

ILCMA WINTER CONFERENCE Employment and Labor Law Update

Top Trends for 2016

Presented by Darcy L. Proctor and Robert T. McCabe

1. Implementation of the Wage Payment and Collection Act Changes of 2014 – if you can believe that.

- (a) Employers are required to keep time records for exempt employees, as well as non-exempt.

Although no penalty is included in this new requirement, a lack of records will be construed against an employer in a misclassification case.

- (b) Questions still remain over whether “use or lose” vacation policies are still valid.

1. The DOL regulations contain some confusing language now.

2. The regulation has long contained the following provision:

An employment contract or an employer's policy may require an employee to take vacation by a certain date or lose the vacation, provided that the employee is given a reasonable opportunity to take the vacation. The employer must demonstrate that the employee had notice of the contract or policy provision.

3. That provision remains in the current version of the regulation. Among the amendments, though, is the following new provision:

An employer cannot effectuate a forfeiture of earned vacation by a written employment policy or practice of the employer.

4. Some very cautious attorneys have advised abolishment of use or lose vacation policies.

5. DOL's website still advises that use or lose vacation policies are still valid and enforceable.

6. Unless the DOL or a court takes an opposite position, we believe use it or lose it vacation policies remain valid.



2. Changes to Overtime Regulations

- (a) Long awaited changes may make the actual implementation almost anti-climactic.
- (b) Initially thought to issue in December 2015, now most believe that the change in rules will occur this summer with a very short time to implement.
- (c) Employers need to be ready for the change. This means:
 1. Evaluate all currently exempt staff to determine whether they will remain exempt.

Two parts:

- Salary minimum may increase to \$50,440
 - No specific recommendation on duties test changes, but that may occur too.
2. Decide if it is more appropriate and feasible to increase the salaries of current staff who will lose their exempt status or to simply start paying them hourly and monitor their overtime.

3. Employee Protected Activities

Primarily in two categories of free speech and protected concerted activities fueled largely by the internet and especially social media. The law is trying to catch up. It used to be that employees said nasty things about their employers behind their backs. Now they post them on Facebook.

- (a) Be aware that employee speech may be protected by both the 1st Amendment and the Labor Act.
- (b) Always consider the context of the speech – personal or as an employee before disciplining.
- (c) Always consider whether the speech is disruptive to the workplace before disciplining and be prepared to prove it.
- (d) Always consider whether employee speech may be “concerted activity” either with or without the presence of a union.
- (e) Review your policies to ensure compliance.

4. Transgender Issues

One of the hottest topics for this year revolves around our increasing awareness of transgender or non-conforming gender rights. Awareness and policies that ensure the protection of transgender employee rights is essential.

- (a) The EEOC has taken the position that Title VII prohibits discrimination as a form of gender discrimination.
- (b) The Illinois Human Rights Act prohibits discrimination based on gender identity
- (c) How do you ensure a discrimination free workplace for transgender or non-conforming gender individuals?
 - i. Clear Policies that Contain the Following:
 - General statement of non-discrimination providing a safe and inclusive work place; free of discrimination;
 - Definitions are very important
 - Gender Identity or Affirmed Gender – person’s sense of who they are
 - Assigned Gender – born with equipment
 - Transgender – gender identity is different than assigned gender
 - Transgender Man – identify as a man
 - Transgender Woman – identify as a woman
 - Gender nonconforming – gender expression differs from stereotypical expectations related to gender
 - Gender expression – the way a person expresses gender identity – clothing, hairstyle etc.
 - Transition – time person begins to live as gender not assigned; may include medical, may not
 - Transition plans – A detailed time line with things such as appearance change, legal name change etc.
 - Co-worker responsibilities – educate, inform, non-discrimination; employees should not approach transgender employee regarding issues – best practice; if employee wants to discuss, answer questions, let them bring that up – remember being a male or a female is not typically a workplace discussion – these types of situations should not make it one
 - Employer responsibilities
 - Supervisor responsibilities – ensure compliance with the policy; work on transition plan; address HR issues
 - Personnel Documentation – must use legal name until SSA affirms change; must use assigned gender until documentation of change is received from medical provider; can use preferred name(s) and

gender identified with on internal documents, name tags, name plates, phone lists etc.

- Names/Pronouns – very important; need to insure that co-workers use proper pronouns
- ii. Locker Rooms – generally, once transition begins person should be in locker room conforming to their new gender – however they can be given specific times or locations for use when other persons will not be impacted by the presence of a transitioning employee
- iii. Dress Code – avoid pronouns when identifying appropriate attire
- iv. Restrooms – access to that restroom which conforms to person’s gender identity; unisex restroom an option
- v. Non-discrimination – like non-discrimination generally – reporting and investigation procedures; follow up etc.

- (d) Supervisor and Employee Training is Essential
- (e) Training is needed to raise awareness of transgender issues
- (f) Supervisors need to learn how to prevent discrimination in the workplace.
- (g) Everyone needs to learn how to talk about this issue

5. Workplace Violence

It’s not just the horrific stories of disgruntled former employees coming back to the workplace to do harm that has society more aware of this issue. It is also the increasing understanding that employers should provide a safe workplace free of threats and violence.

1. What is workplace violence?
2. Establishing a “zero tolerance” policy in your workplace – including co-workers and the public alike
3. Provide training and education to staff
4. Be Proactive – don’t wait until violence is threatened to address this growing topic.
5. Although workplace violence is often connected to mental health issues, a violent or threatening employee is not protected by the ADA.
6. It is always appropriate to send a violent or threatening employee home until they are cleared to return to work by a physician chosen and paid for by the employer.

7. Maintain a strict practice of prohibiting discharged employees from entering employee-only areas of the workplace.
8. Consider enhancing safety features in public areas such as cameras and alarms to avoid surprise intrusions.
9. Collaborate with your Employee Assistance Program providers to ensure that employees know that they have resources.

6. Misclassification of Employees

The Department of Labor is examining more closely the independent contractor relationship. The rules are much stricter now and employers should review all of their independent contractor relationships to ensure they conform with the law. Last July, the DOL endorsed the “economics realities test” with the following tests:

1. The extent to which the work performed is an integral part of the employer’s business.
2. Whether the worker’s managerial skills affect his or her opportunity for profit and loss.
3. The relative investments in facilities and equipment by the worker and the employer.
4. The worker’s skill and initiative.
5. The permanency of the worker’s relationship with the employer.
6. The nature and degree of control by the employer.

In general the degree to which the “contractor” relies economically relies on the income from the contract will determine whether he or she is really in business for themselves. A misclassification can result in liability for unpaid employment taxes, penalties and interest. Further, a misclassified contractor who worked more than 40 hours in a work week will be entitled to overtime, interest and attorneys fees.