JONES WALKER

E*ZINES
May/June 2002 Vol. 17

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NLRB STRIKES DOWN COMPANY CONFIDENTIALITY RULE ON SEX HARASSMENT COMPLAINTS

By H. Mark Adams

In a somewhat surprising decision, the NLRB has just ruled that a company violated the National Labor Relations Act by maintaining a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves. *Phoenix Transit System*, 337 NLRB No. 78 (May 10, 2002). Many employers have similar policies, and they serve a legitimate purpose. When employees blab to coworkers about matters that should be kept confidential, it compromises your ability to conduct a fair and thorough investigation, it's potentially disruptive, and it reduces productivity (after all, employees are supposed to be working, not spending their work time engaging in gossip). So what do you do now to keep the NLRB out of your hair when you get a sexual harassment complaint?

The Board ruled the way it did because the National Labor Relations Act allows employees to engage in what are called "protective concerted activities" and prohibits employers from taking action that interferes with or coerces employees in the exercise of such activities. Protected concerted activities include any action by two or more employees, acting for their mutual benefit, concerning compensation or terms and conditions of employment. In the Board's view, two or more employees discussing their mutual interest in a sexual harassment complaint and the company's handling of it is protected concerted activity.

Not all concerted activities by employees, however, are protected. For instance, concerted activity loses its protection when employees cross the line and violate a legitimate work rule or otherwise engage in misconduct. In fact, numerous cases under Title VII of the Civil Rights Act of 1964 have rejected retaliation claims by employees who were disciplined by their employers for openly discussing their sexual harassment complaints in a manner that disrupted the workplace and compromised the employer's investigation. According to the courts, taking action against an employee for filing a harassment complaint is obvious retaliation, but an employee's refusal to cooperate in the employer's investigation and disruption of the workplace is not protected activity and is legitimate grounds for disciplinary action. Likewise, a policy that allows employees the latitude to discuss their sexual harassment claims discretely with coworkers and management, but prohibits them from doing so in a manner that compromises or interferes with your investigation or otherwise

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disrupts the workplace or violated legitimate work rules should not run afoul of the NLRB.

SUPREME COURT SIDES WITH IRS ON TAXATION OF TIP INCOME

By Timothy P. Brechtel

If you're a restaurant or you have employees who receive tips from your customers as part of their income, you need to take note of a recent U.S. Supreme Court decision.

Most employees who receive tip income are required to report the amount of their tips to their employers. You then are required to pay FICA (Social Security/Medicare) taxes on tips reported by your employees. However, the IRS can also assess you for FICA taxes on tips received by your employees but not reported to you. In determining the amount of unreported tips, **the IRS sometimes computes the average percentage shown as tips on credit card receipts and applies this percentage to a restaurant's gross receipts to determine the total tip income for all employees of the business**. The IRS can assess FICA taxes on the difference between the tip amount reported by employees and the amount the IRS determines was allegedly earned as tips.

The Fior d'Italia Restaurant in San Francisco objected to this method of estimating tip income and took the case all the way to the U.S. Supreme Court. Although the lower courts sided with the restaurant, **the Supreme Court upheld the method used by the IRS to estimate tips.** *United States v. Fior d'Italia, Inc.*, (June 17, 2002).

The IRS rule allows employers to submit evidence to dispute FICA assessments based on the amount of income estimated by the IRS. But to do so, **you may need to do additional record keeping**. You must be able to show, for example, that cash-paying customers paid lower tips on average; that some customers received cash back from their waiters (i.e., that all of the amount tendered by the customer in excess of the bill wasn't a tip); or any other facts that indicate the IRS estimate of total tip income is inaccurate.

The Supreme Court's decision may provide an incentive for employers to enter into voluntary agreements with the IRS under the agency's Tip Reporting Alternative Commitment, whereby the IRS agrees not to assess additional FICA taxes if the employer agrees to keep certain records and to educate its

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employees regarding tip reporting. In this regard, **the IRS suggested to the Supreme Court in oral argument that employers "should hire reliable people who they can trust to follow the rules."** The dissenting justices noted that **this suggestion was met with "laughter."**

Notwithstanding all the consternation about the Supreme Court's decision, your company's net tax bill may not be affected by additional FICA assessments on tip income since you can get an **income tax credit** equal to the amount of FICA taxes you pay on tip income that exceeds the minimum wage. However, businesses that have no income tax liability will not benefit from the tax credit in the year the FICA tax is paid (but credits can be carried forward to future years), and the additional FICA tax may cause cash flow problems. If you don't police your employees' tip reporting and keep good records, you may want to set up a reserve account in case the IRS comes calling.

FORM 5500 DELINQUENT FILER PENALTIES REDUCED

By Timothy P. Brechtel

Has your company been reluctant to file 5500's for a benefit plan due in part to potential penalties for failure to file in the past? If so, recent changes may take the sting out of bringing your plan into compliance. In 1995 the U.S. Department of Labor (DOL) implemented the Delinquent Filer Voluntary Compliance Program (DFVC), which allowed employers to pay reduced civil penalties for late 5500's if they complied with the terms of the program. However, filings under the DFVC did not automatically preclude the IRS from assessing tax penalties. The IRS recently stated in Notice 2002-23 that it will **waive tax penalties** for employers that file 5500's under the DFVC. The Notice is available online at *http://www.irs.gov/pub/irs-drop/n-02-23.pdf*.

Another change favorable to employers is the DOL's reduction of the penalty for late filing under the DFVC from $50 per day to $10 per day. The caps on the total possible penalty were reduced as well. Small Plan filers (generally employers who sponsor plans with fewer than 100 participants) will pay no more than $750 per Form 5500 (reduced from $2,000). For large plan filers, the maximum penalty was reduced from $5,000 to $2,000. In addition, a new "per plan" limit was imposed, equal to two years' worth of penalties. If a single plan has failed to file for multiple years, the maximum penalty is $1,500 for a small plan and $4,000 for a large plan. A DOL Fact Sheet regarding the changes is available online at *http://www.dol.gov/dol/pwba/public/pubs/0302fact_sheet.html*. The final DOL rule was published at 67

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Federal Register No. 60, p. 15051 (March 28, 2002).

WAIVER OF FORM 5500 REQUIREMENTS FOR SOME FRINGE BENEFIT PLANS

By Timothy P. Brechtel

On April 4, 2002 the IRS issued Notice 2002-24, which changes the reporting requirements for certain fringe benefit plans. The Notice is available online at *http://www.irs.gov/pub/irs-drop/n-02-24.pdf*. Cafeteria plans, educational assistance programs, and adoption assistance programs under Code Sections 125, 127 and 137 must file a Form 5500 Schedule F, regardless of whether the sponsor meets one of the exceptions to filing the Form 5500 annual report (such as unfunded welfare plans covering fewer than 100 employees).

The Notice states that **employers will not have to file a Form 5500 and Schedule F for the sole purpose of reporting information for a cafeteria plan, educational assistance program, or adoption assistance program**. If you otherwise are required to file Form 5500, you will still need to file the form, but will not have to attach Schedule F to report information regarding these fringe benefit plans. The change is **retroactive**, meaning that if you were required to file Schedule F in the past, you will not face penalties for failure to file in prior years.

Despite the filing exemption for cafeteria plans, **if you sponsor medical flexible spending accounts (FSA's), you may need to continue to file a Form 5500 for such plans**. Medical FSA's are covered by ERISA, and if you have one, you must file an annual report with the DOL, notwithstanding the relaxed IRS requirements. However, many small employers (those with less than 100 employees) will be exempt under existing ERISA filing exemptions.

FUNDAMENTALS OF INTERVIEWING AND HIRING

By H. Mark Adams

This is the first installment in a multi-part series on interviewing and hiring to help you identify the best job candidates from your applicant pool. Following these simple rules for separating the wheat from the chaffe can help you avoid problems down the line while building a solid workforce that will be a long term asset to your company.

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A. Take the Time to Select the Right Candidate

- You need to know not only if an applicant is qualified for the job sought, but also if he has the potential to be a good employee. Will he come to work regularly and on time? Will he be loyal? Will she be a team player and interact professionally with her coworkers and supervisors? Will he present a positive image for the company?

- Take the time to get the information you need to make an informed decision about whether the applicant is qualified and will be a good employee. Hiring the first applicant who walks in the door, even when jobs seem to be plentiful and applicants scarce, can create additional problems in the workplace.

B. Get All the Information You Need

- **Accept Only Complete Applications**. Never accept an incomplete application. Always require applicants to provide complete information. If you want to know an applicant's job-related skills or experience, don't be satisfied with a list. Require applicants to respond in narrative form on their applications or ask for detailed explanations in their interviews. This gives you the opportunity to judge each applicant's ability to express himself clearly or to describe her skills and experience. Consider requiring a similar explanation of the applicant's educational background if it's important for the job.

- **Look for Red Flags**. Salespeople sometimes say the best sale of their careers was the one they didn't make. The same is true with employment applications. Often, the question left unanswered, particularly when it concerns an applicant's employment history, tells the most about the applicant. In looking at an applicant's employment history, focus on at least the last five years, spotlighting any of the following potential red flags:

  - v Gaps in employment history;
  - v Number and duration of jobs;
  - v Wages paid and benefits provided by previous employers;
  - v Name of immediate supervisor(s);
  - v Reasons for leaving previous employers;
  - v Checking references;
  - v Current employment status; and
  - v Noncompetition, nonsolication, and confidentiality agreements.

- How to deal with these red flags and other interviewing and hir-

ing tips will be discussed in more detail in the next issue of *Jones Walker's Labor and Employment E*Zine*.

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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