



# Employment, Labor & Benefits Update

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MasudaFunai

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## Labor Board Trumps the Donald

By Alan M. Kaplan

In another reminder that companies need to carefully phrase policies and rules, the National Labor Relations Board (“Labor Board”) has again found a violation of federal labor law when a company has gone too far in restricting its employees’ rights. In its Employee Handbook, Trump Marina Casino Resort in Atlantic City, New Jersey, prohibited “[r]eleasing statement[s] to the news media without prior authorization...only the following employees, Chief Executive Officer, the respective property’s Chief Operating Officer, General Manager or Public Relations Director/Manager are authorized to speak with the media.” When a union supporter spoke to the media and was quoted in the press, one of his supervisors confronted him about his conduct and reminded him of the policy. The employee was not disciplined.

Was Trump Resort’s action proper? One would think so. However, the Labor Board found that the rule interferes with the right of employees to communicate with the public concerning an ongoing labor dispute. Merely maintaining and enforcing rules restricting employees from speaking to the media about protected concerted and union activities violates Section 8(a)(1) of the National Labor Relations Act.

Trump Resort contended that the rule merely set forth who was authorized to speak to the media. However, the judge noted that the handbook stated that employees would be disciplined for violating the rule. In addition, the director of employee relations and diversity testified that the purpose of the rule was “[t]o prevent any statements that have anything to do with proprietary information or confidential information [such as] customer lists, marketing plans, new table game products, new slot products.” In response, the judge found that the stated purpose had nothing to do with the wording of the rule and the employee’s conduct. Thus, the scope of the rule was too broad and interfered with the employee’s rights.

Importantly, this decision was a unanimous decision by the two members of the Labor Board, one Democratic and one Republican.



If and when the Senate approves three new Labor Board members, we expect the Labor Board to issue similar and more extensive rulings concerning policies in employee handbooks. Therefore, companies should not merely add new rules to handbooks or orally state them without considering the implications under the National Labor Relations Act. A thorough review by counsel experienced in traditional labor law is required.

### **Senate Passes Jobs Bill Encouraging Hiring With Tax Incentives**

By Frank J. Del Barto

On Wednesday, February 24, 2010, the U.S. Senate passed the Hiring Incentive to Restore Employment Act (the "HIRE Act"). The HIRE Act, which was passed in a 70-28 vote, includes a new jobs creation payroll tax exemption for employers. Specifically, the HIRE Act provides employers with an exemption from having to pay their portion of the 6.2% Social Security payroll tax for every worker hired **after** February 3, 2010 and **before** January 1, 2011 who was previously unemployed for a period of at least 60 days. The HIRE Act also provides a \$1,000 employee retention income tax credit for every new employee retained for 52 weeks. The tax credit is to be taken on the employer's 2011 income tax return. The Senate's HIRE Act now must be sent to the House, where it will likely be reconciled with the House version that was passed in December 2009.

According to Senate Finance Committee Chairman Max Baucus (D-Mont.), "*the HIRE Act is a targeted approach that will cut taxes for businesses, helping them grow and hire more employees and create new jobs rebuilding America's crumbling infrastructure. Today's passage of the HIRE Act is the first step in the Senate's job agenda to put Americans back to work and strengthen our economy.*" Critics of the HIRE Act suggest that its tax-based hiring incentives will not promote the hiring of new employees fast enough to be meaningful.

### **DOL Will Continue to Target Employers That Misclassify Workers**

By Frank J. Del Barto

Built around a vision of "good jobs for everyone," President Obama's fiscal year (FY) 2011 budget includes a request for \$117 billion for the U.S. Department of Labor ("DOL"). As part of this DOL budget request, \$25 million has been earmarked to (1) fund a joint Treasury-DOL initiative to detect and deter the improper misclassification of employees as independent contractors and (2) strengthen and coordinate Federal and State efforts to enforce labor violations arising from misclassification. To implement these initiatives, the DOL expects to hire 90 additional wage and hour investigators.

Individuals wrongly classified as independent contractors are denied access to many benefits, including but not limited to: health insurance, retirement plans, vacations, sick days, family and medical leaves, overtime, workers' compensation, unemployment insurance and the protections of many federal and state civil rights laws that protect employees. In the last comprehensive estimate, the Internal Revenue Service estimated that 15% of all employers misclassified a total of 3.4 million workers as independent contractors, resulting in an estimated annual revenue loss of \$1.6 billion (in 1984 dollars).

While misclassification occurs in all industries, the DOL has indicated that misclassification is more prevalent in several high risk industries, including construction, janitorial, home health care, child care, transportation and warehousing, meat and poultry processing and other professional and personnel service industries. Further, the DOL notes that many studies have concluded that the construction industry, in particular, contains a significant amount of misclassified workers.



All employers must be on notice that the DOL is very serious about pursuing the improper classification of workers as independent contractors. As a preventative measure, all employers should begin reviewing their arrangements with their “independent contractors” to ensure that the individual is properly classified. A written agreement will not be enough to establish independent contractor status. The DOL will be looking beyond the written agreement to determine how much control the company has over the activities of the independent contractor’s duties. In general, the more control that a company possesses over the activities of an independent contractor, the less likely that the DOL will agree that the individual is properly classified.

*For more information about this or any other employment law topic, please contact Nancy Sasamoto, Chair of the Employment, Labor & Benefits Group, at 312.245.7500 or via email at [nsasamoto@masudafunai.com](mailto:nsasamoto@masudafunai.com).*

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### About the Employment, Labor & Benefits Group

Masuda Funai’s Employment, Labor and Benefits Group provides expertise in all aspects of employment and labor law. Our attorneys represent management in everything from day-to-day counseling to employment litigation, training, reorganizations, benefits and compensation plans, OSHA issues, union campaigns and collective bargaining. Our attorneys regularly conduct employment audits, present seminars and publish articles and newsletters to help keep our clients up to date about the ever-changing world of employment and labor law.

### About Masuda Funai

Masuda Funai is a full-service law firm representing international and domestic companies operating and investing in the United States. Our 45 attorneys located in Chicago, Schaumburg and Los Angeles counsel clients in every aspect of business, including establishing, acquiring, and financing operations; ownership, development and leasing of real estate; transfer of overseas employees to the U.S.; employment, labor, and benefits counseling and dispute resolution; intellectual property, copyright and trademark; business litigation; creditors' rights and business risk management; structuring the distribution and sale of products and services throughout the U.S.; and estate planning and administration.

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