

Special points of interest:

- Employment-at-will
- NLRB Weingarten decision reversed.
- Breaking News
- FLSA exemption review
- It's the people . . . Stupid! Review

2004

Employment-at-will

The Human-side

J. ASHCRAFT AND ASSOCIATES, INC.

Employment-at-will is a doctrine that says your employee may quit his or her job at any time for any reason: at the same time employers may terminate an employee at any time and for any *lawful* reason short of an employment contract for a specified time frame.

More and more courts have challenged the doctrine in cases where employees have completed a probationary or introductory period. In both *Fregara v. Jet Aviation* and *Witkowski v. Thomas J. Lipton, Inc.* the courts ruled that the employee completing the probationary period, or introductory period in the latter case, "could reasonably believe he would be discharged only for just cause" . . . "that an employee completing the period has earned the protection of a just cause termination requirement".

It goes back to a properly worded paragraph in your employee handbook. Carelessly worded references to a probationary or introductory period risks being interpreted as an implied contract thereby providing your employee with increased job security after completing the initial period, regardless of what it is called.

Generally, introductory periods are used as a means of letting your employee demonstrate his or her ability to learn the job and a time to see how well the employee fits into the organization. More than anything it is a time to train the employee to be a useful member of the team.

These periods represent a valuable tool for you. Don't run away in fear of the law. As we so often urge, use the law to benefit your operations.

We suggest you avoid creating different classifications for employees. What benefit do you gain by calling an employee a probationary or introductory employee? What is the benefit of referring to an employee as a permanent employee? It is sufficient to refer to an employee as an employee. That is what they are. Why classify them as anything different? Think about it. If a person is classified as 'probationary' or 'permanent' or full-time, what do the terms imply? Well, they imply a contract and that may require for-cause termination. Don't say an employee can be 'fired' at any time as a probationary employee and not carry the thought through for all employees.

Employment-at-will is for all employees. The 'introductory period' is a time for learning and adjusting to a new environment, nothing more.

NLRB Reverses Weingarten

The NLRB reversed the *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. 676 that gave non-union employees the right to representation during investigatory hearings that may lead to discipline. In *IBM Corp.*, 341 N.L.R.B. No. 148 the board reversed the previous ruling by a 3 - 2 vote.

While we advised employers about this incur-

sion into management rights by the N.L.R.B. on several occasions, most nonunion workers had little knowledge of the rights for representation that had been extended by the Board. However, the current, more conservative, Board has now reversed the decision. For now, an employee in a non-union operation cannot demand representation.

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Pay Deductions

In addition to the rules governing overtime, the new FLSA regulations regarding deductions from pay have also changed. The new regulations state that if an employer has a practice of making improper deductions from the pay of exempt employees, the employer will lose the exemption for the entire class of employees who work for that manager in that classification.

The regulations emphasize, however, that improper deductions that are either isolated or inadvertent will not result in loss of the exemption as long as the employer reimburses the employees for improper deduction from their pay.

As most of you are aware, a salaried employee is paid a salary for a fixed period of time. That pay may not be interfered with because of absences, tardiness, sick time and the

However the new regulations have provisions allowing employers to properly deduct salary wages under prescribed conditions. To deduct wages improperly will lead to loss of exemption not only for a particular employee but the entire class of employees.

To prevent loss of exemption, the employer must have a clearly communicated policy which includes a complaint mechanism, that prohibits improper deductions, reimbursement to the employee for improper deductions, and make good faith commitment to comply with the regulations in the future.

Willful violations and repeat deductions will result in loss of exemption.

A clear policy includes a written policy distributed to all employees prior to any improper deductions. We suggest the policy be given to all new hires and be included in the employee handbook.

The Human-side

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Information contained herein is the opinion of the publisher and does not represent advice or counsel to the reader. Should there be any questions, please call **941-400-0483** before you act on any matter contained in this newsletter.

J. Ashcraft
Editor

“It is the trade of lawyers to question everything, yield nothing, and talk by the hour.”

-Thomas Jefferson-

In the News

ITEM: Overtime rules set to take effect even though opponents maneuver to block them. There is still a lot of activity in Washington, DC to derail new overtime rules. However, the rules are likely to take effect in August.

ITEM: More firms are keeping an eye open on outgoing e-mail. Companies battling ‘spam’ and viruses cause more businesses to watch outbound e-mail that contains sensitive information or breaks rules.

ITEM: Weingarten rule reversed by the NLRB. Previous ruling letting nonunion employees have representation in probable disciplinary meetings with management has been reversed by the current Board.

ITEM: Contrary to popular belief, the Fair Labor Standards Act does NOT require breaks. Caution, however, some state laws do dictate break and lunch periods.

ITEM: House of Representatives approved a bill allowing employees to roll over dependent care benefits in FSAs (Flexible Spending Accounts)

ITEM: According to Mercer Human Resources Consulting an improved economy will not lead to larger pay raises this year. Employers are looking at around 3.3% increases in 2004 and 3.5% for 2005. According to Mercer, employers are looking to promote retention by focusing on non-monetary and spot cash awards.

ITEM: The U.S. Senate is set to deliberate bill S-20 which would raise the minimum wage \$1.50 over two steps. One increase of \$0.75 would be effective 60 days after passage. The second \$0.75 would go in effect one year after the first.

ITEM: Several bills are being discussed that would allow small businesses to pool together to purchase health insurance through associated health plans (AHPs). Some include rolling over up to \$500 of FSA money into the next year.

FLSA Wrap-up: a review of changes due August 23, 2004

NEW EXEMPTION TESTS WILL BE IN PLACE ON AUGUST 23, 2004. ACCORDING TO THE DOL THEY WILL BE PREPARED TO BEGIN COMPLIANCE AUDITS IMMEDIATELY. HERE ARE THUMBNAIL COMPLIANCE GUIDELINES FOR EXECUTIVE, ADMINISTRATIVE, LEARNED PROFESSIONAL, CREATIVE PROFESSIONAL, AND COMPUTER RELATED PROFESSIONS.

SALARY BASIS TEST: FOR ALL EXEMPTIONS \$455 PER WEEK (\$23,660 ANNUAL) That means anyone earning a salary of less that \$455 per week must be paid overtime regardless of job title and duties. Of course, all HOURLY employees must be paid overtime regardless of pay. To be exempt from overtime an employee must be paid on a salary basis (except for Computer Professional).

EXECUTIVE EXEMPTION:

Primary duty **MUST** be managing the enterprise; or managing a customarily recognized department or subdivision of the enterprise, **AND**

MUST customarily and regularly direct the work of at least two or more full-time employees or their equivalent (one full-time and two part-time, or four part-time for instance.) **AND**

MUST have the authority to hire or fire or his/her recommendation to hire or fire, advance, promote or any change of status **MUST** carry particular weight.

ADMINISTRATIVE EXEMPTION:

Primary duty **MUST** be in the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customer, **AND**

MUST include the exercise of discretion and independent judgment with respect to matters of significance.

PROFESSIONAL—LEARNED:

Primary duty **MUST** be performing work requiring advanced knowledge, intellectual, and requiring the exercise of discretion and judgment.

Advanced knowledge **MUST** be in a field of science or learning, **AND**

The advanced knowledge **MUST** be customarily acquired by a prolonged course of specialized intellectual instruction.

PROFESSIONAL—CREATIVE:

The primary duty **MUST** be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

COMPUTER PROFESSIONAL:

Salary Basis test is either \$455 per week or \$27.63 per hour.

The employee **MUST** be a systems analyst, programmer, software engineer or other similarly skilled worker in the computer field.

The primary duties consist of application of system analysis techniques and procedures, design, development, testing, creating, modifying of computer systems, including prototypes, as a consultant with users, determining hardware, software or systems functional specifications.

J. Ashcraft and Associates, Inc. has an Exemption Work Sheet available to our clients. Use of these worksheets will make determining exemption status far easier and less time consuming.

"You cannot help men permanently by doing for them what they could and should do for themselves."

-Abraham Lincoln-

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. . . solving HR problems. . . creating HR solutions . . .

It's the People . . . Stupid!

Our web site now has the paper "*It's the People . . . Stupid!*" running in serial form. The paper is a simplified guide to managing people, taking this very important function and breaking it down into understandable basics.

We believe managing the human-side of enterprise is the most critical aspect of a business' success. Yet many place this aspect of the business in a role secondary to finance, sales and marketing. Consequently, hundreds of millions of dollars are spent each year in defending law suits brought on by employees, or ex-employees. All of this could be avoided if we manage our people within the confines of the law, rules and regulations.

Part I discusses the basic function of managers. Unlike many of our beliefs, the primary job of managers of people are the people they manage. The job is



Know your people.

not the almighty part, production or inventory. It's people. In Part II, the confines under which we must manage is discussed while Part III, added in late July, discusses all of the confines of management, be they rules, policy, employment or labor law. Most of the restrictions we face are self imposed yet we tend to blame Congress and governmental red tape for our failures.

Future issues will discuss the over one-hundred years of academic study showing us the values our employees develop, why they work, what motivates and directs their actions. Bad employees and disciplinary problems we face just may be a result of our own actions, or lack thereof.

If you have an interest reading this paper please go to our web site at www.hr-only.com. You will find "*It's the People . . . Stupid!*" under the 'News' tab. We hope you enjoy this effort. Let us know. The next unit is due in late Sep-