EMPLOYER'S EDGE

A Newsletter for Employers and Claims Professionals from Heyl Royster *August 2013*

A WORD FROM THE PRACTICE GROUP CHAIR

I am pleased to present our August 2013 *Employer's Edge* which covers a number of new and significant developments in the law that will impact your workplace.

Be sure to read the *Fifield* article which addresses enforceability of non-compete agreements. Two years of continued employment is required to have valid consideration to enforce a non-compete agreement.

This publication also highlights two significant Supreme Court decisions favorable to employers:

- The *University of Texas Southwestern Medical Center* case requires plaintiffs to prove that the motive to retaliate was the sole motivating factor for the retaliatory act.
- The *Vance* case provides clarity as to who is a supervisor in the workplace. It held a supervisor is the one who the employer has empowered to take tangible employment action against an employee.

Finally, our *Statute in the Spotlight* section addresses the new Firearm Concealed Carry Act and the steps that employers need to take to manage their work environment in light of this new law.

Should you have any questions about the August 2013 Employer's Edge Newsletter, please feel free to contact the undersigned or any of the authors or lawyers in our Employment Law Practice Group.

Bradford B. Ingram
Chair, Employment Law Practice Group
bingram@heylroyster.com

IN THIS ISSUE

THIS MONTH'S AUTHORS:

Tamara Hackmann joined Heyl Royster's Urbana office in 2005, and became a partner in 2008. Her practice focuses on the defense of tort litigation, primarily in the areas of employment, civil rights, and commercial litigation.

Jana Brady joined the firm in 2003 and became a partner in 2011. She focuses her practice on the defense of civil litigation and federal practice, particularly in the context of employment law, civil rights, medical malpractice, correctional medicine, insurance coverage, school law, and nursing home cases.

Shari Berry joined Heyl Royster as an Of Counsel attorney in its Peoria office in 2011 and became a partner with the firm in 2013. She represents clients against harassment, discrimination and civil rights claims.

Alisha Biesinger is a summer law clerk, working in the firm's Urbana Office. She will be a 2L at Southern Illinois University School of Law.

Jessica Sarff is a summer law clerk, working in the firm's Peoria office. She will be a 2L at Southern Illinois University School of Law.

DID YOU KNOW…

- A motor carrier may not allow or require its drivers to engage in texting while driving a commercial motor vehicle. 625 ILCS 5/6-526.
- Employers cannot collect or keep records of a worker's associations, political activities, writings, or any other activities outside of work. 820 ILCS 40/9.
- Employers may not gather or keep records identifying employees as the subject of an investigation by the Department of Children and Family Services if the investigation by the Department of Children and Family Services resulted in an unfounded report as specified in the Abused and Neglected Child Reporting Act. 820 ILCS 40/13.
- All wages earned by any employee during a semi-monthly or bi-weekly pay period shall be paid to such employee not later than 13 days after the end of the pay period in which such wages were earned. 820 ILCS 115/4.
- It is the duty of an employer to furnish each employee who performs duties that may be reasonably expected to involve entering an underground sewer with information concerning the prevention of personal injuries and diseases by contact with poisonous or deleterious materials, vapors, gases or fumes. 820 ILCS 250/2.
- An employer shall be required to notify all employees that they may be eligible for the federal earned income tax credit and may either apply for the credit on their tax returns or receive the credit in advance payments during the year. The employer shall not be required to notify any employee who receives gross wages from that employer that exceed the maximum amount that may qualify for the federal earned income tax credit. 820 ILCS 170/15(a).
- It is presumed that an individual performing services for a contractor is an employee of the employer, and not an independent contractor. 820 ILCS 185/10.

LEGISLATIVE UPDATE

Interpreters Provided to *Pro Se* Petitioners – HB3390

On June 28, 2013, Governor Quinn signed a law amending Section 9 of the Workers' Compensation Act. It requires that, prior to the approval of any *pro se* Settlement Contract Lump Sum Petition, the Commission or an Arbitrator shall determine if the unrepresented employee is able to read and communicate in English. If not, it shall be the responsibility of the Commission to provide a qualified, independent interpreter at the time such Petition is heard, unless the employee has provided his or her own interpreter. The law is effective immediately.

"Employment First Act" – HB 2591

On July 16, 2013, Governor Quinn signed a new law requiring Illinois state agencies to work together to make employment for people with disabilities a priority and establish measurable goals for the state. It also requires the Employment and Economic Opportunity for Persons with Disabilities Task Force (EEOPWD) – created in 2009 – to monitor progress towards this mission. All state agencies will be required to share data and information and ensure all policies, procedures and practices are aligned to these goals and objectives. The EEOPWD Task Force includes advocates, individuals with disabilities, business community members, disability services providers, representatives of state agencies and other stakeholders. The law is effective immediately.

Avoiding Misclassification of Workers as Independent Contractors – HB 2649

On July 23, 2013, Governor Quinn signed a law amending the Employee Classification Act in order to help protect Illinois workers from being misclassified as independent contractors. The new law provides for liability of officers or other agents who knowingly violate the Act on behalf of an employer. It takes effect on January 1, 2014.

RECENT DEVELOPMENTS IN THE COURTS

Illinois Appellate Court Mandates Two-Year Rule for Non-Competition and Non-Solicitation Agreements

The Illinois First District Appellate Court recently held there must be at least two years or more of continued employment to constitute adequate consideration in support of a non-competition or non-solicitation provision. See *Fifield v. Premier Dealer Services, Inc.*, 2013 IL App (1st) 120327. This decision is significant because it imposes a bright line rule requiring two years of continued employment before such agreements are enforceable and it rejected any argument that the rule should be different just because the agreement is entered before or at the time the individual is hired.

With the *Fifield* holding, employers are at risk that a restrictive covenant will not be enforceable when continued employment is the sole consideration. In such case, an employee that resigns prior to his or her two year anniversary will be able to breach the agreement without legal consequence.

In *Fifield v. Premier*, the plaintiff was originally employed by Great American Insurance Company and was assigned to work exclusively for Premier Dealership Services (PDS), which was a subsidiary of Great American. When Great American sold PDS to Premier, Fifield was informed his employment would end. Premier, however, made an offer of employment that was conditioned upon Fifield's signing a non-solicitation and non-compete agreement which lasted two years and covered 50 states. Fifield negotiated the agreement to include the provision that if Fifield was terminated without cause during the first year of his employment, the restrictive covenant would not apply.

The trial court held in favor of Fifield, finding the agreement was unenforceable for lack of consideration.

After three months of working for the defendant, Fifield voluntarily resigned and began working for a competing insurance firm. Premier then sued Fifield and his new employer to enforce the non-compete agreement; Fifield and his employer filed a Motion for Declaratory Relief, asking the court to find the agreement unenforceable. The trial court held in favor of Fifield, finding the agreement was unenforceable for lack of consideration. Premier appealed this decision.

Relying on precedent, the First Appellate District held it was irrelevant whether Fifield signed the restrictive covenant before or after he was hired because the two-year non-solicitation non-competition provisions clearly restricted Fifield's post-employment conduct. See *Brown & Brown, Inc. v. Mudron*, 379 Ill. App. 3d 724, 887 N.E.2d 437 (3d Dist. 2008); *Bires v. WalTom, LLC*, 662 F.Supp.2d 1019, 1030 (N.D.Ill. 2009). Continuing, the court found Fifield's employment for three months was insufficient consideration (even though he resigned), and that the non-compete agreement was therefore not enforceable.

It is possible that the *Fifield* decision will be appealed. Until that occurs, employers may wish to consider whether additional consideration should be offered to ensure the restrictive covenants are enforceable.

Supreme Court Issues Two Decisions Favorable to Employers

On June 24, 2013, the United States Supreme Court issued two significant decisions making it harder for employees to prove liability for harassment or retaliation under Title VII. In *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517 (2013), the plaintiff alleged the defendant hospital retaliated against him for complaining about harassment. The issue addressed by the court was whether the plaintiff had to prove the retaliation was: (a) the motivating factor, or (b) the "but-for cause" of the adverse employment action.

The Court in Texas Southwestern concluded that the heightened "but-for" standard applied to retaliation cases.

Under the motivating factor standard, a plaintiff's burden is lessened, as he or she only needs to prove the motive to retaliate was one of the employer's motives, even if the employer had other lawful motives. Under the "but-for" standard, however, the plaintiff must prove the motive to retaliate was the sole motivation for the retaliatory action. The Court in *Texas Southwestern* concluded that the heightened "but-for" standard applied to retaliation cases, thus making it more difficult for plaintiffs to prevail in these types of cases.

In *Vance v. Ball State University*, 133 S.Ct. 2434 (2013), the plaintiff sued the defendant for hostile work environment. Employer liability for hostile work environment depends, in part, on whether the harasser was a co-worker or a supervisor. If the harasser is a co-worker, the employer is liable only if it was negligent in controlling the working conditions. If, however, the harassment results in a tangible employment action by a harassing supervisor, the employer is strictly liable.

The Supreme Court in *Vance* held that an individual is a "supervisor" only when the employer has empowered the employee to take tangible employment actions against the victim. Thus, an employer is strictly liable for harassment only if the harasser has the power to hire, fire, promote or demote.

STATUTE IN THE SPOTLIGHT

In each issue, Heyl Royster attorneys will summarize a statute that imposes requirements on an employer with respect to its employees. These summaries can be printed and compiled in a notebook for easy access and quick answers to your questions.

The Firearm Concealed Carry Act – 430 ILCS 66/1 *et seq.*

There are many aspects of the new concealed carry law that involve legal areas other than employment law; please contact any of Heyl Royster's offices to discuss any issues related to the new law.

What: Illinois recently enacted the Firearm Concealed Carry Act (PA 98-0063), which allows licensed individuals to carry concealed, or mostly concealed, handguns on their person or in a vehicle.

Quick Tip: It is important to note that the Act references "a" vehicle, not specifically a vehicle owned by the licensee. Thus, employers who do not want employees to carry concealed fire arms in company-owned vehicles should implement a policy prohibiting employees from such conduct.

Who: Any person who is at least 21 years of age, has a valid FOID card, has an acceptable criminal and mental history, and completes an application provided by the Illinois State Police shall be granted a concealed carry license.

Illinois will not accept the concealed carry permits of other states. Those persons holding non-Illinois permits will have to complete a non-resident application to carry a concealed weapon outside of a vehicle in Illinois.

When: The Illinois State Police have 180 days from the effective date of the Act to make applications for a license available, and an additional 90 days after applications have been submitted to issue or deny licenses. However, prosecutors in several counties in Illinois have stated they will not enforce the current ban on concealed firearms.

Prohibited Areas: The Act provides a presumption that concealed weapons are permitted on private property. However, the Act also lists several prohibited areas in which a licensee cannot knowingly carry a concealed weapon. These areas include:

Schools: pre-schools, childcare facilities, public or private elementary and secondary schools, public or private community colleges, colleges, and universities.

Public Areas: playgrounds, parks, athletic facilities, libraries, airports, amusement parks, zoos, and museums.

Healthcare Facilities: public and private hospitals (or affiliates), mental health facilities, and nursing homes.

Establishments that Serve Alcohol: if more than 50% of the establishment's gross receipts within the prior 3 months is from the sale of alcohol; business owners found to be in noncompliance with this provision can be fined up to $5,000 under the Liquor Control Act of 1934.

Gaming Facilities: those licensed under the Riverboat Gambling Act or the Illinois Horse Racing Act of 1975.

*Nuclear Energy Sites and Facilities**

*All areas where firearms are prohibited under federal law**

Additional Options for Property Owners: In addition to the statutorily prohibited areas, owners of private real property have the option to restrict both their customers and their employees from carrying concealed weapons onto their private property.

Quick Tip for employers: Businesses and employers currently in a lease agreement will need to work with their landlords to ensure concealed carry policies are in place and provide the appropriate notice (below).

Notice Requirements: In order to prohibit the carrying of concealed firearms onto private property, an employer or business owner must "clearly and conspicuously" post a 4" x 6" sign at the entrance of the restricted area that indicates that firearms are prohibited on the property. These signs will be of a uniform design, as established by the Illinois State Police.

Exceptions: Under the Act, licensees will be allowed to carry a concealed weapon on their person within a vehicle into restricted parking areas, and will be allowed to store a firearm or ammunition within locked vehicle in a case or locked container out of plain view.

***Note**: This exception does not apply to the parking areas of nuclear energy sites or facilities, nor does it apply to areas where firearms are prohibited under federal law.

Employment & Labor Contact Attorneys

Heyl, Royster, Voelker & Allen

Peoria

Attorneys:
Shari L. Berry - *sberry@heylroyster.com*
Mitchell P. Hedrick - *mhedrick@heylroyster.com*
Bradford B. Ingram - *bingram@heylroyster.com*
Debra L. Stegall - *dstegall@heylroyster.com*

Springfield

Attorney:
Theresa M. Powell - *tpowell@heylroyster.com*

Urbana

Attorneys:
Keith E. Fruehling - *kfruehling@heylroyster.com*
Tamara K. Hackmann - *thackmann@heylroyster.com*
Brian M. Smith - *bsmith@heylroyster.com*
Toney J. Tomaso - *ttomaso@heylroyster.com*

Rockford & Chicago

Attorneys:
Jana L. Brady - *jbrady@heylroyster.com*
Kevin J. Luther - *kluther@heylroyster.com*

Edwardsville

Attorney:
Douglas R. Heise - *dheise@heylroyster.com*

Chicago

Attorney:
Daniel J. Cheely - *dcheely@heylroyster.com*

Appellate:

Craig L. Unrath - *cunrath@heylroyster.com*

Peoria
Suite 600,
Chase Building
124 S.W. Adams Street
Peoria, IL 61602
309.676.0400

Springfield
3731 Wabash Ave.
PO Box 9678
Springfield, IL 62791
217.522.8822

Urbana
Suite 300
102 E. Main Street
PO Box 129
Urbana, IL 61803
217.344.0060

Rockford
2nd Floor,
PNC Bank Building
120 West State St.
PO Box 1288
Rockford, IL 61105
815.963.4454

Edwardsville
Suite 100
Mark Twain Plaza III
105 West Vandalia Street
PO Box 467
Edwardsville, IL 62025
618.656.4646

Chicago
Suite 1203
19 S. LaSalle Street
Chicago, IL 60603
312.853.8700

HEYL ROYSTER

Below is a sampling of our practice groups highlighting a partner who practices in that area – For more information, please visit our website
www.heylroyster.com

Appellate Advocacy
Craig Unrath
cunrath@heylroyster.com

Arson, Fraud and First-Party Property Claims
Dave Perkins
dperkins@heylroyster.com

Business and Commercial Litigation
Tim Bertschy
tbertschy@heylroyster.com

Business and Corporate Organizations
Deb Stegall
dstegall@heylroyster.com

Civil Rights Litigation/Section 1983
Theresa Powell
tpowell@heylroyster.com

Class Actions/Mass Tort
Patrick Cloud
pcloud@heylroyster.com

Construction
Mark McClenathan
mmcclenathan@heylroyster.com

Employment & Labor
Tamara Hackmann
thackmann@heylroyster.com

Insurance Coverage
Jana Brady
jbrady@heylroyster.com

Liquor Liability/Dramshop
Nick Bertschy
nbertschy@heylroyster.com

Long Term Care/Nursing Homes
Matt Booker
mbooker@heylroyster.com

Mediation Services/Alternative Dispute Resolution
Brad Ingram
bingram@heylroyster.com

Product Liability
Rex Linder
rlinder@heylroyster.com

Professional Liability
Renee Monfort
rmonfort@heylroyster.com

Railroad Litigation
Steve Heine
sheine@heylroyster.com

Tort Litigation
Gary Nelson
gnelson@heylroyster.com

Toxic Torts & Asbestos
Lisa LaConte
llaconte@heylroyster.com

Trucking/Motor Carrier Litigation
Matt Hefflefinger
mhefflefinger@heylroyster.com

Workers' Compensation
Craig Young
cyoung@heylroyster.com

Scan this QR Code for more information about our practice groups and attorneys

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Peoria
Suite 600
124 SW Adams St.
Peoria, IL 61602
309.676.0400

Springfield
3731 Wabash Ave.
PO Box 9678
Springfield, IL 62791
217.522.8822

Urbana
Suite 300
102 E. Main St.
PO Box 129
Urbana, IL 61803
217.344.0060

Rockford
Second Floor
120 W. State St.
PO Box 1288
Rockford, IL 61105
815.963.4454

Edwardsville
Suite 100
Mark Twain Plaza III
105 W. Vandalia St.
PO Box 467
Edwardsville, IL 62025
618.656.4646

Chicago
Suite 1203
19 S. LaSalle St.
Chicago, IL 60603
312.853.8700