Labor Law and Workplace Safety
Compliance Concepts
2012 Volume 2, Issue 2 Published Quarterly by Personnel Concepts

In This Issue

Injunction Issued to Block the NLRB's New Unionization Notice

On April 17, 2012, a federal appeals court in Washington, D.C., blocked the National Labor Relations Board (NLRB) from requiring American businesses to post its NLRA Employee Rights Poster by April 30, issuing a temporary injunction to stop the mandate.

On December 22, 2010, the NLRB issued a proposed rule requiring employers subject to the National Labor Relations Act (NLRA), which is the overwhelming majority of private sector businesses, to post notices informing their employees of their rights as employees under the NLRA. The 60-day period for public comments to the proposed rule was extended until March 23, 2011 resulting in more than 7,000 comments. The Board issued, on August 25th, a final rule requiring the posting and published the rule in the Federal Register on August 30th.This final rule sets forth the Board's review of and responses to comments on the proposal and incorporates any changes made to the rule in response to those comments.

The injunction follows on the heels of a federal court's decision in South Carolina that said the Board lacks the authority to mandate the poster. The U.S. Court of Appeals for the District of Columbia now says the poster cannot be required until certain legal issues are resolved. The NLRB had no immediate public response, though the ruling has been appealed.

According to the D.C. Circuit Court of Appeals Order, briefing of the appeal is expected to be completed by June 29, 2012, and oral argument is expected to be scheduled in September 2012.

The NLRA protects the rights of employees to:

- Form or join a union
- Bargain collectively for a contract that sets wages, benefits, hours, and other working conditions
- Discuss wages, working conditions or

NLRB Continued on page 4.

Final Rule Issued: "Reasonable Factors Other than Age" under the ADEA

On March 30, 2012, the U.S. Equal Employment Opportunity Commission (EEOC) published, in the Federal Register, the "Final Regulation on Disparate Impact and Reasonable Factors Other than Age" (RFOA) under the Age Discrimination in Employment Act of 1967 (ADEA). The final rule clarifies that the ADEA prohibits policies and practices that have the effect of harming older individuals more than younger individuals, unless the employer can show that the policy or practice is based on a reasonable factor other than age. The rule explains the meaning of the RFOA defense and makes EEOC's regulations consistent with Supreme Court case law. The new regulations, which have an effective date of April 30, 2012, apply to private employers with 20 or more employees, state and local government employers, employment agencies, and labor organizations.

On March 31, 2008, EEOC published in the Federal Register a Notice of

ADEA Continued on page 4.

EBSA Sets Deadlines for Plan and Participant Fee Disclosures

On February 3, 2012, the Employee Benefits Security Administration (EBSA) established deadlines for implementing new fee disclosure requirements for 401(k) retirement plan service providers, which will then be given to retirement plan participants. The deadline for service providers' disclosure has been pushed back to July 1, 2012, and plan participants' receipt of the providers' fee schedules are due no later than Aug. 30, 2012.

The first set of rules requires that those servicing 401(k) retirement plans, such as Fidelity and Vanguard, disclose the fees that they charge, along with the direct and indirect compensation that their administrators receive. The second set of rules requires that individual plan participants be provided with these service provider fee schedules for the various investments in their portfolios. The first requirement ensures transparency and allows companies to weigh which service provider to use for their employees' retirement plans. The second is intended to provide individual participants with knowledge of the fees associated with their investment decisions.

The original deadline for the service providers' disclosure was April 1, 2012, but EBSA agreed to delay implementation for three months after service providers protested that they couldn't make the earlier spring deadline. Individual companies sponsoring retirement plans then have 60 days (until Aug. 31) to disseminate the service provider information to their participating employees.

"The common-sense rule that we are finalizing today will shed light on the true costs of [Section] 401(k) accounts and ultimately reward those working hard and saving for retirement," Labor Secretary Hilda Solis said in a statement on Feb. 3rd. "This rule, and its companion participant-level fee disclosure rule, will greatly increase the level of transparency in retirement plans. When businesses that sponsor retirement plans, and the workers who participate in those plans, get better information on associated fees and expenses, they'll be able to shop around and make informed decisions that will lead to cost savings and a larger nest egg at retirement."

Overview of the Final Service Provider Regulation

The final rule requires covered service providers (CSPs) to provide responsible fiduciaries with information they need to:

- Assess reasonableness of total compensation, both direct and indirect, received by the CSP, its affiliates, and/or subcontractors;
- Identify potential conflicts of interest; and
- Satisfy reporting and disclosure requirements under Title I of ERISA.

The rule applies to ERISA-covered defined benefit and defined contribution pension plans. It does not apply to simplified employee pension plans (SEPs), SIMPLE retirement accounts, IRAs, and certain annuity contracts and custodial accounts described in Internal Revenue Code section 403(b). Furthermore, the rule does not apply to employee welfare benefit plans. EBSA intends to separately publish proposed disclosure requirements for welfare benefit plans in the future.

The final rule applies to covered service providers who expect at least $1,000 in compensation to be received for services to a covered plan and applies to the following covered service providers:

- ERISA fiduciary service providers to a covered plan or to a "plan asset" vehicle in which such plan invests;
- Investment advisers registered under Federal or State law;
- Record-keepers or brokers who make designated investment alternatives available to the covered plan (e.g., a "platform provider");
- Providers of one or more of the following services to the covered plan who also receive "indirect compensation" in connection with such services:
- Accounting, auditing, actuarial, banking, consulting, custodial, insurance, investment advisory, legal, recordkeeping, securities brokerage, third party administration, or valuation services.

Employers' Responsibilities

Employers who offer qualified retirement plans must be sure their service providers meet the deadline of July 1, 2012, to submit their fee information, and then they must work with their service providers to obtain or create the necessary documents to give to plan participants by Aug. 31st.◆

Recent Posting Revisions (02/12 - 04/12)

- Federal - CHIPRA
- Hawaii - Discrimination
- Hawaii - OSHA
- Indiana - Equal Employment Opportunity
- Louisiana - Earned Income Credit
- Nevada - Discrimination
- North Dakota - Workers' Compensation
- Tennessee - Workers' Compensation
- Texas - Child Labor Laws

Compliance Q & A: Employee Rights in Social Media

In January 2012, the National Labor Relations Board ("NLRB") released a second report detailing the outcome of investigations into 14 cases involving the use of social media and employer's social and general media policies. The purpose of following up its first report in August 2011 was to provide further guidance to assist companies in the creation and implementation of social media policies.

The main issues that arose from these investigations involved section 7 of the National Labor Relations Act ("the Act"), which protects "concerted activities" and restricts "overly broad" drafting and enforcing of social media policies. Both reports underscore two main points:

- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.

The following Frequently Asked Questions (FAQs) have been compiled to help develop effective social media policies:

Q: What are considered "concerted activities" under the Act?

A: Concerted activities are actions or plans that are attempted/accomplished by a group. One person acting on his own does not constitute a concerted activity. Concerted activity is a protected activity under the Act, but acting alone is not.

There are essentially only two things to consider when determining if something is protected concerted activity: Is the conversation about something work-related? If so, is it between co-workers? If these threshold requirements are met, it may be a protected concerted activity.

Q: What are considered "non-concerted activities" under the Act?

A: As stated above, the Act does not protect the activity of an employee when the employee was solely acting on his or her own behalf. For example, public forum conversations with non-coworkers is not considered protected concerted activity. If an employee engages in a rant on Facebook about his/her place of employment but the only people that responds to the post are family members that don't work with the employee, then the post may be considered a non-concerted activity.

Q: What are the dangers of having a policy that is "overly broad?"

A: A social media policy must be narrowly tailored with a legitimate purpose so as to not infringe upon employees' rights. Some of the terms the NLRB found to be overly broad in these cases were:

1. Inappropriate discussions
2. Defamation
3. Disparagement
4. Privacy
5. Confidentiality
6. Contact Information- Company name, address, etc.
7. Logos, photographs, uniform.

Generally, an employer will not want to include these terms in a social media policy unless limiting language or restrictions are used to explain and restrict the meanings of the policy.

Q: What are some tips on developing an effective social media policy?

A. 1. Not having a Social Media Policy is just as dangerous as having a poor one.

Without a social media policy, you open yourself up to the liability of employees misrepresenting the company, harassment between employees, and other issues. For example, without a social media policy, employees could inappropriately harass one another via Facebook with no repercussion.

2. Narrowly-tailor your Social Media Policy by using limiting language.

You should not use overly broad language and you should only restrict what is necessary to accomplish your goal. For example: If you don't want employees to speak with the media regarding the opinion of the employer, state exactly that, nothing more. Explain the reason as well, such as wanting one official opinion from the company instead of multiple different opinions.

3. Emphasize the legitimate purposes for your Social Media Policy.

A company cannot arbitrarily make a social media policy without a legitimate purpose. A legitimate purpose is one that would protect or promote the company without interfering with the rights of its employees.

4. Include language ensuring the employee of their rights under the NLRA.

Make sure that your policy contains language that communicates that the intent of the policy is not to infringe on an employee's rights under the NLRA. For example: "This policy should not be construed or applied in a manner that interferes with employees' rights under the National Labor Relations Act (NLRA)."

5. Always consult counsel before taking action against an employee.

If an employee does violate a provision of your social media policy, you should always consult counsel before taking action. In addition, an employer should consult counsel before drafting a social media policy to best avoid overly broad language.

6. Don't eliminate social media as a tool.

After reading the above, it may not even seem worth it to incorporate social media into an employer's business. However, using social media can provide many benefits to a business. Social media creates more interest in your company, attracts more people to your website and allows people to interact with your company, building a unique trust and customer loyalty in your company. ◆

NLRB Continued from page 1.

union organizing with co-workers or a union
- Act with co-workers to improve working conditions by raising complaints with an employer or a government agency
- Strike and picket their employer, depending on the purpose or means of the action
- Choose not to join a union or engage in union activities
- Organize co-workers to decertify a union

The Board believes that many employees protected by the NLRA are unaware of their rights under the statute and that the rule will increase knowledge of the NLRA among employees, in order to better enable the exercise of rights under the statute. An intended beneficial side effect may well be the promotion of statutory compliance by employers and unions.

Hours after the decision, NLRB Chairman Mark Gaston Pearce said of the recent rulings, "We continue to believe that requiring employers to post this notice is well within the Board's authority, and that it provides a genuine service to employees who may not otherwise know their rights under our law." He also pledged that his agency would abide by the injunction.

The NLRB said its regional offices will not implement the rule until the appeal is decided. Furthermore, the labor board will appeal a part of the ruling that raised questions about the rule's enforcement mechanisms, as well as the ruling that said the agency did not have the legal authority to issue the rule. Until then, employers need to make sure they do not violate any of the provisions protecting employee rights under the NLRA. If there is ever any doubt into the legality of any action or potential action, employers are encouraged to consult an attorney. ◆

ADEA Continued from page 1.

Proposed Rulemaking ("NPRM") to address issues related to the United States Supreme Court's decision in Smith v. City of Jackson. The Court ruled that disparate-impact claims are cognizable under the ADEA but that liability is precluded when the impact is attributable to a reasonable factor other than age. Subsequently, on February 18, 2010, EEOC published in the Federal Register, a second NPRM to address the meaning of "reasonable factors other than age." The Commission considered all comments received in response to both notices of proposed rulemaking and made the appropriate changes to the proposed rules in response to those comments.

An employment practice is based on an RFOA when it was reasonably designed and administered to achieve a legitimate business purpose in light of the circumstances, including its potential harm to older workers. The rule emphasizes the need for an individualized consideration of the facts and circumstances surrounding the particular situation. It includes the following list of considerations relevant to assessing reasonableness:
- The extent to which the factor is related to the employer's stated business purpose;
- The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;
- The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;
- The extent to which the employer assessed the adverse impact of its employment practice on older workers; and
- The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

While most employers already comply with the non-discrimination requirements under the ADEA, it appears that it will now be more difficult to defend against disparate impact age discrimination claims should they occur. Employers are advised to examine their workplace policies and procedures and correct those that could possibly have a negative impact (even a non-intentional one) on older workers. ◆

Compliance Concepts

Published Quarterly by

Personnel Concepts
3200 E. Guasti Road, Suite 300
Ontario, CA 91761
www.personnelconcepts.com
E-mail:
answers@personnelconcepts.com
Managing Editor: Kim Cabanting
Staff Writers: Dave Daniels, Gary McCarty
Graphic Artist: Lorraine Maschler