EMPLOYMENT LAWSCENE ALERT: NLRB ISSUES NEW RULES FOR UNION ELECTIONS

On Monday, December 15, 2014, the National Labor Relations Board (NLRB) issued rules that will speed up the union election process. Although the rules do not take effect until April 14, 2015, employers should be aware of them and start preparing for the changes now.

Under the current rules, representation petitions are filed seeking to have the NLRB conduct an election to determine if employees wish to be represented by a union for the purposes of collective bargaining with their employer. The Board then investigates these petitions to determine if an election should be conducted and will direct the election, if appropriate. There is currently a 25-day minimum period of time between the filing of a petition and the date of an election. Parties must agree prior to the election on the voting unit and other issues. If the parties do not agree, the 25-day minimum can be extended in order to hold a pre-election hearing and, if necessary, a post-election hearing. Currently, that date as to when the pre- and post-election hearings are held can vary by Region. Also, under current rules, parties are not required to identify all specific issues in dispute, and litigation on voter eligibility and inclusion can occur prior to the determination of whether an election should be held.

Under the new NLRB rules, the road to a representation election will be substantially different and quicker. There will no longer be a minimum time frame between the date of the petition and the date of the election. This means that since representation elections will happen more quickly and with a shortened time frame to an election; and employers will be severely limited in their ability to properly and effectively communicate with their employees about the pros and cons of union representation. While the NLRB did not specify any date certain as to when an election must be conducted, under the new expedited election rules, it is anticipated that an election will now occur between 10 and 21 days after the filing of a petition as compared with the current 38 to 45 day time frame.

Now petitions can be filed and transmitted between the parties electronically. With the filing of a representation petition, the petitioning union must also file a letter of position and evidence that employees support the petition (the “showing of interest”). Upon receipt, an employer must post and distribute to employees an NLRB notice about the petition and the potential for an election to follow.

The regional director will now set a pre-election hearing eight (8) days after a petition is filed. The purpose of the pre-election hearing is limited in scope and is designed to determine whether there is a “question of representation.” Employers will be required to file a letter of position prior to the pre-election hearing identifying all issues that the employer wishes to litigate before the election. In addition, employers must also provide a list of the names, shifts, work locations, and job classifications of the employees in the petitioned-for unit, and any other employees that it seeks to add to the unit based upon a community of interests.

Based upon the evidence presented at the hearing, the regional director will decide whether an election should be held and which, if any, voter eligibility questions should be litigated prior to the election.

If an election is directed, the regional director will ordinarily transmit the notice of election at the same time as the direction of election and will specify in the direction of election the election details, such as the date, time, place and type of election and the payroll period for eligibility. An election date will be set for the earliest date practicable. Now there is a new *Excelsior* list requirement as an employer, within two (2) days after a direction of election is issued (as opposed to seven (7) days under the previous rules), must provide a list of employees eligible to vote that now must include employees' personal phone numbers and email addresses, if available.

The NLRB regional office will then conduct the election and, if necessary, hold a post-election hearing to resolve any challenges to voters' eligibility and objections to the conduct of the election or conduct affecting the results of the election. While objections to voter eligibility had been a pre-election issue, it will now be held off until after the election in the event that the objection becomes moot. However, any issues not raised in the employer's position statement will most likely be considered waived by the NLRB. The post-election hearing will be scheduled 14 days after the filings of objections.

Although there is already a pending legal challenge to the new NLRB rule, a suit filed by the U.S. Chamber of Commerce and several trade associations, and there are likely to be others, employers should prepare for these rules to be enforced as the NLRB's new rules are game changers for employers. Employers will have less time to effectively communicate with their employees and employees will have less time formulate their true desires as to whether union representation serves their best interests.

Importantly, employers should not wait until an election petition is filed to address workplace issues that may lead to a representation petition being filed. Employers will need to be proactive in informing their employees about their stance on union-related issues and making sure that employees feel that their concerns are being heard and addressed by the employer. Employers should also train supervisors to be aware of issues that could lead to employees' desire to unionize. If an employer anticipates or suspects that any type of union organizing activities is occurring within its workplace, delaying a response is no longer a viable option. Now, employers will be required to immediately begin the process of drafting communications to employees upon any indication of organizing activities and devise a sound and lawful strategy as to how it will confront any attempt to organize well before a petition is filed. Waiting to act until a petition is filed may be too late!

THE WILAW CONNECTION QUARTERLY NEWSLETTER

- Tax and Wealth Advisor Alert—"The Seven Deadly Sins of Succession Planning Series"
- Employment LawScene Alert—"Successful Employers Recognize the Importance of Having Well-Trained Supervisors"
- Article—"A Family Matter: Protecting an Elderly Parent with Dementia from Financial Abuse"
- Dean Laing Featured in the 2014 *Wisconsin Super Lawyers* Edition
- Welcome Our New Attorneys
- Congrats to Our 2015 Best Lawyers
- Best Lawyers
- *Super Lawyers* Business Edition
- Proud to be a Member of Meritas

TAX AND WEALTH ADVISOR ALERT: DIVORCE DOES NOT ALWAYS REVOKE YOUR EX-SPOUSE AS BENEFICIARY

Most states, including Wisconsin, have a statute that automatically revokes as beneficiary a divorced spouse once the divorce is final. *See, e.g.,* Wis. Stat. § 854.15. This means that, unless your will, trust, IRA, 401(k), life insurance, etc., provides otherwise, once a divorce decree is final, an individual's ex-spouse and the ex-spouse's relatives receive nothing under your estate plan, even if they are the named beneficiary. Instead, the funds or property will transfer to the next of kin.

However, this may not be the result for any benefits provided as part of an employee benefit plan. In *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), the United States Supreme Court held that a Washington statute similar to Wisconsin's § 854.15 was preempted by ERISA, the Employee Retirement Income Security Act. Instead of applying the statute and awarding Mr. Egelhoff's life insurance proceeds to his children, the proceeds went to his ex-wife, whom he failed to remove from his beneficiary designation form. The same rule has since been applied in Illinois, *see Melton v. Melton*, 324 F.3d 941 (7th Cir. 2003), and would also apply in Wisconsin.

Often times, the law works for us in helpful ways, automatically. But many times it unfortunately does not. The lesson to be learned from the Egelhoffs is that it is imperative to update your estate plan after major life events such as divorce, marriage, large purchases, or the death of loved ones. And in-between these events, an update about every five years is wise.

TAX AND WEALTH ADVISOR ALERT: SUCCESSION PLANNINGTHE FOURTH SIN — "ASSUMING THE ESTATE PLAN IS THE SUCCESSION PLAN"

The fourth sin is when the business owner makes the assumption that because the estate planning documents are complete, the succession plan is complete. An estate plan is a strategy for a person to take care of the people he or she cares about. The strategy incorporates two things: getting the right property to the right people at the right time and making sure the right people are making decisions when the client cannot. A succession plan is a plan designed to maximize the value of a business to take care of the people the business owner cares about: first the owner and the owner's spouse, then the children and finally, future generations.

A properly designed estate plan should be a part of the overall succession plan. It should be the implementation of how all of the client's property (including the business) will take care of the people the business owner cares about when the business owner cannot. But it is not the entire succession plan. The entire succession plan also addresses leadership of the business, the retirement income needs of the business owner and the family dynamics of the potential solutions. An estate plan might do those things, but often does not, blindly focusing on taxes and equalization by leaving all of the property equally to the children, with no thought on which, if any, of the children should be running the show. Business owners should have the estate plan drafted as a part of a successful, multi-faceted succession plan; doing these steps in a separate piecemeal fashion often leads to suboptimal results.

EMPLOYMENT LAWSCENE ALERT: NLRB

DECIDES THAT WORKERS CAN USE THEIR EMPLOYERS EMAIL — EVEN FOR UNION ORGANIZING

On December 11, 2014, in *Purple Communications, Inc.*, the NLRB overturned its 2007 *Register Guard* decision and held that employees have the right to use their employers' email systems for nonbusiness purposes, including communicating about union organizing. The NLRB emphasized the importance of email as a critical means of communication for employees, especially in today's workplace culture, and noted that some personal use of an employer email system is common and often accepted by employers. Because communication among employees is a foundation for the exercise of Section 7 rights, the NLRB held that employers who have chosen to give employees access to their email systems must now permit those employees to use those systems for statutorily protected communications on nonworking time. Employers are permitted to monitor employees' email use to ensure that it is being used properly. Employers will not be engaged in unlawful surveillance of Section 7 activity unless they do something "out of the ordinary," such as increasing monitoring during an organizational campaign or focusing monitoring effects on protected conduct or union activists.

In an attempt to balance the employees' Section 7 rights to communication with the legitimate interests of employers, this decision only applies to workers who have already been given access to their employers' email systems; employers are not required to provide access to employees. Businesses may also be able to justify a complete ban on non-work use of email if they can point to special circumstances that make such a prohibition necessary to maintain production or discipline. It will be the employer's burden to show what the interest at issue is and demonstrate how that interest supports any email use restrictions the company has implemented. The decision did not address email access by non-employees or any other type of electronic communication systems.

Employers should review their computer use and e-mail policies in light of this decision. Employers should determine which employees should or need to have access to their computer and e-mail systems and whether there is any business justification to impose a complete ban on non-work use of email.

EMPLOYMENT LAWSCENE ALERT: SUPREME

COURT DECIDES SECURITY CHECK TIME DOESN'T NEED TO BE PAID TIME

On December 9, 2014, the Supreme Court of the United States issued its decision in *Integrity Staffing Solutions, Inc. v. Busk et al.*, ruling that time spent waiting to undergo and undergoing security screenings after work each day is not compensable time under the Fair Labor Standards Act ("FLSA"). This case involved a collective claim by employees of a temporary staffing agency who worked at Amazon warehouses in Nevada retrieving products from shelves and packaging those products for delivery. These employees were required to pass through a security check after the end of their shift to make sure that they had not pilfered any product from the warehouse. At times, employees were required to wait as long as 25 minutes in line before they could leave the premises.

In overruling the Ninth Circuit Court of Appeals, the Supreme Court held that the activity of waiting in a security line, after work, was not a "principal activity or activities which the employee is employed to perform" because they were hired to retrieve products from warehouse shelves and package them, not to go through security screenings. Pursuant to the Portal-to-Portal Act, an employer is not required to pay minimum wage or overtime compensation for activities which are preliminary or postliminary to an employee's principal activities. The U.S. Department of Labor deems that the term "principal activities" encompasses "all activities which are an integral part of the principal activity," including those related activities which are "indispensable to its performance."

The Court concluded that the security screenings were not "integral and indispensable" to the employees' duties because it was not an intrinsic element of retrieving products from shelves and packaging them for shipment and could have been eliminated if the employer so desired. The Court found that the Ninth Circuit had erred in focusing on whether the employer required an activity because that was too broad of an interpretation and the focus under the FLSA and Portal-to-Portal Act is whether the activities are "integral and indispensable" to the productive work that the employee is employed to perform.

Employers should take note of this decision in determining what pre- and post-shift activities must be compensated. Time spent performing activities related to an employee's duties, such as donning and doffing protective gear that is necessary for performing an employee's job duties, should generally be compensated. However, not all activities, such as waiting at a security check and waiting in line to receive pay checks, are compensable.

KILLORAN FEATURED IN THE WISCONSIN LAW JOURNAL

Attorney Grant Killoran was featured in the *Wisconsin Law Journal* article entitled, “Killoran takes onstage experience to courtrooms.”

Read full article here.

EMPLOYMENT LAWSCENE ALERT: CAN AN EMPLOYER DEDUCT AN EXEMPT EMPLOYEE’S SALARY WHEN THE EMPLOYER CLOSES ITS BUSINESS DUE TO EITHER INCLEMENT WEATHER OR A POWER OUTAGE?

The Fair Labor Standards Act (“FLSA”) provides an employer an exemption for minimum wage and overtime payments for any employee employed in a bona fide executive, administrative, or professional capacity. An employee may qualify for exemption if the employee meets all of the pertinent tests relating to duties and receives compensation on a “salary basis” at not less than the minimum amounts as described in the appropriate section of the regulations. The FLSA regulations provide that, for an exempt employee to be paid on a “salary basis,” the employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. An employee will not be considered to be paid on a “salary basis” for any week if deductions are made to an employee’s salary for any absence occasioned by the employer or by the operating requirements of the business. However, a deduction may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability.

Oftentimes, the question arises whether an employer can deduct a day’s wage from an exempt employee’s salary when the employer closes its business due to inclement weather (e.g., a snowstorm) or a power outage. In other words, does an employer need to pay an exempt employee for that day when no work was performed by the employee because of the employer’s decision to close its business? It is the U.S. Department of Labor’s (“DOL”)

position that an employer must pay an exempt employee his or her full salary if the employer closes its operations due to a weather-related emergency or other emergency, such as a power outage. The DOL's position is based, in part, on the FLSA's regulations that provide that deductions may not be made for time when work is not available. When it is the employer's decision to close its business because of some emergency, whether it is due to severe weather or a simple loss of power, the DOL presumes that employees remain ready, willing, and able to work. Under such circumstances, deductions may not be made from an exempt employee's salary when work is not available. If deductions are made under such circumstances, the employer risks losing the exemption, thus subjecting it to potential overtime liability.

On the other hand, when an emergency causes an employee to choose not to report to work for the day, even though the employer remains open for business, the DOL treats such an absence as an absence for personal reasons. This type of absence does not constitute an absence due to sickness or disability. Consequently, an employer that remains open for business during a weather emergency may lawfully deduct one full day's wages from an exempt employee's salary if that person does not report for work for the day due to adverse weather conditions. Such a deduction will not violate the "salary basis" rule or otherwise affect the employee's exempt status. If, however, the employee works only a partial day because of weather-related issues, the employer may not make deductions from the employee's salary for the lost time because an exempt employee must receive a full day's pay for the partial day worked in order for the employer to meet the "salary basis" rule.

EMPLOYMENT LAWSCENE ALERT: HOW TO AVOID BECOMING A WAGE AND HOUR MISCLASSIFICATION HEADLINE

Employers who label their employees as overtime exempt should be cautioned by a recent settlement out of a Florida federal court. The case, *Lytle et al. v. Lowe's Home Centers Inc. et al.,* 12-CV-01848 (M.D. Fla.), was premised on the allegation that plaintiff Lizeth Lytle and a class of similarly situated employees were improperly classified as exempt from the Fair Labor Standards Act ("FLSA") overtime requirements.

The FLSA requires that employees must be paid overtime for all hours worked in excess of forty hours per workweek, unless the employee is exempt. Exempt employees include those who qualify as a bona fide executive, administrative, or professional. Simply being paid on a salary basis does not, by itself, determine the exempt status of an employee. Rather, beyond

the requirement that an employee be paid on a salary basis of not less than $455 per week, an employee's job duties must satisfy the criteria to qualify under either the executive, administrative, or professional exemption. Importantly, job titles do not determine exempt status.

In the *Lytle* case, the class alleged that, although classified by their employer as exempt, their duties did not rise to the level required by the FLSA duties tests. The plaintiffs argued that, despite their managerial description as "Human Resource Manager," none had the ability to make meaningful decisions, nor did they supervise employees; instead, their job duties included tasks such as operating cash registers, cleaning bathrooms, greeting customers, and sweeping floors. The employer denied that it violated any laws; however, it agreed to, and the Court approved, a $3.5 million class settlement and a $1.3 million attorney fee award.

Employers who have classified their employees as "exempt" from overtime pay should not simply rely on the fact that an employee is being paid on a salary basis or that his or her job title may imply executive or administrative job responsibilities. Instead, employers should make sure that the actual job duties of each employee claimed as exempt meet the particular job duties of an executive, administrative, or professional employee. Drafting and keeping up-to-date written job descriptions that accurately describe an employee's actual job responsibilities is an important step in making sure that employees are properly classified as "exempt" or "non-exempt" and helping your company avoid becoming another wage and hour collective action headline.

DEAN LAING FEATURED IN THE WISCONSIN SUPER LAWYERS 2014 EDITION

We are proud to announce that our Partner, Dean Laing, has been featured as the Cover Story for the 2014 *Wisconsin Super Lawyers* magazine. A copy of the article, which calls O'Neil, Cannon, Hollman, DeJong and Laing S.C. "the midsize Milwaukee powerhouse," can be found here.

For the past 10 years, Super Lawyers has published its annual magazine in Wisconsin, in which it selects approximately 5% of Wisconsin attorneys as "Super Lawyers." In addition, each year the magazine selects the Top 50 Attorneys in Wisconsin. Super Lawyers' selection process consists of surveying all Wisconsin attorneys and judges, conducting its own independent research, and having its Blue Ribbon Panel evaluate attorneys.

Since 2006, Dean has been selected each year as one of the Top 50 Attorneys in Wisconsin. He is one of only 10 attorneys out of over 15,000 attorneys in Wisconsin—and the only commercial litigator—to be selected for that honor in each of those nine years. Dean has also been selected as one of the Top 25 Attorneys in Milwaukee each year since Super Lawyers began publishing the list in 2011.

Congratulations Dean on this tremendous honor.