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E-UPDATE

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RECENT DEVELOPMENTS

Federal Labor Law Does Not Preempt State Law Trespass Claims

Maryland's highest court held that the National Labor Relations Act does not preempt an employer's trespass and nuisance claims against a union that had staged disruptive demonstrations at the employer's stores, and it upheld the lower court's permanent injunction against the union.

Facts of the Case: In *United Food and Commercial Workers Int'l Union v. Wal-Mart Stores, Inc.*, the UFCW held demonstrations at Walmart stores, including in Maryland, for the stated purpose of persuading Walmart to improve working conditions. UFCW stated that it was not seeking to represent Walmart employees, who are not unionized. The demonstrations involved flash mobs and demonstrators blocking store parking lots, store entrances and exits, and store traffic. Walmart sued the UFCW in state court for trespass, seeking an injunction and other damages.

The UFCW argued that the case involved a labor dispute for which, under the Maryland Anti-Injunction Act, heightened requirements for an injunction applied. It also argued that Walmart's claims were preempted by the NLRA, meaning that either Congress has expressly stated an intent for federal law to prevail, or state law impermissibly conflicts with federal law.

The Court's Ruling: The Maryland Court of Appeals first acknowledged that the NLRA regulates labor disputes between employers, unions, and employees, and, of relevance here, prohibits unions from interfering with employees' rights to refrain from joining a union. The NLRA is presumed to apply, unless an exception applies. One such exception, known as the "local interest exception," applies when the conduct at issue "touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act." There are two factors to this exception: (1) is there a significant state interest, and (2) would there be interference with the regulatory jurisdiction of the NLRB if the state court addressed the controversy?

In the present case, the Court rejected the UFCW's argument that the local interest exception applied only to conduct involving violence, threats of violence, property damage or malice. Rather, pointing to Supreme Court precedent, the Court found that preventing peaceful trespass qualifies as a significant state interest. The Court also found that a significant state interest in protecting private property rights. As to the second factor, the Court found that this particular issue is not the same as one that was or could have been presented to the NLRB, even if they arose from the same conduct. In so holding, the Court looked to the legal elements of the claims, the issues that would be presented to each tribunal, and the remedies that each tribunal is authorized to award. Thus, the Court held that the local interest exception applied to Walmart's claims.

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The Court also found that the case did not involve a labor dispute within the meaning of the AIA, and thus was not subject to a heightened standard for injunction. The union did not represent Walmart employees and was not seeking to do so during the demonstrations. Moreover, the case did not involve the negotiation of employment conditions or demonstrations by the employees themselves.

Lessons Learned: This case demonstrates that employers may have recourse beyond the NLRA in state tort law, depending on the circumstances.

Maryland Federal Courts Provide Guidance on Post-Employment Restrictions

Both the U.S. Court of Appeals for the 4th Circuit (which covers Maryland, Virginia, West Virginia, and the Carolinas) and the U.S. District Court for the District of Maryland issued opinions this month that offer some guidance to employers on various post-employment restrictions, including confidentiality agreements and trade secret litigation, as well as non-compete and non-solicitation agreements.

4th Circuit Addresses Confidentiality Agreement and Trade Secret Litigation: In *Integrated Direct Marketing, LLC v. May*, a company sued a former employee for breach of a confidentiality agreement and misappropriation of trade secrets, including pricing information and use of a specific software package.

The 4th Circuit found that the confidentiality agreement was unenforceable because the definition of "confidential information" was unlimited in scope, and would have restricted the former employee in perpetuity, as it contained no time restrictions.

As for the trade secret claim, the 4th Circuit found that the company did not present sufficient evidence as to what pricing it was planning to use in its proposal, which was never finalized, while the new employer provided substantial evidence that it did not use the company's pricing information in its own bid. In addition, because the software package information was publicly available, it could not constitute a trade secret.

This case warns employers to be thoughtful in the preparation of confidentiality agreements – particularly by offering a concrete and specific definition of confidential information, and by appropriately limiting it as to time (if appropriate). In addition, if faced with trade secret litigation, employers must be able to articulate with specificity the trade secret that was misappropriated and demonstrate that it is, in fact protectable and protected information.

Maryland Federal Court Discusses Non-Competition and Non-Solicitation Provisions. In *Paul v. ImpactOffice LLC*, the former employee had signed an agreement with a non-competition provision that prevented him from working for a competitor of the employer within 90 miles of any employer or affiliate locations for six months after his employment ended. It also contained non-solicitation provisions that prohibited him from soliciting or accepting business from any of the employer's or its affiliates' customers or prospective customers, also for six months.

The Maryland federal court found that the non-competition provision was too broad in scope, as it prohibited employment in any capacity – not just those positions similar to what the former employee held at the employer. Specifically, the provision inappropriately "focuse[d] on the nature

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of the competitor rather than the work performed by the former employee." The court found that the provision was not reasonably and narrowly tailored to protect the employer's interest in preventing the loss of customer goodwill.

As for the non-solicitation provision, the court found that the protectable interest is in "preventing an employee from *using* the contacts established during employment to pirate the employer's customers." Thus, the court found that the ban on passive acceptance of unsolicited business was not reasonably tailored to address the concern. Additionally, prohibiting the former employee from soliciting customers with whom he had no contact while employed at the employer was similarly overbroad, as the prospective customer would not have been the subject of customer goodwill generated by the employer. The court also examined whether a ban on contact with all of a company's customers would be too broad, and stated that the propriety of such a ban would depend on the circumstances – in some cases it may be appropriate, but not in others. In this particular case, because the former employee's customer base was only a small part of the entire base and because he had never had interaction with segments of the overall base, the provision was overbroad.

For employers, this case warns that non-competition provisions should be narrowly drawn to focus on the actual work performed by the employee. As for non-solicitation provisions, they should also be carefully drawn to prohibit contact only with those customers or prospective customers with whom the employee has contact.

Class Waiver Battle Heats Up

The National Labor Relations Board's position that waivers of the right to bring class or collective actions over employment-related disputes violate the National Labor Relations Act is being rejected by the Trump Department of Justice, even as federal Circuit Courts deepen the split over this issue. The Supreme Court is poised to resolve this issue.

Deepening Circuit Split: In *D.R. Horton*, the Board first articulated its position that arbitration agreements containing class waivers prevented employees from engaging in concerted activities regarding the terms and conditions of employment – a right that is protected by the NLRA. The Board's position was rejected by the U.S. Court of Appeals in the 5th Circuit. Other federal appeals courts subsequently weighed in, with the 2nd and 8th Circuits joining the 5th Circuit, while the 7th and 9th Circuits, and now most recently this month, the 6th Circuit, in *NLRB v. Alternative Entertainment, Inc.*, ruling in favor of the Board. In January of this year, the U.S. Supreme Court agreed to hear this issue.

The DOJ's About-Face: Typically, the DOJ represents federal agencies in cases before the Supreme Court. When the Supreme Court was considering whether to grant certiorari in the case (meaning that it would hear the case), the Obama DOJ filed a brief in support of the Board's position. On June 16, 2017, however, the Trump DOJ filed a brief reversing its prior position, and now stating that such class waivers could not be precluded by the NLRA, and should be enforced under the Federal Arbitration Act. The DOJ's brief asserted that its prior position failed to give sufficient weight to the Congress' policy of enforcing arbitration agreements as set forth in the FAA.

Impact? The DOJ's switch also means that the Board itself, and not the DOJ, will be arguing the case before the Supreme Court. The lack of the DOJ's presence and support for the NLRB's position may have a strong impact on the Supreme Court's assessment of the issue.

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Employer Should Have Accommodated Employee's "Mark of the Beast" Concern

Where an employer had offered alternatives to a hand scanner to other employees for non-religious reasons, its refusal to permit an employee with religious objections the same alternatives was a violation of Title VII. Moreover, according to U.S. Court of Appeals for the 4th Circuit, the unreasonableness of the employee's belief was irrelevant, as long as it was sincere.

Facts of the Case: In *EEOC v. Consol Energy, Inc.*, the employer instituted a biometric hand scanner to track attendance. An employee refused to use the scanner because, according to his religious belief, the system could brand him with the "Mark of the Beast." According to the Book of Revelations, however, the "Mark of the Beast" appears only on the right hand or forehead. Therefore, the employer insisted that the employee could use his left hand in the scanner. The employee refused to do so, believing that any use of the system could mark him, and was subsequently fired. The employer, however, had permitted other employees with hand injuries that prevented their use of the scanner to enter a personal identification number on a keypad instead.

The EEOC filed a religious discrimination suit against the employer on behalf of the employee. A jury found in the EEOC's favor and awarded damages to the employee.

The Court's Ruling: On appeal, the employer argued that the employee's belief that he could not scan any part of his body was mistaken, as evidenced by scripture passages and even the fact that the employee's pastor did not share his belief, and therefore there was no religious conflict. The 4th Circuit stated, however, that, "It is not Consol's place as an employer, nor ours as a court, to question the correctness or plausibility of [the employee]'s religious understandings." Rather, the only issue is whether the employee's belief is sincerely held, and this was undisputed.

Given the sincerity of the employee's religious belief, the 4th Circuit then turned to whether a reasonable accommodation was available. In this case, the employer had provided an accommodation to two other employees – to allow them to use a keypad to enter a PIN – for non-religious reasons. The employer conceded that this accommodation did not impose any additional costs or burdens on the company. Thus, the 4th Circuit found that this accommodation should have been provided to the employee as well.

Lessons Learned: This case emphasizes that an employee's religious belief need not be logical or reasonable; as long as it is sincerely (even if mistakenly) held, it will be subject to protection under Title VII. In addition, if certain exceptions are made to general requirements or procedures for non-religious reasons, these same considerations must be provided for non-religious reasons.

TAKE NOTE

NLRB's Revised Backpay Formula Upheld by Federal Court. The National Labor Relations Board's revised backpay formula, which requires compensation for search-for-work and interim employment expenses, was upheld by the U.S. Court of Appeals for the D.C. Circuit.

As we discussed in our August 2016 E-Update, under Board law, workers who are unlawfully discharged have the duty to mitigate their losses by seeking other, interim employment. In so doing, the workers may incur expenses such as transportation, room and board, relocation costs, and

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training costs for the interim job. Previously, those expenses were treated as an offset to the amount of interim earnings, if any, that would be deducted from the gross amount of backpay due. The Board determined, however, that this approach did not fully compensate the worker. Therefore, the Board held that search-for-work and interim employment expenses must be reimbursed separately from any backpay award. In addition, the Board stated that separating these expenses from taxable back pay will avoid possible tax complications.

The D.C. Circuit, in *King Soopers, Inc. v. NLRB*, found that the Board had the authority to adjust its remedial framework for a make-whole remedy in order to achieve the goals of the National Labor Relations Act. Thus, employers who are found to have illegally terminated a worker should be prepared to see an increase in the damages that they pay. Search-for-work and interim employment expenses can exceed interim earnings, if any, and the amount of these expenses was previously limited by the amount of the interim earnings through the offset. Now the full amount of such expenses will be awarded.

No Retaliation Where Employer Mistakenly Believed Employee Lied. The U.S. Court of Appeals found that an employee's claim for retaliation under Title VII failed where her termination was based on the employer's mistaken belief that she had lied in reporting harassment by a manager.

In *Villa v. Cavamezze Grill, LLC,* the employee reported that a subordinate had told her that the restaurant's general manager had offered the subordinate a raise in exchange for sex, and that she suspected another subordinate had left for the same reason. During the company's investigation, the subordinate denied making such a statement to the employee, and the second subordinate denied that the GM had made such an offer. The employer concluded that the employee had lied, and terminated her. She sued for retaliation, and during the course of the lawsuit, the first subordinate admitted that she had, in fact, told the employee that the GM had harassed her, although she further admitted the claimed harassment was a lie.

The employee argued that her termination was illegal retaliation because her complaint was made in good faith. The trial court rejected her argument, however, and the 4th Circuit affirmed the trial court's ruling. The 4th Circuit emphasized that the employer's motivation was the focus of a retaliation claim. Here, the employer's reason for the termination was its good faith belief that the employee had lied – even if the employer was mistaken in its belief – and not a desire to retaliate against the employee for reporting harassment.

Despite Failed Medical Exam, Employee's Actual Performance Supported ADA Claim. In a cautionary tale for employers, the U.S. Court of Appeals for the 10th Circuit emphasized the significance of an employee's actual performance of job duties, despite the fact that he failed a required medical exam.

In *Iselin v. The Bama Companies, Inc.,* a temporary employee performed the duties of a general production worker for five months, despite having rotator cuff and back injuries. He was offered a regular position with the company, contingent on passing the company's standard "physical demand assessment." He was terminated after failing the exam, and sued for violation of the ADA. The trial court found that, because the employee had failed the exam, he could not show that he was able to perform the essential functions of the job.

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The 10th Circuit, however, reversed the trial court's ruling and found that the employee plausibly established that he could perform the essential functions of the job, since he had performed them successfully for the five months prior to the exam. The 10th Circuit stated that the trial court had improperly ignored the employee's work history. Employers should keep in mind that the most relevant evidence as to an employee's ability to perform the essential job functions of a position is the actual history of performance.

Failure to Provide FMLA Notice Constitutes Interference with Rights. An employer that failed to advise an employee of his rights under the Family and Medical Leave Act could be liable for FMLA interference, according to the U.S. Court of Appeals for the 6th Circuit.

Under the FMLA regulations, once an employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of his eligibility to take FMLA leave, as well as the employee's rights and responsibilities under FMLA. These notices must be provided within 5 business days.

In *Reeder v. County of Wayne,* the employee provided his employer with three doctor's notes that restricted his ability to work more than 8 hours a day for medical reasons, which meant that he was unable to work mandatory overtime. The employer failed to provide him with the required FMLA notices, and he was subsequently terminated for failing to work overtime.

The Court found that, contrary to the employer's argument, the employee was not required formally to request FMLA leave to cover the missed overtime. Rather, he had given the employer sufficient information such that the employer should have recognized that his inability to work overtime could be FMLA-qualifying – or if it did not have sufficient information to make that determination, then, under the regulations, it had the obligation to request additional information. The employer's failure to provide the required notices, therefore, interfered with the employee's right under FMLA to take protected leave. This case emphasizes the need for employers to recognize when the FMLA might be implicated in an employee's inability to work – even if it is on a part-time or overtime basis – and to ensure that the required notices are timely provided.

Supervisor's Text Messages Constitute Unlawful Interrogation. According to the National Labor Relations Board, a supervisor's text messages to an employee that included a question about whether the employee was working for the employer or for the union violated the National Labor Relations Act.

Under the NLRA, employers may not interrogate employees about their union activities or sympathies. In *RHCG Safety Corp*., the Board applied a totality of circumstances test to find that the supervisor's text message, which juxtaposed working for the employer with working for the union, unlawfully suggested that the two were incompatible. The supervisor failed to explain the purpose of the question and failed to provide any assurances against reprisals.

NEWS AND EVENTS

Media Mention. Gary L. Simpler was featured in Crain's Baltimore as part of their series, "If I Knew Then…" Crain's asks executives, entrepreneurs and business leaders about mistakes that have shaped their business philosophy. Gary observed that his mistake was in spending a great deal of

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time trying to find new clients where they don't exist, and that he learned, "It's the relationship that you form with your existing clients that will make you successful."

Media Mention. J. Michael McGuire was quoted in a Maryland Daily Record article, "MSBA panel: How do you solve a (legal) problem like Uber?" The article summarized a panel discussion at the annual Maryland State Bar Association conference, in which Mike, University of Baltimore School of Law professor Michael Hayes and plaintiff's attorney Andrew Dansicker discussed legal issues associated with gig economy workers.

Webinar. Parker E. Thoeni and Lindsey A. White presented a webinar, "Managing Cancer and Other Chronic Diseases in the Workplace," on behalf of the Center for Competitive Management (C4CM), which provides consulting and training services to businesses, including in the human resources area. A recording of the webinar is available through C4CM.

Appointment to General Counsel of the Maryland Chamber of Commerce. Elizabeth Torphy-Donzella was re-appointed as General Counsel of the Maryland Chamber of Commerce. Liz is the first woman to serve in this position.

Victory. Parker E. Thoeni won a case for a manufacturing client in federal court, involving claims of violations of the Equal Pay Act, failure to accommodate, retaliation, and sex discrimination. Some good investigative work by Parker revealed that Plaintiff had been flagrantly dishonest with the court, who subsequently dismissed the case.

Presentation – Baltimore ACC. Teresa D. Teare and Lindsey A. White spoke to Baltimore Chapter of the Association of Corporate Counsel on June 13, 2017, about recently enacted employment legislation in Maryland and surrounding jurisdictions.

Article – "Is Setting Pay Based on Prior Salary the Same as Setting Pay Based on Sex?" Parker E. Thoeni and Lindsey A. White wrote an article that was published in the June 15, 2017 edition of the "Bar Bulletin," the newsletter of the Maryland State Bar Association.

TOP TIP: Make Sure to Provide Those Tip Credit Notices to Tipped Employees!

A recent case reminds employers of the need to provide notice to tipped employees if they intend to use tip credits towards their minimum wage obligation, in accordance with the Fair Labor Standards Act.

Under the FLSA, an employer may take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage (which must be at least $2.13) and the federal minimum wage ($7.25/hour). Tipped employees are defined as those who customarily and regularly receive more than $30 per month in tips.

In order to use the tip credit, employers must provide the following information to a tipped employee:

1) the amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour;

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2) the additional amount claimed by the employer as a tip credit, which cannot exceed $5.12 (the difference between the minimum required cash wage of $2.13 and the current minimum wage of $7.25);
3) that the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;
4) that all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and
5) that the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

In *Valle v. Gordon Chen's Kitchen, LLC*, the employer failed to provide the required notice to its tipped employees, although it applied the tip credit. Therefore, the federal court found that, under the FLSA, the employer was not entitled to take a tip credit and was responsible for paying the full minimum wage rate, instead of just the lower tipped wage rate. In addition, because the employer had used the lower tipped wage rate to calculate overtime, it was also liable for the difference between the lower tipped overtime rate and the full overtime rate. Moreover, it was liable for liquidated damages because the failure to provide the tip credit notice was not reasonable.

As is clear from this case, the consequences for failing to provide the required tip credit notice can be significant – and easily avoided! While the DOL states that the notice may be provided either in writing or orally, we strongly advise that it be provided in writing so that there can be no argument about whether it actually was given to the employee.

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- Be Careful About Waiving the Attorney-Client Privilege by Fiona W. Ong (Selected as a "noteworthy" blog post by the Employment Law Daily)
- Maternity/Parental Leave Policies – A Trap for the Unwary by Fiona W. Ong
- DOL Withdraws Guidance Documents on Joint Employment and Independent Contractor Status by Fiona W. Ong
- We Sued the Department of Labor, and Now It Has Backtracked on the Persuader Rule by Mark J. Swerdlin and Parker E. Thoeni
- Take Your Dog to Work Day! by Fiona W. Ong (Selected as a "noteworthy" blog post by the Employment Law Daily)

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