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Welcome to e-News: From the Labor, Employment and Benefits Group of Robinson & Cole

e-News is a bi-weekly electronic newsletter reporting on recent court decisions, new statutes and other timely and topical information. Where appropriate, e-News provides web links to databases where recipients can easily access the actual decisions, statutes or other information. Navigating e-News is just like navigating the web. To access a web link, simply position your cursor on the link and click your mouse. To return to e-News, hit the back button on your browser.

We hope you enjoy e-News. If you know of others who would enjoy receiving this online newsletter (or if you would like to discontinue receiving e-News), pleaseclick here and send us an e-mail message. If you would like certain information covered in future issues, please let us know. We welcome your feedback.

Employee Terminated for Refusing to Sign Invalid Noncompetition Agreement States Public Policy Wrongful Discharge Claim

In D'Sa v. Playhut, Inc. (12/21/2000), the California Court of Appeal ruled that an employee may proceed with his public policy wrongful discharge claim, where he was allegedly terminated for refusing to sign a confidentiality agreement containing an unlawful covenant not to compete. The court found that the non-compete terms violated a California statute. Playhut, his employer, unsuccessfully argued that, although the non-compete component of the confidentiality agreement was unlawful, the remainder of the confidentiality agreement was valid and so there was nothing unlawful in terminating an employee for refusing to sign it. However, the court rejected that argument ruling instead that an employer cannot lawfully require an employee to sign an agreement containing an unenforceable provision as a condition of continued employment.

Although most states do not have statutes prohibiting non-compete agreements, this case is a reminder that companies should review employment agreements carefully before

presenting them to employees. Companies should also act carefully and with the advice of counsel before terminating an employee for refusing to sign a non-compete or similar agreement.

Massachusetts Executive Office of Public Safety Issues Advisory on Workplace Violence

On December 28, 2000, the Massachusetts Executive Office of Public Safety issued an Advisory to employers on how to create a safer workplace. The Advisory is in response to a recent incident of workplace violence where seven employees at a Wakefield, Massachusetts company were killed by a co-worker.

The Advisory sets forth three steps companies can take to increase safety and security in the workplace. Steps include conducting regular internal and external threat assessments, developing a plan and taking precautions regarding building security, and creating and implementing an emergency response plan. The Advisory notes that "Insuring workplace safety is not just the duty of security guards and police officers. Every employee must share in the responsibility, becoming more observant of their surroundings and reporting unusual occurrences and perceived threats of violence, no matter how insignificant they may seem."

Massachusetts Judge Dismisses Defamation Claim Based on Company's Negative Response to Reference Request from Prospective Employer

In Bianci v. Commonwealth Childcare Corporation, 12 Mass.L.Rptr. No. 13, 312 (12/18/2000), a Massachusetts court dismissed the claims of an employee, Bianci, against her former employer based on the company's response to a reference request. Bianci claimed defamation, infliction of emotional distress, and negligent supervision and training. The claims all stemmed from the company's response to a questionnaire sent by Bianci's prospective new employer, in which the company was asked to rate Bianci in several categories as either "poor," "good" or "excellent." The company rated Bianci "poor" in some categories and circled "no" in response to the question "would you rehire?"

Dismissing the defamation claim, the court found the company's statements to be protected expressions of opinion and noted that the company enjoyed a conditional privilege to respond to a reference request. The court also dismissed the infliction of emotional distress claims because the company's actions could not be found to be "so extreme and outrageous as to be beyond all possible bounds of decency." Lastly, the court dismissed the claims for negligent supervision and training because Bianci failed to present any evidence in support of those claims.

EEOC Issues New Guidance on Application of ADA to Contingent Workers

Citing a recent study suggesting that staffing firms can provide disabled workers with

critical means to move from unemployment to competitive permanent employment, the U.S. Equal Employment Opportunity Commission issued a new internal guidance on the "Application of the Americans with Disabilities Act to Contingent Workers." The guidance, soon to be posted on the EEOC website, is intended to address "unique ADA issues" not addressed in the agency's Contingent Workers Guidance issued in 1997.

The new guidance discusses several bases on which a staffing firm or its client, or both, may be considered "employers" and thus may be liable under the ADA. The guidance addresses the types of disability-related questions that may be asked, medical examinations, employment tests, and the reasonable accommodation process.

Court Overturns $1.5 Million ADA Award, Finding Employee Failed to Participate in Interactive Reasonable Accommodation Process

In Davis v. The Guardian Life Insurance Co. (12/14/2000), the U.S. District Court in Pennsylvania overturned a $1.5 million jury award in favor of a employee who claimed that her employer failed to accommodate her disability and retaliated against her. The employee suffered from Crohn's disease. For years, her employer accommodated her condition by allowing her to work from home three days per week and by providing her with a computer, fax machine and other equipment for home use. The employer asked her to sign a document memorializing her alternative work schedule but she refused. Although she felt that the document was more restrictive than actual past practice, she never expressed her concerns to the company. She soon went out on long-term disability and filed a charge with the EEOC.

The court overturned the jury award, finding that the employee was responsible for the "total breakdown of any kind of interactive process" concerning her accommodation and that she had failed to comply with her duty under the ADA. The court emphasized that both parties were obligated to participate in the ADA's interactive process concerning reasonable accommodation. The court also awarded judgment to the company on the retaliation claim, finding no evidence to support that claim.

Court Challenges to OSHA's Ergonomics Standard are Consolidated

Business groups such as the U.S. Chamber of Commerce have filed legal challenges to OSHA's new Ergonomics Standard, claiming that the rules are excessively burdensome. Now unions have joined in, filing their own challenges, claiming that the rules *do not go far enough* because employers are not required to fix potential hazards until after an employee is injured. These cases, eleven of them, have now been consolidated in the District of Columbia Circuit Court. As reported in our November 20, 2000 e-News, the new standard is scheduled to become effective on January 16, 2001.

New Regulations Require Federal Contracting Officers to Consider Prospective

Contractor's Past Compliance with Labor Laws

In what has been seen as a parting gift to unions by the Clinton Administration, the government has issued new regulations requiring federal contracting officers to consider a prospective contractor's record of compliance with labor, environmental and other laws before awarding government contracts. Under the new rules, a contractor could be disqualified from receiving federal contracts based on allegations of past labor law violations. Business groups complain that the new regulations will be used as leverage by unions involved in labor disputes with federal contractors. The business groups have vowed to seek the repeal of these regulations through litigation, or through action by the new administration. The rules become effective January 19, 2001, the final full day of the Clinton administration.

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