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Employment Practices NEWSLETTER

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Arbitration Agreement Means Arbitrator Determines Validity of Noncompetition Clause, Not Court

Two former oil well workers quit their jobs and began working for a competitor. While employed for the former employer, the employees had confidentiality and noncompetition agreements, which contained arbitration clauses. After they separated their employment, the employer learned that the employees were working for a competitor, and they were served with notice of breach of the noncompetition agreements and a demand for arbitration. The employees sued, asking that the noncompetition agreements be found null and void and seeking to enjoin their enforcement. The Oklahoma Supreme Court held that the existence of an arbitration agreement in an employment contract does not prohibit judicial review of an underlying agreement. The Court accordingly held the noncompetition agreements void and unenforceable. Upon review, the U.S. Supreme Court disagreed. It held that the Oklahoma Supreme Court's decision disregarded well-settled authorities on the Federal Arbitration Act and the policy favoring arbitration. Moreover, the Court noted that when parties commit to arbitrate disputes,

attacks on the validity of the contract, as distinct from the attacks on the validity of the arbitration clause itself, should be resolved by the arbitrator, not the court. The U.S. Supreme Court concluded that because the district court had found that the contract contained a valid arbitration clause, the Oklahoma Supreme Court should not have declared the noncompetition agreements null and void, and instead should have left that determination to the arbitrator. Arbitration agreements can be used effectively to manage litigation. It is important to ensure that they are carefully drafted and comply with federal and state authorities.

Nitro-Lift Technologies LLC v. Eddie Lee Howard, No. 11-1377 (U.S. Sup. Ct. Nov. 26, 2012)

Contact for more information: Amy K. Jensen

Employee's Facebook Pictures Reflecting Conduct Inconsistent With FMLA Leave Supports Employer's Termination Decision

An employee took intermittent leave under the Family and Medical Leave Act (FMLA), but during her leave posted several Facebook pictures showing her drinking at a local festival. Around the same time frame as the festival, the employee had represented to her employer that she was in pain and could not come to work on Monday. Co-workers brought the photographs to a supervisor's attention, and after an internal investigation, which included meeting with the employee, the employer terminated the employee for fraud. During the meeting, the employer addressed employee's communication issues while on FMLA leave, including her request for an extension of her FMLA leave. The employer also addressed the pictures of the employee at the festival, which the employer believed were inconsistent with the statements employee had made in support of her request for FMLA leave. At the conclusion of the meeting, the employer concluded that the employee had failed to offer a reasonable explanation of the discrepancy between her claims and the photos and terminated the employee. The employee sued for retaliation and interference claims related to her FMLA leave. The U.S. Court of Appeals for the Sixth Circuit found that the employer had not interfered with the employee's request for FMLA leave because it had given her all the leave to which she was entitled. The court also found that the employee's retaliation claim failed because she was unable to show a causal connection between her protected FMLA activity and the adverse employment action. In particular, the court held that the employer rightfully considered workplace FMLA fraud to be a serious issue and that the employer's termination of employee because of her alleged dishonesty constituted a nonretaliatory basis for her discharge. This case demonstrates the importance of continued and open dialogue with employees taking leave, as well as the necessity of conducting an investigation into suspected fraudulent activities relative to leaves of absence prior to taking an adverse employment action.

Jaszczyszyn v. Advantage Health Physician Network, No. 11-1697 (6th Cir. Nov. 7, 2012)

Contact for more information: Heidi L. Eckert

Christian Employee Lacks Religious-Accommodation Claim

A Christian police department employee had Fridays and Saturdays off. For religious purposes, the employee requested to have Sundays and Mondays off instead. The employer refused the request, but did offer the employee the option of working a later shift on Sundays so that she could attend church services. The employee sued, alleging that her employer had failed to accommodate her religious beliefs in violation of Title VII of the Civil Rights Act of 1964, as amended. The U.S. Court of Appeals for the Seventh Circuit rejected the employee's claim. The court held that employers have no duty to accommodate an employee's religion "at all costs." Instead, employers must provide a reasonable accommodation that "eliminates the conflict between employment requirements and religious practices." Accordingly, the court found that the employer had satisfied its duty to provide a reasonable accommodation by offering a later Sunday shift to the employee. While employers do not need to provide employees with each and every accommodation requested, employers must still provide a reasonable accommodation to employees who require such an accommodation to practice their religion. This necessarily includes engaging in a dialogue with the employee to determine the nature and extent of the accommodation, and to discuss any available options in terms of accommodations.

Porter v. Chicago, No. 11-2006 (7th Cir. Nov. 8, 2012)

Contact for more information: Leigh C. Bonsall

Nurse Denied FLSA Claim for Failure to Follow Employer's Policies

An emergency department nurse did not have regularly scheduled meal breaks given the nature of her position, but was permitted to take them as work demands allowed. The hospital's employee handbook stated that employees were to take unpaid meal periods, and that the time taken would be automatically deducted from their paychecks. To the extent an employee missed a meal break or had one interrupted by work, he or she was instructed to report this in an "exception log" so that the employer could pay the employee for that time worked. The nurse did not always mark her missed meal breaks in the exception log. She also did not report to human resources or supervisors that she was not being compensated for time spent working while she should have been on break. The nurse sued for violations of the Fair Labor Standards Act, alleging that she was not compensated for working during meal breaks. The U.S. Court of Appeals for the Sixth Circuit found that the nurse had failed to follow the hospital's procedures relating to reporting time worked in the exception log, despite her knowing the policy. The court concluded that because the nurse failed to follow the rules, the hospital would have had no way to know that she was missing breaks or not being compensated for the time spent working. It further opined that an employee must ultimately demonstrate that an employer knew or should have known that he or she was working and not getting paid for the time worked. The employer cannot satisfy its legal obligations if it has no reason to think an employee is being underpaid, and the employee must bear some responsibility for this. The court noted that each time the nurse followed the protocol, she was properly compensated for missed breaks or time worked during breaks, and so she could not now seek to hold the hospital responsible for her own failure to follow the rules. Wage and hour class actions are continuously on the rise. This case demonstrates the importance of having clear, express policies concerning timekeeping.

White v. Baptist Memorial Health Care Corporation, No. 11-5717 (6th Cir. Nov. 6, 2012)

Contact for more information: V. Brette Bensinger

EEOC Requests, and Court Grants, Injunctive Relief to Prevent Recurring Sexual Harassment

The U.S. Equal Employment Opportunity Commission (EEOC) brought a lawsuit on behalf of a class of female employees against a grocery store, alleging sexual harassment and a sexually hostile work environment in violation of Title VII of the Civil Rights Act of 1964, as amended, and New York State law. The sole alleged harasser was the store manager, and although an employee made numerous complaints to management about the alleged harassment, the store owner allegedly discredited the complaints, likely due to the fact that the store owner and the alleged harasser were in a long-term romantic relationship. After a jury trial, the employee was awarded more than $1.25 million in compensatory and punitive damages. The EEOC then sought a 10-year injunction, providing that the employer: (1) could not create or maintain a hostile work environment or retaliate against employees; (2) could not employ or compensate the alleged harasser in any way, except for purchasing produce from him; (3) must bar the alleged harasser from the building, (4) must produce and distribute copies of a notice indicating that the alleged harasser was barred the building, along with copies of his photograph; (5) must pay for an independent monitor to continually review its employment practices and investigate possible instances of sexual harassment; (6) must amend its nondiscrimination policy and complaint procedure and prominently post the policy; and (7) must conduct an annual training session on sexual harassment for its employees. Finally, the injunction called for the EEOC to be able to monitor the employer's compliance with the injunction, and that the employer would cooperate in compliance reviews. The district court denied the EEOC's request, finding that it was unnecessary and overly burdensome. The U.S. Court of Appeals for the Second Circuit vacated the district court's post-judgment order and remanded the case. The Second Circuit concluded that, at a minimum, the district court exceeded the scope of its discretion when it would not enter the injunction to keep the alleged harasser off the employer's premises and the agreement to not hire him. The court found that these orders were appropriate given the alleged harasser's longstanding romantic relationship with the store owner, which was the reason the sexual harassment went unchecked in the first place. The court further opined that without such an order, nothing prevented the store owner from rehiring the alleged harasser, and/or preventing him from returning to the store to visit her. Ultimately, the court concluded, injunctive relief was necessary to address the "cognizable danger" of the employer engaging in, or allowing recurring violations of Title VII. This case highlights the importance of a prompt, thorough investigation into any harassment complaints, and that often times, a neutral third party is in the best position to conduct that investigation. Failure to take complaints seriously can lead to considerable exposure and liability for an employer, and can lead to the imposition of nonmonetary sanctions, such as those identified in the injunction in this case.

EEOC v. KarenKim Inc., No. 11-3309 (2nd Cir. Oct. 19, 2012)

Contact for more information: Sean N. Pon

"Cold Shoulder" and Workplace Disagreements Do Not Necessarily Mean Discrimination

Two African-American nurses sued their hospital-employer, alleging that it discriminated against them on the basis of race and retaliated against them for their complaints about racial discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended. The nurses had complained about their working conditions at various times throughout their employment, and claimed that their supervisors failed to make the changes that they recommended. They further alleged that they were treated unfavorably due to their race, and retaliated against once they complained of race discrimination. The U.S. Court of Appeals for the Seventh Circuit found that the nurses had not presented any evidence showing that they were treated differently from similarly situated employees. It also found that simply because the employer did not respond favorably to the nurses' complaints did not mean it was because of discrimination, reasoning that Title VII does not protect against personal animosity or juvenile behavior. The fact that "someone disagrees with you or declines to take your advice does not, without more, suggest that they discriminated against you." Regarding the retaliation claim, the court found that the nurses failed to provide evidence of an adverse action by their employer, and that personality conflicts or generally getting the "cold shoulder" from a supervisor is not an adverse action that can serve as a basis of a Title VII claim. This case is a reminder that not all negative actions by a supervisor are protected by Title VII and that Title VII has limitations as to how far it will monitor employee conduct. At the same time, it is important to have proper anti-discrimination, anti-harassment, and anti-retaliation policies in place, and to ensure that employees and supervisors alike are trained accordingly.

Brown v. Advocate South Suburban Hospital, No. 12-1135 (7th Cir. Nov. 21, 2012)

Contact for more information: Eileen M. Caver

Co-Workers' Seemingly Ageist Remarks Insufficient to Create Triable Issue of Fact in ADEA Case

During the course of an investigation into employees fraudulently submitting falsified customer service surveys, a 60-year-old employee was terminated. He subsequently filed an age-discrimination claim pursuant to the Texas Commission on Human Rights Act (TCHRA) and the corresponding federal Age Discrimination in Employment Act (ADEA). The employee alleged that his co-workers called him names like "old man," "old fart," "pops," and "grandpa." He admittedly never reported this before he was terminated. Under the applicable Texas authorities, an employee is entitled to a "presumption of discrimination" if he or she can meet the "minimal initial burden" of establishing a *prima facie* case. Here, the district court did not even decide, but instead assumed that the employee had a *prime facie* case. The employer then had the burden to show a legitimate nondiscriminatory reason for termination — in this case, falsified surveys. The burden then shifted to the employee to show that the proffered nondiscriminatory reason for termination was actually pretextual. The employee argued that the district court improperly applied the "but for" standard of causation when evaluating his claim, but the U.S. Court of Appeals for the Fifth Circuit disagreed, finding that regardless of the test applied, the outcome would be the same, in that there was insufficient evidence to create a triable issue of material fact under the "but for" or "motivating factor" tests. The court found the evidence offered by the employee in

support of his claims merely circumstantial, in that he relied heavily upon his co-workers' alleged comments. The court noted that it initially applies a four-part test to determine whether the remarks are: (1) age related; (2) proximate in time to the termination; (3) made by an individual with authority over the employment decision; and (4) related to the employment decision at issue. If remarks are offered with other discriminatory conduct, a two-part test is used: (1) discriminatory animus (2) on the part of a person who is either primarily responsible for the challenged employment action or by a person with influence or leverage over the relevant decision-maker. The court found that the employee could not prevail, regardless of which standard applied. This case serves as a reminder of the importance of clear policies and sufficient training regarding conduct in the workplace — particularly with respect to inappropriate comments, and to remind employees (verbally and in writing) to report any such instances immediately upon occurrence.

Ronald Reed v. Neopost USA, Inc., No. 12-10104 (5th Cir. Nov. 13, 2012)

Contact for more information: Mellissa A. Schafer

Workers' Comp Attorney Fired for Performance, Not Age or Medical Condition

A 54-year-old attorney suffered a brain aneurism that caused him to take intermittent leave. During his leave, his immediate supervisor approached him about retiring. Upon returning from leave, the attorney received a performance evaluation that disqualified him from earning a raise. The attorney discussed the evaluation with his immediate supervisor and was told that a more senior supervisor was out to "get me too" and that time off did not mitigate the performance issues. The attorney was placed on a performance improvement plan and then terminated when his performance problems persisted. The U.S. Court of Appeals for the Seventh Circuit affirmed summary judgment for the employer on the attorney's Age Discrimination in Employment (ADEA) and Americans with Disabilities Act (ADA) claims challenging the termination. In the age claim, the "get me too" statement was considered ambiguous and not persuasive in establishing that age was the motivating factor for discharge. The retirement suggestion was not persuasive of age animus because there was an alternative explanation for the termination — the attorney's declining performance. Additionally, both statements were made years before the attorney was terminated, and thus were isolated comments insufficient to support the age claim. The disability claim also failed because the attorney relied on his medical diagnosis as evidence that he was disabled, while overlooking his obligation to show that his brain aneurism substantially limited a major life activity. It is important to always document performance issues so that if and when an employee must be terminated, the employer can demonstrate the nondiscriminatory, legitimate business reasons supporting the termination to stave off claims such as these.

Fleishman v. Continental Casualty Company, No. 11-3754 (7th Cir. Oct. 18, 2012)

Contact for more information: Alex Breland

EEOC Can Pursue Pattern-or-Practice Claim Under Section 706 of Title VII

A female applicant who on numerous occasions unsuccessfully applied for a sales representative position with a large corporation, filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) in 2000. The EEOC investigated the claim and ultimately expanded its investigation to include the corporation's hiring practices. In 2002, the EEOC determined there was "reasonable-cause" of discrimination and sent a proposed conciliation agreement to the employer suggesting forms of relief to the female applicant and other similarly situated females. The employer did not respond. Two years later, the female applicant filed a class-action complaint under Title VII of the Civil Rights Act of 1964, as amended. The EEOC joined it in 2005 after efforts to reach conciliation terminated. In 2009, after class-certification was reduced from "nationwide females" to "a class of women in the state of Michigan," the employer sought to have the complaint dismissed on the grounds that the EEOC improperly asserted a "pattern-or-practice discrimination" claim under Section 706 of Title VII. The U.S. Supreme Court in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977), had identified the "*Teamsters* framework" for courts to assess government claims of pattern-or-practice theories of discrimination against employers under Title VII. The employer argued, and the trial court agreed, that the EEOC was unable to file suit under the *Teamsters* framework under Section 706 because such claims were explicitly authorized under Section 707 of Title VII. According to the employer, if the court allowed the EEOC to advance under Section 706 of Title VII then the government would be allowed to "have its cake and eat it too" because that section afforded a claimant greater remedies. The district court conceded that Section 706 does not contain the same "explicit authorization" as Section 707 of Title VII for suits under a pattern-or-practice theory; nevertheless, U.S. Supreme Court precedent permits such claims under both Sections 706 and 707. EEOC charges and subsequent investigations and prosecutions can lead to lengthy litigation and considerable exposure, particularly where courts make decisions such as this which appear to expand the enforcement rights of the agency.

Serrano v. Cintas Corp., No. 10-2629 (6th Cir. Nov. 9, 2012)

Contact for more information: Geri Lynn Arrindell

Adverse Decision Against Union Does Not Estop Retirees From Bringing Action on Same Grounds

An employer reduced health care benefits of employees represented by unions. The unions sued on behalf of the employees, alleging that the reduction in benefits constituted a breach of the collective bargaining agreement as the health care benefits of retirees were vested and could not be reduced. The district court held that the retirees' health benefits were not vested and the U.S. Court of Appeals for the Third Circuit affirmed. The retirees in their individual capacity simultaneously filed a class action lawsuit against the employer on the same grounds as the unions' lawsuit (i.e., benefits were vested and not subject to change). The employer moved for summary judgment, contending that the retirees were collaterally estopped from bringing their case and the district court agreed, granting summary judgment. The U.S. Court of Appeals for the Sixth Circuit reversed, holding that because the retirees were not parties to the unions' lawsuit, they were not estopped from maintaining the instant litigation. The court further found that the six exceptions to the rule against nonparty preclusion did not apply here.

Specifically, the court held that there was no pre-existing substantive legal relationship between the parties as the retirees were not members of the union at the time of the judgment in the unions' lawsuit. The Sixth Circuit found that as the retirees had not provided their assent to be represented by the unions and no "special procedures" had been taken by the district court in the unions' lawsuit to protect the retirees' interests in that action, there was not an understanding by the parties that the unions' lawsuit was brought in a representative capacity on behalf of the retirees and thus, the retirees were not bound by that decision. Based on this case, employers subject to a lawsuit brought by an employee union should consider joining or taking some action to protect the interest of all potential related plaintiffs, including employees and retirees who may have an interest in the action.

Amos v. PPG Indus. Inc., No. 10-3319 (6th Cir. Nov. 1, 2012)

Contact for more information: Elizabeth H. Earl

Hospital's Challenge to NLRB Health Care Rule Denied

A hospital challenged the National Labor Relations Board's (NLRB's) certification of a union as the representative of a "wall to wall" bargaining unit of the hospital's professional and nonprofessional employees. The U.S. Court of Appeals for the D.C. Circuit rejected the hospital's claim that the Health Care Rule (which limits the number and type of bargaining units allowed in an acute care setting) violated Section 9(c)(5) of the National Labor Relations Act, 29 U.S.C. § 159(c)(5) (NLRA) because it endorsed the extent of a union's organization as the controlling factor in determining bargaining units. The court also rejected the hospital's claim that the NLRB violated the rule because the union was required to show, and the NLRB was required to find, extraordinary circumstances to join together a number of the rule's designated units. The court determined that such a showing was not required under the rule. The court further rejected the hospital's procedural objections to union certification, which involved the timing of the NLRB's order and a purported untimely complaint amendment. Accordingly, the petitions for review were denied and the NLRB's cross-applications for enforcement were granted. The court found it "regrettable" that the hospital appeared to simply be seeking "the inevitable delay that review of Board Orders affords." It concluded that "the hospital unleashed a blizzard of arguments to challenge the Board's unfair-labor-practice orders. It might be appropriate to suggest that in appellate argument, the proverbial rifle is preferable to a machine gun." The court's ruling means that acute care facilities facing union organizing efforts may still continue to rely on the longstanding Health Care Rule for guidance on appropriate units.

San Miguel Hospital Corporation v. National Labor Relations Board, Case No. 11-1198 (D.C. Cir. Nov. 2, 2012)

Contact for more information: Angeli C. Aragon

Seventh Circuit Affirms Summary Judgment Against Illinois Eavesdropping Law Claim

An employee was reportedly disgruntled over being allegedly overlooked when she was not considered for a supervisory position that opened up in 2005, but for which she did not apply. Earlier that year, the employee had reported two other employees in an internal complaint and those employees were terminated. The employee called the new supervisor after 9 p.m. on Thanksgiving and let go with a "rant." The supervisor's spouse picked up another phone line and recorded the "rant." The call led to an internal report the next workday, a playing of the recorded call for another supervisor, and later police reports filed by the respective participants to the phone call. Two months later, the employer terminated the employee. She sued her employer, the supervisor, and the recipient/recorder family member, alleging multiple claims, and the court granted summary judgment in favor of the employer. The employee appealed, arguing that factual disputes existed relative to the supervisor's spouse's recording of the phone call, unbeknownst to the employee. The Illinois statute at issue prohibits recording a phone conversation unless all the parties to the conversation consent. Individuals are barred from later using or distributing any data procured through a recording that lacks the required unanimous consent, but there are exceptions, and a significant one covers a situation where one of the parties to the conversation has fear of a crime occurring. The statutory exception imposes specific requirements, including that one of the parties to the conversation makes or requests the making of the recording; that the person has a reasonable suspicion that another party to the conversation has committed, is committing, or is about to commit a crime against that person or a member of that person's immediate household; and that the recording of the conversation may produce evidence of that criminal offense. The U.S. Court of Appeals for the Seventh Circuit found that the fear of crime exemption covered all parties, which led to a conclusion that the employer and the individual defendants did not violate the Illinois eavesdropping law by replaying the recorded "rant" before supervisors of the employee. This case highlights the need for employers to seek counsel when there are allegations of potential criminal activity, and before recordings of some type have been played, in order to properly evaluate the laws that may govern the replaying of such materials.

Carroll v. Merrill Lynch, No. 12-1076 (7th Cir. Oct. 16, 2012)

Contact for more information: Ambrose V. McCall

Illinois Employer Liable for Third-Party Investigator's Invasion of Former Employee's Privacy

An employer suspected one of its former salespersons of violating her noncompetition agreement by contacting the employer's clients as part of her work for a competitor. The employer hired a private third-party investigator to verify its suspicions, providing the investigator with the former employee's personal information including her social security number. The investigator engaged a service to obtain her telephone records, which the employer used to determine whether the former employee had violated her agreement by calling its clients. When the former employee learned of this, she sued the employer, claiming invasion of privacy. A jury found in her favor. On appeal, the Illinois Supreme Court addressed its decision to recognize the tort of "intrusion upon seclusion" as the intrusion, physical or

otherwise, upon the solitude or seclusion of another or his private affairs or concerns, which would be highly offensive to a reasonable person. Here, the Court found that the former employee's privacy was intruded upon by using her personal information to obtain her telephone records. The Court found that the employer was vicariously liable for its investigator's actions because the investigator acted as the employer's agent, and the employer's actions set the wheels in motion for the ultimate violation. Employers — especially those with operations in Illinois — must be mindful of the potential for liability that may arise by virtue of third-party investigators' conduct.

Lawlor v. North American Corporation of Illinois, Case No. 112530 (Ill. Oct. 18, 2012)

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