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The "Total" Advisor

May 2012

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Requirement to Post New Employee Rights Notice Put on Hold


Employee Rights
Under the National Labor Relations Act

Employers can hold off on making room for a new poster informing employees of their rights under the National Labor Relations Act (NLRA).

A federal appeals court in Washington, D.C. **temporarily blocked** the National Labor Relations Board (NLRB) rule requiring most private employers to post the new 11-by-17 inch notice, which had been scheduled to take effect on April 30, 2012. The court's decision to block the rule was prompted by two recent lower court decisions that reached conflicting conclusions about whether the NLRB had the authority to issue the notice-posting rule.

According to the NLRB, in view of the court's order, and in light of the strong interest in the uniform implementation and administration of agency rules, its regional offices will **not implement the NLRA poster rule pending the resolution of the issues before the court**.

For further information about the new poster requirement, including a detailed discussion of which employers are covered, please see the NLRB's Frequently Asked Questions. To learn about other federal notices required to be displayed in the workplace, please visit our section on Federal Poster Requirements.

Are You Prepared for a COBRA Audit?

Changes Proposed to Form I-9

U.S. Citizenship and Immigration Services (USCIS) has proposed several revisions to Form I-9, *Employment Eligibility Verification*. Federal law requires every employer hiring an individual for employment in the United States to verify his or her identity and employment authorization through completion of Form I-9.

Proposed Revisions
Key revisions proposed

to the form include:

- Expanded Form I-9 instructions and a revised layout;

- New, optional data fields to collect the employee's email address and telephone number; and

- New data fields to collect a foreign passport number and country of issuance (for aliens authorized to work in the U.S. who have also recorded their I-94 admission number on Form I-9).

Employers Should Use Current Version of Form I-9 Until Final Changes Approved
USCIS will post information regarding a new Form I-9 on I-9 Central once the form has been finalized. Until a new version is approved and posted, employers must continue to use the current version of the form.

I-9 Central includes information about employer and employee rights and responsibilities, step-by-step instructions for completing the form, and information on acceptable documents for establishing identity and employment authorization.

For More Information
You can visit www.regulations.gov to learn more about the

If you sponsor a group health plan subject to the federal Consolidated Omnibus Budget Reconciliation Act (COBRA), now may be a good time to review your compliance. The Internal Revenue Service (IRS) recently issued updated COBRA Audit Guidelines intended to provide IRS examiners with a procedural guide to conduct COBRA compliance checks.

The Internal Revenue Code imposes a tax penalty for failure to comply with COBRA requirements. The tax amount is $100 per day, per qualified beneficiary (those individuals entitled to COBRA continuation coverage), for each day of the noncompliance period.

COBRA Continuation Coverage
COBRA generally requires that group health plans sponsored by employers with 20 or more employees on more than 50% of typical business days in the prior year offer employees and eligible spouses and dependent children the opportunity for a temporary extension of health insurance where coverage under the group plan would otherwise end due to certain qualifying events. Group health plans must provide covered employees and dependents with specific notices explaining their COBRA rights.

New Audit Guidelines
The updated COBRA Audit Guidelines direct IRS examiners to probe specific areas for noncompliance by asking questions regarding:

- The number of qualifying events occurring in the year under examination through the current date;
- How qualified beneficiaries are notified of their COBRA rights;
- How the plan administrator is notified when a qualifying event occurs;
- The COBRA election made by qualified beneficiaries; and
- The premium paid by qualified beneficiaries for COBRA.

Additionally, IRS examiners are instructed to determine what

proposed revisions to Form I-9. Additional information on verifying employment eligibility can be found in our section on the Immigration Reform and Control Act.

Prohibited Practices Under the Age Discrimination in Employment Act

A final rule issued by the U.S. Equal Employment Opportunity Commission addresses prohibited policies and practices relating to older workers under the Age Discrimination in Employment Act (ADEA), a federal law that applies generally to private employers with **20 or more employees**.

Purpose of the ADEA
The ADEA prohibits employment discrimination against people who are 40 years of age or older.

In addition to intentional discrimination, the ADEA prohibits practices that, although neutral on their face, have the effect of harming older workers more than younger workers, unless the employer can show that the practice is based on a reasonable factor other than age.

The final rule explains the meaning of the reasonable factor other

continuation coverage procedures are in place by obtaining certain information related to the plan, including:

- A copy of the continuation coverage procedures manual;
- Copies of standard form letters sent to qualified beneficiaries;
- A copy of internal audit procedures for continuation coverage;
- Copies of all group health care plans; and
- Details pertaining to any past or pending lawsuits for failing to provide appropriate continuation coverage.

Additional Information
Employers required to comply with COBRA should review the Audit Guidelines in detail. If you have any questions regarding your responsibilities or the type of documentation you should maintain, please consult with your plan administrator or a knowledgeable employment law attorney. For step-by-step guidance on compliance, check out our COBRA Steps to Success.

EEOC Updates Guidance on Employer Use of Arrest and Conviction Records

The U.S. Equal Employment Opportunity Commission (EEOC) has released updated Enforcement Guidance on employer use of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964 (Title VII).

Title VII and Criminal History Information
While Title VII does not prohibit an employer from requiring applicants or employees to provide criminal history information, there are two ways in which an employer's use of such information may violate the law.

- First, employers may not treat job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin.
- Second, employers may not use neutral employment practices to exclude individuals on the basis of criminal history if those practices disproportionately exclude people of a particular race or national origin, unless the employer can show that such exclusion is 'job related and consistent with business necessity' for the position in question.

Updated Enforcement Guidance Explains Key Issues
The Enforcement Guidance consolidates previous EEOC policy statements on this issue, and illustrates how Title VII applies to various scenarios that an employer might encounter when considering the arrest or conviction history

than age defense.

Final Rule Emphasizes Need for Individual Review
According to the final rule, an employment practice is based on a reasonable factor other than age when it was reasonably designed and administered to achieve a legitimate business purpose in light of the circumstances, including its potential harm to older workers.

The rule emphasizes the need for an individualized review of the facts and circumstances of a particular situation, and includes a list of considerations for assessing reasonableness.

Generally, an employer would be required to prove that an employment practice is based on a reasonable factor other than age only after an employee has identified a specific policy or practice, and established that the practice harmed older workers substantially more than younger workers.

The final rule is effective as of April 30, 2012. For more information, you can read the final rule in its entirety. Questions and Answers regarding the new rule are also available. Our section on the ADEA provides more information relating to age discrimination.

of a current or prospective employee. Key topics addressed include:

- How an employer's use of criminal history in making employment decisions might violate the prohibition against employment discrimination under the law;
- The differences between the treatment of arrest records and conviction records;
- Compliance with other federal laws and regulations that restrict and/or prohibit the employment of individuals with certain criminal records; and
- Best practices for employers.

For More Information
To learn more about Title VII and the use of criminal history records in employment decisions, you may review the EEOC's Questions and Answers about the Enforcement Guidance. For more information about the laws enforced by the EEOC, please visit our section on Discrimination.

Hiring Interns: To Pay or Not to Pay?

Summer internship season is fast approaching and with so many interns eager for work, it can be tempting to allow such individuals to 'volunteer' at your place of business or to pay less than the minimum wage. In fact, you may be surprised to learn that internships in the for-profit private sector are most often considered 'employment' subject to the federal minimum wage and overtime rules.

The Fair Labor Standards Act
Under the federal Fair Labor Standards Act (FLSA), non-exempt individuals who are 'suffered or permitted' to work must be compensated for the services they perform for an employer. Interns who qualify as employees typically must be paid at least the federal minimum wage of $7.25 per hour, as well as overtime compensation at a rate of not less than one and one-half times the regular rate of pay after 40 hours of work in a workweek.

The Test for Unpaid Interns
There are some circumstances under which individuals who participate in for-profit private sector internships or training programs may do so without compensation. This may apply to interns who receive training for their own educational benefit if the training meets certain criteria.

The determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program. The U.S. Department of Labor (DOL) uses the following six criteria which must be applied when making this determination:

1. The internship, even though it includes actual

operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If **all** of the factors listed above are met, an employment relationship likely does not exist under federal law, and the FLSA's minimum wage and overtime provisions do not apply to the intern. This exclusion from the definition of employment is necessarily quite narrow because the FLSA's definition of 'employ' is very broad.

For a more detailed explanation of the factors used in the test for unpaid interns, please review the DOL Internship Programs Fact Sheet. You may also contact the DOL's Wage and Hour Division, at 1-866-487-9243, for help in determining the employment status of your workers. Our section on Employee Pay provides information on other common federal wage issues.

Newsletter provided by:

Total Insurance Services, Inc.

3175 Commercial Avenue, Suite 200, Northbrook, IL 60062
Phone: 847-205-1777