

H.R. ALERT*

MARCH 2005

The Department of Labor Announces Changes to Labor Certification, Green Card Applications

Labor certification is the process by which the Department of Labor (“DOL”) certifies to the Department of Homeland Security and the state that there are no able, willing and qualified available U.S. workers for a permanent position being offered to an alien and, that employment of the alien will not adversely affect the wages and working conditions of similarly employed United States workers. In response to widespread criticism of the current certification system being too time consuming and complicated, the DOL has implemented a new process, the Permanent Foreign Labor Certification Program (“PERM”); the DOL has published final regulations that it believes will ensure the most expeditious processing of cases using all available resources.

The new labor certification system will require employers to conduct all job recruitment before filing a labor certification application. The DOL further asserts that under the new regulations, responses will be rendered by the DOL within 45 to 60 days of the electronic filing of all labor certification applications, except those applications selected for audit. The application for labor certification will now be made on a new form ETA 9089, which can be filed either electronically or by mail. Employers will not be required to file any further documentation in support of the application, but will be expected to maintain the supporting documentation specified in the regulations in the event that an application is selected for audit or the DOL otherwise requests such documents.

The new DOL pre-filing requirements will include the following steps:

(1) **Job order.** You will have to place a job offer for the offered position with your state workforce agency (SWA) for a period of 30 days.

(2) **Advertisements.** You must run two advertisements on two different Sundays in a newspaper of general circulation in the area of intended employment. The ads must be placed more than 30 days, but not more than 180 days, before filing. If the job requires experience and an advanced degree, you may use a professional journal in lieu of one of the Sunday ads.

(3) **Additional recruitment for professional positions.** PERM requires that if the application is for a “professional occupation” (defined as one for which the attainment of a bachelor’s degree or higher is the usual education requirement), you must also advertise in three additional recruitment outlets of your choosing from the following list: (1) job fair, (2) your website, (3) a job search website other than your own, (4) on-campus recruiting, (5) trade or professional organization, (6) private employment firm, (7) employee referral program if it includes identifiable incentives, (8) notice of the job opening at a campus placement office if the job requires a degree but no experience, (9) local and ethnic newspapers if appropriate, or (10) radio and television advertisements.

(4) **Posted notice.** You must post notice of the opportunity for at least 10 consecutive business days at the place of intended employment. The notice must state the offered salary. (The other job advertisements discussed above don't have that requirement.)

(5) **Posting in other in-house media.** PERM also requires that as part of the labor certification process you also use any and all in-house media, whether electronic or printed, in accordance with normal

procedures used for recruitment for similar position in the organization. The notification must be given for as long as other comparable positions are usually advertised through in-house media.

(6) **Prevailing wage determination.** The new regulations also require you to obtain from your SWA the prevailing wage for the offered job. You have to pay at least that wage at the time the alien begins employment in the offered position on a permanent basis.

Employer Rejects Employee Medical Certification Documents and Prevails on Family and Medical Leave Act Claim

A United States appellate court recently held that a Michigan employer who fired an emergency medical technician following a profanity laced dispute over medical certification documents did not violate the Family and Medical Leave Act ("FMLA"). In *Hoffman v. Professional Medical Team*, 394 F.3d 414 (6th Cir. 1/7/05), The United States Court of Appeals for the Sixth Circuit held that the employer was reasonable in rejecting Lynn Hoffman's request for intermittent leave for migraine headaches after she failed to complete the necessary certification documents. The Court further held that the employer did not willfully discriminate against the plaintiff based on FMLA grounds by subsequently discharging her.

Hoffman allegedly suffered with migraines and had previously received intermittent FMLA leave because her family doctor had certified that the migraines constituted "a serious health condition." Some time later, the employer cited an inconsistency in the medical certification and asked Hoffman to provide updated forms. Hoffman refused. After Hoffman's second hostile encounter with her supervisor regarding her failure to provide adequate medical certification to obtain FMLA leave, Hoffman was terminated for

violating the company's rules by engaging in unprofessional, discourteous conduct, using obscene language and for violating the company's anti-violence policy.

In its ruling, the Court stated that the company's consultation with their attorney and with Hoffman "implies that the company tried to meet its obligations under the FMLA. Cases under the Age Discrimination Employment Act and Fair Labor Standards Act have found willfulness most frequently in situations in which the employer deliberately chose to avoid researching the law . . . here . . . Professional Medical Team ("PMT") sought counsel from its attorney and met with the employee affected."

Employer Practice Tip: It is noteworthy that in areas where the law is not clean cut, such as FMLA, the Courts will sometimes take into consideration an employer's good faith efforts in consulting with a legal professional, or someone familiar with the law, in trying to decipher exactly what the law is in this area and making every attempt to comply. Such good faith efforts often negate liability and/or the imposition of punitive or liquidated damages.

Employee Prevails on Claim of Defamation Based on In-House Statements of Supervisor

In *Popko v. Continental Casualty Co.*, 2005 WL 123869 (111 App. 1 Dist. 1/21/05) (January 21), an Illinois appellate court affirmed a jury's verdict that a supervisor's in-house statements about the plaintiff (a former employee) constituted defamation. The jury found for the employee and awarded him \$100,000 in compensatory damages and \$200,000 in punitive damages, for a total of \$300,000. The appellate court upheld the verdict. Importantly, the defamatory statement about the plaintiff never circulated outside of the company.

The facts leading up to the lawsuit arose out of a performance review. Upon returning from a planned two-week vacation and honeymoon to his workplace of almost sixteen years, plaintiff, Daniel Popko, learned that he had lost his job for poor conduct he had displayed during a performance review. After the performance review at issue, two of Popko's supervisors made both oral and written statements that formed the basis of their decision to terminate Popko. The statements at issue here were that Popko had used profanity during the review and, that he had challenged his supervisor's authority. Popko denied both. Another statement at issue was that Popko "showed a pattern of unacceptable conduct."

The Court's decision in *Popko* was based in large part on the fact that the derogatory statements regarding plaintiff's performance were made and circulated where "testimony established that no investigation into the

truth of the charges against plaintiff was conducted by defendants." The defendants argued the "common interest privilege" which allows individuals who have a common interest, such as those working for the same company, to share information relevant to their common concern; however, the privilege is lost if abused. For instance, if one employee knowingly or recklessly spreads false information about a co-worker within the company, the privilege may be lost. In *Popko*, the Court determined that the common interest privilege was lost due to the recklessness of the supervisors.

The derogatory statements about plaintiff had not been investigated prior to his termination based on these statements; therefore, the Court determined that the privilege was abused and the employer had acted recklessly. Accordingly, it appears that there would have been a very different outcome had the employer actually investigated the truth of the derogatory statements about Popko's conduct prior to terminating him.

Employer Practice Tip: When allegations are made that an employee has conducted himself in an inappropriate or unacceptable manner, employers should conduct an investigation, prior to discharging that employee or taking other disciplinary action. This case also underscores the need for supervisory training as to the need for confidentiality on personnel matters. Supervisors should not make statements about company personnel to other employees that relate to another employee's performance.

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Inquiries concerning topics addressed in the *H.R. Alert* may be directed to Nan Alessandra, Jane Armstrong, Kim Boyle, or David Korn. Your comments, questions, and suggestions are encouraged.

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- BRIEFINGS & SEMINARS -

Baton Rouge Breakfast Briefing

“Workplace Violence”

Thursday, March 17, 2005

Baton Rouge Marriott

Gulf Coast Breakfast Briefing

**“The Scope of Employee Rights Under
the National Labor Relations Act”**

Thursday, March 31, 2005

Casino Magic Bay St. Louis

and

Houston Employment Law Seminar

Topics to be determined

Thursday, May 12, 2005

Hilton Houston Post Oak

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