ROBINSON & COLE LLP
LABOR, EMPLOYMENT AND BENEFITS
eNews
E-news is an electronic newsletter reporting recent developments in labor, employment and benefits law.

Date Issued: 09/23/2002

Welcome to e-News: From the Labor, Employment and Benefits Group of Robinson & Cole
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Arbitration Policy Disseminated by Payroll Stuffer to At-Will Employees Enforced

In Tinder v. Pinkerton Security (9/17/02) the U.S. Court of Appeals for the Seventh Circuit enforced under the Federal Arbitration Act an arbitration policy that was issued to all employees as a payroll stuffer. Pinkerton enclosed the payroll stuffer, a color brochure describing the arbitration program, in paychecks for all employees notifying them that Pinkerton was instituting a mandatory arbitration program effective in three months at the start of the new year. The stuffer also included a brochure in a question-and-answer format describing the process and the claims covered by the mandatory arbitration policy. Pinkerton also featured the arbitration program on the cover of its internal monthly magazine and distributed posters for display in all work sites to inform all employees of the program. Finally, at the commencement of the program, Pinkerton distributed another payroll stuffer reiterating the terms of the arbitration program.

Ilah Tinder sued Pinkerton claiming constructive discharge and retaliation in violation of

Title VII asserting that she was discriminated against on the basis of her sex. Unlike her male co-workers, she was required to work overtime, was not promptly paid for her work, and was not reimbursed for her work boots. Pinkerton asked the court to compel arbitration. Tinder asserted that the arbitration program was unenforceable because she had not signed any agreement and because the policy was implemented after she had already been employed. The trial court ordered arbitration and she appealed. The appeals court ruled that because the agreement provided expressly that by remaining employed at Pinkerton after the effective date of the arbitration program Tinder, like all other employees, agreed to submit her claims to arbitration. The appeals court also ruled that the FAA does not require that an employee sign an arbitration agreement. Finally, the appeals court ruled that Pinkerton took reasonable steps to apprise all employees of the existence of the arbitration program and that Tinder's failure to recall seeing anything about the program did not exempt her from its requirements.

Court Upholds Forfeiture of Bonus and Stock Options of Former Employee Working for Competitor

After working for Ameritech Corporation for more than 25 years, Michael Tatom accepted a job offer with U.S. West. Upon learning that Tatom had joined U.S. West, Ameritech informed Tatom that it considered U.S. West a competitor. As a result, Ameritech canceled his annual incentive award, canceled his unvested stock options, and reduced the exercise period for his vested options. Tatom sued Ameritech for breach of contract and breach of an implied covenant of good faith and fair dealing. In Tatom v. Ameritech Corporation (9/18/02) the U.S. Court of Appeals for the Seventh Circuit affirmed dismissal of Tatom's claims. The court rejected Tatom's argument that Ameritech had promised to pay him an annual bonus and provide vested options, as described in various company documents. Ameritech defended based on disclaimers contained in company documents noting that benefits are governed by certain plan documents and by disclaimers that reserve the right to reduce, modify, or withhold awards based on regulatory events, changes in business conditions, or individual performance. Ameritech's disclaimer also provided that the compensation program did not guaranty any particular amount of compensation and did not create a contractual relationship or any contractually enforceable rights. Ameritech also relied on its stock plan documents that expressly allow for forfeiture of stock options if an employee becomes associated with a competitor.

TV Producers are Supervisors under NLRA

In Multimedia KSDK, Inc. v. NLRB (9/10/02) the U.S. Court of Appeals for the Eighth Circuit ruled that 16 producers of KSDK's television newscast program were supervisors and thus ineligible to organize and join the International Brotherhood of Electrical Workers union under the National Labor Relations Act. The NLRA does not permit supervisors to unionize and the court decided that the producers were supervisors. The producers have overall responsibility for putting together the newscast from planning to air. They assign writers, reporters, photographers and graphic artists to each story. They are responsible for

the accuracy and style of the individual stories reported. They give the anchors instructions during the newscast. During the broadcast, producers can make changes to the script, add or drop stories, or change the order of the broadcast. Based on these findings, the appeals court found that the producers were supervisors and not employees entitled to join a union.

Confusion over Doctor's Instructions Avoids Dismissal of FMLA Lawsuit

Manuel Lara worked for Central Grocers Cooperative as a driver for 14 years when he was fired for excessive absenteeism. Lara suffered from multiple health problems including coronary artery disease and diabetes. Central's attendance policy provides that employees absent 12 times in a 12-month period will be discharged regardless of the reason for the absences. After Lara was absent numerous times, Central asked him to obtain medical certification from his treating physician regarding his absences. His physician provided a note stating that Lara may need to be absent from work on a periodic basis. Lara's supervisors contacted Lara's doctor to ascertain the meaning of the note. According to the supervisors, Lara's doctor orally indicated that Lara only needed to take his medication and could continue to work. The supervisors asked Lara to provide recertification but he failed to do so. Central terminated Lara's employment.

Lara sued Central and his supervisors alleging unlawful termination after denying him intermittent unpaid absences to treat his medical condition in violation of the Family and Medical Leave Act. Lara claims his termination violated the FMLA because his absences should have been treated as intermittent leave and not as absences subject to Central's attendance policy. Central and the supervisors asked the court to dismiss Lara's lawsuit because his leave did not qualify as medically necessary leave under the FMLA or, in the alternative, because he did not provide recertification from his treating physician despite requests to do so. In Lara v. Central Grocers Cooperative, Inc. (9/5/02) the U.S. District Court for Illinois refused to dismiss the case due to conflicting testimony about Lara's doctor's note and the later telephone conversation. While Central relied upon the doctor's statement that Lara could return to work, the doctor denied making that statement. In addition, the court rejected Central's assertion that Lara failed to provide recertification from his doctor because neither Lara nor any of the notes from that meeting mentioned a request to obtain recertification.

Court Affirms Damages Award to Veteran for Failure to Rehire under VRRA

In Lapine v. Town of Wellesley (9/4/02) the U.S. Court of Appeals for the First Circuit affirmed a damages award of over $210,000 after the Wellesley Police Department refused to reinstate Gary Lapine, an army veteran, following his honorable discharge from the Army Reserves. Lapine served in the United States Army and Army Reserves and after discharge, joined the Wellesley Police Department where he worked for 13 years. He contacted an Army recruiter to discuss opportunities, decided to resign, and completed an application for the Active Duty Guard Reserve Program. But he did not tell anyone at the Wellesley Police

Department. Lapine resigned, offering a letter of resignation and rejoined the Army Reserves, where he served for three more years. After leaving the Reserves, Lapine requested reinstatement under the Veterans' Reemployment Rights Act, amended by the Uniformed Services Employment and Reemployment Rights Act. Wellesley refused, claiming that Lapine had not received an order to report to active duty prior to tendering his resignation and so was unable to trigger reemployment rights under the VRRA. The appeals court agreed that the plain language of the VRRA does not require that Lapine enter into active duty while he was actually employed by Wellesley. As explained by the appeals court, neither the language of the statute, the legislative history, nor the surrounding case law suggest that Congress intended that a veteran, to establish the causative nexus, must have received an induction notice, signed an enlistment contract, or received an order or call to active duty prior to his resignation in order to obtain benefits under the VRRA.

Seven-Month Delay Does Not Bar Enforcement of Non-Compete Agreement

Safety-Kleen is a national waste management company providing solvents and parts cleaners and waste collection and disposal services to industrial and commercial customers. Those products and services are customized to fit each customer's needs. Safety-Kleen's sales and service representatives are its primary customer contacts and they develop a personal relationship with customers and learn each customer's waste management needs. Kevin Hennkens joined Safety-Kleen and signed an employment agreement that contained a one-year non-compete provision. After two years, Safety-Kleen fired Hennkens for dishonesty. Following his discharge, Hennkens began working for Heritage-Crystal Clean, a major competitor of Safety-Kleen. Seven months later, Safety-Kleen sued Hennkens seeking to enjoin him from working for Crystal Clean. In addition to other defenses, Hennkens asserted that Safety-Kleen's failure to promptly enforce its non-compete agreement precludes a required finding of irreparable harm in order to issue the injunction. Safety-Kleen responded that it took seven months to learn about Hennkens' competitive activity, marshal its evidence necessary for the preliminary injunction, and file the action prepared for an immediate preliminary injunction hearing. In Safety-Kleen Systems, Inc. v. Hennkens (8/29/02) the U.S. Court of Appeals for the Eighth Circuit agreed that, under the circumstances, a seven month delay did not bar Safety-Kleen's enforcement of its non-compete agreement.

ADA Claim Dismissed because Waitress Cannot Satisfy Essential Job Requirement of Attendance

Charlene Johnson worked for Moundsvista as a waitress. She was diagnosed with Hepatitis C, causing intermittent episodes of severe stomach pain, diarrhea, and fatigue. She notified management that her attacks could be sudden and severe and that she would require occasional sick leave to recover. As a result of her condition, Johnson missed numerous scheduled shifts and suffered attacks during her shifts. Moundsvista reduced her hours and issued written warnings for missing her shift. A short time later, she was discharged. Johnson sued Moundsvista under the Americans with Disabilities Act alleging

discrimination when it reduced her hours, terminated her, and disclosed her medical condition to her co-workers. She also alleged that the reduction in hours and termination were retaliatory actions taken after she and her lawyer complained.

In Johnson v. Moundsvista, Inc. (8/28/02) the U.S. District Court for Minnesota ruled that Johnson was not covered by the ADA because she was unable to satisfy the essential job function of regular attendance. The court explained that regular and reliable attendance is a necessary element of most jobs and that an employee unable to come to work on a regular basis is unable to satisfy any of the functions of the job, much less the essential ones. While the court was sympathetic that one unfortunate aspect of Johnson's medical condition was that it rendered her incapable of regularly and reliably showing up for her job, it noted that Moundsvista's position comported with common sense and that Johnson did not dispute that regular and reliable attendance was an essential function of her job.

Court Dismisses Medical Negligence Claim under ERISA

Wistar Comfort sought treatment for lower back pain. His doctor ordered a lumbar/sacral spine magnetic resonance imaging study. Comfort's medical plan administrator refused to approve the doctor's request, suggesting instead that he undergo physical therapy. One month later, Comfort underwent an MRI revealing a condition that had been exacerbated by the one-month delay in discovery and treatment. Comfort sued his health plan for medical negligence in state court. The health plan transferred the case to federal court and sought dismissal of his claims because they were preempted by the Employee Retirement Income Security Act. InComfort v. Health Net of the Northeast, Inc. (9/11/02) the U.S. District Court for Connecticut dismissed Comfort's medical negligence claims as preempted by ERISA. The court rejected his characterization of his lawsuit as challenging the quality of services rendered and instead characterized his claims as negligence against his plan administrator for denying his earlier request for an MRI. According to the court, Comfort's claim was a challenge to the medical plan's refusal to pay for medical treatment that his physician said was necessary and therefore was related to the administration of his health plan. Robinson & Cole represented the health plan to achieve this favorable decision.

Refusing to Sign Arbitration Agreement Is Not a Protected Activity

The law firm of Luce, Forward, Hamilton & Scripps refused to hire Donald Lagatree as a legal secretary because he refused to sign an agreement to arbitrate any claims arising from his employment. On behalf of Lagatree, the U.S. Equal Employment Opportunity Commission sued the law firm for retaliation in violation of Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Equal Pay Act seeking damages and a permanent injunction forbidding the law firm from requiring that its employees sign arbitration agreements as a condition of employment. The trial court enjoined Luce, Forward from requiring applicants to arbitrate Title VII claims and from enforcing existing agreements to arbitrate those claims, but denied any other relief. The law

firm appealed.

In EEOC v. Luce, Forward, Hamilton & Scripps, LLP (9/3/02) the U.S. Court of Appeals for the Ninth Circuit in a 2-1 decision reversed, ruling that employers may properly require employees to sign agreements to arbitrate Title VII claims as a condition of their employment. The appeals court also rejected the EEOC's retaliation theory, determining that Lagatree did not engage in protected activity when he refused to sign the arbitration agreement, and consequently, the law firm did not retaliate by refusing to hire him. Although Lagatree and the EEOC asserted that forcing employees to sign an arbitration agreement was unfair and treaded on his civil liberties including the right to a jury trial and redress of grievances through government processes, the appeals court countered that the right to a judicial forum is not a substantive right under Title VII, the ADA, the ADEA, or the EPA. The appeals court noted that while Congress might have forbidden arbitration of employment claims in any of these statutes, it instead encouraged their arbitration.

In a dissenting opinion, one judge argued that, by allowing employers to require their employees, as a mandatory condition of employment, to agree to arbitrate future Title VII claims, the majority allows employers to force their employees to choose between their jobs and their right to bring future Title VII claims in court. The judge noted that, while there might be benefits to enforcing arbitration provisions, that does not justify allowing employers to shove arbitration provisions down the throats of individual employees as a non-negotiable pre-condition of employment.

For more information, please contact us

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