JANUARY 2012

NLRB Postpones Mandatory Employee Rights Notice Posting Until April 30, 2012

The National Labor Relations Board ("NLRB") has postponed, from January 31 to April 30, 2012, the effective date of its "Notice Rule" requiring employers to post a notice advising employees of their rights under the National Labor Relations Act. This postponement is merely the most recent of several postponements the NLRB has made to allow time for the many legal challenges the Notice Rule has engendered since its introduction in December 2010.

The controversy surrounding the Notice Rule stems, at least in part, from the NLRB's stated goal of increasing private sector employees' awareness of their rights under the National Labor Relations Act ("NLRA"). The NLRA protects employees who engage in such concerted activities as petitioning or complaining to management concerning the terms and conditions of their employment and refusing to work under poor conditions. The NLRB has stated, in response to the negative comments received during the rulemaking phase, that "[a] fter due consideration, the Board has decided to require that employees of all employers subject to the NLRA be informed of their NLRA rights. Informing employees of their statutory rights is central to advancing the NLRA's promise of 'full freedom of association, self-organization, and designation of representatives of their own choosing. NLRA Section 1, 29 U.S.C. 151.'" The NLRB also observed that union activity in the private sector had declined nationwide from 12% in 1989 to 8% at present and that "nonunion employees are especially unlikely to be aware of their NLRA rights." Finally, the NLRB also noted that increased compliance by employers and unions with the NLRA may be "a beneficial side effect."

The jurisdiction of the NLRB -- which has proposed and will enforce the Notice Rule – covers a majority of U.S. employers in the public, private, and nonprofit sectors. The NLRB's jurisdiction encompasses all employers engaged in even a minimal level of interstate commerce, as measured by an employer's "gross annual income" or interstate cash inflow/outflow. For example, retailers are subject to the NLRA if their gross annual income exceeds $500,000 (except for shopping centers, which have a $100,000 threshold); non-retailers are subject to the NLRA if the goods or services they sell out of state (e.g., "outflow") or which they buy from out of state (e.g., "inflow") exceeds $50,000.

As presently written, the Notice Rule will require the Notice to be posted in a conspicuous place or, alternatively, posted electronically on internal or external websites where the employer posts other workplace notices. Employers will not be required to distribute the posting by email. The posted Notice must be 11" x 17" in size, in English, and in another language if at least 20% of the employees at the noticed workplace are not proficient in English and speak another language. The Board will provide translations of the Notice. Employers will be required to post the Notice at remote worksites in the U.S., but those employers who dispatch employees to worksites owned and operated by third parties will not be required to post Notices at such locations. The form of the Notice is available at **www.nlrb.gov/poster**.

The Bottom Line: Stay tuned. If the Notice Rule is finally implemented in its current form, failure to post the Notice would constitute an "unfair labor practice" in violation of the NLRA. This failure would toll the six-month statute of limitations for filing unfair labor practice charges and, if found to be a knowing and willful non-compliance, might be treated as evidence of unlawful motive in unfair labor practice cases. ■

Proposed OFCCP Revisions to Section 504 of the Rehabilitation Act Require Federal Contractors and Subcontractors to Have a Seven Percent Hiring Goal for the Disabled

On December 9, 2011, the U.S. Department of Labor proposed a new rule that would, among other requirements, mandate that federal contractors and subcontractors set a hiring goal of 7 percent of their workforce for the disabled. The Department's Office of Federal Contract Compliance Programs (OFCCP) invites, by February 7, 2012, public comment on this proposal which includes significant changes in the obligations of federal contractors and subcontractors under Section 503 of the Rehabilitation Act.

Section 503 obligates federal contractors and subcontractors to ensure equal employment opportunities for qualified workers with disabilities. OFCCP's proposed rule would strengthen the Act's affirmative action requirements. Specifically, the proposal would make changes to various areas of employment including, but not limited to, recruitment, training, record-keeping and policy dissemination — similar to those rules that have long been required to promote workplace equality for women and minorities. In a recent statement, U.S. Secretary of Labor Hilda L. Solis stated that "[t]his proposed rule represents one of the most significant advances in protecting the civil rights of workers with disabilities since the passage of the Americans with Disabilities Act." The proposed rule also would clarify expectations for federal contractors by specific guidance on compliance.

Section 503 obligates federal contractors and subcontractors to ensure equal employment opportunities for qualified workers with disabilities.

Goals: The proposed rule would establish, for the first time, a requirement that federal contractors and subcontractors set a hiring goal of 7 percent of their employees for workers with disabilities in each job group of a contractor's workforce.

Data Collection: Federal contractors and subcontractors would be required to request all job applicants to self-identify voluntarily as an "individual with a disability" at the pre-offer stage of the hiring process, and thereafter request post-offer voluntary self-identification. Finally, federal contractors would be required to survey all employees for self-identification in an anonymous manner once every year.

Record-Keeping: Federal contractors and subcontractors also would be required to maintain records on the number of individuals with disabilities applying for positions and the number of individuals with disabilities hired.

Accommodation Requests: Federal contractors must develop and implement written procedures for processing requests for reasonable accommodation.

Outreach: Federal contractors also must engage in a minimum of three specific types of outreach and recruitment efforts to recruit individuals with disabilities.

Job Listings: Federal contractors would be required to list job openings with One-Stop Career Centers or other appropriate employment delivery systems.

Annual Reviews: Federal contractors would be required to implement changes to personnel processes, as well as to their physical and mental job qualifications.

Finally, the proposed changes would revise the definition of disability for consistency with the changes made by the Americans with Disabilities Act Amendments Act (ADAAA) and the EEOC regulations interpreting the ADAAA. To read the proposed rule or submit a comment, please visit the federal e-rulemaking portal at **www.regulations.gov**.

The Bottom Line: If this Rule becomes final, it will place significant additional requirements upon federal contractors and subcontractors. Federal contractors are encouraged to submit their own comments to this notice. ■

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Reference Letters from Employer Not Defamatory Under Qualified Privilege

In *Senisch v. Carlino*, No. A-6218-09T3, 2011 N.J. Super. LEXIS 211 (App. Div. Dec. 1, 2011), the Appellate Division held that reference letters sent by the Deborah Heart and Lung Center ("Center") regarding the job performance of Plaintiff Michael Senisch, a former physician's assistant ("PA"), were not defamatory.

In this case, Plaintiff claimed that reference letters sent by the Center were defamatory, interfered with his job prospects, and constituted retaliation for his prior lawsuit against the Center under the CEPA. In 2007, as part of a job application with a surgical orthopedic practice in Woodbury, New Jersey, Senisch needed to obtain his PA credentials from Underwood Memorial Hospital ("Underwood"). Underwood requested information from the Center about Senisch. Senisch signed an authorization releasing from liability all individuals and organizations who provided this requested information. Defendant Dr. Lynn McGrath responded, making "no recommendation, for or against" Senisch's application for credentials. Dr. McGrath attached a letter summarizing Senisch's written performance reviews and stated that Senisch was not eligible for rehire.

The Appellate Division affirmed the trial court's decision, stating that, while Dr. McGrath's letter certainly affected Senisch's ability to obtain credentials from Underwood and his future employment with the orthopedic group, Senisch was required to show "malice" as part of his proofs. Furthermore, the court found that Senisch's "claim does not establish clear and convincing evidence of falsity or reckless disregard for falsity of the letter, nor does it overcome the qualified privilege of the [Center] to provide a truthful reference letter in response to inquiry from a prospective employer." The Court also held that the New Jersey Health Care Professional Responsibility and Reporting Enhancement Act protected the Center against civil liability for reporting the circumstances of Senisch's discharge. Thus, the Court found that Senisch could not prevail on his claims of tortious interference, defamation, or CEPA retaliation.

The Bottom Line: Employers are generally protected from liability when making truthful references in response to reference checks from prospective employers. Health care employers may be additionally protected from liability by statute. Many non-health care employers choose, by policy, to limit reference checks to confirmation of dates of employment, salary, title, etc. simply to avoid the risk of lawsuits like the one described here. ■

For a non-qualified deferred compensation plan to be effective, it must comply with two types of requirements: distributions from the plan and elections for the deferral of compensation.

Are Your Company's Employment Agreements Subject to Section 409A? Errors in Application Can Lead to Needless Litigation

There are numerous instances of parties entering into agreements that are unwittingly subject to Section 409A of the American Jobs Creation Act of 2004. Certainly, depending upon the option price, stock option plans, and other types of profit sharing arrangements, if employment agreements are not carefully drafted, income tax obligations may be incurred earlier than the parties may expect. Careless drafting may result, not only in a premature tax bill, but also a higher rate of tax since, under § 409A(a)(1)(B), interests and additional taxes may be imposed. Employers should also know when they are clearly not subject to the provisions of 409A. The Third Circuit examined this issue in *Moran v. Davita, Inc.*, No. 10-1951, 2011 U.S. App. LEXIS 16390 (Aug. 8, 2011).

Generally, the goal of Section 409A is to prevent abusive transactions in which corporate executives receive compensation without incurring income taxes. The statute applies to non-qualified deferred compensation and sets forth specific requirements. If, during a taxable year, a non-qualified plan does not satisfy those requirements, all compensation deferred for that year and all preceding years will be included in gross income to the extent that the compensation is not subject to a substantial risk of forfeiture or has not been previously included in gross income. The application of the statute is broad. According to § 409A(d)(1), the term "non-qualified deferred compensation" means any plan that provides for the deferral of compensation other than under a qualified employer plan, and any bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plan.

For a non-qualified deferred compensation plan to be effective, it must comply with two types of requirements: distributions from the plan and elections for the deferral of compensation. The distributions requirement provides that distributions from the deferred plan may not be made before separation from service. The plan cannot permit the acceleration of any payment unless there is a particular exception under the Treasury Regulations. Under the elections requirement, the participant must make the election to defer the compensation for a taxable year no later than the close of the preceding taxable year. For participants in their first year of eligibility, the election can be made as to future services within thirty (30) days after eligibility began. If the deferred compensation is related to performance-based compensation for services performed over a 12-month period, the

election must be made no later than six (6) months before the end of that period. In cases involving a "key employee," if the plan calls for payment upon separation of service, that payment must be deferred for at least six months.

In *Moran*, the Third Circuit was faced with whether Davita, Inc. properly handled Ms. Moran's stock options upon termination. Ms. Moran had an employment agreement with a six-month notice period of termination that gave Davita, Inc. the ability to remove her from her job duties during this period. The agreement also included twelve months severance pay in addition to a one-year non-compete provision. Ms. Moran also participated in a stock option plan which permitted her to purchase stock options at a set price after the options vested on October 31, 2006. Davita, Inc. gave her notice of termination of the Agreement on May 2, 2006 and issued her a release on June 16, 2006. In the May 2006 notice, Davita, Inc. told her that it could not begin paying her severance for six months after the end of her employment, relying on provisions of the unsettled Section 409A requirements. Ms. Moran's last day of employment was June 16, 2006. She refused to sign the release.

In vacating and remanding the case to the district court, the Third Circuit explained that, because the employment agreement provided for a six-month notice of termination, her notice period of employment continued until November 2, 2006. Moreover, while the agreement provided that Davita Inc. was entitled to "remove" Moran from her employment duties, this removal did not equate to a "termination" of employment. Thus, Moran's employment was terminated on November 2, 2006 and she had until November 2, 2006 to exercise her stock options. Since the stock options vested on October 31, 2006, Moran should have been permitted to timely exercise them.

The Bottom Line: Employment agreements for your company's highly compensated employees can be a very complicated matter and should not be taken lightly. In drafting employment agreements like the one litigated in this case, it is imperative to seek experienced employment benefits counsel. ■

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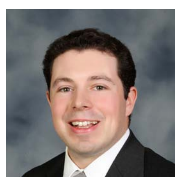
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