Employment Law Matters

March 2015

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

Hot Topics

Prepare for "Ambush Union Elections" Before It's Too Late!

On the heels of its recent decision that forces employers to permit its employees who have access to company email to use said email for their communications about forming a union, the National Labor Relations Board (NLRB) has announced the adoption of a new rule that will speed up the union election process. In what many are calling "ambush" or "quickie" union election procedures, the new rule is designed to dramatically shorten the timeframe between when a labor organization files its NLRB petition to unionize a company and when the employees must vote on whether to become unionized. Why is such a rule change so important for employers? Simply put, the shortened timeframe will make it easier for unions to convince employees to unionize without giving employers a chance to respond. Given this new reality, employers who wish to remain union-free should begin preparing now.

The new expedited union election rule – which becomes effective April 14, 2015 – is considered a major victory for organized labor. As you may recall, union officials have been lobbying for years to change the union election procedures. Beginning in the early 2000s, pro-union members of Congress introduced the so-called "Employee Free Choice Act" bill which would have permitted employees to become unionized through a simple card check, without any secret ballot vote or campaign period. In 2007, then Presidential candidate, Barack Obama, was quoted as saying, "We will pass the Employee Free Choice Act. It's not a matter of if, it's a matter of when." (Source: Chicago

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Firm Events

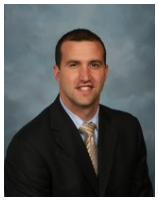
Firm Attorneys to Present at HR Conference and You're Invited!

Now Pre-Approved for 10 credit hours toward PHR, SPHR and GPHR recertification through the HR Certification Institute!

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 **"Let's Cut to the Chase: Practical Human Resources Law Compliance" now approved for HRCI credit.** While the Conference is sponsored by the PIA, it is open to all employers and will be held on **April 23 and 24, 2015** at the **Turning Stone Resort & Casino in Verona, New York**.

Nicholas Fiorenza

Michael Dodd



Joseph Bufano

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.

Below is an in-depth description of just some of the topics to be covered in this comprehensive program.

TOPICS TO BE COVERED

1. ESSENTIAL EMPLOYMENT LAW UPDATE

• Changes Affecting the "White-Collar Exemptions" to Federal Overtime Wage Laws

Last year, President Obama directed the United States Department of Labor to reform the current "white collar" exemptions under the Fair Labor Standards Act ("FLSA") in order to increase the number of persons entitled to overtime under the FLSA. We expect that the Department of Labor will propose raising the salary threshold for exempt employees and amend how "exempt" duties are determined. Hear about the latest developments and what you can do to prepare for the changes to come.

• EEOC's Assault on Separation Agreements

The Equal Employment Opportunity Commission ("EEOC") is waging a le-

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gal battle with employers over waivers that appear in most separation/ severance agreements. The EEOC contends that a typical waiver of discrimination claims violates Title VII of the Civil Rights Act of 1964. They argue that it unlawfully interferes with an employee's rights under Title VII and the EEOC's legal obligation under that law to investigate and stop discrimination. Learn about the current state of the battle, its likely outcome and what you can do in the meantime to avoid challenges to the enforceability of your separation agreements.

• New Marijuana Laws: Can You Still Enforce Your Substance Abuse Policy?

A number of States have legalized the limited use of marijuana either for medicinal purposes or otherwise. This presents a variety of challenges for employers seeking to enforce their drug -testing and drug-use prohibition policies. Employers seeking to avoid such complications should attend to learn what changes they should make to any applicable policies and practices to address these challenges.

• How e-Verify May Increase Your Chances for an Immigration-Related Audit

A new arrangement between U.S. Citizenship and Immigration Services' E-Verify Monitoring and Compliance Branch and its Office of Special Counsel could mean greater liability exposure for companies using the "E-Verify" system (an Internet-based system that allows businesses to quickly determine the eligibility of their employees to work in the United States). Hear about that potential exposure and what you can do about it.

• Federal Paid Sick Leave Law?

Federal lawmakers recently introduced a bill that would allow most private-sector employees to earn up to seven days of paid sick leave per year. This follows closely on the heels of similar laws being enacted by major localities, as well as California, Connecticut, and Massachusetts. Learn about this new congressional bill as well as its potential impact on the state and local government actions.

2. DEALING WITH THE MOST TROUBLESOME HR ISSUES FACING EMPLOYERS TODAY

• Your Hands Aren't Tied: Dealing with Employees with FMLA and ADA-Qualifying Medical Conditions

Given the complexities of the Family Medical Leave Act and the Americans with Disabilities Act, many employers wrongly assume that if an employee is absent from work for a medical condition, an employer's hands are tied, for example, with respect to:

- disciplining the employee for performance deficiencies or misconduct discovered;
- transferring an employee to a new position;
- laying off an employee due to economic conditions and company reorganizations;

While care must be taken in all of these areas, employers need to learn that there are lawful strategies for addressing these and other situations created by an employee on medical leave.

• Exempt or Non-Exempt? That is the Question.

With federal and state labor departments joining forces to crack down on employers who misclassify employees as being exempt from receiving overtime, employers today – more than ever before -- need to be clear on who is properly classified as exempt and non-exempt. The rules are not intuitive. Job titles and written job descriptions may be of little help to an employer undergoing a Department of Labor audit. Get a handle on these issues for your company, before it's too late.

• The NLRB is Changing Your Workplace. Are You Changing with It?

The National Labor Relations Board ("NLRB") continues its efforts to transform the American workplace. With rule changes making it easier for companies to become unionized and administrative decisions overruling decades of established labor law, it would be a mistake for any employer to remain uninformed about these efforts. Only a few years ago, non-unionized employers could generally overlook NLRB rules and decisions as being the "other guy's problem." Not anymore.

• Can You Really Enforce a Non-Competition Agreement Against a Former Employee?

You spend a lot of time and money training an employee; giving him/her access to your confidential information and procedures that have helped make your company successful. Now, that employee wants to leave and work for a competitor; potentially sharing all of your valuable information and hurting your company's competitive position in the marketplace. Given that judges are hesitant to enforce any contract that is designed to limit an employee's ability to find and accept a new job, employers need a realistic perspective about what can and cannot be protected by non-competition agreements.

• Independent Contractors: A Contract in Never Enough

There is no such thing as a "1099 employee." In addition, many employers mistakenly believe that if they have a written service contract with an individual that the individual is automatically not an employee. Independent contractor misclassification continues to be a major concern for federal and state government officials. These officials believe that these misclassifications are causing their agencies to

Hot Topics

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lose significant tax revenue. Consequently, they are joining forces to crackdown on this perceived problem. Learn how to avoid the potential civil (and even criminal) penalties associated with misclassifying an employee as an independent contractor.

• Reworking Your Workplace Harassment Policy and Training to be More Effective

Workplace harassment training has become something of a punch-line in recent years. Many employers have become complacent with their current training efforts as well as their understanding of the law in this area. As a result, we find that they are not strictly enforcing their policies against harassment, not thoroughly investigating any harassment complaints, and not properly disciplining violators. Meanwhile, the law has continued to evolve, becoming more restrictive on workplace conduct and imposing greater penalties on employers for harassment violations. Hear how you can get through to your employees with a more practical approach to harassment training, while making sure that your policies and anti-harassment efforts have kept pace with the evolving law.

• "He Said, She Said" and Other Myths: Investigating Employee Misconduct the Right Way

Investigating harassment and other forms of employee misconduct is not something that managers know how to do instinctively. Too often, the investigation itself becomes the center of disputes that can result in expensive discrimination claims and lawsuits. Learn an easy-to-follow process for performing a full, thorough, prompt and unbiased investigation; doing away with myths and misconceptions about what managers can and cannot do during an investigation and what conclusions they can lawfully reach.

• Ten Top Reasons Why Terminations Lead to Litigation

Firing an employee for poor performance when he/she has nothing but "good performance" reviews, or failing to consistently follow your own policies when discharging an employee for excessive absenteeism, are just two examples of the reasons why terminations can lead to expensive lawsuits. Discover how to avoid the traps that go along with any decision to end a worker's employment.

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 real-life 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 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. This provides participants with the opportunity to practice applying the suggestions and compliance tips offered during earlier sessions and to learn (or perhaps develop for themselves) many others.

4. ASK THE LAWYERS: GETTING HELP WITH YOUR TOUGHEST, TRICKIEST PERSONNEL PROBLEMS

Let's face it, we all have them. Tough human resource problems that seem to defy solution, such as:

- Replacing an employee on a medical-related leave of absence
- Handling a workplace romance
- Discharging an employee for "poor attitude" with little supporting documentation
- Investigating a workplace harassment complaint
- Getting the workplace "bully" under control
- Addressing a sensitive issue with an employee (e.g., body odor, hygiene issues, inappropriate dress, etc.)

Sound familiar? Bring your "trickiest problems" with you for this valuable opportunity to work with experienced employment law attorneys in real time to get the answers you need.

The brochure attached with this email provides more information about the conference and a registration form. You will note that the form is "fillable" online, meaning that you can complete the form in the .pdf format and click the "Submit" button to register for the conference.

Or, click here to register online.

Now pre-approved for 10 recertification credit hours by HRCI!

The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

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.**

Hot Topics

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Tribune, 3/4/07.) However, with the economic crisis that the country faced in the late 2000s, congressional support for the bill faded.

As we have seen with immigration and other issues facing President Obama, when Congress does not enact legislation supported by the Administration, the Administration seeks to accomplish the goals of those proposed laws through regulatory action. This appears to be the case with the new NRLB rule.

Among other technical changes, the new ambush union election rule:

- Requires employers to provide union organizers with the personal email addresses and phone numbers of employees on a proposed voter list in order to permit organizers greater access to prospective voters about an upcoming union election;
- Places restrictions on what pre-election disputes have to be resolved or even considered by the NLRB or courts before having the election (including, for example, issues as fundamental as who can actually vote in the election); and
- Eliminates a 25-day waiting period between the time an election is ordered by the NLRB and the union election itself.

It is expected that these and other technical rule changes will result in union elections taking place within two weeks of a petition being filed with the NLRB. This is a dramatic change from the current average of 42 days.

Organized labor clearly hopes that these changes will help reverse a long-term trend away from private sector unionization in the United States. The fact is that the percentage of unionized employees in the private sector workforce has been steadily declining since the 1950s; from a high of 35% to the current rate of approximately 6.6%. (Source: U.S. Bureau of Labor Statistics.) Simply put, unions are desperate to remain financially viable and to maintain their political clout. They can do neither without increasing their memberships.

With this in mind, employers should be preparing now if they wish to remain union-free. For example, employers should honestly evaluate their companies with respect to union vulnerability. It is important to remember that union-organizing efforts often gain traction when employees feel that they are treated unfairly or without respect or dignity. Efforts to improve fairness and consistency in all aspects of employee management (e.g., wages, hours, assignments, disciplinary actions, etc.) can help foster and maintain a pro-employee, union-free environment. In addition, employers should educate all of their supervisors. Certainly they need to know about the new NLRB rule and its potential impact on their company. Employers should also clarify why they believe it is in the best interest for all involved (especially employees) to remain union-free. Supervisors must also understand the legal dos and don'ts of dealing with union organizers and employees during union-organizing drives. Supervisors can be an employer's best means of articulating a persuasive union-free message to its employees, but only if they follow some rather complex "rules of the road." These efforts, coupled with a strong employee communication program, are perhaps the best way to avoid vulnerability to union-organizing efforts and, to some extent, render the NLRB's actions irrelevant to your company. (Please note that a qualified management-side labor relations attorney should be consulted in all of these efforts.)

If you have any questions regarding this or any other labor/employment law matters, please feel free to contact us at 315-437-7600 or 585-441-0345.

Employment Discrimination

Accommodating Religious Practices vs. Accommodating Disabilities: Two Different Standards for Employers to Follow

Not all "reasonable accommodations" are created equal. Both Title VII of the Civil Rights Act (Title VII) and the Americans with Disabilities Act (ADA) require employers to "reasonably accommodate" employees. Title VII requires reasonable accommodation of an employee's religious beliefs and practices and the ADA requires reasonable accommodation of an employee's disabilities. Despite the use of the same phrase in both laws, they have very different meanings because of what is considered unreasonable according to these laws. Under Title VII, 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. Just as it sounds, the term "de minimis" is simply Latin for "of minimal importance" or "trivial." By contrast, an undue hardship under the ADA is defined as "significant difficulty or expense." In other words, there are many situations where an employer can deny a religious accommodation without violating Title VII. Nevertheless, employers need to understand how to analyze employee requests for religious accommodation to avoid possible religious discrimination claims.

Courts employ a two-step analysis in evaluating claims of religious discrimination. First, an employee must be able to demonstrate that: 1) he/she holds a sincere religious belief that conflicts with an employment requirement; 2) he/she has informed the employer of the conflict; and 3) he/she was discharged or otherwise penalized for failing to comply with the conflicting employment requirement. Assuming that this first step is satisfied, the burden then shifts to the employer to show that it could not accommodate the employee without undue hardship in the conduct of its business.

Applying this two-step analysis, an em-

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Employment Discrimination

Accommodating Religious Practices vs. Accommodating Disabilities: Two Different Standards for Employers to Follow (cont'd)

ployer'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, 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. Ultimately, the determination of whether a proposed accommodation would pose an undue hardship is based on concrete, fact-specific considerations.

Please feel free to call if you have any questions on this issue.

In case you missed the first broadcast,

you can still view the Ferrara Fiorenza Law Firm's webinar

Prepare for Ambush Union Elections Before It's Too Late!

Now "On Demand"

The entire employee relations world is about to change. Is your company prepared for the April 14th deadline?

The National Labor Relations Board (NLRB) has now finalized its new rule on "ambush" or "quickie" union elections. This new rule – which becomes effective in April 2015 – stacks the deck in favor of labor organizations trying to unionize your company. By dramatically shortening the timeframe between when a union files its organizing petition with the NLRB and when the employees must vote on whether to become unionized, the rule limits every union-free employer's opportunity to adequately communicate its position on unionization to its employees. Don't be caught unprepared!

View this crucial one-hour video webinar which covers the following topics:

- The "New Ambush Election Rule": A Fundamental Change in Labor Law
- Why This was Organized Labor's Top Priority
- True Impact of the New Rule
- What Can an Employer Do to Prepare?
- Manager Do's and Don'ts for Expedited Union Elections

Click Here

to purchase the recorded webinar from the Delacroix Consulting Group, LLC website.
The link above takes you to the site, where you can view a free preview of the program,
purchase the full webinar, download it and immediately begin watching it.
Once downloaded, you can watch the webinar as many times as you wish.

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