ROBINSON & COLE LLP
LABOR, EMPLOYMENT AND BENEFITS

eNews

E-news is an electronic newsletter reporting recent developments in labor, employment and benefits law.

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

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“No-Hire” Agreement Ruled Unenforceable

Greenbriar Rehabilitation entered into written contracts with 34 nursing homes in Wisconsin to provide physical therapists. Unbeknownst to the physical therapists, the contracts prohibited the nursing homes from hiring any therapists without Greenbriar’s consent and required those nursing homes that hired therapists with Greenbriar’s consent to pay Greenbriar a steep fee. One nursing home, Dove Health Care, breached the contract by hiring Greenbriar therapists without seeking Greenbriar’s consent or paying the fee. Greenbriar sued Dove for breaching the contract. The court awarded Greenbriar a judgment of $64,000 and Dove appealed. In Heyde Companies, Inc. v. Dove Health Care LLC (10/23/2001), the Wisconsin Court of Appeals overturned the judgment, ruling that the “no-hire” provision was unenforceable because it violated the public policy favoring unrestrained competition in the employment market. The appeals court reasoned that an employee’s individual right and freedom to contract may not be restricted by a contract between two employers unless the employee is aware of and consents to the contract.

Connecticut Department of Labor Revises Wage and Hour Regulations

The Connecticut Department of Labor has issued revised wage and hour regulations that (1) significantly increase the salary threshold for determining whether an employee is exempt from Connecticut's mandatory overtime laws, and (2) allow employers to dock exempt salaried employees' wages under certain circumstances. These regulations became effective on July 1, 2001.

Changes re: Salary Thresholds. Two tests determine whether an employee meets the definition of an exempt executive, administrative or professional employee -- the "duties" test and the "salary" test. While the duties test remains unchanged, the new regulations raise the minimum salary thresholds to $400 per week under the "long test," and to $475 per week under the "short test."

Changes re: Salary Dockings. The new regulations also reverse the DOL's long-standing position that employers are prohibited from docking exempt salaried employees' wages if the employee worked any part of the workweek. Although there were limited exceptions to this policy, the new regulations give employers more flexibility to dock an employee's wages for one or more full days of pay. For example, deductions may be made for one or more full days if the employee is absent for personal reasons other than sickness or accident. Deductions also may be made for one or more full days of sickness or disability if the deduction is made pursuant to a bona fide plan, policy or practice of making deductions from an employee's salary after sickness or disability leave has been exhausted and if that plan, policy or practice was disclosed to the employee at the time of hire.

Chinese Immigrant Awarded $3 Million for Race and National Origin Discrimination

Wei Zhang, an immigrant from China, worked for American Gem Seafoods as its Vice President in charge of Pacific Rim operations. After American Gem hired Harry Lees as its President and Chief Executive Officer, Zhang, the only manager who was not American and Caucasian, was excluded from management meetings. In addition, Lees did not pay Zhang and other Chinese employees bonuses for 1998, did not inform Zhang of many management decisions, demoted him, and ultimately discharged him. Finally, Lees denied Zhang a severance package provided to other employees, who were American Caucasians, and made derogatory comments about persons of Asian descent. Zhang sued American Gem, alleging a hostile work environment and race and national origin discrimination in violation of Section 1981. Following a trial, inZhang v. American Gem Seafoods (10/3/2001) the U.S. District Court in Washington approved the jury's award to Zhang of $3.132 million in damages and back pay, including $2.6 million in punitive damages for malicious conduct that constituted a reckless disregard for Zhang's rights to be free from discrimination.

Reduced Responsibilities upon Return from Maternity Leave Warrants Pregnancy Discrimination Claim

Freda Leichter worked as a business manager for St. Vincent's Hospital in New York City. Following a pregnancy, Leichter took a maternity leave of six months pursuant to hospital policy. When she returned, she found that many of her former job responsibilities had been given to a new employee. As a business manager, she previously had established and operated the faculty practice, supervised its personnel, purchased and maintained furnishings and equipment, ordered supplies, scheduled patients, and handled employee issues. Although she retained her title and salary upon her return, she performed only clerical duties. The new employee, who had a different title, had been assigned Leichter's former responsibilities, office, desk, computer, and files. According to Leichter, the new manager did not have her financial skills or work experience.

Leichter sued St. Vincent's, asserting that the hospital's actions violated the Pregnancy Discrimination Act. The hospital moved to dismiss the lawsuit, reasoning that Leichter had the same pay and job title when she returned from maternity leave, as the PDA requires. In Le
Leichter v. St. Vincent's Hospital (9/28/2001), the U.S. District Court in New York denied the hospital's motion because Leichter returned to a significantly different job. The court explained that adverse employment actions exist even where an employee has experienced no change in salary and that a radical change in the nature of the work an employee is expected to perform is enough. The court also explained that the temporal proximity between Leichter's pregnancy and maternity leave and her adverse employment action was enough to raise an inference of discrimination.

Divided NLRB Panel Finds Immigration Status Used as a "Smokescreen" to Fire Union Supporters

A few days after an election win by the International Union of Operating Engineers, the general manager for Nortech Waste contacted the Immigration and Naturalization Service and reported that 11 employees were working illegally. The manager then told each of the 11 employees that they could not work until they corrected their immigration paperwork. In No
Nortech Waste and Operating Engineers Local Union No. 3 (10/24/2001), two of three members of an NLRB panel agreed with an administrative law judge that Nortech committed unfair labor practices by using the employees' immigration status as a "smokescreen" to fire them unlawfully. The panel majority found that Nortech "significantly departed from its ordinary course of business," belying its contention that it was merely trying to comply with the Immigration Reform and Control Act. The dissenting NLRB panel member argued that the IRCA expressly prohibits an employer from continuing to employ someone it knows is an illegal alien and that Nortech would therefore have risked huge fines had it not contacted the INS.

Employee Photographed in Bathroom Awarded $350,000 Compensatory Damages

Chris Fotiades worked as an auto body repair shop production manager for Hi-Tech Auto Collision & Painting Services. Fotiades sued Hi-Tech for invasion of privacy and intentional infliction of emotional distress after coworkers barged into the office bathroom, took a photograph of him while he was urinating, and showed the photograph to other employees, who then subjected him to vulgar and humiliating comments. A jury awarded Fotiades $1,000,000 in compensatory damages and $500,000 in punitive damages. Hi-Tech successfully persuaded the trial court to reduce these amounts to $350,000 in compensatory damages and $150,000 in punitive damages. Both parties appealed. In Fotiades v. Hi-Tech Auto Collision & Painting Services, Inc. (10/17/2001), the California Court of Appeals overturned the punitive damages award, but affirmed the compensatory damages award. The appellate court found that $350,000 in compensatory damages was reasonable and appropriate, but that no punitive damages should enter because none of the individuals involved were directors, officers, managing agents, or anyone with substantial discretionary authority over corporate policy.

NLRB Chairman Speaks in Hartford

Peter J. Hurtgen, Chairman of the U.S. National Labor Relations Board, was the keynote speaker at a Connecticut Bar Association Labor and Employment Law Section meeting held November 1, 2001 attended by Robinson & Cole attorneys. Hurtgen discussed the decision in Gourmet Award Foods Northeast (10/1/2001) where the NLRB ruled that a labor union properly accreted employees supplied by a temporary employee staffing firm to an existing bargaining unit of employees because the temporary employees and the company employees shared a "community of interests." Hurtgen dissented, explaining that in order to properly join user and supplier employees into one bargaining unit, the employees of the "user" and the "supplier" must have little or no separate identity and share an "overwhelming community of interests." In commenting on employer withdrawal of union recognition in Levitz Furniture Company (3/29/2001), Hurtgen stressed that employers that accept employee petitions or statements of dissatisfaction with the union on their face do so at their own risk. He suggested that it is safer for employers to use a formal election process than to use an informal process to withdraw recognition. Although he dissented in Epilepsy Foundation of Northeast Ohio (7/10/2000), Hurtgen revealed a willingness to extend *Weingarten* rights to nonunion employees but explained that those rights required further consideration by the NLRB.

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