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Newsletters

Employment Practices Newsletter - May 2016

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Department of Labor's Persuader Rule Convinces No One

By: Nicole E. Jagielski

The Department of Labor's controversial Final Rule on Persuader Reporting became effective April 25, 2016. The Rule significantly strengthens a union's rights under the Labor Management Reporting and Disclosure Act ("LMDRA") and may make it more difficult for you as an employer to receive legal advice.

Generally, the LMDRA regulates the public reporting obligations of businesses seeking legal and non-legal counsel to oppose or manage relations with unions. A consultant, known as a "persuader," helps an employer navigate organizing drives and labor disputes. Before the Final Rule came into effect, the LMDRA required "direct" persuader activities to be reported, but exempted "indirect" activities. A direct activity might be a meeting between the persuader and employees, while an example of an indirect activity would be the preparation of materials for the employer to provide to its employees.

The Final Rule requires these "indirect" activities also be reported, including:

1. When a persuader plans, directs, or coordinates supervisors, managers, or other employer representatives, including meetings and interactions with employees.

The final rule specifically states that this includes both formal meetings and less structured interactions with employees. Employers and persuaders can evaluate a lengthy list of factors to determine whether to report an interaction.

2. When a persuader provides materials to the employer, in oral, written, or electronic form, for dissemination or distribution to employees.

When a persuader drafts a communication "tailored to the employer's employees and intended for distribution to them," their activity must be reported. However, if the persuader is simply "revising" materials that the employer created or providing "off the shelf materials," those activities do not have to be reported.

3. When a persuader conducts a seminar for supervisors or other employer representatives.

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Seminar agreements must be reported when the persuader "develops or assists the attending employers in developing anti-union tactics and strategies for use by the employers' supervisors or other representatives."

4. When a persuader develops or implements personnel policies or actions for the employer which are intended to persuade employees.

Personnel policies that are intended to persuade employees must be reported. An example is a policy that is created in response to employees' statements about the need for a union through which employees can arbitrate grievances to protect against terminations. Additionally, it must be reported if certain employees are targeted for personnel action with the intent to persuade those employees about exercising their rights against or in support of union representation.

So what does this mean for you as an employer?

The final rule interferes with attorney-client privilege by removing the "advice" exemption, effectively prohibiting your attorney from relying on attorney-client privilege to avoid reporting obligations.

The final rule may be more temporary than the Department of Labor planned. Multiple lawsuits involving the final rule have been filed, and the American Bar Association vehemently reiterated its stance against the final rule. For now, the rule only impacts "arrangements, agreements, or payments" made after July 1, 2016. Additionally, because no new employer reports are due until 90 days after the end of any fiscal year, there may be additional clarity regarding the validity of the rule by the time reports must be filed. Stay tuned to the Employment Law Observer for further developments.

Perception Is Everything: Supreme Court Expands First Amendment Protections for Public Employees

By: Evan J. Bonnett

In a decision that may expand the "zone of interest" protected by the First Amendment via 42 U.S.C. §1983, the Supreme Court in *Heffernan v. City of Paterson*, strengthened free speech rights for public employees. The Court held that a public employee may bring a suit premised on his engagement in protected political activities, even when the employee did not engage in those activities, and the employer was mistaken in its belief that he had.

The Case

The city demoted a police officer (Heffernan) after it believed Heffernan was holding a campaign sign supporting a mayoral candidate and speaking to the candidate's campaign staff. The demotion punished Heffernan's "overt involvement" in the campaign. However, the city was mistaken about his political activity, because Heffernan was only transporting the challenger's sign to his sick mother, at her request.

The Supreme Court held public employees are entitled to challenge employer actions as unlawful under the First Amendment when the action was taken out of a desire to prevent the employee from engaging in protected political activity, even when the employee did not actually engage in that political activity. The employer's reason for its action is what matters, rather than what the employee was actually doing.

The Court emphasized the jurisprudence in this area of the law is designed to protect employees from being coerced into changing their political allegiance or from refraining from engaging in politics. Whether the public employer was mistaken about such activities did not alter the rights the law seeks to protect.

Justices Thomas and Alito dissented. The dissent can be fairly boiled down to this line: "Nothing in the text of § 1983 provides a remedy against public officials who attempt but fail to violate someone's constitutional rights."

Moving Forward

This case does not affect Court precedent regarding when a public employer may restrict its employees' speech. The Court has permitted exceptions previously, such as a neutral and limited policy that prohibits public employees from engaging in partisan activities. For the sake of its *Heffernan* decision, the Court assumed these exceptions did not apply and, therefore, the city could not lawfully restrict the political activity it thought occurred.

However, by expanding the scope of constitutional injury to cover the perception of engaging in protected speech, *Heffernan* removes a public employer's potential defense against a free speech claim. It simultaneously has the potential to create a whole new category of injury for those who are perceived to have engaged in protected political activity.

New Federal Trade Secrets Protections for Employers

By: Jane C. Schlicht

Both the U.S. Senate and House have passed the Defend Trade Secrets Act of 2016, which is expected to be signed by President Obama in short order.

The Act, which amends the Economic Espionage Act (18 USC § 1831), establishes a federal trade secrets law that can be enforced in federal court. Owners of trade secrets that are used or intended to be used in interstate or foreign commerce can pursue a variety of civil remedies. The most controversial of those remedies is *ex parte seizure*. An aggrieved party can petition the court to order law enforcement officials to seize, *ex parte*, any property "necessary to prevent the propagation or dissemination of the trade secret." Other remedies include injunctive relief, damages and punitive damages of up to twice the amount of actual damages awarded. Claims must be filed within three years from the time the misappropriation was discovered or should have been discovered.

The Act also includes a safe harbor to individuals who turn trade secrets over to the government to investigate potential illegal activity. The provision grants both criminal and civil immunity. Employers must notify employees in any contract that is related to trade secrets or confidential information of their right to provide confidential information to the government if illegal activity is suspected. Employers who pursue a theft of trade secrets claim will not be able to recover attorneys' fees or exemplary damages if they do not provide this notice to employees.

This new law should provide much needed relief to employers, given the increasing amount of trade secret theft by foreign nationals who gain access to a business' trade secrets through consulting or employment relationships. If you suspect current or former employees, consultants, or competitors have misappropriated trade secrets for use in other businesses or with foreign nationals, it is time to evaluate your potential claims under this new law.

NY Transit Agencies Escape Vicarious Liability for Contractors Alleged Discrimination

By: Thaddeus A. Harrell

Companies often contract their daily business operations to third-party companies. In *Motta et al v. Global Contact Services, Inc.*, the court addressed whether such relationships relieve the outsourcing company of any duties to address discrimination or harassment in the workplace.

A group of Black and Hispanic call center employees filed lawsuits against New York City Mass Transit Authority ("NYCTA"), Metropolitan Transportation Authority ("MTA") and Global Contract Services ("GCS") alleging employment discrimination, sexual harassment, and retaliation. Notably, the NYCTA and MTA outsourced their call center operations to GCS.

The Southern District of New York dismissed the employees' claims holding they failed to plead a claim either agency for aiding and abetting liability. The court held NYCTA and MTA were not the employers or supervisors; nor did they exercise control over the employees' workplace. The court further held that even if NYCTA and MTA's contract with GCS obligated it to comply with all applicable laws, the employees identified no contractual provision that would require the agencies to address the discrimination allegations.

Employers should keep in mind that the outcome in this case turned on the specific terms of the parties' agreement. While it is a proper business practice to outsource business responsibilities, it does not give license to turn a blind eye. You should be mindful of what is occurring within your company and address any known issues to avoid potential litigation and ensure a proper working environment.

Employee's Inability to Meet Job's Attendance Requirements Divests Her of ADA Protections Sixth Circuit Holds

By: Elizabeth A. Odian

The converging paths of the Family Medical Leave Act's (FMLA) and the Americans with Disabilities Act (ADA) ranks among the most difficult legal issues for employers to safely traverse. Employers should think twice before terminating an employee who cannot return to work after 12 weeks of FMLA leave. This is because courts across the country have held that additional leave may be a necessary reasonable accommodation under the ADA. The question then becomes, how much additional leave do you need to provide an employee before he or she is no longer protected by the ADA?

The Sixth Circuit provided an example of when additional leave is no longer a reasonable accommodation in its recent decision, *Boileau v. Capital Bank Financial Corp*. While acknowledging leave beyond the 12-week leave mandated by the FMLA is sometimes a reasonable accommodation, Capital Bank had no duty to accommodate because the employee was no longer a “qualified” individual with a disability. Boileau's inability to regularly attend work rendered her unqualified, divesting her of the ADA's protections. Employers should note the court's ruling turned on the facts unique to Boileau's case. The court emphasized that even if Capital Bank provided her with the additional two weeks of leave she requested, Boileau's medical certification indicated she would require 8-12 weeks of intermittent leave indefinitely into the future.

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