Employment Law Matters

March 2014

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

Hot Topics

CEO Held Personally Liable for Unpaid Overtime

The United States Court of Appeals for the Second Circuit (which has jurisdiction over New York, Connecticut and Vermont) recently found John Catsimatidis, the CEO and owner of New York City-area grocery store chain Gristede's Foods, Inc., personally liable for unpaid wages and other penalties under the Fair Labor Standards Act (FLSA). *Irizarry v. Catsimatidis*, 2013 U.S. App. LEXIS 13796 (2d Cir. 2013). In reaching this ruling, the Court applied what is known as an "economic realities test" for determining that Catsimatidis was (in addition to the Company itself) an "employer" subject to liability under the law.

This case began as a class action brought by current and former department managers and co-managers who sued Gristede's alleging that they had been misclassified as exempt employees and were, therefore, entitled to unpaid overtime compensation. In addition to the Company itself, the group also named several of Gristede's high level executives as defendants, including CEO Catsimatidis.

A lower level federal court sided with the employees. This led to a settlement agreement (approved by the court) which involved the Company paying the plaintiffs an undisclosed amount of money over a period of time. When the Company defaulted on those payment obligations, the plaintiffs went back to the lower court which ultimately decided that the CEO should be held personally liable for damages as an "employer" under the FLSA.

On appeal, the Second Circuit agreed

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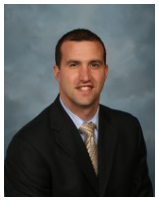
Firm Events

Firm Attorneys to Present at HR Conference and You're Invited!

Nicholas Fiorenza

Michael Dodd



Joseph Bufano

Our firm's President and Managing Partner, Nicholas Fiorenza, and firm attorneys, Michael Dodd and Joseph Bufano, will be featured presenters at the Printing Industries Alliance (PIA) annual Human Resources Conference entitled **"Checkmate! Winning the Chess Match Created by Employment Law".** While the Conference is sponsored by the PIA, it is open to all employers and will be held on **April 3 and 4, 2014** 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. 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.

Managing employees in the current legal environment is like a high-stakes chess match. To win, you first need to know and follow the rules. Then, you need to learn how to defend your position. And finally, with experience and practice, you develop skills and aggressive strategies that will make you successful.

The **2014 PIA Human Resources Conference at Turning Stone Resort & Casino** is designed to help participants become HR Chess Masters! First, our presenting attorneys will make sure participants know the rules by informing them about the latest developments in employment law and rule changes looming on the horizon. Then, they will give attendees the tools to defend themselves against employment claims. And finally, they will work with the participants in developing and putting into practice the best HR strategies for their companies.

Specifically, Mr. Fiorenza, Mr. Dodd and Mr. Bufano will be presenting on the topics listed below.

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In This Issue ...

Firm Events

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

Day 1
April 3, 2014
(Full Day)

1. ESSENTIAL EMPLOYMENT LAW UPDATE: KNOWING THE NEW RULES

You will learn about recent changes in Federal Employment Law, including:

Recently-Decided Cases: The Law Applied

- The Evolving Definition of the "Supervisor" in Human Resources Law
- Defamation and Retaliation Claims: The Law of Unintended Consequences
- WARN Act and Joint Employer Liability: Whose Problem is it Anyway?
- Americans with Disabilities Act Update: Expanding Liability Exposure

Statutory Law

- Affordable Care Act: Where We Stand and 2014 Payroll Issues
- FMLA Leave to Care for Adult Children

The NLRB Trying to Reclaim its Relevance

- Expedited Union Elections: Issue Defeated? Think Again.
- NLRB and Social Media: The Latest
- "Labor Persuader" Rule Delayed

This session will also provide information regarding recent changes in State Law, including new payroll laws, unemployment insurance reform, disability discrimination and more.

2. DEFENDING YOUR POSITION: DAILY LEGAL DEFENSE PREPARATION

In this session, you will learn what you can do to be prepared for and/or to protect against employment-related claims as well as how you can protect your business.

Non-competition, Non-Solicitation and Other Employee Agreements: Can They Truly Protect your Business?
Common Employee Classification Mistakes

- FLSA Exemptions
- "1099 Workers"

Checklist for Protection against Discrimination Claims

- Get control of Electronic Communication
- Training
- Cleaning up Policies
- Conducting Unbiased and Thorough Investigations
- Communications with Separating Employee

So You Think that Memo is Confidential? Not So Fast.

- Understanding What Information an Employee's Attorney has the Right to See

The Top 5 Things That Shouldn't Be In Your Handbook

Day 2
April 4, 2014
(Half Day)

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.

4. STRATEGIES FOR SUCCESS

Whether a company is dealing with a union, dealing with quality or discipline issues, expanding or contracting its workplace, managers need to employ new methods of supervision, evaluation and motivational approaches that are appropriate to today's workforce. Inspiring team work and developing goal-oriented behavior is a widespread but often unfulfilled objective of many managers. This session will focus on identifying talent during employee recruitment and inspiring superior performance throughout an employee's tenure.
In addition, if you are an HR professional who is struggling to impress upon your front-line managers and/or upper management the importance of the HR issues you are confronting daily, our instructors will give you some proven techniques for getting these issues the attention they deserve.

In order to register for the Conference or to obtain further information, you can call PIA at (800) 777-4742.

Hot Topics

CEO Held Personally Liable for Unpaid Overtime (cont'd from page 1)

with the lower court. The Court noted that the FLSA does define the term "employer" clearly. "Accordingly, the [U.S. Supreme] Court has instructed that the determination of whether an employer-employee relationship exists for purposes of the FLSA should be grounded in 'economic reality rather than technical concepts.' …. The "economic reality" test applies equally to whether workers are employees and to whether managers or owners are employers."

Applying this test, the Circuit Court noted that Catsimatidis possessed control over Gristede's actual operations and directly affected the nature and conditions of employment there. He was active in running the company in a variety of ways, including: 1) regular, weekly contacts with individual stores, vendors, employees, and customers; 2) frequent involvement in merchandising at the store level; 3) addressing customer complaints; and 4) playing a direct role in the promotion of key employees. In reaching its conclusion, the Court stated:

> [Mr.] Catsimatidis's actions and responsibilities — particularly as demonstrated by his active exercise of overall control over the company, his ultimate responsibility for the plaintiffs' wages, his supervision of managerial employees, and his actions in individual stores — demonstrate that he was an 'employer' for purposes of the FLSA.

In trying to make sense of this ruling it is clear that the size and the nature of a business played a role in the Court's determination. Although Gristede's was larger than most of the businesses in which high level corporate officers have been found individually liable in past court cases (Gristede's is described in the case as having between 30 and 35 stores and approximately 1700 employees), the Second Circuit concluded it "was not so large as to render [the CEO's] involvement a legal fiction." Simply stated, it appears that the Court would have been less likely to find Catsimatidis personally liable if his company had been bigger and he played less of an active role in its daily operations.

With this in mind, CEOs and other high-level company officials must be aware of the heightened importance of wage and hour compliance. Companies should carefully review to make sure that employees are properly classified as exempt and non-exempt under the FLSA. Moreover, Company owners and officials should take care to emphasize and document all of the "trappings" of corporate structure (e.g., use of outside advisors, group decision making, delegation, etc.), so as not to appear to be an "employer" under the FLSA.

If you have any questions regarding this decision or your company's current practices in this regard, please feel free to contact our office.

Americans With Disabilities Act

Company Policy Requiring Employees to be Restriction-Free When Returning from Medical Leave may Violate ADA

On February 11, 2014, the U.S. District Court for the Northern District of Illinois agreed with the Equal Employment Opportunity Commission (EEOC) that United Parcel Service's leave policy, under which employees were automatically "administratively separated" from employment after 12 months of medical leave, may violate the Americans with Disabilities Act (ADA). *EEOC v. United Parcel Service, Inc.*, No. 09C5291 (2014).

Like many employers, United Parcel Service (UPS) had a leave policy which stated that when employees have been on medical leave for a fixed period of time (12 months in this case), they were automatically separated from employment, unless they could return to work at that time without restrictions. The EEOC challenged the leave policy, arguing that it operates as an unlawful "qualification standard" under the ADA. Specifically, the EEOC noted that the policy prevented an individualized assessment of whether the employee could return to work after 12 months with a reasonable accommodation.

UPS countered by arguing that the ability to regularly attend work is an "essential job function" and not an unlawful qualification standard designed to "screen out" disabled employees. Since the ADA does not protect an employee who cannot perform

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Americans with Disabilities Act

Company Policy Requiring Employees to be Restriction-Free When Returning from Medical Leave may Violate ADA (cont'd)

the essential functions of the job with or without reasonable accommodation, UPS claimed that it could not have violated the law in this instance. To support its case, UPS cited a recent Seventh Circuit Court of Appeals case that held that regular attendance is considered to be an "essential job function."

Ultimately, however, the District Court found that the policy violated the ADA because of its "100% healed" requirement and not because of any attendance issue.

The bottom line for employers is that rigid policies regarding when an employee on medical leave can be terminated may create liability under the ADA. Employers must treat each employee returning to work following a medical leave of absence as an individual. The company must engage the employee in an interactive process to determine whether a reasonable accommodation may assist in returning that person to his or her job.

If you need assistance reviewing and/or revising your existing policies or practices, please feel free to contact us.

Ambush Union Elections

Expedited ("Ambush") Union Election Rule Proposal Revived; Hearings to be Held in April

The National Labor Relations Board (NLRB) announced in February that it will hold at least two public hearings to address its latest effort to drastically reduce the time that employers have to prepare for or respond to union organization drives. The proposed rule was originally scheduled to take effect April 30, 2012. However, it was postponed when a federal court ruled that the NLRB did not have the authority to create and enforce this rule because it acted with less than a quorum of its statutorily-mandated 5-member Board.

The Board is now at full strength and thus it has the authority to put the rule in place. Nevertheless, the Board plans to at least accept comments on its planned expedited union election rule.

The public hearings are scheduled for April 10 and April 11, 2014. The Board published the issues to be discussed at these meetings in the February 26, 2014 Federal Register. Among the more troubling issues slated for discussion are:

Petitions and Pre-Hearing Issues. Whether or how procedures should be revised concerning the petition, electronic filing and service, the showing of interest, and employee notices.

1. Whether the petition may be filed electronically.

2. Whether the petitioner should be required to file the showing of interest with the Board at the same time as the petition.

3. Whether electronic signatures should be permitted to satisfy the showing of interest.

Pre-Election Hearings. Whether or how pre-election litigation procedures should be revised.

1. When the pre-election hearing should be held.

2. Whether or how the rules should define the types of issues which should be litigated at the pre-election hearing.

- Existence of a question of representation.
- The appropriateness of the petitioned-for unit.
- Eligibility issues impacting large groups of employees (the proposed "20% rule").
- Eligibility issues impacting individuals or small groups of employees.

e. Issues which raise special concerns (guard status, professional status, jurisdiction, etc.).

Timing of Elections. Whether or how the rules should address the scheduling of the election.

1. Whether the election should be scheduled "as soon as practicable."

2. If not, whether the rules should include a minimum or maximum time between the filing of the petition and the election, and if so, how long.

All of the foregoing would reduce the timeframe between when an employer learns that there will be a union election and when the actual election occurs. And if you have ever experienced a union election, you know how important it is to have the time to fully explain to employees the reality of the union's agenda, as well as your position on why you may feel that a union is not in the best interest for your company or your employees.

While no one knows for sure what the final rule will look like, or how short a timeframe employers will have to respond to an impending union election, employers should take immediate

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Ambush Union Elections

Expedited ("Ambush") Union Election Rule Proposal Revived; Hearings to be Held in April (cont'd)

steps to be prepared. 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 to employees. 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 your company's union-free philosophy (without violating any NLRA rules)
  - 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

In short, the best way to prepare for ambush union elections is to constantly be in campaign mode. If you need any additional information regarding the foregoing, please do not hesitate to contact our office.

Social Media Cases

NLRB Decision: General Complaints on Social Media Not Protected Activity

One February 12, 2014, the National Labor Relations Board (NLRB) **overturned** an administrative law judge's ruling that a printing company (World Color (USA) Corp.) violated the National Labor Relations Act (NLRA or Act) when a supervisor cryptically suggested that a worker's shift was being changed because of things he posted on Facebook. This decision is somewhat encouraging for employers in that may signal a change in the NLRB's stance with respect to what is considered protected employee speech on social media websites.

In this case, a lead press operator, John Vollene, posted comments on his Facebook page criticizing the Company. He did so from late September 2010 through February or March 2011. Vollene was Facebook friends with several coworkers, including his shift supervisor, Arvil Bingham.

Business for World Color began to decline in late 2010, and in January 2011, the Pressroom Manager met with pressroom shift supervisors, including Bingham, to discuss the downturn in business and the need to restructure the pressroom staff configuration. After identifying each shift's best press operators, they decided who the best press operators would be for each press on each shift. The reassignments, which affected all shifts, did not involve any reduction in employees' pay, hours of work, or job duties. Neither the Union nor Facebook was mentioned at this meeting.

Thereafter, Bingham advised his shift's lead press operators of the reassignments. Vollene was one of many reassigned press operators. When Vollene later asked Bingham why the reassignments were happening, Bingham stated that it was not always about production and asked Vollene if he did not think that management knew about his Facebook posts.

An administrative law judge (ALJ) initially found that Bingham's remark demonstrated that the company was retaliating against Vollene for engaging in concerted activity protected under the NRLA. The Board reversed this ruling based on the lack of evidence that Vollene's Facebook posts were, in fact, protected concerted activity. The Board noted that, in the past, it "… has found Facebook posts among employees about terms and conditions of employment to be protected concerted activity." However, in this case "the record … [did] not include a printout of Vollene's posts, and it provides scant evidence regarding their nature. It reveals neither that the posts concerned terms and conditions of employment, nor that the posts were intended for, or in response to, Vollene's coworkers. The testimony indicates only that Vollene posted unspecified criticisms of the Respondent …. That Bingham's statement implied that the Respondent had reacted adversely to critical posts is insufficient to bridge the evidentiary gap here."

The "take-aways" from this case suggest:

- NLRB may be pulling back from its original stance that any and all communications on social media about employers or supervisors are protected concerted activity;
- This case seems to stand for the proposition that co-workers must be communicating on Facebook or other social media about specific terms and conditions of employment for it to be considered protected concerted activity; and
- General complaints on social media about a company to non-coworkers will not likely be protected by the Act.

Feel free to contact us if you have any questions regarding the foregoing.