EMPLOYMENT LAW NEWSLETTER, SEPTEMBER 2011 VOLUME 1, PAGE 1

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Firm News

R&A Employment Law Conference

Rougeux & Associates will be holding a complimentary Employment Law Conference at T-Bar-M in New Braunfels, Texas on **October 20, 2011**. Watch for upcoming information regarding topics and registration.

R&A Ribbon Cutting

Thanks to all who attended our open house and ribbon cutting. For those who missed it, come see us soon! A video of the ribbon cutting is also available at http://www.youtube.com/watch?v=pVybkqbxRD4.

NLRB Regulations Require Employers to Post Notice of Rights

On August 30, 2011, the National Labor Relation Board ("NLRB") passed its final rule requiring "most" private employers to post a notice of employee rights under the National Labor Relations Act ("NLRA").

Posting Requirements

Covered employers must post the notice beginning **November 14, 2011** in "conspicuous places where they are readily seen by employees, including all places where notices to employees concerning personnel rules or policies are customarily posted." Employers that customarily post personnel rules or policies on a company intranet must also post the NLRA notice on it. Finally, if 20% or more of the workforce is not proficient in English, the employer must also post the notice in the language(s) spoken. Complimentary notices in English and Spanish will be available at www.nlrb.gov.

Covered Employers

Almost all private employers are covered by the NLRA. Specifically, the NLRB has jurisdiction over any retail business with a gross annual volume of $500,000 or more and over any business whose goods and/or services sold **or** purchased across state lines total at least $50,000 per year. Because interstate commerce may be established through the use of the Internet, most employers—even those conducting business only within the state—fall within the NLRB's jurisdiction. Employers who believe that they may not fall within the NLRB's jurisdiction should consult with legal counsel.

Contents of the Notice

In summary, the NLRB poster will inform employees of their rights under the NLRA to:

- Bargain collectively with their employer and engage in "concerted activity," to include the right to negotiate wages, hours, and other terms and conditions of employment;
- Form, join, or assist a union;
- Discuss their wages, benefits, and other terms and conditions of employment with co-workers and take collective action to improve their working conditions; and
- Strike and picket, depending upon the circumstances.

NLRB Regulations Require Employers to Post Notice of Rights (CONT'D FROM PAGE 1)

Contents of the Notice (Cont'd)

Employees will further be informed that it is illegal for an employer to:

- Prohibit employees from talking about, soliciting for, or distributing literature regarding a union during non-working time and in non-working areas;
- Question employees about, or discourage, union support or activities;
- Take or threaten adverse action against employees for engaging in concerted activity;
- Threaten to close the workplace if employees unionize;
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support;
- Prohibit employees from wearing union hats, buttons, t-shirts, and pins except under special circumstances; or
- Spy on peaceful union activities and gatherings or pretend to do so.

Finally, employees will also be informed that it is illegal for a union to:

- Threaten or coerce employees to gain support for a union;
- Refuse to process a grievance because the employee has criticized the union or is not a union member;
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall;
- Cause or attempt to cause an employer to discriminate against employees because of union activity; or
- Take adverse action against employees for failing to join or support a union.

NLRB Board Member Brian E. Hayes' Dissent

The NLRB rejected arguments that the NLRB lacks the rulemaking authority required to issue the regulations, that the notice is unduly biased in favor of unions, and that the notice should also inform employees of the potential costs and negative consequences associated with forming a union. However, NLRB Board Member Brian E. Hayes wrote a scathing dissent to the regulations, arguing that they are arbitrary and capricious because: (i) unlike statutes such as Title VII, the ADEA, ADA, FMLA, and USERRA, Congress did not include a notice-posting requirement in the NLRA; and (ii) the NLRB provided no evidence to support the necessity for the posting rule. In fact, as argued by Hayes, the NLRB majority admitted that "there is no real need to conduct a study of the extent of employees' knowledge of NLRA rights," stating only that "the notice posting rule would be justified even if only 10 percent of the workforce lacked such knowledge."

Given Hayes' dissent and the NLRB's rejection of most employer-side comments, a legal challenge to the regulations is possible. Nonetheless, employers should prepare to comply with the new posting rule while continuing to watch for future developments.

Enforcement and Practical Considerations

The NLRB lacks authority to impose penalties or fines. Accordingly, if a violation is found, the NLRB will order the employer to post the notice and a "remedial notice." Importantly, however, the regulations further provide that failure to post the notice **may** be considered evidence of an unlawful motive or discriminatory animus toward rights protected by the NLRA. However, the NLRB clarified the regulations to state that this evidentiary penalty is applicable **only** if the failure to post was both knowing **and** willful.

Employers are not required to announce the new posting. Thus, covered employers should simply post the notice once it becomes available wherever they regularly post notices required by other employment laws and, if applicable, on the company's intranet. However, it is likely that the new notice will result in increased efforts by employees to exercise their NLRA rights. Accordingly, employers are further advised to review their policies to ensure compliance with the NLRA and train managers on employee rights to engage in concerted activity.

DOL "Right to Know," POWER, and "Bridge to Justice" Initiatives

Department of Labor ("DOL") staffing is at its highest level since 2001. In addition to more aggressive enforcement actions, one result of this increased staffing is numerous DOL compliance initiatives such as its "Right to Know" initiative, "Protecting Our Workers & Ensuring Reemployment" (POWER) initiative, and continued implementation of its 2010 "Bridge to Justice" program.

Right to Know Initiative – Independent Contractor Misclassification

The DOL's "Right to Know" Initiative focuses on the misclassification of independent contractors under the FLSA. Although the anticipated regulations implementing this initiative are still in the proposed stage, the goal is to require employers to undertake an analysis for determining whether an individual may be classified as an independent contractor **and** to disclose both this analysis **and** the rights and benefits of the classification to the affected individual.

POWER Initiative

The DOL's POWER initiative focuses on fostering preemptive compliance by encouraging employers to follow a "plan, prevent, protect" program. Under the "plan" element of the program, employers are encouraged to discover and correct violations before issues arise and to involve employees in this process. Under the program's "prevent" element, employers are required to implement policies and procedures designed to avoid DOL violations. Finally, the "protect" aspect of the program tasks employers with taking steps to ensure that any preventative plan adopted actually achieves the stated goals.

Bridge to Justice Initiative

The impact of the DOL's late 2010 "Bridge to Justice" program remains to be seen. Under the program, the DOL will refer employees to plaintiff's attorneys for prosecution of those FLSA and FMLA actions that the DOL declines to pursue. More importantly, the DOL will share information obtained during its investigation with the plaintiff's attorney, to include the DOL's preliminary damage calculation. Such information may **not** be shared with the employer, giving employees a potentially significant advantage in any resulting lawsuit.

Preventive Measures Advised

Due to their formulaic and rule-based nature, DOL-related claims are relatively simple for employees, former employees, and their attorneys or the DOL to pursue. Moreover, they can have devastating financial consequences and are frequently asserted on a class basis. Specifically, according to one commentator, approximately **91%** of the 4,152 employment class actions filed in federal or state courts in 2010 were wage and hour related. Accordingly, employers are encouraged to proactively identify and correct any FLSA or related errors. Doing so will help to avoid the financial burden of remedying non-compliance or, if a violation is found, help to demonstrate a good faith attempt to comply with the law.

DOL and OSHA Mobile Phone Applications

DOL Application Will Have Expanded Features

In May 2011, the DOL launched a new mobile phone application that enables employees to record their hours worked. The DOL has committed to expanding this application to allow employees to track more extensive data, such as tip income, commissions, bonuses, wage deductions, holiday pay, shift differentials, and paid time off.

OSHA's Heat Index Application

In August 2011, the Occupational Safety & Health Administration ("OSHA") launched a new mobile phone application that enables employees and their supervisors to monitor the heat index at their worksite and thereby avoid heat-related illnesses. The application may be downloaded at http://go.usa.gov/KFR.

Emerging Retaliation Law

The U.S. Supreme Court issued two decisions earlier this year on workplace retaliation, both of which have already been cited by the Fifth Circuit and Southern District of Texas when examining workplace retaliation claims.

Oral Complaints of Alleged FLSA Violations

In March 2011, the Supreme Court held in *Kasten v. Saint-Gobain Performance Plastics Corp.* that employees who make a "sufficiently clear and detailed" oral complaint to the DOL are protected by the FLSA's anti-retaliation provisions. The Court did not address whether its ruling applies to internal complaints to an employer. Immediately after the Supreme Court's decision, however, the Southern District of Texas held in *Palmer v. PSC Industrial Outsourcing* that an employee's informal, verbal complaints to her supervisor that the company's failure to pay overtime was "illegal" and violated the FLSA were sufficiently clear to afford her retaliation protection.

The Court did not address in *Kasten* the application of its ruling to false complaints. However, courts have repeatedly held that an underlying complaint need not always be meritorious to obtain anti-retaliation protection. Accordingly, employers should be cautious when addressing potentially false workplace complaints or when an employee submits a disingenuous complaint in an effort to obtain the protections of anti-retaliation law. Any adverse action following a false or unmeritorious complaint should be taken only with the advice of counsel.

Third Party Retaliation

In January 2011, the Supreme Court held in *Thompson v. N. Am. Stainless Steel, LP* that the fiancé of an employee who complained of sexual harassment was within the "zone of interest" protected from retaliation. The Court did not define this "zone of interest," stating only that: "We expect that firing a close family member will almost always meet the standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize." However, the Fifth Circuit recently held in *Hernandez v. Yellow Transp., Inc.* that a Caucasian employee's mere "association with" African-American and Hispanic co-workers was insufficient to fall within the required "zone of interest." In contrast, the Fifth Circuit recently held in *Zamora v. City of Houston* that a son could pursue a claim of retaliation due to his father's complaint at their shared workplace. Accordingly, until the courts further define the applicable "zone of interest," employers should proceed cautiously when taking an adverse action after any workplace complaint.

Practical Implications

As with retaliation claims under other employment statutes, disputes may arise over whether an employee actually complained and, if so, whether the complaint is legally protected. Nonetheless, employer policies should not require employees to submit their complaints in writing or apply overly technical requirements to the required content of employee complaints. Rather, Human Resources professionals and/or supervisors should either encourage employees to submit their complaints in writing or document employee complaints themselves and clarify any unspecified complaints. Investigators may also take notes of an employee's verbal complaint and, at the conclusion of the employee interview, ask the employee to sign or initial the investigator's notes. Of course, interviews of complaining employees should also be witnessed by a second company representative. Finally, it is important to document the nature of all workplace complaints, even if not protected by anti-retaliation laws. Doing so will help to prevent false claims that general workplace complaints concerned a protected subject matter.

The Supreme Court's decision in *Thompson* and the Fifth Circuit's subsequent opinions also reinforce the importance of maintaining the confidentiality of workplace investigations and training management on this critical aspect of the investigative process. Employers should also consider modifying their EEO and harassment policies to incorporate the courts' expanded retaliation protection. Finally, when reviewing a potential adverse action, it is no longer sufficient to consider only whether the affected employee previously engaged in protected conduct. Rather, employers and HR professionals must now broaden their analysis to examine whether—at a minimum—the employee has a spouse, fiancé, parent, or sibling in the workplace who may have engaged in protected conduct.

Equal Employment Opportunity Commission Update

Leave as a Reasonable Accommodation

This summer, the EEOC received comments on the use of leave as a reasonable accommodation under the Americans with Disabilities Act ("ADA"). Further EEOC guidance on this issue is anticipated. In the meantime, however, EEOC Assistant Legal Counsel in charge of ADA issues emphasized that employers may need to relax "no fault" leave policies when doing so is a reasonable accommodation. Employers should also include this reasonable accommodation exception in their written leave policies.

EEOC Continues to Accept Comments for Retrospective Rules Review

In response to President Obama's Executive Order 13563, the EEOC issued a Preliminary Plan for its review of significant EEOC regulations and identified as its highest priority the EEOC's "*ADEA Rulemaking: Disparate Impact Burden of Proof under the Age Discrimination in Employment Act; Reasonable Factors Other than Age under the Age Discrimination in Employment Act*."

The EEOC accepted public comments on the Plan through June 2011. Only 2 of the 27 comments received by the EEOC were submitted by employer groups, including the Society for Human Resources Management ("SHRM"). The EEOC is continuing to accept comments on this issue. The Plan and comments are available at http://www.eeoc.gov/laws/regulations/comment_retrospective.cfm.

EEOC Examines Tension Between Safety and Conviction Records

The EEOC recently held a public meeting to examine employer hiring practices and policies and the impact of arrest and conviction records on eligibility for employment. The EEOC has not substantively addressed this issue since issuing its 1980 guidance. Accordingly, further guidance is anticipated.

EEOC Continues to Pursue E-RACE Initiative and Increased Visibility

The EEOC continues implementation of its E-RACE Goals and Objectives, which the EEOC designed to improve its efforts to eradicate racial discrimination and increase the visibility of its enforcement efforts. Since January 1, 2011, the EEOC has issued press releases announcing more than 80 EEOC lawsuits against employers and more than 100 significant EEOC/employer settlements. Many of these settlements include employer agreements to pay millions of dollars to allegedly damaged employees or former employees.

FMLA: Bereavement Leave Bill Introduced

In July 2011, Senator Jon Tester introduced the *"Parental Bereavement Act,"* which would amend the FMLA to include bereavement leave for the death of a child. The bill was introduced in response to lobbying efforts by two grieving fathers, both of whom will meet with members of Congress on September 12, 2011.

If the Act passes, employees who have worked for at least 12 months and 1,250 hours for employers with 50 or more employees in a 75-mile radius will be entitled to up to 12 weeks of continuous FMLA leave "because of the death of a son or daughter." Intermittent or reduced schedule leave would be permitted only upon agreement of the employer.

Texas Unemployment Law: Military Leave

Effective September 1, 2011, employer accounts will not be charged for benefits paid to a claimant who was hired to replace a member of the military and subsequently laid off upon the military member's return to work.

Workplace Violence: Firearms on Employer Premises

Effective September 1, 2011, employers may prohibit employees who lawfully possess firearms from possessing them on the employer's premises but cannot prohibit employees from storing them, if locked, in private vehicles parked in employer parking lots, garages, and other parking areas. Accordingly, employers should amend any workplace violence policies that prohibit such conduct and, in the meantime, suspend enforcement of them.

The Marshy Landscape of Texas Non-Competition Agreements

Some commentators are calling the Texas Supreme Court's June 2011 decision in *Marsh USA Inc. v. Cook* a tremendous victory for employers, while others claim that it renders non-competition law even more unstable.

The Court's Holding

The Court held that company stock options issued upon an employee's promotion were related to the company's interest in protecting its "goodwill" and, therefore, sufficient to support enforceability of the employee's non-competition agreement. Justice Wainwright delivered the majority opinion, in which Justices Hecht, Medina, Johnson, and Guzman joined. Justice Willet delivered a concurring opinion in which he agreed with the majority holding but questioned some of its analysis. Justice Green issued a dissenting opinion in which Chief Justice Jefferson and Justice Lehrmann joined.

Non-Competition Agreements – The Basics

Texas non-competition agreements are enforceable only if: (i) reasonable in time, scope, and geography; and (ii) "ancillary to or part of an otherwise enforceable agreement." Thus, Texas courts first determine whether there is an "otherwise enforceable agreement" and, thereafter, whether the agreement not to compete is "ancillary to or part of" that agreement. If these two conditions are met, the court then examines whether the agreement is reasonable in time, scope, and geography. The issue in *Marsh* was whether the non-competition agreement met the "ancillary" test.

"Goodwill" Is a Sufficiently Protectable Interest

According to prior Texas Supreme Court precedent, non-competition agreements must be "part of and subsidiary to" an agreement that "gives rise to an interest worthy of protection." According to the Court's decision in *Marsh*, however, the Court has impermissibly recognized only confidential or proprietary information as "giving rise" to a protectable business interest while disregarding prior decisions that recognize "goodwill" as an equally protectable interest. The employer in *Marsh* argued that the purpose of providing stock options to certain employees was to "strengthen the mutuality of interest between employees" and the company's stockholders, which – in turn – gives employees an interest in protecting the company's value and ultimately enhances the company's goodwill. The Court agreed, holding that the company's goodwill was an interest worthy of protection sufficient to meet the "ancillary to" test and remanded the case to the trial court to determine whether it was reasonable as to time, scope, and geography.

No Timing Requirement

In a single, much overlooked paragraph in the lengthy *Marsh* decision, the Court also rejected an argument that the agreement was unenforceable because it was signed after the employee had already worked for the company for 13 years. According to the Court, "there is no requirement under Texas law that the employee receive consideration for the noncompete agreement prior to the time the employer's interest in protecting its goodwill arises." Accordingly, the decision also provides employers with some much-needed protection for post-employment non-competition agreements. However, post-employment non-competition agreements remain extremely vulnerable to challenge and, therefore, should be obtained only with the advice of counsel.

Concurring Opinion

In his concurring opinion, Justice Willett agreed that "goodwill" may be sufficiently worthy of non-competition protection, but emphasized the long-standing rule in Texas that "[r]estrictions on employee mobility that exist only to squelch competition are per se illegal." Justice Willett also criticized the Court for failing to more fully analyze whether the employer actually demonstrated that its "goodwill" was worthy of protection rather than merely "invoking goodwill to camouflage a less noble interest" of restraining competition. Specifically, Justice Willett noted that evidence of goodwill must demonstrate "special circumstances beyond the bruises of ordinary competition such that, absent the covenant, [the employee] would possess a grossly unfair competitive advantage."

The Marshy Landscape of Texas Non-Competition Agreements (CONT'D FROM PAGE 6)

Dissenting Opinion

In his dissent, Justice Green agreed that "goodwill" is a protectable interest, but argued that the Court's decision is contrary to longstanding precedent, violates the rule that employers cannot "buy" a non-competition agreement, and creates a rule whereby any financial incentive will support the enforceability of a non-competition agreement.

Navigating the Court's Decision

The Court's decision is clearly favorable to employers. However, as demonstrated above, the case: (i) is factually specific; (ii) contains significant disagreements among the justices; and (iii) provides little guidance on the types of "goodwill" that may be sufficient to enforce any particular non-competition agreement. Accordingly, absent special circumstances, the safest course of action is to continue obtaining non-competition agreements from newly hired employees and in exchange for confidential business information, training, or trade secrets that relate to the employer's need to limit competition. Although employers should also now identify "goodwill" as one of the interests to be gained and protected by virtue of the non-competition agreement, they should not rely on this single element or the provision of monetary benefits alone in exchange for it.

NLRB Releases Report on Social Media Cases

Private employers are prohibited from interfering with, restraining, or coercing employees in the exercise of their NLRA rights, which include the right to engage in "concerted activity" with other employees to complain about their working conditions and, in certain circumstances, display pro-union materials. Individual action that is the "logical outgrowth" of concerted activity is also protected. On August 18, 2011, the NLRB Acting General Counsel released a report on the NLRB's recent examination of employer social media policies for compliance with the NLRA. A copy of the report is available at http://www.nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases.

Policies Violating the NLRA

According to the NLRB, social media policies violate the NLRA when they could "reasonably be interpreted as prohibiting protected employee discussion of wages and other terms and conditions of employment." Accordingly, employers could not prohibit online employee discussions of substantive employment issues with other employees. Social media policies that prohibited the posting of any employer logo or photograph of the employer's worksite also violated the NLRA as possibly prohibiting employee displays of pro-union materials.

No Violation Found

The NLRB declined to protect employee social networking where: (i) employees expressed "an individual gripe" or sought only "emotional support;" (ii) other employees did not meaningfully join in the employee's complaint or discussion; (iii) the employees complained only to non-employees; or (iv) the complaints concerned general workplace comments without reflecting an effort to induce group action. Moreover, although an employer's policy prohibiting "derogatory comments in any social media forums that may damage the goodwill of the company" was overbroad, the NLRB held that the employer did not violate the NLRA because the online conduct for which the employee was terminated was not "concerted activity" or otherwise related to the terms and conditions of his employment. Thus, even where the policy is facially unlawful, the discipline itself is unlawful only if "the underlying conduct was itself related to protected, concerted activity."

Caution Advised

In light of the NLRB's active examination of employer social media policies, employers should frequently review their policies for compliance with developing trends. More importantly, before enforcing any such policy, employers must first examine whether the objectionable conduct may constitute protected activity under the NLRA.

Rougeux & Associates PLLC is a full service Labor & Employment Law boutique. Our attorneys defend business owners in a wide variety of employment and commercial litigation, partner with clients to develop strategic responses to their employment law needs, and provide management with the tools needed to achieve sustained economic growth.

Specifically, our attorneys provide clients with a wide range of Labor & Employment Law and Human Resources Management services, all of which are designed to maximize our client's competitive advantage while ensuring compliance with federal, state, and administrative laws, rules, and regulations. We also provide comprehensive Human Resources management training to executive, management, and Human Resources professionals and assist business owners with developing the policies, procedures, and compensation structures needed to avoid risk and promote economic growth.

Most importantly, our team applies the knowledge gained through our collective experience with national and international law firms and businesses to make the law work *for*, not against, our clients. We do so by learning every aspect of our clients' businesses and devising tailored, creative solutions to the challenges they face. Finally, our attorneys keep expenses down without sacrificing quality by maintaining affordable rates and using alternative billing structures.

We know it's the law. There is a practical solution.

OUR TEAM

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