Employment Law Matters

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

Hot Topic

DOL Creates Smartphone App for Employees to Track Own Hours of Work: What if Their Records Don't Match Yours?

The U.S. Department of Labor (DOL) recently announced the launch of a free application for smartphones which is designed let employees independently track the hours they work and determine the wages they believe they are owed. Specifically, the app allows users to track regular work hours, break time and any overtime hours. It also contains other materials about wage and hour laws and DOL contact information; in case an employee's own records do not match those of his/her employer.

According to the DOL's news release regarding the app, "[t]his new technology is significant because, instead of relying on their employers' records, workers now can keep their own records. This information could prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records." Secretary of Labor Hilda L. Solis added, "This app will help empower workers to understand and stand up for their rights when employers have denied their hard-earned pay."

It is unclear at this point how the DOL plans to use this information during an investigation of employee claims about unpaid wages or failure to maintain accurate employment records. However, as noted above, the DOL has said that the app information could be "invaluable" in such situations, suggesting that the information will be viewed as credible evidence of wages owed.

Given the potential for the widespread use — and possible abuse — of this app, employers (especially those in New York) must be prepared. Under New York law, for example, if an employer does not have accurate time records for an employee, the State DOL will presume that any records that an employee produces are accurate. This is often comes into play when an employee has been misclassified as exempt from the overtime pay requirements of the Fair Labor Standards Act (FLSA). As you might imagine, this app could be misused by an employee to claim wages owed for many hours (and particularly, overtime hours) not actually worked over a period of years.

In addition, the new app could effectively end the long-standing DOL wage and hour enforcement principal which allows employers to exclude, from total hours worked, small increments of time that cannot be effectively tracked by a company's timekeeping methods (the so-called "de minimus" rule). With the DOL's new app, employees will almost certainly be keeping track of those small increments of time just after clocking in or just before quitting time.

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Attorney Spotlight

Nicholas J. Fiorenza is a graduate of the Binghamton University and the George Washington University National Law Center. He pursued a concentration in labor relations and employment law.

His practice has been dedicated to this concentration, both in the private and public sectors, encompassing expanded business counseling as well. Early in his career, Mr. Fiorenza served as general counsel and President of the Printing and Imaging Association of New York State, Inc.

He is a founding Partner of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. and serves as the Firm's Managing Partner.

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Hot Topic

DOL Creates Smartphone App for Employees to Track Own Hours of Work: What if Their Records Don't Match Yours? (cont'd)

Employers should work closely with their employment attorneys to make sure that all employees are properly classified as exempt or non-exempt under the FLSA and that accurate time records are kept for all employees (for whom records must be kept under State and Federal law). Consistent and meticulous adherence to proper wage payment and recordkeeping practices will be the only way to effectively combat the likely abuse of the new app.

If you have any questions regarding the foregoing or need further assistance in this regard, please feel free to contact us.

Client Questions

"Cat's Paw" Discrimination: What is it? And, What Does it Mean for Your Company?

In a recent decision, the U.S. Supreme Court clarified when employers can be held liable for discrimination under so-called "Cat's Paw" situations. The phrase "Cat's Paw" comes from a 17th century Aesop fable about a monkey and a cat. In this fable, the monkey dupes a cat into stealing chestnuts from a fire. While the cat's paws are burning, the monkey gets away with the chestnuts. This story is used a metaphor to describe a situation where a supervisor with discriminatory motives (the monkey) gets the employer decision maker (the cat) to take adverse employment action against an employee.

Both federal and state courts have been split on the issue of whether an employer should be held liable under these circumstances. The Court has now ruled that if the supervisor with the improper discriminatory motive is the "proximate cause" of the adverse employment action, the employer is liable for employment discrimination. *Staub v. Proctor Hospital*, 562 U.S. __ (March 2, 2011).

In *Staub*, a supervisor with an anti-military bias wanted to replace an employee with military leave rights. The supervisor was alleged to have lied about the employee's performance problems in order to get the employee fired. The supervisor did not have the authority to fire the employee or any official input into such a decision. However, the ultimate decision-maker for the employer only did a cursory investigation of the supervisor's claims and in due course fired the employee based on the supervisor's account of the events.

The Court held that under the Uniformed Services Employment and Re-employment Rights Act (USERRA), an employer is liable if:

> A supervisor performs an act motivated by anti-military animus that is intended by the supervisor to cause an adverse employment action, and … if that act is the proximate cause of the ultimate employment action.

The Court concluded that there was sufficient proof that the employee's supervisor intended his actions to result in the employee's discharge and those actions were the proximate cause of the discharge.

This new "proximate cause" standard is a higher standard than previously required in the 2nd Circuit (the federal circuit with jurisdiction over New York). In the 2nd Circuit, "Cat's Paw" plaintiffs were required to show only that biased non-decision makers played a "meaningful role in" or "had influence in" the adverse employment action. Under *Staub*, plaintiffs will now have to prove that the action was the cause of the employment decision as opposed to merely influencing it.

It is important for employers to note that the Court cited the fact that the employer failed to do a thorough and impartial investigation of the allegations which led to the employee's termination. The lesson in this case for all employers is to carefully scrutinize all disciplinary actions. Never terminate an employee without first performing an investigation in which you: 1) investigate the claims by a supervisor or any other employee; 2) try to corroborate the claim by seeking independent witness statements or other evidence; and 3) obtain the employee's side of the story. Then, after weighing all of the relevant evidence, reach a final determination about the appropriate disciplinary action to take, if any.

If you have any questions regarding "Cat's Paw" discrimination, please contact us at 315-437-7600.

NLRB Case Update

NLRB Decision Presents a Cautionary Tale about Employee Handbooks

In a decision issued on March 28, 2011, the National Labor Relations Board (NLRB) held that an employer's mere maintenance of an "overbroad rule" in its employee handbook was sufficient to warrant setting aside election results in a union related election. Jurys Boston Hotel, 365 NLRB No. 114 (3/28/11).

In this case, the employees of the hotel sought to remove a union through what is known as a decertification process. Much like a union organizing election, employees must vote by secret ballot about whether or not they want to be unionized. The union had organized the employees years prior without much resistance by the employer. In fact, many commentors on this case have noted that the employer had an almost "positive approach" toward the union during the initial union organizing campaign. Nevertheless, the employees over a period of time became dissatisfied with the union and sought to remove it.

After the employees voted to decertify the union, union officials filed objections with the NLRB which stated in essence that the employer's handbook policies were "overbroad" and infringed on employees' rights under the National Labor Relations Act (NLRA). Specifically, the hotel had policies (which appeared in most employers' handbooks) involving "No Solicitation or Distribution", a "No Loitering" policy, and a dress code policy that banned the wearing of buttons. Even though these policies had been in effect for two years without any union objection, the union officials who contested the decertification process claimed that these policies discouraged employees from communicating about the union and/or their terms and conditions of employment. The NLRB agreed. As a result, the decertification election was overturned and the union was given a second opportunity to resist the employees' efforts to remove them.

While this decision involved a decertification election, its implications are clear; it will be much easier for unions to overturn close union organizing elections in the future by arguing that overbroad policies could have affected the outcome of the election. Unions looking to organize particular companies will likely now review the targeted employers' handbooks. If they find what they feel are overbroad policies, they will file objections to union election if they lose. This will give them a "second bite at the apple".

Based on this decision, employers should carefully review their handbooks to ensure that their policies are not overbroad in this context. The NLRB has suggested that an employer include disclaimers in the handbook associated with policies such as No Solicitation and Distribution, dress codes, etc. that specifically state that these policies are not intended to infringe on an employee's rights under the NLRA.

If you need any assistance with reviewing your policies and/or drafting any needed disclaimers, please feel free to contact us.

Employment Discrimination

Use GINA's "Magic Language" When Requesting Employee Health Information

As most employers are aware, the Genetic Information Nondiscrimination Act (GINA) became law in 2008. The implementing regulations were later issued in November of 2010. Generally, the law: 1) prohibits the use of genetic information about employees in any employment decisions; 2) restricts employers from requesting, requiring, or purchasing genetic information about employees; and 3) strictly limits the disclosure of such genetic information if an employer inadvertently receives it.

One way that an employer can inadvertently receive this genetic information is by requesting information from an employee or an employee's doctor about the employee's current health status. Employers should be aware that

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Use GINA's "Magic Language" (cont'd)

GINA creates a "safe harbor" for those who inadvertently obtain this information as a result of such requests. In order to take advantage of this safe harbor provision, however, all such requests should include the following disclaimer:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

We recommend that this so called "magic language" be used anytime an employer requests information from an employee or an employee's doctor under Family Medical Leave Act (FMLA) (i.e., for medical certification purposes), and any other communications regarding an employee's health for purposes of determining whether an employee has a disability and/or whether there are reasonable accommodations that the law would require the employer to provide.

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