KAUFMAN & CANOLES
A Professional Corporation
Attorneys and Counselors at Law

Legal Update

Winter 2008

Employment Law Update

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New I-9 Employment Eligibility Verification Form Mandatory as of December 26, 2007

A newly revised version of the I-9 employment eligibility verification form was issued by United States Citizenship and Immigration Services (USCIS) on November 7, 2007. Use of this form became mandatory on December 26, 2007. Employers who do not use the new form are subject to applicable penalties. The revised I-9 form must be used to verify the employment eligibility of all employees hired from December 26 forward, as well as to reverify the employment eligibility of any employees whose work authorization has expired. In particular, the form was revised to correctly reflect the documents which can be relied on to establish both identity and employment eligibility in the verification process.

All United States employers, no matter what size, are required to complete the employment eligibility verification form, or I-9, for all employees hired after November 6, 1986. The I-9 form is a deceptively simple form which must be completed correctly both in terms of time and substance. I-9 forms must be retained for either one year post-termination of employment or three years post-date of hire, whichever period is longer.

Employers interested in obtaining this new form do not need to purchase it from any third party vendors. The new I-9 form can be found online at www.uscis.gov. It will also be part of the materials at the next showing of the K&C's 24th Annual Employment Law Update on March 20th in Richmond, or anyone can simply call K&C Employment Team member Heather Mullen at (757) 624-3312 to receive a copy of this form or additional information or assistance with any immigration matters including conducting internal I-9 audits.

24th Annual Employment Law Update

Solutions that Top the Charts

K&C's Labor & Employment team is getting ready to "rock" on March 20th at the Richmond showing of the 24th Annual Employment Law Update – Solutions that Top the Charts! This year's rock n' roll themed program is designed to provide solutions to the everyday challenges faced by today's employer.

Attendees will select their choices of several educational workshops from our chart topping hit list. Topics include: Dealing with the Problem Absentee Employee; Handling an EEOC Charge; Workplace Harassment; The K&C Discipline & Discharge Clinic; and more. The day will also feature the premiere of K&C's "Name that Employment Law Tune" game and guest speakers who should both educate and entertain attendees.

For more information, visit our website at www.kaufmanandcanoles.com or contact Ashley Dufrene at (804) 771-5722 in Richmond or (757) 624-3232 in Hampton Roads.

This program has been approved for 5 credit hours toward PHR and SPHR recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI homepage at www.hrci.org.

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Unemployment Benefits Awarded Even Though Job was Temporary

In a recent ruling that many employers may find frustrating, the Virginia Court of Appeals affirmed an award of unemployment benefits to a claimant following a mutually agreed period of temporary employment. Charmine Key went to work for Chauncey F. Hutter, Inc. t/a Pro-Tax, a tax return service, for the period January 10 through April 15, 2007. As expected she was separated on April 16, and subsequently filed for benefits. Key claimed she was laid off, and Pro-Tax described the separation as a voluntary departure since the duration of employment had been previously agreed. The Virginia Employment Commission and the Court of Appeals determined that the separation was a layoff because Pro-Tax had no further work for Key, rather than a voluntary separation following an agreed upon period of work.

Temporary and seasonal employers should take note that their employees may be entitled to benefits given the remedial nature of a law that encourages workers to seek employment of short duration rather than no employment at all. However, all employers should also remember that claimants who have earned sufficient wages will only become "attached" to their current employer after 30 working days or 240 hours, whichever comes first. So shorter temporary jobs may not cause an increase in the unemployment compensation tax rate.

$1.5M "Spanking" Verdict Overturned

Janet Orlando was extremely embarrassed when her California employer spanked her in front of her co-workers with a metal sign. Not surprisingly, she filed a lawsuit against her employer claiming sexual harassment and sexual battery. A jury sympathized with her and awarded her $1.5 million which included a punitive damage award of $1 million. However, on January 14, 2008 a California Appeals Court overturned the verdict ruling that the jury was not properly instructed. Apparently Ms. Orlando's employer claimed the spankings were not discriminatory because they were given to both male and female workers and that Ms. Orlando and others willingly took part.

Expect this litigation to continue, and based upon the outrageous conduct, this is a candidate for the K&C Employment Team's Top Ten List. We are still considering this year's candidates, so if you hear of any outrageous, funny, or weird cases, please do not hesitate to contact anyone on the K&C Employment Team to let us know if you have a candidate for our list.

"Changing of the Guard" at the VDOLI

After 6½ years of serving as a lawyer for the Virginia Department of Labor and Industry ("VDOLI"), VDOLI Director of Labor and Employment Law, Ellen Marie Hess, has decided to join a somewhat larger agency, the Division of Motor Vehicles, in a similar position. Ms. Hess' last day at VDOLI was January 24, 2008, and she started immediately as the Director of Policy and Legal Affairs for the DMV.

When asked to comment on what she has observed during her tenure that might be of benefit to Virginia employers, Ms. Hess commented that "While it is best to avoid problems related to 'end of employment' pay issues that VDOLI handles, ending employment has many emotional components that at times lead employees to file claims. However, open communication and treating employees with respect seem to keep many claims from being filed." Ms. Hess also noted that in addition to helping employees, VDOLI serves as a source of information for employers who may not have a full understanding of end of employment legal issues.

FYI

One source that representatives from VDOLI and other state and federal agencies dealing with employment rights participate in to help educate employers is the K&C Employment Law Update. Although Ms. Hess will now not be available for the March 20th Richmond showing of the 24th Annual Employment Law Update, the new Acting Director, Wendy Inge, will be there to answer questions at the K&C "Answer Booth." If a new VDOLI Director is chosen before March 20th, we also look forward to introducing him or her to attendees at the seminar.

Happy Birthday! The ADEA Turns 40

The ADEA is now finally old enough to protect itself! The Age Discrimination in Employment Act – the federal legislation that prohibits employment discrimination against individuals who are over 40 – has had a big impact on the nation's workforce over the last 40 years. Among other things, the ADEA is credited with eliminating a mandatory retirement age, which was commonplace when the Act was signed into law on December 15, 1967. And as we all aspire to (at least) reach the age of 40 and be protected under the Act, this law ultimately may have something for everyone.

Even at the ripe ol' age of 40, the ADEA is still making headlines. This comes as no surprise, as age discrimination claims can be costly and, given our aging workforce, the number of cases filed annually has not slowed down over the past 40 years. While our societal stereotypes about aging may be changing, the ADEA promises to present an ongoing challenge as the baby boomers move into their 50's and 60's. So it would appear that the ADEA – like the individuals it seeks to protect – will continue to have an impact in the workplace and is not quite ready to retire.

Practical Pointer

Since everyone hopes to reach the 40 year-old protected status, it should not be surprising that age discrimination plaintiffs generally receive a lot of sympathy in court if it appears that age had a negative impact on an older person's employment. Such plaintiffs are also more likely to have friends who are lawyers and are usually more educated about their rights to sue for age discrimination. So, any employer with 20 or more employees is well advised to monitor its workplace to eliminate any potential age discrimination including ageist remarks that at times result from attempts at humor. Speaking of birthdays, keep in mind that age-related comments that accompany events like "black balloon" birthday parties for older employees sometimes end up as evidence in age discrimination cases.

DOL Announces Record Wage Recovery for FY2007

On December 28, 2007, the U.S. Department of Labor's Wage and Hour Division announced that due to its investigatory efforts, 341,624 workers received $220,613,703 in back wages during FY2007. The amount recovered was the most ever, and this DOL announcement emphasizes that mistakes made in how employees are paid lead to more potential liability than almost any other type of employment decision.

Employers Should Take Advantage of FLSA "Safe Harbor" for Improper Wage Deductions

The Fair Labor Standards Act (FLSA) and related regulations establish rules governing when an employee may be treated as exempt from overtime pay. In addition to establishing these rules, the regulations provide employers with a "safe harbor" to help preserve the exempt status of their employees in the event of improper deductions. To be entitled to this "safe harbor," an employer must publish a policy advising all exempt employees that their pay is subject only to narrowly circumscribed deductions. This policy should also include a complaint procedure allowing employees to complain and the employer to remedy any improper deductions. With such a policy, the exemption is not lost for either the individual from whose pay the deduction was made or for any other employees potentially subject to such deduction.

Given the technical nature of rules governing the exemptions, this "safe harbor" can be a big benefit to employers who make a mistake in paying their exempt employees. This is important because, in the absence of such a policy, an improper deduction can destroy the exemption for both the individual subject to the deduction and all similarly situated employees. All employers should publish such a "safe harbor" policy for exempt employees and make sure the policy is disseminated to all their exempt employees.

Labor & Employment

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Visit us on the web at www.kaufmanandcanoles.com for timely updates or to register for our seminars.

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