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Newsletters

Employment Practices Alert - July 2010

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Supreme Court Rules Two-Member NLRB Lacked Authority to Issue Rulings

In December 2007, the four members of the National Labor Relations Board (NLRB) delegated all of the Board's powers to a three-member group. Later that year, the recess appointment of one of the remaining three members expired. In September 2008, the two remaining members issued a ruling in an unfair labor practice case. The respondent company, which had lost in front of the NLRB, challenged the two-member Board's authority to issue rulings. The U.S. Court of Appeals for the Seventh Circuit affirmed the NLRB's decision, but the U.S. Supreme Court reversed. The Supreme Court found that Section 3(b) of the National Labor Relations Act requires that when the NLRB delegates its authority to a three-member group, the group must maintain a membership of at least three in order to continue exercising the delegated authority. For a more complete summary of the case, please see the Special Alert published June 18, 2010. It is anticipated that the remaining cases raising the issue of the two-member NLRB's authority will be remanded to the Board for further consideration and resolution by the current four-member NLRB.

New Process Steel LP v. NLRB, No. 08-1457 (S. Ct. June 17, 2010)

Supreme Court Rules Against Officers in Fourth Amendment Paging Case

Police officers were given pagers by the police department to which they belonged for use while on duty. After data fees exceeded the amount budgeted for a number of consecutive months, an internal investigation was launched into the officers' pager usage. The investigation revealed that numerous officers were using the pagers for personal business while on duty, and those individuals were consequently disciplined. The officers sued, claiming that the police department's investigation violated their Fourth Amendment rights to be free from unreasonable searches and seizures. The U.S. Court of Appeals for the Ninth Circuit ruled in favor of the officers, finding that the search was an unreasonable violation of their expectation of privacy. The U.S. Supreme Court reversed, holding that the search was permissible under the limited facts set forth by this particular case. For a more complete summary of the case, please see the Special Alert published June 18, 2010. Although the Supreme Court ruled against the officers, it seems clear that overly intrusive searches of electronic communications could run afoul of the Fourth Amendment, even when an employer has a legitimate purpose in reviewing those communications. Public employers must take care to ensure that searches of

Attorneys

Anthony E. Antognoli

Linda K. Horras

Concepcion A. Montoya

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electronically stored communications are done in a reasonable way to achieve a limited and legitimate business objective.

City of Ontario v. Quon, No. 08-1332 (S. Ct. June 17, 2010)

Multimillion Dollar Arbitral Award Against Carpenters Union Upheld

A residential construction company filed a grievance against a carpenters' union. The grievance alleged that the union had forced the company to pay its employees hourly, while allowing other contractors who were parties to the same collective bargaining agreement (CBA) to pay their workers on a piecework basis. According to the company, the union's actions were part of a vendetta against the company for challenging union leadership years earlier. The CBA had a "most favored nations" clause, which prohibited the union from applying unfavorable wage rates to one employer and not others. It also included a provision that prohibited paying employees on a piecework basis. The arbitrator found that there were no other contracts with more favorable wage rates between the union and the company's competitors. The arbitrator nevertheless ruled in favor of the company, awarding it $9,434,436 in damages and up to $2 million in attorneys' fees, as damages for the union's selective enforcement of the CBA's "no piecework" clause. The union refused to comply with the award, and the company sued to enforce it. The U.S. Court of Appeals for the Seventh Circuit upheld the award in part. Recognizing the broad fact-finding power of arbitrators, the court held that when "an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's improvident, even silly, fact-finding does not provide a basis for a reviewing court to refuse to enforce the award." The Seventh Circuit's opinion demonstrates the significant deference that will be given to arbitral awards, and the factual determinations that support them.

Prate Installations, Inc. v. Chicago Regional Council of Carpenters, Nos. 09-2453, 09-2517 (7th Cir. Jun. 4, 2010)

Supervisor's False Information Did Not Affect Decision Not to Promote

An attorney for a federal agency was one of three applicants placed on a well-qualified candidate list for a vacant supervisory attorney position in his region. The attorney's supervisor incorrectly reported to the decision makers in the promotion process that other candidates lived outside of the region. Applicants hired from another region were entitled to travel and relocation expenses. Due to budget constraints those expenses would not get approved. The local attorney was therefore the only viable candidate, but the agency canceled the announcement for the vacancy because of the limited applicant pool. In response, the attorney filed a retaliation claim against the agency for failure to promote. The attorney alleged that his supervisor's incorrect statement was improperly motivated by the attorney's testimony in a lawsuit filed by two African-American women against the supervisor two years earlier. Although the decision makers were unaware of that testimony, the attorney argued that his supervisor's retaliatory animus should be imputed to them because their decision was influenced by the incorrect statement. The U.S. Court of Appeals for the Seventh Circuit rejected that argument, holding that the agency would have reached the same decision regardless of whether it had received correct information. Although one of the other candidates actually lived within the region, he was an out-of-state resident entitled to travel and relocation benefits. Consequently, accurate information would not have expanded the applicant pool, or, in other words, have caused the agency to maintain the announcement. While employers should be careful not to make employment decisions based upon protected classifications, reasonable business justifications may always support employment decisions, even if the facts underlying the justification are later found to be incorrect.

Poer v. Astrue, 09-3473 (7th Cir. May 27, 2010).

Standardized Interviewing Format Aids University in Defending Against Retaliation Claim

A Native American building services worker at an Illinois university applied for a promotion but ultimately was not successful. He had previously complained numerous times over the use of another university's selection of the Chief Illiniwek image as a school mascot because be believed it was disrespectful towards Native Americans. Two of the supervisors who sat on the six-person committee that interviewed the employee were the subject of a civil rights complaint that he had commenced six months prior because they had worn shirts with the Chief Illiniwek image during a previous interview with him that had also resulted in no promotion. The employee sued his employer under Title VII of the Civil Rights Act of 1964, as amended, claiming that the university had retaliated against him in its most recent decision not to

promote him because he had filed the civil rights complaint. The trial court dismissed the suit on summary judgment, and the U.S. Court of Appeals for the Seventh Circuit affirmed. The appellate court reasoned that the employee had failed to show evidence that any of the interviewers were angered by the civil rights complaint. Additionally, the court found persuasive the fact that the format of the interview was standardized and used with all the other candidates applying for the promotion, and that the two supervisors who were the subject of the complaint gave scores to the employee that were within the mainstream range of those given by the rest of the committee. Finally, the court noted that the likelihood of retaliation was diminished as the employee had unsuccessfully interviewed for the same promotion several times in the past. This case underscores the importance of establishing an interviewing committee consisting of several individuals, and providing interviewers with proper training and a uniform evaluation process.

Leonard v. E. Ill. Univ., 606 F.3d 428 (7th Cir. May 26, 2010)

DOL Clarifies Definition of "Son" and "Daughter" Under FMLA to Include Children of Same-Sex Partners

Under the Family and Medical Leave Act (FMLA), eligible employees are entitled to take up to 12 work weeks of unpaid leave during any 12-month period for the birth and care of a newborn child; to adopt or assume care for a foster child; to care for an immediate family member (spouse, child or parent) with a serious health condition; or to take medical leave due to a serious health condition. The U.S. Department of Labor (DOL) recently clarified that an employee who assumes the role of caring for a child is entitled to take family leave, despite the fact that the employee may not have a legal or biological relationship with the child. The clarification ensures that anyone who steps in to parent a child will not be denied leave simply because he or she is not the child's legal guardian. Among others, the clarification specifically benefits families in the gay, lesbian, bisexual and transgender community who may not otherwise have the protections of the FMLA to care for their loved ones. Similarly, the DOL anticipates that, for example, extended family members who care for a child whose single parent is called to active military duty, or grandparents who care for children whose biological parents are absent, will have the opportunity to enjoy the protections of the FMLA, which ultimately provides children with the support and care they need from the persons who have assumed those responsibilities. Employers should note this clarification and revise their FMLA policies accordingly.

Obese and Diabetic Boiler Plant Operator Lacks ADEA or Rehabilitation Act Claim for Reassignment

A U.S. Department of Veterans Affairs (VA) boiler plant operator was reassigned from his position to the housekeeping department after he failed a mandatory physical examination. The exam results demonstrated that the employee was obese and had diabetes, which disqualified him from his position as a boiler plant operator. The employee sued, alleging that his reassignment discriminated against him based on his obesity, diabetes and age, in violation of the Rehabilitation Act and the Age Discrimination in Employment Act (ADEA). The trial court granted summary judgment to the VA, and the U.S. Court of Appeals for the Tenth Circuit affirmed. The appellate court found that the employee did not meet the VA's guidelines for work as a boiler plant operator, and that the guidelines were job-related, uniformly enforced and consistent with business necessity. The VA had made reasonable accommodations for the employee under the circumstances by reassigning the employee to another position. Therefore, there was no violation of the Rehabilitation Act. There was no violation of the ADEA because the VA had a non-discriminatory reason for reassigning the employee that was not pretextual. Employers should be aware that they have the right to establish what is required to satisfactorily perform a job so long as the requirements are: (1) job-related; (2) uniformly enforced; and (3) consistent with business necessity.

Wilkerson v. Shinseki, No. 09-8027 (10th Cir. June 2, 2010)

Claim That Supervisor Abused All Staff Equally Rejected in Hostile Work Environment Case

A female medical technician working for the U.S. Army was regularly subjected to comments about her undergarments and body by a male co-worker. The male co-worker was subsequently promoted and became the technician's supervisor. The supervisor described the technician as dressing like "a street woman" in front of co-workers and patients. He made similarly critical comments about other employees as well. After the technician became depressed and began experiencing panic attacks, she sued the Army alleging that she had been subjected to a hostile work environment. The Army argued that the supervisor's treatment of the technician, while abusive, was not based on her gender. In support of

this argument, the Army offered evidence of occasions on which the supervisor threw away items on the technician's desk and disposed of her food. The Army also referred to the supervisor's treatment of other male and female employees, demonstrating that the supervisor generally intimidated and mistreated all of his staff. A trial court agreed with the Army, finding that Title VII of the Civil Rights Act of 1964, as amended, is not a civility statute, and that while the supervisor's conduct was abusive, it was not gender-based. The U.S. Court of Appeals for the First Circuit reversed, vacating summary judgment and finding that the evidence was sufficient to send the case to trial. Notably, the supervisor's repeated comments about the technician's dress and undergarments, and his statements about her appearance as "a street women," were sufficient to allow a reasonable jury to determine that the technician was subjected to a hostile work environment due to her gender. While Title VII is not a civility statute, employers must be careful not to allow unlawful hostile work environments to be created by abusive managers.

Rosario v. Dep't of Army, No. 08-2168 (1st Cir. June 2, 2010)

Hourly "Per Diem" Included in Regular Rate of Pay for FLSA Overtime Calculation

A staffing company employed a skilled aircraft painter with many years of experience painting the interior and exterior of airplanes. The company set the painter's rate of pay at $5.50 per hour for regular time, and $20 per hour for overtime. The painter was also given a $12.50 "per diem" payment for each regular hour worked, which the company alleged was to reimburse him for travel expenses. The company capped the "per diem" payment at 40 times the regular rate. After the painter learned that other employees were being paid $24 an hour, he sued for unpaid overtime. At issue was whether the "per diem" payment should be included in the painter's "regular rate of pay" under the Fair Labor Standards Act (FLSA). If so, the painter would be entitled to one and one-half times the combined hourly rate of $18 per hour for each overtime hour worked. The company argued that the $12.50 per hour "per diem" was not included in the painter's regular rate of pay, but was meant to compensate the painter for a 280-mile daily commute. The U.S. Court of Appeals for the Fifth Circuit disagreed and awarded the painter back pay, liquidated damages and attorneys' fees. The court noted that the company's treatment of $12.50 per hour as "per diem" was suspicious in light of the fact that the regular rate of pay amongst similarly skilled technicians was approximately three times the painter's $5.50 "base" hourly wage, and given the company's decision to pay a "per diem" on an hourly basis which was capped at 40 hours. Essentially, the court found that the company had simply tried to disguise regular pay under a different classification, an action which had been rejected by federal courts numerous times before. Employers must be careful to properly pay employees overtime that includes all amounts which qualify as the "regular rate of pay."

Gagnon v. United Technisource Inc., No. 09-20098 (5th Cir. May 27, 2010)

Ninth Circuit Upholds Ordinance Prohibiting Roadside Solicitation by Day Laborers

A California city passed a municipal ordinance that prohibited employment solicitation by day laborers. The ordinance was brought about due to the large number of individuals soliciting employment along the sidewalks of major thoroughfares, which thereby caused traffic and safety hazards. Two day laborer organizations sued, arguing that the ordinance deprived workers of free speech rights under the First and Fourteenth Amendments. After a federal court enjoined enforcement of the ordinance, both the workers and the city moved for summary judgment. Finding that the ordinance was content neutral but invalid because it was not narrowly tailored and failed to establish the existence of ample alternative channels of communication, the district court granted summary judgment in favor of the workers and permanently enjoined the city from enforcing the ordinance. The U.S. Court of Appeals for the Ninth Circuit reversed. The court found that the ordinance was narrowly tailored to serve the city's interests of traffic flow and safety, was not unconstitutionally vague, and was a content-neutral time, place and/or manner restriction on speech in a public form. By way of example, the court noted that while the ordinance prohibited workers from approaching vehicles to solicit work, it did not prohibit them from approaching an individual not in a vehicle. Ultimately, the court held that the city had the right to regulate the time, place and manner of protected speech so long as the restrictions did not suppress the message. Here, because the ordinance was designed to protect public safety, it passed muster. Public employers should be aware of the interplay between employment regulation and First Amendment rights, and should narrowly tailor restrictions on speech only when and to the extent necessary to further important governmental objectives.

Comite de Jornalers de Redondo Beach v. City of Redondo Beach, No. 06-55750 (9th Cir. June 9, 2010)

ERISA Estoppel Claim Allowed in Pension Case

An employee was a participant in a multi-employer pension plan, under which he was eligible for early retirement. After the employee contacted the plan's third-party administrator to discuss the possibility of early retirement, he received a letter from an agent of the third-party administrator indicating his estimated amount of a single life annuity (upon early retirement). The employee applied for and was granted early retirement. The third-party administrator provided the employee with a document entitled "Pension Plan Benefit Election Form," which contained a certification that the employee would receive a certain amount of retirement benefit for life. More than one year later, the employee received notices from the third-party administrator indicating that due to a computer error, the amount of the employee's retirement benefit had been inaccurately calculated, that the amount of his benefit was being reduced, and that the employee was required to repay the amounts that he had been overpaid. After exhausting his administrative remedies, the employee filed suit alleging that he had a contract with the plan and that the plan and third-party administrator had made material misrepresentations to him, on which he relied to his detriment. As several other circuit courts had done previously, the U.S. Court of Appeals for the Sixth Circuit held that the a claim for equitable estoppel can be sustained in a claim for pension benefits. The Sixth Circuit held that, "a plaintiff can invoke equitable estoppel in the case of unambiguous pension plan provisions where the plaintiff can demonstrate that the traditional elements of estoppel, including that the defendant engaged in intended deception or such gross negligence as to amount to constructive fraud, plus (1) a written representation; (2) plan provisions which, although unambiguous, did not allow for individual calculations of benefits; and (3) extraordinary circumstances in which the balance of equities strongly favor the application of estoppel." Employers and plan administrators must be aware that a representation made to employees about retirement benefits, even if incorrect, may create an employer or plan obligation if the employee relies on the representation.

Bloemker v. Laborer's Local 265 Pension Fund, No. 09-3536 (6th Cir. 2010)

"Masters of The Complaint," Plaintiffs Avoid Federal Preemption by Careful Drafting

A group of Russian employees filed suit in state court alleging that their former employer had discriminated and retaliated against them based on their national origin. The employer, a company engaged in the business of transporting elderly persons, removed the action to federal court, where the same employees previously had filed a lawsuit raising the same discriminatory and retaliatory allegations pursuant to a collective bargaining agreement. In the previously filed lawsuit, the district court dismissed the claims of retaliation based on lack of jurisdiction because those claims were preempted by the National Labor Relations Act (NLRA). With respect to the claim of national origin discrimination in second action, the district court exercised jurisdiction by treating it as a "hybrid" claim under the Labor Management Relations Act (LMRA); however, it nonetheless dismissed the claim on summary judgment because the employees failed to show that the union had breached its duty of fair representation. While their motion for reconsideration was still pending, the employees filed a state court complaint devoid of any allegations implicating the collective bargaining agreement. The employer removed the action to federal court, where the district court ultimately dismissed the new case based on the employees' failure to distinguish their state claims from the federal claims. In vacating the district court's decision, the U.S. Court of Appeals for the Second Circuit held that because the state court complaint did not rely upon a collective bargaining agreement, it was not subject to federal preemption. The court recognized that the employees were ultimately the "masters of the complaint" and chose to allege discrimination and retaliation solely based on terms and conditions of employment, which did not implicate the terms of a collective bargaining agreement. The complaint, as written, was not preempted by either the NLRA or the LMRA. Accordingly, the district court lacked removal jurisdiction based on preemption. With no issues of federal law remaining, the district court lacked subject matter jurisdiction to dismiss the case. The case was remanded to state court, where the employer was free to raise the defenses of preemption, preclusion and the statute of limitations. Employers must be aware that there are often a number of theories under which an employee may bring claims of discrimination and retaliation that may land the employer in venues that are unfavorable to them.

Domnister v. Exclusive Ambulette, Inc., No. 08-4387 (2d Cir. June 4, 2010)

Hinshaw Special Alert Update
Hinshaw's Special Alert dated June 8, 2010, referenced a new government program that reimburses group health plan sponsors for a portion of claims made by early retiree participants. On June 29, 2010, the U.S Department of Health and Human Services issued the final application form under this program and began accepting applications for subsidies. Because there is a limited amount of funding for this program, and applications will be processed in the order in which they are received, group health plan sponsors who offer coverage to early retirees (those former employees between the ages of 55 and 64 who are ineligible for other coverage) should prioritize complete their applications as soon as possible.