2014
Employment Law Update

David J. Canupp
Attorney at Law
Lanier Ford Shaver & Payne, P.C.
2101 West Clinton Ave., Suite 102
Huntsville, Alabama 35805
256-535-1100
djc@LanierFord.com

www.LanierFord.com

LANIER FORD

Agenda

- Immigration Compliance: A (Much Needed) Refresher.
- FMLA Update: How to Handle Certification & Recertification, and What in the World is *In Loco Parentis?*
- "Bring Your Own Device" Policies: How to Allow More Flexibility While Protecting Yourself.
- Social Media and the National Labor Relations Act: The Risks of "Facebook Firings."

LANIER FORD

Immigration Law Basics for Employers

Statutes Proscribing Discrimination Against Aliens:

- Title VII of the Civil Rights Act of 1964.
  - Applies to employers with 15 or more employees.
- Immigration and Nationality Act.
  - National origin provision applies to employers with between 4 and 14 employees.

Laws Regulating Employment of Aliens:

- Immigration and Nationality Act, as amended by Immigration Reform & Control Act.
- Beason-Hamilton Taxpayer Protection Act (Ala. HB-56).

LANIER FORD

Immigration and Nationality Act 8 U.S.C. § 1324b

Relevant Types of Discrimination Prohibited:

- Citizenship or immigration status discrimination (protects U.S. citizens, U.S. nationals, refugees, asylees, temporary residents, and recent lawful permanent residents).
- National origin discrimination.
- Unfair documentary practices during Form I-9 process.
- Retaliation for engaging in protected activity.

LANIER FORD

Examples of Unfair Immigration Practices

- Employers may not refuse to hire a documented worker, citizen or noncitizen, just because such worker has an accent, was born in another country, is foreign-looking, or is of a particular race.
- Employers may not enact policies under which they only accept applications from U.S. citizens or only employ U.S. citizens.
  - *Note that* being a citizen is **NOT** a requirement to work in the United States. Having authorization to work is a requirement.
  - *Note that* an employer IS permitted to hire a citizen over a noncitizen if both are equally qualified, or if citizenship is required for a particular job under federal, state or local law, or by government contract.
- Employers must complete Section 2 of Form I-9 within 3 business days of hire or start of work. Employers may not refuse to hire non-citizens or those of a particular nationality because paperwork requirements are too onerous, and may not selectively require paperwork only from persons of particular nationalities.

LANIER FORD

Form I-9 Compliance: Getting Started

- Download the U.S. Citizenship & Immigration Service's ***Handbook for Employers: Instructions for Completing Form I-9*** at http://www.uscis.gov/files/form/m-274.pdf
- Thoroughly familiarize yourself with Form I-9, including Lists A, B, and C. Form I-9 can be downloaded at the following website: http://www.uscis.gov/files/form/i-9.pdf
- Download a thorough Audit Checklist. One good form can be obtained through SHRM: http://www.shrm.org/TemplatesTools/Samples/HRForms/Articles/Pages/I-9AuditChecklist.aspx
- **REMEMBER: THERE IS A NEW FORM!!**

LANIER FORD

Form I-9 Compliance: When to Use Form I-9

- Employers and referrers-for-a-fee must use Form I-9 each time an employee is hired to work inside the United States for remuneration in the form of wages or any other thing of value (e.g., food or housing) for all workers hired after November 6, 1986 (effective date of IRCA).
- Do not use Form I-9 for *bona fide* independent contractors.
- Do not use Form I-9 for casual domestic workers inside a home on a sporadic, irregular basis.
- Do not use Form I-9 for individuals not physically working inside the United States.
- **Note:** It does not matter that employment may be extremely temporary (e.g., 3 business days)—an I-9 still must be used.

LANIER FORD

Form I-9 Compliance: Timing of I-9 Completion

- **Section 1** must be completed **by the employee** **no earlier** than the time when the employee accepts the job offer and **no later** than the employee's **first day of work for pay.**
- **Section 2** must be completed **by the employer** and the employer must review and ensure compliance with documentation requirements **no later** than **three business days** following the employee's first day of work for pay.
- **Section 3** is only used for updates and re-verification where required. If persons are separated and **re-hired** within 3 years, no new I-9 is required; just complete section 3 and re-verify prior I-9. However, if original Form I-9 has expired, must use new I-9.
- Requiring completion of Form I-9 prior to acceptance of the offer of employment is a violation of nondiscrimination requirements of the INA.
- If a person is hired for fewer than 3 business days, entire Form I-9 must be completed by the employee's first day of work for pay.

LANIER FORD

Form I-9 Compliance: Acceptable Documentation

- Form I-9 has an attachment with three lists (List A, List B, and List C) indicating documents which may be utilized to establish work authorization and identity. The employer must obtain a document from List A **or** obtain documents from **both** Lists B **and** C.
- The **employee** chooses which documents to supply, except that employers using E-Verify may only accept those List B documents which bear a photograph. This does not mean you may prefer List A documents.
- Requiring specific types of documents is a violation of nondiscrimination requirements.
- Accepting documents which do not reasonably appear to be genuine and to reasonably relate to the person offering the documents is an unlawful practice in and of itself **and** constitutes perjury because employer must sign Form I-9 under penalty of perjury attesting to the apparent genuineness of the documents.
- DHS and USCIS **will not** assist employers in determining whether documents appear genuine, but Employer Handbook has some examples.

LANIER FORD

Form I-9 Compliance: Special Problems With Documents

- Some **documents** may have a future expiration date. It is a violation of the law to decline to accept a document merely because it has a future expiration date.
- However, employers MUST re-verify employment authorization for employees whose **authorization** expires, and must do so *no later than the expiration date.* (Note: U.S. citizens and noncitizen nationals never need reverification.)
- Special procedures must be followed for those under the age of 18 and for those with "**receipts**" from DHS rather than actual documents.

LANIER FORD

Form I-9 Compliance: Retention of Forms I-9

- Employers must retain an employee's completed Form I-9 for as long as the individual works for the employer.
- Once employee leaves employ of employer, employer must still retain Form I-9 for *the later of* (A) three years after date of hire; or (B) one year after date of separation.
- Can retain Form I-9 on paper, microfilm, or electronically.
- Electronic storage requires compliance with DHS standards (most standard storage programs suffice).
- Most practitioners recommend destruction of all Forms I-9 after retention period has expired.
- Selective destruction could suggest spoliation.

LANIER FORD

Form I-9 Compliance: Retention of Supporting Documentation

- The supporting **documentation** for Form I-9 NEED NOT BE RETAINED by employer.
- Two schools of thought on retention:
  - **Pro:** Retention does help fight discrimination lawsuits if non-hired persons were not hired for immigration compliance reasons, and does show auditors "good faith."
  - **Con:** Retention permits DHS to find small discrepancies between Form I-9 and documents.
- Majority view appears to be retain all documents for statutory period to show compliance and to aide in internal auditing.
- However, some argue documents should be retained only for rejected employees (to show reasons for rejection).
- E-Verify employers have increased document retention requirements.

LANIER FORD

Form I-9 Compliance: Audits by Governmental Agencies

- The INA permits not just DHS, but also the Department of Labor and the Office of Special Counsel to audit employers for compliance with Form I-9 requirements and retention.
- Regulations require that employers be provided with at least three days' notice; however, DHS may obtain a warrant without providing notice.
- Must produce forms at location requested.
- E-Verify employers should retain E-Verify "case summaries" and provide these as well.
- Smart employers will also keep copies of internal I-9 audits for review to establish "good faith."

LANIER FORD

Form I-9 Audits: Why?

- Critical to establishing "good faith" in DHS audit. Good faith is a consideration in the penalty amount, and also constitutes a defense to paperwork errors.
- May avoid DHS penalties **and** civil RICO actions by employees.
- Under new Alabama law, noncompliance may result in cancelation of business licenses.

LANIER FORD

Form I-9 Audits: Tips

- First step is to visually review forms for completion and signatures.
- Ensure form used was not expired at time.
- Ensure all notations and entries on form are legible, and any corrections are initialed. (Should not use White-Out.)
- If documents have been retained for all employees, review employee's documents to ensure documents appear genuine, have not expired, and appear to relate to the employee in question.
- Ensure no post office box addresses were used.

LANIER FORD

Form I-9 Audits: Tips (con't)

- Ensure employee signature or signature of parent or guardian if under 18.
- Ensure form is dated same date as signature of employee
- Ensure any document expiration dates indicate that the document was not expired when it was used (i.e., as of the date on which the document supplied to the employer).
- Ensure Section 2 has a signature of an employer representative. The law requires the person who SAW the documents be the signer and no one else. If that person is no longer available and Section 2 is unsigned, seek specific legal advice: Self-reporting to DHS may be an option.

LANIER FORD

Form I-9 Audits: Corrections

- Only an employee can correct an entry in Section 1.
- Only a company representative can correct an entry in Section 2 or 3.
- If a correction needs to be made, person making the correction should, using a different color pen, write in the correct information and cross out the incorrect information, then initial and date the correction.
- Employer should **not** throw out the old I-9 form and complete a new form with the old date.

LANIER FORD

Common Abusive Documentation Practices

- Requesting that employees produce more or different documents than are required by Form I-9 to establish identity and employment authorization.
- Requesting employees present a particular document, such as a Green Card, to establish identity and eligibility.
- Rejecting documents that reasonably appear to be genuine and that reasonably relate to the person presenting them.
- Treating groups of applicants differently when completing Form I-9, such as requiring certain groups of employees who “look foreign” to present particular documents not required of other applicants or employees.
- Retaining documentation for some employees, but not others.

LANIER FORD

E-Verify:
Differences Between I-9 and E-Verify

Form I-9	E-Verify
Is mandatory	Is voluntary for most businesses (except in Alabama beginning April 1, 2012)
Does not require a Social Security Number	Requires a Social Security Number
Does not require a photo on identity documents (List B)	Requires a photo on identity documents (List B)
Must be used to re-verify expired employment authorization	MAY NOT be used to re-verify expired employment authorization

Source:
http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f8d07f5c13f2e210VgnVCM100000082ca60aRCRD&vgnextchannel=f8d07f5c13f2e210VgnVCM100000082ca60aRCRD

LANIER FORD

Registering for E-Verify

All Alabama employers must register and begin use of E-Verify no later than **April 1, 2012**

- Go to E-Verify Homepage: www.uscis.gov/everify
- Click "Enroll in E-Verify."
- Follow automated steps.

Notes about E-Verify Transition and Usage:

- Employers must continue to use and retain Form I-9, because E-Verify is NOT a substitute for Form I-9.
- Once registered, employers must not use E-Verify selectively and may not use E-Verify to re-check existing employees.
- While Social Security Numbers are NOT required on Form I-9, they MUST be used for E-Verify.
- However, requiring an employee or applicant to provide a document listing their Social Security number is a violation of the nondiscrimination mandates of the INA.

LANIER FORD

Notes on E-Verify Usage

- Use of E-Verify does create rebuttable presumption that the employer lacked constructive knowledge that a given worker was unauthorized.
- E-Verify participation does NOT guarantee DHS will not audit.
- E-Verify may occasionally yield a "**temporary nonconfirmation**" for an employee because manual review of documents is necessary, often taking between 24 to 48 hours.
  - Temporary nonconfirmation **does not mean** an employee is unauthorized to work or is an illegal immigrant.
  - Employer **may not** take adverse action against an employee based solely on temporary nonconfirmation.
  - Follow steps set out in E-Verify to contact the Social Security Administration or DHS to solve TNC issues.

LANIER FORD

FMLA Update

- Most common questions in my practice:
  - Sufficiency of initial medical certifications.
  - Timing and availability of re-certifications.
  - Return-to-work issues (bye-bye FMLA, hello ADA).
  - Issues related to *in loco parentis* coverage.

LANIER FORD

FMLA Certification Procedure

- Employer has a **right** to a medical certification for either (1) the employee's own serious health condition or (2) the employee's family member with a serious health condition. See 29 C.F.R. § 825.305(a).
- Employer should not ask for medical certification for new child leave or qualified exigency leave associated with duty activations.
- At the time the employer requests certification, the employer **must also advise an employee of the anticipated consequences** of an employee's failure to provide adequate certification. 29 C.F.R. 825.305(d).
- Note that the regulations provide that if an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA allows employer to use ADA procedures to request medical information under the ADA. You may consider info under ADA in determining the employee's entitlement to FMLA leave. 29 C.F.R. 825.306(d).

LANIER FORD

Ins & Outs of Initial Certifications

- Employee must provide certifications within 5 business days thereafter, or, in the case of unforeseen leave, within 5 business days after the leave commences. 29 C.F.R. § 825.305(b).
- Under 29 C.F.R. 825.305(c), a certification is incomplete if one or more of the applicable entries have not been completed, or if the information provided is vague, ambiguous, or non-responsive.
- The employee has 7 days to correct incomplete certifications.

LANIER FORD

Authenticating & Clarifying Initial Medical Certifications

- The employer MAY make direct contact with a health care provider *in limited circumstances* to (1) authenticate and/or to (2) clarify the information provided, even in a sufficient certification. BUT, clarification is allowed **ONLY AFTER** the employee's own attempts to cure the deficiency have failed.
- Under 29 C.F.R. 825.307(a), "**authentication**" means "providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested."
- The regulations define "**clarification**" to mean "contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response."
- Note that some courts have held that an employer cannot submit a list of questions in connection with a mere attempt at "clarification" (contrast this with re-certifications, in which lists of questions are acceptable). See *Weeks v. Oshkosh Truck Corp.,* 2011 WL 5877105 (E.D. Wis. 2011).

Procedure for Clarifying Initial Certifications

- **First**, write the employee a letter specifying problems and giving the employee a chance to clarify.
- **Second**, if this fails, require the employee to sign a HIPAA release permitting the health care provider to communicate directly. (Note: 29 C.F.R. 825.307 provides that "if an employee chooses not to provide the employer with authorization" the request can be denied.)
- **Third**, make contact ONLY through "a health care provider, a human resources professional, a leave administrator, or a management official." You CANNOT use a direct supervisor.

LANIER FORD

Annual Medical Certifications

- Separate from re-certifications, in cases where the employee's need for leave due to his or her own serious health condition or the serious health condition of a family member exceeds 1 leave year, the employer may require the employee to provide a NEW medical certification (not a recertification) in each subsequent leave year. See 29 C.F.R. 825.305(d).
- Such new certifications are themselves subject to the provisions for authentication and clarification.

LANIER FORD

Second & Third Opinions

- Under 29 C.F.R. 825.307(b) and (c), an employer who has doubt about the validity of an **INITIAL** medical certification may require the employee to obtain a second opinion and, if the first and second opinions differ, a third opinion.
- Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits.
- Employer pays for these opinions, and "[t]he employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances."
- Employer can choose provider of second opinion, but third opinion must be from someone jointly selected.
- Regulations require cooperation by employee in signing HIPAA authorization and release.

Re-Certification: General Rules

- Under 29 C.F.R. § 825.308, the general rule is that an employer may request recertification no more often than every 30 days and only in connection with an absence by the employer. However, there are limitations:
  - If the original medical certification indicates on its face that the minimum duration of the condition is more than 30 days, the employer may not seek re-certification before that minimum duration expires.
  - The employer may request re-certification in less than 30 days of the date of the original certification or previous recertification where (1) the employee requests an extension of the leave; (2) circumstances described by the previous certification have changed significantly (e.g., duration, frequency, nature or severity, etc.); **or** (3) the employer receives information that "casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification."
  - In all events, the employer may request re-certification every 6 months.
- The employee must be permitted 15 days to respond. There are **NO SECOND OPINIONS FOR RECERTIFICATIONS**.

LANIER FORD

Question & Answer for Re-Certifications

- The regulations state that employers may engage in a sort of question and answer with the health care provider through paperwork in connection with a recertification.
- “As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.” 29 C.F.R. 825.308(e).

LANIER FORD

End of FMLA Leave Issues

- Always remember when the FMLA entitlement ends, the ADA comes into play.
- Start the interactive process, and lay the groundwork for termination, with a letter to the employee about 14 days before return-to-work date.
- Identify date certain for return to work.
- Remind employees of no-call, no-show policies.
- Begin “interactive process” by concluding letter with: “If you have any questions or concerns of any type, please contact me within 7 days.”

LANIER FORD

In Loco Parentis

- Increasingly popular to request FMLA leave to care for someone who is NOT the employee's child, but who the employee is caring for on a regular basis. This is the equivalent of taking leave for a seriously ill child, since the employee would stand *in loco parentis*.
  - This applies both to "children" of the employee who are under the age of 18 and also to "children" of the employee who are over the age of 18 but incapable of self-care.
- The converse of this scenario also is possible: many employees have requested leave to care for their grandparents or other persons who otherwise would not be eligible relatives under the FMLA, but who were *in loco parentis* to the employee when the employee was a child.

LANIER FORD

When is *In Loco Parentis* FMLA Leave Available?

- The FMLA permits employees to take leave to care for "parents" and also to care for a "son or daughter."
- However, the definition of "parent" includes "any other individual who stood *in loco parentis* to the employee when the employee was a son or daughter." 29 C.F.R. § 825.122.
- Furthermore, the definition of "son or daughter" includes a child or legal ward "of a person standing *in loco parentis*, who is either under age 18, or age 18 or older and incapable of self care because of a mental or physical disability."

LANIER FORD

DOL Interpretation

- According to the Department of Labor, "*in loco parentis* is commonly understood to refer to a relationship in which a person has put himself or herself in the situation of a parent by assuming and discharging the obligations of a parent to a child with whom he or she has no legal or biological connection. It exists when an individual intends to take on the role of a parent."
- DOL says that "under the FMLA, persons who are *in loco parentis* include those with day-to-day responsibilities to care for or financially support a child."
- Relevant factors include: (1) age of the "child"; (2) degree of dependence; (3) amount of financial support; (4) extent of duties.
- **No one factor is controlling – even the absence of financial support.**
- **Existence of a biological parent, even in the same home, is not dispositive.**

LANIER FORD

Examples of *in loco parentis*

- A grandfather may take leave to care for a grandchild whom he has assumed ongoing responsibility for raising if the child has a serious health condition.
- An aunt who assumes responsibility for caring for a child after the death of the child's parents may take leave to care for the child if the child has a serious health condition.
- A person who will co-parent a same-sex partner's biological child may take leave for the birth of the child and for bonding.

LANIER FORD

Weird *in loco parentis* Scenarios

- Adult siblings who are incapable of self-care?
  - **WHD Opinion FMLA 2003-2** (June 30, 2003), concluding that an employee who was the legal guardian of her adult disabled sister was entitled to FMLA leave under *in loco parentis* rules where the adult child was born with a mental or physical disability that continued to adulthood, and where the employee served as the adult child's "parent" in her capacity as legal guardian since both biological parents were deceased.
- Typical grandparent?
  - Who knows? Very frequently involved significantly in the care of grandchildren.
  - Where do we draw the line?

LANIER FORD

Preparing for *in loco parentis* Requests

- In an administrator interpretation released in 2010, the DOL stated that: "Where an employer has questions about whether an employee's relationship to a child is covered under FMLA, the employer may require the employee to provide reasonable documentation or statement of the family relationship." 29 C.F.R. § 825.122(j); 73 Fed. Reg. 67,952 (Nov. 17, 2008).
- However, "[a] simple statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no legal or biological relationship."
- But courts have put the onus on **employees** to elucidate the *in loco parentis* relationship. See *Ruble v. American River Trans.,* No. 2:10-CV-24 (E.D. Mo. June 29, 2011) (insufficient notice to employer that grandparent stood *in loco parentis*); *Sherrod v. Philadelphia Gas Works,* 57 Fed. Appx. 68 (3d Cir. 2003) (same); *O'Hara v. GBS Corp.,* 2013 WL 1399258 (N.D. Ohio Mar. 13, 2013) (questioning whether employee could ever take leave to care for ailing brother under FMLA, but ultimately dismissing complaint where no allegation that employee informed employer of alleged *in loco parentis* status with regard to brother).
- Think hard about whether to request additional information, or to grant or deny the leave based upon the record as it stands.

BYOD – "Bring Your Own Device"

- Many employers offer this as a "perk." Others have this policy without even realizing that it is a "thing."
- Ask yourself:
  - Do you allow employees to take work calls on private phones?
  - Do you allow employees to work on their own computers?
  - Do you allow employees from receiving work email on their smartphones?
  - Do you allow employees to bring devices of any sort to the workplace?

LANIER FORD

BYOD Advantages & Risks

- BOYD permits employees to seamlessly complete work from various locations in a busy world.
- BOYD permits employees flexibility to work after hours without logging in through slow remote programs.
- BOYD allows employees to handle simple work matters without having to come to the office – resulting in increased efficiency and higher productivity.
- Each of these is both an advantage and a risk.

LANIER FORD

BOYD, Meet FLSA

- Many tech-friendly employers forget that the Fair Labor Standards Act requires compensation for all hours worked, regardless of where the employee is located when work is completed or whether it was requested.
- "Work not requested but suffered or permitted is work time." 29 C.F.R. § 785.11.
- If "[t]he employer knows or has reason to believe that [an employee] is continuing to work[, then] the time is working time." *Id.*
- "The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked." 29 C.F.R. § 785.12.
- There is an exception for "*de minimis*" work, but it is limited. See 29 C.F.R. § 785.47 ("This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities.").

LANIER FORD

Other BOYD Concerns

- Monitoring policies are more difficult to apply to personal devices.
- Employer has more difficult time controlling safety and security of data on personal devices.
- Preserving documentary evidence in anticipation of litigation is more difficult on personal devices.
- Use of personal devices permits employees to have increased access to data to plan employment-related litigation

LANIER FORD

Privacy Issues with BOYD

- Common practice is to remotely or otherwise “wipe” personal devices when employees depart.
- Under the Alabama Digital Crime Act, a person “who acts without authority or who exceeds authorization of use commits the crime of computer tampering by knowingly . . . altering, damaging, deleting, or destroying computer programs or data.”
- Under the federal Wiretap Act and the Electronic Communications Privacy Act, it may likewise present issues if employers are using “autoforward” functions on email, using “journaling” function of email, or otherwise “intercepting” employee communications.

LANIER FORD

Designing a Compliant BYOD Program

- Ensure monitoring policies specifically disclaim any expectation of privacy.
- Ensure monitoring policies describe in detail exactly what monitoring is done.
- Have employees sign a well-written “Consent to Monitor Agreement” that addresses these matters, as well as improper destruction of potential evidence or files.
- Consider having company purchase and retain ownership of smartphones or other devices, but allowing employees possession of devices during period of employment, and documenting this arrangement in an agreement.
- Explore time-management software for phones and computers that permits remote clock-in/clock-out.
- Explore commercially-available “sandboxing” technologies that encapsulate and protect data so as to avoid potential loss or manipulation.
- Train employees on maintaining a record of time on personal devices outside of work, and discipline those who fail to record time properly.
- Develop policies to address social media usage on company-owned or sanctioned devices.

Social Media and the National Labor Relations Act

- **TOPICS**
  - What is the NLRA?
  - Who enforces the NLRA?
  - Does it apply to my employer?
  - Hot topics in Social Media
    - The “Wal-Mart” Social Media Policy is not consistent with recent NLRB opinions or memoranda.
  - SCOTUS: *Noel Canning* Decision.

LANIER FORD

What is the NLRA?

- The National Labor Relations Act of 1935, 29 U.S.C. § 151, *et seq.*
- Protects employees' rights "to engage in . . . Concerted activities for the purpose of . . . mutual aid or protection."
  - These are called "Section 7 rights."
- "Mutual aid or protection" applies to employees' actions related to the terms and conditions of their employment **REGARDLESS OF WHEHTER THE ACTIVITIES ARE UNION RELATED.**

LANIER FORD

What is the NLRA?

- Terms and conditions includes wages, benefits, treatment by management, safety concerns, and conditions of the workplace.
- The NLRA prohibits employers from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.
- Evaluating Employers' actions?
  - **Explicit prohibition** – automatic violation.
  - **Non-explicit prohibition** – whether the rules would reasonably tend to chill employees in the exercise of the Section 7 rights.

LANIER FORD

Who Enforces the NLRA?

- **National Labor Relations Board ("NLRB"):**
  - Consists of **five** members, and requires a quorum of **three** members to take official action.
- **Regional Office**:
  - Harris Tower
    233 Peachtree Street N.E. Suite 1000
    Atlanta, GA 30303-1531
    Phone: (404) 331-2896 Fax: (404) 331-2858
- **Alabama Office**:
  - Ridge Park Place
    1130 South 22nd Street Suite 3400
    Birmingham, AL 35205-2870
    Phone: (205) 933-3018
    Fax: (205) 933-3017

LANIER FORD

Who Enforces the NLRA?

- Employee.
- Regional Office/Director.
- Administrative law judge.
- NLRB.
- Circuit Court of Appeals.
- **Useful link**:
  - http://www.nlrb.gov/resources/nlrb-process/unfair-labor-practice-process-chart

LANIER FORD

To Whom Does the NLRA Apply?

- NLRA applies to most private **non-unionized** employers!
- **Retailers**
  Employers in retail businesses fall under the Board's jurisdiction if they have a gross annual volume of business of **$500,000 or more**. This includes employers in the **amusement industry**, **apartment houses and condominiums**, **cemeteries**, **casinos**, **home construction**, **hotels** and **motels**, **restaurants** and **private clubs**, and **taxi services**.
  Shopping centers and office buildings have a lower threshold of **$100,000 per year**.
- **Non-retailers**
  For non-retailers, jurisdiction is based on the amount of goods sold or services provided by the employer out of state ("outflow") or purchased by the employer from out of state ("inflow"). Outflow or inflow can be direct or 'indirect', passing through a third company such as a supplier. The Board takes jurisdiction when annual inflow or outflow **is at least $50,000**.
- **Special categories**

LANIER FORD

NLRA Exclusions

- **The following employers are excluded from NLRB jurisdiction :**
  - **Federal, state, and local governments**—including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations.
  - Employers who employ only **agricultural** laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery.
  - Employers subject to the **Railway Labor Act**, such as interstate railroads and airlines.

LANIER FORD

Hot Topics in Social Media

- NLRB focuses on **two** issues:
  - Whether employees' statements on social media constitute **protected concerted activity**.
  - Whether an employers' social media policy is **overbroad**.

LANIER FORD

What is Concerted Activity?

- **Concerted activity**?
  - Emphasis is on **dialogue** instead of monologue.
    - **Group** instead of solo.
    - **Organizing** group of employees.
    - Bringing truly group complaints.
  - **For example**:
    - A Facebook post concerning dissatisfaction with job conditions that is “liked” by other co-workers is concerted activity.

LANIER FORD

What Isn't Concerted Activity?

- What isn't concerted activity?
  - Employee loses Section 7 protection for "**opprobrious**" conduct.
    - **Four Factors**:
      - Where the discussion happened?
      - What was the subject of the discussion?
      - What was the nature of the employee's outburst?
      - Did an unfair employment practice prompt the outburst?
  - Employee loses Section 7 protection for **disparaging and defamatory** statements.
    - **Two Factors**:
      - Was statement made during ongoing labor dispute?
      - Was statement too disloyal, malicious, or recklessly untrue for protection?

LANIER FORD

Recent Decisions

- **Facebook Examples**
  - *Hispanics United of Buffalo, Inc.* (2012)
    - Fired five employees for Facebook post and comments written in response to a co-worker's disparagement of the five employees' job performance.
      - **Employer**: argued that the comments violated harassment policy.
      - **NLRB**: a legitimate management concern of preventing harassment does not justify policies that discourage exercising Section 7 rights.
  - *Skinsmart Dermatology* (2013)
    - Employee fired over expletive-laced, Facebook tirade.
      - Other co-workers commented on the post but did not specifically mention any terms and conditions of employment.
      - Statements reflecting "merely . . . Personal contempt" of other employees is not concerted activity.

NLRA Review of Employer Policies

- Overbroad Policies?
  - Policies that "would reasonably **tend to chill employees** in the exercise of their Section 7 rights."
- Exceptions?
  - The NLRB has indicated that policies that prevent "**slanderous**" statements, "**racial or sexual harassment**," and "**sabotage**" would not chill NLRA rights.

LANIER FORD

Overbroad Confidentiality Policies

- *Costco Wholesale Corp*. (2012)
  - Confidentiality policy prohibited employees from making statements that "damage the Company . . . or damage any person's reputation."
    - **NLRB**: Too Broad
- *DirecTV U.S. DirecTV Holdings, LLC* (2013)
  - Confidentiality policy that included employee records and required employees not to discuss details "about your job, company business or work projects with anyone outside the company."
    - **NLRB**: Too Broad

LANIER FORD

Inconsistent Guidance from NLRB

- **"Wal-Mart Policy"**
  - This is often cited as an example of a legal policy.
    - Because the NLRB's General Counsel said so in 2012.
- However, recent decisions and statements from the NLRB call the general counsel's opinion into question.

NLRB Evaluation of Social Media Policies

- **Confidential** information.
- Requiring **accuracy** or **truth.**
- Respecting **privacy.**
- **Courtesy** and **decorum.**
  - Both in person and on-line.
- **IP**
  - Could chill workers from taking pictures of unsafe work conditions.
- **Third-party** contacts.

LANIER FORD

SCOTUS: Noel Canning Decision

- **Reminder**: the NLRB consists of 5 members, and must have a 3 person quorum.
- In 2012, President Obama filled 3 empty seats for the NLRB while Congress was in recess.
  - So-called "**recess appointments**"
- *Noel Canning v. N.L.R.B.*
  - The NLRB Members who were "recess" appointees determined that Noel Canning had committed an unfair labor practice.
  - Noel Canning appealed to the United States Court of Appeals for the D.C. Circuit.

LANIER FORD

SCOTUS: Noel Canning Decision

- Noel Canning argued that the recess appointments were invalid and that the NLRB lacked jurisdiction to rule in its case because it could not meet the three member quorum.
- On January 25, 2013, the D.C. Circuit **agreed** with Noel Canning
  - Note, the Eleventh Circuit of the U.S. Court of Appeals determined in an unpublished decision on November 15, 2013, that the President's NLRB recess appointments were constitutional.
- **Supreme Court** heard argument on January 13, 2014.
  - The decision of the Supreme Court will be released by **June 30, 2014**.

LANIER FORD

SCOTUS: Noel Canning Decision

- **Big Deal**?
  - If the Supreme Court sides with NLRB, all of NLRB's actions are constitutional because the appointments are constitutional.
    - No major change for employers.
  - If the Supreme Court sides with Noel Canning, all of the NLRB's actions over the last three years may be **erased**.
    - Could invalidate more than 1,300 NLRB decisions dating back to 2011.

LANIER FORD

Questions?

David J. Canupp
Christopher M. Pape
Mary E. Gill
Lanier Ford Shaver & Payne, P.C.
2101 W. Clinton Ave., Suite 102
Huntsville, Alabama 35805
256-535-1100
DJC@LanierFord.com

www.LanierFord.com

No representation is made that the quality of legal services to be provided is greater than the quality of legal services to be provided by other lawyers.

This slideshow is not intended to contain or convey specific legal advice. Always consult counsel of your choosing with the specific facts of your situation.

LANIER FORD