
CLIENT EMPLOYMENT LAW ADVISORY

OCTOBER 2010

COMPLYING WITH NEW YORK'S NEW DOMESTIC WORKERS' BILL OF RIGHTS

The last issue of this *Employment Law Advisory* discussed the recent enactment of New York's new Domestic Workers' Bill of Rights. Here are some compliance tips for employers:

1. Use a signed employment agreement or hire letter that provides for employment at-will; states your opposition to any form of discrimination, harassment, or retaliation; clearly sets out the hourly wage, expected hours of work (including hours when the employee must be on the premises, even if he or she is not actually working), paid or unpaid time off, and fringe benefits (if any); and perhaps establishes a dispute resolution mechanism, such as arbitration;
2. Maintain accurate records of:
 - Time that the employee actually works or is not free to pursue his or her own activities;
 - Wages paid as well as all moneys withheld (with reasons for withholding); and
 - Payment of payroll taxes (including deductions for the state disability benefits law).

The employee should be required to sign and authenticate all time and payment records.

3. Check with your insurance broker to assure that you have workers' compensation and other appropriate coverage, and whether you should obtain employment practices liability insurance; and
4. Document all performance issues, disputes, disciplinary actions, and complaints.

EMPLOYER AGREES TO PAY MORE THAN \$1 MILLION AS PENALTY FOR I-9 PAPERWORK VIOLATIONS

The Department of Homeland Security and U.S. Immigration and Customs Enforcement ("ICE") has announced that it settled an enforcement action against Abercrombie & Fitch ("A&F") for \$1,047,110. The Department's press release announcing the settlement is available online at <http://www.ice.gov/pi/nr/1009100928detroit/.htm>.

The settlement stems from a compliance audit initiated in November 2008 involving only A&F's Michigan stores, rather than, as might be expected with a penalty this large, the result of a nationwide compliance audit. The violations found involved only "numerous technology-related deficiencies in A&F's electronic I-9 verification system" – in other words, software glitches – and the ICE never claimed that A&F had employed illegal workers or otherwise violated immigration law. Instead, this penalty is *solely for improper completion of I-9 forms* by A&F's compliance software.

Even employers not using electronic I-9 compliance systems must take note of the heavy fines imposed as a result of this investigation. In fact, the ICE press release confirmed that it has implemented a comprehensive nationwide audit and investigation strategy which, the ICE says, has resulted in a record number of civil and criminal penalties against employers

EEOC FILES OBESITY DISCRIMINATION CLAIM UNDER THE ADA

The U.S. Equal Employment Opportunity Commission (“EEOC”) recently filed a lawsuit alleging that an employer unlawfully fired an employee because of her severe obesity. The EEOC alleged that this violated the Americans with Disabilities Act (“ADA”) because the employer regarded the employee’s obesity as a disability. The EEOC claims that the employee, though substantially limited in one or more (unspecified) major life activities, was nevertheless able to perform the essential functions of her job. Based on recent ADA amendments that make it easier for ADA claimants to litigate their claims, the EEOC will have to establish only that the employer’s decision-makers knew or believed that the employee had a physical impairment, which is a much lower threshold for imposing liability, not that they had any specific belief as to the effect of that impairment on her life activities.

Under the New York State Human Rights Law, overweight, in and of itself, does not constitute a protected disability. In order to succeed on a weight-based discrimination claim, an employee must proffer evidence that he or she is medically incapable of meeting the employer’s weight requirements due to some cognizable medical condition. **Delta Air Lines v. New York State Division of Human Rights**, 91 N.Y.2d 65, 666 N.Y.S.2d 1004 (1997).

NLRB HOLDS THAT UNION "SHAME ON" BANNERS AGAINST NEUTRAL EMPLOYERS DO NOT VIOLATE LABOR ACT

Under the secondary boycott provision of the National Labor Relations Act, it is unlawful for a union to “threaten, coerce, or restrain” a secondary employer with whom the union has no dispute in an effort to force that employer to cease doing business with an employer with whom the union does have a dispute. In the past, the NLRB has interpreted this provision to prohibit picketing and disruptive or coercive non-picketing union conduct directed against a neutral employer. The NLRB, however, has now determined that banners displayed by union representatives targeting a secondary employer are permitted. The banners, which were held stationary by union representatives outside the neutral employer’s premises, were 3 to 4 feet high and 15 to 20 feet long. They read “SHAME ON [name of secondary employer]” in large letters, flanked on both sides by the words “Labor Dispute.” **Carpenters & Joiners of Am. (Eliaison & Knuth of Ariz., Inc.)**, 355 N.L.R.B. No. 159 (2010).

The NLRB found that despite their large size and being held aloft by union representatives, these banners did not constitute proscribed secondary picketing because they did not create a confrontation with the neutral employers’ employees or customers. The NLRB majority stated that “[b]anners are not picket signs. Furthermore, the union representatives held the banners stationary, without any form of patrolling.” A dissenting opinion argued that the decision will put neutral employers “right back into the fray” by allowing unions to target secondary employers with large banners and predicted that the decision will trigger an increase in union secondary activity.

Please note that the cases presented in this Advisory are drawn from courts located throughout the United States. They may or may not apply to a given employer based upon regional interpretations of federal law as well as any applicable state or local laws. If you have any questions concerning labor or employment law, please contact Robert I. Gosseen, Esq., who heads this practice area at Ganfer & Shore, LLP, at (212) 922-9250, ext. 288, or your contact at the firm.