HINSHAW
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Employment Practices NEWSLETTER

January 3, 2013

NLRB Advice Memo Generally Approves of Moonlighting and Noncompete Provisions

An insulation installation company required all new hires to sign an employment agreement as a condition of employment. Included within the agreement was a provision prohibiting "moonlighting," i.e., working for more than one employer simultaneously, as well as a noncompete provision. Although the company's employees were not unionized, a union had been attempting to organize them for several years, and it alleged that the moonlighting and noncompete provision interfered with the employees' rights under the National Labor Relations Act (Act). With respect to the moonlighting provision, the National Labor Relations Board's (NLRB's) General Counsel's office (General Counsel) determined that it was acceptable absent evidence that the provision was put in place pursuant to an unlawful motive or discriminatorily applied. The General Counsel noted that the Act does not provide a right to work simultaneously for more than one employer, and that the NLRB has found that employers are free to refuse to hire an employee who intends to work for more than one employer at a time, even though this would encompass paid union organizers, sometimes referred to as "salts." Consequently, such a provision is appropriate within an employment agreement so long as it was not created for the purpose of preventing salting, and so long as it was not applied in a discriminatory fashion, i.e., only to salts. With respect to the noncompete, the General Counsel upheld the provision, recognizing that the Act does not confer a right to work in a specific geographic location. While the provision may prevent individuals from working as salts within the industry after their separation from the company, that impact is to too incidental and attenuated to create a violation of the Act. When implementing such provisions, employers should be prepared to establish that the implementation was unrelated to salting or other protected activity.

Thermal Tech, Case 19-CA-068292 (NLRB, Dec. 3, 2012)

Contact for more information: Scott M. Gilbert

Seventh Circuit Orders Jury Trial Because Employer Couldn't Prove Date of Phone Call Triggering Title VII's 300-Day Limitations Period

An Albanian national alleged that an employer refused to hire him based upon his national origin in violation of Title VII of the Civil Rights Act of 1964, as amended. The employer did not dispute that it had refused to hire the applicant, but argued that his claim was barred by the 300-day limitations period applicable to Title VII claims. The complaint was filed June 26, 2008, and the employer claimed that it had turned the applicant down by phone on August 27, 2007 (304 days earlier). The employer had no proof of that call, and the applicant denied ever having received it. Instead, the applicant claimed that he was notified of the employer's decision some time after August 27, 2007, bringing his complaint within the 300-day period. The federal district court held an evidentiary hearing on the issue of the phone call, and subsequently dismissed the suit as time-barred. The applicant appealed, arguing that the employer's statute of limitations argument was a defense to be determined by a jury, and a panel of the U.S. Court of Appeals for the Seventh Circuit judges agreed. The panel rejected the district court's finding that the Title VII limitations period was akin to disputes that can be resolved through an evidentiary hearing, and found that the filing deadline was a defense and that there was no basis to exclude it from a jury trial. The case was then remanded for trial. This case serves as a reminder to employers regarding documentation and the risks of not documenting employment actions. If the employer here had simply created reliable documentation of its phone call to the applicant, it would likely have prevailed on summary judgment. Employers should note this decision and be vigilant in their documentation of hiring, firing and disciplinary actions.

Begolli v. Home Depot U.S.A., Inc. et al., No. 12-1875 (7th Cir. Nov. 29, 2012)

Contact for more information: Brett A. Strand

Fifth Circuit Holds Mississippi Law Does Not Require Employer to Conduct Criminal Background Checks Prior to Hiring

A female technician was subcontracted out to work for her employer at a clean-up site following a drilling rig explosion in the Gulf of Mexico. A male technician who was also hired to work at the same site had an extensive criminal history of sexual offenses, but on his application stated that he had no criminal history. He provided consent for a background check, but was ultimately hired without one. The male technician offered to drive the female technician home from work one day when she fell ill. Upon arrival at her home, he allegedly forcibly raped her. The female technician sued the employer in Mississippi state court, alleging negligent hiring, retention, training and entrustment. The case was removed to federal court, and the technician dropped her negligent hiring and entrustment claims. The U.S. Court of Appeals for the Fifth Circuit held that there was no evidence that the employer knew or should have known of the male technician's propensity for violence, particularly because there is no generalized legal duty under state law to conduct a pre-employment background check prior to hiring. Although the employer had a general internal policy regarding background checks, the court found that this was not sufficient evidence to establish a breach of duty in a suit like this. The employer here

prevailed under these circumstances, but employers should nonetheless review their background check policies, procedures and practices to ensure that they are being implemented and enforced.

Keen v. Miller Environmental Group, Inc. et al., No. 12-60220 (5th Cir. Dec. 10, 2012)

Contact for more information: Amanda Mattocks

Employer Not Required to Hire Independent Contractors to Accommodate Employee's Religious Observances

A grading, paving and utility services company occasionally required its employees to work Saturdays. The employee, one of eight commercially licensed drivers who operated the company's dump trucks, flatbed trainers and water trucks, told the employer at the time of hire that he could not work Saturdays on account of his adherence to the Hebrew Israelite faith and his observance of the Sabbath. The company repeatedly requested that he work Saturdays, and when he refused, it wrote him up. He was subsequently terminated because his religious schedule conflicted with his work schedule. The employee filed a complaint with the U.S. Equal Employment Opportunity Commission (EEOC), alleging religious discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended. The matter was subsequently filed in district court. The U.S. Court of Appeals for the Fourth Circuit concluded that the evidence presented a genuine issue of fact as to why the employee was terminated, but that summary judgment might nevertheless be proper if the company established that it could not reasonably accommodate the employee's religious beliefs without undue hardship. The matter was remanded, and the district court granted the employer summary judgment. The employee again appealed, and the U.S. Court of Appeals for the Fourth Circuit affirmed. The evidence showed that the company undertook efforts to accommodate the employee's religious beliefs but did not implement the EEOC's proposed accommodations because they would have created an undue burden. The EEOC's accommodations essentially would have required the company to hire independent contractors to perform essential functions of the position. Providing accommodations for religious observance is required by federal and most state laws. Employers must take caution when denying requests for accommodation. Undue hardship defenses are very circumstance-driven and fact-determinative, and do not always apply to every employer.

EEOC v. Thompson Contracting, Grading, Paving, and Utilities, Inc., No. 11-1897 (4th Cir. Dec. 14, 2012)

Contact for more information: Sean N. Pon

Layoff Found to Be Valid Position of Reemployment Under USERRA

A maintenance technician who was also in the military was laid off right after he returned to work following his military leave wherein he was deployed. The employer indicated that the termination was based on negative job evaluations and company-wide downsizing. The employee sued for failure to provide reemployment as required by Uniformed Services Employment and Reemployment Rights Act (USERRA). He argued that layoff or termination was not a valid position of reemployment under 38 U.S.C. § 4312. The employee also contended that even if USERRA permitted termination to be a valid reemployment position, it only did so if the employee would have been terminated automatically — for example by seniority and not by discretion of the employer. However, the employee did not make this

argument at the hearing on the motion for judgment, thus, the court did not consider this issue. The U.S. Court of Appeals for the Eighth Circuit held that a layoff or termination is a valid position of reemployment under the USERRA escalator principle, which requires employers to place service members into positions of reemployment they would have had absent their military leave. In this instance, the employee's position of employment would have been termination even if he had not taken leave for military service. The significance of this case is that a member of the military can have his or her employment terminated while on duty if such termination is the position of employment that the employee would have had if his employment was not interrupted by military service. Such terminations are nonetheless not without risk; thus, it is advisable to consult with counsel on such matters.

Milhauser v. Minco Products Inc., No. 12-1756 (8th Cir. Dec. 5, 2012)

Contact for more information: Katherine K. Cheng Arnold

Employer Successfully Defends Termination of Employee at Conclusion of FMLA Leave

The employee, a billing specialist, was out on leave under the Family and Medical Leave Act (FMLA) for knee replacement surgery. She requested an extended leave of absence for roughly three weeks, and the employer denied the request but offered to accommodate her medical needs with reduced hours or work restrictions if she returned on the original return-to-work date. The employee did not respond to this offer and was terminated when she failed to return to work. The employer's FMLA policy stated that employees who failed to return at the end of their leave could be terminated. The employee sued, alleging FMLA interference and retaliation. The U.S. Court of Appeals for the Tenth Circuit found no evidence that the employer took adverse action that interfered with the employee's right to FMLA leave. In fact, the employee testified that the company's human resources manager, "did everything she could" to help with "all of the FMLA issues." The court also rejected the employee's retaliation claim because she failed to offer evidence showing that the employer's reason for firing her, e.g., her failure to return from leave, was a pretext for unlawful retaliation. The court noted that the employee did not dispute that the employer encouraged her to return to work by the original return date, and offered to provide her with any necessary work accommodations. Employers are faced with challenging decisions when employees are not able to return at the end of FMLA leave. In many cases, an analysis of whether the employee's serious health condition that required FMLA leave is also a disability under the Americans with Disabilities Act requiring reasonable accommodation will be necessary.

McClelland v. CommunityCare HMO, Inc., No. 12-5030 (10th Cir. Nov. 29, 2012)

Contact for more information: Mindy A. Ferrer

NLRB Requires Employer to Turn Over Witness Statement

A union steward attempted to attend a meeting between a union member and a newspaper editor concerning whether the union employee had earlier that day violated the newspaper's security access policy by admitting a union representative into the facility. The editor and union steward argued about the steward's right to attend the meeting, but ultimately the steward did not attend. The next day the employee was asked to attend a meeting with two other management representatives to discuss what occurred in the confrontation between the steward and the editor. The employee recounted what

happened and one of managers prepared a short written account of the incident and asked the employee to sign it. The employee made some minor corrections to the document and signed it. At some undetermined time later, the manager wrote on the memo "Prepared at the advice of counsel in preparation for arbitration." A few weeks later the union steward was suspended and discharged. The union filed a grievance over the discharge and sought a copy of the memo signed by the employee. The newspaper objected to producing a copy of the memo, arguing that the general duty to furnish information concerning the employer's investigation does not include the duty to furnish "witness statements" themselves. The National Labor Relations Board (NLRB) affirmed the judge's order that the signed statement had to be produced because there was no evidence that the witness (1) had adopted the statement or, alternatively, (2) was given assurances of confidentiality before providing the "statement." The NLRB also rejected the employer's contention that the memo could be withheld based on the attorney work-product privilege because that privilege does not apply to documents created in routine investigations conducted in the ordinary course of business. Employers should be aware that in order for a witness statement to be protected from disclosure in NLRB grievance proceedings it should declare that the employee adopts the statement as true and correct, and/or the witness must be given assurance that the signed statement itself will be kept confidential and not disclosed. Further, the attorney work-product privilege will not apply to workplace investigations undertaken in the absence of specific attorney advice as to the necessity of the investigation for anticipated litigation.

Stephens Media, LLC, d/b/a Hawaii Tribune-Herald, and Hawaii Newspaper Guild Local 39117, Communications Workers of America, AFL– CIO, Case No. 37–CA–007043, etc. (NLRB, Dec. 14, 2012)

Contact for more information: David I. Dalby

Decision-Maker's Reputed Statement to Third Party Creates Triable Issue of Fact

A pharmaceutical company employee was terminated after her employer determined that she had violated (or engaged in behavior that appeared to violate) company policy regarding providing items of value to health care providers to induce the providers to prescribe the company's products. The employee sued under the Age Discrimination in Employment Act, claiming that when she was terminated at age 49, it was due to age discrimination. The U.S. Court of Appeals for the Eleventh Circuit reversed summary judgment for the employer, finding that there existed a triable issue of material fact as to the reason for the employee's termination. The court reviewed a declaration of the doctor with whom the employee had allegedly violated certain business conduct policies. The doctor had asserted that he had called higher management personnel of the employer and was told by the vice-president that the employee "had done nothing wrong, that she had done everything right, and further indicated that she should not have been fired." The statement described by the doctor was attributed to the same vice-president who terminated the employee. The resulting factual dispute meant that a jury would have to decide if the employee's termination occurred due to age discrimination. This case demonstrates that a statement by an external third party can generate a sufficient factual dispute that bars summary judgment in employment discrimination cases.

Kragor v. Takeda Pharmaceuticals America, Inc., No. 11-16052 (11th Cir. Dec. 20, 2012)

Contact for more information: Ambrose V. McCall

Employee's Retaliation Claim Defeated for Failure to Establish "Protected Opposition"

An attorney who worked as in-house counsel for the state fire marshal was terminated from her position. The employer claimed that it terminated her because she had failed to perform her job duties, such as drafting legislation and setting up regulations, and because she had spent too much time on personal matters at work. The employee claimed that she was terminated after she reported to the fire marshal that two other employees had recently made allegations of unlawful discrimination and provided her legal advice on those matters. She sued, alleging retaliation under Title VII of the Civil Rights Act of 1964, as amended. The district court granted summary judgment in favor of the employer, finding that the employee could not establish a prima facie case of retaliation because she could not show that she engaged in protected opposition to Title VII discrimination. Rather, the evidence showed only that she had performed her job by reporting the personnel issues which were brought to her attention, and that, alone, did not amount to protected opposition to discrimination. The U.S. Court of Appeals for the Tenth Circuit affirmed, holding that for an in-house attorney to engage in protected opposition, she must do more than simply provide legal advice to her employer, and must "step outside . . . her role of representing the company and either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting [Title VII] rights, or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights protected by [Title VII]." Before terminating employees, employers should consider any risk factors that may lead to termination, including any recent actions or conduct on the part of the employee which may give rise to a claim for retaliation.

Weeks v. State of Kansas, Office of the Fire Marshall, No. 11-3215 (10th Cir. Nov. 29, 2012)

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