Employment Law Matters

October 2013

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

Hot Topics

"Obamacare" Update:

Employee Notice on Health Insurance Exchanges due by October 1 along with COBRA Election Notice Changes

Employee Notice Due by October 1

The U.S. Department of Labor (DOL) recently issued guidance regarding the next major step on the road to full implementation of the Patient Protection and Affordable Care Act (PPACA), more popularly known as "Obamacare". The new guidance primarily addresses the requirement that employers give their employees written notice about coverage options available through health insurance exchanges. The notice deadline (which was originally set for March 1, 2013) is October 1, 2013.

According to the law and guidance, the written notice must inform each employee about:

- The existence of the Marketplace (referred to in the statute as Health Insurance Exchanges) including a description of the services provided by the Marketplace, and the manner in which the employee may contact the Marketplace to request assistance;
- The fact that, depending on his/her family income and what coverage may be offered by the employer, they may be able to get lower cost private insurance in the Marketplace; and
- If he/she buys insurance through the Marketplace, the employee may lose the employer's current contribution (if any) to their health benefits.

The DOL has created two model notices designed to comply with these requirements and made them available on their website: one is for employers who do not offer health insurance plans to employees and the other is for employers who do. (Copies of these model notices are available on the DOL's website at http://www.dol.gov/ebsa/healthreform/.)

> ***The DOL points out that "… there is no fine or penalty under the law for failing to provide the notice." This does not mean, however, that a fine or penalty will not be added sometime in the future.***

As noted above, the notice deadline is October 1, 2013. However, the DOL points out on its website that while each company should "…provide a written notice to its employees about the Health Insurance Marketplace by October 1, 2013, … there is no fine or penalty under the law for failing to provide the notice." This does not mean that a fine or penalty will not be added sometime in the future. It should also be noted that following the initial deadline, employers are expected to provide new employees with the written notice at the time they are hired.

The notice must be provided in writing "in a manner calculated to be understood by the average employee." It may be provided by first-class mail or electronically, provided that the requirements outlined in the DOL's "electronic disclosure safe harbor rules" are met. Generally speaking, these rules require that the individual sending the electronic written notice "takes appropriate and necessary measures reasonably calculated to ensure that" the system for furnishing the notice:

- Results in actual receipt of the notice (e.g., using return-receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of the transmitted information);

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- Protects the confidentiality of the employee and his/her accounts; and
- Apprises the individual of the significance of the document and of the right to request and obtain a paper version of it.

Employers should carefully review their practices and procedures to ensure that beginning soon -- and for the foreseeable future -- this written notice is provided to every employee regardless of the employee's full or part-time status or plan enrollment status.

COBRA Election Notice Changes

The DOL guidance also introduced an amended model election notice for COBRA continuation coverage. (A copy of the amended model notice is available on the DOL's website at http://www.dol.gov/ebsa/healthreform/.)

Generally, speaking, the COBRA election notice must be provided to qualified beneficiaries within 14 days after the plan administrator receives notice that and employee has experienced a "qualifying event" as defined by the Act. The notice, which explains the right to continuation coverage and how it works, was modified to include new information about Obamacare. One of the major revisions was the addition of the following language:

> "There may be other coverage options for you and your family. When key parts of the health care law take effect, you'll be able to buy coverage through the Health Insurance Marketplace. In the Marketplace, you could be eligible for a new kind of tax credit that lowers your monthly premiums right away, and you can see what your premium, deductibles, and out-of-pocket costs will be before you make a decision to enroll. Being eligible for COBRA does not limit your eligibility for coverage for a tax credit through the Marketplace. Additionally, you may qualify for a special enrollment opportunity for another group health plan for which you are eligible (such as a spouse's plan), even if the plan generally does not accept late enrollees, if you request enrollment within 30 days. "

Employers should begin using this model notice on October 1, 2013, as well.

Union Activity Update

AFL-CIO Encouraging Union Membership in a New and Unique Way

It is no secret that union membership in the private sector has been dwindling for some time. According to recent statistics published by the U.S. Dept. of Labor, Bureau of Labor Statistics, only 6.6% of the private-sector working population belongs to unions. This is down from a high of near 35% in the 1950's.

At its annual convention earlier this year, the AFL-CIO announced its intention to reinvent itself to deal with this "crisis." One of the more novel ways that Union plans to encourage membership is to invite any employee to join the AFL-CIO regardless of whether they work for a unionized employer. The Union's stated intention in this regard it to serve as an advocate and information clearinghouse for otherwise unrepresented workers regarding labor and employment laws. However, employers can expect that these new members of the AFL-CIO will be encouraged to organize their fellow employees. These individuals could, in essence, become internal union organizers for any company.

While it is uncertain whether the AFL-CIO will have any success in turning the tide of union membership in this country, employers should take steps to remain union-free. An employer's success in this regard depends on adapting "best practices" suited to the employer's specific company environment, which make unions (and their claimed advocacy) irrelevant. This will typically involve a combination of the following:

- Educating and communicating with employees
  - Explaining "big picture" business environment (and their role in it)
  - Articulating union-free philosophy
  - Training employees about the realities of union membership
- Training supervisors to:
  - Manage fairly and consistently
  - Not retain "lost cause" employees
  - Become respected leaders for their employees

Should you need assistance in structuring or implementing your "best practices" in this regard, please feel free to contact our office.

National Labor Relations Board (NLRB) Update:

Supreme Court to Rule on Presidential Appointments to NLRB and Board Continues Activist Campaign

Supreme Court to Rule on Recess Appointments to Board

On June 24, 2013, the U.S. Supreme Court agreed to hear arguments from the NLRB's appeal of a lower court's ruling in the case of Noel Canning v. NLRB. As you may recall, the D.C. Circuit Court ruled earlier this year that President Obama's "recess appointments" of three Board members were unconstitutional because the appointments were made while the Senate was technically in session. This decision, in essence, invalidated all of the recent "activist" decisions rendered by the Board during the time that these improper appointees made up a quorum of the five-member board.

Article II, Section 2 of the U.S. Constitution authorizes a President to make a "recess appointment" while the Senate is in recess. To remain in office, a recess appointment must be approved by the Senate by the end of the next session of Congress, or the position becomes vacant again.

In January 2012, at the end of the 112th session of Congress, the Board had three members. Only two of the three were Senate-confirmed. The unconfirmed recess appointee's position then became vacant. Given that the Supreme Court had ruled in 2010 that the five-seat Board did not have authority to act (e.g., to decide unfair labor practice cases, etc.) with fewer than 3 members, President Obama announced the appointment of three new members. Despite the fact that the Senate was meeting every three days at the time, the President did not seek to have the appointees confirmed at that time.

Following the appointments, Noel Canning, a bottling firm, was found by the Board to have committed an unfair labor practice in its collective bargaining negotiations with the IBT. Noel Canning challenged the validity of the ruling claiming that since the three new Board members had not been properly confirmed by the Senate as required by the Constitution, they had no authority to make the ruling.

The D.C. Circuit Court agreed with Noel Canning. The court held that while the NLRB order against the Company would have been enforceable if the Board had a quorum of three properly-confirmed members. However, the Board's order was invalid because the president's recess appointments were unconstitutional.

This decision called into question not only the NLRB's ruling in Noel Canning, but all of its decisions made during the time that the Board had only two properly-confirmed members.

On June 24, 2013, the U.S. Supreme Court granted the NLRB's petition to appeal this lower court decision and thereafter certified the following questions to be decided by the Court:

- Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate;
- Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess; and
- Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.

It is important to remember that the decisions made by the NLRB over the past few years have been particularly one-sided in favor of organized labor. These include decisions invalidating social media policies, at-will employment statements in employee handbooks, etc. If the NLRB is successful in its appeal to the Supreme Court, these decisions will remain in effect. If not, they will have to be addressed by the Board again, with new decisions issued.

Employers should note that the Board now has a full slate of confirmed members. Accordingly, the Board could theoretically rehear and reissue its prior decisions. But, there is no guarantee that the newly-formed Board will be in agreement with the prior Board members who – depending on the Supreme Court's ruling -- may or may not have been properly appointed.

The Supreme Court is expected to hear arguments in this case in January 2014.

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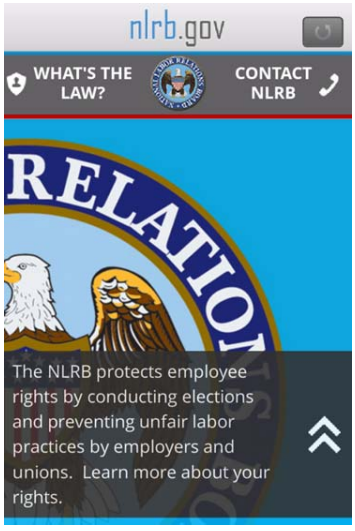
Supreme Court to Rule on Presidential Appointments to NLRB and Board Continues Activist Campaign (cont'd)

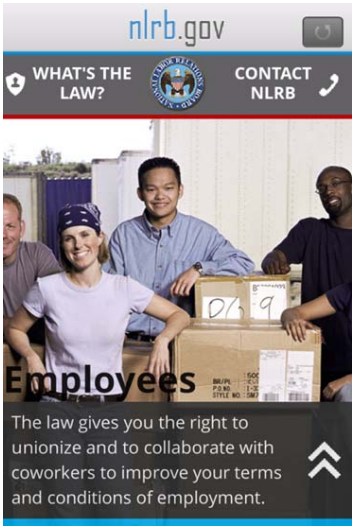
Board Continues Activist Campaign with Launch of Free Smart Phone App

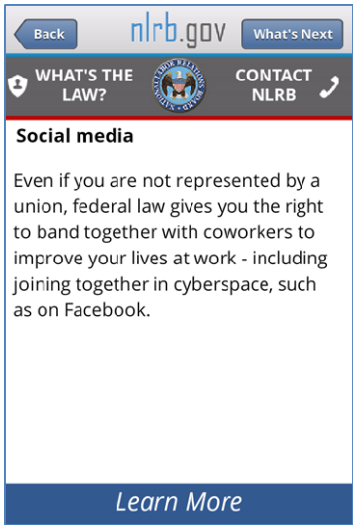
The National Labor Relations Board (NLRB) has launched a new mobile app, available free of charge for iPhone and Android users. The NLRB Describes the app as providing "… employers, employees and unions with information regarding their rights and obligations under the National Labor Relations Act." However, much of the app appears to be consistent with the Board's push — over the past few years — toward advocating for union membership. In its press release announcing the launch, the Board noted:

> "The app provides information for employers, employees and unions, with sections describing the rights enforced by the National Labor Relations Board, along with contact information for NLRB regional offices across the country. The app also details the process the NLRB uses in elections held to determine whether employees wish to be collectively represented.
>
> Each month, an average of 2,000 unfair labor practice charges and 200 representation petitions are filed with the NLRB. In 2012, the NLRB collected more than $44 million in backpay or the reimbursement of fees, dues and fines. More than 1,200 employees were offered reinstatement as a result of NLRB enforcement efforts."

Below are some screen captures from the app itself:







Employers may wish to download the app to keep themselves apprised of the information that is being disseminated among employees and unions. This can help employers to be prepared to answer questions posed by employees and to address union organizing efforts.

If you have any questions about the app or any of the issues it addresses, please feel free to contact our office.