Date Issued: 12/17/2001

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. To view back issues, click on the "e-News Archives" link on the masthead.

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.

One-Sided Arbitration Agreement Held Unenforceable

Diana Gonzalez worked as a customer service representative for Labor Ready Central Illinois, a temporary staffing firm. At the start of her employment, Gonzalez signed an arbitration agreement that required her to arbitrate all claims arising out of her employment, but allowed Labor Ready to take to court any claims it had against her. Two years after signing the agreement, Gonzalez was discharged. She claimed that she was discharged because she had previously complained about sexual harassment by a male co-worker. When Gonzalez sued Labor Ready for retaliation in violation of Title VII, Labor Ready moved to dismiss her lawsuit on the grounds that the arbitration provision barred the lawsuit and instead required that she arbitrate her claims. In Labor Ready Central Illinois L.P. v. Gonzalez (11/29/2001), the Texas Court of Appeals ruled that Labor Ready's arbitration agreement was unenforceable. The court reasoned that, although Gonzalez gave up her right to sue in court, because both parties did not give up something, there was no legal consideration required to support a valid contract.

Professionals Who Choose Corporate Form Count as Employees for ADA Purposes

An employer is only subject to the Americans with Disabilities Act if it has 15 or more employees. In Wells v. Clackamas Gastroenterology Associates, P.C. (11/26/2001), the U.S. Court of Appeals for the Ninth Circuit ruled that the physician-shareholders of a professional medical corporation counted as employees for the purpose of determining how many workers it employed. The physicians asserted that the medical corporation functioned essentially as a partnership and that the physicians acted as employers rather than employees. However, the court ruled that because the physicians chose to use a corporate form, which provided important tax, benefit, and civil liability advantages, they could not claim that the corporation functioned as a partnership in order to avoid being a covered entity under the ADA.

Noncompete Clause Violated Individual's Right to Pursue Employment of Choice

When Aetna and U.S. Healthcare merged to become Aetna U.S. Healthcare, certain Aetna employees were required to sign the same employment agreements that were signed by U.S. Healthcare employees before the merger. The agreement included a noncompete clause that prohibited the employees from working for a competitor in the area for six months after termination. Anita Walia was an account manager in Aetna's San Francisco sales organization. She liked her job and was happy at Aetna until she was told she had to sign the agreement. She informed her supervisors that she believed noncompete clauses were unenforceable in California. Aetna U.S. refused to delete the clause and terminated Walia after she refused to sign the agreement.

Walia successfully sued for wrongful termination, claiming that Aetna U.S. violated a California statute ensuring citizens the right to pursue employment of their choice. Aetna U.S. appealed, asserting that California's public policy was not clearly articulated at the time of the violation because the law was in flux, pointing to California cases that enforced noncompete provisions and arguing that the terms of the clause had never been found unenforceable. In Walia v. Aetna, Inc. (11/21/2001), the California Court of Appeals rejected Aetna U.S.'s argument and upheld an award of $54,312 in compensatory damages, $125,000 for emotional distress, and $1,080,000 in punitive damages. The appeals court explained that punitive damages were appropriate because Walia had told Aetna U.S. that the clause was unenforceable, but the company did not bother to have legal counsel research the matter.

African American Cashier Disciplined More Harshly than Others May Proceed to Trial

Sylvia Curry, who is African American, worked as a cashier at Menard, Inc., a retail store. Menard fired Curry, asserting that she had cash discrepancies on three occasions. According to the store's unwritten discipline policy, a cashier will be warned after one discrepancy, suspended after two, and fired after a third discrepancy within 60 days of the suspension. Curry sued, claiming that she was fired because of her race in violation of Title VII. She identified at least 14 cashiers outside the protected class who, during a two-year period before her termination, should have been suspended or terminated under the policy but were not disciplined. In addition, she offered evidence that the office manager in charge of cashiers called the store's managers and security personnel to warn them when African American or Hispanic customers came into the store, made negative comments about African Americans, and questioned Curry about African-American hairstyles.

The trial court dismissed the case, ruling that Curry failed to prove discrimination because she admitted that her cash register had discrepancies on three occasions and, therefore, she had not performed her job according to Menard's expectations. However, in Curry v. Menard, Inc. (10/29/2001), the U.S. Court of Appeals for the Seventh Circuit reversed, ruling that Curry submitted enough evidence to show that Menard's stated reason for terminating her was a pretext for discrimination. The appeals court was particularly disturbed by the fact that the policy had not been uniformly enforced, that the only individual actually terminated under the policy was African American, and that of 35 cashiers in the store, only three, including Curry, were African American.

Ex-Manager Awarded $5 Million by Jury in AIDS Bias Verdict

Russell Rich, a 20-year veteran of McDonald's franchise restaurants, was hired by McDonald's to manage a corporate restaurant, with promises of swift advancement. At the time he was hired, Rich had been recognized as an outstanding manager three times in his McDonald's career, and his restaurants had been named outstanding stores six times. Soon after taking the corporate restaurant job, however, Rich was hospitalized with an AIDS-related illness. When he returned to work, his general manager refused to allow him to order supplies or schedule employees, effectively stripping him of his management duties. Further, rather than working 46 to 50 hours per week, as specified in his job description, Rich was routinely scheduled for 60 to 70 hours. When he let an assistant manager close the restaurant one night, as was his right as manager, Rich's general manager improperly disciplined him for job abandonment. Rich complained to his area operations manager, who told him her busy schedule would keep her from investigating his complaints for two weeks and that, if he did not like the situation, he could take an unpaid leave of absence, which he did. During his leave, he again became ill. When he returned to work, he was transferred to another restaurant, where he had the title of co-manager but was told his duties would be limited to selling hamburgers at the front counter for the rest of his career.

Rich resigned his employment and filed a lawsuit in Ohio state court, alleging wrongful discharge. He argued that once his HIV positive status was known, his supervisors set him up to fail and made his work life so stressful, given his disability, that he had no choice but to resign, and that McDonald's pretense was evident because none of Rich's supervisors could give a logical reason for the job changes that negatively affected him. In Rich v.

McDonald's Corp. (10/26/2001), after nine days of testimony, a jury deliberated less than three hours before returning a verdict of $5 million in Rich's favor. Unlike many awards of that size, the verdict included only compensatory damages and no punitive damages.

Employer's Policy Entitles Exempt Supervisor to Overtime Pay

American National Can had an exempt employee overtime program to ensure that salaried workers would not earn less than the hourly employees they supervised during overtime. Under the program, eligible employees received overtime pay when required to supervise hourly employees whose work exceeded the normal work schedule. John Kartheiser was promoted to a management position that rendered him ineligible for overtime because he did not supervise hourly employees. However, as a result of a subsequent reduction in force and job modification, Kartheiser began supervising hourly employees. Kartheiser requested overtime pay but American Can refused his requests. Kartheiser did not submit any additional claims for overtime pay, believing that doing so would be futile. Shortly before resigning three years later, he began to record his overtime hours and submit his records. His request was again denied. Kartheiser sued American Can and a jury awarded him more than $15,600. The trial court set aside the verdict, finding that Kartheiser had not documented and submitted his claimed overtime hours in accordance with the requirements of the program. Kartheiser appealed.

In Kartheiser v. American National Can Co. (11/29/2001), the U.S. Court of Appeals for the Eighth Circuit reinstated the jury's verdict, explaining that it was the jury's decision whether Kartheiser was eligible for overtime under the program. The appeals court noted that the jury could have found that American Can failed to comply with its own agreement to pay overtime wages to exempt employees. Even though Kartheiser did not submit his overtime requests properly, American Can knew Kartheiser was working overtime hours and desired overtime pay, but did not tell him to stop working the extra hours.

Business May Bring Federal Racketeering Claims against Competitor that Hired Illegal Aliens

Commercial Cleaning Services filed a class action lawsuit in the U.S. District Court in Connecticut alleging that a competitor cleaning company, Colin Service, engaged in unlawful racketeering by hiring illegal aliens for profit in violation of the Racketeer Influenced and Corrupt Organizations Act. The court ruled that Commercial lacked standing to bring the lawsuit because its claimed injury did not relate to Colin's alleged racketeering activities. In Commercial Cleaning Services, LLC v. Colin Service Systems, Inc. (11/15/2001), the U.S. Court of Appeals for the Second Circuit reversed and permitted the lawsuit to proceed. The appeals court reasoned that Commercial and Colin were direct competitors, that Commercial had alleged that Colin undertook the illegal immigrant hiring scheme specifically to undercut its business rivals, and that there was no class of potential victims who had been more directly injured by the alleged RICO conspiracy than Colin's business competitors.

New Retirement Plan Dollar Limitations Released for 2002

The U.S. Internal Revenue Service has released increased dollar limitations for qualified retirement plans for 2002:

Maximum pre-tax deferrals under a 401(k) plan, 403(b) plan or 457(e)(15) plan - $11,000;
Maximum pre-tax deferrals under a SIMPLE plan - $7,000;
Catch up contribution limit - $1,000;
Compensation cap for calculating contributions - $200,000;
Defined benefit plan annual benefit limit - $160,000;
Defined contribution plan annual contribution limit - $40,000;
Key employee dollar limit - $130,000;
Highly compensated employee dollar limit - $90,000.

The most confusing limit to administer is the highly compensated employee dollar limit, since a highly compensated employee is an employee who in the preceding plan year had compensation exceeding the then applicable dollar limit. Thus, the $90,000 limit will be used in 2003 for purposes of determining which employees earned over $90,000 in 2002. For the 2002 plan year, a highly compensated employee is any employee who earned over $85,000 in 2001.

Another new limit that was recently released by the Social Security Administration is the 2002 taxable wage base limit of $84,900.

For more information, please contact us

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