



HR CORNER

FEES & BURGESS, P.C.



Volume 8, Issue 4

April 2012

NLRB Poster Deadline – April 30, 2012

Pursuant to a regulation issued last year by the National Labor Relations Board, as of April 30, 2012, private sector employers must post a notice that describes an employee's rights under the National Labor Relations Act (Act). This required poster describes employees' rights to join a union and explains various employer actions that may be illegal under the Act. Many industry groups have complained about the poster, noting that it does not describe an employee's rights to avoid joining a union and/or paying union fees.

The posting must be located in a conspicuous place where other labor posters are currently placed, and it must be printed on paper at least 11" X 17". If twenty percent or more of an employer's workforce is not proficient in English but instead speaks another language, the employer must post a notice in the language that such employees speak. Translated posters are available on the NLRB website. If the failure to post the posting was a knowing or willful failure, a court may consider this as evidence of an employer's unlawful motives relative to an employee's unfair labor claim, making it easier for an employee to prove that an employer committed unfair labor practices or otherwise violated the Act.

The posting requirement has been, and continues to be, subject to litigation. Originally, the NLRB stated that employers who did not post the notice would be subject to various penalties for failure to post. Among these was a provision that if an employer did not post the posting, an employee's claims regarding unfair labor practices under the Act may be tolled, providing employees an unlimited statute of limitations in which to file unfair labor claims against the employer. However, several lawsuits were filed against the NLRB, claiming that the NLRB did not have the proper authority to issue such a penalty (and challenging the posting requirement). A district court upheld the validity of the posting requirement, but it struck various penalty provisions, including the statute of limitations extension. Opponents of the regulations appealed the ruling, arguing that the entire posting requirement should be struck-down. Pending appeal, the NLRB is continuing to require the posting, and the district court denied requests for an injunction on the posting requirement while the appeal continues.

Pending appeal, employers should heed the deadline and prepare to post the notice in their workplace. While federal contractors are also covered by this requirements, those contractors who are already subject to similar federal posting requirements through the department of labor are not required to post two notices.

EEOC Issues Final ADEA Regulations

On March 29, 2012, the Equal Employment Opportunity Commission (EEOC) issued its final regulations regarding the primary employer defense to violations of the Age Discrimination in Employment Act (ADEA). Where a plaintiff alleges that he or she was a victim of unintentional discrimination, an employer can defend against these claims on the basis that it made the applicable employment decision based on a “reasonable factor other than age.” However, the scope of the defense and the requirement for proof of this defense have been unclear, and through the new regulations, the EEOC attempts to clarify this employer defense. The regulations list specific factors to consider in determining whether an employer relied on reasonable factors other than age. Many opponents of the new regulation argue that the factors go beyond analyzing whether nonage factors motivated the decision, but look instead to whether the company took actions to lessen any adverse impact in the workplace that may result from its policies or practices.

The EEOC’s listed factors to determine whether an employer properly relied on a reasonable factor other than age in making an employment policy include, among others: “(ii) The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, *including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination*; (iii) The extent to which the employer limited supervisors' discretion to assess employees subjectively, *particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes*; (iv) *The extent to which the employer assessed the adverse impact of its employment practice on older workers*; and (v) The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, *and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.*” These regulations seem to contradict Supreme Court precedent. Previous Supreme Court opinions have held that facially neutral policies, even if they have an adverse impact on protected workers, do not violate the law if they were based on a reasonable, non-age factor. However, the EEOC’s listed guidelines seem to require that an employer take steps to eliminate any adverse impact, even if the decision was based on reasonable factors other than age.

This may create difficulties for employers when implementing various workplace policies. Documentation regarding the reasonable business factors used to implement policies remains critical. In addition, best practices may include performing analyses to determine whether policies adversely affect protected workers. While these regulations are likely to be litigated and further subject to judicial scrutiny, employers may be required, in the meantime, to take extra efforts when analyzing potential policies so that they can avoid potential liability under the ADEA.

Seminars

During these rough economic times, it is important to get the most for your money. The lawyers of Fees & Burgess, P.C., combined, have many years experience working in various fields, as both in-house and private counsel, representing a diverse clientele. Our attorneys have extensive experience in many areas of law, including employment law; intellectual property; supply chain management; mergers and acquisitions; contract negotiation; dispute resolution; and various other fields.

This wide field of knowledge provides our attorneys with the insight and know-how to be able to provide quality training on various topics. Our programs can be customized to fit any business need while keeping the costs of our training competitive, without sacrificing quality.

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Contingent Employees and Labor Outsourcing	Reducing Employee Benefits Costs for Alabama Businesses
Diversity Training	Reducing Risk in Purchasing Terms and Conditions
Elements of an Electrical Manufacturing Services Contract	Reduction in Workforce Strategies
Employment Law Survival Training for Managers	Retaliation and Whistleblowers
Family Medical Leave Act	Uniform Commercial Code: Primer to Articles 1, 2, and 2A
Hiring and Firing	Violence in the Workplace
Immigration Compliance	Wage and Hour Issues/Fair Labor Standards Act
Incoterms® 2010	Americans with Disabilities Act
Indemnity and Limitation of Liability Contract Clauses	Managing Employee Use of Internet and E-mail in the Workplace
International Contracting	Ethics, Business Conduct and Compliance in Government Contracting
Limiting Liability for Sexual Harassment	

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Michael L. Fees

mfees@feesburgess.com

C. Gregory Burgess

gburgess@feesburgess.com

Allen L. Anderson

anderson@feesburgess.com

Jeffrey L. Roth

jroth@feesburgess.com

Stacy L. Moon

smoon@feesburgess.com

FEES & BURGESS, P.C.

213 Green Street

Huntsville, Alabama 35801

Telephone (256) 536-0095

Facsimile (256) 536-4440

www.feesburgess.com

Leah M. Green

lgreen@feesburgess.com

Ryan G. Blount

rblount@feesburgess.com

Lauren A. Smith

lsmith@feesburgess.com

Allison B. Chandler

achandler@feesburgess.com

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