally, anyone who is retained to provide services as an independent contractor is presumed to have been misclassified. (DOL Administrator's Interpretation No. 2015-1, issued July 15, 2015). Administrator David Weil is off to a fast start for 2016, having issued his first Interpretation for the year on January 20, 2016, on the subject of Joint Employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act (MSPA). Once again, in furtherance of its goal to ensure that workers receive the protections of the FLSA, the DOL has put employers on notice that it will utilize various approaches to find two or more companies liable as joint employers.

According to the DOL, the proliferation of business models and arrangements has made joint employer situations more common. For example, a company may engage workers through a staffing agency or enter into a subcontract agreement for housekeeping services. In every situation where there are two or more employers involved, the DOL will look to find whether "horizontal" or "vertical" joint employment exists. Where joint employment exists, all of the joint employers are jointly and severally liable for compliance under the FLSA and MSPA, meaning that each joint employer is individually responsible for the entire amount of wages, and all of the hours worked by the employee will be aggregated and considered as one employment for purposes of calculating overtime pay.

Horizontal joint employment exists where the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee. In determining whether a horizontal joint employment exists, the focus is on the relationship between the two (or more) employers. The DOL provides an example of a horizontal joint employment situation where a nurse works 25 hours at one nursing home and 25 hours at another nursing home in the same week. The two nursing homes would be found to be joint employers if (1) the employers agree to share or interchange the employee's services; (2) one employer acts directly or indirectly in the interest of another employer in relation to the employee; or (3) the employers are associated "with respect to

the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer." If the nursing homes are deemed joint employers, the nurse's hours would be aggregated and she would be entitled to 40 hours of pay at the regular rate and 10 hours at an overtime rate, and both companies would be liable for the amounts due.

Vertical joint employment, on the other hand, occurs where a company (the potential joint employer) contracts with an intermediary employer, like a staffing agency or other labor provider, to provide labor or to provide certain services. The focus in a vertical joint employment situation is on the relationship between the worker and the potential joint employer. This is consistent with the DOL's position that the economic realities of the worker's relationship with the employer are the test of employment.

The most startling proposition by the DOL is its statement that "[a] threshold question in a vertical joint employment case is whether the intermediary employer (who may simply be an individual responsible for providing labor) is actually an employee of the potential joint employer." If this threshold question is met, a vertical joint employment exists, and there is no need to conduct a vertical joint employment analysis. In effect, if the intermediary employer is an employee of the potential joint employer, then all of the intermediary employer's employees are employees of the potential joint employer too, and there is no need to conduct further analysis. This proposition by the DOL is surprising because it means that the potential liability of misclassifying an employee as an independent contractor has suddenly increased exponentially.

Now, more than ever, it is imperative that employers consult with legal counsel and not casually enter into engagements with third parties for the provision of services, relying on contract language and past practices to protect them from being held liable under the FLSA as a joint employer.

LABOR – EMPLOYEE HANDBOOK – IS YOUR TAPE RECORDING RULE LAWFUL OR UNLAWFULLY OVERLY BROAD?
By Alan Kaplan

Does your Employee Handbook prohibit recordings? If so, can your employees reasonably construe the work rule to restrict their right to talk about their working conditions or to engage in group activity (i.e., concerted, protected activity)? Rules in employee handbooks prohibiting recordings are more common than one may think. For example, in a recent case reviewed by the National Labor Relations Board ("NLRB"), Whole Foods had a rule in its employee handbook that states that it is a violation "to record conversations, phone calls, images or company meetings with any recording device, unless prior approval is received" from a supervisor or "all parties…give their consent." See *Whole Foods Market Group, Inc*., 363 NLRB No. 87 (Dec. 24, 2015). To Whole Foods, the rule was an important and logical part of its open door policy and its efforts "to eliminate the chilling effect on the expression of views that may exist," if an employee believes that his conversation is being recorded. At first glance, the Whole Foods rule may seem reasonable to employers. After all, isn't the rule protecting employees and their ability to engage in free speech?

Unfortunately, according to the National Labor Relations Board ("NLRB") the answer is "no" where the prohibition on recording, like in the Whole Foods case, is overly broad. Under Section 7 of the National Labor

Relations Act, employees have the right to take photographs and make recordings when they are acting in concert for their mutual aid and protection. For example, employees have the right to record union picketing, unsafe working conditions, discussions they have with co-workers and to record evidence to be used in court cases. In the Whole Foods case, the NLRB cited a long history of decisions supporting an employee's right to make recordings, including decisions in a number of prior Presidential administrations.

The NLRB's decision with regards to the Whole Foods rule does not mean, however, that a company cannot restrict recordings at all. Rules prohibiting employees from making recordings may be allowed if they are "narrowly drawn." An employer can restrict recordings that are not "part of, or in furtherance of, a course of group action," do not initiate or induce group action, or do not enforce provisions of a union contract. A company may have a rule that restricts a recording made only for an individual purpose. For example, if an employee brings a recording device into a disciplinary meeting, a company may have the right to tell that employee that he either participates in the meeting without recording it, or the meeting will be just short enough to give the employee the notice of discipline. A company may also have a compelling reason to prohibit some recordings, such as to protect patient privacy in a hospital. A company may have a non-recording rule to protect the company's intellectual property.

Therefore, all human resource professionals should examine rules prohibiting recordings in their employment handbooks in light of the NLRB's Whole Foods decision and redraft them to meet the NLRB's requirements.

BENEFITS – IRS NOTICE 2016-16 –LONG AWAITED GUIDANCE ON MID-YEAR CHANGES TO SAFE HARBOR PLANS
By Jennifer Watson

On January 29, 2016, the Internal Revenue Service (the "IRS") issued Notice 2016-16 (the "Notice") that provided long-awaited guidance (or relief from prior IRS guidance) on mid-year changes to safe harbor plans or to a safe harbor's plan required safe harbor notice.

A safe harbor plan design is used by a 401(k) plan[1] as an alternative to satisfying the annual actual deferral percentage ("ADP") or actual contribution percentage ("ACP") tests required under the Internal Revenue Code ("Code") to satisfy nondiscrimination requirements. The "safe harbor plan regulations" (Treasury Regulation Sections 1.401(k)-3 and 1.401(m)-3) set forth the requirements for a 401(k) plan to be considered a safe harbor plan. The safe harbor plan regulations specifically provided that a safe harbor plan could not make amendments to a safe harbor plan unless the amendments had been adopted before the first day of the plan year and had remained in effect for an entire 12 month period, with certain limited exceptions set forth in the safe harbor plan regulations or as provided in IRS guidance. IRS guidance and informal comments prior to the Notice indicated that any change to a safe harbor plan, other than those permitted by the safe harbor plan regulations or in an IRS Notice, were not permitted. Thankfully, this Notice changes that position!

Now, in addition to the previously expressly permitted mid-year changes to a safe harbor plan, the Notice provides that mid-year changes to a safe harbor plan can be made provided that: (i) if the mid-year change requires a change to the safe harbor notice content, that the safe harbor notice and election opportunity conditions in the Notice are satisfied, and (ii) the mid-year change is not a prohibited mid-year change as set

forth in the Notice (or violates other restrictions on a plan, such as anti-cutback, nondiscrimination or anti-abuse).

Notice Requirement:

If a safe harbor plan's required notice would need to be changed, an updated safe harbor notice that describes the mid-year change and its effective date must be provided to each participant at least 30 days prior (not more than 90 days) to the effective date of the amendment ("Notice Prior to Amendment"). If it is not practical to provide the safe harbor notice 30 days in advance of the effective date, the notice is treated as timely if the notice is provided as soon as practicable, but not later than 30 days after the amendment is adopted ("Notice After Amendment"). In addition, each participant must be provided with a reasonable opportunity to change his or her cash or deferred election. This means a participant receiving (i) a Notice Prior to Amendment must be able to change his or her election within the 30 day period before the effective date of the amendment, or (ii) a Notice After Amendment must be able to change his or her election within the 30 day period after the amendment is adopted.

Although permitted, the following mid-year amendments must comply with special rules set forth in the safe harbor plan regulations:

(i) Adoption of a short plan year or any change to the plan year (permitted only as described in §§ 1.401(k)-3(e)(2), (3), and (4) and 1.401(m)-3(f)(2), (3), and (4));

(ii) Adoption of safe harbor plan status on or after the beginning of the plan year (permitted only as described in §§ 1.401(k)-3(f) and 1.401(m)-3(g)); and

(iii) Reduction or suspension of safe harbor contributions or changes from safe harbor plan status to non-safe harbor plan status (permitted only as described in

§§ 1.401(k)-3(g) and 1.401(m)-3(h)).

Prohibited Mid-Year Amendments:

The following mid-year amendments are expressly prohibited unless required by applicable law to be made mid-year (i.e. mandated by statute or court decision):

1. A mid-year change to increase the number of completed years of service required for an employee to have a non-forfeitable right to the employee's account balance attributable to safe harbor contributions under a QACA pursuant to the safe harbor rules under § 1.401(k)-3(k)(3) or 1.401(m)-3(a)(2).

2. A mid-year change to reduce the number or otherwise narrow the group of employees eligible to receive safe harbor contributions. This prohibition does not apply to an otherwise permissible change under eligibility service crediting rules or entry date rules made with respect to employees who are not already eligible (as of the date the change is either made effective or is adopted) to receive safe harbor contributions under the plan.

3. A mid-year change to the type of safe harbor plan, for example, a change from a traditional § 401(k) safe harbor plan to a QACA § 401(k) safe harbor plan.

4. A mid-year change (i) to modify (or add) a formula used to determine matching contributions (or the definition of compensation used to determine matching contributions) if the change increases the amount of matching contributions, or (ii) to permit discretionary matching contributions. However, this prohibition does not apply if, at least 3 months prior to the end of the plan year, the change is adopted and the updated safe harbor notice and election opportunity are provided, and if the change is made retroactively effective for the entire plan year (which may require a plan that provides for periodic matching contributions as described in §§ 1.401(k)-3(c)(4) and (5)(ii) and/or 1.401(m)-3(d)(4) to be amended to provide for matching contributions based on the entire plan year).

MFEM Takeaway: The IRS has positively responded to many comments received from the benefits community by issuing Notice 2016-16. Previously, the IRS substantively prohibited mid-year changes other than in certain limited exceptions. This created uncertainty for plan sponsors of safe harbor plans involved in mergers and acquisitions, and plan sponsors who wanted to increase benefits under a safe harbor plan for the benefit of participants, change plan providers, or make amendments required to maintain a safe harbor plan's qualification. Notice 2016-16 and the request by the IRS for comments with respect to further guidance on mid-year changes with respect to mergers and acquisitions and other comments show a significant step by the IRS towards flexibility with respect to safe harbor plans. This may increase the use of safe harbor plans by plan sponsors who may have avoided adopting a safe harbor plan due to the previously strict interpretation by the IRS prohibiting most mid-year changes.

Please contact Jennifer Watson, Mary Shellenberg or Frank Del Barto if you have specific questions with respect to the Notice or how it may impact your plan.

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.

[1] Although the Notice is applicable to 403(k) plans as well, our focus is only 401(k) plans.