

THE VANTAGE POINTE™

PROACTIVE PERSPECTIVES ON ISSUES AFFECTING THE WORKPLACE

Managing Wage and Hour Compliance

Walmart, Starbuck's, Tyson Foods, Wachovia Bank, City of Honolulu and Mississippi School Districts. What do these organizations have in common? They have all been sued and paid large settlements based on improper wage and hour pay practices. Specifically, as a result of misclassifying employees, each of these companies faced lawsuits in excess of \$24 million for failing to pay overtime, as well as lack of documentation.

Fair Labor Standards Act (FLSA) collective action lawsuits have dramatically increased over the past several years. The U.S. Department of Labor (DOL) reports that collective actions under the FLSA have outnumbered employment discrimination class actions. According to one estimate, employers have paid over \$1 billion annually during the course of the last few years for wage and hour violations.

As you probably know, the FLSA dictates how, when and, to some extent, what employers must pay to employees. Specifically, the FLSA sets forth factors that must be carefully and strictly followed to determine whether an employee is exempt or non-exempt under the Act.

What is the exemption?

Under the FLSA, employees are entitled to all of the privileges afforded for wage and hour protection against unfair pay practices by employers and must be paid overtime, unless they are properly classified as "exempt." The three (3) most common exemptions and the requisite job duties are as follows:

- **Professional Exemption**, requiring knowledge of an advanced type in science or other field of knowledge customarily learned through some prolonged intellectual study, or some artistic invention or other creative endeavor;
- **Administrative Exemption**, requiring the exercise of discretion and independent judgment with matters of significance and performance of office or non-manual work related to the general business operations or management of the enterprise as the employee's primary duty;

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- **Executive Exemption**, designated for employees whose primary duty is to supervise two or more employees and who substantially participate in the management of the business enterprise with the authority to hire, fire, promote or make changes in status of other employees.

In addition to satisfying the job duties test, employees eligible for one of these exemptions must also meet what is known as the 'salary basis' test, which means that they must be paid a fixed salary without regard to the number of hours worked. An employee who does not meet both the job duties test and the salary basis test must be classified as non-exempt.

Why is the exemption relevant?

Almost everyone (including judges, lawyers and even the DOL) acknowledges that determining whether an employee meets the definition of one of the exemptions outlined above can be notoriously complicated and difficult. Notwithstanding this, the misclassification of employees as exempt has grave consequences. When employers fail to properly classify employees, they also fail to properly compensate these employees for hours of employment, primarily overtime compensation. With a few exceptions, most notably in the public safety and health sectors, non-exempt employees must be paid overtime at a rate of one and one-half times their hourly rate for all hours worked in excess of 40 hours in a 7-day workweek. Because employers are not likely to track the hours worked by "exempt" employees, if litigation results, there are usually painfully few records or other documentation maintained by employers to counter the assertions that employees make regarding their hours worked. In this situation, where employees are found liable, they are required to pay back wages based solely on the employee's account of his or her hours of employment.

The FLSA allows employees to recover wages for violations

over a two (2) year period, unless the violation is willful, invoking a three (3) year recovery period. Under some state laws, the recovery period may be even longer. The FLSA also provides for liquidated damages, which double the actual wages owed and substitute for any interest payment the employee would be due on the back wages. Moreover, the FLSA awards attorneys' fees and costs. If the employer is held liable under a retaliation claim related to an FLSA lawsuit, then the court will award punitive damages. In some instances, criminal liability may also apply. And, while private lawsuits are more common under the FLSA, the DOL may also bring a lawsuit against an employer. Thus, the consequences of failing to comply with the pay practices mandated under the FLSA can be far-reaching.

Today, employers are being subjected to wage and hour class action lawsuits more than any other type of employment-related matter. And it is not just federal law violations that have caused employers to pay unprecedented amounts in damages. Some states have wage payment and overtime laws that are even more generous to employees than is the FLSA. For example, WalMart has been held liable in California and Pennsylvania, paying plaintiffs \$172 million and \$78.5 million, respectively, with an additional 80 or more lawsuits pending in other states. In both instances, WalMart was sued under state laws requiring compensation for meal periods, although under the FLSA there is no such requirement.

Cases like these highlight the need for all employers to ensure their pay practices are compliant. Vantage provides a proactive solution for FLSA compliance with our **FLSA Audit and Payroll Rules Analysis**. Before the DOL audits your organization, call us to organize your wage and hour policies, procedures and practices. We can provide guidance to help you make appropriate risk management decisions and to mitigate potential liability under the FLSA and state wage and hour laws.

Unemployment Considerations for Business Acquisitions

For many entrepreneurs and current business owners, purchasing a business can be an exciting process. The purchaser eagerly anticipates operating a new business and can often be consumed by the rigors of due diligence. While a team of meticulous advisors on behalf of the purchaser will review the target company's balance sheet to properly value its assets and liabilities, an often overlooked liability is unemployment taxes and contributions. This article offers some practical tips on common unemployment insurance issues facing the purchasers of businesses and how to avoid some potentially costly problems once the deal is done.



The Pointe:

Conducting an internal analysis of your payroll practices will avoid surprises and help you mitigate risks.

Unemployment Contributions

Every employer in Illinois is required to have an Unemployment Insurance (UI) account. For-profit employers are assessed an annual contribution rate that dictates what percentage of each employee's wages the employer must contribute to the unemployment fund maintained by the Illinois Department of Employment Security ("IDES"). Both new businesses and those formed for the purpose of purchasing an existing business must file Form UI-1, the "Report to Determine Liability Under the Illinois Unemployment Insurance Act", with IDES within 30 days of the commencement of the business. In addition, if the new business is formed by acquiring all or substantially all of an existing business or organization, the purchaser must file a UI-1 S&P "Report to Determine Succession." Both of these forms, as well as other useful forms relating to an employer's obligations under the Act can be found at www.ides.state.il.us.

At the end of every quarter, employers must report to IDES the taxable wages paid to each employee during that quarter on Form UI3/40, the Employer's Quarterly Contribution and Wage Report, and pay contributions on taxable wages paid to each employee up to a certain amount for the entire year. For example, in 2008, an employer must make contributions to IDES for the first \$12,000 paid to each employee during the year.

Inheriting Liability

Many purchasers believe that once they have started a company for the purpose of purchasing an existing business, they have a "clean slate" with IDES, and are therefore entitled to their own contribution rate from IDES. In virtually all instances, the opposite is true. In addition to acquiring other types of the seller's liabilities, the purchaser will also acquire the seller's annual contribution rate.

Under IDES rules, when an employing unit succeeds to substantially all of the employing enterprises of another business, the experience rating record of the predecessor company will be transferred to the successor company. Stated plainly, this means that the buyer "inherits" the seller's history of wages paid for work covered by the Act, all benefit charges based on separations from work and all benefit wages. In these instances, the experience rating will fully transfer to the purchaser and the purchaser's contribution rate for the remainder of the year will be the seller's former rate. In subsequent years, the combined rating of both companies will be used to calculate the buyer's contribution rate.

Therefore, it is important for the potential successor company to request specific information from the predecessor, such as the most recent Annual Contribution Rate Determination from IDES, as well as the documents that show the taxable wages paid out to employees and Statements of Benefit Charges for recent quarters (IDES Form Ben-118). A review of these documents can help the successor anticipate, to some extent, future liability for unemployment contributions in light of the predecessor's experience with unemployment insurance and perhaps, factor this information into the negotiations for the purchase.

It is important to note that if the seller has paid contributions for an employee, the purchaser will only be required to pay contributions on that employee's wages up to the remaining portion of the statutory limit. For example, on July 1, 2008, Newton purchases Chestnut's Factory, a liable employing unit under the Act. From January 1 to June 30, 2008, Chestnut had already paid \$9,000 in wages to Mack, the factory's maintenance technician. Chestnut also paid contributions on Mack's wages. If Newton hires Mack and pays him \$18,000 of wages for the remainder of the year, Newton is required to pay contributions on only \$3,000 of the wages paid to Mack for the remainder of the year.

Avoid Personal Liability for Unpaid Unemployment Contributions by the Seller

At the time of transfer, the successor should also ensure that the predecessor owes no money to IDES for unpaid contributions, including interest, penalties, and fines for previous unpaid contributions. Failure to do so will mean that the buyer will become personally liable for these payments.

To prevent such liability, the purchaser can do one of two things. First, the purchaser can require as a condition of the purchase that the seller produce a certificate from the Director of Employment Security certifying that the seller owes no contributions, interest or penalties to IDES. The buyer can also avoid personal liability if it withholds a portion of the purchase price of the transaction to cover any amount owed to the Department that may be discovered later.

Purchasing a business is an exciting undertaking. While there are certainly more significant due diligence issues in such transactions, purchasers who do not analyze the target company's unemployment experience and liability may get a rude awakening once they become aware of the costs and other liabilities associated with their unemployment insurance.



The Pointe:

Though not the most crucial due diligence decision, purchaser of businesses should make a point of knowing the unemployment risks involved.

WELCOME!



Vantage Legal Solutions, P.C. Welcomes Roy LaParl

Roy LaParl has joined Vantage Legal Solutions as Senior Counsel in our Chicago office. Roy is a highly accomplished labor & employment attorney with 16 years of experience, having worked for two major law firms, as in-house counsel for a Fortune 100 financial services firm and as head of his own practice. Throughout his career, and especially during his seven year tenure as Senior Counsel at Bank One Corporation/J. P. Morgan Chase, Roy worked closely with business and human resources executives at the highest levels on virtually every aspect of the employment relationship. He is skilled at handling all types of human resources matters, and has special expertise in a number of areas, including navigating the complex world of employee leaves of absence (FMLA, ADA, worker's compensation), training, employee relations and FLSA compliance.

Roy received his *Juris Doctorate* from The University of Iowa College of Law with High Distinction. There he served as an editor of the *University of Iowa Law Review* and had an article selected for publication. Previously, he received his B.A. from the University of Michigan. Please feel free to contact Roy for any of your employee relations matters.

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solutions.com**

The Vantage Pointe™ is a quarterly publication of Vantage Legal Solutions, P.C. and Vantage Solutions LLC®, Chicago-based firms specializing in employment law and human resource strategies. Our 110 years of experience in employment law and HR gives us the superior position from which to provide employers of all sizes with proactive strategies to better manage their workforce. Our workplace solutions help maximize worker productivity, minimize employment practices lawsuits, and give business owners more time to run their core operations.

Our integrated and customized services include policy and procedure development, customized on-site training for managers and employees, ongoing advice and counsel on employment law topics, independent investigations of employee complaints, and conflict and dispute resolution.

For more information, contact us at 312.440.0602 or 877.816.4818.

This newsletter is for informational purposes only and should not be considered legal advice. For more information on any of the articles here, please contact Dyahanne Ware at the number above or at info@vantage-solutions.com.

2008 Summer Seminar Series

Believe it or not, summer is here. That means warm days, and Vantage Solutions' Summer Seminar Series! This season's seminar series is not to be missed!

The 2008 Summer Seminar Series featuring two of our most popular presentations: **Managing Your Unemployment Compensation Claims (and Rates!)** and **Investigations 101**.

Managing Your Unemployment Compensation Claims (and Rates!)

Thursday July 31, 2008

2:00 p.m. - 5:00 p.m.

Cost: \$69.00

and

Investigations 101

August 7, 2008

8:30 a.m. - 4:00 p.m.

Cost: \$129.00

For more information or to register, contact us at 312.440.0602 or 877.816.4818. We can also be reached via e-mail at info@vantage-solutions.com.

Both Seminars to be held at:

Chicago Bar Association
321 S. Plymouth Ct.
Chicago, IL 60604

See you there!

