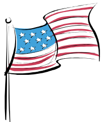

September 2010
Volume 21, Issue 3

Veritas™

A newsletter of Human Resources highlights, helpful hints, suggestions and reminders to assist employers in their daily interactions with employees.

HUMAN RESOURCES POTPOURRI

Sounds Like Union Organizing to Me

The United Auto Workers (UAW) is developing a set of "principles" it believes will allow union elections at nonunion auto manufacturing companies. It appears the UAW is not waiting for passage of the Employee Free Choice Act, so it has decided to use this "diplomatic" organizing tactic. The "principles," which will be presented to executives at nonunion auto makers, will include requirements for equal access for both union and management to communicate with employees, and a prohibition on threats, pressure, or derogatory statements about the other side by either union or management. The UAW's goal: "not to force auto companies to organize," but rather to have the companies "respect the rights of their workers to decide freely whether or not to join the UAW." Do we not have a process already in place to determine this? It is called a secret ballot election. What will they think of next?

On the Same Subject, But From a Different Source

President Obama has vowed to keep fighting for union-friendly legislation, stating he intends to pursue passage of the Employee Free Choice Act—all of this in the name of moving forward …or is it backward? Does American business really need the thing it wants the least, a union?

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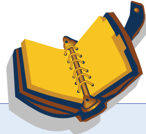
Mark your calendar for the May Oberfell Lorber Labor & Employment Law Seminar, fall edition.



When: November 10, 2010
Where: Windsor Park Conference Center
Time: 3:30—4:30 p.m. Program; 4:30 Reception (Food/Beverages)

Avoiding Religious Discrimination Lawsuits

Employers frequently ask how to accommodate religion in the workplace. The Standard of Measurement for such cases is a sincerely held religious belief balanced against an employer's workplace standards. Most religious-based cases are accommodation cases, and when making a prima facie case of a failure to accommodate religious beliefs the plaintiff must show (a) that he holds a sincere religious belief that conflicts with a job requirement, (b) that his employer knew about the conflict, and (c) that an adverse action was taken because he didn't comply with the conflicting requirement. The burden will then shift to the employer, who must show (a) that it made a good-faith effort to accommodate the religious belief, or (b) that an accommodation would result in an undue hardship upon its business. The undue hardship on the employer must be more than de minimus.

Interestingly, religious claims, according to the EEOC, only represent 3.6% of all charges filed with the agency, but they have been rising since September 11, 2001. Recognizing that the employer "must accommodate the religious belief or practice if it can reasonably do so," the defense process begins by having in place a strong policy that will assist in the avoidance of religious discrimination claims. The employer's policy should, at minimum, mention religion and contain a broad statement that the employer "respects the religious beliefs of all employees." In addition, the employer's policy should incorporate/reference other protected (Title VII) classes, but they should be treated as separate issues.

The biggest concern for employers will be the problem of dealing with untrained supervisors, who usually reject most employee requests for an accommodation, religious or otherwise, on the mistaken belief that accommodations create exceptions to the rules and therefore they are improper. Supervisors must be trained to accept all such requests with an open mind and to forward those requests to the proper people in the organization for decision (generally the Human Resources Department) and to recognize that causally dismissing the employee's request is not the right response. In reality, it will be the properly trained employer who decides if the employee's request for accommodation will be granted or denied, and for the proper reason, i.e., undue hardship.

When issues of religious discrimination arise in your workplace, a telephone call to an experienced employment attorney is advisable. (Source: BNA, Labor Relations Reporter, 2010)

The Chicken or the Egg?

In a decision of somewhat twisted logic, the Pennsylvania Department of Labor & Industry finds against the employer in relation to a work stoppage that was determined to be a lockout by the employer rather than a strike by the employees. At stake, unemployment benefits for 1,500 union-represented workers at Temple University Hospital in Philadelphia, the City of Brotherly Love. The employee strike followed after Temple made its "last best offer" to the union during negotiations for a new contract. The union said it would not strike if Temple restored tuition reimbursement benefits for dependants. When the union's offer was rejected by Temple, the work stoppage (strike) began and ended approximately one month later when the union members voted to ratify contracts that included a less generous tuition benefit for dependants, which incidentally is how the negotiation process works. The Pennsylvania DOL's logic in finding against Temple, the party that first refuses to extend the status quo after a contract expires, but while negotiations are continuing, is responsible for any subsequent work stoppage. In this instance, Temple was viewed as the party that "unilaterally changed the tuition reimbursement policy, and as such is responsible for the work stoppage for purposes of determining eligibility for jobless benefits of $550 per week." Talk about double talk and "it could happen here."

When unemployment issues in your workplace arise, contact with an experienced labor counsel is recommended.

Interesting Job Descriptions

- Consultant: someone who takes the watch off your wrist and tells you the time
- Economist: an expert who will know tomorrow why the things he predicted yesterday didn't happen today
- Lawyer: a person who writes a 10,000 word document and calls it a brief
- Programmer: someone who solves a problem you didn't know you had in a way you don't understand
- Diplomat: someone who can tell you where to go in such a nice way you will look forward to the trip

Things I Have Learned:

- That you can't please some people, no matter what you do.
- That a diet is the penalty we pay for exceeding the food limit.
- That giving doesn't count if you don't want what you're giving away.
- That within each person is a treasure, but sometimes you have to dig for it.
- That everyone has two choices: either you give up and take responsibility for your life or you don't.

HR Potpourri (cont'd)

Misappropriation of Trade Secrets
The Third Circuit Court of Appeals, *Bimbo Bakeries USA, Inc. v. Botticella*, July 27, 2010, decided that under Pennsylvania law a court may issue a preliminary injunction against beginning new employment with a competitor if there is a "sufficient likelihood, or substantial threat" that the former employee will reveal trade secrets, in violation of a signed confidentiality, non-solicitation and invention assignment agreement. For a variety of business-related reasons, the Court decided that the public interest factor weighed more in favor of protection against trade secret misappropriation than temporary restrictions on hiring and employment.

When non-competition issues arise in your workplace, a call to experienced employment counsel is advisable.

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The Courts Seem to Be "Getting It"

ADA. Decisions are being handed down by the courts that indicate they "get it" in regard to the new ADA Amendments Act. Although the definition of disability has not changed, the meaning of the terms have. Recent decisions are bringing more people under the coverage of the ADA (its intended purpose) and the "Regarded As" standard is becoming a really "big deal."

On this note, the Sixth Circuit of Appeals in *Watts v. UPS*, unpublished opinion, May 20, 2010, stated, "When a defendant flatly bars a plaintiff from working at any job at the defendant's company, that is generally sufficient proof that the employer regards the plaintiff as disabled in the major life activity of working so as to preclude the defendant being awarded judgment as a matter of law."

The ADA and GINA, a/k/a The Genetic Information Nondiscrimination Act. The disability law, ADA, covers current medical conditions, while GINA covers "simply genetic status." An example of the difference follows. If a person has a breast cancer gene, that person will be protected by GINA, but if the person has developed breast cancer, that person would be covered by the ADA. There is also an overlap between the two laws. As it relates to the ADA, employers are permitted to require medical exams in certain situations, i.e., a post job-offer medical exam if certain requirements are met. Under GINA, it is more narrow as to what may be obtained in these exams, i.e., no family medical history information may be obtained.

This is likely only the beginning and more court decisions are on the way. Questions regarding the ADA and GINA should always be referred to an experienced employment law attorney.

Source: BNA, Americans with Disabilities Act Manual, Vol. 16, No. 6, June 17, 2010.

Did You Know . . .?

Under the infamous Patient Protection and Affordable Care Act (PPACA/Health Care Law), employers must provide reasonable amounts of unpaid break time and a private place for breast-feeding employees to express milk. The PPACA, which took effect in March 2010, amended sections of the Fair Labor Standards Act.

Employer obligations include "a reasonable amount of break time to express milk as frequently as needed by the nursing mother." The duration of the break will likely vary and must be "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public." Temporary space converted into a lactation area must be available whenever the nursing mother needs it. The employer must meet these provisions for one year after the employee's child is born.

Beware: Federal law does not require employers to compensate nursing mothers for the breaks they take to express milk, but if the employer nevertheless compensates employees for breaks, an employee who uses the break time to express milk must be compensated in the same way as other employees are compensated for break time. Unless, an employee is completely relieved from duty during break time, the time counts as work time and must be paid.

Questions related to wage payments and employment law should always be referred to an experienced employment attorney.

Source: BNA, Daily Labor Report, July 23, 2010.

A Really Bad Decision!

An arbitration panel's decision that required the employer to pay back wages of $3,157 to three painters, including a fine of $55,439 to also be paid to the crew, was rejected and appealed by the employer. The result was devastating.

The Joint Trade Board, a painting industry labor-management arbitration panel, determined in October 2008 that the employer had violated the Collective Bargaining Agreement, a decision the employer ignored. There was another hearing in February 2009 in which the appeal board ordered the employer to pay the penalty award plus a fine of $2,500 per day. The new total: $3.5 million. On appeal to the Seventh Circuit, *Vinco Painting, Inc. v. Painters Dist. Council No. 30*, July 19, 2010, the Court conceded the award might be considered "absurd," but given the terms of the CBA it was binding on the parties. The rationale: it was what the parties intended in their contract. The Court also granted the union's request for attorneys' fees. Ouch!

In the world of contract negotiations, be careful of what you say and write. This could happen to you. In such cases, a call to experienced labor counsel is highly recommended.

Quotes of the Month

It is difficulties that show what men are. ~Epictetus

No civilized society can do without lawyers. ~John Adams

Few are those who see with their own eyes and feel with their own hearts. ~Albert Einstein

The only way to have a friend is to be one. ~Ralph Waldo Emerson

The hardest thing in life is to learn which bridge to cross and which to burn. ~Laurence J. Peter