Employment Law Matters

April 2012

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

Hot Topics

Legal Challenge to NLRB's "Right-to-Unionize" Posting Rule Dismissed But There is Some Good News

On March 2, 2012, a U.S. District Court dismissed a lawsuit filed by a group of business organizations seeking to invalidate the National Labor Relations Board's (NLRB's) new rule that employers must post notices informing employees of their right to "join and assist a union" and to "bargain collectively" with their employer.

In *National Ass'n of Manufacturers v. National Labor Relations Board*, the business groups argued that the NLRB had exceeded its regulatory authority in requiring that such a notice be posted. While the Court rejected their argument with respect to the posting itself, it did strike down two of the new rule's more draconian provisions. First, the Court held that the NLRB could not deem the failure to post a notice an "unfair labor practice" (ULP). Second, it held that the NLRB could not extend an employee's six-month statute of limitations to file an ULP charge where the employee worked for an employer who failed to properly display the right-to-unionize poster. While an appeal has been promised, as it currently stands, employers will be required to post the notices by April 30, 2012.

Employers should prepare for this requirement by educating managers/supervisors about the notices (and unionization, in general) to ensure that they communicate their employers' positions on unionization in a lawful manner. Employers may also want to display their own poster communicating their viewpoints with respect to staying union-free. Such posters must be carefully worded to avoid ULP or other challenges as well.

Firm Events

Firm Attorneys to Speak at HR Conference and You're Invited

Nicholas Fiorenza

Michael Dodd

Our firm's Managing Partner, Nicholas Fiorenza, and firm Partner, Michael Dodd, will be conducting an in-person, one-and-one-half day Human Resources Conference on April 26 and 27, 2012 at the Turning Stone Resort & Casino in Verona, New York.

You are invited to attend the **"Human Resources Conference: Boot Camp 2012,"** sponsored by the Printing Industries Alliance (PIA). The Conference is uniquely relevant to today's challenging legal environment and is intended for all private sector employers.

In an effort to expand the opportunities for its members to network with and learn from other employers and HR executives from different industry groups, ***the PIA has asked us to invite our clients and friends to attend this Conference at the PIA-member rate listed in the conference brochure available on our firm's website at*** http://www.ferrarafirm.com/media/documents/2012/3/HR_Conference_2012.pdf. The Conference will focus on compliance issues facing all private sector employers. Owners, top managers, human resources staff, finance managers and others responsible for complying with employment laws are all encouraged to attend.

While the details of the Conference are spelled out in the brochure, in brief, Mr. Fiorenza and Mr. Dodd will be presenting on the following topics during this one-and-a-half day Conference:

EMPLOYMENT LAW UPDATE

- NLRB's "Right-to-Unionize" Posting requirement -- and how to properly express your viewpoint to employees about it and how to keep your union-free advantage;
- The latest decisions and rulings affecting employee and employer use of social media in the workplace;
- Final rule issued and ready to take effect on "quickie" union elections rule that could severely restrict your ability to mount a campaign to remain union-free;
- "Labor persuader" rule could change how you work with your attorney to remain union-free;
- Upcoming legal battle in front of the Supreme Court regarding challenges to the federal health care reform law (i.e., Patient Protection and Affordable Care Act);

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Firm Events

Firm Attorneys to Speak at HR Conference and You're Invited (cont'd)

- Supreme Court's upcoming decision interpreting the "Outside Sales" exemption to overtime laws under the Fair Labor Standards Act (FLSA);
- Federal agency onslaught on misclassifications of employees as independent contractors; and,
- Much more.

RECRUITMENT: HIRING SMART

- Job Descriptions;
- Effective Interviewing;
- Evaluating Applicants;
- Making the Offer; and
- Avoiding pitfalls along the way.

MANAGING EMPLOYEE ABSENCES

- Obtain a practical guide to complying with FMLA and ADA;
- How to identify legal issues related to disability absences, and how to avoid the most common legal pitfalls associated with these laws;
- How to facilitate communication and understanding about the requirements of these laws between line supervisors, human resources and employees.

STOP IT WITH THE EMAILS ALREADY!

- Understand the legal difficulties email and other forms of "casual" documentation can create.
- Learn when it is legal and illegal to purge your company's system of email and other similar documentation.
- Learn how to create a positive record through use of email to support important employment decisions.

LEADING CHANGE IN YOUR ORGANIZATION

Specifically you will learn about:

- Employee reactions to change;
- Impediments to change in any organization; and
- Process for leading employees through change.

The Boot Camp is designed to teach HR compliance strategies on the first day of the Conference and then permit participants to practice applying those strategies on the second. If you attend, you will also receive an HR Survival Kit (including ready-to-use standard operating procedures, policies, checklists, and more) that you can tailor and use in your workplace to address each and every compliance topic covered at the Conference.

In order to register for the Human Resources Conference: Boot Camp 2012, you can complete and return the registration form included in the conference brochure on our website (listed above) or call PIA at (800) 777-4742. You can also register online at www.PIAlliance.org.

Severance Package Discrimination

Disparity in Severance Package Offers Can Lead to Discrimination Claims

A recent federal appeals court decision has held that an employer violated the gender discrimination provisions of Title VII of the Civil Rights Act by offering a former female employee a less desirable severance package than her male counterparts. (*See Gerner v. County of Chesterfield*, ___ F.3d ___, [4th Cir., No.11-1218, 3/16/12].)

In *Gerner*, a female employee's job was eliminated due to a staffing reorganization. She was offered three months of pay and benefits as severance, if she would sign a waiver of legal claims against the employer. Ms. Gerner declined the offer and was permanently laid off without severance. Thereafter, she filed a gender discrimination claim under Title VII, alleging that some of her male coworkers were offered: 1) six months of pay and benefits; or 2) placement in positions with less responsibility while continuing their prior pay. Ms. Gerner was not offered either.

A lower federal court initially dismissed Ms. Gerner's complaint, holding that the less desirable severance package could not constitute discrimination under Title VII, in part, because the severance offer was made after she had been terminated. However, the Fourth Circuit Court of Appeals reversed this decision.

An appellate court cited a previous U.S. Supreme Court decision which held that under Title VII, "A benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship." Thus, a disparate employment benefit can constitute an adverse action, even if it is associated with a former employee. According to the Circuit Court Judge, to limit actionable adverse employment actions to those taken while an individual is currently employed would be inconsistent with Title VII's principal goal of "eliminat[ing] discrimination in employment."

This case serves as a reminder to employers that Title VII can be applied to actions taken against former employees (in this case, severance package offers). As we have reported in prior editions of ***Employment Law Matters***, Title VII has also been applied to cases where employers have given negative references to prospective employers of former employees, where the basis for the negative reference was discriminatory or retaliatory for filing prior EEO-related claims.

If you have any questions regarding this case or structuring your severance packages, please feel free to contact us.

Restrictive Covenants

Non-Compete Agreements Must Be Properly Tailored and Carefully Drafted to be Enforced

The federal appeals court (with jurisdiction over New York) recently refused to enforce a one-year non-competition agreement signed by a former IBM senior executive. The Court's Chief Judge ruled that the restrictive covenant was "overbroad", and therefore, unenforceable. The Court also rejected IBM's claims of trade secret misappropriation because, according to the Court, the risk that the former executive would use or disclose IBM's confidential information with his new employer was "minimal."

In *IBM v. Visentin*, the senior executive, Giovanni Visentin, resigned from IBM to take a job with an IBM competitor; specifically, Hewlett-Packard (HP). During his 26 years of employment with IBM as a manager, Mr. Visentin had signed two non-competition agreements in which he agreed to refrain from working for an IBM competitor for one year following his resignation. Nevertheless, he began working for HP immediately following his resignation.

IBM sued to enforce its restrictive covenant with Mr. Visentin and for the misappropriation of its trade secrets. The court found IBM's non-competition agreement "overbroad" because it prohibited competition in areas in which IBM had no legitimate business interest. For example, it prohibited Mr. Visentin from working for a competitor in a business in which IBM does not even participate, e.g., retail laptop and printer sales. The agreement was also written to prevent him from owning even a single share of stock in a competitor company. The court noted that if the IBM agreement were enforced as written, it would create an undue hardship for Mr. Visentin. Specifically, the court said that a "protracted absence could alienate" Mr. Visentin from HP and place him at a disadvantage in the highly competitive and quickly changing computer industry..

With respect to its trade secrets, IBM asserted that as a senior manager for IBM, Mr. Visentin learned confidential information and technical trade secrets. The court rejected these claims, finding that Mr. Visentin's primary job at IBM was to be a "general manager." The Judge noted that, "although trade secrets may have lurked somewhere on the periphery, the real thrust of his position was to manage his teams to make them as efficient as possible." In essence, the court found that Mr. Visentin lacked technical knowledge of IBM's confidential information and trade secrets.

The court also focused on the fact that Mr. Visentin and HP designed his position at HP to eliminate the need (or desire) to disclose or use IBM confidential information or trade secrets. This included restricting Visentin from working with customers with whom he had worked at IBM. In addition, the court noted that Mr. Visentin refrained from removing any IBM confidential information or property from IBM's offices or systems before his resignation.

There are a number of lessons to be learned from this case. First, it is important to remember that non-competition agreements are not favored by New York courts and the courts in many other states. Many judges will seemingly go out of their way to invalidate them. Second, non-compete agreements must be carefully drafted to protect a company from unfair competition within its actual marketplace. The temptation to make broad restrictions must be resisted. Third, all non-compete agreements should include a provision that states that if the provision is found to be overly-broad, the Court can, in essence, rewrite the provision (or "blue pencil" it) to make it consistent with the law. The agreements signed in this case were drafted by a Human Resources manager (not an attorney) and it failed to include such a "blue pencil" clause.

Should you have any questions regarding this case or non-competition agreements, in general, please feel free to contact us.

I-9 Webinar Recording Available

In case you missed it, our firm conducted a webinar entitled **"Conduct Your Own I-9 Audit Before It's Too Late,"** on March 15, 2012. A recording of that webinar can be accessed on our firm's website at http://www.ferrarafirm.com/I9_Audit.aspx. Remember, the U.S. Immigration and Custom Enforcement (ICE) agency has increased its enforcement activity focusing primarily on whether or not employers have properly completed the I-9 Form. Failure to do so can lead to expensive fines and even criminal charges. By conducting a self-audit, you can locate and correct many I-9 errors before the ICE comes knocking on your door.

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Religious Accommodations

Accommodating Religious Practices Much Different than Accommodating Disabilities

Not all "reasonable accommodations" are created equal. The requirements for an employer to reasonably accommodate an employee's religious beliefs/ practices are very different than the requirements to reasonably accommodate an employee's disability. Under Title VII of the Civil Rights Act, a religious accommodation is considered unreasonable (or an "undue hardship" for the employer) if it creates "more than *de minimis*" cost or burden for the employer. This undue hardship standard is a substantially lower standard than that required under the Americans with Disabilities Act (ADA), which is defined instead as "significant difficulty or expense."

Title VII prohibits an employer from discharging or otherwise discriminating against an employee because of his/her religion. To avoid such unlawful discrimination, an employer must attempt to accommodate an employee's religious needs. The extent of this obligation is spelled out in the Act's definition of religion, which reads as follows: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that [it] is unable [to]... reasonably accommodate an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

Courts employ a two-step analysis in evaluating claims of religious discrimination. An employee bears the initial burden of establishing a *prima facie* case of religious discrimination. The employee meets this burden by showing that he/ she holds a sincere religious belief that conflicts with an employment requirement, he/she has informed the employer of the conflict, and he/she was discharged or otherwise penalized for failing to comply with the conflicting employment requirement. Once a *prima facie* case is established, the burden shifts to the employer to show that it could not reasonably accommodate the employee without undue hardship in the conduct of its business.

Applying these legal standards, an employer's obligation to reasonably accommodate religious beliefs starts with a threshold determination as to whether the employee is requesting the accommodation because of a "sincerely held" belief or whether in the alternative, the request is actually based on a personal preference. For example, an employee may request to be relieved of all duties on Saturdays for religious reasons. If this is simply because the employee would prefer to attend services on Saturday, as opposed to a sincerely held belief that Saturday is the Sabbath day and no work should be performed on that day, then it is a preference and may not need to be accommodated. This is why it is a good idea to request additional information from an employee requesting a religious accommodation in order to evaluate whether his/her conduct is consistent with a sincerely-held belief.

Assuming that the employee's request for accommodation is based on a sincerely-held belief, an employer's analysis must turn to whether the proposed accommodation imposes more than a *de minimis* cost or burden for the employer. Factors to be considered are "the identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation." For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work. The determination of whether a proposed accommodation would pose an undue hardship is based on concrete, fact-specific considerations.

If you have any questions about religious accommodations, please feel free to contact our office.