THOMPSON HINE

The Law@Work

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Social Media

Concerted Activity "Like" We Haven't Seen Before

By Eric S. Clark & Megan S. Glowacki

For many, social media is an integral part of daily life. Scrolling through Facebook and Twitter posts and viewing Instagram pictures is as entrenched as checking the news or the weather. Providing our approval of others' social media posts is pervasive due to its ease. "Liking" Facebook posts or Instagram photos and retweeting tweets takes little more than a single click of a button. But can simply pressing the "Like" button on Facebook be considered "concerted protected activity" under the National Labor Relations Act? According to the NLRB, it can.

Employers have been warned repeatedly of the National Labor Relations Board's sweeping view of concerted activity, especially through the use of social media. The NLRB has expanded this view further, finding that the simple act of "Liking" another employee's Facebook comment about terms and conditions of employment can constitute concerted activity.

In Three D, LLC d/b/a Triple Play Sports Bar and Grille, employees discovered that, due to an accounting error by the employer, they owed more state income tax than they expected. A former employee, who also owed more income tax, posted her displeasure on Facebook. Several other former employees, and at least one current employee, added their criticism of the employer by commenting on the Facebook post. The current employee indicated that she too owed money and was angry. Another current employee "Liked" the original post. After discovering the Facebook post and comments, the employer discharged the two current employees. Though not unionized, the employees filed a charge with the NLRB.

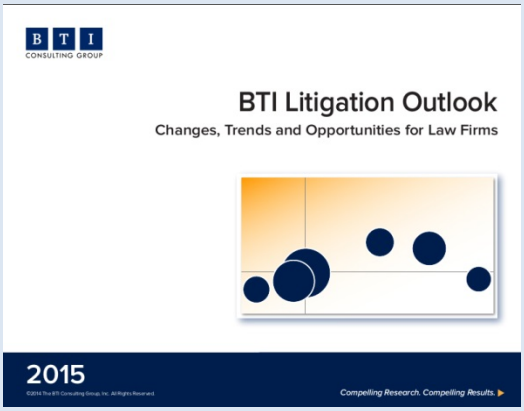
For more details on any of the topics covered in *The Law@Work*, please contact the authors via the links at the end of each article or Tim McDonald, editor-in-chief. For information on our Labor & Employment practice, please contact Stephen Richey, practice group leader.

The NLRB agreed with the administrative law judge who concluded that the overall Facebook discussion triggered by the former employee's original post was concerted activity: it was part of an ongoing discussion of the tax withholding issue and the participants were discussing plans to raise issues at a future staff meeting. The current employee's comment as part of this discussion was "protected" activity. Even more, the Board held that other current employee's "Like" of the initial post expressed the employee's agreement with the original post and therefore "constituted participation in the discussion that was sufficiently meaningful as to rise to the level of protected, concerted activity." Importantly, because the employee "Liked" only the original post and did not separately "Like" any of the ensuing, allegedly defamatory comments, his "Like" showed support only of the original post and not the entire thread.

Thus, a Facebook "Like," without any other comment, verbal or written, has been held to be an expression of agreement sufficient to constitute protected concerted activity. Employers should be alert to these nonverbal expressions of approval or support and may need to consider them as part of concerted activity by employees. Although "Liking" a comment or post can take only seconds, it is apparently sufficient to gain protection under the NLRA.

For more information, please contact Eric Clark, Megan Glowacki or any member of our Labor & Employment group.

WHAT THE MARKET SAYS ABOUT THOMPSON HINE



BTI Litigation Outlook named Thompson Hine one of 15 Standout firms in Routine Employment Litigation, placing us among the top 18 nationwide.

Temporary Workers

OSHA/NIOSH Announce Recommended Practices for Temporary Workers

By M. Scott Young

On August 25, 2014, the Occupational Safety and Health Administration (OSHA) in conjunction with the National Institute of Occupational Safety and Health (NIOSH) issued recommended practices for host employers and staff agencies to better protect temporary workers from hazards on the job. Last year, OSHA issued a temporary worker initiative focused on outreach training and enforcement to ensure that temporary workers are protected in their workplaces. This guidance issued by OSHA and NIOSH makes a number of recommendations for employers.

The guidance recommends that staff agency/host employer contracts clearly define the temporary worker's tasks and safety and health responsibilities for each employer relating to the temporary worker. The extent of responsibilities that a staffing agency and host employer will have to ensure OSHA compliance with respect to temporary employees will vary depending upon workplace conditions. This should be described in their agreement. According to the guidance, depending upon the circumstances, the staffing agency or host employer may be better suited to ensure compliance with a particular OSHA regulation and may assume primary responsibility for compliance with a particular regulation. The contract should clearly define the responsibilities to encourage implementation of all relevant safety and health protections for workers. The division of responsibility should be reviewed regularly.

Normally the host employer is responsible for compliance with OSHA's safety and health regulations at the worksite for temporary employees who are employed by a staffing agency, because the host employer controls the worksite. However, based upon OSHA/NIOSH's guidance, responsibilities for compliance with OSHA's safety regulations can be assigned based upon contract if such assignment is not otherwise contrary to an OSHA regulation. We recommend that both host employers and staffing agencies review their contracts to ensure that safety and health responsibilities are allocated as appropriate considering the particular circumstances at a jobsite.

The guidance recommends that both the staffing agency and host employer track workplace injuries on a worksite. OSHA regulations mandate that the employer who provides day to day supervision of an employee, i.e., controls the means and manner of the employee's work, document recordable work injuries on an OSHA log. This responsibility cannot be contracted away. However, according to the guidance, the contract between a host employer and staffing agency employer can specify which employer will make such OSHA log available upon request for a temporary employee or temporary employee representative.

The guidance recommends that temporary workers be provided appropriate health and safety training as mandated by OSHA regulations. The guidance provides that this training of temporary workers is a shared responsibility of the staffing agency and host employer, in which staffing agencies should provide general safety and health training applicable to occupational settings where a temporary employee is foreseeably placed, and a host employer should provide training tailored to a particular hazard at the workplace that may otherwise not generally be prevalent in similar workplaces. Host employers need to ensure that temporary workers are provided with safety training that is identical or equivalent to that provided by the host employer to its own employees performing the same or similar work.

The guidance recommends that a staffing agency evaluate a host employer's worksite for task assignment and job hazard analysis in order to identify and eliminate potential safety or health hazards applicable to temporary employees. Agency staff are recommended to have a dedicated safety and health professional to ensure that temporary workers are appropriately trained to work on host employer jobsites. Where feasible, host employers and staffing agencies should exchange and review each other's injury and illness prevention programs. The guidance also recommends that staffing agencies and host employers have safety and health programs in place to reduce the number and severity of workplace injuries.

For more information on this guidance, how to comply with it, or other OSHA matters, please contact Scott Young or any member of our Labor & Employment group.

Government Contractors

2014 In Review: A Changing Tide for Government Contractors and Their Employment Obligations

By Staci M. Jenkins & Matthew R. Kissling

With the current political deadlock in Congress, 2014 has seen very little change to the equal employment obligations for a majority of private employers in the United States. Federal government contractors and subcontractors, however, are the key exceptions to this rule. Through the power of executive action and regulatory development, government contractors now face a swelling sea of change to their federal affirmative action, antidiscrimination and equal pay obligations.

The waves started rolling in March 2014 when the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) officially implemented its regulatory changes to Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment and Assistance Act (VEVRAA). These highly-anticipated regulations completely redefine a government contractor's affirmative action duties with respect to veterans and individuals with disabilities. While government contractors were previously required to maintain an affirmative action program for veterans and disabled individuals, the OFCCP did not impose any quantifiable goals to measure those efforts.

Effective March 24, 2014, however, government contractors are now required to implement an annual hiring benchmark for veterans (currently 7.2 percent), as well as a 7 percent utilization goal for disabled workers in each of their individual job groups. To achieve these markers, government contractors must invite all job applicants to provide certain disability or veteran status information at multiple stages of the application process. This data must then be used to perform annual comparisons of the number of veterans and disabled individuals who apply for jobs and are selected for employment. In addition, government contractors must resurvey their current employees for updated disability information at least once every five years. A contractor's applicant and workforce information, together with evidence of their efforts to achieve the stated utilization goals and hiring benchmarks, are now proper subjects of an OFCCP compliance audit.

The regulatory onslaught did not end with Section 503 or VEVRAA. Instead, the second wave hit in June 2014 with the Department of Labor's proposed minimum wage regulations for government contractors. Issued under President Obama's Executive Order 13658, the proposed regulations require all government contractors operating under a federal construction or service contract to pay their workers a minimum wage of at least $10.10 per hour. Beginning with all contracts created, amended or renewed on or after January 1, 2015, this wage rate is nearly $3.00 higher than the federal minimum wage applicable to the rest of the private sector. Covered government contractors are also responsible for wage compliance by any lower-level subcontractors to their contract. While not yet finalized, the proposed regulations provide a preview of the changes to come for a government contractor's minimum wage duties. The Department of Labor is expected to release the final regulations on or before October 1, 2014.

If the regulatory developments of 2014 serve as an indicator, it is safe to assume that the executive branch will have further changes in store for government contractors through the end of the Obama presidency. By taking steps now to overhaul existing programs, government contractors can ensure that they are in tune with their current obligations and are well-prepared for the future.

The OFCCP's most recent big splash occurred with the unveiling of its proposed regulations for the collection of contractor compensation data. Published in the Federal Register on August 8, 2014, the proposed rule requires most government contractors with more than 100 employees to provide the OFCCP with an annual "Equal Pay Report" of compensation data. The contents of this report must include employees' W-2 pay data broken down by sex, race, ethnicity, job category and hours worked. Government contractors must certify to their compliance with these "Equal Pay Report" requirements in any bid for a new federal contract.

This squall of regulatory developments reflects an important reality – the power of executive action during times of political deadlock. Unlike the rest of the private sector, government contractors must now overhaul their affirmative action and antidiscrimination programs from a number of different angles. Failure to do so can subject them to OFCCP

investigations and painful consequences, including monetary penalties, cancellation of an existing federal contract or subcontract, and disqualification from future government contracts. As a result, government contractors are wise to take some immediate steps to ensure compliance with their new obligations.

Overhaul applicant tracking systems. Your existing HRIS and applicant tracking processes, whether paper or electronic, should be updated to incorporate the various new requirements for promoting the hiring and retention of protected veterans and individuals with disabilities. Importantly, the new VEVRAA and Section 503 regulations require government contractors to invite all applicants to self-identify as protected veterans or individuals with disabilities. Contractors must also resurvey their current employees for disability information at least once every five years. This data will then be used to measure your ability to meet the required benchmarks and utilization goals for veterans and disabled individuals. As a result, you should ensure that your existing applicant and employee data systems are in a position to solicit, document and retain the required disability and veteran information.

Identify necessary updates to contracts and payroll practices. With the impending release of the finalized minimum wage regulations, you should take steps to ensure that your future government contracts or purchase orders are ready to comply with the new minimum wage obligations. As an important first step, you should determine whether your government contract is one for "construction" or "service," as this is the threshold requirement for your obligation to pay the heightened minimum wage beginning in January 2015. If covered, you should assess how to best update the wage payment provisions of your future contracts to reflect the new wage obligations. You should also analyze your current payroll systems and practices to determine whether any modifications are needed to ensure a smooth transition to the heightened minimum wage for employees working on future government contracts.

Implement compensation tracking program. While the proposed regulations are not yet final, you should begin making efforts to actively track the wage information for each of your employees. All government contractors will eventually be required to submit this compensation data to the OFCCP on an annual basis. Importantly, you should develop a tracking program that accurately captures both the W-2 earnings and total hours worked by each employee in a calendar year. This information could be maintained in your existing HRIS system, which may help streamline the process of consolidating the wage, hours, race, gender and job category information into your annual "Equal Pay Report." You should be cautious, however, to ensure that W-2 wage and hours worked data is collected for **all** individuals who are employed at any point during a calendar year, including employees who are terminated prior to December 31st.

If 2014 serves as any sort of indicator, it is safe to assume that the executive branch will have further changes in store for government contractors through the end of the Obama presidency. By taking active steps now to overhaul existing affirmative action and equal employment opportunity programs, government contractors can ensure that they are in tune with their current obligations and are well-prepared should the OFCCP arrive at the doorstep.

For more information about a government contractor's obligations regarding affirmative action and equal employment opportunity, please contact Matthew Kissling, Staci Jenkins or any member of our Labor & Employment group.

Retirement Plans

Pension Derisking – What Is It and What Are the Secrets to Success?

By Karen D. Youngstrom

Some Background

For more than a decade the world of retirement plan design has seen an accelerating trend away from traditional defined benefit pension plans to defined contribution arrangements with all the bells and whistles. On the one hand, defined benefit pension plans designed to provide lifetime income are subject to largely unpredictable funding volatility and ever tightening regulatory controls. At the same time, such programs may not be perceived as valuable by younger, mobile members of the workforce. On the other hand, defined contribution plans are always fully funded, provide each participant with a very tangible individual account, and are "portable" as individuals move from one position to another. These considerations have led to pension plan freezes or closures, often coupled with defined contribution enhancements. Although this trend represents a major transfer in retirement plan financial risk from the defined benefit plan sponsor to the individual savings plan participant, untenable levels of risk still remain for sponsors of defined benefit plans.

Many factors have accelerated sponsors' desire to reduce defined benefit plan exposure, including the steep market declines of 2008 that impacted defined benefit plan assets; declining interest rates that escalate pension liabilities; ever more stringent funding requirements; and changes in accounting rules and other legislative tinkering. Because plan termination generally requires full funding of all liabilities, employers seeking to "get out of the pension business" through plan termination have found themselves further than ever from the desired goal. As a result, techniques to reduce pension risk have grown in importance and are being widely implemented. These techniques are generally referred to as "pension derisking."

Derisking Strategies

Pension derisking involves reducing the level of risk associated with pension plans arising primarily from volatility, whether due to underfunding or changes in the underlying assumptions used to determine liability. Where full plan termination is not possible, other strategies are available to reduce this risk. The ones that have gained some

traction, particularly following the publicity surrounding their recent use by Verizon and General Motors, include:

- Offering lump sum settlements to former employees who have not yet started receiving their pension payments.
- Annuitizing payments currently being made to retirees through purchase of an annuity contract from an insurance company.
- Using liability-driven investment strategies (LDI) which match up plan assets with pension liabilities.

Popular Now – Lump Sum Windows

Perhaps the most popular of these alternatives in recent months are lump sum window offers. Typically these are structured to provide the participant with a onetime opportunity to elect immediate payment of the present value of his or her entire pension benefit in a single lump sum. For those who elect the lump sum, the plan is relieved of any ongoing funding or administrative risk, as well as ongoing Pension Benefit Guaranty Corporationpremium obligations. This appears to be a relatively simple concept and has great potential to benefit both the participant and the plan.

However, thoughtfully structuring and implementing such a program requires considerable attention to design and administrative detail. In terms of structure, the scope of the

offer must first be determined. Typically such a program includes only deferred vested participants – those not yet in pay status. The group may be further narrowed to those having a present value under a specified dollar amount, those not affected by a complicating domestic relations order (QDRO), those for whom the employer has "good data" on file, and so forth. These details may be driven by the maximum amount the plan could pay out without triggering adverse settlement accounting, for example, or a decision to exclude groups who joined the plan through acquisitions for which complete data are not readily available.

To meet regulatory requirements it is not sufficient to simply offer a lump sum payment opportunity; the offer must also be accompanied by the opportunity to elect an "immediate" annuity. In the case of a participant who is not married, for example, a reduced (actuarially equivalent) life annuity beginning at the same time the lump sum could otherwise be paid must be presented as an alternative, even if it's many years prior to the participant's normal time for starting benefit payments.

All of this detail must be communicated to each participant eligible for the lump sum window, together with a series of other required disclosures. These include an explanation of how the benefit amount is determined, the other payment forms available to the participant, spousal consent rights and requirements, the "relative value" of each alternative and the consequences of not deferring receipt of benefits until a later date. An example of important information to include is whether the value of any early retirement subsidy available under the plan would be reflected in the lump sum value. In addition, explanation of rollover opportunities and other tax implications must be provided. Needless to say, the net result can be a somewhat complex set of materials which must be read, understood, and acted upon within a limited period of time.

Clear Communication is Key

It is in the employer's interest that these materials are as user friendly and as clear as possible for a number of reasons.

- The employer will want to guard against any claim that it provided materials that were misleading or which omitted important information that a participant would want to consider, which could be the basis for setting aside an election or other potential claims.
- The employer's objective will be that participants find the opportunity attractive and, therefore, decide to accept the lump sum offer. Examples and clear instructions as to completion of election forms are critical in this regard.
- The employer will want assurance that it is operating the program in a manner consistent with all applicable IRS and DOL guidance to protect itself in the event of any audit or investigation by regulators.

Clarity in presentation, of course, serves all of these goals. Legal review, beyond issues of technical compliance, is essential to assure that the materials present clear and accurate information designed to provide the participant with the opportunity to make an informed choice. Communications are the key to a successful lump sum settlement program, with results satisfactory to both the affected participants and plan sponsor alike.

For more information, please contact Karen Youngstrom or any member of our Employee Benefits & Executive Compensation group.

Foreign Employees

Quick Access Guides for Foreign National Employees

By Sarah C. Flannery & Staci M. Jenkins

Companies want to ensure their foreign national employees remain informed about immigration compliance. However, repeated questions from foreign nationals can take away from the many demands and responsibilities of HR professionals. To balance the need for information and efficiency, we recommend employers create intranet sites dedicated to foreign national employees. A sample of topics to be included are:

Understanding My Documentation

Foreign nationals have several documents governing their status – passports, visas, I-94 records and approval notices. Each one controls a different aspect of the employee's immigration status, work authorization and travel authorization, and there is often confusion about the interplay between these documents. The visa is the document issued in the passport by a U.S. Consulate outside the U.S., and it controls only the ability of an individual to enter the United States. A visa does not control an individual's status or duration of legal stay in the United States. Instead, status and duration is controlled by the individual's I-94 record. Thus, it is essential that employees carefully monitor their I-94 record at each entry to make certain that the correct expiration date is listed. To add to the confusion, the government recently stopped providing physical I-94 cards when individuals enter the United States. Now, individuals must go online to www.cbp.gov/I94 to retrieve the I-94 card. Even though the I-94 card isn't provided upon entry, the date on the electronic card still controls so individuals must check this card to ensure the officer did not make a mistake. Employees should also be advised that it is their responsibility to renew their passports well in advance of expiration as an expiring passport can impact the duration of status approved in the United States.

What to Do Before Traveling Abroad

Foreign national employees often make trips to their home country in addition to international business travel that may be required. They need to know how to plan ahead for those trips to make sure neither their visa nor their passport will be expired, or if they will, how to renew. Visas can be renewed only at a U.S. consulate or embassy outside of the United States. The process to schedule a visa appointment, the wait to obtain a visa appointment, and the processing time for the visa to be issued after the appointment will vary from consulate to consulate and can also vary significantly based on the time of year. For example, appointments can be more difficult to obtain during summer months or over holidays due to increased demand. Even if a new visa is not needed, foreign nationals need to know what documents to carry with them when traveling so that they can reenter the United States with ease. Individuals should always carry: evidence of status (I-797 approval notice or I-129S), valid visa (unless they are Canadian citizens who do not need visas), valid passport, and evidence of maintaining current status (e.g., pay stub or letter confirming continued employment).

What to Do When Moving

When foreign nationals move within the United States, they are required to update U.S. Citizenship and Immigration Services with the new address within 10 days. This can be done by filing the AR-11 form online at https://egov.uscis.gov/coa/displayCOAForm.do. This obligation applies to both nonimmigrants (e.g., H-1B, L, TN, etc.) and permanent residents.

What to Do When Considering an Internal Job Change

Immigration sponsorship can limit the job mobility of a foreign national, including their ability to make internal moves within the company. Both foreign nationals and their supervisors should be aware that a job change could result in consequences to their work authorization or permanent residency options. The employer's intranet site can provide information about whom to consult within the company

before seeking another role. The internal team can then work with outside immigration counsel to analyze the impact that the proposed move would have on the immigration sponsorship.

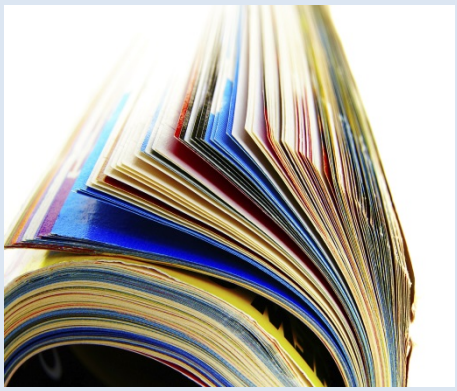
The Green Card Wait

There are not enough green cards for the demand. Thus, a priority system has been established. Foreign national employees will often ask when their priority date will become current and allow them to complete the green card process. A link to the monthly government report about priority dates can be provided through an intranet page and the employees can then access that information directly.

What to Do After Becoming a Permanent Resident

Foreign nationals should be reminded that they are responsible for renewing their permanent resident cards before expiration. Furthermore, even though a child's card does not expire, the card must be renewed in advance of the child's 14th birthday. A permanent resident continues to be responsible for filing the AR-11 to report a change of address. Permanent residents also need to know the impact that long stays outside of the United States can have on their immigration status – both with regard to maintaining permanent resident status and accruing eligibility for naturalization.

Providing the information that affects all foreign national employees in one directly accessible spot – a company intranet site – allows for efficiency as well as consistency in the delivery of the information. If you are interested in setting up an intranet page for your foreign national employees, we would be happy to assist. Please contact Sarah Flannery, Staci Jenkins or any member of our Labor & Employment group.



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