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RUSKIN MOSCOU FALTISCHEK P.C.
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EMPLOYMENT LAW ALERT

September 2011

Save the Date!

The Changing Landscape of Social Media:
How to Protect Your Workplace and Promote Your Business

An RMF "Best Practices" Roundtable Seminar

Wednesday October 26, 2011
8:00 - 10:00 a.m.
at the offices of Ruskin Moscou Faltischek, P.C.
RXR Plaza, Uniondale

Invitation to Follow

Ruskin Moscou Faltischek's Employment Law Capabilities

- Sexual Harassment Prevention
- Discrimination Avoidance
- Restrictive Covenants (non-compete, non-solicitation) and Unfair Competition
- Protection of Trade Secrets, Proprietary Information and Business Opportunities
- Employment At Will, Breach of

UPDATE: NLRB Final Rule Issued; Notice of Rights to be Posted

By: Kimberly B. Malerba

We informed you back in our January 2011 Alert that the National Labor Relations Board issued a proposed rule which, if adopted, would create a substantial change in the workplace. Last month, the NLRB issued a Final Rule requiring the posting of a notification of employee rights. This Rule, which was adamantly opposed by employers as

Contract and Termination for Cause

- Employee Policy Manuals
- Family and Medical Leave
- Wage and Hour Requirements
- Employee vs. Independent Contractor
- Executive Employment Agreements and Severance Packages
- Comprehensive Litigation Services

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Previous Alerts

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January 2011

unnecessary and misleading, becomes effective on November 14, 2011. A copy of the notice can be obtained by clicking here: NLRB Poster. The new Rule requires that all employers subject to the National Labor Relations Act post a notice informing employees of their rights under the NLRA, including the right to form and join labor unions.

The surprising part for many employers is the revelation that they are in fact subject to the NLRA. There is s common misconception among many employers that if your company does not have union workers, it is not subject to the Act. What companies now must realize is that most private sector employers are subject to the NLRA, whether unionized or not.

The Final Rule requires covered employers to post and maintain the notice in a conspicuous place, including any place where notices to employees are customarily posted. Employers must also post the notice on an intranet or an Internet site if personnel rules and policies are typically posted there. Translated versions must also be posted in workplaces where at least 20% of employees are not proficient in English. The content of the notice instructs employees on what conduct is prohibited by employers, how to file a charge and provides the Board's contact information.

While the Board does not have the authority to levy fines against employers who fail to comply and will not institute an investigation of its own accord, in the event that a complaint is filed, sanctions may be imposed against employers who fail to make the required posting. Possible sanctions for failing to post include (1) finding the failure to post to be an unfair labor practice; (2) tolling the statute of limitations for employees wishing to file charges alleging unfair labor practices; and (3) using the employer's willful failure as evidence of unlawful motive in the event of an unfair labor practice case. The tolling of the statute of limitations can be a significant factor for employers because it will extend what is an otherwise short six-month period in which to file an unfair labor practice charge.

The Interactive Process: What's Your Part?

By: Jeffrey M. Schlossberg

Most employers know that if an employee is covered by the Family and Medical Leave Act, the employee is entitled to up to 12 weeks of unpaid leave. But what if the employee is not eligible for FMLA, or the FMLA benefit has been exhausted and the employee still needs time away from work? In most every case where a medical condition is involved, the employer and employee are required to engage in an interactive process to determine if the employee is entitled to a reasonable accommodation - which could be more time off from work. The obligation arises under the federal Americans With Disabilities Act as well as parallel New York State and New York City laws. A recent court decision in New York highlights that an employer's lack of participation in

this process could result in liability to the employer.

In the court case, an employee was injured in a bus accident. His mother contacted the company on his behalf and notified the company that the employee would be out from 3 to 6 months. Shortly after this notice, the company terminated the employee, concluding that 3 to 6 months would be too long to hold the position. The court noted that "the first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested." The court noted that not all requests for leave are necessarily reasonable. For example, one year or an indefinite time period likely would not be reasonable. However, regardless of the length of the request, the employer must interact with the employee and determine (such as through the request for medical documentation) whether any accommodation is possible. As a final note, the court pointed out that employers have an independent duty to reasonably accommodate an employee if the employer knew or should have known that the employee was disabled, even if the employee did not make a specific request.

The lesson for employers is clear: a request for an extended leave of absence mandates some form of interaction with the employee to determine whether a reasonable accommodation is an available option. Employers should analyze their business needs to determine how long the employee can be out without causing undue hardship. Employers also should request medical documentation demonstrating how long the employee is expected to be out of work. A decision that an accommodation is not possible without engaging in the interactive process will be a costly one.

If we can be of assistance on these or any employment law issues, please do not hesitate to contact us.

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