Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management November 2003

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Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

U.S. Senate Votes to Block New Overtime Rules

Earlier this fall, the U.S. Senate voted to block the U.S. Department of Labor's ("DOL") proposed changes to the overtime regulations under the Fair Labor Standards Act (FLSA). A summary of these changes appeared in the April 2003 edition of "Employment Law Matters." Generally speaking, the proposed regulations were designed to clarify which employees are exempt from overtime eligibility.

Proponents of the rule changes (including the DOL, Bush administration and numerous business organizations, e.g., the U.S. Chamber of Commerce) have argued that the current regulations are outdated as they have not been revised since 1954. The criteria for determining which employees are exempt under those rules (e.g., the salary levels, the nature of the employee's work and the types of job duties performed) are no longer relevant in today's workplace. For example, the current "salary level" for exemption from overtime pay is $155/week, or an annual salary of as little as $10,800. Moreover, the current uncertainty surrounding what is and is not "exempt" has led to inadvertent misclassifications by employers, large back pay awards, and class action lawsuits.

Opponents of the revised regulations, led primarily by unions, have argued that millions of workers would lose overtime pay, including union members, "blue collar workers," police, firefighters, health care providers, etc. The DOL has countered this argument by demonstrating that the increased salary levels would automatically entitle an additional 1.3 million workers to overtime compensation.

Earlier this summer, the U.S. House of Representatives narrowly defeated a similar bill by a vote of 213-210. So the difference between the House and Senate votes will have to be reconciled before a final bill goes to President Bush. President Bush has vowed to veto any bill killing the DOL's proposed overtime regulations.

Non-Competition Agreement Struck Down by New York Appellate Court

A regional sales manager left his employment to work as a sales manager for another company, which competed with his former employer for sales business in the hydraulic hose market. The first employer sought an injunction enforcing a non-competition agreement that the plaintiff had signed.

Generally, New York courts will enforce a non-competition agreement so long as its restrictions are "reasonable." In determining the reasonableness of the restrictions, a court will consider: (1) whether the employer's interest is "protectable"; (2) the level of hardship imposed on the employee; and (3) whether the restraints are necessary to protect the employer's legitimate interests.

The New York State Appellate Division held that the lower court should not have granted first employer's injunction. The Court determined that the restrictions imposed by the non-competition agreement were greater than what was required for the protection of the legitimate interest of the former employer, since the individual's sales position required no knowledge of trade secrets and his talents were not unique or extraordinary. *D&W Diesel, Inc. v. McIntosh*, 762 N.Y. S.2d 851 (4th Dept. 7/3/03).

Radio Station Successfully Defends Lawsuit Over Termination of Employment Agreements for On-Air Personalities

Two on-air personalities entered into an employment agreement with the radio station. The contract permitted the station to terminate their employment during the contract term, for "business reasons", including, but not limited to, a determination by the station that either one of them had ceased to perform their services in a satisfactory manner. This was subject to the station giving them 90 days' notice and providing severance pay. The station terminated their employment on the grounds that their morning program failed to achieve expected ratings and caused the station to lose money. The employees sued the station claiming both breach of contract and age discrimination.

The court dismissed the claims finding that this was a "legitimate business reason" to terminate the employees.

If you have any questions regarding enforcing employment agreements, contact either Nicholas Fiorenza or Michael Dodd at 315-437-7600.

Supreme Court to Decide Whether Refusal to Re-Hire Recovered Drug Addict Violates ADA

The U.S. Supreme Court is expected to decide later this year whether an employer who refused to re-hire an employee, after he was allowed to resign as a result of a positive drug test, violated the Americans with Disabilities Act (ADA). *(Hernandez v. Hughes Missile Systems,* ___ F.3d ___(9th Cir. 06/11/2002).)

Joel Hernandez worked for Hughes Missile Systems for 25 years. After he tested positive for cocaine, Hughes allowed Hernandez to "quit in lieu of discharge." Two years later, Hernandez applied to be rehired and Hughes rejected his application. Hernandez claimed that Hughes rejected his application because of his record of drug addiction or because he was regarded as disabled. Hughes argued that it had a blanket policy of not rehiring employees who have resigned in lieu of discharge regardless of the reason. Thus, it did not discriminate against Hernandez based on a record or perception of his drug problem.

In the lower federal court decision which the Supreme Court will review, it was noted that:

> Although the ADA does not protect an employee or applicant who is currently engaging in illegal drug use, it does protect qualified individuals with a drug addiction who have been successfully rehabilitated. Thus, Hughes's unwritten policy against rehiring former employees who were terminated for any violation of its misconduct rules, although not unlawful on its face, violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction. If Hernandez is in fact no longer using drugs and has been successfully rehabilitated, he may not be denied re-employment simply because of his past record of drug addiction.

The bottom line is ...

The Supreme Court will decide whether a policy that serves to bar the re-employment of a drug addict despite his successful rehabilitation violates the ADA.

The decision also noted that:

> Maintaining a blanket policy against rehire of *all* former employees who violated company policy not only screens out persons with a record of addiction who have been successfully rehabilitated, but may well result, as Hughes contends it did here, in the staff member who makes the employment decision remaining unaware of the "disability" and thus of the fact that she is committing an unlawful act. Having willfully induced ignorance on the part of its employees who make hiring decisions, an employer may not avoid responsibility for its violation of the ADA by seeking to rely on that lack of knowledge. Accordingly, Hughes's unwritten policy is not a "legitimate, nondiscriminatory reason" for its rejection of Hernandez's application.

Ultimately, the Supreme Court will have to decide whether a policy that serves to bar the re-employment of a drug addict despite his successful rehabilitation violates the ADA.

Florida Telecommuter Ineligible for New York Unemployment Benefits

The New York State Court of Appeals recently held that an employee who performed her job for her New York employer from Florida via the Internet was ineligible to receive New York State unemployment insurance benefits. (*Matter of Maxine Allen v. Commissioner of Labor*, 2003 N.Y. LEXIS 1781 (N.Y. July 2, 2003).)

Reuters America, Inc. first hired Maxine Allen in 1996 while she was living and working in New York. In mid-1997, she relocated to Florida and Reuters agreed to allow her to "telecommute" via the Internet; performing the same duties she had done when physically located in New York. In March 1999, Reuters terminated the telecommuting arrangement and Allen declined Reuters' offer to relocate to New York. Thereafter, she filed for, and was initially awarded, unemployment insurance benefits in Florida. Upon Reuters' objection, the Florida Department of Labor and Employment Security reversed this decision and found her ineligible because she had voluntarily quit her job without good cause. Allen then filed for benefits from New York.

A New York Administrative Law Judge (ALJ) found that Allen had carried out job responsibilities for her employer simultaneously in both New York and Florida, making her eligible for benefits in New York because her work was directed and controlled from that state.

The Court of Appeals reversed that decision based on Section 511 of the Labor Law which "sets out four tests [to determine eligibility for UI benefits in New York] — localization, location of base of operations, source of direction or control, and employee's residence — to be applied successively to an employee's entire service performed for the employer both within and without the State." The Court found that Allen failed the first test: localization. The Court held that:

> Because claimant was regularly physically present in Florida when she worked for her employer in New York, her work was localized in one state — Florida. Accordingly, the other tests specified in section 511 are not reached, and claimant was ineligible for unemployment insurance benefits from New York.

The court explained that its rationale derived from a uniform definition of "employment," adopted by New York and most other states, under which: (1) all the employment of an individual is to be allocated to one state; and (2) that state should be the one in which it is most likely that the individual will become unemployed and seek work.

> "[T]he uniform rule was intended to promote efficiency, and to ensure that unemployment benefits are paid by the state where an unemployed individual is physically present to seek new work. Unemployment has the greatest economic impact on the community in which the unemployed individual resides . . . ."

Responding to Background Checks: Former Employers Have a "Qualified Privilege"

Employers should be cautious when responding to a request for information about a former employee because of the potential for "defamation" claims. "Defamation" is a false statement of fact regarding the former employee, communicated to a third party (like a prospective employer), which causes an injury to the former employee (like not getting the job sought). In an effort to avoid such claims, many employers have instituted a policy of providing very limited information (e.g., dates of employment) about their former employees when responding to background checks. However, such policies are often unnecessarily restrictive because employers are not aware that they have a "qualified privilege" to provide information about former employees to prospective employers.

Generally speaking, a "privilege" is a legal defense created either by statute or case law designed to shield certain communications from litigation because of their benefit to the general public. For example, doctor/patient communications are often "privileged" because courts have reasoned that this is necessary to avoid the risk to the general public associated with stifling such communications altogether. A "qualified privilege" simply means that the shield against litigation may be lifted under certain circumstances.

In New York, a qualified privilege exists for employers sharing information about their former employees, so that prospective employers can make informed decisions when hiring appli-

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Responding to Background Checks: Former Employers Have a "Qualified Privilege" (cont'd)

cants. Accordingly, an employer's statements regarding an employee's dismissal or negative evaluations of employees are protected by a qualified privilege against defamation claims. In other words, even if an employer made a false statement about the reason why a former employee separated employment and as a consequence the former employee did not get the job he/she sought, the former employer could not be held liable for defamation. However, the privilege shield will be lifted if the former employee demonstrates that the employer made the false statement with "malice." In this context, "malice" means that the employer made the alleged defamatory statements either with the intent to hurt the employee or with a high degree of awareness of their probable falsity.

For example, in *Boyd v. Nationwide Mutual Insurance Co.*, 208 F.3d 406 (2d Cir., 2000), the court refused to hold that the employer enjoyed a qualified privilege defense because the employer allegedly failed to consult its own business records which may have cleared the employee of an alleged theft. Nationwide allegedly terminated Boyd's employment for stealing (in this case, cashing two checks for a single insurance claim). While Nationwide did not report this information to Boyd's prospective employer, it did communicate the reason it terminated Boyd to a third party and it was reported in a local newspaper. In his defamation suit against Nationwide, Boyd alleged that had Nationwide investigated its own records, it would have seen that neither check had been cashed. The court held that where an employer fails adequately to investigate an alleged theft, the employer acted with the malice necessary to defeat the employer's defense of qualified privilege.

Thus, so long as a former employer responds truthfully and accurately to request for information about a former employee's job performance or reason for separation, the employer's communications will be protected by a qualified privilege. This shield can be further strengthened by obtaining a written release of such claims from the former employee expressly waiving the right to bring a defamation lawsuit against the former employer.

If you have any questions about responding to a request for information about a former employee, or obtaining a written release of claims, please contact Mike Dodd at 315-437-7600.

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
5010 Campuswood Drive
East Syracuse, New York 13057