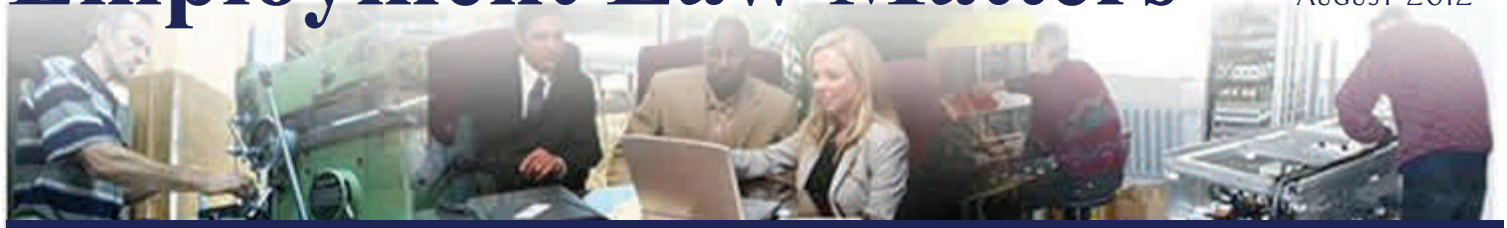
# Employment Law Matters

August 2012



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

## Hot Topics

### NLRB Invalidates At-Will Employment Policy and Direction to Employee to Keep Misconduct Investigation Confidential

As we have reported in past editions of *Employment Law Matters*, the current National Labor Relations Board (NLRB) (appointed by the Obama administration) is increasing its involvement in employment-related disputes in non-unionized companies. For some time now, the NLRB has invalidated numerous non-unionized companies' social media policies as being overly broad and improperly limiting an employee's right to "engage in concerted activity". Recently, the NLRB has applied this same rationale to invalidate commonly-used "employment-at-will" policy statements and an employer's direction to an employee to keep a misconduct investigation confidential.

The NLRB's rationale in these cases is based on its broad interpretation of the National Labor Relations Act (NLRA) which states that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7". Section 7 of the NRLA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…." In the social media cases, for example, the NRLB has found that disciplining an employee for making derogatory statements about an employer on Facebook was a viola-

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## Firm Events

### Firm Attorneys to Present Employment Law Webinar Series

Nicholas Fiorenza

Michael Dodd

Our firm's Managing Partner, Nicholas Fiorenza, and firm Partner, Michael Dodd, will be presenting a five-part "Lunch and Learn" Employment Law Webinar Series beginning on August 23, 2012. The series, sponsored by Delacroix Consulting Group, LLC, is designed to provide supervisors skills which: 1) minimize the risks associated with often hidden legal problems that can lead to employment law litigation; and 2) help them manage their employees better. The series' objective is to provide an easy-to-follow roadmap for not only complying with often complex laws and regulations, but also for allowing companies and employees to thrive in such an environment.

The webinars will be one-hour long sessions from Noon to 1 p.m. (Eastern time) on the following dates, covering the topics described:

August 23, 2012
**Employment Law Basics: What No Manager Can Survive Without**

- Employment Discrimination Laws
- Responding to Discrimination Claims
- Fair Labor Standards Act
- National Labor Relations Act

September 27, 2012
**Independent Contractors/ Misclassifications: DOL Crackdown on Your Business Model**

- Determining How to Protect Your Business Model
- Essential Independent Contractor Agreement Provisions
- Liability for Misclassification

October 17, 2012
**Wage & Hour Issues: What You Need to Know about Enforcement Agencies Now**

- Exempt vs. Non-Exempt
- Overtime Calculations and Options
- "Rounding" Hours of Work for Payroll Purposes

November 15, 2012
**Workplace Harassment: Claims that Strike When You Least Expect It**

- The "Evolving" Hostile Environment
- Investigating Claims and Responding to Complainants
- Preventing Harassment Before It Starts

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### *In This Issue …*

## Firm Events

### Webinar Series (cont'd)

December 20, 2012

**Employee Discipline and Termination: Still the Greatest Risk for Employment Litigation**

- Building Record that Stands Up in Court
- Drafting Warning & Termination Letters
- "Before-You-Fire Checklist"
- Layoffs and Plant Closings

There is a $65 per session, per computer connection registration fee. To register online for any or all of the webinar sessions you can click on the individual sessions described above or click here to register for all five. You can also register by telephone by calling Delacroix Consulting Group at 315-234-3800. If you have any additional questions about the program, you may call that number as well.

### 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.

## Hot Topics

### NLRB Invalidates At-Will Employment Policy and Direction to Employee to Keep Investigation Confidential (cont'd)

tion of the NLRA because employees "have a protected right to discuss matters affecting their employment amongst themselves." In other words, so long as coworkers were communicating on Facebook about these matters, they were deemed to be engaging in "protected concerted activity."

The NLRB recently held that the American Red Cross had an "overly-broad and discriminatory" statement regarding employment-at-will in its employee handbook. In the case *American Red Cross Arizona* and *Lois Hampton*, the acknowledgement section of the organization's handbook stated that the at-will employment relationship could not be changed without the signature of both the employee and certain Red Cross managers. The NLRB held that this language was tantamount to an unlawful waiver by employees of their right to engage in concerted activities to change their at-will employment status (e.g., collectively bargain for greater job protection). The Board ordered the Red Cross to display a poster in its facility specifically reinforcing employees' rights to engage in concerted activities.

In *Banner Health System d/b/a Banner Estrella Medical Center and James A. Navarro*, the NLRB found a violation of the NLRA when a hospital's HR manager asked an employee not to discuss an investigation into the employee's alleged misconduct with co-workers, in order to protect the integrity of her investigation. This case involved a hospital technician who refused to follow his supervisor's order to clean surgical instruments in a specific way. The hospital investigated the technician's refusal and disciplined him for insubordination. The technician then filed an unfair labor practice charge against the hospital. The Board focused on the HR manager's use of a standardized interview form which contained instructions for the manager to request that interviewees refrain from discussing the investigation with others. According to the NLRB, this form created a "rule" that improperly prohibited employees from discussing HR investigations. The Board held that an employer could only make such a request on a case-by-case basis after first determining that "witnesses need [ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up." As in the *Red Cross* case, the Hospital was ordered to display a poster in its facility specifically reinforcing employees' rights to engage in concerted activities.

It is important to note that in both of these cases the unfair labor practice charge was filed by an individual employee. Moreover, neither case involved any union activity. With this in mind, employers should review their investigation procedures and any at-will provisions in their employee handbooks and other employment documents (e.g., offer letters) for compliance with the NLRB's new and more expansive interpretation of the NLRA.

If you have any questions or need assistance in this regard, please feel free to contact our office.

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*Retaliation Discrimination*

## Employee Cannot Sue for Retaliation Associated with Employer's Internal Harassment Investigation, Federal Appeals Court Rules

In a recent decision, the Second Circuit Court of Appeals ruled that an employee who participated in an employer's internal investigation of another employee's harassment complaint was not protected by the anti-retaliation provisions of Title VII of the Civil Rights Act, because no Equal Employment Opportunity Commission (EEOC) charge had been filed. (*Townsend v. Benjamin Enterprises, Inc.,* ___ F.3d ___ [2d Cir., 2012].)

Title VII of the Civil Rights Act prohibits retaliation against employees who bring complaints of discrimination on the basis of race, religion, age, disability, etc. It also prohibits retaliation against non-complaining employees who simply participate in any investigation or hearing concerning the complaint. Even if the underlying discrimination complaint is ultimately found to be without merit, the employee may still have a valid claim of retaliation if he/she is treated in a negative way by the employer because of the complaint. As you might imagine, any time an employer makes a legitimate decision that adversely affects an employee's job (e.g., involuntary transfer, reduction in hours, reduction in force, termination for cause, etc.), there is a risk of a retaliation claim if that employee was involved in any way with a prior discrimination claim. This is part of the reason why Equal Employment Opportunity Commission (EEOC) complaints alleging retaliation in violation of federal anti-discrimination statutes increased by 73% between 2000 and 2011.

However, the Townsend decision makes it clear that in order for a non-complaining employee to have a valid claim of retaliation for participating in an investigation, the investigation must be conducted by the EEOC or state agency investigating the claim. In Townsend, a receptionist reported to the company's human resources (HR) director that she was being sexually harassed by the company vice president, who happened to be the husband of the company president. The HR director directed the husband to work from home during her investigation. While the internal investigation was underway, the president of the company, the wife of the alleged harasser, fired the HR director for breaching confidentiality by speaking with a third party about the investigation. The alleged harasser was then allowed to return to work and was not found to have violated company policies.

In the lawsuit, the former HR director claimed that she was terminated in retaliation for her investigation of the receptionist's discrimination complaint.

The Court ruled that the former HR director could not pursue a retaliation claim under Title VII because no formal discrimination complaint had been filed with the EEOC at the time the alleged retaliatory firing took place. The Court noted that "… participation in an internal employer investigation not connected with a formal EEOC proceeding does not qualify as protected activity under the…" anti-retaliation provisions of the Title VII.

While this decision is subject to appeal to the U.S. Supreme Court, for now, it is safe for employers in states that are a part of the Second Circuit's jurisdiction to assume that participation in internal discrimination investigations will not be sufficient to invoke the anti-retaliation provisions of Title VII.

*Retaliation Discrimination*

## Last Chance Warning Agreements May Pose Retaliation Claim Problem

In *Whitlow v. Cognis Corp*. a Federal District Court in Illinois ruled that an employer retaliated against an employee in violation of Title VII by terminating the employee after the employee sought to revoke his consent to a last chance agreement ("LCA").

The Employer decided to offer an employee with a history of performance problems a LCA in lieu of termination. The LCA provided that the employee would be discharged if he did not meet performance expectations or violated company rules within two years. The LCA also stated that the employee agreed to waive his right to file a grievance under the labor contract or to sue in court to challenge his termination during the two-year term of the LCA.

The employee initially signed the LCA, but ten days later he requested that it be modified so that he could "retain his civil rights." The employer refused to modify the LCA. When the employee announced that he was revoking his consent to the LCA, the employer terminated his employment.

The Court ruled that the employer engaged in unlawful retaliation in violation of Title VII by terminating the employee because he refused to agree to the LCA. The Court stated that an employer could not take an adverse employment action against an employee based on the employee's refusal to waive his right to file discrimination complaints in the future, even if in the context of a LCA.

It should be noted that the employee had not filed any EEOC complaint in the *Whitlow* case, yet the Court found the anti-retaliation provisions of Title VII were implicated. The *Whitlow* decision was issued on May 23, 2012, just shortly after the *Townsend v. Benjamin Enterprises, Inc.* decision discussed above.

*State Law Issues*

## Expansion of Permissible Wage Deductions to Become Law in New York

The New York State legislature recently passed a bill amending New York Labor Law Section 193 to increase the number and types of voluntary deductions that an employer can legally withhold from an employee's paycheck. While the bill is currently awaiting the Governor's signature, it is almost certain that it will become law as the bill was originally proposed and written by the Governor and his staff.

Currently, New York's Department of Labor (DOL) only permits employers to make deductions from employee paychecks for reasons specifically stated in Section 193. These include premiums and associated withholdings for insurance and pension/health/welfare benefits, contributions to charitable organizations, payments for United States bonds, and payments for dues or assessments to a labor organization. As enforced by the DOL, employers are not permitted to make deductions for an employee to repay a loan or pay advance given to the employee by his/her employer or even for recouping of a mistaken overpayment of wages.

When the amended version of Section 193 goes into effect, it will allow most employers to make wage deductions (in addition to those described above) for:

- Prepaid legal plans;
- Purchases made at certain events for charitable organizations "affiliated with" employer;
- Discounted parking/passes, tokens, fare cards, vouchers, etc. related to mass transit;
- Fitness center, health club or gym memberships;
- Cafeteria, vending machine purchases; and
- Certain child care expenses.

In order to make these deductions under the new law, employers must give written notice to the employee of the terms and conditions or benefits of the deduction, as well as the manner in which the deduction will be made and receive a written authorization from the employee. Employers must also provide advance notice when there is a substantial change in the terms or conditions of the payment including, but not limited to, a change in the amount, a substantial change in the benefits, or a change in the way the deduction is made.

The new law will also allow employers to make deductions for both wage overpayments due to mathematical or clerical errors, and repayments of salary or wage advances. However, the parameters and procedures for doing so have yet to be written. They will be provided by regulations to be issued by the DOL sometime after the new law takes effect. Specifically, the amendment authorizes the Commissioner of Labor to create regulations addressing issues such as: the size of the overpayment that may be deducted; the timing, frequency, duration, and method of deductions; etc.

The amendment also requires employers to keep employees' written deduction authorizations for the duration of the employee's employment and for six years after the employment relationship ends.

The law will take effect on the 60th day after the Governor signs it or allows enough time to pass for it to automatically become law. Please note, however, that the law is scheduled to "sunset" or expire three years after it become law unless it is extended by the Legislature.

With the passage of this new law, employers may wish to reevaluate practices or policies which they may have discontinued over the past several years due to the restrictions imposed by the DOL (for example, vacation pay advances, discount parking fee deductions, etc.). If you have any questions or if you need assistance in this reevaluation process, please feel free to contact our office.

**REMINDER:**

## New York Employers Obligated to Post and Disclose to Employees/Applicants State Law Prohibiting Discrimination Based on Criminal Convictions

It has come to our attention that many employers are still unaware of an amendment to New York's General Business Law (which passed in 2008) that places new posting and disclosure obligations on employers with respect to an applicant's or employee's criminal conviction status.

Employers must also provide a copy of Article 23-A of the New York Correction Law to job applicants each time they request an "investigative consumer report" (i.e., a specific type of background check performed by a third-party commercial provider) in connection with an offer of employment. This law prohibits discrimination against applicants or employees who have one or more criminal convictions. Currently, N.Y. General Business Law Section 380 and the federal Fair Credit Reporting Act require employers to obtain the applicant's consent prior to performing such a check. To comply with the 2008 General Business Law amendment, a copy of the Article 23-A of the Correction Law should also be provided at the same time that the individual's consent is requested.

In addition, the amendment requires employers to provide the job applicant or employee with a copy of Article 23-A anytime the background report received by the employer contains any criminal conviction information.

In addition to complying with the posting and disclosure requirements of the General Business Law amendment, employers should review their forms, policies and procedures to ensure overall compliance with this this law and Article 23-A in general.

If you have any questions about your company's obligation in this regard, please feel free to contact us.