

## New Rules Affecting Workers and Employers by the U.S. Department of Labor

*Recently Issued Rules from the U.S. Department of Labor Regarding the Test to Determine Whether a Worker is an Employee or Independent Contractor*



Gerald C. Davis

**M**any businesses, as employers, have experimented with treating their workers as independent contractors in an effort to avoid withholding wages for taxes, social security (FICA) and unemployment insurance, as would be required for workers classified as employees.

The U.S. Department of Labor (DOL) compiled a new six-part test, issued under the Administrator's Interpretation 2015-1.

### 1. Is the work an integral part of the employer's business?

For example, a lawyer doing work for law firm may have to be treated as an employee rather than an independent contractor, while the same lawyer providing services for other business enterprises would likely be treated as an independent contractor.

### 2. Does the worker's managerial skill affect the worker's opportunity for profit or loss?

According to the DOL, this test is unaffected by the ability to work more hours, but is affected by the worker's opportunity for profit or loss related to the worker's managerial skill.

### 3. How does the worker's relative investment compare with the employer's investment?

The DOL emphasized that a worker's investment should not be considered in isolation, but rather compared to the investment an employer makes to the overall business. For example, if the worker is an accountant and brings his own computing and calculating equipment, office equipment, such as ledger paper, and other office supplies necessary to perform his or her job, he or she will more likely be treated as an independent contractor than an employee.

### 4. Does the work performed require special skill and initiative?

A worker's skill set, judgment, intuition and independence prevail over technical skill in determining whether the worker is economically independent.

### 5. Is the relationship between the worker and the employer permanent or indefinite?

The more permanent a worker performs services for an employer, the more likely the worker is an employee, albeit a temporary employee or a part-time employee.

### 6. What is the nature and degree of the employer's control?

The more independence, judgment and reliance upon developed skill-sets acquired from experience, learning, or education, with the ability to exercise independent managerial and administrative judgment in the way the job will be performed, favors treatment as an independent contractor.

However, many of the job functions overlap, and the application of the six-part test issued by the DOL requires analysis for "best fit" among the criteria outlined by the six-part test.

There are significant penalties for improperly classifying an employee as an independent contractor to avoid the taxes imposed on an employer on behalf of employees. The employer can be liable to the worker for back overtime for a two-year period, or for three years if the misclassification is deemed willful. Further, under the Fair Labor Standards Act, successful litigants can also recoup their attorneys' fees and costs, which may far exceed the overtime pay they may otherwise be entitled to, if classified as an independent contractor, but later determined by the DOL to be an employee.

Earlier, the DOL relied on a 20-part "control test" that considered

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whether the worker brought his own supplies, exercised judgment, performed mostly administrative or supervisory work, controlled subordinates, such as assistants, whether the work was typically done by an independent contractor or an employee, and whether the worker controlled his or her hours of work and the manner in which the work was executed. Now, with the six-part test, control is merely one aspect of six considerations applied by the DOL in evaluating a candidate's entitlement to benefits under the Fair Labor Standards Act, including payment of overtime and the employer's incurrance of tax liability for withholding of wages, payment of FICA, unemployment compensation insurance and workers' disability compensation premium. Further, there appear to be proposed changes to the overtime laws which increase the minimum pay, from \$23,660.00 per year to \$50,440.00, for an employee

to be considered salaried and, therefore, exempt from overtime eligibility.

Beginning with the third quarter of 2015, the Taxable Wage Base, which is the maximum annual wage on which an employer must pay unemployment taxes, will be lowered from the current rate of \$9,500 to \$9,000. This means that non-delinquent contributing employers will pay less in unemployment taxes for the upcoming quarters.

*Gerald C. Davis*

*Gerald C. Davis is a partner in our Livonia office where he concentrates his practice on corporate and business law, leveraged buy-outs, company reorganization and refinancing, analyzing investments for joint ventures, intellectual property, and drafting loan agreements. He may be reached at (734) 261-2400 or gdavis@cmda-law.com.*

## California Legislation Update

### RECENTLY ENACTED CALIFORNIA LAWS



*Maurice S. Kane*

#### Amendments to FEHA

In August 2015, California Gov. Jerry Brown signed into law amendments to the California Fair Employment and Housing Act (FEHA) that will provide additional protection for employees who make a request for an accommodation for a disability or religion. Assembly Bill 987 (AB 987) was initiated in reaction to *Rope v. Auto-Chlor System of Washington, Inc.*, a

2013 decision from a California appellate panel. In that case the employee requested a leave of absence to donate a kidney to his sister five months prior to the surgery. Two months prior to the scheduled surgery the donor-employee was terminated from his employment. He sued for associational disability discrimination under FEHA, but the appellate panel affirmed dismissal of his suit, holding that "a mere request—or even repeated requests—for an accommodation, without more" does not constitute protected activity sufficient to support a claim for retaliation in violation of FEHA. AB 987 amended the statute to establish that "[a] request for reasonable accommodation based on religion or disability constitutes protected activity ... such that when a person makes such a request, he or she is protected against retaliation for making the request." The changes to FEHA will take effect on January 1, 2016.

#### Term "Alien" Removed from CA Labor Code

Scheduled to take effect January 1, 2016, a law that will excise the term "alien" from the California Labor Code. Sen. Tony Mendoza (D-Artesia), who proposed Senate Bill 432, explained that the term was derogatory as applied to foreign-born workers. "California is among the top destination states for immigrants in the United States," the lawmaker said in a statement. "Given the abundant evidence of their many contributions, it is imperative that any derogative references to foreign-born individuals be repealed from state law." Pursuant to the new law, the term "alien" will henceforth be removed from the official

Codes of the State of California, wherever it currently appears.

### LEGISLATION TO WATCH

#### Bill Would Ban Mandatory Arbitration Agreements

California lawmakers passed a controversial new measure earlier this month. Assembly Bill 465 would effectively ban mandatory agreements to arbitrate employment disputes in the state. While employee groups have voiced support for the proposal, the California Chamber of Commerce has dubbed it a "job killer," cautioning that it would clog the courts and lead to more employment litigation. In addition, it would be objectionable as covering the field occupied by the Federal Arbitration Act, which likely preempts any such contrary state legislative scheme. The California Senate passed the bill in a 22-15 vote and the Assembly followed by a vote of 45-30. Gov. Brown will decide later this month whether to sign it into law. If he does, any arbitration agreement entered into, revised, extended, or renewed on or after January 1, 2016 would need to include a statement that the agreement is not mandatory and that signing is not a condition of employment.

#### Bill 358: Strongest Equal-Pay Law in Country

A second measure awaiting the Governor's signature is Senate Bill 358, the California Fair Pay Act. The legislation would prohibit employers from paying employees of one sex at a rate less than the rate paid to employees of the opposite sex, "for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." In addition, the bill protects workers who discuss or ask about wages from retaliation. Gov. Brown has indicated that he intends to sign the measure, which would take effect January 1, 2016.

*Maurice S. Kane*

*Maurice S. Kane is an attorney in our Riverside, CA office where he concentrates his practice on employment and labor law, insurance defense, and litigation. He may be reached at (951) 276-4420 or mkane@cmda-law.com.*

## EEOC Bans Discrimination Against Sexual Orientation in the Workplace



*Elizabeth Rae-O'Donnell*

The U.S. Equal Employment Opportunity Commission (EEOC) recently ruled that all job discrimination based on sexual orientation is a form of sex discrimination under Title VII of the Civil Rights Act of 1964.

This historic 3-2 decision does what Congress and most courts so far have refused to do: ban discrimination against gays and lesbians in the workplace. Until now, only a handful of states and municipalities have done so.

The ruling came in an appeal by an air traffic controller who had claimed he was discriminated against and denied a promotion in 2012 because he is gay. He filed a claim with the agency, whose staff initially ruled that sexual orientation discrimination was not within the jurisdiction of the agency. He appealed to the commission, which overturned the decision, stating, "We conclude that sexual orientation is inherently a 'sex-based consideration' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination."

Neither Congress nor the courts have approved this ruling, and it contradicts several federal circuit court rulings that held sexual orientation is not part of Title VII. The EEOC's views on Title VII are considered persuasive, but not binding, authority on the courts. What remains to be seen is how circuit courts will go along with the EEOC's interpretation of Title VII. While some 22 states currently ban workplace discrimination on the basis of sexual orientation, the 6th Circuit Court has held that Title VII's prohibition of the basis of "sex" only applies to discrimination on the basis of gender and does not include discrimination based on one's sexual orientation.

Now is as good of time as any for companies and governmental entities to start thinking about updating their employment policies to reflect this paradigm shift. This ruling comes on the heels of the Supreme Court's June 2015 decision affirming a right to same-sex marriage.

*Elizabeth Rae-O'Donnell*

*Elizabeth Rae-O'Donnell is an attorney in our Livonia office where she concentrates her practice on municipal law, employment and labor law, and education law. She may be reached at (734) 261-2400 or erae@cmda-law.com.*

## CMDA Attorneys Selected as Michigan Super Lawyers & Rising Stars

We are pleased to announce that several CMDA attorneys have been selected for inclusion in the 2015 Michigan Super Lawyers & Rising Stars List. Chris Schultz, managing partner of the Firm, explains, "Having several CMDA attorneys selected as Michigan Super Lawyers and Rising Stars is validation for the hard work they put into the Firm and the superb level of service they offer clients. All of our lawyers are completely dedicated to obtaining the best possible outcome for every client."

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33900 Schoolcraft Road  
 Livonia, Michigan 48150

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CMDA: On Law  
 33900 Schoolcraft Road  
 Livonia, Michigan 48150  
 (734) 261-2400  
 E-Mail: jsherman@cnda-law.com

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 Jennifer Sherman.

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**Office Locations**

**MICHIGAN**

**CALIFORNIA**

**Livonia**

33900 Schoolcraft Road  
 Livonia, MI 48150  
 Telephone: 734.261.2400  
 Facsimile: 734.261.4510

**Clinton Township**

19176 Hall Road  
 Suite 220  
 Clinton Township, MI 48038  
 Telephone: 586.228.5600  
 Facsimile: 586.228.5601

**Traverse City**

400 West Front Street  
 Suite 200  
 Traverse City, MI 49684  
 Telephone: 231.922.1888  
 Facsimile: 231.922.9888

**Grand Rapids**

2851 Charlevoix Drive, S.E.  
 Suite 327  
 Grand Rapids, MI 49546  
 Telephone: 616.975.7470  
 Facsimile: 616.975.7471

**Riverside**

3801 University Avenue  
 Suite 560  
 Riverside, CA 92501  
 Telephone: 951.276.4420  
 Facsimile: 951.276.4405

**MISSOURI**

**Kansas City**

9140 Ward Parkway  
 Suite 225  
 Kansas City, MO 64114  
 Telephone: 816.842.1880  
 Facsimile: 816.221.0353