EMPLOYER'S EDGE

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

A WORD FROM THE PRACTICE GROUP CHAIR

I am pleased to introduce our March 2013 edition of the Employer's Edge Newsletter which is designed to keep our clients up-to-date with developments in employment law and provide strategies for successful management of the work environment.

This month's authors, Tamara Hackmann and Jana Brady, have put together a very helpful and informative issue identifying recent developments in the courts. This issue also provides some helpful strategies to guide employers when monitoring or restricting employee's use of social media and addresses the impact of employee's privacy rights to help employers avoid litigation.

Also, everyone should read the Statute in the Spotlight section dealing with the Victim's Economic Security and Safety Act and its impact on employers.

Please feel free to contact any of our attorneys for your employment law questions. A list of their locations and contact information is included in this newsletter.

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IN THIS ISSUE

DID YOU KNOW…

- An employer cannot discharge an employee in retaliation for filing a legitimate medical claim or using medical or health care services made available under an employer provided insurance plan or contract. 820 ILCS 45/2.
- An employer cannot refuse to hire, discharge or discriminate against an individual because he uses lawful products off the employer's premises during nonworking hours, unless such use impairs the employee's ability to perform his assigned duties. 820 ILCS 55/5.
- An employer cannot require an employee or applicant for employment to pay the cost of a medical examination or the cost of furnishing any records of such examination required by the employer as a condition of employment. 820 ILCS 235/1.
- It is unlawful to record an oral conversation without the consent of all parties to that conversation. 720 ILCS 5/14-1.

RECENT DEVELOPMENTS IN THE COURTS

EEOC v. United Airlines: Seventh Circuit Changes Employer Accommodation Analysis Under The ADA

Under the ADA, employers are required to provide reasonable accommodations to disabled employees. One possible "reasonable accommodation" is reassignment to a vacant position.

In 2000, the Seventh Circuit ruled that an employer was not required to reassign a disabled employee to a job for which there is a better applicant, provided that it was the employer's consistent and honest policy to hire the best applicant for the particular job in question. This ruling was overruled by the Seventh Circuit in *EEOC v. United Airlines*, 693 F.3d 760 (7th Cir. 2012), issued on September 7, 2012.

According to *United Airlines*, the ADA *does* mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer. On the issue of reasonableness, the court noted that the fact an accommodation would provide a "preference" cannot, in and of itself, automatically show that an accommodation is not "reasonable."

In determining whether reassignment is a reasonable accommodation, the court adopted a two-step framework. The first question a court will consider is whether mandatory reassignment is ordinarily a reasonable accommodation. If yes, the court must then consider if there are fact-specific considerations particular to the employer's employment system that would create an undue hardship and render mandatory reassignment unreasonable.

The court indicated undue hardship may occur if reassignment runs afoul of a collective bargaining agreement. It did not identify any other circumstances where an undue hardship might be found. In the coming months and years, district courts in the Seventh Circuit will likely identify additional undue hardships. However, since *United Airlines*, there have not been any district court opinions published on the subject.

In reaching its conclusion, the Seventh Circuit relied on case law from the Tenth Circuit. While not binding, this Tenth Circuit decision identified factors that are helpful considerations:

- The reassignment obligation extends only to existing vacant positions. The employer is not required to create a job or to modify the essential functions of a vacant job. If other employees have contractual or seniority rights to a vacant job, it may not be considered vacant for reassignment purposes.
- The disabled employee must be qualified for the vacant position.
- The employer has the authority to pick which appropriate vacant job is to be offered.

- No reassignment is required if it is not reasonable or poses an undue hardship.

Aside from the foregoing factors, there are a number of factual issues that must be considered on a case-by-case basis with respect to any individual that contends he is disabled.

Knox v. Service Employees: The United States Supreme Court Addresses the Requirements a Union Must Meet in Order to Collect Regular Fees From Nonmembers

In *Knox v. Service Employees Intern. Union, Local 1000*, 132 S.Ct. 2277 (2012), the United States Supreme Court addressed the *Teachers v. Hudson*, 106 S.Ct. 1066 (1986) decision which sets out the requirements a union must meet in order to collect regular fees from nonmembers without violating their rights. In *Knox*, the respondent (a public sector union) sent California employees its annual *Hudson* notice setting and capping monthly dues and estimating that 56.35 percent of the total expenditures in the coming year would be chargeable expenses. A nonmember had thirty days to object to full payment of dues but would still have to pay the chargeable portion. After the thirty day objection period ended, the union sent a letter to unit employees announcing a temporary 25 percent increase in dues and a temporary elimination of the monthly dues cap, billing the moves as an "Emergency Temporary Assessment to Build a Political Fight Back Fund" in order to achieve the union's political objectives in the special election and in the upcoming November 2006 election. Petitioners, on behalf of nonunion employees who paid into the fund, brought a class action against the union alleging violation of their First Amendment rights. The court held 1) that the voluntary cessation of challenged conduct does not ordinarily render a case moot because that conduct could be resumed as soon as the case is dismissed; and 2) under the First Amendment, when a union imposes a special assessment or dues increase levied to meet expenses that were not disclosed when the regular assessment was set, it must provide a fresh notice and may not exact any funds from nonmembers without their affirmative consent.

Christopher v. SmithKline Beecham Corp.: The United States Supreme Court Addresses Payment of Overtime to Outside Salesmen

In *Christopher v. SmithKline Beecham Corp.,* 132 S. Ct. 2156 (2012), the petitioners were employed by the respondent as pharmaceutical sales representatives for approximately four years. During that time their primary objective was to obtain nonbinding commitments from physicians to prescribe respondent's products in appropriate cases. Each week the petitioner spent about forty hours in the field calling on physicians during normal business hours and an additional ten to twenty hours attending events and performing other miscellaneous tasks. Petitioner ultimately filed suit alleging that the respondent violated the Fair Labor Standards Act which requires employers to pay employees overtime wages. The respondent moved for summary judgment, arguing the petitioner's were "employed in the capacity of outside salesmen" and were, therefore, exempt from the FLSA's overtime compensation requirement. The district court agreed and granted summary judgment. After making its way to the Supreme Court, the Supreme Court held that petitioners qualify as outside salesmen under the most reasonable interpretation of the Department of Labor's Regulations.

Kasten v. Saint-Gobain Performance Plastics Corporation: Oral Complaints May Qualify as Protected Activity Under the FLSA

Kevin Kasten sued Saint-Gobain alleging unlawful retaliation for lodging oral complaints regarding the location of time clocks under the Fair Labor Standards Act. He complained that the clocks were placed in locations which caused him to frequently forget to punch in, notifying his supervisors on at least five occasions that the location was "illegal." He was disciplined for

failing to punch in on several occasions, was suspended and ultimately terminated. The district court granted summary judgment for the employer on the ground that oral complaints do not constitute protected activity under the FLSA and the Seventh Circuit affirmed the decision. On *certiorari,* the Supreme Court vacated and remanded holding that oral complaints may qualify as protected activity where they provide fair notice that an employee is asserting his rights under the FLSA. *Kasten v. Saint-Gobain Performance Plastics Corp*., 131 S.Ct. 1325 (2011). The case was remanded to the district court who granted summary judgment in the employer's favor. The Seventh Circuit then held that Kasten had provided evidence which would support a jury inference of retaliation so it reversed the district court's grant of summary judgment and remanded for further proceedings.

RECENT DEVELOPMENT IN THE LAW

New I-9 Form Must Be Used By May 7, 2013

Employers are required to use an I-9 Form for each individual hired. This form was recently revised on March 8, 2013 and the new form can be downloaded at www.uscis.gov . The new form should be used immediately. After May 7, 2013, all prior versions of Form I-9 cannot be used. Employers do not need to complete the new Form I-9 for current employees for whom there is already a properly completed Form I-9 on file, unless re-verification applies.

PRACTITIONER'S POINTS

Social Media Investigation: How Much is Too Much?: The Impact on Employees' Privacy Rights and Pointers to Avoid Litigation

On January 25, 2012, the National Labor Relations Board ("NLRB") released an Operations Management Memo ("OM 12-31"), its second since taking on its first social media case in November of 2011, which sets forth its position concerning "how much is too much" when it comes to monitoring and restricting employees' use of social media sites ("SMS"). In a nutshell, the message is:

> Social media policies should be specific and not overly broad such that they might "chill" activity protected by the National Labor Relations Act ("NLRA").
>
> An employee's SMS activity will not likely be protected by the NLRA unless it relates to the workplace and involves other employees.

In OM 12-31, the NLRB reviewed fourteen cases. Half of the cases involve questions about employer social media policies, five of which were found to be unlawfully broad. The NLRB found that it is unlawful for a policy to forbid employees from making "disparaging comments about the company through any media, including online blogs, other electronic media or through the media" because "it would reasonably be construed to restrict" protected Section 7 activity. The NLRB also found a policy to violate the NLRA which provided that "employees should generally avoid identifying themselves as the employer's employees unless discussing terms and conditions of employment in an appropriate manner." Additionally, the NLRB found that an employer's disclaimer in a social media policy that nothing in the policy should be construed to prohibit employee rights under the NLRA was not enough to make the

overall policy lawful. The NLRB did shine some light on what provisions might be acceptable, including a policy which prohibits the use of social media to "post or display comments about coworkers or supervisors or the employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic." The NLRB also found that an employer could request employees to confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws. It prohibited employees from using or disclosing confidential and/or proprietary information, including personal health information about customers or patients, and it also prohibited employees from discussing launch and release dates and pending reorganizations.

The other half of the cases addressed in OM 12-31 involved the discharge of an employee after the employee posted comments on Facebook. Many of the discharges were ruled to be unlawful because they stemmed from unlawful policies. One of the cases reviewed involved a collections agency that fired a worker for her expletive-laced Facebook post complaining about being transferred to another department. The post rallied support from other co-workers. The worker was fired for violating the company's policy against disparaging remarks. The NLRB found that the discharge was unlawful.

This area of law is still developing since most laws were drafted before social networking became popular, but employers can lessen any expectation of privacy that employees might have, and violations of privacy, by taking the following steps:

- Establish a SMS policy that is specific and not overly broad. For example, it is permissible to prohibit the disclosure of "confidential information" so long as "confidential information" is defined.
- Have the employee sign an acknowledgment of receipt and agreement to the SMS policy.
- Include a provision that, if an employee identifies the employer on the employee's SMS, the employee should include language which makes it clear that the postings are the employees' personal views and that the employee is not a spokesperson for the employer.
- Incorporate by reference other existing policies including anti-harassment, anti-discrimination and non-disclosure policies.
- Require a written acknowledgement by employees that they are responsible for the content of their Internet postings during work hours, and/or when using employer-owned computers and smart phones, and whenever their posting associates them in any way with the employer (including any private page that specifically identifies them as an employee of the company).
- Limit employee access to social media during the scope of work and when using employer-provided equipment.
- Make sure that employees are informed that a violation of the company's social networking policy could lead to discipline, including termination.
- Although you cannot rely upon a NLRA disclaimer to rescue an overly broad SMS policy, you should still include one.
- Enforce the policy.

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 Victims' Economic Security and Safety Act - 820 ILCS 180/1 *et seq.*

Who: Employee employed by an employer and includes a participant in a work assignment as a condition of receipt of federal or State income – based assistance.

Employer that is a State or agency of the State; any unit of local government or school district; or any person that employs at least 15 employees.

What: Employee who is a victim of domestic or sexual violence or has a family or household member who is such victim may take unpaid leave from work to address domestic or sexual violence by: (a) seeking medical attention; (b) obtaining services from a victim services organization; (c) obtaining counseling; (d) participating in safety planning, relocation, or taking other actions to increase safety; (e) seeking legal assistance or remedies to ensure health and safety.

How: Employee must provide at least 48 hours' advance notice of intention to take leave, unless providing such advance notice is not practicable. When an unscheduled absence occurs, the employer may not take any action against the employee if the employee, on request, provides certification within a reasonable time.

All information provided to the employer must be retained in the strictest confidence.

Limits: An employee working for an employer that employs at least 50 employees is entitled to a total of 12 workweeks of leave during any 12-month period. An employee working for an employer that employs between 15 and 49 employees is entitled to a total of 8 workweeks of leave during any 12 months period. The Act does not create a right for an employee to take unpaid leave that exceeds the unpaid leave allowed under FMLA.

Leave may be taken intermittently or on a reduced work schedule. The employer may not require the employee to substitute available paid or unpaid leave for leave provided under the Act.

Notice Requirements:

Every covered employer must post in conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice, prepared or approved by the Director of Labor, summarizing the requirements of the Act. The Director must furnish

copies of summaries and rules to employers upon request without charge. An employer that fails to post the required notice cannot claim the employee failed to provide notice that he or she wanted or was eligible for leave under the Act.

Prohibited Acts: An employer cannot interfere with an employee's rights under the Act.

An employer cannot discharge or discriminate against an individual because he or she has filed a charge or participated in a proceeding related to rights under the Act.

An employer cannot discharge, harass, or discriminate against an employee that exercised rights under the Act or opposed any practice made unlawful by the Act.

An employer cannot refuse or fail to hire, discharge, harass, or discriminate against an individual and a public agency cannot discriminate against any individual with respect to the amounts, terms or conditions of public assistance of the individual because (1) he or she (a) is perceived to be a victim of domestic or sexual violence; (b) attended, participated in, prepared for, or requested leave to attend, participate in, or prepare for a criminal or civil court proceeding relating to an incident of domestic or sexual violence; or (c) requested an accommodation, or (2) the workplace is disrupted or threatened by the action of a person whom the individual states has committed or threatened to commit domestic or sexual violence.

Discrimination includes not making a reasonable accommodation for an otherwise qualified individual that is a victim or has a family member that is a victim unless the employer or public agency can demonstrate the accommodation would impose an undue hardship.

The statutes and other materials presented here are in summary form. To be certain of their applicability and use for specific situations, we recommend an attorney be consulted. This newsletter is compliments of Heyl Royster and is for advertisement purposes.

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