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LABOR & EMPLOYMENT

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IN THIS NEWSLETTER:

The beginning of the year is always a good time for employers to review new laws and developments that may have an impact on their operations. In this issue, we report on a new National Labor Relations Board (NLRB) posting rule, as well as recent NLRB decisions concerning employee use of social media. We also summarize several new state employment laws.

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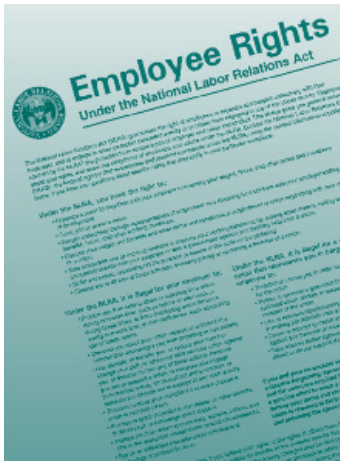
NEW NLRB POSTING RULE TO TAKE EFFECT IN APRIL 2012

In August 2011, the National Labor Relations Board (NLRB) issued a new rule requiring nearly all private sector employers — whether or not their workforce is unionized — to post a notice informing employees of their rights under the National Labor Relations Act (NLRA), including their right to unionize.



Although this rule is currently being challenged on multiple fronts, it is currently scheduled to take effect on April 30, 2012.

The Notice

The required notice informs employees, among other things, of their right to "[o]rganize a union to negotiate with [their] employer concerning wages, hours, and other terms and conditions of employment." It also explicitly informs employees that they have the right to "[d]iscuss [their] wages and benefits and other terms and conditions of employment or union organizing with [their] co-workers or a union."

An English version of the notice is currently available on the **NLRB's website**. Employers must also post a copy of the notice in a foreign language if at least 20 percent of their employees are not proficient in English and speak that other language. Foreign translations of the notice are not yet available on the NLRB's website, but are expected to be available online in the near future.

Employers must post the notice where other work-related notices are typically posted. Employers must also post the notice on an intranet or an internet site if personnel rules and policies are typically posted there.

Employers Covered By the Posting Rule

Virtually all private sector employers subject to the NLRA are required to post the notice, regardless of whether their workforces are unionized, partially unionized or non-unionized. Employers who are excluded from the NLRA's jurisdictional coverage, including agricultural, railroad and airline employers, are not required to post the notice.

Moreover, the NLRB has chosen not to assert its jurisdiction over very small employers whose annual volume of business is not large enough to have a more than "slight effect" on interstate commerce. More precise jurisdictional standards have been promulgated by the NLRB, and employers with small businesses should consult with legal counsel to determine if they can take advantage of this exception to the posting requirement.

>> continued on pg. 2

NEW NLRB POSTING RULE TO TAKE EFFECT IN APRIL 2012

>> continued from page 1

Consequences for Failure to Comply

Failure to post the notice may be treated as an unfair labor practice under the NLRA. The NLRB investigates allegations of unfair labor practices made by employees, unions, employers, or other persons, but does not initiate enforcement action on its own. Although the NLRB does not have the authority to levy fines against employers who fail to post the required notice, a willful and knowing failure to post may be considered evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA and may also lead to the NLRB extending the 6-month statute of limitations for filing a charge involving other unfair labor practice allegations against the employer.

Challenges to the Posting Requirement

The posting requirement currently is being challenged in court on the grounds that the NLRB lacks the authority to mandate a posting requirement and asserting that such a requirement can only come via the legislative process. In addition, a bill has been introduced in the House of Representatives to repeal the regulation and otherwise block the NLRB from issuing similar posting requirements in the future.

>> The Bottom Line

Despite the aforementioned challenges to the posting requirement, employers should not delay in familiarizing themselves with the new rules which are scheduled to take effect in April. In advance of this date, employers also should seek legal advice with respect to proper compliance and to determine if they appropriately can rely on any exceptions to the posting requirement.

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> Virtually all private sector employers subject to the National Labor Relations Act are required to post a notice informing employees of their rights under this Act, regardless of whether their workforces are unionized.

UPCOMING LABOR & EMPLOYMENT BREAKFAST SEMINAR:

New Year, New Changes in the Workplace:

Technology/Social Media and Key EEOC Initiatives – What You Need to Know NOW

MARCH 2012

COST: Free

LEGAL AND HR CLE CREDITS: 1.5

You see it every day - the immense influence and use of technology and social media in the workplace. Now, more than ever, employers need to have policies and procedures in place that protect them in this ever-changing landscape: Who owns that Twitter or LinkedIn account? Is an employee allowed to complain on Facebook about his employer or supervisor? From whom does an employee need to get permission before posting something on the Company's website? We will address these issues and also explore the EEOC's position on employers' use of criminal background checks and the potential discriminatory impact on candidates for employment, as well as other timely EEOC initiatives. This program will cover, among other things:

- Legal risks associated with employee use of technology
- The influence of the National Labor Relations Act on the non-union workplace, including social media decisions
- The EEOC's view on criminal background checks and other key EEOC initiatives
- Quick Takes: New laws and timely updates as well as a refresher on key topics based upon your feedback from previous seminars

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NLRA LIMITS EMPLOYERS' USE OF SOCIAL MEDIA IN ACTIONS AGAINST EMPLOYEES

Several recent decisions by the NLRB have defined what constitutes protected, concerted activity in the social media arena.

The National Labor Relations Board (NLRB) has made several recent decisions relating to whether particular employee use of social media constitutes protected activity under Section 7 of the National Labor Relations Act (NLRA).

Many employers may think that the NLRA does not govern how they manage their employees if they do not employ unionized workers. However, employers should think again: Section 7 of the NLRA protects the rights of most non-supervisory employees to engage in concerted activity – acting together to improve working terms and conditions, including communicating about pay, benefits and other work-related issues – regardless of whether they are unionized.

The following decisions illustrate how the NLRB has recently defined what constitutes protected, concerted activity in the social media arena.

Co-Worker Facebook Posts Protected

In early 2011, a restaurant employee posted a comment on her Facebook page that included an expletive and expressed dissatisfaction with owing income taxes for 2010 relating to her paycheck. She further stated that the restaurant's owners "could not even do paperwork correctly." One of her co-workers "liked" her post, and several other co-workers commented on the post. One employee also noted that the matter should be discussed with management at an upcoming employee meeting.

The restaurant fired the employee who made the Facebook post and the employee who had "liked" the post, claiming that they were not loyal employees and violated the restaurant's internet policy, which prohibited "inappropriate discussions." The restaurant also threatened to sue the terminated employees, who themselves filed a charge with the NLRB for violation of their rights under the NLRA.

The NLRB held that the employees' posts constituted protected, concerted activity under Section 7 of the NLRA because, among other reasons, they related to the employees' shared concerns about a term and condition of employment: the employer's administration of income tax withholdings. The NLRB also considered the fact that the employees made the Facebook posts outside of the workplace during non-working time, thus not undermining supervisory authority or disrupting operations. The NLRB further held that the restaurant's threat of suing the employees also violated the NLRA, which prohibits conduct by the employer that would "reasonably tend to chill" employees' exercise of their Section 7 rights, and that the restaurant's internet policy prohibiting "inappropriate discussions" further violated the NLRA because it could reasonably be interpreted as restraining Section 7 activity.

Individual Gripe on Facebook Not Protected

In contrast, the NLRB held that a customer service employee of a retail store operator who posted profane Facebook comments that were critical of local store management was not protected by Section 7. In this case, the employee posted a comment complaining that the new Assistant Manager of the store was a tyrant, and surmising that employees would quit. Several co-workers responded to his post expressing emotional support. The employee then wrote that the Assistant Manager was being a "super mega puta [a derogatory and profane Spanish word]" because she had reprimanded him for misplacing and mispricing merchandise. The Store Manager suspended the employee for one day, prepared a discipline report, and told the employee he would be fired if such behavior continued.

The employee filed a charge, and the NLRB held that the employee's conduct did not constitute protected, concerted activity under Section 7 because it was an individual gripe. The NLRB

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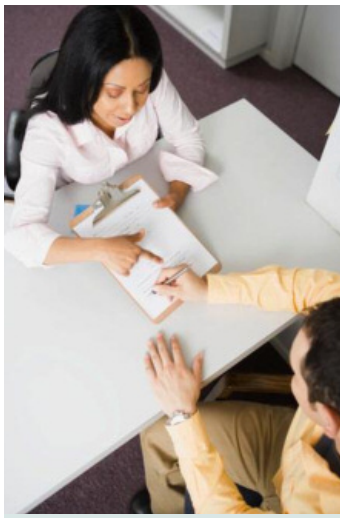
RECENT CHANGES IN GEORGIA AND TEXAS RESTRICTIVE COVENANT LAW



Recent changes in Georgia and Texas restrictive covenant law may make it easier for employers to enforce post-employment restrictions on employees.

Georgia

In 2010, Georgia passed the Georgia Restrictive Covenants Act (the Act), which significantly departed from pre-existing Georgia common law by making it easier to enforce post-employment restrictions on employees. The Act applies to all restrictive covenants entered into on or after May 11, 2011.

The following are some of the more important elements of the Act:

- >> Covenants that are two years or less in length are presumptively reasonable, while those of more than two years are presumptively unreasonable
- >> Covenants associated with the sale of a business are presumptively reasonable for five years, or as long as payments are being made to the seller, whichever is longer
- >> Non-solicitation restrictions do not need to include an express geographic definition
- >> Non-competition provisions may only be enforced against employees who: (1) customarily and regularly solicit customers; (2) customarily and regularly make sales; (3) manage the company or one of its departments or subdivisions, direct the work of two or more employees and have the authority to hire or fire other employees; or (4) perform the duties of a "key employee" or a "professional" as defined by the Act

Perhaps the most crucial change is that the Act specifically permits Georgia courts to "blue pencil" otherwise unenforceable restrictions. A court "blue pencils" a restrictive covenant when it modifies an otherwise unenforceable covenant by removing the unenforceable language from the provision (as if it were crossed out by a blue pencil). Under pre-existing Georgia common law, courts could not "blue pencil" or otherwise reform an unenforceable agreement, and therefore employers lost any benefit from a restrictive covenant if any portion of it was unenforceable. Now, under the Act, Georgia courts are expressly permitted to "modify" an overbroad restrictive covenant provision by "severing or removing" a portion of a restrictive covenant that would otherwise render the covenant unenforceable.

Texas

In June 2011, the Supreme Court of Texas held, in *Marsh USA Inc. v. Cook*, that an employer's grant of stock options to an employee constituted sufficient consideration for the employee's covenant not-to-compete. In most states, there would have been no question whether stock options are legitimate consideration for a non-compete agreement, as anything of value given to the employee (which includes continued employment in many states) will usually be deemed sufficient consideration. However, under Texas' Covenants Not to Compete Act (the Statute), a covenant is enforceable only if it is "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made."

In determining whether a *covenant* meets this standard, Texas courts require that:

> (1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement.

Using this standard, Texas courts previously held that giving money to an employee, without more, is insufficient consideration under the Statute because the money provided does not "give rise to" the employer's need to restrain the employee from competing. Instead, the courts required that the consideration be, for example, the provision of confidential information to the

>> continued on pg. 6

QUICK TAKES >>

New Laws You Should Know

Paid Sick Leave Law – Connecticut and Seattle

Connecticut now requires employers to provide 40 hours of paid sick leave per year to non-exempt "service workers." The new law applies to companies with 50 or more employees and went into effect on January 1, 2012. Leave is accrued at a rate of one hour for every 40 hours worked and can be used by employees for their own illness, injury, or health condition or the illness, injury, or health condition of a child or spouse. Seattle and Milwaukee have also enacted paid sick leave laws. Seattle's law, which goes into effect on September 1, 2012, requires five annual paid sick days for small employers (5-49 employees), seven days for companies with 50-249 employees, and nine days for larger companies.

Connecticut became the first state with such a law, while Seattle has joined San Francisco and Washington D.C. in requiring paid sick leave.

Several States Limit Use of Credit History Against Employees/Applicants

In 2011, California, Connecticut and Maryland enacted laws creating certain prohibitions on employers' use of credit history against employees and job applicants. While the specifics of these laws differ, they generally do apply the prohibitions to financial institutions or managerial positions, positions with access to large amounts of money, and/or where there is a legitimate business purpose to use credit information. Hawaii, Oregon, Washington and Illinois have also previously enacted similar laws.

NYC Religious Accommodation Law

New York City's Human Rights Law prohibits religious discrimination and requires employers to reasonably accommodate the religious beliefs and practices of employees unless such accommodations cause an "undue hardship." A recent statutory amendment now clarifies the meaning of "undue hardship," defining it as "an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system)." This clarification will make it more difficult for employers to deny a request for religious accommodation on the basis of undue hardship.

New Jersey Prohibition of Discrimination Against Unemployed

New Jersey employers are prohibited from posting print or online job advertisements that discriminate against the unemployed. A new law provides that employers cannot post job ads stating that current employment is a required job qualification, that unemployed candidates will not be considered for the position, or that the employer will only consider candidates who are currently employed.

California, Connecticut and Nevada Laws Barring Gender Identity Discrimination

California, Connecticut and Nevada have joined a growing number of states that protect transgender employees from discrimination. New laws in these states prohibit discrimination in employment on the basis of "gender identity or expression." The Nevada law provides that employers can require employees to maintain reasonable workplace appearance and grooming standards consistent with their preferred gender.

NLRA LIMITS EMPLOYERS' USE OF SOCIAL MEDIA IN ACTIONS AGAINST EMPLOYEES *>> continued from page 3*

noted that there was no language in the posts that invited coworkers to engage in group action, and that the employee was just expressing individual frustration with his Assistant Manager.

Conclusion

As the above examples illustrate, the NLRB's decisions are heavily fact-based, and there are key factors distinguishing these cases. In the first case, the NLRB found that the Facebook poster and responding employees were discussing a term or condition of employment and contemplated future concerted activity. In the second case, the NLRB determined that the employee was merely complaining about his own, personal interactions with his supervisor, and that his posts did not invite, nor did his co-workers contemplate, any future concerted activity relating to any term or condition of employment.

>> The Bottom Line

When considering employment actions relating to employee use of social media, employers need to be cognizant of the NLRA's protections of employees and should consult with an attorney before taking action against employees who complain about working conditions.

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RECENT CHANGES IN GEORGIA AND TEXAS RESTRICTIVE COVENANT LAW *>> continued from page 4*

employee, which would create the need for, or "give rise to," protection of that consideration.

However, in *Marsh USA*, the court retreated from its prior decisions, noting that "[t]here is nothing in the statute indicating that that 'ancillary' or 'part' should mean anything other than their common definitions." Instead, the court held that "consideration for a non-compete that is reasonably related to an interest worthy of protection, such as trade secrets, confidential information or goodwill, satisfies the statutory nexus."

Cook's stock options were intended to advance the interests of the company by attracting, retaining and motivating him. Marsh linked the interests of its key employee (Cook) to its own interests – the value of the options grows as the value of the business grows. Given these facts, the court held that the stock options were reasonably related to the protection of the company's business goodwill (i.e., the options encouraged Cook to foster the goodwill between Marsh and its clients) and therefore constituted sufficient consideration for Cook's post-employment restrictions.

>> The Bottom Line

Texas and Georgia employers should review their existing restrictive covenants since, given these legal changes, it may be possible to implement greater restrictions than are currently in use. However, navigating restrictive covenant laws throughout the United States can be extraordinarily difficult for employers, as new statutes and cases constantly change what restrictions are permissible, and how they will be analyzed. As such, it is critical for employers to consult with legal counsel before using restrictive covenants in different states, as an employer's standard forms may not be appropriate in a new forum.

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