Employment & Labor Update: New Posting Required by the National Labor Relations Act (NLRA)

October 24, 2011

As of November 14, 2011, employers covered by the National Labor Relations Act (NLRA) are required to post an 11-by-17 inch notice which advises employees of their union rights (the "Notice"). The Notice must be posted in a conspicuous place, where other notifications of workplace rights and employer rules and policies are posted.

Who is covered by the NLRA?

The NLRA covers employers (both union and non-union workplaces) engaged in interstate commerce. The NLRA covers most employers in the private sector. However, the Act specifically excludes individuals who are:

- employed by federal, state, or local government;
- employed as agricultural laborers;
- employed in the domestic service of any person or family in a home;
- employed by a parent or spouse;
- employed as an independent contractor;
- or employed by an employer subject to the Railway Labor Act, such as railroads and airlines.

If you are unsure whether you are covered by the NLRA, it is recommended that you contact legal counsel to determine whether this new regulation applies to you.

Employees' Rights.

The Notice advises employees of their rights to:

- organize, form, join, or assist a union to negotiate wages, hours, and other terms and conditions of employment;
- bargain collectively regarding wages, benefits, hours, and other working conditions;
- take action with one or more co-workers to improve working conditions;
- strike and picket, depending on the purpose or means of the strike and the picketing; and
- choose not to join or remain a member of a union.

Employers' Prohibited Acts.

The Notice also lists acts that are illegal for an employer to take against employees, including:

- prohibiting employees from talking about or soliciting for a union during non-work time;

- questioning an employee about union support or activities that discourages employee from engaging in such activity;
- taking adverse employment action against an employee because an employee joins or supports a union;
- threatening to close workplace if workers choose a union;
- promising or granting promotions, pay raises and other benefits to encourage or discourage union activity; and
- prohibiting employees from wearing union paraphernalia in the workplace.

What are the consequences for failing to post the Notice?

Failure to post the Notice could result in an extension of the normal six-month statute of limitations for filing an unfair labor practice charge under the NLRA. If an employer fails to post the Notice, the NLRB may consider it as evidence of an employer's motive against unionization. This is particularly significant in cases where an employee is claiming retaliation due to union activity.

The Notice is available for downloading and printing from the NLRB website https://www.nlrb.gov/publications.

Does an Employer Have a Duty to Accommodate an Employee's Commute?

Recently, the Court of Appeals for the Second Circuit held that, under certain circumstances, an employer may have a duty to accommodate employees in their commute to and from work. See Nixon-Tinkelman v. New York City of Health and Mental Hygiene, No. 10-3317 (2d Cir. Aug. 10, 2011).

In that case, Ms. Tinkelman was hearing impaired and suffered from cancer, heart problems, and asthma. After working in the employer's Queens office, Ms. Tinkelman was moved to the Manhattan office. She claimed, in part, that her employer should have accommodated her request with respect to her commute to work.

The Second Circuit remanded the issue, requesting that the district court engage in a fact-specific inquiry to determine whether there was a reasonable accommodation. The Court reasoned that because Ms. Tinkelman had worked for many years in the Queens office before being transferred to Manhattan, the employer may have a duty to provide a reasonable accommodation—including, moving plaintiff to a closer location, allowing plaintiff to work from home, or providing her with a car or parking permit.

The Court's decision in Tinkelman, seems to be the direction that many federal courts are taking with respect to commuting accommodations under the ADA. See Colwell v. Rite Aid Corp, 602 F.3d 495 (3d Cir. 2010) (partially blind plaintiff was entitled to change from night to day only shifts due to difficulty driving at night); see also Livingston v. Fred Meyer Stores, Inc., 08-35597 (9th Cir. July 21, 2010) (employer had to accommodate request for modified work schedule in fall and winter months for visually impaired employee to minimize night driving).

These recent decisions are, however, contrary to prior rulings in which the Courts consistently ruled that commuting to and from work falls outside the scope of a position and therefore, does not impose an obligation on the employer under ADA. See Bull v. Coyner, 2000 WL 224807, *9 (N.D. Ill. Feb. 23, 2000); see also LaResca v. Am. Tel. & Tel., 161 F. Supp. 2d 323, 334-35 (D.N.J. 2001) (employer is not obligated to change shifts to accommodate commuting difficulties under NJLAD).

Although the exact implications of Tinkleman are not clear, it appears courts are consistently taking a more expansive view of an employer's duty to provide a reasonable accommodation to individuals with a disability. Employers must carefully review all accommodation requests to ensure that they do not run afoul of the American's Disability Act or state discrimination laws.