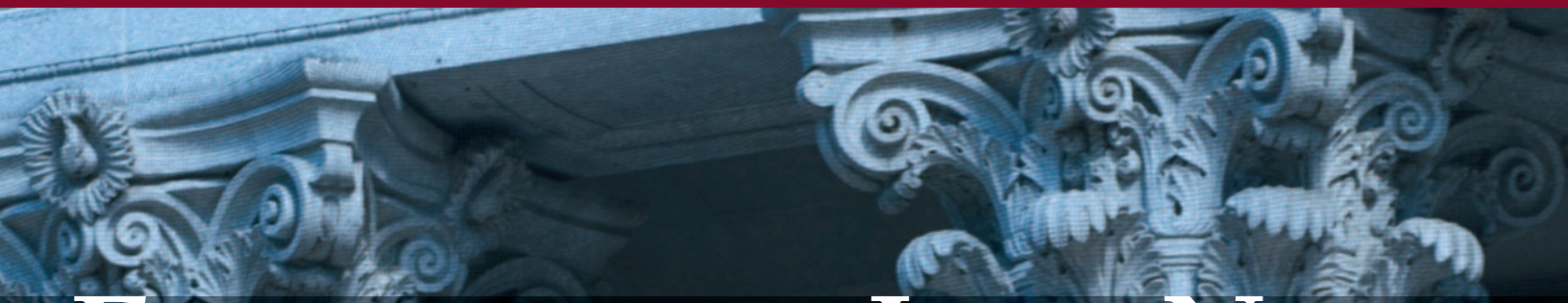

EMPLOYMENT LAW NEWS

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Employment Law Practice Group

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January 2012 Deadline Under The New York Wage Theft Protection Act

- *Summary:* Effective January 2012, under the New York Wage Theft Prevention Act, employers are required to provide annual pay notices to *all employees*, whether exempt or non-exempt, and regardless of whether there has been any change in such employee's compensation. The annual pay notice must include rate of pay, exempt or non-exempt status, wage payment dates, and other required information. These notices must be provided to all employees between January 1 and February 1, 2012.

Full article on page 2.

Year-End Performance Appraisals – Dos And Don'ts

- *Summary:* As we enter the final quarter of the calendar year, many employers are thinking about conducting performance reviews of their employees. We have provided some basic "dos and don'ts" for conducting performance reviews which can help employers maximize the benefits that both the employer and the employee gain from the performance appraisal process.

Full article on page 3.

Hostile Work Environment Claims May Now Be Easier To Prove Under The New York City Human Rights Law

- *Summary:* According to a recent decision by the Appellate Division, Second Department in *Nelson v. HSBC Bank US,* employees who bring claims under the New York City Human Rights Law have a lower burden to prove liability as compared to claims brought under the New York State Human Rights Law or federal law. Rather than requiring that the complained of conduct was "severe and pervasive," the Second Department held that a plaintiff satisfies the New York City Human Rights Law standard by establishing that he or she was treated "less well than other employees because of the relevant characteristic." The decision represents another significant difference between the New York City Human Rights Law and state and federal law.

Full article on page 4.

DOL Holds Revealing A Whistleblower's Identity Is An Adverse Action Under Broad Application of Sarbanes-Oxley Act Protections

- *Summary:* A September 13, 2011 decision of the U.S. Department of Labor's Administrative Review Board ("ARB") confirmed that the whistleblower provisions of the Sarbanes-Oxley Act of 2002 ("SOX"), which applies to publicly traded companies and certain of their subsidiaries, will be construed broadly in favor of employees. Relying on statutory language and legislative intent, as well as recent Title VII anti-retaliation jurisprudence, the ARB in *Menendez v. Halliburton, Inc.*, clarified that a plaintiff may assert a whistleblower retaliation claim even when the alleged adverse actions are not economic in nature and do not result in tangible job consequences. Specifically, *Menendez* holds that revealing the identity of a whistleblower is an adverse action under SOX.

Full article on page 5.

January 2012 Deadline Under The New York Wage Theft Protection Act

As we previously reported in the Summer 2011 Employment Law Newsletter, the New York Wage Theft Prevention Act ("WTPA") took effect on April 9, 2011. *All* private sector employers in New York are covered by the WTPA, regardless of size. Effective as of April 9, 2011, employers were required to provide all newly-hired employees with certain disclosures regarding their rate of pay, wage payment dates, exempt or non-exempt status and other required information at the time of their hire. Additionally, effective January 2012, Employers will be required to provide annual pay notices to *all employees*, whether exempt or non-exempt, and regardless of whether there has been any change in such employee's compensation.

Annual Notice Requirement for Existing Employees

Annual notices for existing employees must be issued each year between January 1 and February 1. Notice *cannot* be given at any other time of the year to satisfy the yearly requirement. Further, the notices must be issued each and every year, regardless of whether there has been any change in the employee's compensation.

An additional notice must also be given to an employee any time there is a reduction in pay or a change in any other information contained on the wage notice, such as a change in payroll date frequency. A new notice does not need to be given if there is an increase in pay.

As a reminder, the WTPA requires that the notice be provided to the employee both in English and also in the employee's primary language as identified by the employee, provided that the notice form is available from the New York State Department of Labor ("DOL") in such language. If no such form is available, the English notice form will be deemed sufficient. Currently forms are available in English, Spanish, Chinese, Korean, Creole, Polish and Russian.

We recommend that any inquiry into an employee's primary language include a statement that the inquiry is being made pursuant to New York state law and that the information being provided will be used only to provide proper notice to the employee and not for any other purpose.

Employers must retain the signed original notices for a period of not less than six (6) years and must make the signed notices available to the DOL upon request.

Further Information and Forms

Further information, and answers to some frequently asked questions, can be found at: http://www.labor.ny.gov/workerprotection/laborstandards/PDFs/wage-theft-prevention-act-faq.pdf

Employers may use the forms available from the DOL or they may craft their own forms, provided that any such form complies with all requirements of the WTPA. As there are very specific requirements as to what information must be included on the form, we recommend that employers use the forms provided by the DOL and do not craft their own forms. The DOL's template notice of pay rates, pay days and employee acknowledgement forms can be found on the DOL's website at: http://www.labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm.

Form LS52 - provides general guidelines about the law.

Form LS 53 - explains the notice forms for the various categories of employees.

Form LS54 - is the form to be used for employees who are paid hourly.

Form LS59 - is the form to be used for salaried, exempt employees.

Action Steps

We recommend that employers take the following steps:

- Create administrative procedures now, in preparation for the annual notice requirement which will need to be fulfilled between January 1 and February 1, 2012.
- Keep all signed notice forms for a period of not less than six (6) years.

Year-End Performance Appraisals – Dos and Don'ts

In the final quarter of the calendar year, many employers are thinking about conducting performance reviews of their employees. Performance reviews can be a valuable management tool. However, when not conducted properly, a review can potentially do more harm than good.

This article provides some basic "dos and don'ts" for conducting performance reviews which can help employers maximize the benefits that both the employer and the employee gain from the performance appraisal process.

- **Establish a Schedule.** If your employee manual indicates that performance reviews are conducted at least annually, be sure to conduct performance reviews at least annually. Prioritize and make time in your busy schedule to conduct reviews in a timely manner.
- **Be Honest.** It is imperative that any supervisory employee who will be conducting a performance review understands the importance of being honest and accurate during the appraisal. Most people are uncomfortable openly criticizing others. Supervisors must be trained to offer constructive criticism along with praise. We often encounter situations where an employer wants to terminate an employee for poor performance, but when we look back at the performance reviews for the past few years they are overwhelmingly positive because the supervisor "felt bad" about being negative.
- **Prepare.** Do not wait until just before the review to think about what points you would like to cover. Remember that the review comprises the entire review period, which is the entire year if reviews are only done annually. Have an outline in mind of how you would like the discussion to go. Know what key points need to be discussed and have a clear vision of what you would like the employee to take away from the discussion.
- **Setting.** Conduct the discussion in a private, quiet place. Be certain to allow adequate time for the discussion; do not make the employee feel rushed.
- **Avoid Surprises.** As instances of poor performance arise during the year, bring them to the employee's attention and establish a clear path for improvement. Jot down some contemporaneous notes documenting the key facts of the incident and save those notes in the employee's personnel file. If there are incidents from the year, remind the employee of them at a year-end review.
- **Encourage.** A year-end review should be a mix of constructive criticism and encouragement. If there are any outstanding achievements that the employee made during the year, be sure to recognize them. Mention a few key areas where the employee has succeeded and encourage him/her to keep up the good work in those areas.
- **Be Professional and Respectful.** Understand that the employee is likely anxious. Conduct the meeting in a business-like tone. Even if the subject matter gets challenging, do not demean or belittle the employee, and do not raise your voice. If the employee becomes unusually emotional or upset, stop speaking, take a moment and resume the conversation when the employee has calmed down. Unless there is an unavoidable emergency, do not take phone calls or check emails during the discussion.
- **Encourage a Dialogue.** The employer should not do all the talking in the review. Ask the employee for feedback on his/her experiences working at the company during the past year. Encourage the employee to share ideas and goals for making the relationship better and the workplace more productive.
- **Give a Clear Path.** Focus on what was expected of the employee during the year, what he/she achieved and outline some key areas for improvement. Give clear examples where appropriate, and avoid making overly general statements without giving the employee a clear path to succeed. (Ex. "you should communicate better with the group" vs. "you can improve your communication with the group by doing x, y and z"). End the discussion by giving the employee a clear vision of what is expected in the coming year. Set concrete goals if possible. If there are specific areas where improvement is needed, explain why you believe there was a failure and what you would like the employee to do to rectify the failure going forward.
- **Written Appraisal.** If a written form is being used, make sure it is appropriate for the positions being reviewed. Generally, a form based on numerical rankings in broad categories without further color is not helpful. If no written evaluation form is used, make some notes of the factual points made during the discussion and the goals established for the employee in the coming year and keep the notes in the employee's personnel file.

One of the primary objectives of a performance appraisal is to improve performance. One of the best ways to achieve improved performance is by taking the time to implement a solid year-end appraisal process which engages the employee in a dialogue and fosters the creation of collaborative solutions to make the workplace a better and more efficient place for both employer and employee.

Hostile Work Environment Claims May Now Be Easier To Prove Under The New York City Human Rights Law

A New York appellate court recently ruled that employees who bring claims of hostile work environment under the New York City Human Rights Law now have a lower standard to prove liability than employees who sue under federal or New York state law. In 2005, an amendment to the New York City Human Rights Law provided it was to be construed broadly in favor of plaintiffs. This September, the Appellate Division, Second Department applied the amendment to hostile work environment claims to establish a more liberalized standard that was applied retroactively in *Nelson v. HSBC Bank USA*, ___ A.D.3d ___, 2011 N.Y. Slip Op. 06481 (2d Dep't Sept. 13, 2011).

The plaintiffs in *Nelson*, four African-American women, worked at a Brooklyn branch of defendant HSBC Bank. Plaintiffs filed a complaint in 2003, alleging that while employed at HSBC they were victims of discrimination on the basis of race in violation of the New York State Human Rights Law (Executive Law § 296) and the New York City Human Rights Law (Administrative Code of the City of New York § 8-107). The case went to trial on plaintiffs' disparate treatment and hostile work environment claims. A jury found in favor of the defendants on all claims and a verdict was entered dismissing the complaint. The plaintiffs appealed. The Appellate Division modified the judgment and remanded the case for a new trial, holding that the jury instructions that required defendants' conduct to be "severe and pervasive" to constitute harassment, was reversible error.

The court held that "under the New York City Human Rights Law, liability for a harassment/hostile work environment claim is proven where a plaintiff proves that he or she was treated less well than other employees because of the relevant characteristic." *Nelson,* 2011 N.Y. Slip Op. 06481 (citing *Williams v. New York City Housing Authority*, 61 A.D.3d 62, 66 (1st Dep't 2009)). In so holding, the court explained that the 2005 amendment to the New York City Human Rights Law, called the Local Civil Rights Restoration Act, was meant to clarify the scope of the statute, which had been construed too narrowly. Specifically, the amendment provided that the New York City Human Rights Law provisions "shall be construed liberally… regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed." *See* Administrative Code, § 8-130. The court in *Nelson* concluded "it is now beyond dispute that the provisions of the New York City Human Rights Law must be construed broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." While the amendment did not explicitly state it was to be applied retroactively, the court in *Nelson* concluded that the amendment was remedial in nature, and "[t]he remedial purpose of the amendment would be undermined if it were applied only prospectively."

Although it held that a lower standard applies under New York City Human Rights Law for harassment claims, the court in *Nelson* also recognized an affirmative defense for defendants who can "prove the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences." *Nelson,* 2011 N.Y. Slip Op. 06481.

The standard for proving liability addressed in *Nelson* is not the only substantive difference between claims brought under the New York City Human Rights Law and the New York State Human Rights Law. Employers should also recall that the affirmative *Faragher-Ellerth* defense, available under federal and state law for claims of sexual harassment and retaliation, is not available to defendants accused of those same claims under the New York City Human Rights Law. *See* Summer 2010 Employment Law Newsletter, "An Anti-Harassment Policy and Complaint Procedure Is Not a Defense for Harassment Perpetrated by Supervisors Under New York City Law."

DOL Holds Revealing A Whistleblower's Identity Is An Adverse Action Under Broad Application of Sarbanes-Oxley Act Protections

A September 13, 2011 decision of the U.S. Department of Labor's Administrative Review Board ("ARB") in *Menendez v. Halliburton, Inc.*, ARB Case Nos. 09-002, 003 (ARB Sept. 13, 2011), held that the whistleblower provisions of the Sarbanes-Oxley Act of 2002 ("SOX") will be construed broadly in favor of employees and that revealing the identity of a whistleblower is an adverse action under SOX.

Background

Anthony Menendez was hired by Halliburton, Inc. as a Director of Technical Accounting Research & Training in March 2005. Shortly after he commenced employment, in June and July 2005, Menendez raised concerns about Halliburton's accounting practices to his direct supervisor. Halliburton ordered a review of its practices, and ultimately disagreed with Menendez. After Menendez requested another meeting with his supervisor to discuss his continued misgivings, he was advised that if he had concerns, he could contact the Audit Committee of the Board of Directors under SOX.

Instead, in November 2005, Menendez made a confidential complaint to the U.S. Securities and Exchange Commission ("SEC") reporting that he suspected that Halliburton was engaging in questionable accounting practices, implicating his supervisor and Halliburton's external auditor, KPMG. In February 2006, Menendez learned that the SEC had contacted Halliburton. He then emailed a complaint to Halliburton's Audit Committee, asserting the same concerns he raised with the SEC. While he provided his name and contact information in his email to the Audit Committee, he expected that his identity would remain confidential.

Halliburton, however, did not maintain Menendez's identity as confidential. The Assistant General Counsel, who also received Menendez's email complaint, forwarded it to the Audit Committee, as well as to the company's General Counsel and the CFO who, in turn, forwarded it to KPMG, Menendez's supervisor, and Halliburton's Vice President for Investor Relations. When the SEC notified Halliburton that it was commencing an investigation, the General Counsel issued a document retention notice to a number of management officials, noting that "the SEC has opened an inquiry into the allegations of Mr. Menendez." Many of the individuals who received the email then forwarded it on to their teams – including to Menendez's team – thus expanding the group who knew that Menendez had blown the whistle on Halliburton.

After Menendez realized that his identity had been revealed within Halliburton, he left the office for a week on a pre-scheduled leave. When he returned to work, he was shunned by his coworkers and colleagues at KPMG, with whom he normally had a close working relationship. About a month later, in March 2006, Menendez requested, and in early April received, approval to take a six-month paid leave of absence. While Menendez previously had been scheduled to teach a training course in June, that duty was reassigned.

During Menendez's leave of absence, the SEC completed its investigation and declined to pursue any enforcement action, and the company's internal investigation confirmed that no changes to its accounting practices were required. Menendez was scheduled to return to work on October 18, 2006, but was advised that upon his return he would report to a different supervisor. By letter dated October 17, 2006, he resigned from employment, noting that he believed he had been demoted by requiring him to report to a different supervisor, and that he believed that Halliburton would continue to violate securities laws and file inaccurate financial information.

The Whistleblower Action

In May 2006, during his leave of absence, Menendez filed a SOX whistleblower complaint, alleging that Halliburton retaliated against him for filing complaints with the Audit Committee and SEC. A hearing was held in late September 2007 before an Administrative Law Judge ("ALJ"). The ALJ found that Menendez engaged in protected activity under SOX, but dismissed the case, finding that Menendez failed to show that Halliburton had taken adverse action against him. Both parties appealed.

The ARB Confirms Menendez Engaged in Protected Activity

Halliburton appealed to the ARB from the portion of the ALJ's ruling that found that Menendez engaged in protected activity. Under SOX whistleblower analysis, an employee's belief that his employer is violating an SEC rule or regulation must be both objectively and subjectively reasonable. *Menendez* at 12. The ALJ found, and the ARB confirmed, that the evidence supported a finding of both subjective and objective reasonableness. Testimony from witnesses, including Halliburton officials, revealed that they agreed with some, but not all, of Menendez's concerns, and that reasonable minds may differ on the complex issues at hand. *Id*. The ARB also rejected Halliburton's argument that Menendez's concerns were not material. *Id*. at 13-14. SOX's plain language does not contain a materiality requirement. *Id*. It did not matter that the SEC and internal investigations ultimately found that there was no violation because an employee's reasonable but mistaken belief of employer misconduct still may constitute protected activity. *Id*.

The ARB Clarifies the SOX Adverse Action Standard

Though it found that Menendez had engaged in protected activity, the

ALJ dismissed the case because it found that Halliburton did not engage in any retaliatory adverse action. On appeal, the ARB held that the disclosure of Menendez's identity was an adverse action and remanded the case for further proceedings.

Before the ALJ, Menendez argued that he was subject to five adverse employment actions: breach of confidentiality; isolation within his job; removal of duties; demotion; and constructive discharge. *Id*. at 14. The ALJ found that the Supreme Court's definition of the types of adverse action under the anti-retaliation provisions of Title VII as articulated in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), applies to SOX whistleblower cases, but found that Menendez failed to show that he suffered "tangible job consequences" -- a stricter standard than that set forth in *Burlington*, which requires only that the conduct be such that would deter a reasonable employee from engaging in protected activity. *Menendez at 14*.

The ARB noted that SOX explicitly prohibits non-tangible retaliatory activity, and the legislative history confirms that Congress intended that SOX's whistleblower provisions be construed broadly to encompass a wide array of adverse employment actions to give maximum protection to whistleblowers. *Id*. Specifically, Section 806 states that no company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" because an employee engaged in a protected activity. *Id*. at 15.

The ARB clarified that the term "adverse action" for purposes of SOX means "unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions." *Id*. at 17. The ARB further noted, however, that Burlington's analysis of Title VII's anti-retaliation provisions provided a helpful framework for analyzing SOX claims. *Id*. at 20.

In particular, the ARB found that while the SOX whistleblower provision refers to "the terms and conditions of employment" in defining adverse action, such language did not limit the scope of the types of adverse action prohibited by the statute, which should be construed broadly. *Id*. at 18. Rather, actionable harm under SOX is that which would deter a reasonable employee from engaging in protected activity, like the *Burlington* court held, and is not limited to just economic or employment related actions. *Id*. at 20.

The ARB Holds That Revealing A Whistleblower's Identity Is An Adverse Action

Viewing the ALJ's findings of fact through the lens of a broader legal standard, the ARB affirmed the ALJ's findings that Menendez did not show an adverse action under SOX based on his allegations of isolation, removal of duties and demotion, but ruled that Halliburton's breach of confidentiality was an adverse action.

The ARB emphasized that maintaining the confidentiality of a whistleblower's identity is one of the hallmarks of the SOX legislation. Specifically, Section 301 of SOX requires publicly traded firms to institute procedures for their employees to make anonymous, confidential reports of questionable accounting or auditing practices so as to encourage employees with information to come forward. *Id*. at 23-24. It would undermine the purpose of the statute and discourage potential whistleblowers if employees were not protected from employer retaliation if the employer were to reveal the identity of a confidential tipster. *Id*. at 24. Indeed, the ARB found that the right to confidentiality under Section 301 constitutes a "term and condition" of Menendez's employment, which Halliburton violated. *Id*.

Managing Whistleblower Claims After *Menendez*

The lesson of *Menendez* is clear -- employers must maintain strict confidentiality of the identity of whistleblowers. Even when an employer must notify members of its business, legal or accounting departments in connection with internal investigations or document preservation requirements, the identity of the tipster should not be revealed, especially to the whistleblower's supervisor. Employers should review their whistleblower policies to ensure that there is a protocol in place to maintain the confidentiality of a whistleblower's identity while fulfilling all investigative and reporting obligations that may arise from a whistleblower complaint.