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LABOR UPDATE – FOURTH QUARTER 2010

RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

HOW DO THEY GET THOSE NOOKS AND CRANNIES? BAKERY BOSS ENJOINED FROM WORKING FOR COMPETITOR

Chris Botticella was a highly paid manager of Bimbo Bakeries. In such capacity, Botticella was privy to a number of trade secrets of his employer, including the closely guarded secret recipe of the signature “nooks and crannies” of Thomas’ English Muffins, a secret known only by seven people in the world.

While still working for Bimbo, Boticella accepted an offer of future employment from Hostess Brands, a competitor of Bimbo. Boticella did not disclose the offer to Bimbo while he remained employed there, and he continued to routinely receive highly confidential information and attend meetings at Bimbo where such matters were discussed.

Boticella had a long standing written agreement with Bimbo that he would not disclose any of Bimbo’s confidential information, but did not have any restriction as to whom he could work for if he left Bimbo.

When Boticella finally disclosed to Bimbo that he was leaving, and it was discovered that three months had passed since he accepted Hostess’ employment offer, Bimbo conducted a forensic examination of Boticella’s laptop computer. The company discovered that Boticella had accessed a significant number of confidential documents during the final weeks of his employment at Bimbo. Evidence that external hard drives and portable flash devices were connected to Boticella’s computer near the time that the confidential files were accessed by him was of great concern to Bimbo.

Bimbo filed suit not only to enforce its rights under the confidentiality agreement it had with Boticella, but also to seek an injunction barring him from going to work for Hostess, where Bimbo feared its trade secrets would be divulged. Boticella admitted to copying files from his laptop to external devices, but said he was only “practicing,” to hone his computer skills. He also claimed that during the months after he accepted the Hostess position but was still employed by Bimbo, he didn’t look at any confidential materials that were shown or given to him, and when confidential matters were reviewed in meetings, he “blocked” the discussions out of his head.

A United States District Court in Philadelphia issued a temporary injunction, barring Boticella from employment with Hostess, at least until a trial could be held. Boticella appealed to the United States Court of Appeals in the Third Circuit, which agreed that the temporary injunction should stand.

The court first wrestled with the question of whether there was a substantial likelihood, and perhaps an inevitability, that Bimbo's trade secrets would be disclosed in the course of Botticella's employment with Hostess. The court observed that Botticella's prospective job at Hostess was substantially similar to his former position at Bimbo, having a broad oversight over bakery operations at a similar compensation level and corporate rank.

The court also had to weigh two important public interests. First, the interest in keeping trade secrets secret and in enforcing confidentiality agreements needed to be considered. Second, the public interest of employers hiring whom they want and employees' freedom to work for whom they please was an important consideration. While the court acknowledged that Pennsylvania law typically gives greater weight to the interest of free employment, the facts in this case demonstrated that protecting Bimbo's trade secrets outweighed the temporary restriction on Botticella's choice of employment. Whether or not that temporary restriction will become permanent will be determined at trial. *Bimbo Bakeries USA, Inc. v. Botticella*, 2010 LEXIS 15314 (3rd Cir., July 27, 2010).

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ILLINOIS TOUGHENS WAGE PAYMENT PENALTIES

Effective January 1, 2011, a recent amendment to the Illinois Wage Payment and Collection Act (IWPCA), ominously dubbed the "Wage Theft Enforcement Act," will impose significant new penalties upon employers that fail to pay wages on time and in full. The Act will also make it easier for employees to bring administrative or court claims to collect unpaid wages.

The amendment enhances criminal penalties for employers that violate the IWPCA and makes the willful failure to pay wages due either a Class B or Class A misdemeanor, depending upon the amount of wages due. The amendment also punishes repeated violations of the IWPCA as a Class 4 felony.

The revised law also authorizes the Illinois Department of Labor to establish streamlined procedures for adjudicating small wage claims (\$3,000 or less) filed with the Department. In addition, employees may now pursue individual or class action wage claims directly in court, without having to first file a complaint with the Department.

The amendment also awards prevailing employees interest at the rate of 2% per month for the entire time in which wages go unpaid. If an employer is ordered to pay wages owed, it must now also pay, in addition to wages and interest, a \$250 administrative fee to the Department. If an employer refuses to comply with or appeal an order to pay, it also must pay the Department a penalty equal to 20% of the total amount owed, and pay the employee 1% of that total for each day payment is delayed.

Lastly, the amendment expands the current anti-retaliation provisions of the IWPCA. An employee may file a claim for retaliation either with the Department or in court, and may recover costs and attorneys fees in connection with a court claim.

In view of these changes and tough new penalties, employers should review their payment policies and practices to make certain that current employees are compensated regularly and on time, and that terminated employees receive all final compensation due them upon separation, regardless of the reasons for termination.

EMPLOYERS TAKE NOTICE: FMLA PREVAILS OVER POLICY

A recent decision by a federal court in Chicago highlights how broadly the Family and Medical Leave Act applies to absences due to illness. In some instances, the FMLA either excuses or expressly overrides compliance with company policies.

Mitchell Harvey worked as a driver for Waste Management. The company had a formal attendance policy based on a point system for unexcused absences. Waste Management also had a formal contact procedure—called the “Time Off Planning Service” or “TOPS”—for employees to report their need for any medical-related absence.

Harvey had already received formal notice that he was one point away from termination under Waste Management’s attendance policy. When he became sick at work one day, Harvey told his supervisor that he wasn’t feeling well and also spoke to his district manager. The district manager observed that Harvey was having difficulty even standing up straight, so he suggested that Harvey leave work, if needed.

Harvey left work and was admitted to a hospital later that day. Although no one contacted TOPS that day, Harvey and his girlfriend both called Harvey’s supervisors and left messages that Harvey was in the hospital. Harvey’s girlfriend also called and spoke with Harvey’s supervisor the next day. Nevertheless, Waste Management terminated Harvey, because his absence the day before was considered unexcused and thus resulted in his final “point” under its attendance policy.

Harvey, who was diagnosed with Addison’s disease a month later, sued the company claiming that his absence the day he left work and was admitted to a hospital (and subsequent time off) should have been deemed job-protected FMLA leave. In defense, Waste Management argued that Harvey failed to provide adequate notice that FMLA leave was needed or required and did not comply with the company’s absence notification requirements under TOPS.

The court rejected Waste Management’s arguments and ruled for Harvey on his FMLA claim. The court noted that the FMLA’s notice requirement is not demanding, and that an employee is not required to mention the statute or specifically demand its benefits, but need only alert his employer to a “probable basis” for FMLA leave. Although it is not enough for an employee to merely inform an employer that he is “sick,” in this case, Waste Management had probable cause—based upon Harvey’s report that he was not feeling well, the district manager’s observation that Harvey was having trouble standing, and the company’s knowledge of his hospitalization—to believe that Harvey’s health condition was sufficiently serious to warrant FMLA leave.

Furthermore, the U.S. Department of Labor’s regulations provide that an employee’s failure to follow specific internal reporting procedures does not permit an employer to delay or deny an employee’s taking of FMLA leave, so long as the employee has otherwise given timely notice. Consequently, it made no difference that Harvey had not contacted TOPS.

Much more so than their employees, covered employers must always be mindful of the potential application of the FMLA to reports of employee illness. Even when an absence appears to fall squarely within the terms of an established company policy, a review of the FMLA’s rules and regulations is recommended. *Harvey v. Waste Management of Illinois, Inc.*, 2010 U.S. Dist LEXIS 42028 (N.D. Ill., April 29, 2010).

COMPARED TO WHAT? COURT HELPS DEFINE WHO IS “SIMILARLY SITUATED”

Discrimination cases often depend upon the plaintiff successfully pointing to a “similarly situated” fellow employee or employees who were treated differently than the plaintiff. Last month, the federal appeals court in Chicago helped shape the law on this point.

Katherine Weber was terminated by Universities Research Association, Inc. (“URA”) after the company discovered that Weber was spending excessive work time browsing the internet, including accessing her personal email accounts. Weber sued URA for gender discrimination and retaliation, and pointed to the personal computer usage of several male employees who were not fired, as evidence that she was treated differently than similarly situated males.

Examining the facts, the court found that Weber had spent up to 16 hours per week surfing the internet, including regular access of her two personal email accounts. Weber had an outside dog training business, and her business ads listed her two personal email accounts as contact points. Much of Weber’s internet browsing involved sites related to canine interests. Further, Weber had failed to file a form with her employer, disclosing that she had outside employment.

Turning to the males that Weber claimed were comparative, the court of appeals observed that Weber was required to show that her male coworkers, “...had engaged in similar conduct without differentiating or mitigating circumstances as would distinguish their conduct or the employer’s treatment of them.” Although Weber was able to point to a male coworker who had downloaded a few music files, another who had looked at some pornography on his computer and another who had an outside business that wasn’t registered by that employee with URA, the court found these rather isolated instances, “...a far cry from spending more than 16 hours in one week on myriad websites related to an outside business.” The court further found that URA might reasonably have viewed Weber’s use of company resources and time to further her outside business as something more offensive than merely wasting company time, as the males had done.

The case illustrates the importance of documenting work performance factors and the bases for discipline, hiring and promotion decisions. When faced with a claim of discrimination, such documentation can be vital to show *differentiating or mitigating circumstances* demonstrating that claims of different treatment relative to other employees are inapt, because those employees are not similarly situated. *Weber v. Universities Research Association, Inc.*, 2010 U.S. App. LEXIS 18324 (7th Cir., September 2, 2010).

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QUOTABLE

If you wish to drown, do not torture yourself with shallow water.

Bulgarian Proverb

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