The Employer

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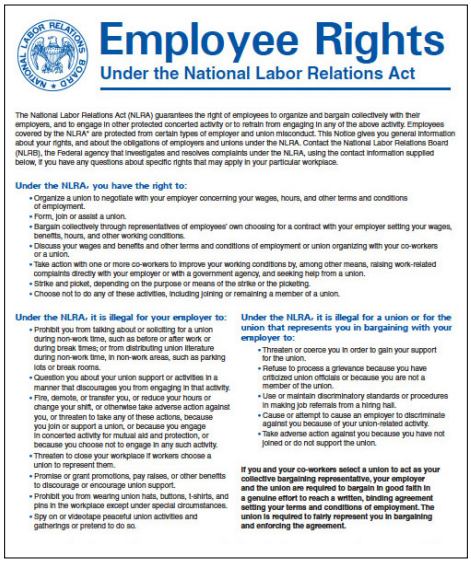
NLRB Posting Postponed Again: *Federal Courts Hold Contradictory Views on Whether the NLRB May Require Posting of Union Rights*

by Brian M. Clifford

The Courts' Decisions

The United States Court of Appeals for the District of Columbia has granted an emergency motion for injunction blocking the National Labor Relations Board ("NLRB" or the "Board") from forcing millions of employers to post notice of employee rights under the National Labor Relations Act ("NLRA") by April 30, 2012. The Court of Appeals' injunction is in response to two contradictory decisions at the U.S. District Court level on whether tthe NLRB has authority to require such a posting under the NLRA. The NLRB Chairman, Mark Pearce, said the Board will instruct its regional offices not to enforce the posting requirement pending appeal.

On March 2, 2012, the United States District Court in Washington D.C. upheld the Board's right to enact regulations requiring covered employers to post notice of employee rights under the NLRA. The court stated that Congress' intentions do not preclude the NLRB from promulgating such a rule and that it does not violate the employer's free speech rights. The court struck down two major provisions of the NLRB's proposed rule. The court first rejected the provision that provided for an automatic finding of an unfair labor practice for failure to post the notice. Second, the court rejected the provision that tolled the applicable six month statute of limitations period for filing a charge against an employer where the Board deemed it appropriate. Remedies will still be available to the NLRB under the court's ruling, however, infractions will be investigated on a case-by-case basis for interference, restraint, or coercion of employees' rights. This decision is currently on appeal with oral argument set for September 2012.



Employee Rights
Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

One month after the D.C. District Court's decision, the Federal District Court for the District of South Carolina issued a decision that completely contradicts the D.C. Court. The South Carolina District Court ruled that the Board simply does not have the statutory authority to require employers to post the notice. The court reasoned that the Board had "confuse[d] a 'necessary rule with one that is simply useful" in carrying out the provisions of the NLRA. The court further found that "by promulgating a rule that proactively imposes an obligation on employers prior to the filing of a [unfair labor practice] charge or representation petition, in the absence of express statutory authority," the Board had "contravened the statutory scheme established by Congress." The Board has stated it will appeal the decision.

The Notice Posting

The proposed notice poster includes a brief description of employees' rights under the NLRA including their right to organize with other employees and bargain collectively with their employer. It includes a brief description of the employer's obligations under the NLRA including the employer's inability to prohibit union talk or solicitation during non-work time, to take adverse employment actions based on an employee's membership or support of a union, to threaten workplace closures in response to union activity, and to generally discourage

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Sixth Circuit Court of Appeals Applies *McDonnell Douglas* to FMLA "Interference" Claims

by Stephanie Roth

As claims brought under the Family and Medical Leave Act ("FMLA") continue to consume employers' resources, the U.S. Court of Appeals for the Sixth Circuit may have helped ease the burden on litigants by clarifying a key issue. Earlier this year, the Court held the *McDonnell Douglas* burden-shifting framework typically seen in discrimination cases is applicable to FMLA interference as well as FMLA retaliation claims. While this may seem to be an esoteric point of law, the clarification provides a boon to diligent employers who might otherwise feel hamstrung when attempting to address performance issues with employees requesting or taking leave provided under the FMLA.

Under the FMLA, employees can bring claims against employers either for interfering with the employees' exercise of leave or attempt to exercise leave or for retaliating against them for taking leave. To establish an interference claim, employees must show they were entitled to leave and gave proper notice and yet were denied FMLA benefits by the employer. In retaliation claims, employees argue they successfully took their leave, but suffered an adverse employment action after the employer learned they exercised their FMLA rights.

After an employee has satisfactorily established a claim, the *McDonnell Douglas* framework permits an employer to provide a legitimate, non-discriminatory reason for the adverse employment action which the employee must then show is really an artificial or sham reason. This framework can provide a strong position for an employer to obtain pre-trial dismissal of the case. For example, in the recent case of *Donald v. Sybra*, 667 F.3d 757 (6th Cir. 2012), an employee took leave on multiple occasions for various health problems and asserted her FMLA rights. While on leave,the employer discovered evidence the employee was stealing from the company. The employer confronted the employee upon her return from leave; she denied the accusations and was terminated. The trial court held that even if the employee was able to establish her interference and retaliation claims, she could not establish the employer's justification for termination was pretextual. Based on precedent that assumed the the *McDonnell Douglas* framework applied to interference claims, the court clarified such application is appropriate and affirmed the trial court's dismissal of the FMLA claims.

While taking an adverse employment action in the time around a denial or exercise of FMLA leave should always be carefully considered, the law supporting an employer is now clearer with respect to interference claims. An employer may take appropriate steps to address concerns if the employer has a well-documented, legitimate reason for the action.

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activities protected under the NLRA. The notice poster also lays out a few ground rules for unions' solicitation of employees. Finally, the poster explains how to file a charge based on any alleged violation of the NLRA. Under the rule, employers are required to obtain an exact copy of the notice poster (with size requirements) and place it on the bulletin board where other workplace rights are posted.

The Proposed Notice Affects All Private Employers - Even Non-Union Ones

The Board's jurisdiction is very broad and covers the majority of non-government employers with a workplace in the U.S., including non-profits, employee-owned businesses, non-union businesses, and even businesses in "right to work" states. Those employers specifically excluded by statute or regulation include federal, state, and local governments; those who only employ agricultural laborers; and those subject to the Railway Labor Act (railroads and airlines). An employer's workforce does not need to be organized under the NLRA for the Board to maintain jurisdiction over a particular employer. The Board does not conduct audits on its own initiative. An employer's failure to post would need to be brought to the Board's attention in the form of an unfair labor practice charge on behalf of an employee, union, or other person. In most instances, the employer's failure to post would likely result from the employer's unawareness of the posting requirement. A Board agent would likely request the employer to post the notice and no further action would be taken. On the other hand, the Board may consider an employer's failure to post as being willful and knowing under the NLRA, which could result in fines, penalties, and injunctive relief.

What Employers Should Do Next

Employers do not need to comply with the notice posting requirement on April 30, 2012. If the U.S. Court of Appeals for D.C. ultimately determines that the NLRB has not exceeded its authority, employers may have to post it at a later date. If contradictory views persist at the appellate level, however, the U.S. Supreme Court will likely make the final decision.

The Threat of Identity Theft in the Workplace

by Tremain C. Mattress

Identity theft occurs when unauthorized persons gain access to and use another person's personal information such as his or her name, Social Security Number, credit card or bank account number, or other identifying information to commit fraud or other crimes.

Identity thieves gain access to personal information through a variety of sources such as lost or stolen credit cards, stolen paper mail, dumpster-diving, computer spyware or hacking, e-mail scam, or by accessing customer or employee records maintained by businesses. Instances of identity theft have increased dramatically over the last several years. In fact, according to the United States Federal Trade Commission (FTC), in 2011 identity theft was the nation's top consumer complaint for the twelfth year in a row. In 2011 alone, approximately 11.6 million adults became a victim of identity fraud in the United States, at a cost to the economy of approximately $54 billion. Because many instances of identity theft go unreported, the numbers are likely even higher.

Employer records are among the top sources of identity theft. Several recent high-profile examples of missing or stolen data, such as the theft of personal information concerning 50,000 to 2,000,000 consumers from Georgia-based transaction processor, Global Payments, and the ring of McDonald's employees that skimmed at least 282 customers' credit card numbers, demonstrate the vulnerability of the personal information that businesses maintain about their employees and customers.

Controlling the growing threat of identity theft presents significant challenges for employers. The vast amount of sensitive personal information maintained by employers about their employees and customers, including demographic information, personnel files, credit histories, background reports, Social Security numbers, benefits data, direct deposit information, and payroll and tax records, can be a virtual treasure trove for identity thieves.

When employees or customers become victims of identity theft, the employers ultimately may pay the price, especially if the employers' treatment of employee or customer information contributed to the problem. Employers may face legal risks when their customers' records are compromised by employees or third parties. In July 2007, the United States District Court for the Eastern District of Pennsylvania held that an employer could be held liable for identity theft committed by one of its employees using a customer's personal information. In Lukens v Dunphy Nissan, Inc., the defendant, a car dealer, hired a salesperson with a prior criminal record involving numerous forgeries and thefts by deception. The employee informed the defendant about his criminal history and was hired without further question. The day after his employment began, the employee, acting within the scope of his employment, obtained the plaintiff's credit report. He then used the personal information to open numerous fraudulent credit accounts in the plaintiff's name. The court denied summary judgment to the defendant employer finding that it could be found vicariously liable under the Fair Credit Reporting Act (FCRA) for the employee's unlawful use of the report. The court held that liability may attach to the employer under an agency theory because it was within the scope of the employee's job to access and to evaluate customer credit information and because the defendant disregarded the employee's relevant criminal history.

This case demonstrates that employers should exercise particular caution in selecting, training, and supervising employees who may have access to personal information concerning customers or co-workers, especially in states such as Tennessee where negligent hiring, supervision, and/or retention claims are recognized.

Strategies for Minimizing the Risk of Identity Theft

As identity theft continues to increase, it would be wise for employers to consider the following strategies:

- Develop a comprehensive information security policy that includes responsible information-handling practices for employee, customer, and other sensitive business records
- Keep hard-copy personnel and customer files under lock and key
- Restrict access to sensitive information to only those employees with a "need to know"
- Train employees with access to sensitive information on how to keep it secure
- Require employees with access to sensitive information to sign an acknowledgement that such information will be kept confidential and will be used only for business purposes
- Disable employee access to company records and computers immediately upon termination
- Do not use Social Security numbers as employee or customer identifiers
- Carefully screen third-party vendors and temporary agencies and restrict their access to sensitive information
- Offer some sort of identity theft protection as an employee benefit

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- Consult with experienced employment counsel to discuss federal and state requirements concerning the handling of employee or customer information and for assistance in implementing comprehensive information security policies and procedures and contingency plans
- Consider conducting background checks for candidates and current employees who handle or have access to sensitive and confidential information.

Although no business can keep its records entirely secure from identity theft, adopting these strategies can help to protect employees and customers and to minimize a company's exposure from this growing threat.

VOW's Double-Edged Sword: Tax Credits in Exchange for Hostile Work Environment Claims

By Bahar Azhdari

As part of the effort to make the return to civilian life as seamless as possible for the thousands of troops returning from Afghanistan and Iraq, President Obama signed into law on November 21, 2011 the Veterans Opportunity to Work ("VOW") to Hire Heroes Act. VOW is meant both to encourage employers to hire veterans and to offer additional protections to veterans entering the workforce. Of the Act's three main provisions, two are of interest to employers.

First, the Act offers tax credits to employers who hire qualified veterans, which are defined as veterans who have been looking for work for more than four weeks. According to the Bureau of Labor Statistics, over 800,000 of the nearly 21.2 million veterans in the civilian population as of March 2012 are unemployed. A large portion of these veterans are from the Gulf War II era and are under the age of 35. The unemployment rates for these veterans are well above those for the civilian population.

To decrease this number, VOW offers a tax credit of up to $5,600 to an employer who hires a qualified veteran who has been looking for work for over six months. That tax credit is doubled to $9,600 if the qualified veteran has a service-connected disability. An employer

can also receive a tax credit of up to $2,400 for hiring an unemployed veteran who has been looking for work for over four weeks but less than six months. Generally, employers must request the credit within 28 days after hiring the qualified veteran. The IRS has made it relatively simple for employers who have already hired or who plan to hire qualified veterans to take advantage of the credit by releasing applicable forms, which are available at http://www.irs.gov/pub/irs-pdf/f8850.pdf.

As with most federal legislation, VOW giveth and it taketh away. Of concern for employers is the Act's amendment to the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), creating a hostile work environment private right of action for individuals based on their military status. Historically, federal courts have been reluctant to recognize a hostile work environment claim under USERRA, and it was unclear whether such a claim could survive. This amendment erases those doubts. USERRA now prohibits discrimination against veterans with respect to the "terms, conditions, or privileges of employment." *See* 38 U.S.C. § 4303(2). This standard brings USERRA on par with other federal antidiscrimination laws, such as Title VII and the Americans with Disabilities Act. It also opens up liability – including payment of lost wages, benefits, and potentially liquidated damages for willful violations – for employers who discriminate against individuals based on veterans status or subject them to a hostile work environment.

With the anticipated influx of veterans into the labor pool, employers should expect to see an uptick in applicants with some military status. By virtue of their statuses, veterans will be sympathetic plaintiffs. To avoid a simultaneous increase in USERRA claims, employers should begin to take preventive action by revising equal opportunity policies and procedures, including complaint-reporting procedures, to ensure they include military and veteran status. Employers also should train all managers, supervisors, and hiring personnel on the importance of USERRA compliance, and any complaints by applicants or employees regarding potential violations of USERRA should be promptly investigated and addressed.

Upcoming Events

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DRI Employment and Labor Law Seminar
Who: Waverly Crenshaw
Where: Chicago

ACI's 15th National Wage & Hour Conference
Who: Andy Naylor
Where: New York

Immigration Considerations in Healthcare Mergers, Acquisitions and Restructuring*
Who: Vinh Duong
Where: Nashville

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Labor & Employment Healthcare Administrators Workshops*
Who: Waverly Crenshaw, Stan Graham, Jeb Gerth, Bahar Azhdari
Where: Jackson, Nashville, Knoxville

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Labor & Employment Trends and Developments Workshop*
Who: Andy Naylor, Vinh Duong, John Park, Bahar Azhdari, Marti Downey, Brian Clifford, Coe Heard, Tremain Mattress, Stephanie Roth
Where: Murfreesboro, Cookeville, Nashville

Tennessee Hospitality Association Meeting
Who: Marcus Crider
Where: Nashville

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Lorman FLSA Seminar
Who: Andy Naylor
Where: Nashville

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ACI's 16th National Wage & Hour Conference
Who: Andy Naylor
Where: San Francisco

If you are interested in more information about any of these upcoming events, please contact Kathleen Caillouette at 615.850.8185 or kathleen.caillouette@wallerlaw.com.

* Events hosted by Waller Lansden

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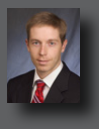

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