GARDNER SKELTON
ATTORNEYS AT LAW

LEGAL NEWS FOR YOUR BUSINESS

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General Business Alert

DOL WORKPLACE POSTERS ARE STILL IMPORTANT (AND REQUIRED)!

While the Department of Labor Workplace Posters appear to be an outdated means to communicate employee rights, these posters are still very much a part of the DOL's arsenal to ensure that employees are aware of their rights. In most cases, the posters are still required to be on display in the workplace, and the DOL is even increasing the fines for violations.

Despite the increasing popularity of working from home, the DOL has stated that the posters must continue to be displayed on the premises in a conspicuous area or where they can be "clearly seen." If an employer has a combination of on-site and telework employees, then the DOL encourages both hard-copy and electronic postings. Placing posters on a website is a supplement to, not a substitute for, the physical posting of the notices on the premises. There are a few narrow situations where an electronic posting satisfies the regulatory requirements. For example, an electronic posting is an acceptable substitute for the continuous posting requirement where (1) all the employees exclusively work remotely, (2) all of the employees customarily receive information via electronic means, and (3) all of the employees have readily available access to the electronic posting at all times. Individual notices, either hard copy or electronic, may be permissible under certain statutes and regulations. Additionally, different statutes have their own size and location requirements. Therefore, it is important to review these requirements to determine which posters pertain to the employer's business and how to properly post the requisite notices.

Otherwise, employers who violate these regulations face penalties, which includes recently increased fines:

- "Job Safety and Health: It's the Law" (OSHA): $14,502 (from $13,653)
- Employee Polygraph Protection Act (EPPA): $23,011 (from $21,663)
- Family and Medical Leave Act (FMLA): $189 (from $178)

Employers should review their current practice to ensure compliance with these regulations. State and local governments may also have their own poster rules that need to be considered, as well. For example, the North Carolina Department of Labor has updated its labor law posters based on recent legislative changes. These changes affect North Carolina's Wage and Hour Act. New posters may be necessary to comply with these changes.

Finally – you don't need to subscribe to a poster service to be in compliance. Poster services can be handy since they provide a neat, laminated all-in-one product. However, all the posters needed by employers can actually be downloaded for free, printed and posted from the DOL website – click ***here*** to access the posters. Contact Gardner Skelton for assistance regarding Labor Law postings.

General Business Alert

COVID-19 AND RETALIATION IN THE WORKPLACE

Covid-19 has certainly presented all employers with new challenges, including learning to interpret laws through the new lens of COVID-19 safety compliance. Most employers know that they cannot retaliate against employees and/or applicants for participating in protected activity. Employers should be alert to what the EEOC (the Equal Employment Opportunity Commission) views as "protected activity" related to Covid-19, including these examples recently cited in EEOC guidance:

- A complaint that a supervisor unlawfully disclosed a Covid-19 diagnosis (confidential medical information).
- A complaint by an Asian-American employee of harassment in the form of abusive comments accusing the employee of starting or spreading Covid-19.
- A request by an employee for continued telework after the office has reopened.
- A request by an employee for modified protective gear that can be worn with religious attire.
- A complaint regarding harassment about an employee's religious views against vaccination.

It is important to note that such requests or complaints themselves are protected activity even if the request is denied or the complaint is unsubstantiated. In other words, if an employee reasonably and in good faith complains of harassment based on being Asian-American, the act of complaining itself is protected. An Employer may determine that no unlawful harassment occurred, but even so, the employer may not retaliate against the employee for making the complaint. Retaliation is any action that would deter an

employee from engaging in protected activity, including but not limited to, denial of a job or benefits, disciplinary actions, a negative change in hours or location, and/or work-related threats and warnings.

Employers remain entitled to take legitimate, non-retaliatory action against employees. If an employer would have taken such an action regardless of the employee's participation in protected activity, then that action is not retaliatory. Of course, sometimes the Employer's intent in taking certain actions can be open to question. For example, assume that on Monday of this week, Employer AcmeCo decided to change Employee Jane's schedule from first shift to third shift, but didn't communicate that decision to Jane. On Tuesday, Employee Jane complains that she has been subjected to unwelcome comments about her Asian-American heritage. On Wednesday, AcmeCo tells Jane that her schedule is being changed. While Jane may view the change as retaliatory – the employer knows it was not. The real question may be whether AcmeCo can definitively show the EEOC, or a judge or jury that the decision to change Jane's schedule was in fact made prior to her complaint. We always recommend that Employers contemporaneously document their decisions in writing for just this reason.

*Covid-19 has definitely created a new spin on some old issues, so if you need guidance, don't hesitate to reach out to a member of Gardner Skelton's **employment team**.*

NICOLE GARDNER
(704) 335-0350 phone
(704) 390-7007 direct

JOCELYN HOEFLING
(704) 335-0350 phone
(704) 390-7024 direct

nicole@gardnerskelton.com *jocelyn@gardnerskelton.com*