Employment Law Matters

October 2011

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

Hot Topics

NLRB Postpones "Right to Unionize" Posting Requirement

On October 5, 2011, the National Labor Relations Board (NLRB) announced that it is delaying the implementation of its requirement that private sector employers post notices in their facilities informing employees of their right to "join and assist a union" and to "bargain collectively" with their employer. (Free copies of the required poster can be viewed and downloaded at http://www.nlrb.gov/poster.) The rule was originally scheduled to go into effect November 14, 2011 but has been postponed until January 31, 2012.

While the NLRB stated in its announcement that the delay is designed "to allow for enhanced education and outreach to employers", there is speculation that the postponement is in response to several employer-led lawsuits that have been filed with regard to the new requirement. Nevertheless, it is important to remember that this is merely a delay and not an elimination of the requirement. Employers who wish to remain union-free should consider taking steps to prepare for this new posting requirement. These steps could include, for example, communicating the employer's viewpoint with respect to staying union-free.

If you need assistance in responding to this new employer challenge or have additional questions about properly communicating your union-free message, please feel free to contact Nick Fiorenza at 315-437-7600 or at njfiorenza@ferrarafirm.com.

Worker Misclassification: Stakes Raised Again

Employers should take special note that the enforcement efforts designed to find violations for misclassifying an employee as an independent contractor have been substantially increased.

On September 19, 2011, the U.S. Department of Labor (DOL) announced that it had signed a memorandum of understanding (MOU) with the Internal Revenue Service that will enable them to share information and coordinate enforcement activities against employers accused of misclassifying employees as independent contractors.

According to the DOL press release concerning this alliance, the MOU will "improve departmental efforts to end the business practice of misclassifying employees in order to avoid providing employment protections." As the IRS's involvement suggests, this alliance has as much -- if not more -- to do with enhancing tax and other government revenues as it does with "employee protections".

Labor Secretary Hilda Solis also announced that the DOL would enter into similar MOU's with state authorities in Connecticut, Massachusetts and New York, among other states.

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Attorney Spotlight

Miles G. Lawlor received a B.A., *cum laude*, from the State University of New York at Geneseo in 1978, and his J.D. from Fordham University School of Law in 1989. Since then he has served in law firms focusing on the representation of employers. Mr. Lawlor devotes a substantial portion of his practice to employment and labor relations matters. He has extensive litigation experience defending employers against discrimination, wrongful termination and employee benefit claims made in state and federal courts and before administrative agencies. Miles also writes extensively with respect to employer obligations under various laws, and preventive maintenance techniques for both local and national publications.

In This Issue …

Hot Topics

Worker Misclassification: Stakes Raised Again (cont'd)

The bottom line is that employers who use independent contractors will face multi-pronged scrutiny and enforcement proceedings, from the DOL, the IRS, and various state agencies.

In light of this development, every company that uses independent contractors should anticipate renewed enforcement energy, activity, and aggressiveness. Company owners should work with their attorneys to immediately evaluate their vulnerability to a successful claim that those workers are improperly classified. Employers found to be in violation may face steep penalties for both labor law and tax-related violations.

If you have any questions or need assistance in assessing your vulnerability in this regard, please do not hesitate to contact us at 315-437-7600.

Social Media Issues

NLRB Continues to Impact Social Media Issues

Recently, the National Labor Relations Board (NLRB) required an employer to rehire five workers it had terminated after the workers posted derogatory comments about a coworker and their employment with the company on Facebook. The NLRB found that the Facebook communications were a "concerted activity" that were protected by the National Labor Relations Act (NLRA).

This case involved five employees who worked for Hispanics United of Buffalo, Inc. (HUB), a non-profit that provides social services to its economically disadvantaged clients in the Hispanic community of Buffalo. One of the five made a posting on Facebook on a Saturday (outside of her normal working hours), in response to criticisms from another HUB employee named Lydia Cruz. Specifically, the employee posted on Facebook that "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB I about had it! My fellow coworkers how do u feel?" The other four employees responded with their own Facebook postings, saying such things as "What the Hell, we don't have a life as is, What else can we do???" and "What the f. .. Try doing my job."

Cruz saw the posts and complained to HUB's Executive Director, attempting to prompt HUB to terminate or at least discipline the Facebook posters. As a result, the five posters were terminated by the Executive Director. The five filed charges against HUB with the NRLB. HUB argued at the hearing that it terminated the five individual posters because: 1) Cruz had suffered a heart attack as a result of the Facebook comments, requiring HUB to have to pay Cruz compensation; and 2) the posts constituted bullying and harassment in violation of HUB's policies.

The NLRB Administrative Law Judge (ALJ) rejected HUB's rationale for the terminations, ruling that the employees had engaged in "protected concerted activity" thereby making their terminations unlawful. The ALJ found it irrelevant that the workers were not trying to change their working conditions, that they did not communicate their concerns to HUB, and that there was no express evidence that the employees intended to take further organizing action. Nevertheless, the Judge concluded that employees simply "have a protected right to discuss matters affecting their employment amongst themselves." Based on these findings, the Judge ruled that HUB must offer all five employees reinstatement as well as backpay compensation with interest.

Given this ruling, employers should carefully review their social media policies and analyze any employment decisions based on employee activity on social media websites. As this case demonstrates, any social media postings that are related to work can potentially be considered "protected activity."

ADA Enforcement

EEOC Cracking Down on Rigid Work Schedule and Attendance Policies

In the last few years, the Equal Employment Opportunity Commission (EEOC) has begun to focus its enforcement efforts on employer leave of absence and attendance policies, and has obtained numerous costly settlements. While an employee's request for a medical leave of absence, intermittent leaves and modified work schedules create staffing uncertainty and can be a burden on both the company and coworkers, an employer's denial of an employee's leave or schedule change can lead to costly Americans with

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ADA Enforcement

EEOC Cracking Down on Rigid Work Schedule and Attendance Policies (cont'd)

Disabilities Act (ADA) claims for failure to accommodate.

In a class action lawsuit filed against a nationwide communications company, the EEOC argued that the employer's no-fault attendance policy violated the ADA because employees were assessed points for absences, resulting in discipline or discharge, even where the absences were due to ADA-covered disabilities. The EEOC's position was that the employer should provide, as a reasonable accommodation, an exception to its no-fault point system for such absences. The company recently settled the case for $20 million.

In another class action case, the EEOC alleged that the employer's policy of terminating employees at the end of a fixed medical leave period rather than bringing the employees back to work with reasonable accommodations was a violation of the ADA. The policy in question required employees who were returning from leave to be able to return to full duty with no restrictions. The employer settled this case with the EEOC for $3.2 million earlier this year.

Currently, the EEOC has several pending lawsuits against employers in which it contends that the employers' inflexible leaves-of-absence policies fail to reasonably accommodate individuals with disabilities. As with the cases described above, at issue in these cases are policies in which employees are terminated where they are ineligible for the FMLA or have exhausted FMLA leave or have exhausted a fixed maximum leave period.

While the EEOC is expected to issue guidance on leaves of absence in the near future, these cases are a good indication of what the guidance will contain. In light of these cases and the anticipated guidance, employers should consider taking precautions to reduce their potential liability exposure for ADA violation claims, such as:

- Removing any language from attendance and leave of absence policies that suggest that an employee will be terminated if he/she does not return to work within a specific period of time.
- Training supervisors to notify your HR department or other appropriate company officials of all leave or time-off requests to ensure that the organization promptly engages in an individualized interactive process with all disabled individuals, even where they are not eligible for or have exhausted FMLA and company-provided leave.
- Removing all statements from leave and attendance policies requiring that an employee must be able to return to work at "full capacity, without restrictions."

While it is possible that the EEOC will expand its challenges to leaves of absence and attendance programs, taking these steps should help your company to avoid future EEOC and court scrutiny in the near term.

If you have any questions about these issues, or need assistance in modifying your policies or training your supervisors, please feel free to call us at 315-437-7600.

Staying Union-Free

DOL Proposed Rule Change Complicates Open-Shop Communications

The Department of Labor (DOL) has issued proposed regulations designed to fundamentally change how it enforces the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). The LMRDA has required (for more than 50 years) that employers report "any agreement or arrangement" where the object is "directly or indirectly, to persuade employees to exercise or not to exercise…the right to organize and bargain collectively..." (29 U.S.C. Sections 433(a)(4) and (b)(1)). However, during that 50-year timeframe, the DOL interpreted the LMRDA as exempting lawyers/consultants from the law's "persuader activities" reporting requirements when they provided services directly to employers, but had no direct contact with employees.

Under the proposed rule change, both employers and lawyers/

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Staying Union-Free

DOL Proposed Rule Change Complicates Open-Shop Communications (cont'd)

consultants who provide advice to employer clients will have to file periodic disclosure reports, even if the lawyers/consultants have no direct contact with the employees. The proposed rule also expands the definition of "persuader" activities, to include such things as:

- Planning a response to a union campaign;
- Delivering draft communications for the employer to use;
- Training supervisors on how to comply with the NLRA;
- Drafting or revising policies.

The bottom line is that the proposed regulations broaden the number and types of activities that would have to be publicly disclosed under the LMRDA. This could cause labor attorneys/consultants (on whom HR professionals rely for advice) to stop providing critical advice and counsel to clients on how to best comply with the law. This will likely limit the information that employees receive when confronted with the important decision about whether or not to join a union.

Moreover, given that lawyers/consultants would have to publicly disclose the details of any agreements or arrangements to provide these so-called "persuader" services within 30 days of entering into such an agreement/arrangement, unions will have time to use that information against an employer in its organizing efforts.

Labor Law

Who Needs EFCA? Is the NLRB Rewriting Federal Labor Law?

As most employers are aware, the Employee Free Choice Act (EFCA) which would have permitted employees to become unionized through a simple card check (without any secret ballot vote or campaign period) does not have the support in Congress to become law. However, the National Labor Relations Board (NLRB) has demonstrated in recent years its intention to effectuate parts of EFCA through its case decisions and regulatory powers.

First, the NLRB is currently considering changes to its regulations which would permit employees to vote in a union election by phone or on the Internet. In the past, employees had to vote in person under conditions closely supervised by representatives of the employer, the union and the NLRB itself to avoid the possibility of fraud and/or coercion of voters. This change could result in situations where employees are being coerced at their homes or elsewhere to vote against their will in such an election. Like the card check provisions of EFCA, this change would effectively destroy the protections of a closely supervised secret ballot vote.

Second, the NLRB is also suggesting an expedited election rule change. This would permit the union to force an election within 14 days of filing its petition. Right now, campaign periods are typically 45 days or more. This change is designed to remove the alleged "advantage" that employers have to develop and implement a campaign strategy when confronted with an organizing campaign. Like EFCA, this change would limit an employer's ability to disseminate its union-free message to employees prior to a vote.

Third, it is anticipated that the new members of the NLRB (appointed by the Obama Administration) may overturn significant past NRLB decisions. Overturning these decisions would make it substantially easier for the NLRB to force an employer to "voluntarily" recognize a union that can produce signed cards from a majority of employees supporting unionization. Again, these actions would accomplish part of what EFCA was designed to do.

Finally, the NLRB has recently moved to implement more stringent penalties against employers who engage in unfair labor practices during organizing drives, as were proposed in part III of the EFCA bill.

Given that these efforts are taking place, employers should be taking the same precautions they would have to be prepared for the EFCA. Specifically, employers should honestly evaluate their companies with respect to union vulnerability. It is important to remember that union organizing efforts often gain traction when employees feel that they are treated unfairly or without respect or dignity. Efforts to improve fairness and consistency in all aspects of employee management (e.g., wages, hours, assignments, disciplinary actions, etc.) can help foster and maintain a pro-employee, union-free environment. These efforts coupled with a strong employee communication program are perhaps the best way to avoid vulnerability to union-organizing efforts.

If you have any questions, or need assistance in this regard, please call us at 315-437-7600.