

EMPLOYMENT LAW ALERT

January 2011

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For further information, please contact these Employment Law Group members:

Jeffrey M. Schlossberg
Chair
(516) 663-6554
jschlossberg@rmfpc.com

Douglas J. Good
(516) 663-6630
dgood@rmfpc.com

Joseph R. Harbeson
(516) 663-6545
jharbeson@rmfpc.com

Kimberly Malerba
(516) 663-6679
kmalerba@rmfpc.com

NLRB Rule Creates New Obligations for Employers

By: **Kimberly B. Malerba**

On December 22, 2010, the National Labor Relations Board issued proposed regulations that, if enacted, will create a substantial change in the workplace. The proposed rule requires employers subject to the National Labor Relations Act to inform employees of their rights under the NLRA, including the right to form and join labor unions.



What many companies do not realize is that most private sector employers are subject to the NLRA, whether unionized or not. In the case of a nonretail business, the NLRA applies to those that (a) provide at least \$50,000 worth of goods or services out of state, or (b) purchase at least \$50,000 worth of goods or services from out of state. For a retail business, coverage exists if the business has gross annual revenues of at least \$500,000.

The proposed rule requires covered employers to post and maintain the required notice in a conspicuous place, including any place where notices to employees are customarily posted. Employers must also take the additional step of making certain that the notices are not altered, defaced, or covered by other material. The content of the proposed notice will instruct employees on what conduct is prohibited, how to file a charge and will provide the Board's contact information. The posting will be provided by the NLRB.

Employers with a significant number of employees who are not proficient in English will be required to post notices in the languages spoken by those individuals.

In addition, employers that communicate customarily with their employees electronically are required to distribute the notice electronically, either via email, on an intranet or Internet site, and/or other customarily used electronic means. Alternatively, employers can include a link to the relevant information which

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will be posted on the Board's website.

Sanctions will be imposed against employers who fail to make the required posting. The proposed sanctions include: (1) finding the failure to post to be an unfair labor practice, (2) tolling the statute of limitations for filing charges alleging unfair labor practices, and (3) using the employer's willful failure to comply with the posting requirements as evidence of unlawful motive in the event of an unfair labor practice case. Notably, the unlimited tolling of the statute of limitations likely will have a significant impact on unfair labor practice cases because it will operate to extend what is an otherwise short six-month period in which to file a charge.

The Board is now in the midst of its sixty-day comment period, after which it will be determined whether or not the proposed rule will be adopted. By all accounts it is very likely that there will be little difference in the final regulation. We will keep you informed regarding the status of the rule and as always, are available to assist you in ensuring your compliance with the rule once it is adopted.

Retaliation Passes Race Discrimination as Most Common EEOC Charge

By: Jeffrey M. Schlossberg



According to the Equal Employment Opportunity Commission, retaliation charges were the most common type of charge filed in fiscal year 2010. Retaliation charges rose to comprise 36.3% of the agency's total charges. The data also shows that charges in many major areas rose as well, including age discrimination and disability discrimination. In addition, the EEOC announced that private sector discrimination charges hit an unprecedented level of almost 100,000 in 2010.

Employers are encouraged to consider the risk of retaliation claims when dealing with employees who have alleged discrimination (even if the complaint is only made internally within the company). Moving an employee's office, changing shift hours or other changes could be viewed as retaliation when the action is taken subsequent to the assertion of a complaint. It should also be kept in mind that a successful retaliation claim can be made even if the underlying complaint had no basis as long as the complaint was made in good faith. Damages for retaliation are the same as for other forms of discrimination and include back pay, compensatory and punitive damages and attorney's fees.

If we can be of assistance on these or any employment law issues, please do not hesitate to contact us.



East Tower, 15th Floor
1425 RXR Plaza, Uniondale, NY 11556-1425
516.663.6600
www.rmfp.com

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Ruskin Moscou Faltischek, PC | 1425 RXR Plaza | East Tower 15th Floor | Uniondale | NY | 11556