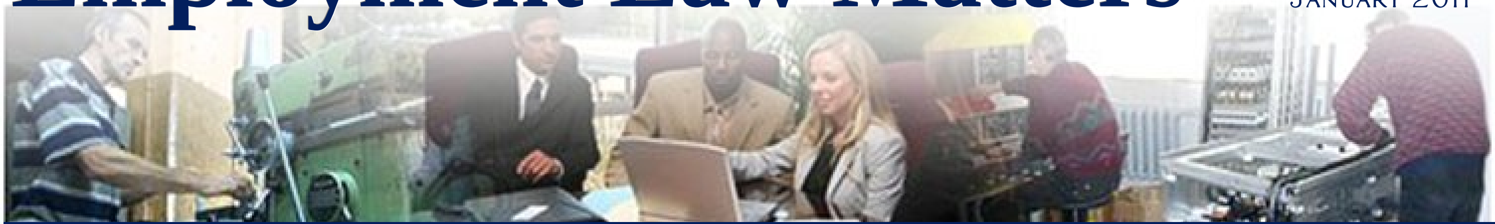
Employment Law Matters

January 2011



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

Special Firm Events

FREE Webinar on New York Wage Theft Prevention Act

Learn How to Protect your Company from Costly Penalties for Payroll Mistakes

On Thursday, January 13, 2011, our Law Firm will be presenting a FREE Webinar for our clients and friends on the recently-enacted Wage Theft Prevention Act (WTPA). As we reported in a recent special alert, on December 13, 2010, Governor Paterson signed into law the Wage Theft Prevention Act (WTPA), which will: 1) substantially change every private sector employer's payroll-related reporting requirements to employees, 2) dramatically increase fines and penalties for failing to provide employees with the required information (as well as other pay-related mistakes), 3) grant the New York State Department of Labor (DOL) with new, more onerous, enforcement powers, and 4) initiate new "whistleblower" protections.

Join us for this 60-minute web-based conference designed to make this extraordinarily complex law easy to understand. You and your colleagues will learn about the new compliance requirements including:

- Substantial changes to "Notice of Wage Rate" requirements, including both pre- and post-employment notices, information regarding payment methods, business structure, and other information the DOL deems necessary;

- More specific information to be included on employee pay stubs, including information about your company and how you pay your employees;

- Granting employees a private right to sue your company if you fail to comply with the notice and pay stub requirements;

- Greater enforcement powers granted to the DOL, including more severe civil and criminal penalties for non-compliance with the new law and other labor laws;

- Greater protection for employees who report suspected labor law violations.

This program is designed for all private sector employers, business owners, their supervisors and managers (including human resource professionals, benefits managers, and accountants).

There is **NO REGISTRATION FEE** for this program. However, space is limited and registration is necessary. Please register at our website **www.ferrarafirm.com**. Simply click on "Wage Theft Prevention Act: Protect Your Company from Costly Penalties for Payroll Mistakes", from the Events Calendar on the far right column on our Firm's home page, then click on "Register Now" and complete the online form. Click "Submit" and you're registered.

You may also register by telephone (as indicated below) by providing your name, the name of your school district or organization and the names of all participants who will be attending.

To Register:

- **Online:** go to **www.ferrarafirm.com**
- **By telephone:** Call **315.437.7600** or **716.875.1406**

Attorney Spotlight

Colleen W. Heinrich graduated *magna cum laude* from Siena College in 1990 and received her law degree from Albany Law School in 1993. She is a member of the American Association of Trial Lawyers, the New York State Bar Association, the Women's Bar Association of the State of New York, and the Central New York Woman's Bar Association (President 2001-2002). Ms. Heinrich has performed pro bono work for the Central New York Women's Bar Association Domestic Violence Divorce Project and the Vera House. She has lectured numerous legal issues for the National Business Institute (1998, 2003, 2005) and on Civil Litigation for the New York State Bar Association (1999). Ms. Heinrich was formerly on the Board of Directors of Legal Services of Central New York and has served as an Impartial Hearing Officer for State of New York Office of Special Education Services since 1996. Her other areas of practice include: municipal and education law and related civil litigation.

In This Issue …

Can An Employee on FMLA Leave be Laid Off?

***CLIENT QUESTION**: We have an employee who is out of work due to his own serious health condition under the Family Medical Leave Act (FMLA). Due to a slow down in business, we are planning on laying off a number of our workers. If the employee taking FMLA leave were still here, he would be a part of that layoff. Are we prevented from laying off this employee because he is on FMLA leave?*

We receive this question frequently. Many employers mistakenly believe that once an employee is on FMLA leave, the employee cannot be laid off or otherwise terminated. This is **not** the case.

Unfortunately, based on this mistaken belief, many employers will implement a reduction in force (RIF) that should have included an employee on FMLA leave but choose to exclude him/her from the RIF. Then, when the employee is ready to return to work, the employer is confronted with a dilemma: do I find a job (or "make work") for the individual now or do I risk laying him/her off immediately upon his/her return to work? Neither choice is desirable. The first choice creates obvious business problems and the second almost guarantees a lawsuit based on FMLA discrimination.

This dilemma can be avoided by understanding the requirements of the FMLA and taking a few simple precautionary steps when conducting a RIF. The FMLA regulations specifically state that:

> An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

For example:

> … If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. 29 C.F.R. §825.216.

However, the regulations go on to say that:

> An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. *Id.*

This means that an employer's RIF decision will be under close scrutiny by investigators from the Equal Employment Opportunity Commission (EEOC) and/or the state anti-discrimination agency (like New York's Division of Human Rights), should the affected employee file a claim. Generally speaking, an employer is more likely to convince an investigator that the employee "would not otherwise have been employed at the time reinstatement", if he/she were a part of a mass layoff, for example, than if the layoff only effected the employee who was on FMLA leave.

In order to meet its "burden of proof" in this regard, the employer should be prepared to produce evidence that the layoff was necessitated by legitimate business concerns completely separate from the fact that the employee was on leave. Since investigators tend to be more convinced by documentary evidence, we generally recommend that employers carefully document the reasons for the layoff and why the layoff needs to include the employee on leave.

For example, if your company has decided for business reasons to discontinue making widgets and the employee on FMLA leave worked in the widget manufacturing department, his/her layoff along with everyone else in that department would likely withstand the investigator's scrutiny. By contrast, if the employee on leave is the only employee laid off in his/her department and his/her duties are either redistributed to other remaining employees (or given to a newly-hired employee), the EEOC or state agency will be less likely to believe that the layoff decision was motivated by reasons other than the employee's absence.

In either case, the employer should be documenting the legitimate reasons for the layoff in the form of intra-office memos, emails, sales reports, etc. to prove the need for the employment action. Using the earlier example, if the company can produce sales figures showing a downturn in the widget market, production cost figures showing that the company is losing money by manufacturing widgets and written layoff notices to everyone in the widget manufacturing department, the employee on FMLA leave would have a very difficult time maintaining a claim that his/her layoff was improper.

The bottom line is that employers **can** lay off employees on FMLA, if the decision is motivated by legitimate business factors. Remember that you will have to prove that your layoff decision was properly motivated, thus you will need to document accordingly.

Should you need assistance in analyzing and/or implementing a RIF that will effect an employee(s) on FMLA, please contact us at 315-437-7600 or 716-875-1406.

Also, feel free to submit your "Client Questions" for future editions of *Employment Law Matters* by contacting Mike Dodd at the numbers noted above.

IRS Postpones Enforcement of Nondiscrimination Rules for Highly-Compensated Employees Under Health Care Reform Law

The Internal Revenue Service (IRS) has postponed the enforcement of the health insurance nondiscrimination provisions of the Patient Protection and Affordable Care Act (PPACA) until after it develops regulations to enforce it. The IRS has set a deadline of March 11, 2011, for comments from the public on this rulemaking. The issuance of these rules will come some time after the comment period ends but (at least) before 2014, according to the IRS Revenue Ruling on this issue. (IRS Revenue Ruling 2011-1.)

As most employers are aware, PPACA, in part, prohibits employers (who are health care plan sponsors) from discriminating in favor of highly-compensated employees with respect to health benefits. Under PPACA, highly-compensated employees (or HCEs) include:

- The five highest-paid officers;
- A shareholder owning more than 10 percent of the company's stock;
- The highest paid 25 percent of all employees.

These requirements are not mutually exclusive. The five highest paid officers may also be among the highest paid 25% of all employees. However, if one of the top five officers is not in that pay range, that officer must still be included in the HCE category.

An insured group health plan that fails to comply with this part of the law may be subject to: (1) an excise tax of $100 for each day of noncompliance with respect to each individual to whom such failure relates, or (2) a civil action to enjoin a noncompliant act or practice or for other appropriate equitable relief. This section (i.e., Section 2716) does not apply to grandfathered health plans.

The IRS noted in its Revenue Ruling that:

> Because regulatory guidance is essential to the operation of the statutory provisions, the Treasury Department and the IRS, as well as the Departments of Labor and Health and Human Services … have determined that compliance with §2716 should not be required (and thus, any sanctions for failure to comply do not apply) until after regulations or other administrative guidance of general applicability has been issued under §2716. In order to provide insured group health plan sponsors time to implement any changes required as a result of the regulations or other guidance, the Departments anticipate that the guidance will not apply until plan years beginning a specified period after issuance.

Some of the issues that the IRS will be addressing in this rulemaking are:

1. What constitutes "nondiscriminatory benefits" under the law and what is included in the term "benefits?" For example, is the rate of employer contributions toward the cost of coverage (or the required percentage or amount of employee contributions) or the duration of an eligibility waiting period treated as a "benefit" that must be provided on a nondiscriminatory basis?

2. Whether the IRS and other Departments have the authority to provide for an alternative method of compliance with §2716 that would involve only an availability of coverage test.

3. Whether nondiscrimination standards should be applied separately to employers sponsoring insured group health plans in distinct geographic locations. If so, whether application of the standards on a geographic basis should be permissive or mandatory.

4. Whether the IRS will allow for "safe harbor" plan designs and, if so, the components of such designs.

5. Whether employers should be permitted to combine different, but substantially similar, coverage options for purposes of §2716 and, if so, the basis upon which a "substantially similar" determination could be made.

6. The application of the nondiscrimination rules to multiple employer plans.

7. The treatment of employees who voluntarily waive employer coverage in favor of other coverage.

8. Potential transition rules following a merger, acquisition, or other corporate transaction.

9. The application of the sanctions for noncompliance with §2716.

We will keep you informed of any developments regarding this rulemaking effort. If you have any questions about the nondiscrimination provisions of the law or any question about PPACA as a whole, 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 and 2858 Delaware Avenue, Kenmore, New York 14217 Tel. 716-875-1406, www.ferrarafirm.com.**

Wage and Hour Issues

National Labor Relations Board (NLRB) Proposes Rule to Require All Employers to Post "Right to Unionize" Notice

The NLRB is in the process of creating a new regulation which would require virtually all private sector employers to post notices in their facilities informing employees of their rights to "join and assist a union" and to "bargain collectively" with their employer. Generally speaking, only employers of airline, railroad, and agricultural workers would be exempt from this proposed requirement.

The proposed notice is similar to one mandated by the U.S. Department of Labor for federal contractors, which we reported about in our August 2010 edition of *Employment Law Matters*. Like the federal contractor notice, it states that employees have the right to act together to improve wages and working conditions, to form, join and assist a union, to bargain collectively with their employer, and to choose not to do any of these activities. It provides examples of unlawful employer and union conduct and instructs employees how to contact the NLRB with questions or complaints.

Employers would be required to post the notice where other workplace notices are typically posted, e.g., Wage and Hour posters, Family Medical Leave Act posters, Workers' compensation notices, etc. If an employer communicates with employees primarily by email or other electronic means, the notice would have to be posted electronically as well.

Failure to post the notice would be treated as an unfair labor practice under the National Labor Relations Act (NLRA). While no fine is proposed for such a failure, there are other anticipated ramifications. According to an NLRB Fact Sheet on the proposed regulation, the NLRB:

> …expects that most employers that fail to post the notice would do so because they were unaware of the rule, and would comply when requested by a Board agent. In that event, the unfair labor practice case normally would be closed without further action. The Board also could extend the 6-month statute of limitations for filing a charge involving other unfair labor practice allegations against the employer. Finally, if an employer knowingly fails to post the notice, the failure could be considered as evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA.

We will keep you informed on any developments related to this proposed regulation. If you have any questions regarding this or any other labor relations matters, please do not hesitate to call us.