

LABOR AND EMPLOYMENT LAW UPDATE



WHAT DO EMPLOYERS RISK BY CUTTING LEGAL CORNERS TO WEATHER THE CURRENT ECONOMIC STORM?

Harsh economic realities continue to threaten the financial health of many employers. In response, management has undertaken efforts to trim the largest expense of most employers – labor costs.

Amongst these efforts, layoffs still dominate the headlines. According to a December 19, 2008 Summary by the U.S. Department of Labor, Bureau of Labor Statistics, 224,079 employees were affected by mass layoffs in November 2008 alone.

Other efforts have been the product of lawful ingenuity. Some grocery employers, for example, have implemented labor-efficiency programs to maximize productivity with fewer workers.

Not all efforts by employers to reduce labor costs, however, have been lawful. Internet blogs and attorney consultations indicate that some cost-cutting efforts by employers violate labor and employment laws. Even if these efforts help employers weather the current economic storm, the price to be paid in the future could be substantial. The following are only some efforts which should be avoided.

PAYING LESS THAN PRESCRIBED MINIMUM WAGE: The Fair Labor Standards Act (“FLSA”) mandates that nonexempt employees (including part-time employees) be paid at least \$6.55 per hour. There are two primary exceptions:

1. An employee under the age of 20 need only be paid \$4.25 per hour for the first 90 days of employment.
2. An employer may pay a tipped employee not less than \$2.13 per hour in direct wages if (a) that amount plus the tips received equal at least the federal minimum wage, (b) the employee retains all tips, and (c) the employee customarily and regularly receives more than \$30 a month in tips.

Many states also have minimum wage laws.

A private employer and nonexempt employee cannot agree to a lesser wage even where compliance with the FLSA would require a termination of employment or closing the employer’s business; such an agreement is void.

PAYING LESS THAN PRESCRIBED OVERTIME PAY: The FLSA also requires that nonexempt employees be paid 1½ times their regular hourly wage for hours worked in excess of 40 hours in a week. Many states have more stringent requirements.

A private employer and nonexempt employee cannot agree that overtime hours in any week will be (1) off-the-clock, (2) paid at a straight-time rate, or (3) paid with compensable time off in a subsequent week. Such agreements are void even if compliance with the FLSA would require a termination of employment or closing the employer’s business.

The FLSA exacts a price for statutory violations. Civil liability to affected employees can include (1) unpaid wages, (2) an equal amount as liquidated damages, and (3) attorney’s fees and costs. This exposure is greater if affected employees sue in a class or collective action. For willful or repeated violations, the Secretary of Labor can assess civil and criminal penalties.

PAYING LESS THAN EARNED COMPENSATION:

The laws of many states, including the Texas Pay Day Law (“TPL”), require that employers pay employees earned compensation. Such compensation is not limited to minimum wages and overtime pay and can include salary, wages, commissions and bonuses and fringe benefits, such as vacation pay, holiday pay, sick leave pay and severance pay.

An employer’s exposure for violating the TPL is not limited to unpaid compensation. The Texas Workforce Commission (“TWC”), which enforces the TPL, may assess a civil penalty of up to \$1,000 for each violation. It is a felony if an employer (1) intends to avoid payment of wages to an employee, (2) intends to continue to employ the employee, and (3) fails after demand to pay the wages.

A TWC order to pay an employee wages is a lien on all property belonging to the employer. The assets or debts of a delinquent employer can be subject to a freeze or levy by the TWC.

RECLASSIFYING EMPLOYEES AS INDEPENDENT CONTRACTORS: Amongst the legal obligations which attach to private employees, but not to independent contractors, are federal and state tax payments and withholdings, the minimum wage and overtime pay requirements of the FLSA, and benefit entitlements enforceable under the Employee Retirement Income Security Act.

Avoiding such legal obligations, however, is not as simple as an agreement to work as an independent contractor, not an employee. The determination of whether a worker is an employee or independent contractor entails a more detailed and thorough analysis which includes some 20 factors. That an independent contractor was previously an employee is viewed with suspicion under this analysis. Many workers are found by relevant authorities to be employees despite the existence of independent contractor agreements.

The price of improperly classifying workers as independent contractors can be steep. An employer who fails to properly withhold or pay employment taxes may be liable to a taxing authority for past taxes, interest and penalties. Such liability is enforceable through tax liens, freezes and levies by taxing authorities. Criminal prosecution for tax fraud can also result.

An employer who fails to pay employee benefits can be liable for past benefits and attorney’s fees and costs. As to a 401(k) plan, such liability can include the value an individual account would have achieved during the time period in which a worker should have been classified as an employee.

QUESTIONS: Questions regarding the legality of cost-cutting efforts or any other labor and employment issues can be directed to Robert G. Chadwick, Jr. at Campbell & Chadwick, P.C.

CAMPBELL & CHADWICK

A PROFESSIONAL CORPORATION

BRUCE A. CAMPBELL
ROBERT G. CHADWICK, JR.*
TIMOTHY B. SOEFJE
KAI HECKER
JOHN A. KOWTUN, JR.

4201 SPRING VALLEY ROAD, SUITE 1250
DALLAS, TEXAS 75244
TELEPHONE: 972.277.8585
FACSIMILE: 972.277.8586
WWW.CAMPBELLCHADWICK.COM

* BOARD CERTIFIED, LABOR AND EMPLOYMENT LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

LABOR AND EMPLOYMENT UPDATE is published periodically solely for the interests of friends and clients of Campbell & Chadwick, P.C. and is not intended to provide or be relied upon as legal advice in general or with respect to any particular factual scenario. Such legal advice should be obtained directly from retained legal counsel.

Circular 230 Notice. The following disclaimer is included to comply with and in response to U.S. Treasury Department Circular 230 Regulations.

ANY STATEMENTS CONTAINED HEREIN ARE NOT INTENDED OR WRITTEN BY THE WRITER TO BE USED, AND NOTHING CONTAINED HEREIN CAN BE USED BY YOU OR ANY OTHER PERSON, FOR THE PURPOSE OF (1) AVOIDING PENALTIES THAT MAY BE IMPOSED UNDER FEDERAL TAX LAW, OR (2) PROMOTING, MARKETING OR RECOMMENDING TO ANOTHER PARTY ANY TAX-RELATED TRANSACTION OR MATTER ADDRESSED HEREIN.