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

EMPLOYMENT LAW MATTERS

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

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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.

Two New and Important NLRB Decisions for Non-Union Employers

Work Rules Against Profane Language OK'd, But No Discipline for Employee Lying About Fliers

Work Rules Against Foul Language No Longer Considered Unlawful by NLRB

According to a recent National Labor Relations Board (NLRB) ruling, company work rules prohibiting "abusive and profane language," "harassment" and "verbal, mental and physical abuse" do not infringe on employees' rights to organize and be represented by a union (under Section 7 of the National Labor Relations Act [NLRA]). *Martin Luther Memorial Home, Inc*., 343 NLRB No. 75 (11/19/04). This decision marks a significant departure from the NRLB's earlier ruling in *Lafayette Park Hotel*, 326 NLRB No. 69 (1998).

In *Lafayette Park Hotel*, the work rule at issue stated that employees could not engage in the following:

> Making false, vicious, profane or malicious statements toward or concerning the [hotel] or any of its employees

The NLRB ruled that this rule was unlawful, explaining: "[p]unishing employees for distributing merely 'false' statements fails to define the area of permissible conduct in a manner clear to employees and thus causes employees to refrain from engaging in protected activities."

In *Martin Luther Memorial Home, Inc.,* the General Counsel of the NLRB pointed to the earlier decision and argued that the employer's rule against "abusive and profane language," "harassment" and "verbal, mental and physical abuse" violated the NLRA because the rule tended to "chill" employees in the exercise of their Section 7 rights. The NLRB disagreed noting that:

> our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The NLRB applied this standard and held that the company's rule did not infringe on employees' rights. The Board wrote, "employers have a legitimate right to establish a 'civil and decent work place.'" The Board also recognized that employers have a legitimate right to adopt preventative rules banning such language because employers are subject to civil liability under federal and state law for "racial, sexual, and other harassment." In addition, the Board noted that there was no basis for a finding that a reasonable employee would interpret a rule prohibiting such language as prohibiting Section 7 activity.

Employer Violated NLRA For Firing Employee Who Lied About Distributing Fliers

Even companies without unions need to be careful when questioning and disciplining

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Work Rules Against Profane Language OK'd, But No Discipline for Employee Lying About Fliers (continued)

employees for certain types of misconduct. In *United Services Automobile Association v. NLRB*, 2004 WL 2514343 (D.C.Cir., 11/9/04), the Association's employees were not unionized – nor were they being organized. Rather, an employee anonymously distributed fliers to her coworkers (after working hours) expressing concerns about a previous reduction in force. The Association questioned her about the incident and she lied about her involvement. The Association also interrogated her about who else was involved. When she later admitted that she distributed the fliers, she was discharged for lying during the Association's investigation. She subsequently filed a charge with the NLRB.

The NLRB ruled that the Association violated NLRA by interrogating the employee about "concerted activity" protected under Section 7 and by terminating her for engaging in such activity. The Association appealed and contended that the employee's activity of distributing fliers was not protected under section 7 because it violated the Association's valid work rule against "workplace solicitation." Moreover, it argued that even if it was protected activity, the Association properly discharged her for lying.

The NLRB disagreed and its decision was later upheld in federal court. The court ruled that the employee's actions were both "protected" and "concerted". They were "protected" in the sense that they related to terms and conditions of employment generally and they were "concerted" in that she engaged in those actions for the benefit of all employees, as opposed to her own benefit. The court also ruled that because the Association questioned the employee about who else was involved in this activity, it was guilty of unlawful "interrogation" under the NLRA.

With respect to the employee's termination, the Court wrote that:

> The company's contention that it could lawfully terminate Williams for lying during the interrogation, even if her discharge was also motivated by retaliation against her for distributing the fliers, is without merit. . . . There was substantial evidence in the record to support the Board's finding that Williams had responded evasively during the interrogation because she feared retaliation against her for engaging in protected concerted activity. The Board was thus warranted in concluding that Williams had no obligation to respond to the questions in any particular manner and that her dishonesty about her protected concerted activity did not constitute a lawful reason to discharge her.

Accordingly, the Court enforced the Board's order, which included reinstatement and back pay.

If you have any questions about either decision and/or its impact on your business, please contact us at 315-437-7600.

Outside Sales Staff Must Sell at Customer's Location to be FLSA Exempt

Are you sure that your "outside sales" staff are properly categorized as exempt from the overtime requirements of the Fair Labor Standards Act (FLSA)? The recent amendments to the FLSA regulations could call these designations into question. Prior to the amendments, it was unclear whether a sales employee could simply work from his or her home to qualify for this exemption. The new regulations make clear that an outside sales employee must make sales at the customer's place of business, or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property.

In addition, to qualify for the outside sales employee exemption, the employee's "primary duty" must be making sales, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. "Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. The amount of time spent performing exempt work can be a useful guide in determining whether it is the primary duty of an employee. Thus, **employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement**. Time alone, however, is not the sole test.

If you have any questions about whether your sales staff is properly categorized under the FLSA, please contact us at 315-437-7600.

Things to Consider When Installing a Time Clock

The Fair Labor Standards Act (FLSA) requires employers to keep accurate time records for all non-exempt employees and imposes fines for the failure to do so. However, the law does not dictate the time-recording method. Some employers require employees to fill out time sheets by hand indicating how many hours they worked. Others install time clocks and cards for the same purpose. But regardless of how an employer chooses to track employee hours, there are a couple of considerations to bear in mind.

First and foremost, employers should remember that time records are potential evidence in a lawsuit. If an employee – or more than likely, a former employee – sues an employer for unpaid or underpaid overtime wages, the existing time records can make or break an employer's defense. Weekly time records, signed by the employee, can be some of the strongest evidence an employer can present in such a case. This is because such a time record is clear evidence that the employee was aware of the hours he/she worked that week and what pay he/she received for it. If the employee did not dispute the amount paid at that time, it creates a strong presumption that the amount was correct. Unsigned but complete records are also evidence of the time an employee worked, but they are not as convincing to a judge or jury because the employee could claim that he/she never saw or approved of the time for that week. Where an employer has no time records for an employee, there is a strong presumption in favor of the employee's own recollection (or own records) regarding the time worked in a given week. In other words, in the absence of complete time records, not only will the employer be subject to fines for violating the FLSA requirement that time records be kept, but a judge or jury will take the employee's word for the number of hours he/she worked and the amount of pay they were owed.

For employers who choose to use time clocks, there is another, more employer-friendly consideration to bear in mind. The FLSA regulations allow for minor differences between clock records and actual hours worked. In those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work. Their early or late clock punching may be disregarded. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged since they raise a doubt as to the accuracy of the records of the hours actually worked.

Specifically, the regulations allow employers to use "rounding" practices. The Department of Labor (DOL) has found that in most industries where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted by the DOL, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

If you have any questions regarding time records, feel free to contact us.

No Requirement to Continue Benefits After FMLA is Exhausted, Generally

Employers subject to the Family and Medical Leave Act (FMLA) are often exasperated to learn that after an employee has exhausted his/her 12 weeks of job-guaranteed leave under the FMLA, the employee may still be entitled to more leave under the Americans with Disabilities Act (ADA). However, unlike the FMLA, an employer is not required to maintain an employee's health benefits for an extended leave under the ADA unless the employer does so for employees on other types of unpaid leaves.

The FMLA requires employers of 50 or more workers (in a 75-mile radius) to permit those workers to take up to 12 weeks of job-guaranteed leave during a 12-month period. While this leave is generally unpaid, the law obligates the employer to maintain the employee's health benefits throughout the FMLA leave at the same level they existed at prior to the leave. In other words, if an employer paid 100% of the monthly premium for an employee before he/she went on FMLA leave, the employer would have to continue paying

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No Requirement to Continue Benefits After FMLA is Exhausted, Generally (cont'd)

100% of the premiums throughout the leave. On the other hand, if the employee was responsible for paying 50% of the premium costs, he/she would continue to be responsible for that payment for the 12 weeks of leave. But once the employee has exhausted the 12 weeks of leave under the FMLA, the employer's obligation to maintain health insurance for the employee may cease.

The ADA requires employers of 15 or more to reasonably accommodate all qualified employees with covered disabilities. Many employers are confounded to learn that after an employee has been absent from work for 12 weeks under the FMLA, the employee may be entitled to the accommodation of more leave under the ADA (assuming that the employee has a covered disability). The only situation where the employer would not have to allow the disabled employee an extended leave would be if the leave created an "undue hardship" for the employer. To determine whether the "hardship" is truly unreasonable for the employer, courts will examine the financial cost of the accommodation, the disruption on the workplace and procedures as well as the size and financial capacity of the employer. Generally speaking, if an employer was able to cope with the employee's absence during the FMLA (e.g., by dispersing the employee's duties to other employees, or hiring a temp), the court will find that an extended leave beyond the 12 weeks of FMLA leave will be a reasonable accommodation; how much more leave is reasonable depends on the size of the company, its financial well-being, the level of disruption the leave causes, etc.

But regardless of how long of an extended leave an employee may be entitled to under the ADA, there is no obligation under that law to continue the employee's health benefits. All that the ADA requires is that employers treat all employees equally regardless of their disabilities. Accordingly, if an employee without a disability loses his/her health insurance while on an unpaid leave of absence, an employee with a disability would also lose his/her insurance for an unpaid leave of absence under the ADA. In other words, while the employer may need to allow the employee to come back to work after their ADA extended leave, that extended leave need not cost the employer anything. But, remember, before you decide to terminate an employee's health benefits following his/her FMLA leave, make sure that you do not maintain health benefits for other employees on non-ADA-related unpaid leaves of absence.

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