Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management January 2005

Route to: _____ _____ _____

In this issue …

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

New York's Minimum Wage Increases to $6.00 Per Hour January 1, 2005

Effective January 1, 2005 the minimum wage in New York will increase to $6.00/hour. On December 6, 2004, the New York State Legislature overrode a veto by Governor George Pataki on a minimum wage bill which was introduced in July.

The bill increases the state's minimum wage from $5.15/hour to $6.00/hour on January 1, 2005; then to $6.75/hour on January 1, 2006; and to $7.15/hour on January 1, 2007. The bill also increases food service tip workers' base hourly wage from the current $3.30/hour to $3.85/hour on January 1, 2005; then to $4.35/hour on January 1, 2006; and to $4.60/hour on January 1, 2007.

The minimum wage bill was introduced in the Legislature on July 20, 2004. The bill passed both houses on July 21, 2004 and was delivered to the Governor on July 22. Governor Pataki vetoed the bill on July 29 citing his desire to see the issue addressed at the federal level. The Assembly quickly responded by overriding the Governor's veto in a special session on August 11 with a 129 to 19 vote. The Senate did not take up the veto override vote until a special session was called by Senate President Joseph Bruno on December 6, when the Senate voted to override the veto by a 50 to 8 margin.

In addition to the requirement that employers pay the new minimum wage, the law also requires all businesses in the state to post the new minimum wage poster by January 1, 2005. The most common poster (covering "miscellaneous industries and occupations") can be found at http://www.labor.state.ny.us/pdf/PART142s.pdf. For other posters or more general information on New York State's minimum wage requirements, please contact our office at 315-437-7600.

U.S. Labor Department Publishes New Youth Employment Rules

The Labor Department recently published its final regulations implementing changes to employment rules for youth. The new rules expand protections for youth working in restaurant cooking, roofing, and driving, among other changes.

The rules incorporate into the regulations the provisions of two statutory amendments to the Fair Labor Standards Act (FLSA) that deal with driving and the operation of compactors and balers by teenage employees.

The first statutory change established criteria permitting 16 and 17-year-olds to load, but not operate or unload, certain waste-material baling and compacting equipment. The second statutory change delineated what limited on-the-job driving may be performed by qualified 17-year-olds.

Provisions are also included to modernize the youth employment provisions regarding what types of cooking 14- and 15-year olds are permitted to perform. The new rules now permit those minors to clean and maintain cooking devices in some situations.

The rules also expand the current prohibition against youth under age 18 working in roofing occupations to encompass all work, including work performed upon or in close proximity to a roof. Under the new provisions,

Continued on next page

U.S. Labor Department Publishes New Youth Employment Rules (cont'd)

youth may only perform such work if in an apprenticeship or student-learner program.

The Department has also revised existing compliance assistance materials to comport with these new rules. These materials may be found at www.youthrules.dol.gov and www.wagehour.dol.gov. Information may also be obtained by calling the department's toll-free help line at 1-866-4USWAGE (1-866-487-9243).

Call our office at 315-437-7600, if you have other questions.

Expensive Employment Contract Object Lesson

A recent state court decision provides a valuable object lesson for any employer considering offering an applicant an employment contract; namely, don't do it! *Benson v. AJR, Inc.*, 2004 W. Va. LEXIS 21 (2004). AJR is a small business engaged in the manufacture and welding of truck beds. During the summer of 1997, the three AJR shareholders decided to sell the company to an employee, John M. Rhodes. As part of the sales transaction, Mr. Rhodes agreed to enter into an employment agreement with Mr. Benson (the son of one of the previous owners). **In this agreement, Benson would be guaranteed employment for a period of eight years** beginning on August 29, 1997. While AJR had the right to terminate Benson with only one day's written notice under this agreement, it was required to continue paying Mr. Benson his salary for the balance of the eight-year term of employment in the absence of three specified conditions: (a) dishonesty; (b) conviction of a felony; or (c) resignation by Mr. Benson.

On March 2, 1998, a drug test was administered to the employees of AJR. The results of the drug testing revealed that Mr. Benson had more than three times the limit utilized by the United States Department of Transportation ("DOT") to establish drug use and impairment. Between the time when the drug test was administered and the results were made available, Mr. Rhodes conducted meetings with various AJR personnel during which he inquired of those in attendance whether anyone was aware of an employee who was using illegal drugs. Benson attended one of those meetings and admits that he did not respond to this question despite personal knowledge that his drug test would come back positive.

Along with eleven other employees who also tested positive for drug use, Benson's employment was terminated. AJR prepared a termination form in connection with his dismissal from the company which listed the reason for termination as "tested positive for cocaine."

Mr. Benson then filed a lawsuit in which he alleged that AJR breached his employment contract and owed him a salary for the remainder of his eight-year contract.

At trial, AJR's attorney argued that Benson had been fired for "dishonesty," citing his failure to respond when John Rhodes asked the assembled employees if they knew anyone who was using drugs. Over seven years' pay rested on what the parties meant by "dishonesty." The trial court checked the dictionary and, finding dishonesty defined as "a lack of honesty or integrity," held Mr. Benson had indeed been fired for dishonesty. The Supreme Court of Appeals of West Virginia reversed, Noting that "nowhere on either of the two termination forms that were introduced below is there any indication that [Benson] was dismissed for dishonesty," the court held the issue had to be submitted to a jury. If the jury determines that "drug use, rather than dishonesty was the basis for dismissal," Mr. Benson collects his "penalty" pay. If, however, the jury accepts the company's belated claim that he was indeed fired for dishonesty, the company wins.

To emphasize the obvious object lesson for employers everywhere, one judge noted that no one questioned the company's right to fire Mr. Benson. **"If anything," the judge pointed out, "this case says that small employers should not give their employees open-ended contracts guaranteeing them employment."**

In addition, AJR could have listed other grounds for a no-penalty termination in Benson's employment agreement, such as being under the influence of drugs on the job. Not only did they not do that but they further compounded their problems by taking an inconsistent position on the reason for his termination. Specifically, they stated that the reason for his termination was "testing positive for cocaine" (and created evidence of that position in its "termination form"), rather than listing "dishonesty" as the cause.

If you have any questions regarding employment contracts, please contact our office at 315-437-7600.

New Veterans Benefits Improvement Act Creates New Obligations for Employers

In late December, President Bush signed the Veterans Benefits Improvement Act of 2004 (VBIA), which amends the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA provides for reinstatement rights and continuation of benefits for employees who are members of the uniformed services and who meet the requirements of USERRA. The VBIA improves and extends some of these benefits for veterans and uniformed service members. Specifically, the VBIA makes the following changes to employers' responsibilities under USERRA:

Extension of COBRA-Like Benefits

Prior to the VBIA, the law allowed an employee who was absent from work due to military service, to elect to continue his/her employer-sponsored health insurance coverage during this absence for a period of up to 18 months, even if the employer was not covered by COBRA. The new law extends the maximum period for which an employee may elect to continue the coverage from 18 months to 24 months. To be precise, the maximum period of coverage is now the lesser of 24 months beginning on the date the employee's absence began or the day after the date on which the employee fails to apply for or return to a position of employment. Any employee who elects to continue employer-sponsored health insurance coverage cannot be charged more than 102% of the full premium under the plan. However, an employee who is absent from work because of military service for less than 31 days cannot be charged more than the employee share, if any, for the coverage.

New Posting Requirement

The VBIA also amends USERRA by requiring employers to "provide to persons entitled to rights and benefits under [the law] a notice of the rights, benefits, and obligations of such persons and such employers." Employers can meet the notice requirement by posting the notice where they customarily place notices for employees. Within the next few months, the Secretary of Labor will make a sample notice available to employers. Employers will be required to post the notice as of March 10, 2005.

Dress Code Prohibiting Facial Piercings Challenged on Religious Grounds

A federal appellate court ruled earlier this month that a retailer had no duty to accommodate its employee's religious beliefs by exempting her from the company's dress code which prohibited wearing facial jewelry other than earrings, because to do so would impose an "undue hardship" on the employer. (*Cloutier v. Costco Wholesale Corp.*, No. 04-1475, 1st Cir. 2004).

In *Cloutier*, a cashier at a Costco's retail store professed membership in the "Church of Body Modification". The Court described the Church of Body Modification as a congregation of approximately 1,000 members (established in 1999) that espouses as its goals "... for its members to 'grow as individuals through body modification and its teachings,' to 'promote growth in mind, body and spirit,' and to be 'confident role models in learning, teaching, and displaying body modification'."

Costco's dress code prohibited the wearing of any facial jewelry other than earrings (e.g., facial and tongue piercings). Ms. Cloutier had an eyebrow ring. When she was directed by a supervisor to remove the ring, she refused based upon religious grounds. The store manager told her to remove the piercing or go home. Ms. Cloutier left work. A few weeks later, after being told that she had been suspended, Ms. Cloutier received notice that she had been terminated for her unexcused absences resulting from noncompliance with the dress code.

She filed an action against the company with the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964, for religious discrimination. During the EEOC mediation, Costco offered to let Ms. Cloutier return to work wearing either plastic retainers or a band-aid to cover the eyebrow ring. Ms. Cloutier maintained that neither of the proposed accommodations would

Continued on next page

EMPLOYMENT LAW MATTERS is published monthly by **Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com.**

Dress Code Prohibiting Facial Piercings Challenged on Religious Grounds (cont'd)

be adequate according to her religious beliefs. She asserted that the only reasonable accommodation would be to excuse her from the company's dress code.

"Granting such an exemption would be an undue hardship because it would adversely affect the employer's public image", the Court stated. "Costco has made a determination that facial piercings, aside from earrings, detract from the 'neat, clean and professional image' that it aims to cultivate. Such a business determination is within its discretion." The Court concluded that "A religious accommodation constitutes an undue hardship when it would impose upon an employer more than a de minimus cost", whether the cost be economic or non-economic. Recognizing that, "Costco is far from unique in adopting personal appearance standards to promote and protect its image," the Court noted that "[c]ourts have long recognized the importance of personal appearance regulations, even in the face of Title VII challenges." Such codes, it added, "which are designed to appeal to customer preference or promote a professional public image," have been upheld. Accordingly, the Court affirmed the dismissal of the claim.

While this case resulted in a legal victory for the employer (Costco), other employers should read this case as a cautionary tale. First, this case establishes a precedent for protecting an employee's right to have and display piercings, tattoos and other body modifications on religious grounds. Second, it is clear that the Court in this case took into consideration the fact that Ms. Cloutier was in constant contact with Costco customers, and therefore, her image directly reflected on the company's image. It appears unlikely that had Ms. Cloutier worked in a warehouse and rarely came into contact with customers that the outcome would have been the same.

Remember, employers must reasonably accommodate all employees' religious beliefs and practices unless to do so would impose an undue hardship on the employer's business. Although reasonable dress codes or grooming requirements grounded in safety, efficiency, discipline or business concerns may be upheld, employers should review their dress codes to ensure the policy is reasonably related to their employees' jobs and that it is applied consistently to all employees in the workplace.

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
5010 Campuswood Drive
East Syracuse, New York 13057