



Human Resources Potpourri

A new law imposing significant consequences on Indiana employers who employ unauthorized workers goes into effect on July 1, 2011. Under the law, the state may sue employers who do not use E-Verify to recover unemployment benefits paid to a worker employed on or after July 1, 2011 whom the employer knew was not authorized to work in the United States. Reasonable attorney fees and costs may also be recoverable. It has been stated that legal challenges to this law may follow due to some of its more controversial provisions, i.e., imposing of criminal sanctions and the verification of immigration status.

Stay tuned; there is more to come!

Source: Global Immigration Alerts, Fisher & Phillips, LLP, May 2011

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The National Labor Relations Board continues to file unfair labor practice charges against employers who “illegally” terminate employees for sending Facebook posts that are critical of the company. The latest is a case against a BMW dealership in Illinois that terminated a salesman for posting a complaint that (the employees) were “unhappy with the quality of food and beverage” served at a promotional event at the dealership. The employee posted photos and comments critical of the dealership for offering customers hot dogs and bottled water. The NLRB contends this is protected behavior and a
(Continued on page 2.)

Developing a Social Networking Policy

The last few years have seen an explosion in the popularity of online social networking Web sites. These sites can be both a benefit and a detriment for employers because they can potentially create a series of legal pitfalls. In view of the problems that may arise from social networking, it is wise for an organization to consider having a policy addressing social networking as it relates to the employer’s workplace.

When developing such a policy, the employer must first determine the purpose of the policy and whether it will have strong prohibitions restricting social networking, or whether it will encourage employees to contribute to social networking sites and allow employee participation, but with limitations. How an employer intends to enforce a social networking policy is also very important. In this regard, an employer’s policy should:

- ˆ! Specify the forms of online communication and conduct covered by the policy;
- ˆ! Outline how the company’s name and logo may be used, if at all;
- ˆ! Describe what financial, sensitive or proprietary information should be excluded from such sites;
- ˆ! Address whether employees may discuss specific clients, and whether the employee may post pictures of the workplace;
- ˆ! Remind employees that postings on social networking sites are public;
- ˆ! Encourage employees to engage in responsible and respectful conduct regarding current, former, and potential customers, partners, employees and competitors;
- ˆ! Warn employees to avoid conflicts of interest and of potential harm to the employer’s business interests;
- ˆ! Contemplate all of the legal considerations noted above, and also consider the employer’s other employment policies and guidelines, such as the anti-discrimination policy or other code of conduct; and
- ˆ! Warn the employees about possible disciplinary action for violation of the policy.

An effective social networking policy should establish guidelines about whether or not employees can use social networking sites during working hours and if so, under what circumstances. In this regard an effective social networking policy should also:

- ˆ! Encourage employees to go to Human Resources with work-related issues and complaints before blogging about them.
- ˆ! Specify potential discipline, up to and including termination, if an employee misuses social networking sites related to employment.
- ˆ! Establish a reporting procedure for suspected violations of the policy; reiterate that the company’s policies, including harassment and discrimination policies, apply with equal force to employee communications on social networking sites.
- ˆ! Remind employees that the company’s computers and e-mail system are company property intended for business use only, and that the company may monitor Internet and e-mail usage.
- ˆ! Require employees to sign a written acknowledgement that they have read, understand and will abide by the policy.
- ˆ! Be enforced consistently and indiscriminately among all employees.

In developing a social networking policy, the employer’s goal should always be to protect a company’s reputation, trade secrets and confidential, proprietary, and privileged information, but must also keep in mind the privacy right of employees.

When considering or writing such policies, a call to an experienced employment lawyer is recommended.

Source: DRI Employment Law Supplement, Social Working in the Workplace, Newman and Isenath, March 2010; Labor and Employment Law Notes, State Bar of Michigan, Spring 2010.

ADAAA—Reminder

The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009. The amendments made significant changes in the law as it relates to the definition of “disability” under the Americans with Disabilities Act (ADA):

- ˆ! Under the ADAAA, Congress has made it easier for an individual seeking ADA protection to establish that he or she has a disability.
- ˆ! The ADAAA clearly interprets the definition of “disability” in favor of broad coverage.

Based on the numerous changes in the ADA, employers should be concerned with any individual who has a record of a disability. Clearly, the ADAAA and the federal regulations will make defending ADA claims much more difficult for employers.

Sources: US Equal Employment Opportunity Commission Fact Sheet and Questions and Answers Guide, May 2011. See www.EEOC.gov/laws/regulations/adaaa_fact_sheet.cfm and www.EEOC.gov/laws/regulations/ada_qa_final_rule.cfm.


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Things I Have Learned:

‘That when your wife (spouse) asks for a kiss, you shouldn’t say, “I already did.”
‘That big problems always start out small.
‘That I want to exercise, but not now.
‘That everyone can use a prayer.
‘That the ache of unfulfilled dreams is the worst pain of all.
‘That every great achievement was once considered impossible.
‘That it’s worth fighting for causes, but not with people.

HR Potpourri (cont’d)

violation of Section 7 of the NLRA. Trial before an administrative law judge is scheduled for July 21, 2011. This appears to be an NLRB trend. Stay tuned!

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An interesting issue, whether employees who accept a severance package and resign their employment on the eve of a plant closing or mass layoff should be included in the head count for determining whether the WARN numerical thresholds are satisfied. This question was recently answered by the Seventh Circuit in *Ellis v. DHL Express, Inc., USA*, 633 F3d 522 (7th Cir. 2011). The employees who took the union-negotiated special severance package argued they should not be excluded from the “head count” because they did not voluntarily depart, but rather left the company under “extreme economic uncertainty and pressure.”

Not so, says the Seventh Circuit. The Court determined, while these employees found themselves in “unenviable positions,” they had nonetheless voluntarily elected to leave (employment) and as such were not counted as affected employees who had experienced job losses. In this case, the employer gambled that enough workers would accept its offered incentive package, thereby absolving it from potential WARN Act liability...and it won!

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Social Media and Employee Discipline by the Numbers

From a 2011 survey of 485 compliance professionals, sponsored by the Health Care Compliance Association and Society of Corporate Compliance and Ethics, come the following findings:

- ^! 42% - employees disciplined for misusing social media applications; up from 18% in 2009
- ^! 31% - organizations that had specific policies related to social media use outside the workplace of employees; up from 10% in 2009
- ^! 45% - companies that had no policy regarding outside use of social media, e.g., Facebook, Twitter and LinkedIn; down from 50% in 2009
- ^! 35% - respondents who said their firms deny all workers access to Facebook, Twitter, but only 20% banned access to LinkedIn

Enforcement Gaps

- ^! 48% - organizations who used a passive monitoring approach (only works if it detects an employee using social media); up from 32% in 2009
- ^! 18% - survey respondents that did not know what monitoring approach their organizations were using

Bottom Line: Although your organization may be paying attention to what is happening in the social media area, many companies have a long way to go in ensuring their policies are followed. Also noticeably absent is a clear and consistent implementation (and application) of social media policies.

If your organization falls into the gap area of policy development and application, a call to experienced counsel is recommended.

Source: BNA, Daily Labor Report, May 24, 2011

FMLA Eligibility

In a somewhat novel argument before the Seventh Circuit Court of Appeals, an employee who had not worked the requisite 1,250 hours in the 12-month period preceding her request for leave (because she was on a previously approved FMLA leave) claimed she should be allowed to “toll” the 12-month period because of the prior FMLA leave. To do otherwise, she claimed, would effectively penalize her for taking the previous FMLA leave. Not so, says the Seventh Circuit (*Bailey v. Pregis Innovative Packaging Inc.*).

The Court stated there was “no hint in the statute or elsewhere that Congress envisioned and approved such a circumvention of the requirement that an applicant for FMLA have worked 1,250 hours in the preceding 12 months.

The Court also rejected the employee’s retaliation claim, in which she claimed that the points threshold of the absenteeism policy should also be tolled because of the FMLA leave. Not so, again says the Seventh Circuit. The Court noted, wiping a point off the absenteeism slate was an employment benefit and that (the employee) could not, while on leave, accrue a benefit that accrues only by actively working (i.e., absenteeism forgiveness).

One for the employer. Good job, Seventh Circuit!

The “Old Cripple” - Lacks ADA, ADEA Harassment Claims

A 51-year-old retired auto parts specialist (Clark) who had lupus, fibromyalgia, diabetes, and arthritis could not proceed with his hostile work environment claims under the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA), so says the U.S. District Court for the Eastern District of Arkansas (*Clark v. O’Reilly Auto Inc.*, May 23, 2011).

In responding to the plaintiff’s claims against a named co-worker (Hansen) under the above laws, the Court made the following findings:

- ^! Clark must present evidence from which a reasonable person could find that Hanson’s alleged harassment was “severe enough to affect the terms, conditions, or privileges of his employment.”
- ^! Even if Clark could show that Hanson routinely called him names like “cripple” and “old man,” it would not meet the rigorous standards for hostile work environment claims because simple teasing, offhand comments, and sporadic use of abusive language do not materially alter the terms and conditions of employment.
- ^! (The) failure to accommodate claims under the ADA...cannot survive...because his (Clark’s) requested accommodation to be restricted to a “sedentary position” was not reasonable because his position required “light to moderate physical activity.”

Despite the apparent “swing” by the Court in their interpretation of the various discrimination laws, cases like this with their reasoned analogies provide hope to employers, that when they consistently follow the rule, the playing field tends to find a balance.

Source: BNA, Daily Labor Report, May 24, 2011

Quotes Of The Month

A nickel ain’t worth a dime anymore. ~Yogi Berra

An eye for an eye makes the whole world blind. ~Mahatma Gandhi

If you make yourself a sheep, the wolves will eat you. ~Benjamin Franklin

An idea is salvation by imagination. ~Frank Lloyd Wright

The most important thing is to not stop questioning. ~Albert Einstein

If you can dream it, you can do it. ~Walt Disney



Forgive your enemies, but never forget their names.
~John F. Kennedy