# HR Banker

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The Centers for Disease Control released new guidance for employers on how to control the spread of the H1N1 virus and maintain business continuity. As part of the nation's "critical infrastructure," financial institutions should be aggressive in their response to the pandemic.

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The Supreme Court ruled that age discrimination cases must be decided under a standard of proof that makes it tougher for employees to prevail.

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Workforce reductions and unemployment have heightened the risk of age discrimination in the workplace. The Equal Employment Opportunity Commission held a hearing and published guidance on severance agreements.

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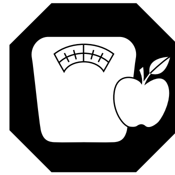

## Health & Safety

# H1N1 Virus Expected to Resurge

## *Guidance Urges Employers to Plan Ahead and Actively Respond*

The White House Council of Advisors on Science and Technology is pulling no punches about the reemergence this fall of the H1N1 virus, or swine flu. The pandemic virus is expected to sicken as much as half of the U.S. population and cause some 90,000 deaths during the 2009–2010 flu season. The Centers for Disease Control (CDC) is in high gear and, on August 19, 2009, released new guidance for "non-healthcare employers" regarding measures to decrease the spread of the influenza and maintain business continuity.

### How Bad?

The President's Council of Advisors on Science and Technology based its estimates on observations of the H1N1 virus during spring and summer 2009 in the United States and the past few winter months in the southern hemisphere. Those involved in the analysis call the estimates "a possibility," not a prediction, and they caution that the flu could turn out to be either milder or more severe than expected.

The estimates are based, in part, on the fact that H1N1 is a new strain of virus and most people lack immunity to it. Public health authorities also know that children and young adults are more susceptible to the illness, indicating that older people must have, at some point, gained partial immunity when they became ill with some other flu strain.

The federal government, under the auspices of the Department of Health and Human Services (HHS), the Department of Homeland Security (DHS), and the Department of Commerce, is coordinating the U.S. response. Among other things, the government is purchasing 159 million doses of vaccine from five companies. H1N1 is evidently a slow growing strain, so the production

attempt to "cure" a defective waiver by issuing a subsequent letter containing OWBPA-required information that was omitted from the original severance agreement.

The EEOC guidance also makes clear that a waiver of age discrimination claims is invalid and unenforceable if an employer used fraud, undue influence, or other improper conduct to coerce an employee to sign it or if it contains a material mistake, omission, or misstatement.

In addition, according to the guidance, workers who signed severance agreements that include a waiver of claims can still file a charge with the EEOC if they believe that they were discriminated against or wrongfully terminated.

Although the EEOC guidance is addressed primarily to employees, it is of considerable value to employers who are forced to downsize and wish to offer their employees severance benefits in exchange for a waiver of claims. The guidance can be found at www.eeoc.gov/policy/docs/qanda

## Legal Update

# Wage and Hour Disputes More Likely in Down Economy

Compared with exposure to employment discrimination complaints, wage and hour disputes seem to present a lower order of concern to most financial institutions … until a big class action is filed and everyone is reminded of the stakes involved. A $200 million lawsuit against Northwestern Mutual Life Insurance Company has had that kind of effect.

The current state of the economy only adds to the risk of wage and hour litigation. Many businesses are trying to trim their pay and benefit rolls while finding ways to keep loyal employees working. Classifying such employees as independent contractors could be tempting for both the company and its employees, but it may be illegal. In another scenario, laid-off workers may try to improve their income prospects by claiming wage and hour violations and hoping for a large settlement from their former employer.

According to Wendy E. Lane, an employment law attorney with Rutter Hobbs & Davidoff, the risk of wage and hour litigation intensifies during economic hard times. That's why employers should be paying special attention to compliance with the Fair Labor Standards Act (FLSA) and state wage and hour laws and regulations, Lane asserts.

"Especially in the aftermath of layoffs, many people are desperately seeking income, and suing employers is a means of collecting cash. In these troubled economic times, employers must take careful steps now to avoid costly litigation."

### The Northwestern Case

Three former employees filed the charges against Northwestern Mutual Life Insurance Company on behalf of a class of more than 100 "financial representatives" in California. The plaintiffs say that the company wrongly classified them as independent contractors and failed to pay them overtime wages under state and federal law.

In the complaint, the would-be class representatives claim that they were actually paid less than minimum wage, were forced to work more than 40 hours per week, and were required to obtain management approval before making any major decisions. To escape liability, Northwestern must prove that the representatives were never actual employees of the company but were legitimately working on an independent contractor basis under the wage and hour rules.

The questions raised in these lawsuits are complicated by the fact that both federal and state law apply, multiple state agencies

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may play a role in enforcement (as in California and other states), and the Internal Revenue Service has jurisdiction over the underlying tax issues. Wage and hour disputes are also extremely susceptible to class actions, according to Lane, who has represented national grocery and drug stores, among other employers, in wage and hour class actions.

"It takes just one employee to file an action on behalf of the entire class, which can ratchet up potential damages instantly. As a result of the greater potential monetary recovery, a potential class representative in a wage and hour action is likely to have an easier time than a single plaintiff in finding an attorney who is willing to work on a contingency basis," notes Lane.

The *Northwestern Mutual Life Insurance Company* case is relevant to financial institutions and other types of companies that employ financial representatives, Lane adds. In many cases, such employees appear to work independently but do not make independent decisions and are required to work at a time and place specified by the financial institution. Mortgage brokers or financial planners, for example, may have such an arrangement with a financial institution, and their employment status could be ambiguous.

**Beware of Misclassifying Employees**

"Despite what some may think, companies don't want to lay off people and they do want to remain in business. When times get tough, they start to look for ways to save overhead and labor costs," Lane notes.

In these situations, an independent contractor relationship becomes attractive because the employer doesn't have to pay for overtime, meal periods, benefits, and equipment and doesn't have to deal with workers' compensation claims or tax withholdings. Where a legitimate independent contractor relationship exists, this is a viable strategy. "The problem is, however, that most employers don't fully understand, or have misconceptions about, what makes a worker an independent contractor," according to Lane.

Another common trap is to misclassify employees as "exempt" and pay them a salary rather than on an hourly basis. This could save on overtime pay if the classification is proper, but if a company misclassifies an employee as exempt, it may later face a costly lawsuit that requires it to pay retroactive compensation as well as punitive damages and attorney's fees. If the lawsuit is a class action, the monetary payout is potentially enormous, as in the *Northwestern* case.

The pitfall in misclassification is its multiplier effect, Lane adds. "Unless you are a very small employer, if you misclassify one employee, there is a good chance you have also misclassified other employees holding similar positions."

**Nuances of Classification**

Classifying employees is not always easy or clear-cut, and employers must be keenly aware of the nuances that play into the process, Lane says. For example, to be exempt from receiving overtime pay, meal periods, and rest breaks, employees must meet various wage requirements (among them, earning a certain multiplier of minimum wage) and perform particular types of duties. While some professional, administrative, and sales positions are exempt, other positions with those same titles must still be classified as non-exempt. The classification of a position as exempt or non-exempt is a fact-specific determination.

Contrary to the belief of some employers, putting the word "manager" or "supervisor" in an employee's job title does not necessarily mean they qualify as exempt. For example, if a manager or supervisor is directed to always consult a senior officer on all decisions, the employee may not technically meet the independent decision-making criteria for classification as exempt. Lane recommends that employers err on the side of caution when classifying management and supervisory employees.

Likewise, signing a contract agreement or completing a 1099 miscellaneous income tax form for a worker does not automatically make him or her an independent contractor, says Lane. "The IRS has a list of twenty different factors that indicate independent contractor status. This definition applies to all employers in all states. In addition, employers have to worry about how their specific state or states in which they operate define independent contractors."

Lane warns of yet another common trap for employers: hiring someone on a legitimate independent contractor basis and then using the person full time for many years without reevaluating the relationship. "At some point, an agency or court may say that this is no longer an independent

contractor relationship," says Lane. For example, one of the IRS's definitional factors is duration of employment, and a long-time contractor may no longer qualify under this factor.

Another factor raised in the *Northwestern* case is whether the employer determines when and where work is performed. "In a true independent contractor relationship," explains Lane, "independent contractors have control over their schedule. If a company decides when the work day starts and ends, when the lunch break happens, and how many days a week the person works, one must ask whether the worker really has control."

Other issues that come into the determination of independent contractor status include whether the company provides a workspace, makes available the services of an assistant, furnishes computer and other office equipment, or pays for travel expenses.

The aforementioned factors indicating independent contractor status "are the more concrete ones that employers can get their arms around," says Lane. The IRS also specifies other factors that are more ambiguous and may need counsel's interpretation.

"Wage and hour disputes can be complex, so when dealing with employee classification matters, it is a good idea for HR managers to consult with legal counsel familiar with employment law," notes Lane.

As always, preventive compliance strategies work best, particularly when a struggling economy offers temptations for wage and hour lawsuits. ▮▮

*Rutter Hobbs & Davidoff, based in Los Angeles, California, represents clients in matters involving business disputes and litigation, real estate, intellectual property, labor and employment, corporate and securities, bankruptcy and reorganization, estate planning, and probate litigation. For more information, go to www.rutterhobbs.com.*

## Compensation & Benefits

# Minimum Wage Reaches Third Step-Hike

In July, the federal minimum wage increased to $7.25, meaning that employees covered by the Fair Labor Standards Act (FLSA) are entitled to be paid no less than that amount per hour. The increase is the last of three provided by the Fair Minimum Wage Act of 2007, which amended the FLSA to increase the federal minimum wage in three increments:

- $5.85 per hour effective July 24, 2007;
- $6.55 per hour effective July 24, 2008;
- $7.25 per hour effective July 24, 2009.

The Department of Labor (DoL) has reminded employers that, if they employ workers subject to the FLSA, they must post (and keep posted) in each of their establishments, a notice explaining the law. The notice must be posted in conspicuous places in such a way that permits employees to readily read the postings.

DoL also reminds employers in states that have minimum wage laws that differ from the federal standard: If the employer is subject to both laws, it must pay the higher of the two (federal or state) rates.

The most recent change affects both full-time and part-time workers in 30 states where the state minimum wage is currently at or below the federal minimum wage (or there is no minimum wage law). The 30 states are Alabama, Alaska, Arkansas, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia,

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