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News & Types: Employment, Labor & Benefits Update

# Employment, Labor & Benefits Update - February 2017

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Practices: Employment, Labor & Benefits

**ANNUAL SEMINAR REMINDER**

MFEM's Immigration Group will hold its 2017 Annual Immigration Law Update Seminar on Friday, February 24, 2017, at the Doubletree Hotel in Arlington Heights, Illinois. Topics to be covered during this year's seminar include:

1. The transition from the Obama to the Trump administration and its effect on the U.S. immigration system;
2. The H-1B quota for fiscal year 2018;
3. Nuts and bolts of L, L Blanket and E visa processing;
4. Employing international students on CPT, OPT and STEM OPT;
5. New aggressive immigration worksite enforcement and the new Form I-9; and
6. Crimmigration and visa revocations.

**LITIGATION TEAM OBTAINS FAVORABLE SETTLEMENT FOR PLAINTIFF IN AGE DISCRIMINATION AND RETALIATION CASE AT TRIAL**

David J. Stein and Frank J. Del Barto recently obtained a favorable settlement during the trial of an employment discrimination case in federal court in Chicago, Illinois. The Court appointed David and Frank on a pro bono basis to advocate on behalf of a former employee of the Illinois Department of Corrections ("IDOC") who alleged age discrimination and retaliation against her supervisors for scheming to terminate her employment and replace her with younger employees, as well as retaliating against her after she complained about discrimination.

After successfully opposing IDOC's summary judgment motion, David and Frank diligently prepared all Pre-Trial materials and began the trial of their client's case, conducting opening statements and examining several witnesses. Before sending the case to the jury to deliberate, IDOC offered, and the Plaintiff accepted, a monetary settlement on very favorable terms, evidencing the risk of a potentially adverse verdict against the Defendant.

Masuda Funai's employment litigation team routinely defends all types of employment-based disputes on behalf of our clients, including claims of discrimination, harassment, retaliation, the enforcement of non-compete and arbitration agreements, and traditional labor relations matters.

**HAVE YOU UPDATED YOUR ANTI-HARASSMENT POLICY AND TRAINING PROGRAMS?**
By Alan M. Kaplan

In thinking about human resource goals for 2017, reviewing and updating the anti-harassment policy and training program should be at the top of any company's list. This is because a correctly written policy and training program will help lower the risk of harassment complaints and suits. First, by conducting an annual audit of the anti-harassment policy and running an anti-harassment training program, a company can take preliminary steps to ensure a workplace free of harassment. Second, even if harassment, or allegations of the same, were to occur, the company would have in place a concrete plan for investigating complaints, taking appropriate disciplinary action, and for complying with the applicable anti-harassment laws. Finally, if an employee were to bring a charge of harassment against the company, having an updated and well-written anti-harassment policy and training program in place can help with the company's defense.

What are the elements of a well-written anti-harassment policy? The policy should:

- Comply with the requirements of federal, state and local laws.
- Apply to employees and non-employees as well as during working and non-working hours.
- Prohibit harassment based on sex, race, national origin, religion, and all other classifications protected by applicable federal, state, and local laws.
- List the three-pronged definition of harassment.
- Describe the different forms harassment could take, including verbal, non-verbal, physical, visual, and electronic harassment.
- List the circumstances during which harassment may occur.
- Encourage the filing of complaints either orally or in writing.
- Promise an investigation.
- Ensure confidentiality to the extent possible.
- State that the Company will implement appropriate disciplinary and other actions to resolve complaints and prevent future incidents.
- State that there will be no retaliation against any employee for making a complaint in good faith.

What are the elements of a good anti-harassment training program? Companies should:

- Comply with the requirements of federal, state and local laws.
- Require employees to sign an attendance sheet or issue certificates of attendance to demonstrate attendance at the training program.
- Retain the program and proofs of attendance to submit to the EEOC, state, or local fair employment agencies and courts as part of the company's defense.
- Train all employees, including the president of the company.

- Make sure employees are aware that the core values taught during the training program are considered to be very important by management. For example, a company's president or other official could start off the training program with a statement that the training program reflects important company's values, which include creating a workplace free of harassment and discrimination.
- Present an interactive program with role playing, quizzes, questions and answers, and/or a discussion of videos with examples or written scenarios drafted based upon issues at the company.
- Include scenarios and examples of harassment based upon sex, as well as other protected classifications, that are applicable to the employees working in the company.
- Explain the types of harassing behaviors and the circumstances in which harassment may occur.
- Describe the steps the company will implement to investigate and resolve complaints of harassment.
- Make sure that the training includes specific mention of the company's anti-harassment policy, and the policy should be distributed at the beginning of the training program.
- Require employees to sign an acknowledgement of their receipt of the anti-harassment policy at the end of the training program. These should be kept in each employee's personnel file.
- Present the training program at least once a year laws.

This past year, the Equal Employment Opportunity Commission reviewed and approved our Firm's anti-harassment policy and training program. Our Firm has developed a simple, four-step rule of behavior that employees and supervisors can use to avoid and/or monitor harassment. In addition, our Firm has developed two separate programs, one for employees and one for supervisors who have special responsibilities to report harassing behaviors and complaints and to participate in the investigation and resolution of complaints. If you require any assistance with your anti-harassment policy and/or training program, feel free to contact us.

**SEVENTH CIRCUIT UPHOLDS JURY VERDICT AGAINST EMPLOYER FOR VIOLATION OF THE FMLA**
By Nancy E. Sasamoto

In a "wink" of an eye, Tracy Wink's employer violated the Family and Medical Leave Act ("FMLA") when it terminated Wink because she needed leave to care for her autistic son. On January 9, 2017, the United States Court of Appeals for the Seventh Circuit not only upheld the jury's verdict against her employer, Miller Compressing Company ("Miller"), it also reversed the decision of the trial court to reduce Wink's attorneys' fees by 20 percent.

Wink had worked for Miller since 1999 and was considered an experienced and highly valuable employee. In February 2012, Wink's son was expelled from day care because of his aggressive behavior, which was a product of his autism. Consequently, Wink asked Miller for FMLA leave, which would enable her to work from home 2 days a week. Miller agreed to an arrangement where Wink could work from home for 2 days a week, provided that Wink report the number of hours she actually worked while at home. The time Wink spent taking care of her son would be considered FMLA leave.

In the summer of 2012, Miller experienced serious financial problems and decided that none of its employees would be allowed to work at home and that all employees would be required to work on the company premises. On a Friday in July, Miller gave Wink an ultimatum: she had to show up on Monday and work the same full-time schedule as all other employees. She started to cry and said that it would be nearly impossible for her to

find day care over the weekend for Monday. In response, Miller's human resources officer falsely told Wink that the FMLA only covered leave from work for doctors' appointments and therapy. In fact, under the FMLA, eligible employees are entitled to take up to 12 weeks of leave during a 12-month period for qualifying reasons, which include caring for a child with a serious health condition.

On Monday morning, when Wink returned to work and reported that she had been unable to find day care for her son over the weekend, Miller's human resources officer told Wink that she would be considered a "voluntary quit" the first day she didn't work in the office full-time. When Wink returned home to take care of her child, the human resources officer ordered that her termination be processed "today."

Wink sued for retaliation in violation of the FMLA, interference with her rights under the FMLA, violation of a Wisconsin Wage Statute, and breach of contract. The jury found in favor of Wink on all claims, except for the interference claim. In addition to various damages, Wink was awarded attorneys' fees, since the FMLA entitles a winning plainitff to attorneys' fees, but the trial judge reduced the fee award by 20 percent because Wink had not prevailed on the FMLA interference claim. Miller appealed, stating that no reasonable jury could have found enough evidence to justify the verdict, and Wink cross-appealed, seeking a higher award of attorneys' fees.

On appeal, the Seventh Circuit Court of Appeals upheld the jury's verdict that Miller retaliated against Wink for asserting her right to take FMLA leave to take care of her autistic child. Because the company had previously allowed her to work at home for 2 days a week since February and because Wink was a valuable, experienced employee, the Court found that Miller had no compelling reason to fire her other than to express anger that she requested to be allowed to stay home. The Court found that the false explanation of FMLA rights by Miller's human resource supported Wink's case against Miller and showed that Miller had not acted in "good faith," which entitled Wink to liquidated damages plus interest. With regards to the attorneys' fees, the Seventh Circuit reversed the decision of the trial court to reduce Wink's attorneys' fees by 20 percent because (1) Wink's attorneys were prudent in pressing both the FMLA retaliation and interference claims to reduce the likelihood of a total defeat; and (2) because FMLA retaliation and interference claims are so similar that the cost of presenting the interference claim in addition to the retaliation claim was marginal.

Clearly, employers cannot justify denying eligible employees the right to use FMLA because of the company's financial problems or by announcing a company-wide edict that all employees must work at the company on a full-time basis or be terminated. While employees are not necessarily entitled to take FMLA leave every time they don't have a babysitter or other child care provider, employees have the right to take FMLA leave to care for a very difficult, sick child. Additionally, in this case, the human resources officer's rash acts and false explanation of the FMLA resulted in a significant liability for the company.

For more information about this or any other employment law topic, please contact Frank Del Barto, Chair of the Employment, Labor & Benefits Group, at 847.734.8811 or via email at fdelbarto@masudafunai.com.