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Labor and Employment Law Update

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In This Issue

The Employee Free Choice Act Is Down But Not Out

By Todd A. Newman

The Employee Free Choice Act ("EFCA") has been the subject of some heated debate and speculation in recent months, but don't count it out. Momentum is building for Senate activity after the August recess, and this controversial labor legislation seems likely to pass – most likely in a revised form – as early as this fall. Some employers are expressing optimism that the "card check" provision may be dead and that increased attention on the "binding arbitration" provision may soon lead to dramatic changes to that aspect of the EFCA. Nonetheless, employers should expect that the labor law will change dramatically in the next 3-6 months, and that those changes will favor unions and make it easier for them to organize employees. Employers are well advised, then, to prepare now.

I. The EFCA As Originally Drafted

The purpose of the EFCA is to make it easier for unions to organize employees. The two key – and highly controversial – provisions are "card check" and "binding arbitration":

- *Card Check.* In a feature known as "card check," the National Labor Relations Board ("NLRB") would be required to certify a union – without the secret-ballot election currently required by law – upon a mere showing that a majority of employees in the proposed bargaining unit signed authorization cards.

- *Mandatory Binding Arbitration.* If a newly certified union and the employer failed to agree to a first contract after 90 days of bargaining, then a mediator from the federal government could be asked to mediate for 30 days. If this did not result in an agreement, then the federal government would appoint an arbitration panel to decide the terms of the contract for a two-year period.

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Red Flags Rule Delayed Until November 1, 2009

By G. Michael Palladino

The Federal Trade Commission ("FTC") has announced that it has extended the deadline for complying with its new identity-theft regulations, commonly referred to as the Red Flags Rule, from August 1, 2009, to November 1, 2009. These regulations, which concern the FTC's enforcement of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), will impose obligations not only on certain financial institutions and creditors – but also on employers that use consumer reporting agencies to obtain background information on applicants for employment, and others.

This is the FTC's second recent extension of the deadline for complying with the Red Flags Rule. In April 2009, the FTC announced that it would delay enforcement of the regulations until August 1, 2009, to give covered entities additional time to prepare. Notably, other federal agencies commenced enforcement of the Red Flags Rule on November 1, 2008, for institutions subject to their oversight.

Coverage of Regulations

Generally, any public or private entity that meets the definition of a "financial institution" or "creditor" with "covered accounts" will be covered by the Red Flags Rule. Although much in the regulations is directed at banks and other financial institutions that provide credit to consumers, the new regulations also apply to entities that obtain consumer reports from third-party agencies – in the case of employers, for the purpose of making hiring, promotion and other employment-related decisions. Although users of consumer reports are covered by the new regulations only to the extent that they obtain the consumer reports from nationwide credit reporting agencies (such as Experian, Equifax and TransUnion), this encompasses a significant number of the consumer reports obtained by employers.

The new regulations will come into play for an employer when it receives a "notice of address discrepancy" from a nationwide credit-reporting agency in response to a request by the employer for a consumer report on an individual. A notice of address discrepancy will be sent by a consumer reporting agency when the address provided by the employer differs substantially from the address contained in the consumer report provided by the agency.

Although much in the regulations is directed at banks and other financial institutions that provide credit to consumers, the new regulations also apply to entities that obtain consumer reports from third-party agencies – in the case of employers, for the purpose of making hiring, promotion and other employment-related decisions.

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The proposed EFCA would also dramatically increase employer penalties. If an employer were found to have engaged in unlawful conduct during a union organizing campaign or while negotiations for a first contract were under way, then the employer would be subject to triple back pay in discharge situations, civil fines of up to $20,000, and mandatory injunctions.

The EFCA has stalled in the Senate, primarily over concern about card check and binding arbitration, because all Republican senators and as many as 12 Democratic senators oppose the EFCA in its original form. Accordingly, even though Democrats enjoy a filibuster-proof 60-40 majority in the Senate, they are presently unable to prevent a filibuster.

II. Alternatives Under Consideration

The Democratic senators who support labor law reform, but who do not support the EFCA in its present form, have generated a lot of discussion about how dramatically the EFCA might be revised before it becomes law. Some of these Democratic Senators, including Senators Arlen Specter (D-Pa.) and Blanche Lincoln (D-Ark.), have been discussing ways to make the bill "filibuster proof" yet still appeal to organized labor.

The rumors and reports coming out of these discussions include a report that six Democratic senators agreed to drop the card-check provision. However, union leaders insist that card check is still on the table. In addition, Senator Tom Harkin (D-Iowa), the EFCA's lead sponsor, has been quoted as saying, "There is no agreement on anything until there is an agreement on everything."

Thus, it appears that any and all potential alternatives continue to be in play, including the original version of the EFCA and such alternatives as "quickie" elections and other potential dramatic changes in the law.

While it is impossible to predict exactly what the EFCA will look like when it passes, it appears almost certain that some version of this legislation will eventually be enacted, potentially as early as this fall.

A. Alternatives To Card Check

A number of potential alternatives to card check have been raised in recent weeks, all of which would make it easier for unions to organize. Thus, even if one or more of the following ideas is included in the EFCA, employers need to remain active in efforts to deter union organizing if they want to remain union-free:

- *"Quickie" Elections.* In this scenario, a union could demand an NLRB-supervised secret-ballot election on extremely short notice by producing authorization cards signed by 30% of the proposed bargaining unit. Notice periods of five, ten, and 15 days have been proposed. As representation elections are typically preceded by a 40-60 day campaign period under current law, this alternative would *significantly* impair an employer's ability to communicate with employees prior to the election about its views on union representation.
- *Early Voting.* This proposal would replace card check by permitting employees – at any time during a union organizing campaign – to submit their vote to the NLRB by a confidential mail-in procedure. Opponents of this proposal are concerned that unions would encourage employees to submit their votes as soon as possible, preferably before the employer is even aware of the organizing drive. This would deprive the employer of the opportunity to communicate with its employees about unionization and to respond to the union's propaganda, one of the concerns that underlies opposition to card check.
- *Telephone And Internet Voting.* Under this approach—which is typically taken by the National Mediation Board ("NMB") in the railroad and airline industries—employees would be (a) given a confidential voter identification number approximately three weeks before the tally of votes, and (b) permitted to vote by telephone or internet at any time prior to the tally. This is of concern to employers under the NLRB's jurisdiction for two reasons. First, the three-week period is much shorter than the 40-60 day period that generally precedes an NLRB-supervised election under current law. And second, the potential for early voting during the pre-tally period would impair the employer's ability to convey its message to all eligible voters before they actually vote.
- *Equal Time – On Company Property.* In this scenario, unions vying to represent the proposed bargaining unit would be given equal time to meet with employees *on company property* if the employer holds "captive audience" meetings. This would radically change the law, which presently recognizes an employer's right not to permit third parties onto its private property, except in those rare situations when the union would otherwise not have reasonable access to the employees (*e.g.*, in "company town" situations). Of additional concern to employers is whether this proposal might evolve to give unions an equal right to use an employer's email system and/or other property or facilities, which would represent a dramatic shift in the present "balance of power."

B. Alternatives To Binding Arbitration

Also under consideration are the following potential alternatives to the EFCA's requirement for binding arbitration to resolve first contracts:

- *Last, Best Offer.* In this scenario, if the parties reached an impasse in their negotiations for a first contract, then they would submit their respective last, best offers to a mediator or arbitrator of some kind. Further details, if formulated, have not been disclosed.
- *Remedy For Bad-Faith Bargaining.* Another proposal believed to be under discussion would permit the NLRB to require the terms of a first contract to be determined through binding arbitration—but only upon finding that the employer had engaged in "bad faith" bargaining. This approach, however, could encourage unions to file bad-faith bargaining charges as a way to gain an advantage in negotiations and, as such, would likely make bargaining a much more litigious undertaking.
- *Miscellaneous Minor Adjustments.* Also under discussion are various minor adjustments to the proposed mandate for binding arbitration, such as requiring negotiations regarding a first contract to begin within 20 days after a union is certified, and extending the mediation period that would precede binding arbitration from 30 days to 120 days.

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C. Alternatives Proposed By Starbucks, Costco, And Whole Foods

Significantly, three high-profile companies that like to project a progressive image—Starbucks, Costco, and Whole Foods—have unveiled ideas for a potential compromise bill. While these companies oppose card check and mandatory binding arbitration, they have proposed the following:

- *Union Penalties.* Keep the tougher penalties against employers for unlawful conduct during union organizing campaigns and initial contract negotiations, and also add corresponding tougher penalties for union violations.
- *More Liberal Decertification Elections.* Make it easier for employers to call elections to try to decertify a union.
- *Short Pre-Election Period.* Set a fixed, relatively short period in which a secret-ballot election must be held (although their proposal does not specify what the time period should be).
- *Equal Access.* Give unions equal access to workers before elections, such as by allowing organizers to address workers on lunch breaks in the company cafeteria.

Interestingly, of these three companies, only Costco has a substantial component of employees who are unionized (about 20% of its hourly employees). Starbucks and Whole Foods have resisted most unionizing efforts.

III. Recommendations For Employers

While it is impossible to predict exactly what the EFCA will look like when it passes, it appears almost certain that some version of this legislation will eventually be enacted, potentially as early as this fall. Accordingly, employers should take the following steps immediately – if such steps are not already under way – to bolster their ability to prevent (or, as the case may be, to defeat) a union organizing campaign:

- Evaluate compensation and benefits.
- Conduct a wage and hour audit.
- Audit worker classifications.
- Evaluate senior executives, managers and front-line supervisors.
- Conduct employee surveys and/or 360-degree reviews.
- Audit workplace safety.
- Audit and address any unresolved workplace complaints.
- Provide training to managers to educate them on relevant topics.
- Provide training to employees to educate them about unions and the EFCA.
- Gather information about relevant unions.
- Develop and implement a comprehensive communications plan.
- Develop and implement policies restricting solicitation, distribution of literature, and access to the premises by non-employees to the extent permitted by law.

* * *

We have developed a comprehensive human resources and management program in anticipation of the EFCA's eventual passage, which we frequently tailor for corporate retreats, management retreats, and other training opportunities on-site at client locations.

Please feel free to contact us if you are interested in our EFCA program, or if you have any questions about the EFCA's status or potential impact on your business. ◆

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- Employee Handbooks And Employment Contracts

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E-Mail Policies May Open The Door To Labor Unions

By Brian D. Carlson

For employers interested in preventing employees from using the company e-mail system to solicit support for labor unions, *maintaining a facially neutral e-mail policy is not enough.*

Regardless of how carefully the policy is drafted, if it is *enforced* in a discriminatory manner—that is, if employees are permitted to use e-mail to solicit support for or participation in other types of organizations and activities—then the policy may be declared unlawful as applied to union solicitations.

In *Guard Publishing Co. v. NLRB*, a recent decision by a federal appeals court, the employer learned this lesson the hard way. The employer had a policy prohibiting all nonwork-related e-mails, but the employer did not enforce this policy strictly. Rather, the employer permitted employees to send e-mails concerning various nonwork-related pursuits, including invitations to house parties, poker games, and other social events. Nonetheless, when an employee sent e-mails asking coworkers to wear green as a show of support for the union in contract negotiations and seeking volunteers to help with the union's entry in a local parade, the employer disciplined the employee for violating this policy.

The* Guard Publishing *decision underscores that however an employer chooses to draw the line between permitted and prohibited uses of its electronic systems, it is not permitted to apply such policies in a manner that treats union-related communications differently from other nonwork-related communications of a similar nature.

The union's legal challenge to this action resulted in a clear wake-up call for the employer: *the court held that the employer's uneven enforcement of its e-mail policy rendered the policy unenforceable as to union solicitations.*

Factual Background

The employer in the case, Guard Publishing Company ("Guard"), publishes a daily newspaper in the Eugene, Oregon area. A significant number of its employees are represented by a local unit of the Communications Workers of America.

In May and August of 2000, Guard sent formal disciplinary warnings to a copy editor, Suzi Prozanski, who also served as the union's president, as a result of three e-mails that Prozanski sent to other Guard employees through the company's e-mail system. The first of these e-mails purported to clarify the facts surrounding a union rally. Prozanski had sent it in response to an e-mail from Guard that warned employees that the rally might be attended by anarchists. In the other two e-mails, Prozanski (a) urged employees to wear green to show support for the union in contract negotiations, and (b) sought volunteers to help with the union's entry in a local parade.

As its basis for formally warning Prozanski about these e-mails, Guard cited its written Communications Systems Policy ("CSP"), which prohibited use of the company's electronic systems and equipment "to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." In response to the disciplinary warnings, Prozanski's union filed an unfair labor practice charge with the National Labor Relations Board ("NLRB"), alleging that Guard had unlawfully discriminated on the basis of union activity by disciplining Prozanski for these e-mails while tolerating employee e-mails of a similar nature that did not relate to union activities.

The NLRB's Holding

In ruling on the charge, the NLRB determined that the first of the e-mails by Prozanski (the one concerning the union rally) did not constitute a "solicitation" but was purely informational in nature. Thus, the NLRB ruled that the e-mail did not fall within the prohibitions of the company's CSP. Moreover, the NLRB found that Guard had permitted a wide variety of nonwork-related e-mails by employees other than solicitations, such as jokes and baby announcements. As a result, the NLRB concluded that Guard had acted unlawfully by disciplining Prozanski based on the fact that her e-mail related to a union matter.

As to the remaining two e-mails (those soliciting support for the union relative to contract negotiations and a local parade), the NLRB rejected the union's allegation that Guard had unlawfully disciplined Prozanski based on the union-related content of these messages. On this point, the NLRB stated that an employer is free to draw the line between permitted and prohibited uses of its electronic communications systems on any basis that it deems appropriate, so long as the employer does not discriminate based on whether a communication relates to union activity.

Applying this principle, the NLRB found that while Guard had tolerated individual e-mail solicitations by employees (*e.g.*, e-mails offering sports tickets and personal services such as dog-walking), there was no indication that the company had permitted employees to use its e-mail system to solicit support for any outside groups or organizations. The NLRB concluded that it was this distinction, rather than the union-related content of the e-mails, that had motivated the disciplinary warning, and that Guard therefore had not violated the law by issuing this warning.

The Appeals Court's Decision

Both parties appealed the NLRB's decision to the U.S. Court of Appeals for the D.C. Circuit. In its ruling, the court did not question the NLRB's holding that an employer may adopt whatever distinctions it deems appropriate between permissible and prohibited uses of its electronic systems, provided that those distinctions are not based upon union activity. In addition, the court upheld the NLRB's finding that Prozanski's e-mail concerning the union rally did not fall within the restrictions of the CSP and that Prozanski's discipline regarding this e-mail was therefore unlawful.

However, contrary to the NLRB's finding, the court concluded that Guard had unlawfully discriminated on the basis of union activity in disciplining Prozanski for sending the two e-mails relating to contract negotiations and the union's entry in a parade. As to these e-mails, the court emphasized that the distinction cited by Guard and relied on by the NLRB – that of individual solicitations versus solicitations on behalf of outside groups or organizations – did not appear anywhere in the company's CSP. Rather, the CSP expressly prohibited *all* nonwork-related e-mail solicitations, whether individual or organizational in nature.

The court also made the following three points. *First*, the disciplinary notice that Guard had issued to Prozanski did not cite any distinction between individual and group solicitations as the reason Prozanski's e-mails were deemed to violate Guard's policies. *Second*, the company could not cite any other instance in which an employee had been disciplined for sending an e-mail in support of an outside group or organization. And *third*, employees had sent e-mails inviting coworkers to participate in parties, poker games, and other outside group events without being subject to discipline.

Accordingly, the court concluded that the distinction between individual and group solicitations that Guard relied on in the litigation was merely a *post hoc* invention, and that Prozanski had been disciplined unlawfully due to the union-related content of the e-mails.

Guidance for Employers

The *Guard Publishing* decision underscores that however an employer chooses to draw the line between permitted and prohibited uses of its electronic systems, it is not permitted to apply such policies in a manner that treats union-related communications differently from other nonwork-related communications of a similar nature. Therefore, employers should formulate e-mail policies that fit

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their culture and serve their goals—and that they are willing and able to strictly enforce.

For instance, an employer could validly exclude union-related communications by adopting a blanket rule requiring that its electronic systems be used solely for work-related messages. Such a policy, however, may be challenging to enforce, given that the incidental use of personal e-mails is inevitable in most workplaces. In this regard, supervisors may be uncomfortable imposing discipline for such incidental usage, and employees may perceive such discipline as unduly harsh.

Alternatively, an employer might bar only those nonwork-related e-mails that solicit support for or participation in nonwork-related activities and organizations. If strictly enforced, this approach should preclude union-related e-mails, while permitting the incidental use of personal e-mails for other purposes (*e.g.*, "Honey, what would you like me to pick up for dinner tonight?"). Such a policy should be easier to enforce than the blanket rule referenced above. Additionally, although such a policy would prevent personal e-mails that solicit support for or participation in popular activities like school events and fundraising walks, it nonetheless should be more acceptable to employees.

Regardless of where employers decide to draw the line, they are advised to take the following measures:

- Have legal counsel review any existing or proposed e-mail policy and enforcement plan to ensure compliance with applicable labor and privacy laws;
- Include in the company's employee handbook any new policy language that may be required, and notify employees of this change in a manner that does not state or imply a motive to prevent them from exercising their legal rights regarding labor unions;
- Conduct training for supervisors and managers on the e-mail policy and the related labor-law implications so that they may enforce the policy with a full understanding of its scope—and of the consequences of a failure to enforce it strictly; and
- Proceed to implement and strictly enforce the new or modified policy, as the case may be, having legal counsel review any personal e-mails that are questionable under the policy to determine an appropriate course of action.

Please feel free to contact us if you have any questions about the *Guard Publishing* decision, or if you need assistance in reviewing existing or proposed e-mail policies and corresponding enforcement practices. ◆

Red Flags Rule Delayed Until November 1, 2009

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Requirements for Employers

Under the new regulations, an employer must implement reasonable policies and procedures designed to enable it, in response to a notice of address discrepancy, to form a "reasonable belief" that the consumer report relates to the individual about whom the report was requested. The regulations state that possible examples of such policies and procedures include:

- Comparing the information in the consumer report provided by the agency with identity-confirming information that the employer uses under the federal Customer Information Program rules;
- Comparing the information in the consumer report with information that the employer maintains in its own records (such as job applications or change-of-address notifications); and
- Verifying the information directly with the individual to whom it relates.

After following such policies and procedures, an employer must furnish any address reasonably confirmed as accurate to the consumer reporting agency, provided that the employer:

- Has been able to form a reasonable belief that the consumer report corresponds to the individual about whom the report was requested;
- Regularly and in the ordinary course of business furnishes information to the consumer reporting agency that provided the notice of address discrepancy; and
- Has a "continuing relationship" with the individual. (Although the regulations do not define a "continuing relationship," this presumably includes any instance in which an employer hires or retains an individual as an employee after obtaining a consumer report regarding him or her.)

The employer must report the confirmed address as part of the information regularly furnished to the consumer reporting agency for the reporting period in which the relationship with the individual was established.

Failure to comply with the Red Flags Rule can result in substantial liability, including actual and punitive damages, costs and attorneys' fees. In addition, the FTC can impose civil penalties of up to $3,500 per violation. Thus, employers are advised to review the new regulations carefully to ensure that their policies and procedures for obtaining and processing consumer reports from nationwide consumer reporting agencies are fully compliant.

The Red Flags Rule, which has been published in the Federal Register at 16 C.F.R., Part 681, can be found by typing the following link into the address bar of your Internet browser: http://www.access.gpo.gov/nara/cfr/waisidx_08/16cfr681_08.html. In addition, the FTC has established a web site at www.ftc.gov/redflagsrule to assist covered entities with compliance programs. The FTC web site provides, among other things, a "how-to" guide for businesses seeking to create a Written Identity Theft Prevention Program in accordance with the Red Flags Rule.

Massachusetts employers covered by both the Red Flags Rule and the new Massachusetts data security regulations effective January 1, 2010, are urged to develop a Written Identity Theft Prevention Program that is consistent with the Written Information Security Program required by the Massachusetts Data Security Breach Law, codified in Chapter 93H, Sections 1-6 of the Massachusetts General Laws, and whose implementing regulations appear in Part 201, Section 17.00 of the Code of Massachusetts Regulations.

Please feel free to contact us if you have questions about the use of consumer reports in background checks, the Red Flags Rule, or the Massachusetts data security law and its corresponding regulations. ◆

Avoiding Six Common Traps In Defending Against Employee Lawsuits

By Heather E. Davies

When an employee (or a former employee) threatens a lawsuit against the employer, the employer should have a game plan in place to maximize its chances of successfully defending against that lawsuit. While there is no "one size fits all" strategy, there are traps to avoid. This article outlines tips for avoiding six common traps that employers often face in these circumstances.

1. Don't Ignore Demand Letters (And Don't Send A Half-Baked Response)

Some employers ignore demand letters, or send a half-baked (off-the-cuff) response. This is a mistake. A demand letter is often the first notification an employer receives of a threatened lawsuit by an employee (or former employee). Typically sent by the employee's lawyer, the demand letter usually sets forth the employee's claims, the alleged basis for these claims, and a monetary (or other) demand for resolving the claims without resort to litigation.

Even if the allegations appear baseless – or completely ridiculous – provide a firm, measured, professional response. Generally, employers should forward the demand letter to counsel for review and preparation of a prompt response. While lawsuits are not always averted by the response to a demand letter, they often are. Ideally, the response will stop the former employee and his/her attorney in their tracks, forcing them to acknowledge the frivolity of their claims – or it may lead to a negotiated solution, if that is appropriate. At worst, however, the effort to investigate the threat contained in the demand letter should help the employer begin to prepare a successful defense of the lawsuit, if it is filed.

2. Utilize The Litigation Hold

Employers sometimes neglect to promptly impose a "litigation hold," which is a written instruction to key employees that they must not discard or destroy any documents or information that pertain to the employee, the employee's claims, and the employer's defenses. The "litigation hold letter" should be drafted with care, to ensure that it addresses all relevant facts and legal issues, and then it should be sent to all relevant managers, supervisors, and coworkers, as well as to those who maintain the employer's paper and electronic records. The litigation hold should specifically include documents and information stored electronically, including e-mails.

Some employers expressly refuse to send out such a letter, based upon the mistaken belief that what does not exist cannot cause harm. Unfortunately, that "strategy" has backfired badly. The risk is that such employers will incur substantial liability under the "spoliation doctrine," which applies when a party – or someone affiliated with the party – negligently or intentionally loses or destroys documents or other evidence relevant to actual or anticipated litigation. A party that loses or destroys relevant evidence – even if erroneously and in good faith – may be held accountable for the resulting prejudice to the opposing party. Thus, when questions arise, the employer should err on the side of preserving documents.

Sanctions for failing to preserve evidence can be severe, and may include: giving a jury permission to infer that the missing evidence would have been unfavorable to the employer's case (an "adverse inference" instruction); precluding testimony from any of the employer's representatives who failed to preserve evidence; and requiring the employer to pay the potentially substantial costs associated with re-deposing witnesses after missing evidence is retrieved.

3. Advise Employees About Inquiries By Plaintiff's Counsel

Employers sometimes neglect to advise employees that they may be contacted by plaintiff's counsel – and that they have the right (or, in the case of certain managers, the obligation) not to communicate with him/her. Employers should be sure to have these conversations with employees and managers, and should ask them to report any such contacts to a designated company official.

Note: employers should *not* instruct *employees* that they "must" report any such contact by plaintiff's counsel, as such an instruction could infringe on employees' rights under Section 7 of the National Labor Relations Act, which entitles employees to engage in "concerted activities" for the purpose of "mutual aid or protection."

Generally, plaintiff's counsel may contact employees in connection with a lawsuit without notifying the employer. The only employees who are typically "off limits" are those who (1) exercise managerial responsibility in the matter, (2) are alleged to have committed the wrongful acts at issue in the litigation, and (3) have authority to make decisions for the employer about the course of the litigation. But while plaintiff's counsel has a right to contact most employees, the employees have no corresponding obligation to cooperate. Being informed of this is often a relief to employees, as many would prefer not to deal with the lawyer of a disgruntled coworker (or former coworker).

4. Carefully Designate Company Representatives

If a lawsuit is filed, carefully designate your employer representatives for purposes of the employer's deposition. Under state and federal rules of civil procedure, plaintiffs can – and almost always will – take the deposition of the employer, after first serving a deposition notice that includes a list of the topics to be explored in the deposition. The employer must then designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, indicating the topics as to which each person will testify.

Even if the allegations appear baseless – or completely ridiculous – provide a firm, measured, professional response...While lawsuits are not always averted by the response to a demand letter, they often are.

While the employer's witness(es) cannot be designated until the deposition notice has been served, nonetheless, ideally, this issue will have been given some consideration early in the case, when the employer selected its "point person" for managing the litigation. In this regard, the manager(s) who are most likely to be employer witnesses should not be completely unfamiliar with the lawsuit when the deposition notice is served.

The employer's designees need not have had involvement in the circumstances giving rise to the litigation. The only requirement is that they appear at the deposition prepared to testify about information known or reasonably available to the employer relative to the topics for which they are designated. Factors to consider in determining the employer's designees include the individual's ability to (a) absorb information concerning the designated topics and understand how to discuss it in the context of the case, (b) present well and think on his or her feet, (c) project an image of confidence and credibility, and (d) handle a challenging or even hostile cross-examination calmly and tactfully.

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Massachusetts Court Enforces Non-Competition Agreement In California

By Brian D. Carlson

A Massachusetts Superior Court judge recently ruled that a company could enforce a non-competition agreement with a former employee even though the employee was seeking to take a new job in California, which generally prohibits employee non-competition covenants.

Factual Background

The defendant in the case, David Donatelli, was employed by EMC Corporation ("EMC") as an Executive Vice President and as President of its data-storage division, the company's core business. Donatelli worked out of EMC's Massachusetts headquarters.

In May 2002 (approximately 15 years after joining EMC), Donatelli entered into a written "Key Employee Agreement" with EMC. As part of this agreement, Donatelli agreed that for a period of 12 months following the termination of his employment with EMC, he would not work in a similar capacity for a competitor of the company. The agreement provided that it was to be governed by Massachusetts law.

...it remains to be seen whether other Massachusetts judges and courts will formally adopt Judge Neel's conclusions. The decision, however, is the first clear Massachusetts judicial decision on this issue and thus may prove persuasive in future cases...

In April 2009, Donatelli notified EMC that he was resigning from the company in order to accept a position in California with Hewlett-Packard Company ("HP"). His new job would involve responsibility for HP's data-storage business. At the same time, Donatelli filed a lawsuit against EMC in a California court, asking that his non-competition agreement be declared unenforceable due to California's statute barring such covenants and its corresponding policy against them.

The following day, EMC filed its own lawsuit against Donatelli in Massachusetts Superior Court. EMC asked the court to issue a preliminary injunction upholding Donatelli's non-competition agreement and precluding him from accepting employment with HP.

The California court denied the initial relief sought by Donatelli (a temporary restraining order prohibiting EMC from enforcing the non-competition covenant), and while further California proceedings were pending, the Massachusetts court issued its ruling against Donatelli. A dismissal was filed in the California action on August 5, 2009.

Massachusetts Superior Court's Decision

As noted, the Massachusetts Superior Court ruled that the non-competition covenant was, in fact, enforceable against Donatelli to prevent him from competing against EMC as an officer of HP in California. In reaching this conclusion, the court rejected Donatelli's arguments that California law and policy precluded enforcement of his agreement with EMC.

In opposing EMC's request for an injunction, Donatelli emphasized that he intended to work for HP *in California*, which prohibits employee non-competition agreements. Accordingly, Donatelli argued, the Massachusetts Superior Court should refuse to enforce his non-competition covenant, even though the Key Employee Agreement provided that it was to be governed by Massachusetts law, which permits employee non-competition covenants in appropriate circumstances.

In a ruling by Judge Stephen E. Neel, the Massachusetts Superior Court concluded that California's policy against enforcement of non-competition covenants should not take precedence over Massachusetts law. In this regard, Judge Neel noted that Donatelli had lived in Massachusetts, that he worked for EMC in Massachusetts, and that he had not yet relocated to California in connection with his planned employment with HP.

In addition, Judge Neel rejected Donatelli's argument that an injunction should not be issued against him because a California court would not enforce it. Noting that at the time the Key Employee Agreement was signed, EMC had no reason to expect that Donatelli might later move to California, Judge Neel concluded that an injunction enforcing the non-competition covenant should not be refused "simply because another state may not enforce the injunction should the Massachusetts employee move to that state." This, the judge noted, would be unfair to EMC because EMC reasonably expected the covenant to remain enforceable.

Finally, Judge Neel denied Donatelli's request that all proceedings in the case be placed on hold pending resolution of Donatelli's own lawsuit against EMC in California. Judge Neel stated that the so-called "first filed" rule (under which courts may defer to previously filed lawsuits involving the same parties and issues) does not apply to lawsuits filed in two different states' courts.

A few weeks after releasing this decision, Judge Neel issued a supplemental ruling that Donatelli could go to work for HP so long as he had no involvement in HP's data-storage business for the one-year duration of the injunction. While this supplemental decision allowed Donatelli to begin working for HP in a different capacity than he had intended, it did not alter Judge Neel's earlier ruling that the non-competition covenant was enforceable.

Because the *Donatelli* decision is a trial-court holding, it will not be binding on other courts in other cases. Thus, it remains to be seen whether other Massachusetts judges and courts will formally adopt Judge Neel's conclusions. The decision, however, is the first clear Massachusetts judicial decision on this issue and thus may prove persuasive in future cases, particularly as Judge Neel sits in the court's Business Litigation Session, where cases involving non-competition agreements are frequently heard.

For the time being, the decision may dampen the efforts of companies located in California (and other states that are relatively hostile to non-competition agreements) to recruit executives from Massachusetts. Correspondingly, Massachusetts employers now have a measure of comfort that key employees cannot freely break their non-competition agreements simply by relocating to another state in order to work for a competitor.

Should you have any questions about the implications of the *Donatelli* decision or non-competition agreements generally, please do not hesitate to contact us. We regularly assist employers in drafting non-competition agreements and in litigation regarding such agreements. ◆

If you prefer to receive a copy of the Firm's Labor and Employment Law Update by e-mail in pdf (portable document format), please contact Kathie Duffy at kduffy@shpclaw.com or (978) 623-0900 to let us know and to provide us with your correct e-mail address. (As you may know, you must have Adobe Acrobat Reader to view the Update in pdf.)

A searchable archive of past Update Articles and E-Alerts is available on the Firm's website, www.shpclaw.com.

Massachusetts High Court: Pay All Accrued But Unused Vacation Time

By Shannon M. Lynch

Employees who are involuntarily discharged must be paid for all accrued but unused vacation time on the discharge date, regardless of whether the employer has a policy to the contrary, the Massachusetts Supreme Judicial Court ("SJC") has ruled. Employers must immediately comply with this ruling, which clarifies a critical yet ambiguous portion of the Massachusetts Wage Act.

In *Electronic Data Systems Corporation v. Attorney General*, the SJC addressed whether an employer's written vacation policy, which did not provide for payment of accrued but unused vacation time upon an employee's discharge, violated Mass. Gen. Laws ch. 149, § 148 (the "Wage Act").

The Wage Act states that "any employee discharged from such employment shall be paid in full on the day of his discharge." It defines wages to include "any holiday or vacation payments due an employee under an oral or written agreement." Significantly, the statute also instructs that "[n]o person shall by a special contract with an employee or by any other means exempt himself from this section."

The employer, Electronic Data Systems Corporation ("EDS"), argued that vacation payments were not due to a discharged employee under a written agreement – and therefore were not required to be paid under the Wage Act – because its written vacation policy stated: "Vacation time is not earned and does not accrue. If you leave EDS, whether voluntarily or involuntarily, you will not be paid for unused vacation time (unless otherwise required by state law)."

In rejecting EDS's argument, the SJC relied upon a 1999 Advisory of the Massachusetts Attorney General (the "Advisory"). The Advisory requires the payment of accrued but unused vacation time upon discharge and treats policies like EDS's as prohibited "special contracts." Because the Attorney General's office is responsible for enforcing the Wage Act, the SJC explained, its Advisory is entitled to "substantial deference." Finding the Advisory to be reasonable and not inconsistent with the plain language of the Wage Act, the SJC deferred to it.

The SJC did not reach the question of whether an employee who leaves a job voluntarily must be paid for accrued but unused vacation time. However, the Advisory instructs, "Employees who have performed work and leave or are fired, whether for cause or not, are entitled to pay for all the time worked up to the termination of their employment, including any earned, unused vacation time payments."

This case began when EDS refused to pay employee Francis Tessicini his accrued but unpaid vacation time upon eliminating his position in April 2005. Tessicini filed a wage complaint with the Attorney General's office, which issued a citation requiring EDS to pay a civil penalty. EDS appealed to the Division of Administrative Law Appeals ("DALA"), which upheld the citation, and then sought review of DALA's order by the Superior Court, which affirmed DALA's decision. EDS appealed the Superior Court's decision to the SJC, which granted direct appellate review.

Electronic Data Systems provides an important reminder to Massachusetts employers not to make policy decisions until after reviewing all applicable sources of legal authority. In this regard, while EDS's interpretation of the Wage Act itself was plausible, it was inconsistent with an administrative advisory that interpreted the Wage Act differently and that was entitled to "substantial deference" by the courts.

Achieving full compliance with the Wage Act is particularly important because this law entitles prevailing plaintiffs to mandatory treble damages plus attorneys' fees for proven violations. This is so even in the case of unintentional violations by employers acting in good faith. Accordingly, we encourage employers to review their vacation policies, update their employee handbooks, and provide corresponding training to their supervisors and managers so as to ensure adherence to *Electronic Data Systems*.

Multi-state employers are encouraged to review all applicable vacation laws and guidance to ensure compliance in all relevant states.

If you have questions about the implications of this case or pay practices generally, please do not hesitate to contact us. ◆

Avoiding Six Common Traps In Defending Against Employee Lawsuits

continued from page 6

5. Always Consider Potential Counterclaims

When a lawsuit is threatened, the employer should consider whether it has any potential counterclaims against the employee (or former employee). If the employer can assert a counterclaim against this person based on facts arising out of the employment relationship, then this counterclaim is likely to be "mandatory," meaning that the employer will waive the right to pursue this claim by failing to raise it as a counterclaim. Valid counterclaims, whether mandatory or permissive, can be an effective way to gain leverage against the employee, as they increase the employee's risk of loss and impose a burden to defend.

Employers also need to be circumspect about potential counterclaims. In short, employers should not countersue merely because the employee's suit is considered to lack merit. Counterclaims of this kind, sometimes styled as claims for malicious prosecution or abuse of process, are routinely dismissed under the Massachusetts Anti-SLAPP Act, which prohibits "strategic lawsuits against public participation." When a suing employee successfully files a special motion to dismiss under this law, the employer is required to pay the employee's costs and reasonable attorneys' fees. Accordingly, any and all counterclaims should be based on facts and legal grounds beyond the fact of the employee's lawsuit.

6. Include A Cooperation Clause In Separation Agreements

Even when employers may not anticipate a future lawsuit, employers should always consider including a cooperation clause in separation agreements (and other similar agreements) signed by departing employees. A cooperation clause typically requires the departing employee to assist the employer in pending and future lawsuits (or similar proceedings, such as audits and investigations) concerning matters that arose during the individual's employment and as to which he or she has knowledge or information. Such provisions should routinely be used with departing management employees. Employers whose agreements do not include a cooperation clause may have difficulty in future litigation after a supervisor, manager, or key employee separates from the employer, as such persons often have knowledge or information about the circumstances giving rise to the lawsuit. From a practical standpoint, then, a cooperation clause is an easy way to secure a commitment of assistance in advance of litigation.

* * *

Please do not hesitate to contact us if you have any questions, or if we can assist with threatened or pending employment litigation. Our attorneys are licensed to practice in seven states, the District of Columbia, and numerous federal trial and appeals courts, and routinely represent employers in state and federal actions and administrative proceedings. ◆

SCHWARTZ HANNUM PC
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Fall 2009 Boot Camps And Seminars

Employee Free Choice Act (EFCA) Boot Camp

September 24, 2009
8:30 a.m. to 12:30 p.m.
(4.00 (General) recertification hours through HRCI)
Location: Schwartz Hannum PC

Schwartz Hannum PC has developed a comprehensive human resources and management program, presented in an interactive seminar format. EFCA Boot Camp instructs participants about expected dramatic changes in the law, and explains why employers must act now to prepare for those changes. The program reinforces how participants' existing knowledge of basic management skills, employment laws and personnel practices can be utilized to reduce the heightened risks of union organizing efforts under the EFCA.

Registration Deadline: ..... September 15, 2009

Tuition: $375

Employment Law Boot Camp

October 6, 2009 and October 7, 2009
8:30 a.m. to 4:30 p.m.
(14.00 (General) recertification hours through HRCI)
Location: Schwartz Hannum PC

The Firm has developed a fourteen-hour intensive human resources skills development program in response to the growing challenges of its clients. Boot Camp, presented in an interactive seminar format, provides written resources, real-life role-plays, and valuable networking opportunities for its participants.

Registration Deadline: ..... September 30, 2009

Tuition:

Early Bird Registration: $850
(Prior To Labor Day, September 7th)

On Or After September 7th: $950

Labor Relations Boot Camp

October 19, 2009
8:30 a.m. to 4:30 p.m.
(7.00 (General) recertification hours through HRCI)
Location: Schwartz Hannum PC

Schwartz Hannum PC has developed a one-day interactive seminar for human resources professionals, labor relations professionals, in-house counsel, and managers at both unionized and non-unionized employers who want to better understand and manage the big-picture and day-to-day operations of their organizations' labor-management relationships.

Registration Deadline: ..... October 10, 2009

Tuition: $500

Annual Hot Topics Seminar

November 12, 2009
8:30 a.m. to 12:00 p.m.
(3.25 (General) recertification hours through HRCI)
Location: The Westin Waltham-Boston, Waltham, MA

Schwartz Hannum PC will hold its 9th annual Labor and Employment Law "Hot Topics" Seminar on Thursday, November 12, 2009, at The Westin Waltham-Boston. The Firm will discuss the most current issues in labor and employment law.

Registration Deadline: ..... Open

Tuition:

Early Registration For Current And Former Clients: $150
(Prior To October 1, 2009)

Early Registration For All Others: $200
(Prior To October 1, 2009)

Late Registration: $225
(On Or After October 1, 2009)

Detailed information for each presentation may be found on the Firm's website at www.shpclaw.com.

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$200 (all others, prior to October 1, 2009)
$225 (on or after October 1, 2009)

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