

2012 WRAP-UP

12.19.2012

Following months (seemingly years) of campaign ads, the 2012 presidential election is finally over. Based on the results of the 2012 Presidential election, it seems even more likely that the Affordable Care Act is here to stay. Next month the NewsFlash will present the third of our three-part series on what employers should do since the Patient Protection and Affordable Care Act (the "Affordable Care Act") was upheld by the U.S. Supreme Court last June. A careful review of the entire three-part series might be prudent for those employers who held out hopes that the Affordable Care Act would be overturned. Parts I and II of the three-part series can be located on Koley Jessen's Website.

Employers should also prepare for further action from the National Labor Relations Board (the "NLRB"), which, as you know, has been very active over the past four years. A big topic at this time last year was the NLRB's proposed requirement that employers post a notice to employees informing them of their rights under the National Labor Relations Act (the "NLRA"), including the right to unionize. That proposed posting requirement is still on hold, pending the resolution of several lawsuits. Social media and employee rights in social media was also a big topic last year, with the NLRB going as far as publishing what it considered to be an "acceptable" social medial policy for employers.

At-Will Disclaimers

More recently, the topic of discussion is the NLRB's attack on "at-will" disclaimers - a staple of employee handbooks. Last February, in a case involving the American Red Cross, an administrative law judge found that requiring employees to sign an acknowledgment of their at-will status amounted to a

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violation of the NLRA. The acknowledgment in question contained the following language: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." The administrative law judge determined that the at-will language could be construed by employees as relinquishing their right to "advocate concertedly" to change their at-will status; and as such, is not acceptable.

More recently, on October 31, 2012 the NLRB's Office of General Counsel ("OGC") issued advice memoranda clarifying the issue and drawing a clear distinction between the American Red Cross provision and at-will disclaimers the OGC considers acceptable.

In one case referenced by the OGC, the handbook's at-will clause states:

"Employment with Rocha Transportation is employment at-will. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the company. Nothing in this handbook or in any document or statement shall limit the right to terminate employment at-will. No manager, supervisor or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the company has the authority to make any such agreement and then only in writing."

In the other "acceptable" case, the at-will clause states:

"The relationship between you and Mimi's Café is referred to as 'employment at will.' This means that your employment can be terminated at any time for any reason, with or without cause, with or without notice, by you or the company. No representative of the company has authority to enter into any agreement contrary to the foregoing 'employment at will' relationship. Nothing contained in this handbook creates an express or implied contract of employment."

Based on the OGC's advice memorandum, the NLRB's current position appears to be that disclaimers can reaffirm the at-will relationship, but cannot extract a personal promise from employees to refrain from seeking to change their at-will status or to agree that their at-will status cannot be changed in any way. In other words, disclaimers can limit what managers, supervisors or employees can do on behalf of the employer, but cannot limit the employee's ability to seek a change in at-will status. Employers should review their at-will disclaimers to ensure there are no such provisions.

Right to Work

Although we can expect to see more employer-friendly opinions to come from the NLRB and more attempts to regulate employers, some states are taking steps in a different direction. Indiana and more recently (as of December 11, 2012) Michigan have both passed right to work laws to clarify that employees cannot be forced to join a union or pay dues as a condition of

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employment. Michigan with approximately 17.5% of its workforce represented by unions is by far the most unionized state to take such measures. The next few years should be interesting as labor forces continue to battle at the federal, state and local levels.

New Law

New, somewhat unexpected, issues may also be on the horizon for employers. Colorado and Washington both passed laws this past November allowing recreational marijuana use. The laws do not require employers to allow marijuana use on the job, but we can certainly expect employees to test the water. This might be a good time for all employers to review their drug-free workplace policies.

Other Updates:

New Standard Mileage Rates for 2013 are:

- 56.5 cents per mile for business miles
- 24 cents per mile for medical or moving purposes
- 14 cents per mile driven in service of charitable organizations

New State Minimum Hourly Wage Rates are:

STATE

REGULAR

HOURLY

TIPPED EMPLOYEES

Arizona

\$7.80

\$4.80

Florida

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\$7.79

\$4.77

Montana

\$7.80

Ohio

\$7.85

\$3.93 (for businesses with
annual gross receipts of
more than \$288,000 per
year)

Oregon

\$8.95

Rhode Island

\$7.75

\$2.89 (tip credit increased
to \$4.86/hr)

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Washington

\$9.19

Remember - where federal and state rates differ, employers must adhere to the higher rate. Also, remember to change your minimum wage poster if applicable.

New Pension Plan Limits

- Elective deferral limits (contributions) for employees who participate in 401(k), 403(b), most 457 plans and the federal government's Thrift Savings Plan increased to \$17,500.
- The catch-up limit remains the same at \$5,500.
- The limit for contributions to an Individual Retirement Account ("IRA") increased to \$5,500.

HSA & HDHP Limits

- Health Savings Account ("HSA")
 - o Annual Contribution Limits: Individual-\$3,250 Family-\$6,450
 - o Catch-up provision remains unchanged at \$1,000
- High Deductible Health Plan ("HDHP")
 - o Minimum Deductible Individual-\$1,250 Family- \$2,500
 - o Maximum Out-of-Pocket: Individual-\$6,250 Family-\$12,500