



HUMAN RESOURCES POTPOURRI

Gambling Policies— Survey Says ...!

According to a recent SHRM study, “Workplace Policies for Office Pools,” 67% of employers do not have a formal written or unwritten gambling policy, while 23% of employers reported having a written gambling policy, and 10% said they had an unwritten gambling policy. Interestingly, 66% of poll participants reported they had Super Bowl, NCAA, lottery, baby and world series pools, and 55% of the participants said office pools have a positive impact on employee morale, while 62% said office pools have no impact on work productivity.

Source: Labor Relations Reporter, BNA, February 22, 2010

The Unions Still Don't Get It!

Good News and Bad News. First the good: the number of major work stoppages in 2009 dropped to five—two occurred in the private sector, while three took place in state and local government.

Now the bad: despite the downturn in the economy and the layoffs experienced by businesses around the country, there were five major strikes, idling 13,000 workers. The unions involved: United Auto Workers, Laborers' International Union, Transport Workers Union, and the American Federation of Teachers.

They really don't get it!

(Continued on page 2.)

Fall Employment Law Update

Make a note that the next May Oberfell Lorber Labor and Employment Law Update will take place in November 2010. Details will follow at a later date.

EEOC Plans New ADEA Regulations

Seeking to revise Agency regulations, the EEOC has released a proposed rule defining the “reasonable factors other than age” (RFOA) defense available to employees under the Age Discrimination in Employment Act (ADEA). Published in the February 18, 2010 Federal Register, the EEOC proposal would amend the existing regulations interpreting the ADEA.

In drafting the proposal, the EEOC looked to tort law for a legal definition of “reasonableness,” determining that “a reasonable factor is one that is objectively reasonable when viewed from the position of a reasonable employer under like circumstances,” “one that would be used in like manner by a prudent employer mindful of its responsibilities under the ADEA.” “Accordingly, a reasonable factor is one that an employer using reasonable care to avoid limiting the employment opportunities of older persons would use.”

Under the proposed regulations, an employer asserting the RFOA defense would be required to show that its challenged employment practice was “reasonably designed to further or achieve a legitimate business purpose and was reasonably administered to achieve that purpose.” The EEOC has also proposed some relevant considerations, namely, whether the employer practice and its implementation are “common business practices” and the extent to which the factor is related to the employer’s stated business goal; whether the employer took steps to define the factor accurately and apply the factor fairly; whether the employer assessed the adverse impact of its practice on older individuals; and whether the employer had options available and why it selected the option it did.

An employer asserting the RFOA defense need not prove “business necessity,” nor does it have to choose the option with the least discriminatory impact. “Unlike Title VII’s business necessity defense,” “the reasonableness inquiry includes no such requirement.” Of equal importance, however, the EEOC’s proposal contains a non-exhaustive list of ways to determine whether an employer’s criteria for making a challenged employment decision actually consisted of “non-age” factors. The EEOC has noted that such factors should be as objective as possible. “An employer that gives unchecked discretion to supervisors to engage in subjective decision making should know that doing so may well cause an age biased disparate impact claim ... and expose themselves to liability on that basis.” Employers should, therefore, “avoid giving such discretion to rate employees on criteria known to be susceptible to age-based stereotyping, such as flexibility, willingness to learn, or technological skills. Evaluation criteria should be objectified to the extent feasible.” Now you know why the EEOC has a backlog of cases.

The agency is serious about enforcement of the ADEA; are you equally serious about taking action to avoid EEOC scrutiny of your potentially age-related business decisions? When such problems arise in your workplace, a telephone call to experienced employment counsel is recommended.

Source: Labor Relations Reporter, BNA, March 1, 2010

Clever Observations, or Truth?

The nicest thing about the future is that it always starts tomorrow.

Money will buy a fine dog, but only kindness will make him wag his tail.

A good time to keep your mouth shut is when you're in deep water.

Why is it that at class reunions you feel younger than everyone else looks?

No one ever says “it’s only a game” when their team is winning.

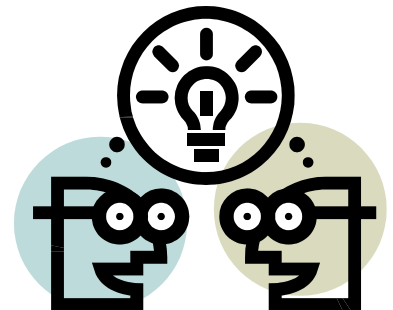
There are no new sins; the old ones just get more publicity.

I’ve reached the age where the happy hour is a nap.

Be careful reading the fine print. There’s no way you’re going to like it.

Always be yourself. The people who matter don’t mind, and the ones who mind don’t matter.

Business conventions are important because they demonstrate how many people a company can operate without.




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Things I Have Learned:

- That small daily happenings make life so spectacular.
- That everyone wants to live on top of the mountain, but all the happiness and growth occurs while you're climbing it.
- That people place too much importance on progress and not enough on maintenance.
- That you can keep going long after you think you can't.
- That my success stops when I do.

HR Potpourri (cont'd)

E-mails to Lawyer Protected

A New Jersey healthcare service executive who used a company laptop to exchange messages with her attorney on a personal password protected e-mail account had a reasonable expectation of privacy that was violated when her employer retrieved and read the messages from the computer's hard drive, so says a unanimous New Jersey Supreme Court (*Stengart v. Loving Care Agency Inc.*, 3/30/10). The Court's rationale: the company's policy on computer use was "not entirely clear" and made no mention of personal e-mail accounts used by the executive. The Court stressed, however, "even a more clearly written company manual" would not have justified the company's intrusion into the executive's communications with her lawyer. Bottom line, the company violated the executive's right to privacy and its lawyers violated ethics rules by reviewing the executive's e-mails and failing to return them to the former employee's lawyer.

Source: BNA, Labor Relations Reporter

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Sex Discrimination—Still Alive and Well...But Costly!

Three recently reported cases of interest in the area of sex discrimination affirm what we already know and previously stated: Discrimination is alive and well, and employers' actions continue under close scrutiny by the EEOC and the courts:

- A Cleveland-based waterproofing service firm recently paid \$558,000 in damages and interest to satisfy a district court judgment that it violated Title VII of the Civil Rights Act by permitting the sexual harassment of mostly teenage female employees by male managers. *EEOC v. Everdry Mktg. and Mgmt. Inc.*, WDNY (judgment satisfied 5/5/10). Most of the alleged harassment victims were teenagers, and the conduct included demands for sex, groping, sexual jokes, and comments about women's bodies. The Court stated, "Victims ... (who) were young and especially vulnerable."
- A former Washington state hospital employee who claimed that she was sexually harassed by a coworker between 1989 and 2003 will receive a settlement of \$995,000, \$795,000 paid by the Washington Department of Social and Health Services which runs the hospital, and \$200,000 paid by the union that represented her, Washington Federation of State Employees Local 793. The reason? The union president was the coworker who sexually harassed her. The harassment occurred in the form of unwanted comments about the victim's body, unwanted touching, and pressure for sex (a sexual relationship followed, including an encounter with the union's president's wife). *DOL v. Washington Department of Social and Health Services* (settlement 5/10/10).
- A federal jury awarded \$250 million in punitive damages in a sex discrimination action, claimed as the "largest ever" in a sex discrimination case (*Velez v. Novartis Pharms. Corp.*, SDNY, punitive damages verdict 5/19/10). The punitive damages were in addition to \$3.4 million in compensatory damages awarded to 12 testifying plaintiffs. Other related damages are still to be determined. The basis for the award: "egregious gender discrimination for years" relating to pay, promotions, and pregnancy leave.

Employers Beware: If you do not follow your policies and take steps to eradicate discrimination in the workplace, the same could happen to you. Contact with experienced employment counsel is also recommended.

Sources: BNA, Labor Relations Reporter, May 17, 2010; BNA, Daily Labor Report, May 20, 2010

When Is the Last Chance Agreement...the Last Chance?

Based on a Last Chance Agreement with her employer, an employee with a good (employment) record was discharged. The agreement stated no grievances would be filed on the employee's behalf if she was terminated for future misconduct. Well, guess what! The employee was discharged for a second incident that the employer claimed violated the "Last Chance Agreement." The labor arbitrator found the grievance arbitrable, but denied it on its merits (*Cargill Meat Solutions*, 127 LA 586). The rationale, whether the employee intentionally or carelessly committed the contract violation, is an arbitrable issue, even though the employee was subject to the terms of a Last Chance Agreement which precluded further grievances on her behalf. In the arbitrator's view, employer discipline must be related to proper misconduct, and to suggest that an employer could discipline an employee who had not "engaged in conduct warranting discipline" was unacceptable. Interestingly, the union did not waive its right to grieve a discharge under the Last Chance Agreement (employer drafting mistake); however, the arbitrator found no evidence that the union ever believed any employee discharged under a Last Chance Agreement in the past was not guilty of the alleged misconduct. When disciplinary issues arise under a Collective Bargaining Agreement, contact with qualified Labor counsel is recommended.

Substantial Continuity and Successor Liability Under Title VII

A New York court ruled that an employer who purchases the assets of another company may be held liable under Title VII for sexual harassment that was committed by the company's owner before the sale if there is "substantial continuity" between the two businesses. (*EEOC v. Nichols Gas & Oil Inc.*, 108 FEP cases 522, WDNY January 13, 2010). The Court based its decision on three substantial continuity factors. First, it had notice of the EEOC charge and lawsuit before purchasing the predecessor's assets. Second, it substantially continued the predecessor's business, i.e., used the same customer list, same facility and equipment, and employed substantially the same personnel. Third, although the predecessor could have provided relief when the lawsuit was filed, it is now insolvent. Interestingly, and despite the fact that the employer continued to employ the predecessor's owner, it was not enough to make it liable for punitive damages. The Court's rationale: Such damages are not appropriate against an innocent successor.

CAVEAT: Selling your business may not get rid of the problem. Always contact experienced employment counsel when such issues arise in your workplace.

Source: Labor Relations Reporter, BNA, February 8, 2010

Quotes of the Month



What would life be if we had no courage to attempt anything? ~Vincent VanGogh

Self-confidence is the first requisite to great undertakings. ~Samuel Johnson

Only those who dare to fail greatly can ever achieve greatly. ~Robert F. Kennedy

To be a champ you have to believe in yourself when nobody else will. ~Sugar Ray Robinson

We must teach our children to dream with their eyes open. ~Harry Edwards

Destiny is no matter of chance. It is a matter of choice. It is not a thing to be waited for, it is a thing to be achieved. ~William Jennings Bryan