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Wisconsin 2015-2016 Legislative Round-Up

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Absent a special session being called, the Wisconsin Legislature has apparently completed work for the 2015-2016 legislative session. While hundreds of bills were introduced in the Senate and Assembly, 346 bills actually became law (as of this writing). Among those laws are a number of new or modified laws that may impact certain employers. This article will summarize a few of the most significant laws for employers.

Right To Work Law (2015 Wisconsin Act 1)

The legislative session got off to a bang with the very first law signed by Governor Walker -- the Right To Work legislation, which took effect on March 11, 2015. For a more detailed analysis of that law please see our previous post at http://www.boardmanclark.com/publications/right-to-work-what-it-means-for-wisconsin-employers/. Briefly, Act 1 provides no individual can be required to become or remain a member of a labor organization; be required to pay any dues or fees to any labor organization (or third party); be prevented from voluntary financially supporting a labor organization; or be forced to resign from membership in any labor organization. While the law took effect on March 11, 2015, the impact of the law is likely to gradually be seen as contracts expire. Act 1 does not affect existing collective bargaining agreements. Rather, it takes effect upon the renewal, modification, or extension of any agreement after the effective date of the law.

A recent lawsuit was filed alleging a union and a company violated the Right to Work Law. The National Right To Work Foundation is representing a group of ten employees from Maysteel Industries who claim the company and the International Association of Machinists and Aerospace Worker's District 10 and Lodge 2053 have been violating the Wisconsin Right to Work Law by virtue of a contract it signed on March 18, 2015. The contract between the parties expired on March 4, 2015. The parties were in negotiations for a successor contract. The new contract was signed on March 18 (after the March 11 effective date of the law), but the effective date of the contract was listed as March 5. The company and union claim a new agreement was reached on March 2, 2015. The new contract included language requiring employees to pay union dues as a condition of their employment. During the period between March 4, 2015 and March 18, 2015, employees were allegedly misled about whether the new Right to Work Law would or would not apply to this contract. By letter dated April 29, 2015, the union informed the employees that the new Right to Work Law would not apply at Maysteel until March of 2018. The letter stated that employees would be required to pay their fair share of the union's costs as a condition of employment. The letter further stated that they could make the payments directly to the union instead of having the dues deducted, but the payments would need to be made on time each month and, that if the employees failed to make timely payments, the union would have no choice but to initiate the process for their termination from Maysteel.

The lawsuit asks the court to rule that the company and union violated the Right to Work Law, to order repayment of the money paid by employees in dues under the new contract, and to bar the company and union from terminating any employee for failure to pay dues. The lawsuit was originally filed in Washington County Circuit Court, but the company and union have filed to have the case removed to federal court.

It will be interesting to see how the court addresses the issues in this case. However, employers with collective bargaining agreements which are expiring should be aware that the new law does apply to them upon contract expiration. Advocacy groups, such as the National Right To Work Foundation, may be looking for potential violations of the law and will assist employees to make sure the law is followed.

Unemployment Insurance Law Changes (2015 Wisconsin Acts 86 and 334)

The state unemployment insurance law was amended by two separate laws, and all of the changes were recommended by the Unemployment Insurance Advisory Council. We will highlight a few of the most significant changes. Under Act 86, a procedural change concerns an individual's eligibility for unemployment when combined with wages worked for an out-of-state employer. The new law authorizes the Department of Workforce Development to issue a determination that an out-of-state employer who makes an erroneous UC payment is at fault for failing to respond to the agency's request and specifies that the same procedures which apply to in-state employers will apply to determinations regarding out-of-state employers.

The second change affects benefits available through a Work-share Program. Wisconsin law provides two alternate approaches to determining unemployment benefits that may apply to an employee who works less than full-time hours. First, an employee may be eligible to receive benefits for partial employment, which are calculated based on a percentage of the weekly benefit that would be provided under the regular unemployment insurance benefit table. Alternatively, Wisconsin's Work-share Program allows an employer to reduce the hours of employees throughout a work unit in lieu of layoffs. In that program, an employee's unemployment benefit is based on a proportionate reduction in hours worked in that week as a result of the Work-share Program. Under prior law, if both of the alternatives described above applied, then an employee received a benefit under the alternative that provided the higher benefit. Under the new law, if an employee is included in a Work-share Program, then the employee must receive benefits as calculated under the Work-share Program, and not as a percentage of benefits for partial employment.

The final Act 86 change brought Wisconsin into compliance with a federal law enacted in 2013 requiring states to take action to recover unemployment compensation debts via the United States Department of Treasury Offset Program if the debts remain uncollected one year after the date that they were finally determined to be due. This change authorizes DWD to recoup funds owed to the Department by any employer or individual who was found personally liable for the funds following the statutory proceedings, and provided that no appeal is pending and that the time for taking an appeal or review has expired.

Under Act 334 a couple of significant changes were made. The standard was changed from "willful" to "knowingly and intentionally" for employers in the construction industry or those engaged in painting and drywall that provide false information to DWD for the purpose of misclassifying an individual as an independent contractor rather than an employee. The fines start at $500 and can range up to $25,000 per violation, depending on the circumstances. These changes are the latest steps in the trend of greater scrutiny of and enforcement against employers who misclassify employees. The "employee" vs. "independent contractor" issue will continue to be an area of enforcement under a number of laws so employers should evaluate this area carefully.

Another change modifies the criteria and some of the timeframes about what constitutes good cause for failure to accept suitable work when claiming benefits. Within the first six weeks of UC suitable work means that work which is not at a lower grade of skill and would have had a wage that was 75% or more of what the employee earned on their most recent job or jobs. Starting with the seventh week of UC, suitable work means any work the employee is capable of performing regardless of whether they have any experience or training and that pays above the lowest quartile of wages for similar work in the labor market. The law also provides an employee can demonstrate good cause if it relates to a legitimate personal safety concern, religious beliefs, unreasonable commuting distance, or another compelling reason that would make accepting the offer unreasonable.

Seasonal Layoffs

While these statutory changes took effect between November of 2015 and April 2016, a more interesting and disruptive change under the UC law took effect by administrative rules which were effective June 14, 2015, that affect seasonal employees who were laid off and expected to be recalled.

Traditionally, employees collecting unemployment benefits who were expected to be recalled to work (seasonal employees) were exempt from certain requirements to conduct job searches. Prior to 2004, Wisconsin had work search waivers limited to 12 weeks. The twelve-week limit was revised in 2004 and waivers could last a full benefit year (52 weeks). However, effective June 14, 2015, the new rules require employees who were expected to be recalled within a period of 8 weeks to obtain a waiver from the Department in order to be exempt from the job search requirements. This waiver period can be extended for a period of an additional 4 weeks with verification from the employer that cannot exceed a total of 12 weeks.

Generally speaking, the new rules require employees who are collecting unemployment benefits to register with the Wisconsin Job Service and conduct at least 4 weekly work search actions unless the Department provides the waiver. Thus, if an employee is not expected to recalled to work within 8 weeks, or is unable to provide a recall date, or provides a recall date longer than 8 weeks away, the employee will be required to commence the work searches and register with the Wisconsin Job Service immediately upon applying for an initial claim. Failure to meet the job search requirements could cause the loss of unemployment benefits.

For many employers and employees who are engaged in seasonal industries, this has become quite an imposition. Many seasonal layoffs in Wisconsin last more than 8 or 12 weeks due to the nature of the industry. Therefore, employees who have become accustomed to being laid off and not having to search for work discovered that is no longer the case. Likewise, seasonal employers are not happy with the change due to the risk of losing valued employees who now must engage in a work search and may be tempted to take different employment. Moreover, employers in many of the seasonal industries are now being inundated with applications from employees who are engaging in a "work search" who are not really interested in different employment but must engage in the required number of work searches to remain eligible for benefits.

One approach that appears to be meeting with Department approval is to recall employees during a seasonal layoff for a week of training. An employee who returns to work for at least one week for the original employer who laid him off can close his current unemployment claim during the week he performed work for his employer and then open a new claim the following week when the employer lays him off again. This starts the 8 or 12 week period running again.

Despite the uproar over this change in work requirements for seasonally laid-off employees, there does not appear to be present momentum to change the law back to its 2004 through 2015 version.

Switchblades and Employers (2015 Wisconsin Act 149)

Effective February 8, 2016, this law repealed the state's prohibition (which existed for more than 50 years) on manufacturing, selling, transporting, purchasing, or possessing a switchblade. How does this law exactly affect employers? While the law does allow local governments to ban knives in municipal buildings, it prohibits local governments from enacting knife regulations stricter than state law. However, the Department of Justice has stated that knives are still prohibited from schools, claiming the knives are classified as dangerous weapons.

For private employers, the impact may be felt based on Wisconsin's Concealed Carry Law. Wisconsin's Concealed Carry Law, which went into effect in 2011, allows the carrying of a concealed weapon with a state issued license. Employers may prohibit an employee from carrying a concealed weapon or particular type of concealed weapon in the course of the employee's employment or during any part of the course of the employee's employment. However, an employer may not ban an employee, as a condition of employment, from carrying a concealed weapon in the employee's own motor vehicle, regardless of whether the motor vehicle is used in the course of employment or whether the motor vehicle is driven or parked on property used by the employer.

Thus, Wisconsin employers may wish to consider updating their handbooks and policies to specifically address switchblades.

Workers' Compensation Law Changes (2015 Wisconsin Act 180)

As is customary every two years, the Wisconsin Workers' Compensation Advisory Committee, composed of equal numbers of labor and management representatives, proposed changes to the Worker's Compensation Law which the legislature accepted and the governor has signed. In total, there were about two dozen changes which took effect March 2, 2016, many of which deal with maximum rates, procedural issues, or other technical matters. However, there were a handful of significant changes which employers should be aware of.

Fraud

The law has always required insurers or self-insured employers to report evidence of a false or fraudulent claim to DWD and for DWD to investigate and refer the matter to a district attorney in the county in which the violation was alleged to have taken place or to the Department of Justice. The law was amended to provide one DOJ position would be funded and devoted to investigating and prosecuting fraud committed by employees, employers, insurance companies, and providers.

Statute of Limitations

The time period for filing a claim for a traumatic injury has been reduced from 12 years from the date of injury or the date of the last payment of indemnity benefits to six years. (The period for filing for occupational disease remains 12 years). While many employers are shocked to hear an employee has 12 years to file a claim, that has been the law for a long time. This change cuts that time in half. The likely result of this change is that employees who have suffered certain injuries where the full scope of the injury and the employee's eventual limitations are not immediately known may be forced to file a claim in order to preserve their right to obtain treatment and benefits.

Apportionment of Permanent Disability

This new provision requires apportionment of permanent partial disability in cases of traumatic injuries between that disability caused by the work injury and that caused by other factors. Any practitioner who prepares a report on permanent disability shall address the issue of causation of the permanent disability that includes a determination of the percentage of permanent disability caused by the direct result of the work-related injury and the percentage attributable to other factors before and after the injury. An employee who claims a work-related injury must disclose, upon request, all previous permanent disabilities or physical impairments and the records needed to make an apportionment determination. The end result of this modification of the statute may result in more litigation between the parties regarding apportionment.

Discharge or Suspension for Misconduct or Substantial Fault

The law now provides that temporary total disability payments will be denied when an employee who was released to light-duty work is suspended or terminated due to misconduct or substantial fault connected with the employee's work. It is unknown whether this provision applies only if the employee remains under temporary restrictions.

Violation of Employers' Alcohol/Drug Policy

There previously was a provision in the law requiring a 15% reduction of all indemnity benefits paid to a worker if the injury resulted from the employee's intoxication by alcohol or controlled substances. The reduction was limited to a maximum of $15,000.00. Under the revision to Section 102.58, if an employee violates the employer's policy concerning employee drug or alcohol use and is injured, and if the violation is causal to the employee's injury, then no compensation or death benefit is to be paid. (Incidental Compensation, including all medical expense, still must be paid).

Because the penalty for violating drug and alcohol policies has been increased substantially, it is likely that such cases may be tried more aggressively and appealed to the courts. The main issue in such cases will likely be whether the drug or alcohol usage was "causal to the injury".

Franchisors Not Joint Employers (2015 Wisconsin Act 203)

Effective March 1, Act 203 specifically clarifies that a franchisor is not the employer of a franchisee's employee under several areas of Wisconsin's employment laws. Specifically, the Act amends the definition of an employer for the purposes of Unemployment Insurance, Workers' Compensation, employment discrimination, minimum wage, and wage payment statutes.

The Act defines franchisor as provided by the Federal Trade Commission under 16 CFR 436.1(k) as follows:
"Franchisor means any person who grants a franchise and participates in the franchise relationship. Unless otherwise stated, it includes subfranchisors. For purposes of this definition, a "subfranchisor" means a person who functions as a franchisor by engaging in both pre-sale activities and post-sale performance."

The law specifically provides that a franchisor can only be considered an employer of a franchisee's employees if: (1) the franchisor has agreed in writing to assume that role; or (2) the Department of Workforce Development, in administering the particular employment law, has found the franchisor has exercised a

degree of control over the franchisee or the franchisee's employees that, "is not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks or brands."

Whether franchisors may be considered the employers of their franchisee's employees has become one of the most controversial topics in employment law over the last couple of years. The National Labor Relations Board has recently endorsed an expanded joint employer standard. The Department of Labor has also indicated an expansive interpretation of joint employers which may result in franchisors consider being employers of franchisee's employees as well. In addition, a number of courts across the country have considered whether franchisors may be liable for the workers' compensation coverage of the franchisee's employees.

The franchisor/franchisee and joint employer issue will continue to be an important issue for employers to follow.

Bone Marrow or Organ Donor Leave (2015 Wisconsin Act 345)

This law allows an employee to take no more than six weeks of leave in a 12-month period for the purpose of serving as a bone marrow or organ donor if the employee provides written certification that the employee will be a donor. This law uses many of the same provisions and definitions of the state family and medical leave law. Notably the employer must employ 50 or more employees and the employee must have worked for the employer for 52 consecutive weeks and worked at least 1,000 hours in the last 52 weeks in order to be eligible. The law does not require pay, but does allow substitution of paid or unpaid leave provided by the employer. And, the law does provide job protection upon return from leave.

Summary

Staying abreast of employment law changes is not easy. However, employers who continually review their policies and procedures to account for legislative changes may face fewer issues later.

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