

PETERS & LYONS, LTD.

ATTORNEYS AT LAW

7035 VETERANS BOULEVARD
BURR RIDGE, IL 60527

VOL. 28 No. 4

DONALD F. PETERS JR.
CHRISTOPHER P. LYONS

TELEPHONE (630) 887-6900
FACSIMILE (630) 8876910
WWW.PETERSLYONS.COM

LABOR UPDATE — FOURTH QUARTER 2011

RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

AT THE “CORE” OF THE DUTY TO BARGAIN

The National Labor Relations Board ruled in August that a hospital did not have authority to implement a flu prevention program without first bargaining with its nurses’ union.

In order to combat the spread of influenza from its employees to its patients, the hospital adopted a policy requiring all employees, including nurses, to either have a flu shot, take antiviral pills, or wear a mask while at work. The nurses’ union opposed the plan and filed an unfair labor practice charge against the hospital for failing to collectively bargain with the union over it.

As a general rule, matters affecting terms and conditions of employment, including work rules enforceable through discipline, are mandatory subjects of collective bargaining. Therefore, an employer must provide a union with both notice and opportunity to bargain over such matters, prior to adopting them. There are, however, some limited, recognized exceptions to this rule.

Citing one of these defenses, known as the “core purposes” exception, an Administrative Law Judge dismissed the failure to bargain charge against the hospital. The ALJ found that there was “little if anything more central to the Hospital’s entrepreneurial purpose than its attempt to keep its patients free of the influenza virus.”

However, in reversing this dismissal and reinstating the complaint against the hospital, the Board held that the “core purposes” exception should not have been applied to the case. It said that the exception emerged from a 1987 case in which a newspaper publisher unilaterally implemented an ethics policy for journalists. In that 1987 case, the Board held that the paper had lawfully implemented its policy without bargaining, because the subject of the policy, the protection of journalistic ethics and integrity, went to the “core purposes of the enterprise.”

Nevertheless, a majority of the current Board held that this 1987 precedent was decided under “unique circumstances” involving the First Amendment and freedom of the press, and was thus “limited to its facts.” Accordingly, it declined to apply this nearly 25 year-old exception to the hospital.

This decision should caution unionized employers against implementing work rules and policies not already covered in their contracts without bargaining. However, in some instances a strong management rights clause within the union contract can allow the implementation of certain rules without bargaining. Therefore, counsel should be sought in these instances before proceeding. *Virginia Mason Hospital*, 357 NLRB No. 53 (August 23, 2011).

ACCOUNT MANAGER FOUND TO BE EXEMPT FROM OVERTIME

Penny Verkuilen worked as an account manager for MediaBank, LLC. The company provides software services to advertising agencies that enable the searches necessary for advertisers to locate and negotiate with available media outlets. The software is complex because it integrates these functions and is capable of being customized for the needs of the ad agency and advancing technology.

Meeting with customers to understand their needs, Verkuilen developed specifications to be implemented by the software developers who often checked back with her to be sure that the ultimate goals of the customer were being met. Once the software was delivered, Verkuilen spent substantial time on the customer's premises. While there, she trained the customer's staff, solved problems and answered questions to the extent of her knowledge, while acting as a bridge bringing more difficult questions back to MediaBank's software developers.

Verkuilen sued for overtime pay for the weeks in which her work time exceeded forty hours. At issue was whether Verkuilen met the administrative exemption of the federal Fair Labor Standards Act. If so, she would not be entitled to overtime pay. Quoting the applicable regulations of the U. S. Department of Labor, the federal court of appeals in Chicago observed that to fall within this exemption the employer must show that Verkuilen's primary duty was *both* "the exercise of discretion and independent judgment with respect to matters of significance" *and* "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers."

In considering the scope of Ms. Verkuilen's duties and responsibilities, the court observed that she was not like "a salesman for Best Buy or a technician sitting at a phone bank fielding random calls from her employer's customers—instead she's on the customer's speed dial during the testing and operation of the customer's MediaBank software." Thus, the court found her exempt in that her primary duty involved the exercise of discretion and independent judgment with respect to matters of significance, and held further that such non-manual work was related to the general business operations of MediaBank's customers.

This decision certainly does not mean that every account manager at every company is exempt from overtime. Determinations as to whether an employer can meet its burden of demonstrating that a given employee is exempt must be done after a careful review of the employee's actual duties and responsibilities and in light of the requirements of the Act and the regulations of the Department of Labor.

Our firm has long advocated that employers proactively conduct a self-audit to identify positions they currently classify as exempt that may be problematic and then seek professional guidance to make necessary adjustments to comply with the law. Peters & Lyons, Ltd. can assist with such a review. (*Verkuilen v. MediaBank, LLC*. 616 F.3d 976 (7th Cir. 2011).

LES MISERABLES – REDUX

The EEOC has brought suit against Walgreen Co. under the Americans with Disabilities Act ("ADA") for firing a diabetic cashier. Josephina Hernandez worked in a Walgreens store for eighteen years with an unblemished record. The company knew of her diabetes. Apparently, Hernandez opened and ate a small bag of potato chips off the store's shelf when she felt that her blood sugar was becoming low. Hernandez paid for the \$1.39 snack at the end of her shift, but nevertheless was fired. The EEOC attorney has taken the position that Walgreens should have reasonably accommodated Hernandez's disability by being flexible and open-minded given all of the facts.

DESTRUCTION OF DOCUMENTS DOES NOT AFFECT DISPOSAL OF DISCRIMINATION CLAIM

Carol Everett worked as a dentist for the Cook County Bureau of Health, providing dental services to inmates at Cook County jail. During a County financial crisis, the Bureau of Health was targeted for budget cuts, and a decision was made to reduce the number of dentists at the jail from five to one.

In deciding which of the five dentists to keep, the County considered management experience, flexibility, productivity and skills. The County ultimately retained Ronald Townsend, an African-American. Everett, who is White and was terminated, then sued the County for “reverse” discrimination.

Everett’s claim was dismissed, the court holding that she failed to present either direct or indirect evidence of discriminatory intent. In addition, she could not show that the County’s stated belief that Townsend was more qualified was dishonest or a pretext.

Everett tried to salvage her claim by emphasizing the fact that the County had admittedly destroyed various notes and reports relating to its layoff and retention decisions. Everett argued that the County’s “conscious destruction” of these documents warranted an inference that the materials contained information adverse to the County and helpful to her claim.

The court of appeals rejected Everett’s argument and affirmed the dismissal of her discrimination claim. It held that for Everett to be entitled to a negative inference against the County, she had to show that the County intentionally destroyed the documents in bad faith. However, she had no evidence of that.

Although the destruction of these relevant documents did not disadvantage Cook County in this litigation, employers should be careful to safeguard and preserve all records relating to personnel decisions, in order to defend themselves from subsequent challenge. In a worse case scenario, destruction of even benign documents can hurt an employer through a negative inference, if an issue of bad faith destruction can be credibly raised. *Everett v. Cook County*, No. 10-1975, 2011 U.S. App. LEXIS 17681; 113 Fair Empl. Prac. Cas. (BNA) 9 (7th Cir. August 24, 2011).

YET ANOTHER THING FOR EMPLOYERS TO POST IN THE WORKPLACE

The National Labor Relations Board recently issued a rule requiring private-sector employers to post a notice informing employees of their rights to form or join a labor union under the National Labor Relations Act (NLRA). Employers must begin posting the notice, copies of which will be made available on the NLRB’s website (www.nlr.gov), by November 14, 2011.

In addition to posting the 11” by 17” notice on company bulletin boards where other required postings are typically displayed, employers must also post the notice electronically on their intranet or internet sites, if other personnel policies and rules are customarily placed there. Translated versions of the notice must be displayed at workplaces where at least 20% of the employees lack English proficiency.

Failure to post the notice will be considered an unfair labor practice under the NLRA. A willful failure to post the notice may be considered evidence of improper motivation for other acts alleged to be unfair labor practices. Further, should there be a union organizational attempt, an employer victory in an NLRB election may be in jeopardy if the notice was not posted in the workplace.

BITS & PIECES

Roy Lester, a 61 year old former public beach lifeguard (and also a lawyer) is suing the New York Office of Parks for firing him after 40 years of service. Lifeguards have to periodically demonstrate swimming speed. Lester claims that he was forced to wear a state issued Speedo brief in lieu of the “jammers” (bicycle shorts) he preferred. Claiming age discrimination, Lester says there ought to be a law against any man over 50 wearing a Speedo.

* * *

The federal court of appeals in Chicago recently dismissed a case due to a party’s lawyer repeatedly filing documents containing “rampant grammatical, syntactical and typographical errors (which) contributed to an overall sense of unintelligibility.” The court pointed to one sentence in the lawyer’s filing containing 345 words! At least 23 sentences contained 100 or more words. *Stanard v. Nygren*, No. 09-1487, 2011 U.S. App. LEXIS 19213 (7th Cir. September 19, 2011).

* * *

A spate of “social media” cases are being fast-tracked through the NLRB decision making process. When an employee or group of employees blasts an employer on Facebook or on a blog, where is “the line” drawn between free speech and “protected concerted activity” on one hand and disparaging attacks that would otherwise be grounds for discipline on the other? What sort of policy may an employer make on the matter without unlawfully chilling free speech and concerted activity? With the proliferation of participation in various social media, union organizers will be watching the legal developments in this area to see how far the envelope can be pushed.

QUOTABLES

*I am a trial lawyer. Matilda says that at dinner on a good day
I sound like an affidavit.*

Mario Cuomo

* * *

*I have never killed a man,
but I have read many obituaries with great pleasure.*

Clarence Darrow

Since 1984, the *Labor Update* has been provided as a service to clients, fellow attorneys and other friends of our firm. Written entirely by the attorneys of PETERS & LYONS, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed or as covering all significant developments in labor and employment law. The *Labor Update* is not intended to be a substitute for legal advice.

The *Labor Update* may be quoted or reproduced if credit is given to PETERS & LYONS, LTD. as the source.