

HRAGC LEGAL UPDATE

FEBRUARY 15, 2018

FEDERAL

New NLRB Handbook Test

In a continued rollback of decisions under the prior administration, the NLRB has implemented a more employer-focused view of handbook provisions. The NLRB decided that the employer's "legitimate business justifications" must be considered when evaluating whether a handbook policy adversely impacts an employee's right to engage in concerted activity protected under the NLRA. Under the prior test, a policy could be deemed to violate the NLRA if it could be reasonably construed to limit employee rights under the Act. The case involved the Boeing Company and its policy banning cameras on company property, which was based on legitimate national security concerns, decided December 2017 by a 3-2 vote.

In light of this, employers have more latitude to implement company policies where there is a legitimate business justification that outweighs any adverse impact on protected employee rights, provided they are consistently enforced.

New DOL Intern Test

The U.S. Department of Labor, on January 5, 2018, enacted a new test to determine if an unpaid intern or student is an employee under the FLSA. The new test examines who is the "primary beneficiary" of the relationship, it is designed to be flexible and consideration is given to the following:

- Both parties understand the intern is not entitled to compensation. A promise of compensation suggests the intern is an employee.
- The internship provides training that is similar to what would be given in an educational environment.
- The internship is tied to integrated coursework or completion of the program entitled him or her to academic credit.
- The internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- The internship's duration is limited to the period when the internship provides the intern with beneficial learning.
- The intern's work complements rather than displaces the work of paid employees while providing significant educational benefits to the intern.
- The intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Employers who use unpaid internships, or who wish to resume or begin the practice, should ensure their postings and advertisements, job descriptions, and policies are in line with this new balancing test. In addition, employers should utilize written agreements to document the intern relationship and ensure compliance during the period of the internship.

NEW HAMPSHIRE

On January 9, 2018, an amended version of HB 628, providing for a family and medical leave insurance program, was approved by the House of Representatives by a vote of 183-151. It was then referred to the Commerce and Consumer Affairs Committee who recommended it not pass. However, the House passed the bill in February 2018 by a vote of 186-164. The bill has been sent to the House Finance Committee and will come back to the House for yet another vote. If approved once again by the House, then approved by the Senate and signed by the Governor, this bill will establish a system of family and medical leave insurance (FMLI), effective January 1, 2019.

IBM v. Khoury

On December 21, 2017 the New Hampshire Supreme Court decided the case of *IBM v. Khoury*. IBM appealed adverse findings by the Department of Labor and the Superior Court regarding commission payments, liquidated damages and attorney's fees. The New Hampshire Supreme Court affirmed the decisions below.

The IBM commission plan applicable to Mr. Khoury was in writing and it provided that commissions would be earned when IBM completed its measurements of business results for the specific period. The plan reserved to IBM the right to make changes to the plan for errors and generally to adjust the quotas and commission rates. After the date the commissions were "earned" IBM changed the quotas because it realized the quotas were too generous.

The DOL found a valid wage claim, and both the Superior Court and Supreme Court affirmed. The Supreme Court found that while IBM had attempted to reserve the right to change the plan during the year, IBM was required to notify employees of changes in compensation before the changes were effective under RSA 275:49, II and Lab 803.03(c), and changing the plan after the date the commissions were "earned" violated those provisions. The Court also found the plan ambiguous and construed it against the employer; this reflects the Court's view of the goals of RSA 275 (entitled "Protective Legislation") and imposes a requirement on employers to ensure employees actually understand how their rate of pay will be calculated and how changes can be made.

The *Khoury* decision reminds employers that commission plans should be in writing, the employer should strictly follow the written commission plan (or its established practices if there is no written plan) and before making any changes provide employees with a clear written notice before the effective date of the change. Employers must be very careful when denying current or former employees the commissions they believe are due, as the exposure for wrongfully denying a commission can be significant when interest, liquidated damages and attorney's fees are added.

PRACTICE POINTER

Best Practices to Avoid Wage Claims

- Put commission policies and practices in a clear and unambiguous writing.
- Ensure the employees understand how their pay will be determined and how changes will be made.
- Review/audit commission payment practices for compliance.
- Review the actual duties of all exempt employees – will they still meet the exemption test?
- Examine whether independent contractors are properly classified.
- Assess whether employees on flexible or reduced schedules, or who take leaves, are falling behind their peers.
- Review compliance with break laws – are employees being paid for breaks under 20 minutes?
- Ensure all paperwork is in order to support employee wage payments if there is a unique arrangement, such as logs, invoices, and receipts.

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