Barley Snyder

Employment Law Update 2011

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Unprecedented Joint Department of Labor -- American Bar Association Referral Initiative Connects Potential Plainti

By: Joshua L. Schwartz

On December 13, 2010, in a move touted by the American Bar Association as a "first of its kind partnership between a federal agency . . . and the private bar," the U.S. Department of Labor (DOL) launched an unprecedented initiative to assist potential plaintiffs in obtaining legal counsel to enforce their rights under the Fair Labor Standards Act (FLSA) and Family Medical Leave Act (FMLA). Employees bringing FMLA or FLSA complaints that are not resolved by the DOL's Wage and Hour Division are now given a toll-free telephone number that will connect them to a newly created ABA-approved attorney referral system. A caller will be given information regarding referral services in his or her geographic area, and these referral services will, in turn, provide assistance in locating an attorney to handle the claim.

In addition to attorney referrals, in those cases where the DOL has conducted an investigation, the DOL will provide the employee with its initial determinations, including its assessment of violations and back wages owed. The DOL will also provide employees and attorneys access to "the most relevant documents from [an employee's] case file" should they decide to pursue claims in private litigation.

Because the referral system provides plaintiffs' attorneys practicing in this area increased access both to potential clients and to DOL's investigative information, it has the potential to increase litigation -- including collective and class-action cases -- over FLSA and FMLA violations. The prospect of recovering attorneys fees, and, in FLSA cases, liquidated damages, makes these cases attractive for the plaintiffs' bar, and those that the DOL could resolve or otherwise would not pursue may wind up in expensive litigation. Further complicating matters is the increased risk that employees and their attorneys will assess the strength of a case based on DOL determinations that have not been finalized and that have not been subject to a thorough and complete investigation as the DOL generally would do if it pursued the case on its own. Indeed, the DOL's press release notes that this information "will be very useful for attorneys who may take the case." Moreover, the DOL may use the prospect of private litigation and the threat of

turning over its documents and findings as an incentive for employers to settle at the administrative level.

Part of a More Aggressive and Enforcement-Focused U.S. Department of Labor.

This DOL-ABA Referral Initiative is part of a more aggressive DOL approach to both investigations and enforcement in 2011 and into the future. The enforcement arm of the DOL -- the Office of the Solicitor of Labor -- recently developed an Operating Plan for 2011 and beyond. That Plan includes the Solicitor becoming more involved in the administrative and pre-litigation phases of DOL investigations. In wage and hour cases, in particular, the Solicitor plans to target employers for injunctions in addition to fines, to initiate a "liquidated damages pilot project" to assist the DOL in seeking double damages as part of the investigation and settlement process, and to identify cases for criminal prosecution.

The upshot of the DOL's aggressive approach to enforcement means that employers need to be wary and approach DOL audits and administrative investigations with litigation in mind as the end result. For example, because the DOL's investigative file can be accessed under the Freedom of Information Act, employers should take measures to ensure that the information provided in the course of an investigation be treated as confidential and protected from disclosure to the fullest extent possible.

On the regulatory front, the DOL's Wage and Hour Division expects to propose several rules revising FMLA regulations with regard to military leave and FLSA regulations regarding misclassification of employees as independent contractors, the computation of wages, and the domestic employees companionship exemption. Through discretionary "Administrator Interpretations," the Wage and Hour division will unilaterally issue guidance to clarify the law as it relates to an entire industry, a category of employees, or to all employees, so it will be important to stay on top of these developments, as well.

Most importantly, employers should take proactive measures now to head off or, at least, minimize the risks of a DOL audit:

- Evaluate your compensation policies and practices to ensure that they are compliant with the FLSA and all applicable state and local laws.
- Audit your salaried managers and supervisors to make sure that they meet the exempt tests under federal and state wage and hour laws.
- Train managers, supervisors, and payroll employees to ensure that they understand how to comply with the applicable wage-hour requirements.
- Review arrangements with independent contractors to avoid misclassification.

The attorneys in Barley Snyder's Employment Law group can assist companies in evaluating their compensation practices and in assessing whether their independent contractors should be classified as employees. Our attorneys work with you to craft policies and compliance strategies and to prepare independent contractor agreements to reduce the risk of non-compliance with federal and state laws.

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OSHA Reverses Course on Noise Exposure Proposal

By: Richard L. Hackman

Employers who are required to monitor closely workplace noise levels recently received some very good news. Specifically, OSHA's recent proposal involving significant changes to an employer's obligation to reduce overall noise exposure in the workplace was withdrawn effective January 19, 2011.

Under the proposal, employers would have been required to reduce noise exposure in the workplace by using "administrative or engineering controls," rather than by simply providing Personal Protective Equipment (PPE), or a combination of these controls and PPE, if the cost of doing so did not threaten the employer's ability to stay in business. As part of the proposed changes, employers would have been obligated to evaluate all work locations with noise at or above 90 decibels to determine whether there exists "engineering or administrative controls" that are "achievable" to reduce noise levels prior to resorting to PPE to protect employees. Examples of administrative controls included limiting the amount of time an employee can work in an area with high noise levels, whereas engineering controls would reduce the decibel level of specific machinery.

OSHA's proposed standard would have had a significant effect on employers, and would undoubtedly have resulted in substantial increased expense, since the sole exception to the new rule requiring administrative or engineering controls to first reduce the noise levels (as opposed to the use of PPE) would have been if these controls would be so prohibitively expensive that they would essentially put the employer out of business.

Ultimately, based upon the outcry from manufacturing groups and lawmakers, OSHA withdrew the proposal. Notably, a number of senators signed a strongly worded letter to the Secretary of Labor, Hilda Solis, charging that the Department's proposal was "ill-timed" and would result in the loss of jobs when manufacturers would be forced to layoff employees in order to meet the financial obligations involved with implementing new engineering or administrative controls.

While this is likely only a temporary respite for employers, it has, at least momentarily, slowed the pro-active agenda of the current Department of Labor. Specifically, the current Department of Labor has exhibited a clear willingness to exercise its rulemaking authority in order to achieve its goals. However, employers have likely not heard the last word on this issue, and, as such, are advised to closely monitor further developments.

Barley Snyder will continue to monitor developments with respect to this area of the law and will update you as events unfold.

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NLRB Files Complaint Against Employer Who Fired Employee Over Facebook Comments

By: Jennifer Craighead Carey

On October 27, 2010, the National Labor Relations Board (NLRB) filed a complaint against a Connecticut company, American Medical Response of Connecticut, Inc. (AMR), alleging that the ambulance service company illegally fired an employee who posted negative remarks about her supervisor on her personal Facebook page. The case is groundbreaking in that it marks the first time the NLRB has stepped in to argue that workers' criticism of their supervisor or employer on social media sites amounts to protected activity.

The case involves Dawnmarie Souza, who was asked by her supervisor to prepare a response to a customer

complaint about her work. Her supervisor declined to allow her union representative to assist in preparing her response. Later that day from her home computer, Ms. Souza mocked her supervisor using multiple vulgarities and writing, "love how the company allows a 17 to become a supervisor." 17 was AMR's lingo for a psychiatric patient. The negative remarks drew supportive responses from her co-workers which prompted Ms. Souza to continue making disparaging comments about the supervisor. Ms. Souza was suspended and later terminated for her Facebook postings because the postings violated the company's internet policy.

An NLRB investigation found that Ms. Souza's Facebook postings constituted protected concerted activity and that the company's blogging and Internet policy contained unlawful provisions, including one that prohibited employees from making disparaging remarks when discussing the company or supervisors and depicting the company in any way over the Internet without company permission. A hearing has been scheduled for January 25, 2011.

It should be underscored that the case is still in the complaint stage and the NLRB has not made a formal decision yet. If and when a ruling is made we will advice you of the ruling. Although no final ruling has been made, the recent complaint by the NLRB highlights two issues of which employers need to be aware.

First, whether unionized or not, all employees are protected against unfair labor practices through Section 7 of the National Labor Relations Act (NLRA). Specifically, Section 7 provides that employees may not be discriminated against for participating in concerted activities concerning their wages, hours and other terms and conditions of employment. In the case involving AMR, the NLRB is asserting that Ms. Souza and her co-workers were engaging in protected concerted activity when she posted criticisms of her supervisor on Facebook, sparking a dialogue with co-workers.

Second, the complaint sends a cautionary message to employers to not make their social media policies too restrictive. Employers should review their social media policies to ensure that they are not susceptible to claims that the policy deters employees from their right to discuss wages, hours and working conditions.

However, employees do not have a free license to criticize their employers on social media websites. For example, if an employee lashes out in a post against a supervisor but is not communicating with his/her co-workers, that type of conduct might not be protected. Similarly, if the employee posts statements that are defamatory and not supported by facts, the activity may not be protected.

If you would like assistance in reviewing your social media policy to mitigate your risk of unfair labor practice charges, please contact any member of the employment law group.

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EEOC's Final Regulations Regarding The Genetic Information Non-Discrimination Act Became Effective On January

By: David J. Freedman

On November 9, 2010, the United States Equal Employment Opportunity Commission (EEOC) released regulations implementing the Genetic Information Non-Discrimination Act (GINA), a law enacted in 2008. Title II of GINA prohibits all employers in the United States with 15 or more employees from using "genetic information" in employment decisions and permits aggrieved employees to sue for money damages. GINA also imposes liability on employers for

requesting or inquiring regarding an employee's "genetic information," which is defined broadly as an individual's "genetic tests . . . the genetic tests of family members of such individual; and . . . the manifestation of a disease or disorder in family members of such individual." The term "family member" is defined as a dependent or a first, second, third, or fourth degree relative of an employee or his/her dependent.

In the wake of GINA's passage, many employers have expressed concern about the broad definition of "genetic information" and whether employers would face liability for obtaining information for legitimate, non-discriminatory purposes. The law addresses these concerns by creating six major exceptions, which when applicable relieve an employer of liability for obtaining "genetic information"

- Information obtained during the Family and Medical Leave Act (FMLA) certification process;
- Information obtained as part of an employer-sponsored voluntary wellness program;
- The acquisition of genetic information through publicly-available information;
- Information obtained when the employer conducts genetic monitoring of the biological effects of toxic substances in the workplace;
- Requiring employees to provide genetic information as a quality control marker, but only for those employers engaged in conducting genetic testing for law enforcement purposes; and
- Inadvertently obtaining genetic information.

The EEOC's implementing regulations contain some important guidance for employers regarding these exceptions. For example, the regulations discuss when information obtained from Internet sources would fall within the inadvertent, or "water cooler" exception. In this regard, the EEOC states that an employer does not violate GINA if its HR manager inadvertently obtains an employee's genetic information through an ordinary Internet search regarding the employee or through a social media site, like Facebook or LinkedIn, for which the employee has provided the HR manager with access. An employer, however, may not intentionally run a search or request information over a social networking site that is "likely to result in uncovering genetic information." Again, the key word in the exception is "inadvertent." Employers who intentionally seek genetic information regarding an employee-through, for example, follow-up questions or by searching the employee's name along with an obvious genetic marker-could still face liability.

The implementing regulations also contain guidance for employer-sponsored wellness programs that request or require employees to complete health risk assessments. The regulations do not prohibit employers from requesting or requiring that employees provide health risk assessments. The regulations, however, strictly prohibit employers from providing financial incentives for employees to disclose their genetic information as part of such programs. Employers may still provide financial incentives for employees to complete health risk assessments, but only if the employer identifies the portions of the health risk assessment that request "genetic information," like family history information. Additionally, an employer requesting such information must make clear that employees will still be entitled to the financial reward for completing the health risk assessment even if they do not provide the requested genetic information.

Another important aspect of the final regulations deals with genetic information obtained in response to legitimate medical inquiries, including requests regarding whether an individual is capable of performing the essential

functions of his position and requests for certification that an employee has a serious health condition qualifying him for FMLA or other forms of leave. GINA does not prohibit these inquiries, but leaves open the possibility that an employer might be liable for genetic information obtained in response to such an inquiry. Thankfully, the EEOC's regulations provide the following "safe harbor" language that if used will insulate an employer from liability associated with an employee's volunteering of genetic information:

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. `Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

One word of caution: even if the employer uses the safe harbor language, it still cannot use acquired genetic information in making employment decisions and must take reasonable steps-such as storing the information in a separate medical file-to preserve the confidentiality of inadvertently-obtained genetic information.

If they have not done so yet, employers should consider how to incorporate GINA's prohibitions and requirements into their current employment policies. At the very least, this should involve re-evaluating health risk assessment forms and adding the safe harbor language to medical inquiry forms, including requests for FMLA certification or other forms of leave. The EEOC regulations became effective on January 10, 2011.

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