

# CLIENT EMPLOYMENT

GANFER & SHORE, LLP

## LAW ADVISORY

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### GANFER & SHORE WELCOMES ROBERT I. GOSSEEN, ESTABLISHES MONTHLY LABOR AND EMPLOYMENT ADVISORY

GANFER & Shore, LLP is pleased to announce that Robert I. Gosseen has become Of Counsel to the firm. Mr. Gosseen has worked as a labor and employment lawyer in New York for more than 40 years. He represents domestic and international clients in all aspects of labor and employment law, including union relations, employment discrimination and ERISA law. He regularly conducts seminars for clients in areas such as preventing sexual harassment and discrimination, reducing the workforce, labor relations, and the hiring, discipline, and discharge of employees, and counsels clients on creating and updating their employee manuals. He also negotiates employment and severance agreements.

In conjunction with the expansion of our labor and employment law practice, Ganfer & Shore, LLP will issue this *Client Employment Law Advisory* on a monthly basis. This monthly advisory is intended to keep the firm's clients and friends updated on important developments in the area of labor and employment law. If you would like to be included on the mailing list for future issues of this advisory – or of the firm's existing *Client Advisory* covering the areas of cooperative, condominium, and real estate law – please send an e-mail to [agarcia@ganfershore.com](mailto:agarcia@ganfershore.com). Please be sure to include your name, contact information, affiliation (for our files), and whether you would like to receive the advisory by regular mail, e-mail, or both.

### EMPLOYERS MUST BE AWARE OF "SIDE DEALS" BETWEEN SUPERVISORS AND EMPLOYEES

A recent court decision reminds employers that they must be aware of situations in which a supervisor purports to promise something of value to an employee, without the employer's permission or even knowledge. In some cases, the employer may be bound by the promise, even though the supervisor had no authority to make it.

In *Gallagher v. E.L. DuPont de Nemours & Co.*, the plaintiff, who was approaching retirement age, applied to take part in the employer's "Career Transition Program." The program provided selected employees with a lump-sum payment in exchange for their taking early retirement. The plaintiff would have received \$148,000 if he had been selected, but the employer did not select him for the program because he had "vital responsibility" for a "business critical" project and the employer wanted to keep him at work. The plaintiff then told his employer that he had planned on retiring prior to the completion of the project and would require a financial incentive to stay on the project to completion.

Plaintiff's supervisor then stepped in and promised plaintiff that he would "take care" of him if he postponed his retirement until the project was completed. Plaintiff testified that he understood the supervisor's statement to mean that he would receive a bonus similar in size to the transition program payment, and that he postponed his retirement based on the supervisor's promise. After the project was completed, the plaintiff received a \$30,000 bonus rather than the \$148,000 he claimed he was expecting. He sued his employer for breach of the oral contract and misrepresentation.

The court ruled against plaintiff on his claim for breach of contract, because his understanding with his supervisor was not "clear and unequivocal," but permitted plaintiff to proceed to trial on his misrepresentation claim. The court observed that the employer had never before paid a bonus exceeding \$20,000 and found that the supervisor "knew or should have known that he could never come close to the dollars being discussed, and he misled plaintiff into believing otherwise."

### **LABOR DEPARTMENT APPROVES FMLA LEAVE FOR GAY PARENTS AND OTHERS CARING FOR A CHILD**

In a significant gain for nontraditional families and families in the lesbian-gay-bisexual-transgender community, the U.S. Department of Labor ("DOL") recently clarified its regulations concerning the definition of a "son or daughter" for purposes of the federal Family and Medical Leave Act ("FMLA"). Under the revised regulations, an otherwise eligible employee will be entitled to FMLA leave if the individual has assumed parental responsibilities for a child, under the same circumstances that would entitle a biological or adoptive parent to leave.

If an employee eligible under the FMLA makes a request for FMLA leave to care for the child of his or her same sex partner or, indeed, any child that he or she is going to care for *in loco parentis*, the employer must now grant the request, subject to the receipt of appropriate documentation, which may include a medical certification or documentation establishing the parental relationship. The employer may require the employee to provide "reasonable documentation or a statement of the family relationship," but the DOL emphasizes that this documentation need not consist of anything more than a "simple statement" from the employee asserting that a family relationship exists.

### **EMPLOYERS SHOULD PREPARE FOR STEPPED UP I-9 ENFORCEMENT**

Employers must verify the identity and employment eligibility of each newly hired employee by completing and retaining a Form I-9. Employers must retain these forms for all current employees. For former employees, employers must retain them until the later of three years from the start date or one year from the termination date. The U.S. Immigration and Customs Enforcement agency ("ICE") has drastically stepped up its I-9 inspection efforts, meaning more employers will face subpoenas of their records. There are substantial monetary penalties for non-compliance with the recordkeeping and the substantive requirements for verifying employment eligibility.

Employers should prepare for the possibility of an I-9 audit by adopting a written I-9 policy and by assuring that its managers are aware: (i) who must complete a Form I-9, (ii) when and how to conduct verification, (iii) what may lawfully be asked prior to hiring, (iv) what limits may be placed on hiring of certain individuals, (v) what records should be maintained and for how long, (vi) whether documents supporting statements in I-9s should be copied, and (vii) when I-9s must be re-verified. Significantly, failure to put verification procedures into place may be viewed by the ICE as a lack of good faith in compliance, subjecting the employer to penalties even if no undocumented workers were ever hired.