Employment Law Matters

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Newsletter of the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
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In This Issue ...

New "Right to Unionize" Notification Requirements For Federal Contractors and Subcontractors

Under new U.S. Department of Labor regulations, federal contractors and subcontractors are now required to post notices in their facilities informing employees of their rights to "join and assist a union" and to "bargain collectively" with their employer. The new poster provides examples of unlawful employer and union conduct that interferes with those rights; and indicates how employees can contact the National Labor Relations Board with questions or to file complaints. Contractors who violate these Labor Department's regulations may be subject to sanctions, including suspension or cancellation of their federal contracts.

Specifically, the new regulations require federal contractors and subcontractors to:

- post the required employee notice conspicuously in and around their plants and offices so that it is prominent and readily seen by employees who are covered by the National Labor Relations Act (NLRA) and who engage in contract-related activity;
- post the required notice electronically if they communicate with employees electronically, which requires posting a link to the Department of Labor's website containing the employee notice where they customarily place other electronic notices to employees about their jobs; and
- insert provisions in their subcontracts that require their subcontractors to comply with the same posting requirements as well.

COBRA Subsidy Ended May 31 but Don't Forget the 15-Month Change

As most employers are aware, COBRA allows certain people to extend employer-provided group health coverage if they would otherwise lose the coverage due to qualifying events such as loss of a job. President Obama's "Stimulus Package", which was enacted in February 2009 as the American Recovery and Reinvestment Act of 2009 (ARRA), temporarily reduced the premium for COBRA (or comparable State continuation coverage) for eligible individuals. Specifically, employers were required to pay

Contractors and subcontractors may obtain the required poster by downloading it from http://www.olms.dol.gov or by calling (202) 693-0123. Compliance information for contractors and subcontractors can be found at the Office of Federal Contract Compliance Program's website.

If you have any questions about this major change in federal law, please feel free to contact us.

Electronic Document Retention Policies Can Guard Against Costly Sanctions

Should your company have a policy which sets forth when and how electronic files (including email) are retained or deleted?

One recent case, i.e., *Residential Funding Corp. v. DeGeorge Fin. Corp.,* answers both of these questions in the affirmative. In *Residential Funding*, the Second Circuit Court (the Federal Appeals Court with jurisdiction over New York) ruled that if your company does not have an electronic document retention policy and as a result you cannot produce such documents for litigation, your company may be liable for monetary and other penalties that can severely damage your case.

Residential Funding involved a breach of contract litigation. When the litigation reached the discovery phase (the phase where evidence is exchanged between the parties), DeGeorge served its document discovery requests on Residential, which included a request for all documents, including electronic mail, relating to DeGeorge. Residential was unable to locate and retrieve the email in a timely fashion.

The Second Circuit applied a long-standing legal principle ("spoliation doctrine"), ruling that courts have broad discretion in fashioning an appropriate penalty for this delay, including delaying the start of a trial (at the expense of the party who failed to produce the evidence), declaring a mistrial, if the trial has already commenced, or proceeding with a trial with an adverse inference instruction to the jury (i.e., telling the jury that failing to produce the evidence must mean that the evidence is damaging to the party's case). The Court also noted that these sanctions could be imposed not only if the party failed to produce the evidence through bad faith or gross negligence, but also through ordinary negligence.

This ruling suggests that business owners and operators should establish electronic document retention policies governing storing, recovering and purging electronic data. The policy should recognize that all information, electronic and otherwise, which is relevant to litigation that has been threatened or commenced, must be retained for the duration of any such litigation.

Digital information pertaining to an employee's employment with your company (e.g., warning notices, progress reports, commendations, etc.) should be retained for as long as he/she is your employee and then three years after their employment ends. This is because the statute of limitations for most employment-related litigation is three years. In other words, an employee has up to three years to sue your company following the end of their employment. Digital information pertaining to contractual matters, tax matters and other matters related to your company's business should be retained for six years and in some cases even longer because of their applicable statutes of

65% of the premium costs while the eligible individuals paid only 35%. This subsidy program recently ended on May 31, 2010. While there has been a great deal of discussion in Congress over extending the subsidy program further, no such law has been passed. In other words, employees involuntarily terminated after May 31, 2010 are not entitled to the COBRA subsidy.

How long do employers have to continue paying the 65% of the premium costs for the employees (and their beneficiaries) who were involuntarily terminated between February 2009 and May 31, 2010? Initially, the law set the maximum period for receiving the subsidy at nine months. Recently, however, the Department of Defense Appropriations Act, 2010 (2010 DOD Act) amended ARRA to extend the maximum period for receiving the subsidy an additional six months (from nine to 15 months).

If you have any questions regarding the COBRA subsidy, please feel free to contact us.

Waivers of Past FMLA Violations Now Enforceable Without Court or DOL Approval

The recently amended Family and Medical Leave Act (FMLA) regulations, adopted by the U.S. Department of Labor (DOL), reversed a

limitations.

The policy should also provide a protocol for retrieving electronic documents. As *Residential Funding* points out, even a delay in retrieving the documents can lead to court-imposed penalties.

Lastly, the policy should clearly spell out the criteria that will be used as well as a protocol for purging stored information. Should the information be purged in accordance with a sound document retention policy, under circumstances where there is no indication that the information might be needed for litigation, a court would not likely view the failure to produce that evidence as negligence warranting sanctions.

If you have any questions, or need assistance in crafting an electronic document retention policy, please feel free to contact us.

Compliance Tip: Document Your Compliance with Employer Posting Requirements

Various state and federal laws require that employers post notices in the workplace advising employees of their rights under specific statutes. An example of a federal law that requires such posting by employers is the Family and Medical Leave Act ("FMLA"). The FMLA requires an employer:

> ... to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions... (emphasis added)

Employees have a federal cause of action in the event that their employer interferes with, restrains, or denies their benefits as provided under the FMLA by failing to post the required notice of FMLA rights. As one federal judge recently noted in a decision denying an employer's motion to dismiss a federal complaint:

> "... so long as there are issues of fact which, if true, would establish that plaintiff was somehow hindered from exercising her rights by defendant's failure to provide notice of the protections afforded under the Act, plaintiff may state a second claim under § 2615(a)(1) for interference with her FMLA rights..."

Accordingly, it is important to ensure that your company is complying with the various statutory notice posting requirements. Required notices should be posted in employee handbooks, company intranets (if appropriate) and in locations in the workplace that are likely to be observed by all employees.

Whether or not an employer actually posted a given notice can sometimes be a matter of dispute. An employer may insist that it posted the required notice at the appropriate locations, while an employee may claim that no such notices were posted. Such factual disputes can sometimes prevent the early dismissal of lawsuits, and may prevent an employer from taking advantage of certain types of defenses to lawsuits.

In order to obtain the maximum legal protection, employers should document their compliance with the statutory posting requirements. This

long-standing rule that employees could not waive their rights under the FMLA in a dispute settlement or severance agreement. The 1995 regulations stated that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." Understandably, some courts construed this language as prohibiting settlement agreements and other retroactive waivers (like those appearing in severance agreements) without DOL or court approval. The recently amended regulations insert the word "prospective" before the word "rights," and include an express provision permitting "the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court." 29 CFR § 825.220(d).

Accordingly, it is now clear that employers can obtain a valid waiver of an employee's right to sue under the FMLA for incidents occurring in the past. This does not mean, however, that an employee can prospectively waive his/her right to take FMLA leave or waive his/her right to sue for future violations. If you have any questions, please feel free to contact us.

can be accomplished through the use of an "affidavit of posting" wherein the individual who posted the notice contemporaneously executes a simple sworn affidavit attesting to the date and location of the posting.

In addition to an affidavit of posting, a digital camera can be used to also document the posting by contemporaneously photographing the notices posted in various locations, and attaching the affidavit of posting to a print out of the photograph. The affidavits of posting and the photographs can be scanned and emailed to create further proof regarding where and when the notices were actually posted.

In the event that you have questions or concerns regarding notice posting requirements and steps to document compliance with those requirements, contact us at 315-437-7600 or 716-875-1406.