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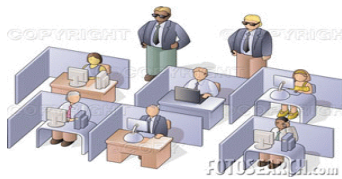


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 IN EMPLOYMENT AND LABOR MATTERS AND CONSTRUCTION
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NLRB Changes Definition of a Supervisor

In a 3-2 decision in *Oakwood Healthcare, Inc.*, the NLRB issued new guidelines for determining which employees meet the National Labor Relation Act's definition of a supervisor. Supervisors are not entitled to have union representation and engage in collective bargaining.

In the *Oakwood* ruling, the NLRB issued new interpretations to parts of the statutory definition of supervisor, including what it means to "assign" other employees and to responsibly "direct" others.

In *Oakwood*, the NLRB decided that registered nurses at a hospital who serve as charge nurses on a permanent basis, but not those who rotate the duty, are supervisors for purposes of the NLRA. In the other two cases, the NLRB held that charge nurses at a nursing home and lead persons at a manufacturing plant are not supervisors.

The *Oakwood* decision changes workers, with some oversight over co-workers, into 'supervisors' even when such oversight is short of managerial or supervisory authority. As a result of being deemed supervisors who are not protected by the NLRA, employers may be permitted to fire such 'supervisors' for any trade union activity such as helping to organize a union at their workplace, holding union office or possibly joining a union.

Overview of Pension Protection Act of 2006

Faced with an operating deficit of nearly \$23 billion in the Pension Benefit Guaranty Corporation (PBGC), the federal agency that insures pension plans, and a potential multi-billion dollar taxpayer bailout of the PBGC, President Bush signed the Pension Protection

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Act of 2006 (PPA) into law. The PPA's reforms include: 1) increased flexibility for employers in funding plans, 2) increased stability and recovery strategies for volatile/underfunded plans, 3) increased disclosure requirements, and 4) prevention of promises of increased benefits for underfunded plans. The PPA will make up the PBGC deficit, in part, through an increase in flat-rate premiums. Underfunded plans will incur higher premiums, plan termination penalties will be paid to the PBGC, and increased premiums will be paid for multi-employer plans. Most of the provisions of the PPA will take effect for plan years beginning in 2008. The PPA increases the notice requirements to plan participants - within 90 days of the close of the plan year, all participants must be notified of the plan's status (assets, liabilities, and funded status) and other annual plan reports must be made available to the public. As an employer, the effects of the PPA will depend upon the type of plan that is offered to your employees.

Defined Benefit Plans

The majority of reforms in the PPA deal with defined benefit (DB) plans, which promise set/defined benefits for participants at retirement based upon the number of years worked and salary at retirement, as opposed to defined contribution (DC) plans such as a 401(k). Employers are required to fund these DB plans to ensure that participants receive the promised benefits at retirement. Prior to the PPA, employers were only required to maintain 90 percent funding of these plans. The PPA requires that employers with DB plans fully fund their plans, and most plans will have four years (beginning in 2008) to reach the 100 percent funding requirement. Plans that are severely underfunded (less than 60 percent) will have strict limitations on plan management as well as accelerated contributions.

One of the major changes under the PPA is the allowance for employers to make contributions over and above those necessary to fully fund their plans which is meant to allow employers to create a "cushion" in their plans during productive years to

protect against potential lean years in the future. Underfunded employers can also take advantage of tax deductions for the costs of fully funding their plans. The PPA is not without penalties - failure to meet PPA funding requirements will result in higher premiums to the PBGC, penalties for termination of pension plans, and tax penalties for failing to correct funding deficiencies.

The PPA also includes several changes to the actuarial aspects of pension plans. To give plan sponsors a better gauge of plan status, permanent interest rates are provided for employers to calculate pension contributions and current liabilities based upon the makeup of their workforce (e.g., employers would contribute more to plans with workforces made up of employees closer to retirement). These interest rates are also used to determine lump sum contributions for participants, which were inflated under previous methods causing funding problems. Under the PPA, underfunded plans cannot utilize credit balances to replace cash contributions. Mortality tables were modified to better reflect changing demographics, and in some cases plans can even apply for use of a different table than that provided in the PPA. Conversion from traditional DB plans to cash-balance plans or other hybrid plans are also easier under the PPA, but employees must still be guaranteed all of their accrued benefits from the pension plan prior to conversion.

Defined Contribution Plans

The most significant change to the law related to DC plans, such as a 401(k) plan, is that employers can automatically enroll employees in these plans without concerns related to state penalties for unauthorized deductions from employee paychecks and concerns about fiduciary responsibilities in managing employee investments. The PPA specifically preempts state law and protects employers from any

liability related to unauthorized deductions. The PPA also eliminates fiduciary concerns by allowing for default investments, with the Department of Labor to issue regulations regarding default investments.

Multi-employer Pension Plans

The PPA establishes differing funding levels for multi-employer plans - 1) plans funded above 80 percent are considered well-funded; 2) plans between 65 percent and 80 percent funded are considered “endangered”; and 3) plans less than 65 percent funded are considered “critical.” “Endangered” plans must adopt a strategy to improve the plan within a set time period (improve the plan by one-third in 10 years, if possible). Benefits cannot be increased if the increase would put the plan in “critical” status (less than 65 percent funded). The plan trustees must also adopt other strategies for increasing contributions and limiting benefit increases until the plan can meet the one-third requirement.

“Critical” plans must develop a strategy to become over 65 percent funded within 10 years - using a combination of increases in employer contributions, reducing expenses, restricting future benefit accruals, and reducing certain ancillary benefits. Timely notice must be given to workers, contributing employers, unions, employer bargaining representatives, as well as the PBGC, Internal Revenue Service, and Department of Labor that the plan is in reorganization. Contributing employers will be most affected by the requirement of a 5 percent surcharge on all contributions during the first critical year, and a 10 percent surcharge in subsequent critical years. The surcharge will be payable 30 days after contributing employers are notified by the plan sponsor, and failure to pay will be considered a delinquent contribution. The surcharge will not be required for employees covered by a collective bargaining agreement that has contribution terms consistent with the strategy presented by the plan sponsor to get out of critical status (e.g., a new collective bargaining agreement

with contributions that include the surcharge). While in critical (or “endangered”) status, the plan sponsor cannot accept any collective bargaining or participation agreements that reduce contributions for any participants, suspend contributions for participants related to a period of service, or directly/indirectly exclude younger or newly-hired participants.

In addition, the “free look” rule related to withdrawal liability (permitting employers to join a multi-employer plan for up to six years without risking withdrawal liability) is extended under the PPA to plans primarily covering employees in building and construction.

Chicago Approves Ordinance Changing Requirements for Some Minority Firms

The Department of Procurement Services indicated that African American contractors continue to win nine percent (9%) (in terms of dollar value) of work procured by the City. Hispanic, Asian and women owned firms won ten percent (10%) of that contracting work. Overall, minority and women-owned businesses captured thirty percent (30%) of the contracts approved by the City.

The main feature of the new ordinance is an increase in the so-called “net worth standard” from \$750,000 to \$2 million. By raising the net worth standard to \$2 million, M/WBE would obtain a larger group of qualified contractors.

The ordinance also makes several changes to the bonding and insurance requirements mandatory for contractors participating in the program.

The City will now allow one-time annual insurance certificates to replace the previous requirement that all contractors submit separate insurance certificates for the entire term of each contract awarded.

**Changes to the Illinois Day
and Temporary Labor Services
Act and Their Effect on Parties
Who Contract for Temporary Laborers**

Revisions to the Illinois Day and Temporary Laborer Services Act take effect on January 1, 2007. These changes increase the responsibilities of third party clients that contract for the services of day and temporary labor. Following is a brief summary of the changes and their effect on third party clients.

Before contracting with a day and temporary laborer agency, third party clients must verify that the agency is registered with the Illinois Department of Labor (IDOL). In addition, the agency's registration must be verified each year on March 1 and September 1. Third party clients can obtain a list of registered agents from the IDOL or reference a list of registered agencies that is maintained on the IDOL's website. Contracting with an unregistered agency can result in steep fines, as the Act can subject third party clients to a penalty of up to \$500.00 for each day that they contract with an unregistered agency.

If a third party client contracts for workers to work for a single day, the third party client must provide the day/temporary laborer with a work verification form at the end of the work day. Forms, either provided by or approved by the IDOL, must contain the date, the name of the laborer, the work location and the hours worked on that day. Failure of third party clients to provide workers with work verification forms can result in penalties of up to \$500.00 for each violation, and this fine may increase to \$2500.00 for subsequent violations.

Under the Act, third party clients contracting with day and temporary labor agencies share all legal responsibility and liability for the payment of wages to laborers under the Illinois Wage Payment and Collection Act and the Minimum Wage Law.

In summary, the changes to the Day and Temporary Labor Services Act impose several new

requirements with substantial fines for parties that fail to meet these requirements. Most of these requirements are related to record keeping or verification of registration and, as in most situations, the investment of a small amount of time and money to maintain compliance can prevent the imposition of significant potential fines that could result from non-compliance.



**Under New Law IDOL and
Employees Given New Rights
to Collect Back Wages and Penalties**

Senate Bill 2339 which became Public Act 94-1025 gives the Illinois Department of Labor (IDOL) wider authority to enforce state minimum wage, overtime and wage payment statutes. The new law will permit workers denied proper payment of wages the right to seek penalties against their employers in private lawsuits brought under the Illinois Minimum Wage Act.

Enforcement gaps were also closed. For example, the law provides IDOL with authority to subpoena an employer's records, payroll logs, and other evidence with respect to any matter under investigation or hearing. The law also shortened IDOL's processes for assessing twenty percent (20%) of compensation owed fines for violations of Illinois' minimum wage and overtime statutes.

In addition, the law restores the one percent (1%) penalty under the Illinois Wage Payment and Collection Act. Such penalties would total one percent (1%) of underpayment per calendar day against employers who ignore IDOL demands that workers be paid earned wages or final compensation.

The new law restores workers' access to punitive damages in private minimum wage lawsuits against their employers.

Finally, the damages available to workers in cases where a civil action has been filed by an employee or a group of employees would be assessed in the amount of two percent (2%) of the underpayment for each month the wages remained unpaid. These penalties would be in addition to the amount of the underpayment, costs, and attorney's fees.

In summary, the changes to the Day and Temporary Labor Services Act impose several new requirements with substantial fines for parties that fail to meet these requirements. Most of these requirements are related to record keeping or verification of registration and, as in most situations, the investment of a small amount of time and money to maintain compliance can prevent the imposition of significant potential fines that could result from non-compliance.



Employer Tax Credit Signed Into Law

Gov. Blagojevich signed S.B. 1279, which now became Act 94-1067 providing a tax credit to companies that hire former prisoners and veterans. The law provides a limited tax credit of up to \$600.00 per individual per year to employers who hire qualified ex-offenders and veterans who have been honorably discharged.

Illinois Prevailing Wage Act Amended

Under the new law, public works defined in the Prevailing Wage Act may exclude the starting and ending times of work each day. The bill also provides that the contractor and each subcontractor must make the certified payroll records available to the public body in charge of the project, its officers and agents and to the Director of Labor or his or her deputies and agents upon seven (7) (previously two days) days' notice.

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