Holland and Holland L.L.C.

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EMPLOYMENT LAW DIGEST

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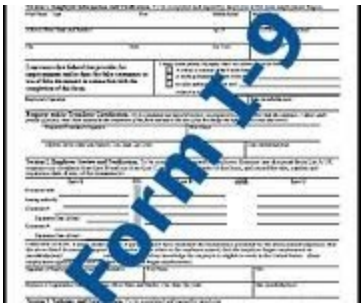
NEW I-9 FORM REQUIREMENTS MAY 7, 2013 DEADLINE



As you know, employers are required to complete an I-9 Form to verify the identity and employment authorization eligibility for newly hired employees and for re-verification purposes. The U. S. Citizenship and Immigration Services (USCIS) is in charge of these forms and recently published a notice that it has revised the form. The USCIS's notice contains instructions directing all employers to begin using the newly revised form immediately. The USCIS, however, will also continue to accept the older forms (dated 02/02/09 and 08/07/09) until **May 7, 2013.** Employers may be subject to penalties for using an older version of the form after May 7th. The revised I-9 Form, that must be used beginning May 7th, has a revision date "03/08/13 N" in the left hand corner of the form; it is two pages long with more fields to complete, different formatting, and new instructions.

The new instructions on the revised form now include the retention requirements --employers must retain completed I-9 Forms during an individual's employment and for an additional period of either three years after the date of hire or one year after the day employment ended, whichever is later. We recommend employers retain the I-9 Forms in a secure file that is separate from personnel files so that the forms may be easily accessed in the event of an audit without having inspectors going through other personnel documents.

We have noticed increased inspections of the I-9 Forms by the Department of Labor and USCIS. If you have not recently audited completed I-9 Forms to ensure they have been properly completed or reviewed your practices relating to completing/retaining the I-9 Forms, we recommend that you do some "Spring cleaning." In the long run doing a self audit will help save time in the event the government comes knocking on your door and, more importantly, it may help avoid hefty fines.

What's Inside?

(Continued on Page 2)

(Continued from Page 1)

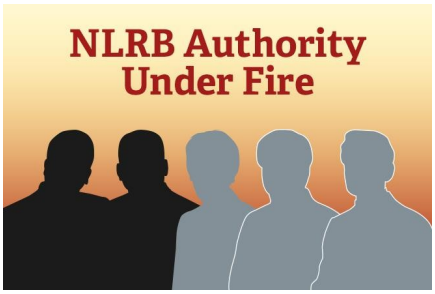
The newly revised I-9 Form may be obtained online at:

http://www.uscis.gov/files/form/i-9.pdf (English)
http://www.uscis.gov/files/form/i-9_spanish.pdf (Spanish)

While the I-9 Form is provided in Spanish, only employers located in Puerto Rico may complete the Spanish-language version. Otherwise, the Spanish-language version may only be used for reference purposes to assist in completing the English version of the form.

NLRB QUORUM STILL IN QUESTION

Normally, appointments to the National Labor Relations Board require Senate approval. Perhaps you will recall back in January 2012 President Obama announced he would use his recess appointment power under the U.S. Constitution to add three members to the NLRB. The National Labor Relations Act prevents the NLRB from acting without a quorum. Many protested and claimed that the President was without authority to make the appointments. Nevertheless, the President made the appointments and the NLRB proceeded to act with a quorum that included the newly appointed members.



The NLRB's actions since the controversial appointments have been widely criticized and generally unfavorable to employers, including for example:

January 2013 the NLRB held that an arbitration agreement (with non-union employees) violated NLRA where the employees agreed, as a condition of employment, to waive rights to file class action lawsuits against their employers. D.R. Horton 357 NLRB No. 184. The validity of this NLRB ruling is currently before the Fifth Circuit (federal court over Texas).

Some of the 2012 controversial decisions include the NLRB's rulings invalidating employer policies and actions as violating the NRLA even though the policies were designed to prohibit employees from badmouthing their employer and protect confidentiality during the employer's investigation, including:

- A policy prohibiting employees from posting electronic messages that "damage the Company, defame any individual or damage any person's reputation unlawfully restricted employees' protected rights" Costco Wholesale Corp., 358 NLRB No. 106
- A policy prohibiting "disrespectful" language or "any other language which injures the image or reputation of the Dealership" was unlawful. Karl Knauz Motors, Inc., 358 NLRB No. 164
- Instructing an employee during an internal investigation not to discuss it during the investigation. Banner Health System, 358 NLRB No. 93

The question regarding the validity of the appointments has slowly worked its way through the court system with a decision finally being made in January 2013 by the U.S. Court of Appeals for the District of Columbia Circuit in *Noel Canning Div. of Noel Corp. v. NLRB,* D.C. Cir., No. 12-1115, 1/25/13). The D.C. Circuit held that the Constitution only grants the President the power to make recess appoint-

ments to the NLRB if a vacancy on the NLRB happens during the intersession recess of the Senate (a recess between the end of one congressional session and the start of another). The D.C. Circuit found that the NLRB vacancies did not occur during the intersession recess and the President had exceeded his constitutional authority in making the three appointments. The D.C. Circuit ruled the appointments were INVALID and overturned the NLRB's decision (against the employer) in the specific case before the court. While the D.C. Circuit's decision only overturned the NLRB's decision in the specific case that was before the D.C. Circuit, the decision could have a significant impact on other NLRB actions if upheld.

On March 12th, the NLRB issued a news release stating that it intends to file a petition for certiorari with the U.S. Supreme Court for review of the D.C. Circuit's decision. The NLRB's deadline to file its petition is April 25, 2013.

On March 27, 2013, the Congressional Research Service (CRS) released its Report for Congress on this issue. The CRS Report for Congress indicates that if the D.C. Circuit's ruling is upheld, not only will the decision significantly impact the three appointments to the NLRB and actions taken by the NLRB with the invalid members, but the decision could have far reaching implications, including invalidating many other appointments. The CRS Report indicates that if the decision is upheld, it would have the effect of invalidating many of the approximately 323 intersession recess appointments that have been made since 1981; increasing the Senate's role in approving appointments and restricting the president's authority to make unilateral appointments. The CRS Report for Congress is at: https://www.fas.org/sgp/crs/misc/R43030.pdf

WHISTLEBLOWER PROTECTION UNDER THE AFFORDABLE CARE ACT

Yes, with the Affordable Care Act comes another protected category for employees – whistleblowers.

The Affordable Care Act includes a provision to protect employees against retaliation for:

--Reporting alleged violations of Title I of the Act,

--Receiving a tax credit, or

--Cost-sharing reduction as a result of participating in a Health Insurance Exchange or Marketplace.

Occupational Safety and Health Administration (OSHA) has been given the function of investigating complaints and making decisions regarding whether retaliation has occurred. In February 2013, OSHA issued its interim final whistleblower rules. While the rules are not in effect, they broadly define "employee" and liberally construe when a complaint is made (oral or written, with no specific form required). OSHA has also issued a "Fact Sheet" for employees describing protected conduct, prohibited retaliation, and how to file a claim. The only good news is that the deadline for filing a claim is relatively short, 180 days. OSHA's "Fact Sheet" is available at:

http://www.osha.gov/Publications/whistleblower/OSHAFS-3641.pdf

CARE OF ADULT CHILD WITH DISABILITY COVERED BY FMLA

Employers covered by the Family Medical Leave Act (50 or more employees for required period), should be aware that the FMLA entitles an eligible employee to take up to 12 workweeks of unpaid, protected leave during a 12 month period for certain circumstances. One of those circumstances is to care for a son or daughter with a serious health condition. Son or daughter" is defined by the FMLA as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability."

Because the FMLA regulations do not explicitly address if the child's disability must have occurred before or after the son or daughter turns 18 years old, the Labor Department's Wage and Hour Division Administrator issued guidance on January 14, 2013 to clarify the issue.
The guidance states that an eligible employee may take FMLA leave to care for an adult child who is incapable of self-care because of a disability regardless of the child's age or when the disability began. The age of onset of a disability is irrelevant in determining whether an individual is a "son or daughter" for purposes of the FMLA. A parent will be entitled to take FMLA leave to care for a son or daughter 18 years of age or older, if the adult son or daughter:

(1) has a disability as defined by the ADA;
(2) is incapable of self-care due to that disability;
(3) has a serious health condition; and
(4) is in need of care due to the serious health condition

While all four requirements must be met for an eligible employee to be entitled to FMLA-the protected leave to care for an adult son or daughter threshold is not very high for meeting the standard.

The Administrator points out that the broader definition of disability under the amended ADA increases the number of adult children with disabilities for whom parents may take FMLA-protected leave when the other criteria is met. The FMLA regulations define "incapable of self-care" to mean that the individual requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (such as grooming and hygiene, bathing, dressing and eating) or "instrumental activities of daily living" (such as, cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office). The term "needed to care" also includes providing psychological comfort and reassurance that would be beneficial to a son or daughter with a serious health condition who is receiving inpatient or home care.

The guidance also addresses the unfortunate number of injured military service personnel as it relates to the FMLA and care of an adult child. The parent of a covered service member who sustained a serious injury or illness is entitled to up to 26 workweeks of FMLA leave in a single 12 month period. The Department of Labor recognized that the impact of an injury may last beyond the single 12-month period covered by the military caregiver leave entitlement. The guidance clarifies the DOL's position that the service member's parent can take FMLA leave to care for a son or daughter in subsequent years due to the adult child's serious health condition, as long as all other FMLA requirements are met.

The guidance, with examples of qualifying conditions is available at:

http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2013/FMLAAI2013_1.htm

Arbitration Provision Enforced In Challenged Non-Compete Agreement

The United States Supreme Court recently sent state courts a reminder that an arbitration agreement between an employer and employee is enforceable. In *Nitro-Lift Techs., L.L.C. v. Howard*, employees entered into non-compete agreement with their employer, Nitro-Lift Techs, containing the following arbitration provision:

> Any dispute, difference or unresolved question between Nitro-Lift and the Employee (collectively the "Disputing Parties") shall be settled by arbitration by a single arbitrator mutually agreeable to the Disputing Parties in an arbitration proceeding conducted in Houston, Texas in accordance with the rules existing at the date hereof of the American Arbitration Association.

The employees had worked for Nitro-Lift in Arkansas, Texas and Oklahoma. When Nitro-Lift learned that the employees had resigned to work for a competitor in Oklahoma, Nitro-Lift sent the employees a letter demanding arbitration for their breach of the non-compete agreement.

The employees responded by filing a lawsuit in Oklahoma asking the Oklahoma court to declare the non-compete agreements void and to enjoin their enforcement. The lower court dismissed the complaint, finding that the contracts contained valid arbitration clauses under which an arbitrator, and not the court, must settle the parties' disagreement. Unhappy with this decision, the employees appealed the case to the Oklahoma Supreme Court. The Oklahoma Supreme Court declared the non-compete agreements void under Oklahoma's non-compete statute.

The employer appealed to the U.S. Supreme Court and was rewarded with a reversal. The U.S. Supreme Court ruled that the state court should have only determined the validity of the arbitration provision under the Federal Arbitration Act. Once the arbitration provision is found to be valid, it is for the arbitrator to decide whether the covenants not to compete are valid under state law.

The Lighter Side of Law

Negotiations between union members and their employer were at an impasse. The union denied that their workers were flagrantly abusing their contract's sick-leave provisions.

One morning at the bargaining table, the company's chief negotiator held aloft the morning edition of the newspaper, "This man," he announced, "called in sick yesterday!" There, on the sports page, was a photo of the supposedly ill employee, who had just won a local golf tournament with an excellent score.

A union negotiator broke the silence in the room. "Wow," he said. "Think of what kind of score he could have had if he hadn't been sick!"

Trainees or Employees?

If you are considering utilizing an unpaid student trainee at your business you should make sure that you can meet the Department of Labor's economic realities test. In several recent cases, companies were sued by trainees who claimed that they were employees. To avoid being labeled an "employer" the training must meet the follow criteria:

(1) the training, even though it includes actual operation of the facilities of the employer, must be similar to that which would be given in a vocational school;

(2) the training is for the benefit of the trainees;

(3) the trainees do not displace regular employees, but work under close supervision;

(4) the employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded;

(5) the trainees are not necessarily entitled to a job at the completion of the training period; and,

(6) the employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

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If you, or anyone in your office, would like a copy of this newsletter on a quarterly basis, at no cost, please contact Deanna Jennings at (210) 824-8282.

E-mail copies are also available

ABOUT THE FIRM

Holland & Holland L.L.C. represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—**management counseling**

—review and preparation of **personnel policy** and procedures including employee handbooks;

—representation in administrative matters before the **Equal Employment Opportunity Commission**;

—**representation of management in state and federal court** for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—**protection of trade secrets** and other confidential information through the use of covenants not to compete and non-interference agreements;

—preparation of **arbitration agreements**, non-subscriber programs and waivers of jury trial agreements;

—**management training** on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

—general **human resource audits** to promote compliance with the myriad of legal and regulatory obstacles facing employers on a daily basis;

—**wage/hour compliance** audits and defense of FLSA collective actions.