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SECOND CIRCUIT COURT RECOGNIZES HOSTILE WORK ENVIRONMENT CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT

In *Fox v. Costco Wholesale Corporation*, an employee sued his employer, asserting a claim for a hostile work environment under the Americans with Disabilities Act ("ADA") because he was ostracized by coworkers for having Tourette's Syndrome ("Tourette's") and Obsessive-Compulsive Disorder ("OCD"). The United States Court of Appeals for the Second Circuit faced the issue whether hostile work environment claims can be brought under the ADA.

The employee worked as a cashier and greeter. As part of his neurological condition, the employee would often touch the floor before moving, had a verbal tic, and would cough when he would feel a verbal tic come on to prevent others from hearing him swear. He had no issues at work for approximately seventeen years. Then, there was a change in management and the employee began having problems at work. On one occasion, the employee was reprimanded for telling a customer that she looked beautiful with her

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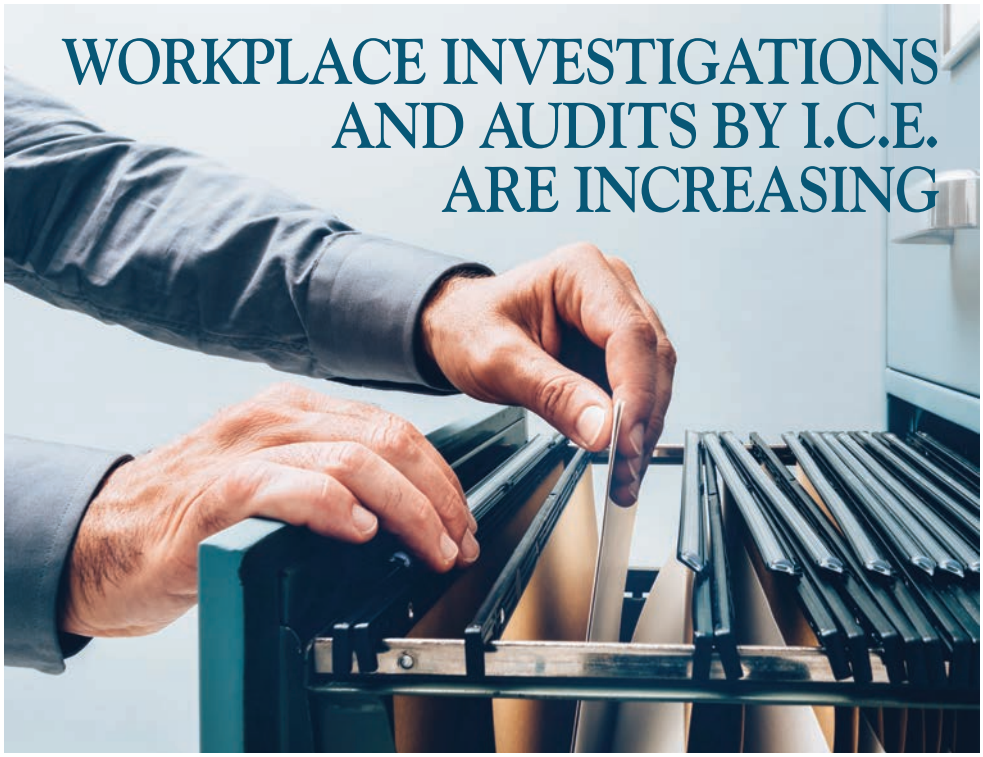
WORKPLACE INVESTIGATIONS AND AUDITS BY I.C.E. ARE INCREASING



All employers in the United States must complete the Form I-9 to verify each new employee's (citizen and non-citizen) right to work in the United States. Newly hired employees must complete and sign the employee portion of the form no later than the first day of employment. Employers must then collect documents that establish identity and employment authorization, make copies of them, and fill out the employer portion of the form within three business days of the employee's first day of employment. A list of acceptable documents can be found on the form itself. Employees must keep the completed form in each employee's personnel file. Failure to properly complete the Form I-9 may result in fines of over $1,000 per employee.

The United States Immigration and Customs Enforcement (ICE) has been cracking down on employers suspected of hiring undocumented and unauthorized immigrant workers. Between fiscal years 2017 and 2018, the number of worksite investigations increased from 1,691 to 6,848. The number of audits regarding Form I-9 went from 1,360 to 5,981. ICE has indicated that its increased efforts are part of an initiative to increase immigration enforcement across the U.S. "Reducing illegal employment helps build another layer of border security and reduces the contin-

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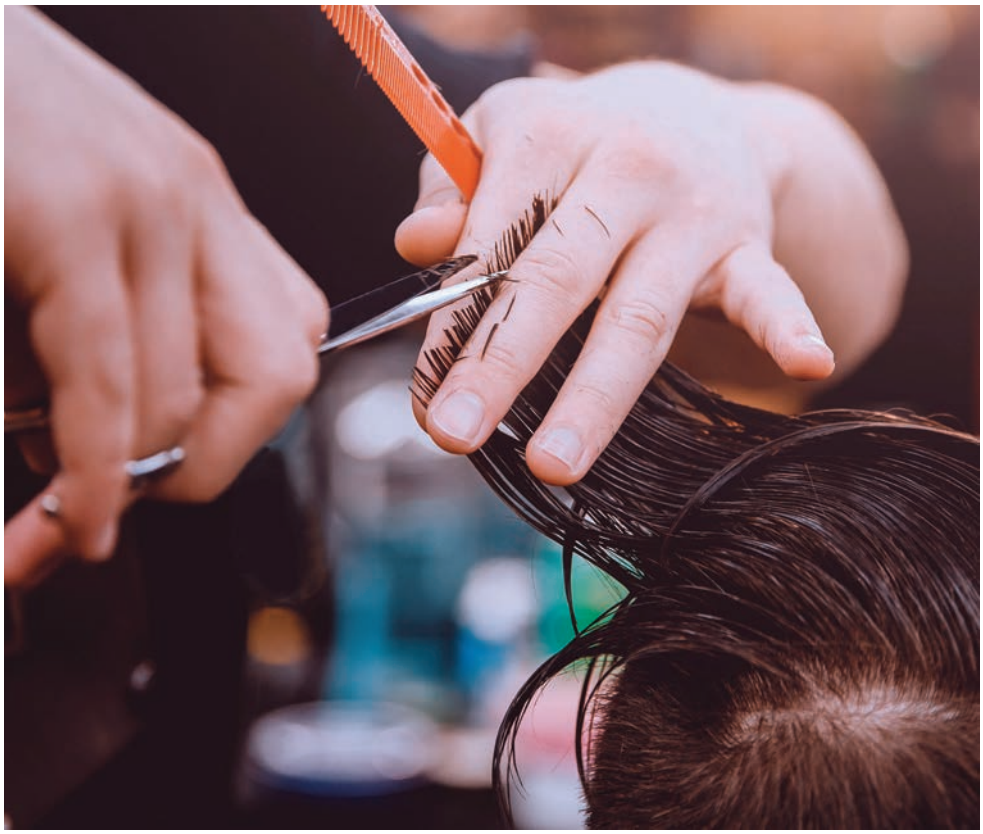
INTERN V. EMPLOYEE

In 2015, the Second Circuit, in *Glatt v. Fox Searchlight Pictures, Inc.*, applied the "primary beneficiary" test, stating that if, under certain circumstances, the intern is the "primary beneficiary" of the relationship, then the host entity is not the intern's employer and has no legal obligation to pay compensation under the FLSA or the NYLL. If, on the other hand, the host entity is the "primary beneficiary" of the relationship, then the entity is an employer and both federal and state law impose compensation obligations. The court considered what the intern received in exchange for his or her work, the economic reality of the relationship between the intern and the employer, the complexities of the relationships involving the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment, and the extent to which the intern's work complemented, rather than displaced, the work of paid employees. A student's work is complementary if it requires some level of oversight or involvement by an employee.

In *Velarde v. GW GJ, Inc.*, a cosmetology student sued a cosmetology school, seeking to collect unpaid wages based on allegations that the school violated the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL). The United States Court of Appeals for the Second Circuit examined whether the "primary beneficiary" test applied to individuals enrolled in a for-profit vocational academy who were preparing to take a state licensure test and who had to fulfill state minimum training requirements.



The student, desiring to become a cosmetologist in New York, enrolled in the cosmetology school, a for-profit training school. He finished the school's program, having successfully completed 1,000-hour course of study in cosmetology, which satisfied the requirements of license applicants in New York. The course included both classroom instruction and supervised practical experience in a student salon, in which members of the public could receive cosmetology services and the students could practice and refine their skills. The school charged clients a reduced price and as a for-profit enterprise, derived some of its revenues from the fees paid by the salon's clients. The student worked 34 hours per week for a period of 22 weeks and performed barbering and hair styling, skin and body treatments, and manicure and pedicure services for the public. Three years after finishing the program, the student sued the school for unpaid wages, alleging that he was an employee and the school violated the FLSA and NYLL by failing to pay him for the work that he did in the salon while he was enrolled in the school. The trial court ruled in favor of the school and the student appealed.

Here, the Second Circuit, applying the primary beneficiary test described above, held that the student was the primary beneficiary of the relationship. He was required to complete 1,000 hours of

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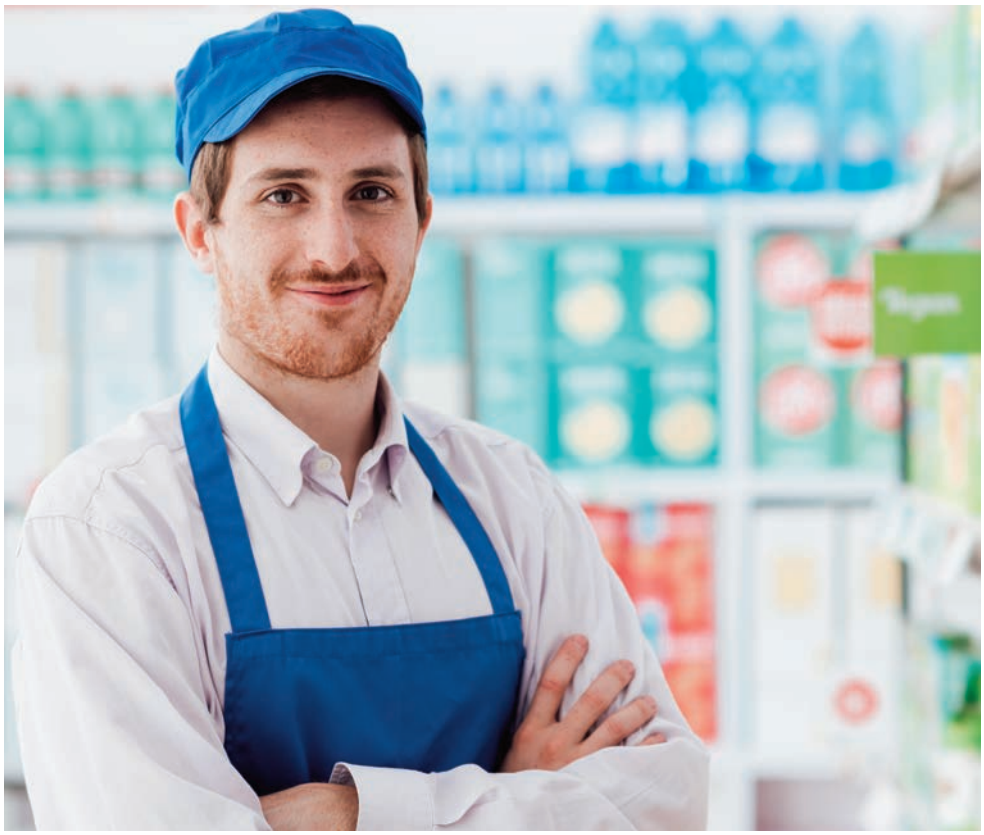
pocketbook. A few months later, the employee told a customer that she was the love of his life. When asked by his manager about it, the employee stated that he could not always control what he said. As a result of this incident, the employee was demoted to assistant cashier, a position that would require him to have less contact with customers. Once he began his position as an assistant cashier, other co-workers began mocking him because of his Tourette's and OCD. These comments were often heard by management and no action was taken. The employee eventually complained via email to the company's CEO. The CEO transferred some of the employee's supervisors, but the employee's co-workers continued to treat him poorly due to his disability. The employee eventually filed a lawsuit against the company. The trial court ruled in favor of the company, and the employee appealed to the Second Circuit.



Under the ADA, a covered employer "shall [not] discriminate against a qualified individual on the basis of disability in regard to . . . terms, conditions, and privileges of employment." The court found that Congress had borrowed this language from Title VII of the Civil Rights Act of 1964, which similarly provides that it "shall be an unlawful employment practice for an employer to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment." Because the ADA echoes and expressly refers to Title VII, and because the two statutes have the same purpose – the prohibition of illegal discrimination in employment – the court held that disabled Americans should be able to assert hostile work environment claims under the ADA, as can those protected by Title VII. Here, the court found that the employee's allegations of his co-workers' comments about this Tourette's and OCD were ongoing and pervasive and overturned the trial court's decision. In recognizing that hostile work environment claims can be brought under the Americans with Disabilities Act (ADA), the Second Circuit joined the Courts of Appeal for the Fourth, Fifth, Eighth and Tenth Circuits.

Employers who have employees with disabilities should be mindful and sensitive to their disabled employees' needs. Managers and supervisors should never engage in any conduct that makes disabled employees feel ostracized or uncomfortable and should not allow employees to do so either.

If you have any questions regarding this or any other labor and employment law matter, please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131.

CLIENT CONCERN CORNER

I had been unhappy with my office manager for several months. Her attitude has been terrible and I have had many complaints from her subordinates about her being abusive. She has been insubordinate to me and has failed to complete assignments on time. She has worked for me for many years and I never had any issues with her before. I have spoken to her many times to try to find out what her problem was. I have suggested that she go see a counselor or therapist for help. She has resisted all my efforts to help her. I have reached the end of my rope and I want to terminate her. I have not given her any written warnings. Do I face any legal exposure?

Possibly. Any time an employer terminates an employee there is a possibility that a lawsuit may follow. An employee can allege that he/she was the victim of discrimination based on race, sex, age, disability, religion, national origin, etc. In this case, she may allege that you discriminated against her on the basis you had a perception that she had a disability as evidenced by your suggestion that she see a therapist. Even though she may not have a disability, under the law it is actionable if you acted because you had the mistaken belief or perception that she had a disability. It certainly sounds like you had legitimate grounds for termination. However, in a trial, you would have some evidentiary problems. Even though you gave her no written warnings, you should be able to document that she failed to complete assignments on time. Her subordinates can testify as to specifics as to how she was abusive and you can testify about her attitude and insubordination. Of course, the employee could testify denying abuse, poor at-

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uum of crime that illegal labor facilitates, from the human smuggling networks that facilitate illegal border crossings to the associated collateral crimes, such as identity theft, document and benefit fraud, and worker exploitation. Employers who use an illegal work force as part of their business model put businesses that do follow the law at a competitive disadvantage," Homeland Security Investigations Executive Associate Director Derek Benner said in a statement released by ICE. The number of investigations and I-9 audits is projected to continue increasing in 2019.

Employers often hire undocumented workers with the false belief that these workers do not need to be paid overtime wages or offered other employee benefits required under the law. However, neither the U.S. Department of Labor (USDOL) nor the New York State Department of Labor (NYSDOL) are concerned with a worker's immigration status when it comes to wage and hour violations and other employment violations. Similarly, federal and state courts offer undocumented workers an avenue for legal recourse without inquiring into their immigration status. Workers are becoming increasingly aware of this and are making wage and hour claims and other employment-related claims. Employers should always verify an individual's right to work legally in the U.S. and ensure their payroll practices are in compliance with the law to reduce their exposure to liability.

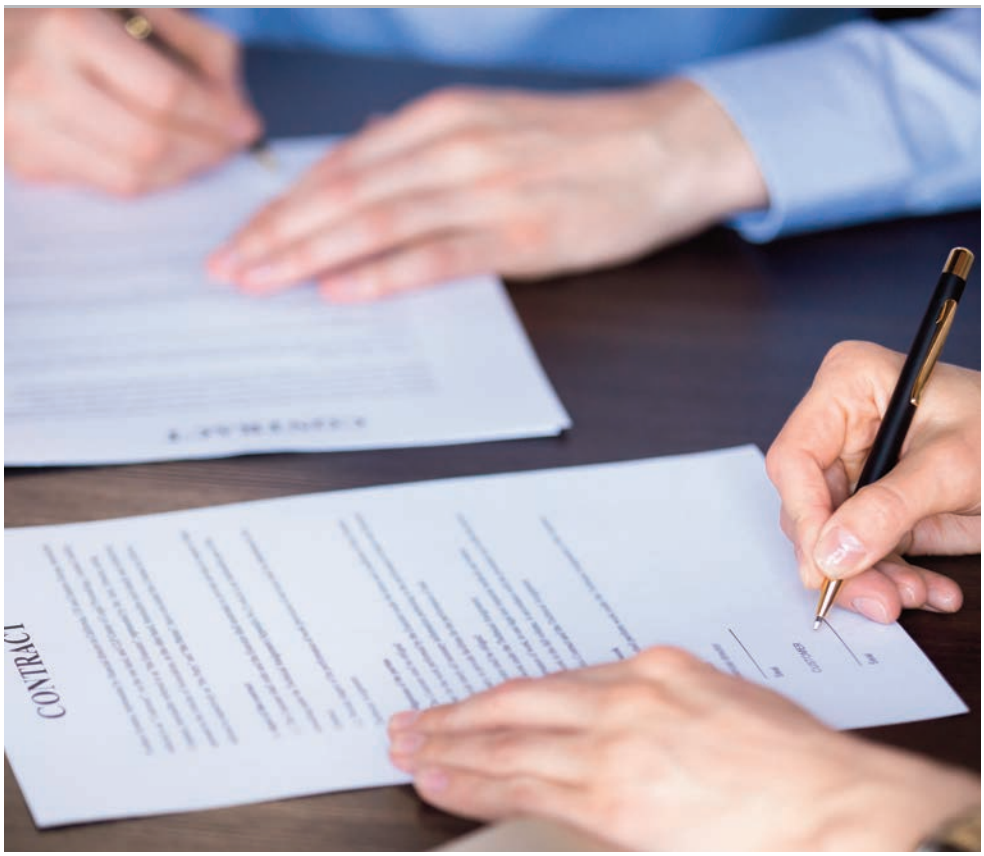
If you have any questions regarding this or any other labor and employment law matter, please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131.

REMARKABLE RESULTS

STATUTE OF FRAUDS — SHOULD MY CONTRACT/AGREEMENT BE IN WRITING?

In New York, there are particular contracts/agreements that must be in writing in order to be valid and enforceable in a court of law. This is known as the Statute of Frauds and is codified in New York's General Obligations Law Section 5-701. If a particular contract/agreement is not in writing the consequence is harsh as it will be barred and unenforceable by the Statute of Frauds.

We recently relied upon the Statute of Frauds to have a lawsuit against one of our clients dismissed from the outset. In this particular case, our client and a business partner, who were both CPAs, had allegedly negotiated the transfer of particular clients of an accounting business to our client. The terms of the proposed deal were that our client, over a four (4) year period of time, would pay on a monthly basis a percentage of receivables from accounts that had been successfully transferred to him and for which our client had performed accounting services. However, the terms of this proposed deal were never agreed to in a signed writing by either of the parties. Pursuant to New York's General Obligation Law Section 5-701(a)(1), "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith…if such agreement, promise or undertaking…[b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime." Since the proposed agreement could not be performed within one (1) year, as it was proposed to be a four (4) year deal, the alleged oral agreement by our client to pay a percentage of receivables over that four (4) year period of time was void and unenforceable.



Ultimately, a breach of contract action was commenced against our client in an attempt to enforce this proposed oral agreement. We immediately made a motion to dismiss the case against our client on the grounds that the oral agreement was void and unenforceable by the Statute of Frauds. The Court agreed and dismissed all contractual claims against our client, which avoided a long and costly legal battle.

This is one of many examples as to why it is essential that any time parties reach an agreement, no matter what that agreement is, they consult with an attorney who is versed in this area of law.

If you have any questions regarding this or any other labor and employment law matter, please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131.

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coursework to qualify for taking the cosmetology license examination, and the court found it meaningful that the school required him to complete the exact number of hours required by the State of New York to qualify for licensure. It was also relevant to the court that the student performed services under the supervision of the school's instructors. Further, the school's enrollment agreement and catalogue advised the student that coursework would include both classroom and practice components, and the student was aware that he would pay the school, a for-profit entity, for his participation in both components. The fact that the school received some advantage from the student's work did not create an employer-employee relationship.

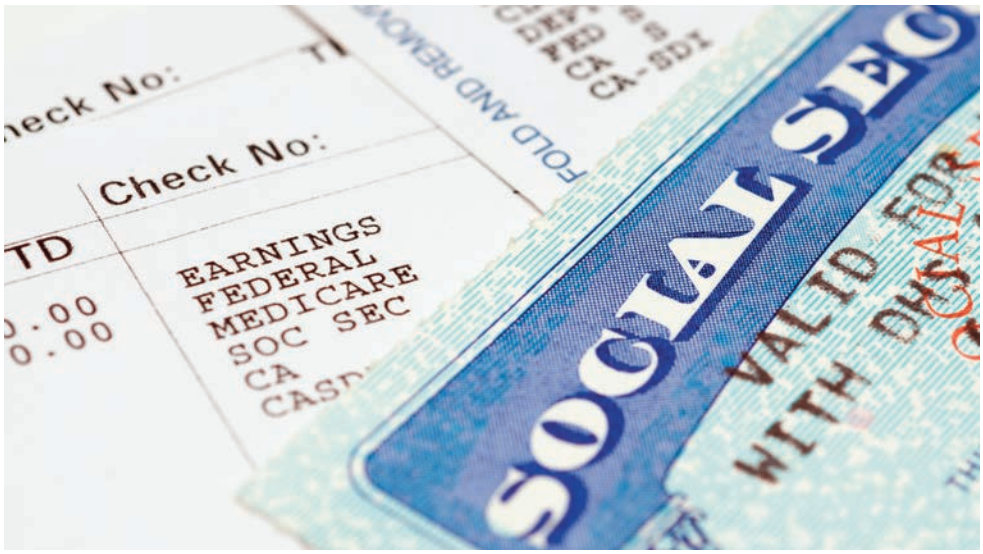
Employers who use interns should be mindful of the "primary beneficiary" test and understand that interns are not free labor. If you have any interns in your place of business, please contact an attorney from Franklin, Gringer & Cohen, P.C. to ensure that he or she is not an employee under the law.

IMPORTANT LAW UPDATE FOR ALL EMPLOYERS IN NEW YORK CITY

- Effective March 18, 2019, the New York City Administrative Code will be amended to require employers in New York City with four or more employees to:
  - Provide a designated lactation room for employees; and
  - Implement a lactation room accommodation policy.
- The law will require covered employers to provide employees needing to express breast milk with access to a lactation room and a refrigerator suitable for breast milk storage, "in reasonable proximity" to the employee's work area.
- Under the law, a lactation room is defined as "a sanitary place, other than a restroom, that can be used to express breast milk shielded from view and free from intrusion and that includes at minimum an electrical outlet, a chair, a surface on which to place a breast pump and other personal items, and nearby access to running water."
- Employers would not be required to create a dedicated lactation room, but if the room designated for lactation is also used for other purposes then:
  - The room must be used solely as a lactation room during times when an employee is using the room to express milk; and
  - The employer must provide notice to other employees that the room is given preference for use as a lactation room.
- If providing a lactation room creates an undue hardship for an employer, the employer is nevertheless obligated to engage in a cooperative dialogue with employees to determine what, if any, alternate accommodations may be available, and to provide a written final determination to employees at the conclusion of the cooperative dialogue process, identifying any accommodations granted or denied.
- The written lactation room accommodation policy must be distributed to all new employees upon hire and to current employees. The policy must include a statement that employees have a right to request a lactation room and identify a process by which employees could request a lactation room.

If you have any questions regarding this or any other labor and employment law matter, please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131.

SOCIAL SECURITY ADMINISTRATAION IS ISSUING "NO MATCH" LETTERS AGAIN



Starting in October 2018, the Social Security Administration (SSA) began issuing "no match" letters to employers, which inform them which employee's W-2 information does not match the information in SSA's records. SSA originally began issuing these letters in 1993. SSA would send an annual letter informing employers and employees that there was a discrepancy between the employee's W-2 information and SSA's records. In 2012, SSA stopped sending the letters because it felt that E-Verify and other methods were a more effective way of detecting and reducing unauthorized employment. SSA has now revived the practice and is sending more and more of these letters to employers across all industries.

When an employer receives one of these "no match" letters, it does not necessarily mean that the employee does not have a valid social security number or that they are not authorized to work in the United States. A number of things can cause the discrepancy besides an individual not having a valid social security number. For example, "no match" letters may be generated due to a reporting or clerical or administrative error by the employee, employer, or SSA. The letters can also be generated if an employee has a name discrepancy, which may include an unreported name change or multiple last names. Regardless of the reason, employers should not take any adverse action against an employee simply because their name and social security numbers do not match. Taking an adverse action against an employee due to a discrepancy in their social security number and/or name can potentially lead to a discrimination claim. The appropriate thing for employers to do is to inform the employee, in writing, that there was an issue with their information and that they should contact a local SSA office to correct the problem. Eventually, if the problem is not corrected, the employer may have to take further action.

If you have any questions or have received a "no match" letter from SSA and would like to find out how to proceed, please call an attorney at Franklin, Gringer & Cohen, P.C. at 516-228-3131 to discuss it.

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CLIENT CONCERN CORNER

titude and insubordination setting up a credibility issue for a judge or jury.

We recommend that in counselling an employee, the employer focus on the performance and where it is lacking and not try to play doctor to ascertain the cause to avoid this kind of allegation. Also, there should be written warnings, and possibly performance improvement plans. You should consider giving her a written warning now about her performance before terminating her if her performance does not improve. You may also consider the option of offering her a severance package in exchange for a release of claims.

If you have any questions regarding this or any other labor and employment law matter, please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131.

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We have over ninety years of combined experience representing employers in labor relations and employment law matters. We believe that there are numerous advantages for a company to look to a firm that has practiced labor and employment law for many years in both preventing and defending employment discrimination litigation. Our foremost concern is to avoid litigation whenever possible through preventive planning. Our clients consult with us on a regular basis before taking action to avoid labor disputes and costly lawsuits. The best result for a client is the lawsuit that does not happen in the first place.

We have been giving seminars and writing articles for many years on how to avoid litigation through the use of progressive discipline, documentation, consistent treatment, adoption of anti-harassment policies, employee handbooks, and proper training of supervisory staff. We give this advice because we have seen that it has worked for our clients. Our long-term clients who regularly consult with us before taking adverse disciplinary action rarely face litigation over those decisions.

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