Employment Law Matters

April 2008

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Significant Changes in New York's Prevailing Wage Law

Notifying Employees of Wage Rates and Right to Contact DOL

A new state law, which became effective in February 2008, requires public contractors in New York to notify all laborers, workers, and mechanics working for them of the prevailing wage for their particular job classification. Specifically, it requires:

- contractors and subcontractors provide written notice to all laborers, workers or mechanics of the prevailing wage rate for their particular job classification on each pay stub, and
- bi-annual notification including the telephone number and address for the Department of Labor, which contains a statement that it is the laborer's, worker's or mechanic's right to contact the Department of Labor or some other representative if he is not receiving the proper prevailing rate of wages and/or supplements for his/her particular job classification. (Chapter 629 of the Laws of 2007.)

New Civil and Criminal Penalties for Prevailing Wage Violations

The new Prevailing Wage Act of 2007, which goes into effect on April 28, 2008, creates civil and criminal penalties for **willful violations** of the existing prevailing wage law. For example, a contractor who requires employees to work more than 8 hours a day on a public works project can be found guilty of a Class A misdemeanor – punishable by up to one year in jail and a fine of up to $1000.

In addition, if a contractor is found to have **willfully** failed to pay employees the prevailing wage/ supplements, the contractor can face criminal prosecution.

Specifically, if the aggregate underpayment to all employees is less than $25,000, the offense will be considered a Class A misdemeanor. If it is greater than $25,000 but less than $100,000, it will be classified as a Class E felony, carrying a sentence of up to 4 years in jail. Underpayments greater than $100,000 but less than $500,000, will be a Class D felony carrying a sentence of up to 7 years and underpayments greater than $500,000, will carry a potential penalty of up to 15 years.

All such felony convictions will carry fines up to $5,000, or double the amount of gain the contractor obtained from the underpayments. Moreover, any contractor found guilty of a second willful failure to pay the prevailing wage/ supplements within a 5-year period must forfeit all profits from public works jobs and cannot receive future payments from a current contract.

The law also requires that all contractors submit to the "public owner" within 30 days of the first payroll and every 30 days thereafter certified payrolls. These certified payrolls must be sworn to or affirmed under penalties of perjury. A willful failure to provide certified payrolls will be a Class E felony, carrying a civil penalty of $1000 per day.

If you have any questions about complying with these new requirements, please do not hesitate to contact our office at 315-437-7600.

In This Issue …

- Significant Changes in New York's Prevailing Wage Law
- Managing Workplace Documentation in the Digital Age
- Avoiding Liability for the Discriminatory and Harassing Acts of Employees

Managing Workplace Documentation In The Digital Age

A company was recently sued by a former employee (we'll call him "Charlie") for employment discrimination. The Company was so sure it had an "open-and-shut case" against Charlie, that Company officials decided it would be unnecessary to have its employment attorney represent it at a hearing in front of the state agency responsible for investigating Charlie's discrimination claim.

At first, the hearing seemed to be going well for the Company. In their presentation in front of the investigator, Company supervisors earnestly and convincingly explained that they had no choice but to terminate Charlie's employment. He had the poorest attendance record of anyone on his shift, his work was marginal at best, and it seemed that he went out of his way to pick fights with his supervisors. The supervisors testified that they met with Charlie about all of these problems and warned him that any further attendance or attitude problems would result in his immediate dismissal. Then, they told the investigator the final story of how – after all these warnings – Charlie came back late from lunch one day telling his supervisor that it was "none of his business" where Charlie had been that day and that the supervisor should just "go ahead and give [him] another attendance point" for his tardiness.

Open-and-shut case, right? Not so fast.

You see, when Charlie filed his claim with the state fair employment agency, he alleged that his actions were no worse than those of many other employees, and that the Company had been "out to get him" ever since he began "opposing discrimination in the workplace". The investigator asked to see Charlie's "personnel file" – including any emails sent by supervisors about Charlie at work. Along with some helpful documentation about performance and attendance, the following email exchange was submitted to the investigator:

Supervisor A: "Isn't there any way we can get rid of this guy?"

Supervisor B: "We can't. The laws just protect the troublemakers."

Supervisor A: "He'll mess up again and when he does I'll be waiting."

The Supervisors had explanations for the comments. They testified that they were talking about Charlie's poor performance and how frustrated they were that they could not simply let, in their minds, a "bad worker" go. But the emails were enough to convince the investigator that there might be something to Charlie's story that he was being improperly singled out. The investigator noted that the emails didn't say anything about Charlie's attendance issues, insubordination or other legitimate work issues. Instead, they read like an informal conversation between friends which could be interpreted as evidence of unlawful discriminatory intent. Consequently, the state agency found merit in the charge and a relatively simple matter – that under other circumstances would likely have been dismissed – turned into full-blown, expensive litigation.

The moral of this story for employers is that EACH AND EVERY EMAIL A SUPERVISOR SENDS AT WORK **IS** POTENTIAL EVIDENCE IN A LAWSUIT. It doesn't matter whether the supervisor treats the email as informal conversation or not. He or she may still be called upon to testify about – or more to the point – defend the content of those email communications.

Content Management

It is estimated that more than 90% of "documents" in corporate America are now electronic. Calculations of emails sent each day in North America are measured in the trillions. U.S. businesses are, to a large extent, ignoring the critical need to manage electronic documents properly on two legal fronts: 1) content management; and 2) document retention requirements.

The first is highlighted in our opening example. Many frivolous employment claims have been given life by offhanded, careless or carelessly written electronic messages that make it easy for a plaintiff's attorney to find an inference of discriminatory intent where none exists.

The U.S. legal system is premised on the concept of full and open discovery. Essentially, when a legal dispute commences, anything not protected by a legal privilege is available to the other side if it could lead to the discovery of evidence admissible in court. While most managers understand that the warning notices they write, evaluation forms they fill out and counseling memoranda they draft, are all "documentation" in an employment lawsuit, few realize the significance of the text message fired off in frustration to their co-worker.

Every company supervisor and

Continued on next page

manager must be trained in the significance of creating corporate documentation, electronic and otherwise. It must become second nature for supervisors to ask themselves before they ever put pen to paper or hit the send button on their email programs, "how am I going to explain each and every aspect of my communication – especially the 'off-the-cuff emails' and 'throw away remarks' – to an investigator, judge or jury?"

Document Management

Managing the content of documentation is only part of the legal problem facing employers today. Businesses are drowning in years' worth of electronic data maintained with little thought as to a basic analysis of what must be maintained, what should be maintained, and what should be discarded. As the cost of electronic storage media has decreased, more and more businesses operate under the mistaken assumption that it is easier to simply buy more storage capability than it is to analyze their electronic data issues and develop a workable document retention policy covering all business documents, electronic and traditional.

The hidden costs of chaotic data retention can be enormous. When involved in a lawsuit, companies are required to produce virtually all of their data, back up tapes, emails, etc. Trade secrets become difficult to protect and exposure to claims initially not at issue increase. In addition, the time it can take to sift through all of the data and produce the demanded information can lead to enormous costs in both employee time and loss of focus, as well as attorney costs in reviewing the information.

Document Retention Policies

.

Many of these problems can be avoided by the creation and diligent enforcement of a document retention policy. With the help of counsel familiar with your business environment, you should consider taking the following steps toward a such a policy:

Identify what records must be maintained. By law, certain personnel and general business records must be maintained in a particular fashion for a specific time frame. Find out what you are obligated to do and maintain those records in an organized, easily retrievable fashion.

Be aware of "spoliation". It is against the law to destroy or alter evidence which may be used by another in current or possible future litigation. Special rules apply when you are aware of a lawsuit or possible lawsuit against your company. Destroying or failing to preserve documents in this situation can lead to severe penalties, including financial sanctions and adverse findings of fact against your company – not to mention possible criminal sanctions in the more extreme cases.

Inventory all types of e-data in your organization. Computer capable cell phones, printers, thumb drives, discs and DVDs, home personal computers containing work data should all be covered by your document retention policy. Determine how and when unnecessary data will be destroyed and provide for enforcement of your policy. Options here include a specific life cycle for email not saved for a particular purpose, including email backup tapes. Some document retention policies prompt employees to delete emails while others automatically delete them unless a specific retention code is entered by an employee.

Once you have addressed each of these areas and established how they will be handled in your document retention policy, incorporate it into your employee handbook and update the handbook whenever the policy changes. Then, train all employees in the policy and enforcement measures associated with it.

This training, along with the training of your supervisors discussed above can help you ensure that you don't leave your "open-and-shut case" open.

If you have any questions about managing your documents and/or documenting employments matters, please feel free to contact us.

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

Avoiding Liability for Discriminatory or Harassing Acts of Employees

It is well settled that the New York State Human Rights Law does not impose liability on employers for discriminatory or harassing acts of its employees absent a showing that the employer became a party to the discriminatory conduct. *Matter of State Div. of Human Rights v. St. Elizabeth Hosp.*, 66 N.Y.2d 684, 687 (1985). As such, an employer cannot be held liable for an employee's discriminatory act unless the employer "encourages, condones or approves" of the act. However, it is important to note an employer may be held liable for its omissions as well as its actions. The court has found an employer liable where it was aware of the objectionable conduct and did nothing, holding the employer acquiesced to and condoned the conduct.

A recent decision, *Clayton v. Best Buy Co., Inc.*, 851 N.Y.S.2d 485 (1st Dept. 2008), provides an example of a good course of action to take in regard to discriminatory and harassing conduct by an employee. In this case, the court held there was no evidence that the defendant, Best Buy Co., encouraged, condoned or approved any harassing conduct because the defendant employer immediately acted and reprimanded the employee on the same day the incident occurred. The employer also warned the employee that another similar incident would result in the employee's dismissal.

If you need assistance or counseling with respect to a similar situation in your company, please feel free to contact us.

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