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Foster Swift Employment, Labor & Benefits Group

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Efforts for More Union-Friendly Organizing Rules Continue

by: Michael R. Blum

Currently, if at least 30% of employees state their wish for union representation, the National Labor Relations Act (NLRA) provides the right to a secret ballot election to determine whether a majority of employees want union representation. If 50% or more of the employees cast secret ballots against union representation, the National Labor Relations Board (NLRB) certifies the work force as remaining non-union.

Several attempts have recently been made to remove or significantly weaken the right to a secret ballot election. In October 2009, the Employee Free Choice Act (EFCA) was introduced in Congress, seeking to permit unions to be certified as the official union to bargain with an employer simply through collection by unions of signatures of a majority of workers. EFCA would have removed the present right of the employer to demand a separate secret ballot election. EFCA has been hotly contested and chances of its passage into law appear remote.

With EFCA likely dead, on June 22, 2011 the NLRB published in the *Federal Register* a controversial rulemaking proposal to amend the agency's representation case procedures. According to the NLRB, the new rules would streamline litigation and limit the availability of board review in representation cases, thereby allowing the board to conduct representation elections in a shorter time after the filing of a petition for a secret ballot election. The NLRB held a two-day public meeting on the proposal in July and received more than 65,000 public comments, many reflecting disagreement about the necessity for a rule change as well as the appropriateness of the procedures proposed by the board. Nevertheless, by the time this article is published, the NLRB will have voted on the proposed new election rules. Passage appears likely. However, in response to political controversy surrounding the proposed new rules, a bill has been introduced in Congress (H.R. 3094) that would set minimum time periods for NLRB representation hearings and a 35-day minimum interval before balloting that are inconsistent with the board's rulemaking proposal. The House is likely to vote on this bill before the end of the year.

At this point, it is unclear what changes will be made to the NLRB's rules governing union

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organizing activity. However, it is likely that significant changes will be made in the near future, so employers desiring to remain union-free would be well-advised to review or develop strategies for responding in a significantly shortened period of time to a union petition seeking to represent employees in collective bargaining.

Attorneys in Foster Swift's Employment, Labor and Benefits Group have significant experience in NLRB matters, will be watching these developments closely, and will be able to answer any questions you may have.

Qualified Plans: Approaching Compliance Deadline for Cycle A Plans

by: Terri L. Bolyard, Paralegal

All qualified retirement plans that are categorized as "Cycle A" plans must be restated and submitted to the IRS for approval on or before January 31, 2012. Cycle A plans include individually designed plans that are sponsored by employers whose taxpayer identification numbers end with 1 or 6. Satisfaction of this restatement deadline will help ensure that affected retirement plans maintain their qualified status.

Contact your employee benefits counsel at Foster Swift for more information.

Qualified Retirement Plan Form 8955-SSA Deadline Approaching/Plan Administrators May Report 2009 and 2010 Data Using the 2009 Form

by: Jaxine L. Wintjen, Paralegal

For plan years prior to January 1, 2009, qualified retirement plans were required to attach Schedule SSA to Form 5500 to report information relating to terminated employees who had deferred vested benefits payable from the plan. The IRS has replaced Form 5500 Schedule SSA with Form 8955-SSA effective with the 2009 plan year. The due date for filing Form 8955-SSA for the 2009 and 2010 plan years is the later of:

1. January 17, 2012; or
2. the last day of the seventh month following the end of the 2010 plan year (July 31, 2011 for calendar year plans).

In future years, the deadline for filing Form 8955-SSA may be extended by filing Form 5558; however, the January 17, 2012 deadline may not be extended by filing Form 5558.

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Plan administrators may file separately for 2009 and 2010 or may use the 2009 Form 8955-SSA to file a combined 2009 and 2010 report.

Form 8955-SSA may be obtained as a fillable form from the IRS web site at www.irs.gov/formspubs. The form is also available from third party software developers or by calling the IRS at (800) 829-3676.

Form 8955-SSA may be filed electronically using the Filing Information Returns Electronically system (FIRE) or on paper to Department of the Treasury, Internal Revenue Service Center, Ogden, UT 84201-0024. Filers submitting the form electronically will need:

1. software to create files in the proper format for filing electronically with the IRS;
2. a Transmitter Control Code (TCC) obtained by submitting Form 4419 with the IRS; and
3. a FIRE account to log into and use the FIRE system (Visit fire.irs.gov to create a FIRE account.).

Please contact your Foster Swift Employee Benefits professional for more information.

Document Employee Discipline: Don't Wait Until It's Too Late

by: Sheralee S. Hurwitz

Documenting employee discipline is as important from a litigation defense perspective, as is counseling the employee in the first place to try to correct or improve job performance. Documentation confirms the employer's perspective, and a good counseling form tells the employee what, exactly, was done wrong and what performance improvement is expected.

Holding the face-to-face meeting with the employee is often harder than completing the necessary paperwork. Issuing a warning or performance notice to an employee who is performing poorly can be uncomfortable and even confrontational. Supervisors may be reluctant to put formal counseling or discipline in writing. Delaying or soft-peddling the problem, however, does not help the company prove that there was a problem, and that the employee was aware of it. It also does not help the employee who isn't performing well to understand the seriousness of the issue.

Some practice pointers to keep in mind are listed below:

1. Supervisors need to know and enforce basic employer policies regarding employee performance requirements and discipline, including the employer's policy on workplace conduct, attendance, and productivity (where applicable). Familiarity with the employee's job description is also important.

2. Keep the counseling form simple. Typically a one-page form is enough to document the reason for the counseling. While additional disciplinary action may be taken (and listed on the form) pursuant to

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1. the company's policies, the key for documentation purposes is the written document of the problem or infraction itself.

2. The written warning information should be specific, stating just objective facts -- dates, times, places of the infraction, a short summary of the problem, and how it is to be remedied.

3. Some performance failures (attendance, for example) are easier to identify and document than others. If the problem is more subjective (insubordination or other inappropriate conduct), it is still important to document the problem. Keep in mind, however, that these performance problems must be documented with particular clarity and confirm, to the extent possible, that the standard for deciding to issue a counseling statement regarding them is consistent for all supervisors and all employees.

4. Follow up with further, timely, and cumulative written warnings, as appropriate. For example, if it is the third time the employee has been written up for the same problem, make sure the documentation makes that clear.

An employee warning report doesn't have to be signed by the employee in order to be placed in the employee's file. Obtain the signature if possible, but the key is to document that there was a problem, it was discussed with the employee, and when the discussion occurred. If the employee refuses to sign the warning, make a notation that the report was "discussed with employee on [date], but employee refused to sign" on the signature line. Two supervisors should then sign below the notation. Documentation in an administrative file kept separately by supervisory personnel can later be placed in the employee's personnel file, under limited circumstances, even if the "write up" of the incident is not shared with the employee. Under the Bullard Plawecki Right to Know Act, there is a six month deadline for placing such documentation in an employee's file.

Too often employers get to the point of terminating an employee, but don't have documentation to show that they have supportable reasons for doing so. Simply put, if a document records valid and objective information about an employee relating to his/her performance, good or bad, the document should be included in the employee's personnel file.

Please contact your Foster Swift employment law professional if you have any questions.

IRS Issues Guidance Regarding Tax-Free Treatment of Employer-Provided Cell Phones

by: Lauren B. Dunn

The IRS recently issued guidance that addresses the tax-free treatment of employer-provided cell phones. Effective as of January 1, 2010, IRS Notice 2011-72 eliminates any tax recordkeeping requirements for the business and personal use of employer-provided cell phones and other telecommunications equipment. This favorable tax treatment is available only if the employer can demonstrate that the cell phone or other telecommunications device is

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provided to an employee primarily for "noncompensatory business reasons."

An employer will be considered to have provided an employee with a cell phone for "noncompensatory business reasons" if the cell phone is provided for reasons that substantially relate to the employer's business. Noncompensatory business purposes include the (i) employer's need to contact the employee at all times for work-related emergencies, (ii) employer's requirement that the employee be available to speak with clients during times when the employee is away from the office, and (iii) employee's need to speak with clients who are located in other time zones that fall outside of the employee's normal work day.

An employer that satisfies the "noncompensatory business reasons" standard for an employer-provided cell phone is deemed to have satisfied any tax recordkeeping requirements. As a result, the value of a cell phone (and the related calling/data plan) that is provided by an employer to an employee is **excludable** from that employee's gross income as a working condition fringe benefit. In addition, the employee's personal use of the employer-provided cell phone is excludable from that employee's gross income as a *de minimis* fringe benefit. The tax reporting requirements continue to apply in situations where an employee is provided with a cell phone for non-business reasons (for example, to provide an employee with additional compensation, to promote the good will or morale of an employee, or to attract a potential employee).

Please contact your Foster Swift employee benefits professional if you have any questions.

Sharing Exemplifies the Holiday Spirit, Right? … Not this Time!

by: Melissa J. Jackson

The Internal Revenue Service (IRS) and the Department of Labor (DOL) recently signed a memorandum of understanding, agreeing that they will share information and coordinate law enforcement to end the practice of misclassifying employees as independent contractors. After the DOL shares information with the IRS, the IRS will then pass information along to those state taxing authorities that also have signed onto a memo of understanding

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as part of the Questionable Employment Tax Practices Initiative (QETPI); Michigan is one of those states that has signed onto the QETPI.

What does all of this mean for employers? The short answer is that it could result in adverse consequences if your workers have been misclassified as independent contractors. The consequences of misclassification can be severe. There are significant civil penalties, as well as interest, taxes, overtime liability, benefits issues – and even exposure to potential criminal charges.

Some commentators will tell you that the "good" news is that the IRS has given employers an opportunity to correct the problem in the form of the Voluntary Classification Settlement Program (VCSP). If an employer applies, meets specified eligibility requirements, and is accepted into the VCSP, the IRS will enter into a "closing agreement" with that employer. The closing agreement allows the employer to pay just 10% of the employment tax liability owed on compensation paid to the workers for the most recent tax year, forgives interest and penalties, and exempts the employer from an audit for employment tax purposes for prior years.

That all sounds enticing … but pause before that sigh of relief. Unfortunately, there are several drawbacks. First, the "forgiveness" does not extend to other state and federal agencies. So, an employer that is granted amnesty under the VCSP still could be flagged and/or penalized for liability for state taxes, unemployment and workers' compensation taxes, pension plan contributions, and potential exposure to laws such as FMLA. The VCSP also does not shield the employer from wage and benefit claims by the workers. Second, the limitations period on assessment of employment taxes will be extended to six years, rather than three; this is intended to provide an "incentive" for the employer to correctly classify workers on a go-forward basis. Finally, the employer has to apply for the VCSP; the application itself subjects the employer to scrutiny – and what if the employer is not accepted into the program?

So, the first thing to do is review your workforce to determine if you might be vulnerable. Just to keep this challenging, the IRS and the DOL use two different tests for determining employment status, so you should contact your employment attorney for assistance in applying these tests. Also, please take note that the strong inclination of the IRS and the DOL is to find employment status; so any doubt generally should be resolved in favor of classifying the worker an employee. If you find that you are vulnerable on this issue, review the requirements to be accepted into the VCSP, as well as the relative merits and potential disadvantages.

The risk of being tagged for misclassification has never been higher. In addition to the sharing exercise between the agencies, federal funds have been earmarked for investigation into this hot button issue, and the DOL has entered into a venture with the plaintiff's bar called the "Bridge to Justice." This ironically named program was designed, according to the DOL website, to connect workers with local attorneys who can help them seek redress for suspected violations. In sum, you can't afford to wait. Engaging in proactive strategies NOW may help avoid the need to scramble for a reactive defense later.

Please contact your Foster Swift employment law professional if you have any questions.

ESOP Companies Must Vigilantly Review ESOP Repurchase Obligation

by: Stephen J. Lowney

Companies that maintain ESOPs are legally required to provide enough cash to the ESOP to meet the distribution and diversification requirements of the ESOP (referred to as "Repurchase Obligation"). A company should implement a strategy to review the Repurchase Obligation and begin to fund for the Obligation to avoid any unpleasant financial surprises.

Upon a distributable event (i.e., death, disability or severance from employment), the company will ultimately be responsible for providing enough cash to the ESOP to equal the value of the company shares held in a participant's account. There are two general mechanisms to deal with Repurchase Obligation. First, a company may contribute cash to the ESOP, which, in turn, is used to make a distribution from the ESOP to the participant. Under the "recycle approach", the amount of outstanding shares held by the ESOP remains constant.

Second, the employer may redeem (i.e., purchase) shares of stock held by the ESOP. The ESOP utilizes the cash from the sale of stock to the company to make a distribution from the ESOP. This redemption ultimately lowers the percentage ownership by the ESOP, but is done with after-tax dollars. Other than an S Company owned 100% by an ESOP, the "after-tax" element of Repurchase Obligation needs to be carefully taken into account by an ESOP company.

There are many methods available to an ESOP company to soften the financial impact of its Repurchase Obligation. For example, the timing and form of distributions should be reviewed. In addition, leveraged ESOPs should strongly consider structuring any ESOP loan (not the bank loan) for a longer period of time than the bank loan. This will result in a slower release of shares from the unallocated suspense account to participants' accounts.

The legal obligation to fund these Repurchase Obligations lies with the company, not with the ESOP trustee. However, the ESOP trustee should be reviewing the company's Repurchase Obligation and bring any issues to the attention of the company's Board of Directors in order to properly discharge its fiduciary obligations to the participants. Both the company and the trustee must carefully review the ESOP valuation to ensure that it accurately reflects the per share value of the company held by the ESOP. In addition, there is now a discussion among ESOP appraisers regarding whether and to what extent the financial impact of Repurchase Obligation should be reflected in the annual valuation.

Companies should periodically review their Repurchase Obligations and fund their ESOPs accordingly. Failure to do so could result in creating or enhancing a potential financial problem to the company and could ultimately result in litigation if improperly handled.

Please contact your Foster Swift employee benefits professional if you have any questions.

Employment, Labor & Benefits Attorneys

SHAREHOLDERS

Michael R. Blum
mblum@fosterswift.com
Matt G. Hrebec
mhrebec@fosterswift.com
Melissa J. Jackson
mjackson@fosterswift.com
Stephen I. Jurmu
sjurmu@fosterswift.com
Stephen J. Lowney*
slowney@fosterswift.com
Frank T. Mamat
fmamat@fosterswift.com
Robert E. McFarland
info@fosterswift.com
Johanna M. Novak
jnovak@fosterswift.com
Sherry A. Stein
sstein@fosterswift.com

ASSOCIATES

Lauren B. Dunn
ldunn@fosterswift.com
Joel C. Farrar
jfarrar@fosterswift.com
Erica E. L. Huddas
ehuddas@fosterswift.com
Derek Walters
dwalters@fosterswift.com

PARALEGALS

Terri L. Bolyard
tbolyard@fosterswift.com
Jaxine L. Wintjen, CP
jwintjen@fosterswift.com

* Practice Group Leader

IRS Announces Pension Plan Limitations for 2012

by: Jaxine L. Wintjen, Paralegal

The IRS has announced the cost-of-living adjustments applicable to pension plan limitations for 2012. Many of the pension plan limitations will change for 2012 because the increase in the cost-of-living index has met the statutory thresholds that trigger the adjustment. However, some limitations remain unchanged. The chart below sets forth the applicable limitations.

EMPLOYEE PLAN COLA	2011 LIMIT	2012 LIMIT
401(k) and 403(b) Employee Contribution Limit	$16,500	$17,000
"Catch-Up Contribution" Limit	$5,500	$5,500
Defined Contribution Maximum	$49,000 (plus "Catch-Up")	$50,000 (plus "Catch-Up")
Highly Compensated Employee	$110,000 (look back year compensation)	$115,000 (look back year compensation)
Annual Compensation Limit	$245,000	$250,000
457 Plan Contribution Limit	$16,500	$17,000
Social Security Wage Base	$106,800	$110,100

Please contact your Foster Swift employee benefits professional if you have any questions regarding these limits.

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