HR COMPLIANCE LIBRARY
Ideas & Trends

AUGUST 5, 2015
ISSUE NO. 773

INSIDE

EMPLOYEE CLASSIFICATION

DOL guidance broadens FLSA definition of employee

Coming down strongly on the side of finding an employment relationship, the Wage Hour Division of the Department of Labor issued an Administrator's Interpretation from Dr. David Weil on July 15, 2015. It was no surprise that the agency takes the position that most workers are employees under the FLSA. The Administrator's Interpretation No. 2015-1 compliance assistance document focuses on the economic realities test in light of the FLSA's definition of "employment" as "to suffer or permit to work," discusses each factor in the economic realities test, and provides case law and examples to flesh out its interpretation. Given the examples and the DOL's emphasis, there's a little something here to make advocates of the "sharing economy," as well as employers that have relied on an independent contractor business model, uncomfortable.

Labels matter little. Most misclassified employees are labeled "independent contractors," said the DOL, but it has seen an increasing number of situations where employees are labeled something else, such as "owners," "partners," or "members of a limited liability company." Regardless of what they are called, the determination of whether the workers are in fact FSLA-covered employees is still made by applying an economic realities analysis.

Most workers are employees

The appropriate test to determine whether a worker is an employee or an independent contractor under the FLSA is the multi-factorial "economic realities" test, which focuses on whether the worker is economically dependent on the employer or in business for him or herself. A worker who is economically dependent on an employer is suffered or permitted to work by the employer, reasoned the DOL, so applying the economic realities test in view of the expansive definition of "employ" under the Act, most workers are employees under the FLSA.

"Very broad" scope of employment. Application of the economic realities factors should be guided by the FLSA's statutory directive that the scope of the employment relationship is very broad. All of the factors must be considered in each case; no one factor (particularly the control factor) is determinative; and the factors should not be applied mechanically, but as indicators of the broader concept of "economic dependence." Ultimately, the goal is to determine whether the worker is economically dependent on the employer (and is an employee) or is really in business for him or herself (and is an independent contractor).

Economic realities in light of "suffer or permit." The Administrator's Interpretation goes into some detail on the history of the economic realities standard and its application. It stresses that the ultimate inquiry under the FLSA is whether the worker is

Wolters Kluwer

economically dependent on the employer or truly in business for him or herself. In a nutshell, if the worker is economically dependent on the employer, then the worker is an employee. If the worker is in business for him or herself (economically independent from the employer), then the worker is an independent contractor.

Economic realities test factors

1. Is the work an integral part of the employer's business? A true independent contractor's work, in the eyes of the DOL, is unlikely to be integral to the employer's business. The WHD says that whether the worker's work is an integral part of the employer's business should always be analyzed in misclassification cases. Especially considering developments such as telework and flexible work schedules, for example, work can be integral to an employer's business even if it is performed away from the employer's premises, at the worker's home, or on the premises of the employer's customers.

2. Does the worker's managerial skill affect the worker's opportunity for profit or loss? A worker's decisions to hire others, purchase materials and equipment, advertise, rent space, and manage time may reflect managerial skills that will affect his or her opportunity for profit or loss beyond a current job. But the worker's ability merely to work more hours, and the amount of work available from the employer, have nothing to do with the worker's managerial skill and do little to separate employees from independent contractors—both of whom are likely to earn more if they work more and if there is more work available. The effect on one's earnings of doing one's job well or working more hours is no different for an independent contractor than it is for an employee. Those considerations are not the product of exercising managerial skill, emphasized the DOL, and do not demonstrate that the worker is an independent contractor. The Administrator's Interpretation also stresses the importance of not overlooking whether there is an opportunity for loss: A worker truly in business for him or herself faces the possibility of experiencing a loss—not just lost "wages."

3. How does the worker's relative investment compare to the employer's investment? The worker should make some investment (and therefore undertake at least some risk for a loss) in order for there to be an indication that he or she is an independent business, the agency points out. But even if the worker has made an investment, it should not be considered in isolation; it is the relative investments that matter. Comparing the worker's investment to the employer's investment helps determine whether the worker is an independent business. Investing in tools and equipment is not necessarily a business investment or a capital expenditure that indicates that the worker is an independent contractor, for example.

Comparative analysis required. The DOL reasoned that an analysis of the workers' investment, even if that investment is substantial, without comparing it to the employer's investment is not faithful to the ultimate determination of whether the worker is truly an independent business. Perhaps more importantly, an analysis that compares the worker's investment to the employer's investment—but only to the employer's investment in the particular job the worker performs—also disregards the ultimate determination, because it examines "only a piece of the employer's business" for the comparison.

4. Does the work performed require special skill and initiative? "Skills are not the monopoly of independent contractors," the DOL points out. A worker's *business skills, judgment, and initiative*, and *not technical skills*, will aid in determining whether the worker is economically independent. So, concluding that the skills required to install cable indicates independent contractor status because the skills are like "those of carpenters, construction workers, and electricians, who are usually considered independent contractors," overlooks *whether the worker is exercising business skills, judgment, or initiative*. "The technical skills of cable installers, carpenters, construction workers, and electricians, for example, even assuming that they are special, are not themselves indicative of any independence or business initiative," explained the agency.

5. Is the relationship between the worker and the employer permanent or indefinite? According to the Administrator's Interpretation, a worker who is truly in business for him or herself will eschew a permanent or indefinite re-

HR COMPLIANCE LIBRARY
Ideas & Trends

Managing Editor
Heidi J. Henson, J.D.

Contributing Editors
David Stephanides, J.D.
Sandra Stoll, J.D.

Newsletter Design
Publishing Production & Design Services

Newsletter Layout
Don Torres

No claim is made to original government works; however, the gathering, compilation, and arrangement of such materials, the historical, statutory and other notes and references, as well as commentary and materials in this Product or Publication are subject to CCH Incorporated's copyright.

HR Compliance library—Ideas & Trends (USPS 680-810)(ISSN 0745-0613), a Wolters Kluwer editorial staff publication, is published monthly by Wolters Kluwer, 4025 W. Peterson Ave., Chicago, Illinois 60646. Periodicals postage paid at Chicago, Illinois, and at additional mailing offices. POSTMASTER: SEND ADDRESS CHANGES TO HR COMPLIANCE LIBRARY—IDEAS & TRENDS, 4025 W. Peterson Ave., CHICAGO, IL 60646. Printed in U.S.A. © 2015 CCH Incorporated. All rights reserved.

lationship with an employer and the dependence that comes with such permanence or indefiniteness. Conversely, however, a lack of permanence or indefiniteness does not automatically suggest an independent contractor relationship. The reason behind the lack of permanence or indefiniteness should be carefully reviewed to find out if the worker is running an independent business. But "neither working for other employers nor not relying on the employer as his or her primary source of income transform the worker into the employer's independent contractor." The key, says the DOL, is whether the lack of permanence or indefiniteness is due to "operational characteristics intrinsic to the industry" (for example, employers who hire part-time workers or use staffing agencies) or the worker's "own business initiative."

6. What is the nature and degree of the employer's control? In order to be viewed as a non-employee, the worker must control meaningful aspects of the work performed to the extent that it is possible to view the worker as a person conducting his or her own business. This control over meaningful aspects of the work must be more than theoretical—the worker must actually exercise it. Employers' lack of control over offsite or remote workers is not particularly telling; nor is workers' control over the hours during which they work or even that they are subject to little direct supervision if they work remotely.

Flexible schedules not determinative. Workers' control over the hours when they work is not indicative of independent contractor status, the DOL said without embellishment. Flexibility in work schedules is common and "is not significant in and of itself." Scheduling flexibility and lack of direct supervision mean less than they perhaps used to, the DOL observed, because technological advances and enhanced monitoring mechanisms may allow employers to maintain "stringent control over aspects of the workers' jobs, from their schedules, to the way that they dress, to the tasks *that* they carry out."

Regulatory arguments less persuasive. Some employers assert that the control that they exercise over workers is due to the nature of their business, regulatory requirements, or the desire to ensure that their customers are satisfied, the DOL commented, but those reasons don't change the nature of the inquiry into whether or not the worker is an employee. The test examines the nature and degree of the alleged employer's control, not why control was exercised. If the nature of a business requires a company to exert such a level of control over workers, emphasized the DOL, quoting the Eleventh Circuit, "then that company must hire employees, not independent contractors."

Overall, however, the control factor does not and should not overtake the other factors of the economic realities test, the agency concluded. Like the other factors, it should be analyzed in the context of ultimately determining whether the worker is economically dependent on the employer or an independent business. According to an accompanying blog post by Weil, "The Labor Department supports the use of legitimate independent contractors—who play an important role in our economy—but when employers deliberately misclassify employees in an attempt to cut costs, everyone loses."

Practitioner notes. "This guidance comes as no surprise," commented Kevin Hishta, a shareholder in the Atlanta office of Ogletree Deakins. He pointed out that independent contractor misclassification has been an enforcement priority of the administration and "the DOL has adopted perhaps the most expansive definition of "employee" possible."

More importantly, "any company utilizing independent contractors is well advised to have the relationship closely examined and weigh the pros and cons of maintaining the relationship very carefully," said Hishta, because the guidance "will receive a tremendous amount of publicity, and legal challenges will undoubtedly increase substantially along with potential liabilities."

Michael Droke, a partner in the Labor and Employment division of Dorsey and Whitney, made a similar point. "Many companies do not monitor their independent contractor relationships. Companies should make clear which department within the organization is responsible to understand the law, know which contractors have been engaged, and monitor compliance." He recommended that general counsel should question independent contractor classification as part of their global risk audit and take appropriate action to ensure that the situation is being monitored.

"Employers should maintain basic records on the independent contractor determination process and the facts used to make that determination. For example, they should keep records of business licenses, business cards, contractor tax records, project work plans showing limited engagements, and correspondence from the contractor," Droke continued. "Companies should avoid giving contractors rights or access that cut against a contractor determination. For example, contractors should not have internal email accounts, should not be given server access, and should not be invited to employee functions"

"The DOL guidance reminds employers to periodically audit existing contractors to make sure they have not inadvertently slipped from contractors to employees. This audit should be conducted with legal counsel in order to obtain confidential advice on the standards and contractor determination," Droke cautioned. ■

Source: *Article, written by Joy P. Waltemath, J.D., was originally published in the July 15, 2015 edition of Employment Law Daily, a Wolters Kluwer Law & Business publication.*

© 2015 CCH Incorporated. All rights reserved.

HEALTHCARE

After design changes, health care costs will increase 4.5 percent in 2016

In 2016, health care costs will increase 6.5 percent, but after likely changes in benefit plan design, such as higher deductibles and co-pays, the net growth is expected to be 4.5 percent, according to recent research from PricewaterhouseCooper's (PwC) Health Research Institute (HRI).

HRI research confirms that employers intend to continue shifting costs onto employees, which prompts many workers to scale back on services or search for alternatives.

The report, Medical Cost Trend: Behind the Numbers 2016, noted that while cost increases are low, medical inflation still outpaces general economic inflation. In addition, while the health sector has adopted structural changes to improve efficiency and quality, most of the slowing growth is attributable to cost-shifting onto consumers.

PwC HRI found that several factors will intensify spending in 2016. For instance, new specialty drugs entering the market in 2015 and 2016 bring with them the hope for new cures and treatments, but at a high cost. And, major cyber security breaches are prompting health companies to take extra steps to protect sensitive personal information from external threats. Investments to guard personal health data will add to the overall cost of delivering care in 2016 and beyond, PwC noted. But moderating forces are expected to hold growth in check. Insurance plan designs influence how often and to what extent employees use health services. HRI research confirms that employers intend to continue shifting costs onto employees, which prompts many workers to scale back on services or search for alternatives.

PwC believes that the looming "Cadillac" tax is one of the factors accelerating cost-shifting to employees. The Patient Protection and Affordable Care Act's 40 percent excise tax on high cost health plans (those plans with premiums over $10,200 for individual and $27,500 for family coverage) is making employers up the amount that employees must pay to help reduce their costs. ■

HR QUIZ

Can an employer make pretax contributions to a spouse's HSA?

Q **Issue:** *One of your employees cannot contribute pretax funds to his health savings account (HSA) because he is enrolled in Medicare. However, his spouse is covered by your company's high-deductible health plan, and she recently opened up an HSA.*

Can you contribute funds into her account and exclude them from the employee's gross income and wages? Also, can the employee contribute catch-up contributions into the spouse's HSA?

A **Answer:** The answer to both questions is no.

An employer is not allowed to make pretax contributions to the HSA of a nonemployee — in this scenario, the spouse. Any contribution by an employer to the HSA of a nonemployee, including salary reduction amounts made through a Sec. 125 cafeteria plan, must be included in the gross income and wages of the employee.

The employee is not an eligible employee and cannot contribute pretax funds into his own HSA because he is enrolled in Medicare. He also is barred from making catch-up contributions into his wife's HSA. An individual who is allowed to make catch-up contributions may only make them into his or her own HSA.

Source: *IRS Notice 2008-59, July 21, 2008; Employee Benefits Management Newsletter, No. 588, June 23, 2015.*

© 2015 CCH Incorporated. All rights reserved.

IMMIGRATION

What employers must do before moving H-1B employees

U.S. Citizenship and Immigration Services issued final guidance on when employers are required to file an amended or new H-1B petition in light of *Simeio Solutions, LLC*. That ruling reflects the agency's position that H-1B petitioners are required to file an amended or new petition before placing an H-1B employee at a new place of employment not covered by an existing, approved H-1B petition.

After USCIS issued its Simeio decision in April, the agency followed up with draft guidance on the topic in May, also soliciting public comment on the implementation of the ruling. After carefully reviewing and considering submitted feedback, USCIS issued final guidance on July 21.

The new guidance is effective immediately. USCIS also noted that, while the final guidance responds to many of the comments received by the agency, suggestions and inquiries that fell outside the scope of *Simeio* were not addressed. The agency that said it will consider addressing those remaining questions, as necessary, in the near future. ■

WORKPLACE INVESTIGATIONS

Missteps in work investigations trip up employers' defense

If recent cases are an indication, HR professionals and others tasked with conducting internal investigations of employee complaints or suspected misconduct are failing to follow some basic advice readily available from employment law experts on how and when to conduct a proper investigation. For example, the Society for Human Resource Management published a "How-to" on investigations, identifying common mistakes such as ignoring complaints, losing objectivity, and failing to be thorough. The EEOC also offers guidance for employers facing discrimination or harassment complaints; summarizing what makes an effective investigation, what questions to ask, how to assess credibility, and what corrective actions might be taken. These suggestions likely could have helped the employers in the following cases, many of which can serve as cautionary tales on what not to do.

If recent cases are an indication, HR professionals and others tasked with conducting internal investigations of employee complaints or suspected misconduct are failing to follow some basic advice readily available from employment law experts on how and when to conduct a proper investigation.

Don't ignore, minimize, or discourage complaints—investigate them. Several recent cases involved employers that not only failed to investigate discrimination and harassment complaints but openly dissuaded further complaints. For example, a leased employee survived a motion to dismiss her intentional infliction of emotional distress claim, which was based on allegations that when she told her supervisor about sexual harassment, including being told she was "f*ckable" and invited for a lunch time "quickie," the supervisor told her to "ignore it and smile" (*McCourt v. Gatski Commercial Real Estate Services*). A retaliatory harassment claim by a female corrections officer survived summary judgment based in part on evidence that a supervisor responded to her sexual harassment complaints by telling her to keep her mouth shut and that he did not have time to be a babysitter (*Sanchez v. State of California*).

Minimizing or ignoring discrimination or harassment complaints also hinders any defense in a subsequent lawsuit. In one case, an HR manager minimized racial harassment complaints by an African-American employee by calling the alleged harasser a "good guy" and telling the employee (who was threatened) that "you are going to be fine" (*Gillum v. Safeway, Inc.*). And an employer in another case now faces punitive damages over a Title VII hostile work environment claim by a female administrative assistant, whose repeated complaints about coworkers making sexual comments and putting porn on her computer prompted no investigation or remedial action. Her complaints were simply ignored (*Scuffle v. Wheaton & Sons, Inc.*).

Conduct a thorough investigation. Some employers do not ignore complaints but fail to take the ensuing investigation seriously. For example, a finding of employer liability for a hostile work environment was supported in an Illinois case where the HR director took no notes while investigating an employee's complaints that photographs of sexual bathroom graffiti depicting her image were being passed around the workplace and the HR director refused to look at the photographs. Moreover, the employee's supervisor blew off her concerns over Facebook posts of the pictures (*Meng v. Aramark Corp.*).

© 2015 CCH Incorporated. All rights reserved.

In some cases, there has been no complaint but an employer suspects employee misconduct. Again, being thorough in the investigation is imperative. For example, a JPMorgan branch manager who was fired soon after taking FMLA leave survived summary judgment on her FMLA claim based in part on evidence that, in investigating allegations of fraud against her, JPMorgan's investigator did not follow-up on significant evidence suggesting that her ex-brother-in-law was being untruthful (in the midst of a messy divorce) in claiming the employee opened an unauthorized account in his name (*Walker v. JPMorgan Chase Bank, N.A.*). In another case, evidence that a convenience store employer did not sufficiently investigate or make particularized findings before blaming one co-manager for the theft of lottery tickets from an unsecured cabinet (when the other co-manager was actually the last one on duty) suggested the plaintiff's discharge was really based on race discrimination (*Bondwe v. MAPCO Express, Inc.*).

As these cases also suggest, the point of a proper investigation is to seek the truth, not to justify a decision or assumption that has already been made and certainly not to justify discrimination or retaliation.

Avoid biased investigators, biased investigations. Surprisingly, some employers have allowed individuals with an obvious source of bias to conduct an investigation. For example, it is not a good idea to let a supervisor investigate possible misconduct by an employee if the employee has previously accused the supervisor of impropriety. Indeed, one court recently held that allowing an accused harasser to investigate a radiology employee's purported HIPAA violations supported her Title VII hostile work environment claim (*Douglas v. Aiken Regional Medical Center*).

Sometimes the way an investigation is conducted suggests bias, even if the investigators themselves show none. For example, a federal court in Oklahoma found evidence that an employee's demotion was due to race discrimination based on the fact that African-American employees were required to turn over their computers during an independent forensic expert's investigation into violations of a computer use policy (viewing porn at work) while some white employees did not have to turn theirs over (*Crabbe v. American Fidelity Assurance Co.*).

Timing of an investigation can also suggest ill motive. For example, an employee who was only investigated for possible time card fraud *shortly after* she took FMLA leave survived summary judgment on her retaliation claim in part due to the timing of the investigation. There was also a tell-tale email from an attorney for whom she worked, in which he queried "Do we have enough now to take action? Please?" The email was sent during the investigation and, at a minimum, showed a desire to take disciplinary action (*Hartman v. The Dow Chemical Co.*).

Hear all sides to a story. As these cases also suggest, the point of a proper investigation is to seek the truth, not to justify a decision or assumption that has already been made and certainly not to justify discrimination or retaliation. Thus, it is extremely important to give an employee suspected of misconduct a chance to tell his or her side of the story. Failure to do so can be evidence of unlawful intent. For example, the Sixth Circuit found questionable a bank's motivation for firing an African-American employee who was assumed to be the aggressor in a workplace altercation. Significantly, the investigator did not allow him to tell his side of the story and even ignored evidence that the coworker started the incident (*Wheat v. Fifth Third Bank*).

Make sure your response is effective. If complained-of conduct continues after an investigation and corrective action, courts are likely to find the employer's response inadequate. For example, although one company had an anti-harassment policy, investigated an employee's complaints, and reprimanded a supervisor who asked her about sex toys and said women have the upper hand in business because they can use their sexuality (among other sexist remarks), a jury could find its response insufficient to rely on the *Faragher/Ellerth* defense because the inappropriate remarks continued (*Macaddino v. Inland American Retail Management, LLC*).

Responses should be consistent. Make sure, once an internal investigation is complete, that any discipline or other response is consistent with company policy and with the response to similar infractions in the past. Also make sure to treat similarly situated coworkers similarly. Disparate discipline is often at issue in litigation, as are allegations that the punishment didn't fit the crime. For example, in the MAPCO case, there were two co-managers on duty the day lottery tickets were stolen but only the African-American employee was fired, and that was considered evidence of discrimination. Conversely, in another case, an employer investigated and found that all assistant managers at a theater violated the nonfraternization policy. Two females who were fired claimed discrimination because no male employees were fired. However, the investigation disclosed that they had committed more serious violations, which justified their terminations, and their claims failed as a matter of law (*Serrano v. Cinemark USA, Inc.*).

Other issues. While many recent cases highlight the ways in which investigatory missteps hurt an employer's chances of successfully defending discrimination, harassment, or retaliation suits, other cases also raise important considerations with respect to internal investigations:

- **Genetic information.** An employer violated GINA during an investigation into who was defecating in a warehouse by having DNA from employee cheek swabs com-

© 2015 CCH Incorporated. All rights reserved.

pared to the DNA of fecal samples (*Lowe v. Atlas Logistics Group Retail Services (Atlanta), LLC*).

- **FCRA compliance.** Although an investigation into employee misconduct normally does not fall under the Fair Credit Reporting Act, an employee had evidence that the investigation that uncovered his criminal background and led to his discharge arose from the employer's desire to avoid his anticipated discrimination suit rather than to uncover misconduct. The FCRA claim therefore survived summary judgment (*Mattiaccio v. DHA Group, Inc.*).
- *Weingarten* **rights.** An employee who is represented by a union has the right to request and have a union representative present at an investigatory interview that he/she reasonably believes may result in disciplinary action. In one recent case, an NLRB panel found that an employer unlawfully threatened a union steward with discipline for using notes while representing an employee during an interview (*Howard Industries Inc.*).
- **Privilege.** Documents created in an investigation by an employer's attorney may be privileged depending on the facts. For example, a bank sued for discrimination by a former employee did not have to turn over information about another employee's exit interview and a related investigation by the employer's attorney but did have to supply the names of the individuals interviewed. The attorney attested that she conducted the interviews, created documents, and provided legal advice on liability and protective measures. Though there were reasons for the investigation that were not in anticipation of litigation, it was not "wholly independent of litigation" so the work-product privilege applied, as did the attorney-client privilege (*Richmond v. Mission Bank*).
- **Spoliation of evidence.** Destruction of notes, documents, tapes, or other evidence related to an internal investigation can lead to sanctions for spoliation of evidence, depending on the circumstances. One employer was let off the hook, though, because notes that were shredded had been incorporated into an investigation summary so an employee could not show prejudice and was not entitled to sanctions (*Hill v. Phillips 66 Co.*).

Outside investigations by regulatory agencies. Also worth noting are several recent cases in which courts issued injunctions or provided other remedies when employers failed to cooperate with, and in some cases interfered with, investigations by regulatory agencies. For example:

- A federal court in California issued an injunction after an employer interfered with the DOL's investigation into misclassification of cab and limo drivers as independent contractors. Drivers were told not to speak to investigators and to say they were independent contractors (*Perez v. Abbas*).
- Interference and retaliation were at the forefront of a case in which a federal court issued an injunction against an employer based on evidence that it suspended, fired, and sued an employee because she spoke to the media and complained to OSHA about workplace exposure to chemicals linked to breathing problems. The employer was enjoined from: terminating, suing, or otherwise retaliating against employees for exercising OSH Act rights; telling employees not to speak to DOL representatives; and otherwise obstructing an ongoing DOL investigation (*Perez v. Lear Corporation Eeds and Interiors*).
- Enforcing an administrative subpoena by the EEOC, a court in Wisconsin noted that the agency still had the authority to investigate possible discrimination even if the claimant who filed the EEOC charge had her individual suit dismissed or reached a settlement with the employer. The agency serves not only the individual's interests, but the public's interests, explained the court (*EEOC v. Union Pacific Railroad Co.*).
- The Fifth Circuit affirmed a DOL Administrative Review Board's award of $30,000 in damages under SOX's antiretaliation provision after an employer identified an employee as the whistleblower who reported questionable accounting practices to the SEC, leading to an investigation. The court held that the disclosure, followed by coworker ostracism, was a materially adverse action (*Halliburton Co. v. Administrative Review Board*).

Good investigations provide good defenses. When done right, an employer's investigation into potential misconduct can provide a defense to lawsuits over any remedial measures taken. Thorough investigations and effective responses to harassment and discrimination complaints by employees can provide a basis for the *Faragher/Ellerth* defense. And proper investigations into misconduct can also allow an employer to rely on the "honest belief" rule, in which even erroneous conclusions (as to an employee's fault or guilt) will not lead to liability because the employer honestly believed, based on the investigation, that the employee committed the infraction that led to whatever discipline the employee claimed was unlawful. With that in mind, employers should make sure that any HR professional or other employee who undertakes an investigation is aware of the issues identified above. At a minimum:

- Provide effective means for employees to lodge complaints and make sure they know how to do so.
- Take all complaints seriously and have an unbiased investigator conduct a thorough investigation, hearing all sides of the story. Reach a justifiable conclusion.
- Take remedial measures as appropriate, ensuring that the measures are consistent with policy, past practice, and as between individuals who have committed similar infractions. Avoid disparate discipline or discipline that is excessive.
- Follow-up to make sure the remedial measures were effective. ■

Source: *Article, written by Lorene D. Park, J.D., was originally published in the May 27, 2015 edition of Employment Law Daily, a Wolters Kluwer Law & Business publication.*

© 2015 CCH Incorporated. All rights reserved.

HR NOTEBOOK

Real average hourly earnings decrease 0.4 percent in June

Real average hourly earnings for all employees decreased 0.4 percent from May to June, seasonally adjusted, the U.S. Bureau of Labor Statistics (BLS) reported July 17. This result stems from no change in average hourly earnings being combined with a 0.3 percent increase in the Consumer Price Index for All Urban Consumers (CPI-U). Real average weekly earnings decreased 0.3 percent over the month due to the decrease in real average hourly earnings and no change in the average workweek.

CPI for all items rises 0.3% in June as gasoline, shelter, food indexes rise

The Consumer Price Index for All Urban Consumers (CPI-U) increased 0.3 percent in June on a seasonally adjusted basis, the BLS reported July 17. Over the last 12 months, the all items index rose 0.1 percent before seasonal adjustment. The seasonally adjusted all items increase was broad-based, with advances in the indexes for gasoline, shelter, and food all contributing.

The index for all items less food and energy rose 0.2 percent in June. In addition to the rise in the shelter index, the indexes for recreation, airline fares, personal care, tobacco, and new vehicles were among the indexes that increased in June. These advances more than offset declines in the indexes for medical care, household furnishings and operations, used cars and trucks, and apparel.

Unemployment rate dips to 5.3% in June

Total nonfarm payroll employment increased by 223,000 in June, and the unemployment rate declined to 5.3 percent, the BLS reported July 2. The number of unemployed persons declined by 375,000 to 8.3 million. Job gains occurred in professional and business services (+64,000), health care (+40,000), retail trade (+33,000), food services and drinking places (+30,000), financial activities (+20,000), and in transportation and warehousing (+17,000). Employment in mining continued to trend down in June (-4,000). Employment in other major industries, including construction, manufacturing, wholesale trade, information, and government, showed little or no change over the month.

National Safety Council calls for policies around opioid use

The National Safety Council is calling on employers to develop workplace policies around the use of opioid prescription painkillers after reviewing research and court cases showing the negative impacts of these medicines on employee safety and worker's compensation costs. Many workers who have taken opioid painkillers following on-the-job injuries have become addicted, suffered additional injuries or fatally overdosed. As a result, courts have ordered employers and worker's compensation insurance carriers to pay for detoxification, medication-assisted treatment and death benefits to surviving family members. The findings and synopses of recent court cases are detailed in the Council's new report, Prescription pain medications: A fatal cure for injured workers.

The council says workers who use opioid painkillers for more than a week to treat on-the-job injuries have double the risk of being disabled one year later. Worker's compensation claims also skyrocket, they say, and the average lost time worker's compensation claim for workers using opioid painkillers can total as much as $117,000—900 percent higher than the cost for workers who do not take opioid painkillers.

To help protect injured workers and mitigate liability, the Council recommends employers:

1. Educate workers about the risks of opioid painkillers;
2. Work with insurance carriers to identify inappropriate opioid painkiller prescribing and adopt procedures to manage worker's opioid use;
3. Ensure medical providers follow prescribing guidelines and use state Prescription Drug Monitoring Programs, which track prescribing history;
4. Provide supervisor education focused on identifying impaired employees;
5. Expand drug testing programs that include testing for all common opioids; and
6. Evaluate employee assistance programs and make sure they include access to treatment. ■

Source: National Safety Council.

Wolters Kluwer Law & Business connects legal and business communities with timely, specialized expertise and information-enabled solutions to support productivity, accuracy and mobility. Serving customers worldwide, our products include those under the Aspen, CCH, ftwilliam, Kluwer Law International, LoislawConnect, MediRegs, and TAGData names.