



Human Resources Potpourri

In a recent Indiana Court of Appeals decision, *Quezare v. Byrider Finance, Inc.* (January 14, 2011), the Court reminded us that the language used to establish employee bonus programs can help insulate the employer from liability in the event of a wage dispute. The Indiana Wage Payment Statute imposes penalties upon the employer for wages not timely paid, up to two times the amount owed plus attorney fees. In *Quezare*, the central question was whether a bonus was a “wage” that qualifies for the statute’s enhanced penalties. In addition to finding the bonus was not paid on a regular basis, the Court also found the bonus was not a “wage” because the company’s program was discretionary and the employer could alter or terminate it at any time. In the Court’s decision, it was noted that the language used to describe a bonus structure is critical. We recommend that employers always consult with experienced employment counsel when dealing with wage and hour and related compensation issues.

Employees Have Rights, But They Must Behave Civilly:

In an interesting Seventh Circuit case, *Formella v. U.S. Dept. of Labor and Schmidt Cartage* (December 2010), the Court held that an employee who engages in protected whistleblowing must “demonstrate civility and respect for his supervisors in voicing (his) concerns.” At the administrative

(Continued on page 2.)

Save the Date!

The next **MAY•OBERFELL•LORBER** Labor and Employment Law Seminar will be held May 18, 2011.
New Format! Bring your HR questions.
Program details will be provided at a later date.

Immigration Compliance—Big Brother Is Watching

Immigration compliance has become (always has been) a major concern for employers, and the audit process is beginning to intensify.

The Form I-9 is a simple-looking document that seems to transform itself into one that is difficult to understand and complete. Just read the 65-page I-9 Instruction Handbook and you will see. Nevertheless, the completion of the Form I-9 is important to the preservation and survival of all businesses. Compounding the problem is the Department of Homeland Security Immigration and Customs Enforcement (ICE), which has made it known that it will be aggressively going after employers who violate the immigration law, no matter their size or location. What does this mean? Well, for starters, worksite enforcement actions are on the rise; monetary fines are climbing; senior members of management are going to jail; assets are being seized; civil fines and criminal charges are being imposed. So what should you be doing? Simply, begin making immigration compliance an essential part of your employer relations HR program.

Here are some suggestions for achieving compliance:

- ! Develop and implement uniform Form I-9 processes and procedures
- ! Provide Form I-9 training for those responsible for form completion
- ! Maintain Form I-9s in separate files; do not mix I-9s with personnel documents
- ! Perform periodic self-audits on all, or at least a representative sample, of the I-9s; keep a record, date and time, of the audits
- ! Create a follow-up system for re-verification
- ! Keep copies of documents presented by employees
- ! Develop and enforce I-9 document compliance policies
- ! Develop a plan for addressing problems, i.e., “no match” letters
- ! Implement a document retention plan for the Form I-9s, three years from date of hire or one year from the date of separation/termination, whichever is longer
- ! Use qualified outside counsel for advice when I-9 questions arise

The information in this article is only the tip of the iceberg. There are many things an employer should do, recognizing, of course, that compliance is always the best offense. It is also important that employers develop and implement a corporate immigration mindset or philosophy. Always keep in mind, from hiring to termination, an employer’s act or omission could have severe consequences if not properly done.

In matters involving immigration or Form I-9 compliance issues, a telephone call to experienced employment counsel is highly recommended.

Source: “The New Immigration Reality and Landscape,” Pierre Georges Bonnefil, Daily Labor Report, July 30, 2010



MAY • OBERFELL • LORBER
Attorneys

Accessible. Experienced. Versatile.

Labor and Employment Team
Bradley L. Varner
Richard F. Nugent, Jr.
Christopher R. Putt
Robert F. Conte
Brett R. Hummer

4100 Edison Lakes Parkway, Suite 100
Mishawaka, IN 46545
PH: (574) 243-4100
FAX: (574) 232-9789
www.maylorber.com

Points To Ponder

Life isn’t fair, but it’s still good.

When it comes to chocolate, resistance is futile.

No one is in charge of your happiness but you.

Take a deep breath. It calms the mind.

Time heals almost everything. Give time time.

If we all threw our problems in a pile and saw everyone else’s, we’d grab ours back.

However good or bad a situation is, it will change

The best is yet to come....



Things I Have Learned:

- “That you shouldn’t talk about what you’re going to do. Do it, then talk.
- “That if you can laugh at yourself, you will always be amused.
- “That it’s easier to keep up than to catch up.
- “That when you begin to ask yourself if it’s your fault, it usually is.
- “That children follow examples, not advice.
- “That age is important only if you are cheese.

HR Potpourri (cont’d)

hearing, the ALJ found that the employee had engaged in protected activity under the Surface Transportation Assistance Act (STAA) (reporting an unsafe condition on his assigned truck), but was not terminated for engaging in protected activity, but, rather, for the “provocative, intemperate, volatile, and antagonistic conduct” he used in expressing his safety concerns. The employee was deemed out of line as to deprive him of the STAA’s protections.

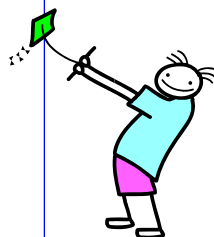
In denying the employee’s petition for review, the Seventh Circuit noted that a worker must be given “some leeway to stray beyond the boundaries of workplace propriety” while engaging in protected activity. But “the employee’s entitlement to some indulgence for the manner in which he engages in protected activity must be balanced against the employer’s right to maintain order and respect.”

Although the employer’s right to maintain order in the workplace was preserved, employers are reminded to consult with experienced employment counsel prior to terminating any employee who has engaged in protected activity.

Veritas is a trademark publication of Robert F. Conte, Attorney at Law, Mishawaka, Indiana, and is intended for general information purposes only. It is not to be considered legal advice. Always consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations.

The contents of this publication may not be reproduced, transmitted or distributed without the express written consent of the editor, Robert F. Conte, Esq. Any comments or questions regarding this publication should be directed to:

Robert F. Conte, Esq.
MAY • OBERFELL • LORBER
4100 Edison Lakes Parkway, Suite
100
Mishawaka, IN 46545
E-mail: rconte@maylorber.com
Web sites:
www.maylorber.com



E-mails—Is There An Expectation Of Privacy?

The Sixth Circuit Court of Appeals decided that “a subscriber enjoys a reasonable expectation of privacy in the context of his e-mails that are stored with, or sent or received through, a commercial ISP (Internet service provider)” and that “the government may not compel a commercial ISP to turn over the contents of a subscriber’s e-mails without first obtaining a warrant based on probable cause” (*United States v. Warshak* [6th COA, December 2010]).

In a lengthy opinion, the Court looked at the Fourth Amendment as applied to the more “traditional forms of communication (telephone calls and letters).” As to both, the Court noted, there is a reasonable expectation of privacy such that a warrant is required to intercept them, while telephone calls and letters, like e-mails, are open to access by a third party, a person may nonetheless maintain their expectation of privacy and that a warrant is therefore required to conduct a search. The Court also noted “an ISP is the intermediary that makes e-mail communication possible. E-mails must pass through an ISP’s servers before they reach the intended recipient. Thus, the ISP is the functional equivalent of a post office or a telephone company.... The police may not storm the post office and intercept a letter and they likewise are forbidden to use the phone system to make a clandestine recording of a telephone call unless they get a warrant, that is...it only stands to reason that, if government agents compel an ISP to surrender the contents of a subscriber’s e-mails, those agents have thereby conducted a Fourth Amendment search, which necessitates compliance with the warrant requirements. ... After today’s decision, the good-faith calculus has changed, and a reasonable officer may no longer assume that the Constitution permits warrantless searches of private e-mails.”

An interesting decision and a reminder to everyone: the world of technology changes at the speed of light. When these issues arise in your workplace, a telephone call to experienced employment counsel is recommended.

Applicants, Employees And Credit Checks

Employers frequently review information about job applicants and employees in credit reports and use that information in their hiring decisions. The Federal Fair Credit Reporting Act (FCRA) regulates the use of credit reports, and legislation has been introduced to amend the FCRA to prohibit “most” employers from conducting credit checks on current and prospective employees (the Equal Employment for All Act H.R. 3149). Leading the charge is the EEOC, which has raised concerns that credit history reviews may have a disparate impact by screening out certain protected groups, i.e., women and minority groups.

While many employers see the value of information obtained through credit reports for hiring and retaining employees, and for screening job applicants, the EEOC sees it differently. The Agency argues, based on information it has obtained from public meetings on the subject, that racial minorities and women tend to have lower credit scores and as such the use of credit histories by employers could have a chilling effect on those groups and could constitute discrimination based on race and sex under Title VII of the Civil Rights Act of 1964.

Employers must comply with federal and state laws before they conduct credit checks on prospective or current employees. When such issues arise in your organization, a call to an experienced employment lawyer is recommended.

Independent Contractors—The Saga Continues

In a multi-litigation proceeding involving dozens of lawsuits, the U.S. District Court, N.D. Ind. (182-page decision), ruled that current and former drivers of FedEx Ground Package Systems, Inc. were lawfully treated as independent contractors (*In re FedEx Ground Package Sys., Inc. Emp’t Practices Litig.*, N.D. Ind., December 13, 2010).

The Court noted that the right to control the methods and means by which drivers did their work was the central issue in determining whether they were employees or independent contractors. The Court stressed the company’s “control of results” did not mean that FedEx controlled the means by which the drivers achieved that result. The Court also noted that there was an operating agreement between FedEx and each driver which expressed a mutual intent to create an independent contractor relationship; and, as such, it was necessary to look beyond the text of the contract to determine employee status.

The “weightiest factor” in distinguishing an employee from an independent contractor is the right of control and as such there was a distinction made between control of means and control of results. The test, therefore, is “the right to control the means and methods of achieving results. And the battle continues.

When questions of this nature arise in your workplace, a telephone call to experienced employment counsel is highly recommended.

Source: BNA, Daily Labor Report, December 15, 2010

Quotes Of The Month

There’s a better way to do it. Find it! ~Thomas Edison

There is nothing we cannot live down, rise above, and overcome. ~Ella Wheeler Wilcox

I’m a great believer in luck, and I find the harder I work the more I have of it. ~Thomas Jefferson

The most flammable kind of wood is the chip on the shoulder. ~E. Joseph Cossman

The most called-upon prerequisite of a friend is an accessible ear. ~Maya Angelou

We fear things in proportion to our ignorance of them. ~Titus Livius