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AREAS OF PRACTICE

www.raineykizer.com Spring 2015 Issue

New Workers' Compensation Rules Affecting Employers and Carriers and Potential Penalties

Effective March 22, 2015, the Tennessee Department of Labor has implemented new rules substantially affecting many Tennessee employers and workers' compensation insurers. These new rules require an employer to immediately provide medical panels to injured workers, and they impose the potential for significant civil penalties if an employer fails to comply. These new rules also affect the procedure for reviewing potential violations of the Division's Rules or the Workers' Compensation Act.

Under the new rules, once the employer receives notice of *any* workplace injury the employer "*shall immediately provide* the injured employee a panel of physicians that meets the statutory requirements for treatment." The only exception is for very minor injuries which no one could reasonably believe needs treatment from a physician. The absolute deadline to provide a panel is five (5) business days from the date the employer has notice of an injury. Otherwise, the employer may be hit with a civil penalty of up to $5,000. This civil penalty may also be assessed if an employer provides a panel of physicians which fails to meet the statutory requirements on more than one occasion for a particular injury.

The new rules also provide different procedures for reviewing rules violations and assessing civil penalties against employers and carriers. Any Division of Workers' Compensation Division employee-not just a Workers' Compensation Judge-may refer a person or entity to the penalty program whenever they believe a rule or statutory violation has occurred. An assigned penalty program employee then investigates, determines whether to assess a penalty, and sends written notice of the penalty. To contest the penalty, the penalized party must submit a written request for a contested case hearing within 15 calendar days of the date the penalty was assessed.

Additionally, the new law allows penalties ($50 up to $5,000) for such acts as:

- Failing to attend a scheduled mediation, or arriving over 30 minutes late without notifying the mediator;
- Failing to provide a representative with settlement authority to a mediation;
- Denying or stopping benefits for a claim of temporary disability or medical benefits without reasonably investigating the claim;
- Providing medical providers on a Form C-42 that one knows, reasonably should know, or has reason to know, will not provide treatment for the employee's injury;
- Providing medical providers on a Form C-42 in an untimely manner;
- Failing to timely provide documents as required by the Tennessee

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Workers' Compensation Act or the Division's rules; or
- Failing to comply, within a reasonable amount of time, with any proper request of the ombudsman.

Further, a civil penalty "shall" be assessed against an employer or carrier, *regardless of good or bad faith*, if the employer or carrier fails to timely comply with any Workers' Compensation Judge's order or for any other conduct deemed to be contempt of court.

SAVE THE DATE -- SPRING EMPLOYMENT LAW SEMINAR

Mark your calendars for **May 6, 2015**! In conjunction with the West Tennessee SHRM chapter, we will hold our annual Spring Employment Law seminar at Union University in Jackson, Tennessee. The full-day event will provide insight and updates on a variety of issues facing employers of all sizes and backgrounds. For further information, contact Elaine Amicone at eamicone@raineykizer.com or 731-423-2414.

Employees Fired Over Facebook Activity:

NLRB's Ruling is NOT a "Like" for Employers

The National Labor Relations Board (NLRB) recently found an employer unlawfully discharged employees for participating in a negative Facebook posting about the employer's owners. The NLRB also determined the employer's Internet/Blogging policy violated Federal labor law. See Three D, LLC d/b/a Triple Play Sports Bar and Grill v. Sansone and Spinella, cases 34-CA-012915, 34-CA-012926 (N.L.R.B. Aug. 22, 2014). The Board ultimately required the employer to revise or rescind its Internet/Blogging policy, reinstate the two fired employees with back-pay and back-benefits, and take other necessary corrective action.

Employer's employees discovered they owed more state income taxes than expected, apparently due to one of the employer co-owner's payroll calculations. A former employee posted a Facebook "status update" on her personal page alleging the employer's co-owner improperly completed the tax paperwork and negatively discussing the co-owner. Employee Jillian Sanzone posted one comment under this status update using a single expletive against the co-owner. Employee Vincent Spinella selected Facebook's "Like" feature under the initial status update. When the employer's other co-owner learned about the Facebook discussion, he fired Sanzone because she was not loyal enough due to her Facebook comment. Both co-owners questioned Spinella about his "Like" selection and the Facebook discussion, then fired him for liking the disparaging initial status and claimed he would be hearing from the co-owners' lawyer. An administrative law judge found the firings were unlawful under the Fair Labor Standards Act (FLSA), but did not find the employer's Internet/Blogging policy violated the law.

The NLRB upheld the firings as unlawful. The Board agreed the Facebook discussion was protected, concerted employee activity. The Board deviated from the usual standard on employees' comments because the comments were made on a social media website, off employer's premises, and by only employees and non-employees (no managers) while off-duty. Sanzone's comment and Spinella's

"Like" were not deemed so "disloyal, reckless, or maliciously untrue" as to lose FLSA protection. As well, the employees were not held responsible for any others' unprotected statements by merely participating in an otherwise protected discussion. Sanzone's comment and Spinella's "Like" were only supporting the initial status update, not other comments, and Sanzone's single expletive was interpreted as an opinion and not a fact. The Board noted the discussion was posted on an individual user's personal page, was not directed to the general public, and did not mention the actual employer's products or services.

Also, the Board found the employer's Internet/Blogging policy violated the NLRA. The policy stated that employees engaging in "inappropriate discussions about the company, management, and/or co-workers" may be violating the law and subject to discipline. The Board found the term "inappropriate discussions" was sufficiently imprecise and broad that employees would reasonably interpret the policy to encompass and prohibit FLSA-protected activity. Moreover, the Board noted that the employer's firing of Sanzone and Spinella particularly for their Facebook participation presented an example to other employees that such activity violated the policy.

PRACTICE POINTER: Employees' social media activity regarding workplace or labor controversies may be protected, especially if the activity is limited to the employee's own comments, is posted on a personal page and not directed to the general public, and consists of opinions and not facts. Employers should investigate all the circumstances in considering disciplinary decisions. Also, employers should review social media policies to ensure that the terms are not so general or broad to overly constrict employees' activity and render the policy void.