

Employment Law Matters

APRIL 2013



A NEWSLETTER FROM THE LAW FIRM OF FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.

Hot Topics

The NLRB Overrules Precedent Protecting Witness Statements

The National Labor Relations Board (NLRB) recently overturned a 34-year old precedent regarding a unionized employer's right to maintain the confidentiality of employee witness statements in misconduct matters. (*American Baptist Homes of the West d/b/a Piedmont Gardens*, 359 NLRB No. 46 (2012).) When a bargaining unit member is disciplined, his/her union will typically request all relevant documents from the employer. Under a 1978 NLRB ruling, employers were not required to provide the unions with fellow-employee witness statements. In other words, the employer was permitted to protect the identity of other employees who came forward to the employer with information about a co-worker's misconduct. The *American Baptist Homes of the West d/b/a Piedmont Gardens* decision radically modifies this former ruling.

In *American Baptist Homes of the West d/b/a Piedmont Gardens*, the employer sought to keep confidential the names, job titles, and witness statements of three employee-witnesses who observed a co-worker sleeping on the job. The NLRB held that when a union requests witness statements and the employer seeks to protect their confidentiality (as well as the anonymity of the witnesses themselves), the statements must be subjected to a "balancing test." The test requires that if the information is relevant, the employer must prove that a legitimate and substantial confidentiality interest exists and it outweighs the union's need for the information. This inquiry is very fact-specific

Continued on page 3

Firm Events

Firm Attorneys to Present 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 featured presenters at the Printing Industries Alliance annual HR Conference entitled "Navigating the Ever-Changing Landscape of Human Resources Law". While the Conference is sponsored by the Printing Industries Alliance (PIA), it is open to all employers and will be held on **April 25 and 26, 2013** at the

Turning Stone Resort & Casino in Verona, New York.

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 our Firm to invite our clients and friends to attend this day-and-a-half Conference at the PIA-member rate listed of \$225 per person. 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.

The **2013 PIA Human Resources Conference at Turning Stone Resort & Casino** is designed to both inform participants about the latest developments in employment law and also review the next set of changes on the horizon. It will also provide you with an opportunity to work with two Employment Law Attorneys and a former Director of the Wage and Hour Division of the New York State Department of Labor in understanding and developing

the best strategies for your company to deal with the most dynamic time of employment law change in recent memory.

Mr. Fiorenza and Mr. Dodd will be presenting on the topics listed below. Also speaking will be Richard J. Polsinello, a former Director of the Wage and Hour Division of the NYS Dept. of Labor, who will give an insider's view of Wage and Hour Compliance.

Day 1
April 25, 2013
(Full Day)

1. Essential Employment Law Update: Understanding the Changed Landscape

You will learn about:

Continued on next page

In This Issue ...

- NLRB Overrules Precedent Protecting Witness Statements
- Firm Attorneys to Present at HR Conference and You're Invited
- New York Law Impacts Employers' Ability to Request Social Security Numbers of Job Applicants
- New I-9 Form Available and Required for New Hires
- New FMLA Poster

Firm Events

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

- NLRB Decisions Affecting both Union and Non-Union Employers
- Union Organizing Activity
- New FCRA Forms
- I-9 Audits and Fines Increasing
- EEOC Guidance on Criminal Background Checks
- Recent Federal Case Law Affecting the Workplace

This session will also provide information regarding recent changes in State Law, including:

- New York SSN Protection Law
- New York Wage Deduction Law
- Recent State Court Decisions Affecting the Workplace

2. Legal Trends and Challenges: What's On the Horizon?

In this session, you will learn about the following trends and proposals in Federal and State Law that may affect the workplace in the near future:

- Supreme Court Case Awaiting Decision on Who is a Supervisor for Harassment Purposes
- NLRB Requirement for "Right to Unionize" Poster
- Accelerated Union Elections Preventing Employers from Mounting Strong Campaigns
- Proposal for Sweeping Immigration Reform
- EEOC Enforcement Priorities for 2013-2016
- Efforts to Repeal Wage Theft Prevention Act Wage Notice Requirements
- Proposed Minimum Wage Increase
- Meal Period Lobbying Effort

3. Skills Building: Practical Solutions to Real World Issues

In this session, the Instructors will divide the participants up into smaller discussion groups. Each group will be provided with a different hypothetical scenario involving some of the laws/regulations discussed in earlier sessions as well as other difficult HR issues that employers face on a daily basis. Each group will be given the opportunity to discuss their scenario, spot the legal/regulatory issues involved, and suggest possible resolutions to problems presented. After each group has had adequate time to reach their conclusions, the entire group will reconvene and discuss each scenario and each group's suggested resolutions.

Among the issues that will be covered are:

- Exposing Fakers under the FMLA and ADA
- Utilizing the Interactive Process under the ADA to Arrive at a Reasonable Accommodation for an Employee's Disability
- Addressing Sensitive Workplace Issues: Substance Abuse, Body Odor, Office Romances, Etc.
- Handling Bad Employee Attitudes
- Hiring Protocols and Techniques
- Conducting Misconduct Investigations

Day 2
April 26, 2013
(Half Day)

1. Affordable Care Act: What You Need to Know!

Now that the U.S. Supreme Court has upheld "Obamacare," employers need to be prepared for the next phases of the new law. This session will focus on

the changes that employers will need to comply with in 2013 and 2014. Specifically, this will include in depth discussions regarding:

- Valuing Employer Provided Health Care on Employee W-2s
- FICA Medicare Tax Increase
- Health Flexible Spending Account Contribution Limits
- Notifying Employees of Availability of Health Insurance Exchanges
- Preparing for the "Play or Pay" Provisions of ACA beginning in 2014

2. An Insider's View of Wage and Hour Compliance

This powerful session will be led by the former Director of the Wage and Hour Division of the New York State Department of Labor, Richard Polsinello. He will provide a unique "insider's" perspective on the compliance challenges faced by businesses every day. Learn about the real enforcement strategies governing the New York State Minimum Wage, Wage Order provisions, the meal period issues, deduction from wages, as well as what to expect during a Federal or State Labor audit, cost effective Wage and Hour tips, etc. **Be prepared to ask all those questions you've always wanted to ask a Dept. of Labor official but were afraid to ask.**

In order to register for the Conference or to obtain further information, you can call PIA at (800) 777-4742. You can also register online at <http://www.pialliance.org/index.php/calender.html?view=category>.

EMPLOYMENT LAW MATTERS is published by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com. © Copyright 2013 by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., all rights reserved. Photocopying or reproducing this newsletter in any form in whole or in part for other than internal use is a violation of federal copyright law and strictly prohibited without the express written consent of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. The information contained in this newsletter is intended for information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. Readers should not act upon any information contained herein without seeking professional counsel.

Hot Topics**The NLRB Overrules Precedent Protecting Witness Statements (cont'd from page 1)**

and will likely be decided by arbitrators and/or the NLRB itself.

As a practical result of this ruling, unions will likely make requests for witness statements part of their standard information requests for grievances, arbitrations and unfair labor practice charges arising from employee disciplinary matters. It will also likely result in employees refusing to come forward

with information they may have about a co-worker's misconduct for fear of harassment and threats at work.

In another departure from prior NLRB rules (toward the end of 2012), the NLRB held that employers ordered by the Board to pay back wages to employees must file a report with the Social Security Administration allocating the back wages to the years in which

the wages would have been earned. In addition, the Board ruled that employers must compensate employees for extra taxes they have to pay as a result of receiving the back wages in a lump sum. (*Latino Express, Inc.*, 359 NLRB No. 44 (2012).)

If you have any questions about these changes, feel free to contact our office.

Privacy Issues**New York Law Impacts Employers' Ability to Request Social Security Numbers Of Job Applicants**

A New York State law which went into effect on December 12, 2012, prohibits individuals and private sector entities (including non-governmental employers) from requiring anyone to disclose their unencrypted social security account numbers, unless one of the law's many exceptions apply. Moreover, an employer may not discriminate against any such individual for refusing to disclose his/her social security number (SSN).

Among the most common exceptions to this new rule are:

- The individual consents to the acquisition or use of his or her SSN.
- The SSN is expressly required by federal, state, or local law or regulation.
- The SSN is to be used for internal verification or fraud investigation.
- The SSN is requested in connection with a request for credit or a credit transaction initiated by the consumer or in connection with a lawful request for a consumer report or investigative consumer report (e.g., a background check performed by a third-party in accordance with the provisions of the Fair Credit Reporting Act).

- The SSN is requested for purposes of tax compliance.

There is also an exception for when the SSN is required for "purposes of employment." However, the law gives specific examples of permissible purposes including "in the course of the administration of a claim, benefit, or procedure related to the individual's employment by the person, including the individual's termination from employment, retirement from employment, injury suffered during the course of employment, or to check on an unemployment insurance claim of the individual." Noticeably absent from this list is requiring SSN's on employment applications. Thus, it appears that employers will need to take a different approach toward obtaining a job applicant's SSN than simply demanding it on an application form.

As noted above, the law only applies to unencrypted SSNs. Accordingly, employers can avoid this law entirely by providing for the encryption of SSNs requested of job applicants (and employees). Such an approach would accomplish at least one of the goals of this new law, i.e., to encourage companies to implement and maintain greater data security measures when dealing with SSNs.

Another way to avoid possible violations of the law would be to obtain the

applicant's (or employee's) consent to provide your company with the needed SSN. Many employers already include a statement on their job applications when they ask for SSNs indicating to the applicant that providing the prospective employer with the SSN is purely voluntary. With the passage of this new law, it may be prudent to include a more detailed consent form with any request for an individual's SSN. Should you need assistance in drafting such a consent form, please feel free to contact our office.

A violation of this new law carries a maximum fine for the first violation of \$500 and \$1,000 for each subsequent violation. The law provides a defense for employers where they can show that the violation was unintentional and occurred notwithstanding the existence of procedures designed to avoid such violations.

To take advantage of this defense, employers should review their privacy policies and practices -- and in particular their data management practices -- to make sure that they are designed to avoid violations of this law's minimum standards.

If you have any questions regarding this new law, please contact our office.

New I-9 Form Available and Required for New Hires

On March 8, 2013, U.S. Citizenship and Immigration Services (USCIS) (formerly the "Immigration and Naturalization Service" or "INS") released a new Employment Eligibility Verification Form I-9. Employers should begin using the new Form I-9 immediately for all new hires. The new form's revision date appears on the lower left corner of the new form as "(Rev. 03/08/13)N".

Some of the changes to the I-9 include:

- Amending the layout of the form in an effort to reduce clerical errors;
- Adding data fields for the employee's foreign passport information, email address and telephone number; and,
- Revising the form's instructions in the interest of greater clarity.

The USCIS is providing a 60-day transition period (or until May 7, 2013), during which employers may continue to use previously valid I-9 forms without penalty. This is intended to give employers time to train their personnel on completing the new Form and to modify their protocols and any applicable technology to accommodate these changes.

After the 60-day period, no prior versions of Form I-9 will be accepted. Thereafter, employers who fail to use the new form will be subject to costly penalties set forth in the law and regulations.

Employers can obtain the new I-9 Form online by visiting <http://www.uscis.gov>.

If you have any questions about the new form, please contact our office.

New FMLA Poster

Beginning March 8, 2013, employers are required to post a new Family and Medical Leave Act (FMLA) poster. It can be accessed at <http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf>. The poster was revised to reflect changes made to the FMLA and its regulations. Specifically, the law and regulations were amended to extend military caregiver leave to eligible employees whose family members are recent veterans with serious injuries or illnesses and expanded the definition of a serious injury or illness to include injuries or illnesses that result from preexisting conditions. They also expanded "qualifying exigency" leave to eligible employees with family members serving in the Armed Forces (but added a requirement that for all such leave the military member must be deployed to a foreign country).