

Fall 2003

Cost-Effective Benefits for Part-Time Workers

By Evelyn A. Haralampu

Employers hire part-time employees for many reasons. In a tight economy, for example, employers that do not want to commit overhead to full-time employees often consider hiring part-timers. Alternatively, some employers choose to avoid layoffs by reducing work schedules from full-time to part-time, allowing the retention of good employees in a slow business environment. In addition, some employees themselves seek part-time schedules, such as retirees looking to return to work, temporarily disabled employees, and employees caring for small children or aging parents. Others who choose part-time work include individuals who may be teaching, writing or pursuing additional schooling.

In many cases, employers offer part-time employees fewer benefits than full-time employees, or no benefits at all. However, from the employer's perspective, providing benefits to part-time employees can yield significant economic advantages. For example, providing benefits to experienced part-time employees helps the employer attract and retain these employees without incurring the training costs of new employees or other overhead associated with full-time employees, while maintaining or increasing production. In these situations, the incremental cost of providing benefits to part-time workers is far outweighed by the employees' value to the business.

Avoiding legal pitfalls is important in designing compensation policies for part-time workers. In some circumstances, for example, excluding part-time employees from a tax qualified retirement plan program can present tax and other problems. Likewise, treating part-time employees as independent contractors can lead to numerous costly legal and tax issues, including tax withholding liabilities and penalties and potential taxation of an otherwise tax-

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exempt retirement fund. Similarly, paying exempt employees on an hourly basis can destroy the exempt status and open the door to liability for overtime pay. Thus, proper design of the compensation program for part-time workers is imperative to ensure its cost effectiveness.

A properly-structured benefits program for part-time employees will not only eliminate certain legal pitfalls, but it will also minimize costs to the employer and maximize benefits and tax advantages to the employee. For example:

Medical Benefits: Medical benefits and certain insurance benefits are cheaper if purchased at group rates. Medical benefits often motivate an individual's acceptance of a part-time position because an individual's cost of medical insurance through an employer's group is much cheaper than buying an individual policy. Strategies for reducing the cost of providing employees group medical insurance include choosing less expensive health insurance programs such as HMOs or programs with higher deductibles. In addition, many employers choose to pro-rate the amount of premiums that they pay for part-time employees.

Cafeteria (§ 125) plan: A cafeteria plan allows employees to pay or co-pay their insurance premiums on a pre-tax basis, which defrays the employer's costs of providing certain benefits while giving tax savings to employees. Similarly, a cafeteria plan allows employees to fund their own uninsured medical and day care costs with pre-tax dollars, thus reducing real costs to employees without adding any material costs to the employer.

Retirement Benefits: The annual amount that individuals can contribute to their own IRA is far less than what an employee can contribute to a 401(k) plan that is offered through an employer. The tax advantages available to an employee contributing to an employer-sponsored retirement plan are also far greater than those offered under an IRA. Employers also can reduce their costs of providing retirement benefits by shifting some of the expense to the employee. A 401(k) plan without an employer match, for example, presents a negligible expense to an employer. Also, it costs the employer very little to include part-time workers in a 401(k) plan that already exists for full-time employees.

Tax deductions: The employer may further reduce its cost of providing benefits by taking advantage of tax deductions for the annual cost of providing the benefits. Employer contributions to a retirement plan, medical or other insurance policies are generally deductible to the employer in the year of the contribution, and serve to reduce an employer's total income tax costs.

By providing part-time workers benefits, employers, especially in the service and knowledge-based industries, can increase profits by attracting, retaining and rewarding good employees, creating better morale in the workplace, and providing greater continuity with clients and customers without significant added cost. The key is designing a compensation program that avoids costly pitfalls, minimizes costs to the employer and maximizes benefits to the employee. ■

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Constructive Eviction in Commercial Leases

By Paul R. Mastrocola

The doctrine of constructive eviction essentially permits a tenant in a commercial lease to elect to terminate the lease, abandon the premises, and have no further obligation to pay rent when the premises have become unfit for the use for which they were leased. The law treats the situation as an actual physical eviction without just cause. In most constructive eviction cases, a tenant invokes the doctrine as a defense to a landlord's lawsuit to collect unpaid rent for the balance of the lease term after the tenant has vacated early.

Generally, constructive eviction can be established if all of the following elements are present: (1) there is an act of a permanent character; (2) done or procured by the landlord; (3) with the intention and effect of depriving the tenant of the enjoyment of the premises; and (4) the tenant yielded and abandoned the premises within a reasonable time. The tenant has the burden to prove that a constructive eviction occurred.

All relevant facts and circumstances must be analyzed and the law properly applied to determine whether a constructive eviction has actually occurred. The details are critical. Not every act done by a commercial landlord that interrupts or interferes with the tenant's use and enjoyment of the leased premises may produce the legal consequences of constructive eviction. Acts of the landlord must have some degree of substance and permanence. Landlord conduct that is slight or temporary in effect, although possibly giving rise to some legal redress, will not permit the tenant to regard that conduct as constructive eviction. The landlord's intent is relevant, but wrongful acts of the landlord that render the premises permanently unsafe and unfit for occupancy carry with them the presumption of intent to deprive the tenant of the use of the premises.

A landlord's failure to furnish the tenant with essential services, at least if serious in extent and not excusable, that deprives the tenant of a vital part of what the tenant must have to carry on its business, may constitute a constructive eviction. For example, landlords' failures to furnish reliable electric, heat or elevator service to commercial tenants have been found to constitute constructive eviction. In another case in

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which the court held constructive eviction to have occurred, a landlord installed a defective oil burner causing smoke and soot to enter the tenant's space. On the other hand, in a recent case involving a chronically leaking roof with water damaging the tenant's

printing business' high-tech equipment, the Court held that the landlord breached his obligation to repair, but the landlord's conduct merely made the tenant's operation less convenient and more expensive and did not rise to the level of constructive eviction.

Commercial landlords can minimize exposure to constructive eviction by taking common sense steps, such as acting promptly and diligently to correct serious problems, with particular attention to issues that a tenant might consider "essential services" given the nature of the tenant's business. A landlord should correct the condition as soon as practically possible, demonstrating that the landlord does not intend to deprive the tenant of use of the

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Recently Published Articles

Articles

Address Probate Issue, Protect Your Assets (*Women's Business Boston*, September 2003)

by Ingrid C. Schroffner

Will Your Web Site Preclude or Invalidate Your Patent Rights?

(*Mass High Tech*, Aug. 4-10, 2003)

by Trevor D. Arnold

Cultural Considerations in Massachusetts Courts

(*Massachusetts Lawyers Weekly*, June 30, 2003)

by Ingrid C. Schroffner

Is Your Firm Prepared to Withstand the Threat of Insolvency? (*Boston Business Journal*, June 13-19, 2003)

by Theodore E. Dinsmoor

Ways to Revive a Zombie Company and Have It Stay Among the Living (*Mass High Tech*, May 19-25, 2003)

by Con Chapman

Nondisclosure Agreements, Whistleblowers and Sarbanes-Oxley (*Human Resource Executive Magazine, Workindex.com*, April 21, 2003)

by Renee Inomata

Correctness of Inventorship (April 2003), by Frederick C. Williams

Recent Client Advisories and Updates

New NYSE and Nasdaq Rules for Stockholder Approval of Equity Compensation Plans, *B&L Securities Law Update*, July 2003

Planning for Your Mass Business Trust/QSUB Group

by Howard D. Medwed, July 2003

The President's Tax Cut: Too Good To Be True or Tax Nirvana?

by Howard D. Medwed, July 2003

Liability for Retirement Plan Investment Losses: How Exposed Is Your Business

by Evelyn A. Haralampu, July 2003

Overtime Rules About to Change *B&L Employment Solutions Update*, June 2003

Military Leaves and Age Discrimination, *B&L Employment Solutions Update*, May 2003

Previous Issues of Focus

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State "QTIP" Trust Eases Massachusetts Estate Planning Dilemma by Clifford R. Cohen and Denise A. Lambert

Employment References: The Conditional Privilege

by Jennifer L. Lauro

Early Lease Termination – A Tenant's Perspective by Victor Bass and Christina M. Murray

Corporate Law Update

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Don't Forget Your E-mail: The Need for Electronic Document Retention Policies

By Victoria L. Schmidt

In the wake of Enron and Arthur Andersen, companies have become more aware of the need for corporate policies on document retention and destruction, yet many have not considered their electronic documents within that policy. A company that chooses to ignore such electronic information in its retention policies does so at its peril, especially now when the average office worker receives 60 e-mails per day and almost 100% of all information is created and stored electronically.

Companies first must know what records are required to be kept by law in their particular industry. For example, securities firms are required under federal and state law to retain all business-related records for a minimum of three years. This includes e-mail communications from clients as well as instant messages. Indeed, a securities firm was fined \$100,000 recently by Massachusetts regulators when it was unable to produce certain e-mail messages. The firm had a policy of backing up its e-mail system on tape, but the tapes were reused and copied over before the three year period had expired. The recently-enacted Sarbanes-Oxley Act, if taken literally, requires accountants and publicly-traded companies to keep business records, especially audit-related papers, for seven years. This includes e-mails and other electronic documents.

Electronic data retention policies are also critical for companies in managing discovery costs if litigation occurs. In a survey conducted by the American Management Association for 2002, 14% of organizations surveyed reported that they had been ordered by a court or regulatory body to produce employee e-mails. Such production can often cost in the thousands, if not hundreds of thousands, of dollars. Generally, electronic discovery is not expensive in itself, but wading through poorly organized information to decide what information is to be produced and how it is to be produced can be.

More importantly, this cost is often borne by the producing party, which, in employment disputes, often means the employer. In a recent employment

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discrimination case, a former employer estimated that e-mail messages requested by the plaintiff in discovery would cost \$300,000 to retrieve because the messages would need to be retrieved from 94 backup tapes and then sorted and reviewed in order to determine what to produce. After a lengthy decision by the court, the employer was required at its own expense to produce e-mail from five months of backup tapes as a sample to test the feasibility of the plaintiff's request. In certain cases, a court may even order the producing party to design a computer program to extract the data from its computerized business records, subject to the court's discretion on the allocation of costs. Such costs can be staggering for any company.

Adopting a retention policy, however, is only the first step toward preparing for such scenarios. Companies must alert and train employees on their policies, which are only as effective as the training given. Furthermore, retention policies that directly address e-mails and instant messages are critical to tackling the storage issue caused by such communications, i.e., storage on desktop computers versus e-mail servers. Many companies now maintain e-mails on company servers rather than on desktop computers to avoid searching individual computers in the event of receipt of an electronic document subpoena. Moreover, any retention policy should address not only company file servers, mail servers and personal computers, but also laptops, PDAs and other backup media.

Every document retention policy should also address the destruction of documents. A retention policy does not work if employees do not know what to do with documents once the document's useful life and retention period have expired. Many companies unnecessarily spend thousands of dollars maintaining information beyond required retention periods simply because they have no formal document retention and destruction policy. However, electronic documents are difficult to destroy so any document

retention policy should address this issue. Once retention and destruction policies are in place, it is critical that destruction be strictly maintained according to company policy.

Finally, periodic audits of a company's paper and electronic document retention and destruction should be conducted. Only after an audit, which should include a real-time test of the system, will a company definitively know what information it has and where such information is stored. Indeed, the securities firm recently fined by Massachusetts regulators is a perfect example of how a document retention policy will not protect a company if the policy is not properly drafted, implemented and tested. ■

Recently Published Articles

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Fees Increase In Massachusetts ... But for a Client, Some Relief

By Tracy W. Klay

Massachusetts Number One in Fee Hikes.

In an attempt to raise sorely needed revenue, Governor Mitt Romney and the Massachusetts Legislature have made the state a more expensive place to get married (or divorced), purchase a house, file court documents, or even take the bar exam. Specifically, 56 fees were raised with the passage of the 2004 fiscal year budget. The fees range from the understandable (e.g., an increase in the surcharge on speeding violations to \$50), to the inevitable (e.g., \$75 to have your car towed in Boston (similar to other communities)), and to the seemingly unfair (e.g., a \$10 fee for a certificate of blindness and a \$15 fee for an ID card for the legally-blind). Together, these increases make Massachusetts one of 30 states to enact fee increases this year, but only one of nine to potentially bring in over \$100 million, and the only one to report over \$501 million in fee hikes – with New York in second place with \$367 million.

Although Gov. Romney stuck to his campaign promise of “no new taxes,” largely because raising taxes would have had grave political fallout, the staggering amount and across-the-board application of the fee increases certainly have the feeling of a tax.

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This leads to the question, “Is there any relief from a particular fee increase or must one simply accept it and move on?”

Hazardous Waste Transporter Fee

Burns & Levinson was successful in delaying the full implementation of one of the fee increases, the Hazardous Waste Transporter Fee, which the Administration proposed to increase by 45%. Two large hazardous waste transport companies retained Burns & Levinson to challenge the increase. Working with our clients, we prepared a detailed series of comments to the Department of Environmental Protection challenging the legal basis for the increase. The Romney Administration carefully considered our position and pulled the hazardous waste transporter fee increase from a large package of other environmental fee increases which went into effect as proposed on July 1, 2003. Ultimately, the fee increase was delayed by one month and promulgated as a phase-in over two years: 25% for the first year and 20% in fiscal 2005. Given the political climate, our clients considered this result a significant achievement. ■

Focus

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premises. Landlords should also be mindful that tenants may claim that the repair work itself is so disruptive to the tenant's business as to constitute constructive eviction. Obviously, this presents the landlord with a dilemma, although the landlord may be able to inoculate itself from such a claim by including certain protective language in the lease.

From the tenant's perspective, the tenant must promptly notify the landlord of problems that may constitute con-

structive eviction. It would also bolster the tenant's claim to clearly communicate to the landlord the negative impact of the condition on the tenant's business. Further, the tenant must abandon the premises within a reasonable time in order to successfully assert constructive eviction in the inevitable litigation that will follow. Whether abandonment was within a “reasonable time” is usually a hotly contested issue, but in any event, vacating the premises after the landlord completes corrective action is too late.

Litigation of a constructive eviction case often involves complicated issues of law and fact. Since premature termination of a long-term commercial lease can cause substantial financial harm and devastating business disruption to both parties, landlords and tenants should be fully advised of the doctrine's principles and consequences and how they apply to the particular facts. Only then can informed decisions be made for a landlord to defend or a tenant to assert a constructive eviction claim. ■