San Diego Chapter American Payroll Association Newsletter ~ 4th Quarter 2013

Articles, info, contents:

Look for Year-End updates and payroll change notices throughout the coming months with supplemental postings!

IRS Imposes Strict Rules Taxing Mandatory Tips

It is common practice for restaurants and hotels to charge customers an automatic gratuity for large parties (example: 18% for parties of 10). However, based on a recent IRS publication, automatic gratuities may constitute wages. Employers in the hospitality industry may now need to change their mandatory gratuity practices.

Generally, the burden of reporting tips falls on the employee. Employees that receive more than $20 in cash tips (cash, debit/credit cards) per month are required to report the tips to their employers by the 10th day of each month. The employer is then required to withhold FICA taxes, similar to non-tip wages. An employer is not liable for their share of FICA taxes if the employee fails to report tips.

The new IRS bulletin re-defines what is considered a tip. Effective January 2014, employers are required to treat mandatory gratuities as "service charge wages" instead of tips. This *directly* affects an employer's responsibility to report and pay FICA taxes, as well as, overtime calculations.

Under the new guidelines (Rev. Rul. 2012-18) the IRS stated the difference between a tip and wage requires a factual determination considering all the circumstances. The IRS will generally categorize a payment as a tip (versus a wage) when: (1) the payment is made free of compulsion; (2) the customer retains the right to determine the amount; (3) payment is not subject to negotiation or employer policy; and, (4) the customer determines who gets payment.

Based upon the guidelines, automatic gratuities are no longer considered tips. Customers do not have a choice whether or not to leave a mandatory gratuity and are forced to leave a specified amount set by the employer. The IRS distinguished a situation where the employer provides the customer a receipt with recommended tipping amounts from the mandatory gratuity issue. Absent choice by the customer an automatic gratuity is now considered part of the employee's wages.

For employers, this means the burden is now on the employer to incorporate automatic gratuities into an employee's wages, rather than rely upon the employee to report their tips.

In addition, automatic gratuities, as wages, must be considered part of the employees overall pay rate. This will directly affect the employee's rate of overtime. Employers are required to pay overtime of one and half times an employees *regular rate of pay*, which now *includes* mandatory gratuities. Employers must pay close attention to the employee's rate of pay to avoid underpayment of overtime wages.

There is no doubt that the IRS has created a headache for restaurants, hotels, and the hospitality industry in general. Employers should reevaluate tipping policies and adjust wage policies if mandatory service charges will be imposed. Employers can avoid these issues by discontinuing mandatory gratuity practices and leaving the decision to tip to the customers.

Commute in Company Vehicle Creates Legal Quandary

Company risk managers are rightly concerned about avoiding liability any time an employee drives on the job, or commutes in a company vehicle. Although a few recent California cases have blurred the line for employers, the court in *Halliburton Energy Services, Inc. v. Department of Transportation* gave one California employer a break.

Troy Martinez worked as a directional driller for Halliburton. The company provided Martinez with a company truck and assigned him to work on an oil rig approximately 140 miles from his home. One day, Martinez decided to drive the company truck over 100 miles to meet his wife and children for dinner. After visiting with his family, Martinez started the 100 mile drive back to the jobsite. On his way back to work, Martinez was in an auto accident and injured six people.

The accident victims sued Halliburton. Generally, an employer is liable for acts committed by an employee that occur within the course and scope of the employment. The injured plaintiffs argued the accident occurred during the course of Martinez's employment because he was driving back to work in a company truck.

Under the "going and coming rule" an employer is generally not liable for acts committed by the employee while "going and coming" from work. However, there is an exception to this rule when an employer provides a company vehicle for the employee. Under the "incidental benefit exception" an employer who "furnishes, or requires the employee to furnish, a vehicle for transportation on the job" may be liable for the employee's negligence caused while traveling to and from work. In this case, the accident victims relied upon this exception to hold Halliburton liable because Halliburton provided Martinez the truck and the accident occurred while he was returning to work.

Ultimately, the court disagreed with the plaintiffs' arguments and did not hold Halliburton liable. The court held the incidental benefit exception only applied when the "employee does not deviate substantially from the commute to pursue his own personal business." Here, Martinez chose to drive over 100 miles to visit his family which was a "complete and material departure from his employment duties [and] it could not be considered an activity in pursuit of the employer's business. " Thus, Halliburton was not liable for the accident regardless of the fact that Martinez was driving a company vehicle at the time and returning to work.

Staffing Company Hit with FMLA Violations but Its Client Let Off the Hook

A recent California case dealt with the issue of whether or not an employer is liable for Family Leave Medical Act (FMLA) violations when it utilized a staffing agency to hire the employee. The Court held the employer was *not* liable because the staffing agency was the "primary employer" and it failed to seek the employee's reinstatement.

New Baby, No Job

In *Cuellar v. Keppel*, Perma-Temp Personnel Services, Inc., Perma-Temp and Keppel Amfels, LLC had a longstanding business relationship, where Perma-Temp provided staffing services to Keppel. In 2007, Keppel had a job opening and hired Jessica Culler ("Cueller") based upon Perma-Temp's recommendation. During her employment, Cueller became pregnant and notified both Cueller and Keppel that she needed medical leave.

When Cueller went on maternity leave, Keppel hired a replacement employee. Keppel then told Perma-Temp that Cueller's position was terminated. Once Cueller was released back to work, Keppel notified Cueller that her position was no longer available. Cueller then notified Perma-Temp. Instead of referring Cueller back to Keppel or asking Keppel to reinstate Cueller's position, Perma-Temp encouraged Cueller to seek unemployment benefits.

Cueller sued Keppel for FMLA violations including: (1) interfering with her rights by convincing Perma-Temp not to seek her reinstatement; and, (2) retaliating against her for exercising her rights.

Joint Employers

The FMLA is a federal law that guarantees eligible employees twelve weeks of leave within a one-year period relating to the birth of a child. Under the law, the employee is guaranteed the same position they previously held, or a comparable position with equivalent pay and benefits, upon return from leave. When a staffing agency is involved there is an issue about whether the staffing agency, the employer, or both, are subject to FMLA requirements.

Under the FMLA employers are considered "joint employers" when "two businesses exercise some control over the work or working conditions of the employee." Thus, in the staffing agency context, the staffing agency and employer would be considered "joint employers." A joint employer's FMLA obligations depend upon whether the employer is

considered a "primary" or "secondary" employer. Generally, staffing agencies are considered primary employers.

The primary employer is responsible for providing FMLA leave and for restoring the job after leave. Job restoration is the *primary responsibility* of the primary employer. Differently, the secondary employer "is responsible for accepting an employee returning from FMLA...*if* it continues to utilize an employee from the temporary replacement agency, *and* the agency chooses to place the employee with the secondary employer." Thus, the staffing company client, as the secondary employer may be held liable when the staffing agency attempts to place the employee with the employer after leave, but the client refuses to accept the employee.

Here, the Court found Perma-Temp was the primary employer of Cueller. Further, the client Keppel did not commit any FMLA violations because Keppel was entitled to rely upon Perma-Temp to provide FMLA leave. Keppel was only required to accept Cueller back *if* Perma-Temp referred her back to Keppel. The Court reasoned, "Keppel acted within its rights to replace Cueller temporarily, and had no obligation to reinstate her absent a request from Perma-Temp." Instead of requesting Cueller be reinstated or referring her back to Keppel, Perma-Temp told Cueller to seek unemployment. Thus, the Court held Keppel was not liable for FMLA violations regardless of the fact Keppel told Perma-Temp that Cueller's job was terminated. This decision opens the door to liability for Perma-Temp as the primary employer. Further, it places a majority of the responsibility regarding FMLA compliance on the staffing agency's shoulders.

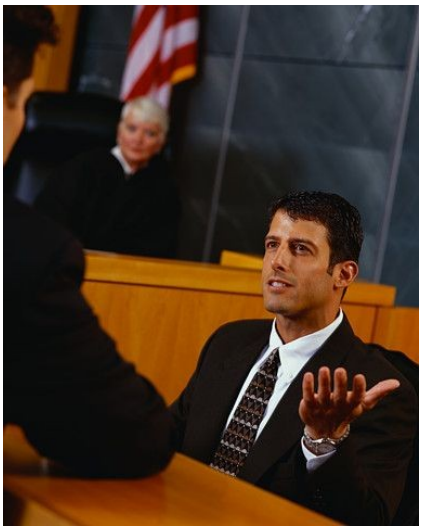
Practical Tips:

Staff with Care. Staffing agencies are primarily responsible for administering FMLA leave for their temporary employees. Therefore, the staffing agency should carefully administer leave to ensure compliance with FMLA, including ensuring reinstatement upon conclusion of the leave.

Reinstate. Staffing companies should endeavor to refer employees back to the client after medical leave, or if that is not possible because the assignment has ended, to reassign the employee. Likewise, client companies should be prepared to accept the employee upon conclusion of the leave.

Train. Train employees on FMLA requirements so employees do not give incorrect advice such as suggestion someone seek unemployment when they are entitled to reinstatement.

Can Employers Sue Employees For False Unemployment Claims?



Employers frequently bemoan the fact that some terminated employees apply for unemployment benefits under false pretenses. What can an employer do about it? Not much. In *Kurz v. Syrus Systems, LLC,* a California appellate court held an employer was barred from brining a malicious prosecution based upon an employee's frivolous unemployment claim.

Edward Kurz was employed by Syrus Systems, LLC as an independent contractor. Kurz provided general bookkeeping services to Syrus and was paid a flat fee of $40,000 per year. Kurz had access to Syrus's bank account in order to issue payments. However, the bank pass code was changed and Kurz was unable to access the account. Kurz assumed he was terminated despite reassurances from Syrus he was not terminated.

Ultimately, Kurz filed a claim with EDD for unemployment benefits. Syrus argued Kurz was not entitled to unemployment because he was not terminated. (And arguably he was not entitled to benefits if he was in fact an independent contractor.) Ultimately, the Unemployment Insurance Appeals Board ruled in favor of Syrus and denied Kurz's request.

Kurz then filed a civil suit against Syrus for wrongful termination. In response, Syrus counter-sued Kurz for malicious prosecution. Syrus argued Kurz prosecuted the unemployment benefits claim knowing he was not terminated and his claim was invalid.

To prevail on the malicious prosecution claim, Syrus was required to show the prior unemployment action: (1) was commenced by or at the direction of Kurz and resulted *in legal conclusion of the case in favor of Syrus*; (2) was brought without probable cause; and, (3) was initiated with malice.

The company lost on a technicality applicable to unemployment matters. Technically, the Unemployment Insurance Code bars evidence relating to the outcome of prior EDD proceedings. Therefore, without the ability to introduce evidence of the outcome of the unemployment hearing, Syrus was unable to meet the first element required to prove malicious prosecution - legal termination in its favor.

The result of this ruling is that employers cannot bring malicious prosecution actions against employees that bring frivolous EDD unemployment claims. Employers are barred from introducing evidence of EDD proceedings which precludes employers from demonstrating a prior favorable termination. This is an unfortunate ruling for California employers.

An employer's only recourse in response to a meritless claim is to fight the claim within the EDD system. Employers needing guidance on how to disqualify terminated employees from receiving benefits should contact an employment law attorney.

Celebrate and enjoy! Happy New Year!

Spinach and goat cheese tartlets

Ingredients

- 4 tablespoons unsalted butter
- 3 sheets frozen phyllo dough, thawed
- 2 tablespoons grated parmesan cheese
- Vegetable oil, for brushing
- 1 large shallot, minced
- 1 clove garlic, minced
- 1 teaspoon all-purpose flour
- 1/4 cup milk
- Pinch of freshly grated nutmeg
- Kosher salt and freshly ground pepper
- 3 1/2 ounces mild goat cheese, softened
- 2 teaspoons finely grated lemon zest
- 1 tablespoon white wine vinegar
- 2 large eggs, separated
- 1 10-ounce box frozen chopped spinach, thawed and squeezed dry
- Chopped chives, for garnish

Directions

Preheat the oven to 350 degrees. Melt 1 tablespoon butter. Place 1 phyllo sheet on a clean surface (cover the other sheets with a damp towel), brush with melted butter and sprinkle with 1 teaspoon parmesan. Cover with another phyllo sheet, brush with more butter and sprinkle with another teaspoon parmesan. Top with the remaining phyllo sheet and brush with butter. Cut the phyllo stack into 24 squares, about 3 inches each. Brush a 24-cup mini muffin tin with oil, then firmly press a phyllo square, buttered-side down, into each cup. Bake until golden, 10 minutes.

Meanwhile, heat the remaining 3 tablespoons butter in a saucepan over medium heat. Add the shallot and garlic and cook until translucent. Stir in the flour, then add the milk and stir until the mixture is smooth, 1 minute. Add the nutmeg, 1/2 teaspoon salt, and pepper to taste. Stir in the goat cheese, lemon zest and vinegar until the cheese melts. Remove from the heat and mix in the egg yolks, then the spinach.

Beat the egg whites to stiff peaks and fold into the spinach filling. Spoon about 1 tablespoon filling into each phyllo cup and top with the remaining parmesan. Bake until the filling is set, 15 minutes. Cool slightly in the pan; remove and top with the chives.

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