ROBINSON & COLE LLP

Labor, Employment & Benefits

Company Held Liable for Bait And Switch

U.S. Professionals, LLC supplies contract workers to other companies. Neeraj Chopra, a citizen of India, was recruited by USP for a computer analyst position in the United States. USP promised to give Chopra a salary of $42,000 and to obtain the visa required for Chopra to perform professional services in the U.S. Relying on these promises, Chopra rejected a position in the Indian army and traveled to the U.S. on an H-1B visa. When Chopra arrived in the U.S., however, USP did not employ Chopra as a computer analyst, but instead, gave him a job as a cashier at a gas station where he earned less than minimum wage.

Chopra brought a lawsuit against USP and its owners for breach of contract and intentional misrepresentation. Following the conclusion of a trial, a jury awarded Chopra $216,900 in damages. On appeal, USP and its owners claimed that Chopra's status as an illegal alien barred him from bringing a lawsuit in U.S. courts. In Chopra v. U.S Professionals, LLC (2/2/05), the Tennessee Court of Appeals rejected USP's argument. Noting that Chopra legally entered the U.S. on an H-1B visa obtained by USP and that his status as an illegal alien was caused by USP's failure to fulfill its obligation to employ Chopra as a computer analyst as promised and its failure to pay Chopra's expenses to return to India prior to the expiration of the visa, the court concluded that Chopra was entitled to pursue his claims in the U.S. court system, and affirmed the jury's award of damages.

Requirement that Employee Disclose HIV Test Results Was Consistent with Business Necessity And Did Not Violate the ADA

In March 2002, Douglas Gajda, a bus driver for the Manhattan and Bronx Surface Transit Operating Authority, submitted a request for an undetermined amount of intermittent FMLA leave (throughout his lifetime) due to his HIV positive status. Gajda had actually discovered his HIV status in 1996; however, he concealed this information from the Transit Authority for several years. Indeed, in February 2002, he underwent medical examination for re-certification as required by state law, and identified sinus and back pain as his only current medical problems. When Gajda submitted his request for lifetime intermittent leave in March 2002, he represented on the leave application that he was unable to perform the functions of his job and that his condition left him unable to perform work of any kind. Given the inconsistencies between Gajda's March leave request and the statements he made during the February examination, the Transit Authority questioned whether Gajda was in fact HIV positive and sought additional medical information concerning Gajda's condition in order to assess his ability to perform his duties. Gajda initially refused to provide any information other than a statement that he was "physically and mentally fit to drive a bus." Gajda was placed on restricted work status until he ultimately provided the information sought, at which time he was returned to work.

Subsequently, Gajda filed a lawsuit against the Transit Authority claiming its inquiries violated the Americans with Disabilities Act. In Gajda v. Manhattan and Bronx Surface Transit Auth. (1/21/05), the Court of Appeals for the Second Circuit agreed that the requests for information concerning Gajda's HIV status were consistent with business necessity because there were legitimate doubts about his ability to perform his duties. Therefore, the Transit Authority's requests for information did not violate the ADA.

No Preferential Treatment Required by USERRA

Fifteen employees of San Antonio's fire department claimed their collective bargaining agreement and City policies regarding military leave denied them benefits such as straight time and overtime pay, vacation accrual, vacation scheduling flexibility, opportunities to secure unscheduled overtime work, and job upgrades. The employees argued that the City's policy of deeming employees on a military leave to be "absent" instead of "constructively present at work" unfairly deprived them of these benefits.

In Rogers v. City of San Antonio (2/20/04), the Fifth Circuit explained that the Uniform Services Employment and Reemployment Rights Act of 1994 offers employees engaged in military service some protection of non-seniority- based rights and benefits, but only to the same extent that such rights and benefits are provided to employees on non-military leaves of absence. USERRA does not extend preferential treatment to employees on a military leave. Instead, employers are required to treat employees on a military leave in an equal manner as employees on non-military leaves of absence are treated. Because the City did not offer any type of non-military leave under which an employee could accrue or receive lost straight-time pay, lost overtime opportunities, or missed upgrading opportunities, the employees on military leave had no right to such benefits either. As to the remaining benefits in dispute, such as a bonus day leave and a perfect attendance leave, there was not enough evidence for the court to decide whether such benefits were available to employees who took non-military leaves, and thus, further proceedings were necessary.

Department of Labor Clarifies Salary Basis Test for Exempt Employees

The Wage & Hour Division of the U.S. Department of Labor recently released an opinion letter clarifying the salary basis test of the Fair Labor Standards Act. The opinion letter responds to an employer's question as to whether deductions may be made from an exempt employee's paid time off bank for partial days of absence. Generally the FLSA prohibits partial day deductions from exempt employee's salary; however, this opinion letter clarifies that partial days of absence may be deducted from an exempt employee's accrued paid time off leave bank as long as the employee continues to receive her salary. The Department of Labor stated that such a reduction to an employee's paid time off leave bank does not affect the salary basis and therefore, does not jeopardize the exemption. Finally, the Department of Labor clarified that when a full day deduction is made from an employee's salary, such deduction must result from sickness or disability of the employee and may be made only if the employer has a bona fide sick leave plan.

Paralegals Are Generally Non-Exempt Employees

The Wage & Hour Division of the U.S. Department of Labor also recently released an opinion letter clarifying the exemption status of paralegals pursuant to the Fair Labor Standards Act. According to regulations, the "professional exemption" requires (1) that the employee perform work requiring advanced knowledge, (2) the advanced knowledge is in a field of science or learning, and (3) the advanced knowledge is customarily acquired by a prolonged course of specialized instruction. Paralegals often do not qualify as exempt employees because an advanced specialized academic degree is generally not required for the position. The Department of Labor noted, however, that paralegals may qualify as exempt under some circumstances, such as when the paralegal possesses an advanced specialized degrees, performs a job requiring that advanced specialized degree, and applies his or her specialized knowledge in his or her work. Therefore, companies employing paralegals within a legal department or in other capacities are encouraged to review the FLSA designation of these employees in consultation with legal counsel to avoid a wage and hour violation.

EEOC's Publication of Final Rule Allowing Reduced Retiree Benefits Is Delayed

In 2004, the Equal Employment Opportunity Commission approved a rule allowing employers to coordinate retiree health benefit plans with Medicare or comparable state-sponsored health benefit plans without violating the Age Discrimination in Employment Act. According to the EEOC, the "rule is intended to ensure that the ADEA does not have the unintended consequence of discouraging employers from providing valuable health benefits to retirees." Following the EEOC's proposal of this rule, however, the AARP sought and obtained a 60-day delay of the publication of the final regulations in the Federal Register. A

federal court in Pennsylvania will conduct a hearing at the end of March and the outcome of the hearing may result in a permanent block to the EEOC's implementation of this rule.

USERRA Amendment Extends Health Care Continuation Coverage for Employees Serving in the Military

The Veterans Benefits Improvement Act of 2004 alters the requirements for health care continuation coverage to employees who are serving in the military. The Act requires employers to offer health care continuation coverage for up to twenty-four months to employees who are serving in the military. Previously, employers were required to offer eighteen months of health care continuation coverage. Employers not subject to COBRA are required to extend this continuation coverage, at the employee's cost, pursuant to the Uniformed Services Employment and Remployment Rights Act of 1994.

The Act also requires employers to provide affected employees with an annual notice of their rights and obligations under USERRA. The notice requirement can be satisfied through posting a notice at a location in the workplace, such as on an employee bulletin board. The DOL will be issuing a form notice that can be used for this purpose.

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