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This issue contains articles addressing timely employment topics including: social media policies; FMLA forms; age discrimination claims; and 2012 Oregon legislative updates. Employers with questions about these articles and case summaries are encouraged to contact Mark Amberg, Sharon Rudnick, or Andrea Nagles.

NLRB General Counsel Publishes New Report on Social Media Policies

The Acting General Counsel of the National Labor Relations Board (NLRB) recently published its second of two reports outlining developments in the NLRB's position on employer social media policies and employee Facebook activity ("Report"). The first NLRB social media report was released to the public in August 2011.

The National Labor Relations Act's (the Act) prohibition against employers interfering with employees' exercise of Section 7 "concerted activity" rights is the central focus of the decisions examined in the Report. In a nutshell, Section 7 of the Act gives non-supervisory employees the right to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection. "Protected concerted activity" under the Act may include employees' discussions about wages and other terms and conditions of employment, as well as employees' criticisms of employer policies or workplace treatment.

Employer Social Media Policies – Brief Isn't Necessarily Better.

The NLRB looks at a social media policy and asks: "Would an employee reasonably construe the policy to prohibit concerted

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activity?" With this guiding question in mind, the NLRB has struck down many employer policies as unlawful because the policies included "overbroad" or "vague" terms that an employee could have interpreted as prohibiting protected concerted activity.

For example, the NLRB found prohibitions against "inappropriate" or "disparaging" social media activity unlawful because an employee could reasonably read the terms to prohibit complaints about wages, working conditions, and supervisors. Notably, the NLRB held that a "savings clause" provision, such as, "nothing in this policy shall be construed to prohibit protected concerted activity under the NLRA," no longer creates a definitive safe-harbor for employers.

The unlawful policies examined in the NLRB's report shared at least one fundamental problem: they were vague and overly broad. To help address this problem, social media policies should provide definitions or examples of the prohibited activity. For example, the Report examined a portion of an employer's policy that prohibited employees from disclosing or communicating company information of a "confidential, sensitive, or non-public" nature without obtaining prior employer approval. The NLRB found this provision to be overly broad because the policy did not provide any context or examples of the types of information the employer deemed to be "confidential, sensitive, or non-public" – e.g., a highly confidential company trade secret.

Thus, including concise, specific examples of the conduct prohibited by the policy can help avoid problems of vagueness and over breadth while still clarifying that the policy does not restrict "protected concerted activity" under Section 7 of the Act.

Venting or Protected Concerted Activity? The Fine Line Narrows Further.

Once armed with a carefully-crafted social media policy, employers face the challenge of deciding when they are permitted under the Act to take action with respect to an employee's social media conduct. Unfortunately, the Report suggests that the line between what we traditionally view as an employee "venting" about work problems and what constitutes "protected concerted activity" is thinning. With no bright-line rules, an employer should tread carefully in enforcing its social media policy. Employers should consider the facts and circumstances surrounding the employee's conduct and examine each situation on a case-by-case basis.

The task of determining when inappropriate social media activity is actionable under an employer's policy can be difficult. When an employee posts a Facebook comment that damages an employer's reputation, or disparages a co-worker, can you discipline the employee? The answer is – it depends. Employers can best protect their interests by being prepared for these situations. Employers should have a solid, carefully crafted policy and communicate it effectively to all employees.

Employers who would like assistance with drafting or interpreting social media policies, or who have questions about how the Act and other laws may impact the ability to take action against an employee for inappropriate social media posts, are encouraged to contact a member of our labor and employment team.

Update: NLRB Notice Posting Rule

The U.S. District Court for the District of Columbia recently upheld the National Labor Relations Board's (NLRB) authority to promulgate its notice-posting rule, which requires all private sector employers subject to the National Labor Relations Act (NLRA) to post a notice informing employees of their rights under the NLRA. Nevertheless, the court questioned the validity of the severe penalties imposed by the rule for an employer's non-compliance. Despite the ongoing litigation regarding the required posting, the effective date for the NLRB's notice posting rule remains April 30, 2012.

DOL Releases Updated Model FMLA Forms

The U.S. Department of Labor's (DOL) Family Medical Leave Act (FMLA) model forms expired at the end of 2011. The DOL recently posted updated model forms on its website, which have an expiration date of February 28, 2015.

Employers should note that the updated FMLA forms do not address an employer's obligations under the federal Genetic Information Nondiscrimination Act (GINA). GINA generally prohibits employers from requesting or using the genetic information of an employee or an employee's family member. In certain circumstances, employers may comply with GINA by using a "safe harbor" provision that expressly instructs medical providers to refrain from providing genetic information and explaining what types of information can qualify as "genetic information." In addition, employers should be aware that the updated FMLA forms do not address the 2010 amendments to military family leave law, such as employee rights related to "exigency leave."

If you have any questions about your FMLA forms or the mandates of GINA or the FMLA, please contact a member of our labor and employment team.

Defending Against Age Discrimination Claims: Ninth Circuit Clarifies Summary Judgment Standard

On January 12, the federal Ninth Circuit Court of Appeals issued a decision in the age discrimination case of *Shelley v. Geren*, 666 F.3d 599 (9th Cir. 2012). Shelley sued his employer, the Army Corps of Engineers (Corps), alleging age discrimination in violation of the Age Discrimination in Employment Act (ADEA). Shelley alleged the Corps unlawfully failed to grant him an interview and rejected his applications for two promotions due to his age.

The district court granted the Corps' motion for summary judgment, ruling that Shelley failed to present sufficient facts to show his age was the "but-for" cause of his non-promotion. The Ninth Circuit reversed, holding the evidentiary framework outlined in the U.S. Supreme Court decision of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) applies to motions for summary judgment in ADEA cases. The *McDonnell Douglas* framework places a burden on the employer to articulate a legitimate, non-discriminatory reason for a challenged employment action once the plaintiff-employee establishes a prima facie case of age discrimination (applying the *McDonnell Douglas* framework to the Corps' summary judgment motion, the court concluded Shelley established a prima facie case of age discrimination because he was 54 and qualified for the positions he sought, which were awarded to substantially younger candidates).

Employers should remember to exercise caution when interviewing job candidates to avoid questions that could be construed as seeking information about the candidate's protected classifications, such as age. *Shelley* also reinforces the need for good documentation of employer hiring and other employment decisions. Employers are in a better position to defend ADEA claims (and other types of discrimination claims) if they have documented the legitimate, business-related reasons for their decisions. Employers with questions about the *Shelley* decision or its impact should contact one of our labor and employment attorneys.

2012 Oregon Employment Legislation Update

The 2012 Oregon legislative session ended on March 5. The entire session was short (lasting only approximately one month), with relatively few bills considered. Of the bills considered, labor and employment bills took a back seat as the legislature focused on budget, education and health care issues. The following summarizes the labor and employment bills considered during

the 2012 Oregon legislative session and their ending status. Although the majority of the bills considered did not pass, it is possible that the bills could reappear in future legislative sessions in the same or similar format.

If you have questions about any of the bills, please contact a member of our labor and employment team.

Bill That Passed

Senate Bill 1548 – Job Advertisements and the Unemployed

This bill prohibits employers from making job postings or advertisements (both print and web-based) that limit the applicants to be considered for a position to only those who are currently employed. The legislation allows the Bureau of Labor and Industries (BOLI) to impose a civil penalty against employers not exceeding $1,000 per violation. The bill does not prevent an employer from making job postings containing minimum education or training qualifications or stating only applicants who are current employees will be considered. The bill also does not preclude employers from not considering unemployment applicants for the position, and contains language clarifying it does not create a private cause of action for individuals to sue a prospective employer for violations.

This bill was signed by the Governor on March 27, 2012, with an immediate effective date.

Bills That Did Not Pass

Senate Bill 1569 – Unemployment Benefits for the Employed

This bill would have allowed employed workers to earn approximately $280 per week (i.e., minimum wage up to 32 hours per week) without losing or being denied unemployment benefits during the first 18 weeks of the worker's benefit period. During this time, the worker would receive unemployment benefits equal to the difference between the wages and his or her unemployment benefit amount. The bill would have authorized disqualification of claimants who refused an offer of work paying at least $280 per week during the final 8 weeks of the worker's benefit period.

House Bill 4052 – E-Verify Requirement for State Agencies

This bill would have required all Oregon state agencies to use the federal E-Verify employment verification system to verify eligibility for employment in the United States for all employees hired on or after January 1, 2013. The bill defined state agencies to include any state officer, board, commission, department, or agency of the executive, judicial or legislative branches of state government, including the Oregon University System. This bill would not have applied to private-sector or non-state agency employers, although such employers may elect to use the federal E-Verify system for employment eligibility verification purposes.

House Bill 4124 – Bereavement OFLA Leave

This bill would have expanded the Oregon Family Leave Act (OFLA) to allow eligible employees to take unpaid, job-protected family leave for bereavement purposes. If passed, the bill would have required covered employers (i.e., employers with 25 or more employees in Oregon) to permit OFLA eligible employees to take up to 2 weeks of leave per leave year for the purposes of "dealing with" a family member's death by attending the funeral of the family member, making necessary arrangements related to the family member's death, and/or grieving the loss of the family member. The bill also would have allowed eligible employees to take up to 6 weeks of leave per leave year to receive counseling or other medical treatment to cope with the death, upon receipt of a health care provider's medical verification of the need for treatment. The bill would have allowed an employee to take bereavement OFLA leave intermittently. Any OFLA bereavement leave taken would be counted toward the employee's total entitlement of OFLA leave per leave year.

House Bill 4162 – Discrimination Protection for Interns

This bill would have extended certain employee protections to both paid and unpaid interns, including the employment discrimination protections provided to employees under Oregon's unlawful discrimination in employment laws. The bill would have essentially created an employer relationship between an employer and an intern if the individual was performing work for the employer for "educational purposes," whether or not the individual was being paid for the work. For example, this bill would have permitted interns to pursue an unlawful employment discrimination claim against an employer based on a protected classification (e.g., race, religion, color, sex, national origin, marital status).

House Bill 4096 and House Bill 4120 – Tax Credit for Hiring the Unemployed

House Bill 4096 was proposed as the "Rehire Oregon Act of 2012." If passed, this bill would have created a tax credit for employers who hired employees who had been unemployed for a period of at least 4 weeks immediately prior to the offer of employment and remained employed with the employer for 12 consecutive months.

House Bill 4120 was proposed as the "Jobs, Opportunity and Business Success Act of 2012." If passed, this bill would have created a tax credit for employers who hired employees who had exhausted all unemployment compensation benefits available under either state or federal law and remained employed with the employer for at least 6 consecutive months.

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