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EMPLOYMENT LAW ALERT

April 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

Additional Notice to Employees Looming

By: Jeffrey M. Schlossberg

With the ink barely dry on New York's Wage Theft Prevention Act notice requirements, The United States Department of Labor is continuing to advance its "Right to Know" agenda. The DOL is considering a proposed rule requiring covered employers to notify workers of their rights under the Fair Labor Standards Act (FLSA), and to provide information regarding hours worked and wage computation.

This may seem similar to New York's law, which was described at length in RMF's March 2011 Employment Alert. However, there is one very big difference: Any employer that seeks to exclude workers from the FLSA's coverage will be required to perform a classification analysis, disclose that analysis to the worker, and retain that analysis to give to DOL enforcement personnel in the event it is requested. In other words, employers will be required to provide written notification as to whether an individual is an employee or independent contractor and the grounds for that determination.

The "Right to Know" proposed rulemaking is currently scheduled for this month, with a likely 60- to 90-day comment period.

In the meantime, to prepare for this potential change, employers should conduct a company-wide analysis (including review of job descriptions) to determine whether a worker is an employee or independent contractor as well as whether employees are properly classified as exempt or non-exempt.

FLSA Anti-Retaliation Provision Covers Oral Complaints

In a decision just handed down, the United States Supreme Court resolved a split among federal appellate courts and held that the

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Fair Labor Standards Act's provision prohibiting retaliation includes oral complaints.

The case arose when an employee, after raising complaints with his supervisors about timekeeping procedures, was subsequently fired. The FLSA prohibits retaliation when an employee has "filed" a complaint. The Court was called upon to determine whether "filed" includes verbal complaints and not just written ones. In finding that oral complaints fall under the statute, the Supreme Court stated that "filed" under the FLSA means when "a reasonable, objective person would have understood that the employee is asserting statutory rights" under the FLSA.

This decision is another reminder of how important it is to train managers. As in the case of workplace harassment, managers must be trained on what to do when complaints regarding wage & hour issues - even if oral and even if informal - are brought to their attention. In addition, managers must be aware of the actions that can lead to claims of retaliation (e.g., firing, change of shift, poor review, etc.) Managers must be told that complaints need to be brought to the attention of HR or other company designee so that appropriate steps can be taken to address the complaints, eliminate the problem and avoid potential retaliation claims.

Social Security Administration Resumes No-Match Letters

The Social Security Administration has once again started sending employers no-match letters. The SSA stopped sending no-match letters several years ago when a legal action was commenced challenging a rule regarding these letters. No-match letters are issued by the SSA if it is determined that an employee's name does not match a valid Social Security number.

If you receive such a letter, it is clear that the letter itself should not be the basis for taking any adverse action against any employee referenced in the letter. A no-match letter is not evidence that the employee is unauthorized to work.

In addition, the employer should provide the employee with a reasonable period of time in which to address the discrepancy. If the Social Security number was presented as proof of work eligibility, failure to present proper documentation after a reasonable period of time could require termination of employment. Upon receipt of a no-match letter we strongly recommend seeking advice from your counsel on how to respond.

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

RUSKIN MOSCOU FALTISCHEK P.C.

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

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