Employment Law Matters

July 2014

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

Hot Topics

NLRB's New "Ambush Union Election" Rule Now Imminent

The National Labor Relations Board (NLRB) recently held two public hearings to address its latest effort to drastically reduce the time that employers have to prepare for or respond to union elections. Now that the meetings have taken place the Board is poised to implement the new regulations which will, in our view, greatly diminish employers' rights and compromise worker privacy in the union election process, all in a concerted effort to make it easier for unions to organize unsuspecting companies. Some have predicted the new rules will be in place by August 2014.

While the NRLB once referred to the amendment as the "expedited union election rule," their website now refers to it as the more generic (and decidedly less threatening) "proposed amendments governing representation-case procedures." Despite this new terminology, the aim of the regulations remains the same: i.e., to make fundamental changes in the way that petitions are filed and issues surrounding a union election are handled to shorten the timeframe between when the union organizing petition is filed and when the union election takes place. Estimates suggest that the timeframe will be shortened from an average of 38 days now to as few as 10 days. This means employers will have little time to convince employees of their position with respect to the union organizing debate.

Specifically, the following major phases in the election process will be modified as described below:

1. Petition: The union will be permitted to file its election petition with the Board's Regional Office in electronic format, along with a "showing of interest" demonstrating enough employee support (30% of the unit described in the petition) to justify an election. All of which can be done without the employer's knowledge that a union organizing drive has begun.

> ***The NLRB is poised to implement the new regulations which will, in our view, greatly diminish employers' rights and compromise worker privacy in the union election process, all in an effort to make it easier for unions to organize unsuspecting companies.***

2. Investigation: The Board's Regional Director investigates the petition and serves the parties with a notice of hearing, setting the hearing for seven (7) days from service. The employer is then required to post an initial notice of election (and distribute it electronically) for employees in the proposed designated unit.

3. Identifying and narrowing the issues: No later than the date of the hearing (i.e., within 7 days), the employer files and serves its "statement of position" form, setting forth its position on election-related issues that it intends to raise at the hearing, including the Board's jurisdiction; the appropriateness of the bargaining unit sought by the union; and the type, date, and location of the election. The employer is also required to file and serve a preliminary list of voters, stating their name, work location, shift and classification, regardless of whether the employer has objections to certain individuals being included in the proposed bargaining unit. The union responds to the positions taken by the employer. Both parties describe the evidence they would offer relevant to any disputed issues.

4. Hearing: On the seventh day following the union filing, the Board's hearing officer will hear disagreements and accept evidence only concerning genuine disputes of material fact. However, disputes involving the eligibility of voters constituting less than 20% of the proposed unit will be deferred until after the election. In the past, the resolution of these disputes

Continued on next page

In This Issue ...

Hot Topics

NLRB's New "Ambush Union Election" Rule Now Imminent (cont'd)

would often significantly expand the time elapsing from when the union filed the petition and when the election took place; giving employers more time to participate in the campaign in a real way.

5. Decision on pre-election issues: Based on the record created at the hearing, the Regional Director will determine whether a "question of representation" exists and, if appropriate, will direct an election to occur on the "earliest date practicable."

6. Election: Within two days of the direction of election, the employer will provide a final list of eligible voters to the union, including phone numbers and email addresses when available. On the date stated in the direction of election, a secret-ballot election will be held, the ballots counted, and a tally prepared. If a voter's eligibility is disputed, he or she is permitted to vote under challenge.

With it appearing as though this final rule will likely become effective in the Fall, and with the prospect to employers having as little as 10 days to respond to an impending union election, employers should begin immediately to take steps to be prepared.

An employer's success in any union organizing campaign depends on adapting "best practices" suited to the employer's specific company environment, which make unions (and their claimed advocacy) irrelevant. 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.

Wage Theft Prevention Act

Annual Wage Notice Requirement to be Removed from Wage Theft Prevention Act

The New York State Legislature recently passed a bill (A8106C/S5885B) to eliminate the annual notice requirement from the Wage Theft Prevention Act (WTPA). Assuming that Governor Cuomo signs the bill (which is expected sometime later this year), employers in New York will no longer have to provide wage notice forms to every employee, every year, between January and February as previously required.

Employers should note, however, that this bill would not do away with the wage notice requirement entirely. Employers will still have to provide the forms to newly-hired employees. (These forms can be downloaded from the New York State Department of Labor's website at www.labor.ny.gov.) And, technically, employers would still have to provide updated wage notice forms to current employees when the information on the employees' initial wage notice changes (e.g., changes in the rate or rates of pay; changes with regard to whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or other; a change in the regular pay day; etc.). This requirement can also be eliminated given that the law specifically states that if an employee receives a wage statement (as opposed to an updated wage notice form) with his/her paycheck that clearly shows the changed information, no updated wage notice form will have to be provided to the employee. The bill is scheduled to become effective 60 days after the Governor signs it.

While the new bill would somewhat lighten the bureaucratic burden placed on employers in this State, it also would substantially increase the penalties employers would be subject to for violations of the State wage laws. In part, the new bill would also amend the Labor law by:

- Doubling the maximum penalty for employers that commit a second Labor Law violation within a six-year period (from $10,000 to $20,000).
- Requiring employers to provide employee and wage data to be published on the New York State Dept. of Labor's (DOL) website, when an employer who has previously been found in violation of the Labor Law, commits another violation, or a violation that is deemed by the DOL to be either willful or egregious.
- Requiring construction contractors and sub-contractors who violate the Labor Law to notify all of their employees of any and all such violations.

Continued on next page

Wage Theft Prevention Act

Annual Wage Notice Requirement to be Removed (cont'd)

- Holding the ten members with the largest ownership interests in a Limited Liability Company personally liable for any unpaid wages to the Company's employees. Up to this point, employees were only permitted by law to recover unpaid wages from the top ten shareholders of a corporation.

While the elimination of the annual wage notice requirement (once signed into law) will be a positive development for employers in New York, the increase in penalties and other DOL enforcement actions makes it critical that employers strictly adhere to the wage payment and notice requirements of the Labor Law. Employers should work closely with their employment attorneys to review and revise, if necessary, all organization policies and practices to ensure compliance.

Reasonable Accommodations

Telecommuting Now Held to be "Reasonable Accommodation" under ADA

In a recent federal Circuit Court case (EEOC v. Ford Motor Company), the Court held that a Ford employee, who was responsible for making sure that Ford parts' manufacturers had a steady supply of steel, should be allowed to telecommute as a "reasonable accommodation" under the Americans with Disabilities Act (ADA). This decision further erodes the traditional notion that employees must physically be at work in order to perform the essential functions of their jobs.

In this case, claimant was a part of a problem-solving team involved in troubleshooting supply interruptions, interacting with suppliers, etc. During her tenure with the Company, she developed Irritable Bowel Syndrome (IBS). The condition impeded her ability to commute to and from work as well as her ability to move about the office without experiencing embarrassing symptoms.

Ford had allowed other employees to telecommute, depending on the nature of their jobs and work environments. With this claimant, Ford allowed her to try flex-time telecommuting on a trial basis. However, it ended the trial when the employee could not establish regular and consistent work hours and could not effectively participate in team problem solving meetings or accessing suppliers during normal work hours.

Despite the claimant's protests and continued requests to telecommute, Ford decided to offer her the choice of either an office space closer to a restroom or a transfer to another position better suited to telecommuting. She declined both offers and filed a claim with the EEOC for Ford's failure to accommodate her disability. The EEOC sued on her behalf.

> ***It is no longer a given that an employee must be physically at work in order to perform the essential functions of his/her job.***

Ultimately, the Sixth Circuit reversed a lower court's summary judgment in favor of Ford holding that there were issues that a trial court should be allowed to decide:1) whether the claimant was "qualified" as defined in the ADA and 2) whether telecommuting was a reasonable accommodation under her circumstances. The court further held that Ford had the burden of proving that the claimant's physical presence at the Ford facility was indeed an "essential job function" or – if it was – that telecommuting created an undue hardship for the Company. The Court noted that proving an "undue hardship" is not the same thing as "showing that an accommodation would be bothersome to administer or disruptive of the operating routine."

In short, it is no longer a given that an employee must be physically at work in order to perform the essential functions of that job. With this ruling in mind, employers need to review their current job descriptions and organizational charts/structures and be able to carefully document and prove why particular jobs cannot be accomplished through telecommuting. Those factors should be stressed in the documents prior to receiving a request for such an accommodation. This should be done quickly given that decisions such as this tend to open a flood-gate of similar requests from employees throughout the country.

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.**

EEOC Taking Aggressive Approach to Waivers of Claims in Severance Agreements

Earlier this year, two EEOC District Offices (in Denver and Chicago) filed lawsuits against employers alleging, in part, that severance agreements unlawfully contained release provisions that were "overly broad, misleading, and unenforceable" because they allegedly infringed on the employees' rights to file charges of discrimination and participate in EEOC investigations. Specifically, the EEOC has asserted that provisions of the agreements requiring release of claims, cooperation with the company, and non-disparagement violate the Age Discrimination in Employment Act (ADEA) because those provisions allegedly "chill" the rights of individuals to file charges of discrimination and participate in EEOC investigations. The EEOC is also challenging: 1) clauses specifically prohibiting contact with government agencies and/or cooperation with others who filed complaints against employers; 2) clauses representing that the individual has filed no claims to date; and 3) clauses certifying that the former employee disclosed all non-compliance with regulatory requirements (including providing a sheet to list any instances of non-compliance of which the employee was aware).

Remember, these lawsuits do not allege that an employee cannot validly waive his/her right to recover monetary or other damages for EEO claims. Rather, the EEOC is claiming that an employee cannot validly waive his/her rights to file claims or participate in EEOC investigations and proceedings.

Most severance agreements contain provisions in which the employee represents that he/she has not filed any claims and if he/she has, there is an agreement to withdraw the claim with prejudice. Employers should consider revising such provisions to include something similar to the following:

"With respect to a claim(s) which could be filed with the Equal Employment Opportunity Commission (EEOC), Employee acknowledges that he retains the right to file such a claim(s) and to participate in related investigations and/or proceedings. However, he expressly agrees to waive his right to recover monetary or other damages from the Employer for any such EEOC claims."

While neither of these EEOC cases have been decided, they signal a more aggressive approach than we have seen from the EEOC in the past. Until the courts have ruled in these lawsuits, employers should work closely with their attorneys to review and consider revising the release provisions in any severance agreements, general releases, etc., to avoid possible EEOC intervention.