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LAW ALERT
EMPLOYMENT

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LinkedIn: What's Your Policy ?

By Kimberly B. Malerba, Esq.

The prevalence of social media in today's society, both in and out of the workplace, is undeniable. However, this continually emerging area of the law is fraught with perils. With that acknowledgment, companies must consider how and to what extent they wish to allow their employees to engage in social media during working hours, and what parameters they wish to place on their employees' social media use generally. However, regardless of an employer's desire to prohibit certain uses by its employees, and as much as employers have a legitimate interest in controlling employees' social media use in order to limit disclosure of sensitive information and to protect the company's image, employers' efforts to limit employees' use of social media has become a hot bed of potential liability. This liability largely stems from the National Labor Relations Board's ("NLRB") interest in social media cases over the past several years. The primary issue that is implicated in the NLRB's actions involves Section 7 of the National Labor Relations Act ("NLRA"), which protects an employee's right to engage in concerted activities for the purpose of mutual aid and protection. Significantly, the NLRA applies even if the company does not have any union employees.

An interesting issue, which we had previously confronted in our practice, but which has now been litigated, is whether and to what extent a company can prevent a former employee from identifying himself as a current company employee on social media. In the federal court case, the employer brought claims against a former employee for fraudulent misrepresentation, among other things, as a result of his refusal to remove the company as his current employer on social media, including LinkedIn. This listing of the company as his present employer was particularly irksome for the company because the former employee has disparaged the company to a customer while still employed. The District Court dismissed those portions of the case and ruled that the employer could not recover against the employee notwithstanding that his profile had still not been changed several months after he was terminated from the company.

One way in which this issue might have been avoided was if the company had implemented an appropriate social media policy that addressed such issues. The lesson to be learned from this case is that it is essential that companies consult with counsel proficient in this area to craft a policy that accomplishes the dual goals of protecting the employers' interests while still avoiding crossing the line into liability for impinging upon employees' rights.

Final Regulations Issued under ACA

By Laura Davidov, Esq.

Last month, the U.S. Department of the Treasury and the IRS released final regulations which delay specific deadlines for "applicable large companies" and modify certain responsibilities under the Affordable Care Act (the "ACA" or the "Act"). The Department also issued final regulations implementing a 90-day limit on waiting periods for health coverage.

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For additional information on this or any employment related issue, please contact ***Kimberly Malerba***, or any other member of the Employment Law Practice Group.

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What is an "applicable large company"?

Under the ACA, "applicable large companies" are those who employed at least 50 full-time employees (including full-time equivalents ("FTEs")) the previous year. A full-time employee is one that works on average at least 30 hours per week or at least 130 hours per calendar month.

The hours worked by all remaining employees (i.e. those working less than 30 hours per week that month) are added together and divided by 120 to determine the number of FTEs for that month. Then, the total number of FTEs and full time employees for each month are added up and divided by 12. If the sum for the year exceeds 50, the employer may be considered an applicable large company so long as the following two situations do not apply:

a. the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and
b. the employees in excess of 50 employed during such 120-day period were seasonal workers.

Employers will use information about the number of employees employed during 2014 to determine whether they employ enough employees to be an applicable large employer for 2015. Employers with fewer than 50 full time employees (or FTEs) are exempt from the employer mandate under the ACA.

Changes to deadlines for companies with 50 - 99 employees

The final regulations delay the implementation of the employee shared responsibility penalty provisions (commonly referred to as the "pay or play" requirement or the "employer mandate") for companies with 50 - 99 full time employees (or FTEs) from 2015 to 2016. This is intended to provide transition relief to companies with fewer than 100 employees.

To be eligible for this extension, an employer with an average of 50 to 99 employees on business days during 2014 must not:

a. reduce the size of its workforce between now and December 31, 2014 in order to qualify for the transition relief (reduction of hours for bona fide reasons is permissible); or
b. eliminate or materially reduce the health coverage it currently offers to employees between now and December 31, 2014.

Changes to deadlines for companies with 100+ employees

Companies with 100 or more full time employees will still be subject to the employer mandate on January 1, 2015. However, instead of requiring that employers offer coverage to 95 percent of their full time employees to avoid penalties, the new regulations reduce that percentage to 70 percent. The requirement for large companies to cover 95 percent of its employees will go into effect in 2016.

Limiting the waiting period for health care coverage

The final regulations prohibit group health plans or group health insurance issuers from imposing a "waiting period" that exceeds 90 days after an employee is otherwise eligible for coverage. A "waiting period" is defined as the period that must pass with respect to an individual before the individual is eligible to be covered for benefits under the terms of the plan.

To ensure that eligibility conditions based solely on the passage of time are not used to evade the waiting period limit, the rules state that such conditions cannot exceed 90 days. Other conditions for eligibility are generally permissible, such as meeting certain sales goals, earning a certain level of commission, or successfully completing an orientation period. Further, employers may require employees to complete a certain number of hours prior to becoming eligible so long as that prerequisite is capped at 1,200 hours.

This limitation applies to group health plans and group health insurance issuers for plan years beginning on or after January 1, 2015. For plan years beginning in 2014, the Department will consider compliance with either the proposed regulations or these final regulations to constitute compliance with the Act.

Other modifications

The final regulations also clarify the methods used for calculating the number of employees for purposes of penalty determination (i.e. the safe harbor look-back measurement/stability period method). Further, it clarifies whether certain types of employees – including volunteers, educational employees, seasonal employees, student workers in work-study programs, adjunct faculty – are considered "full time" for purposes of the mandate.

In our next Alert, we will address the methods discussed above, applicable penalties and other related issues. Stay tuned!

6679 or **click here** to email her.

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