Neel, Hooper & Banes, P.C.

Counsel Leader's Trust

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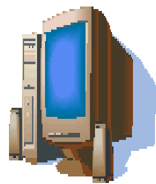
I. UPDATES



Watch Out, Here Come The New Electronic Discovery Rules. Any business that has been involved in litigation understands that destruction of relevant paper documents is a sin in the world of the lawsuit. By now most everyone is used to the preservation of documents in paper form and realizes that failure to comply can get your hands slapped by the court. Well hold on to your hats because the federal courts have new rules as of December 1, 2006, that now control electronic discovery too.

However, electronic evidence is a very slippery animal and is not confined to just e-mail, Word documents or Excel spreadsheets. There's so much more. So, the scope of what is relevant and what must be preserved has greatly expanded, creating new costs and new potential pitfalls. In short, it creates a big new HEADACHE! Among other things it requires parties to discuss the handling of electronic evidence at the outset of any case in litigation.

There are still many unanswered questions about how this will work in a practical sense (how much burden or cost is "undue?" etc.). All that is clear is that electronic evidence is now a factor in every case from this point forward and even inadvertent destruction of data may have dire consequences. And you thought the computer made everything much easier!

Workers' Compensation Update: ERISA Plans Are Not Perfect. To subscribe or not to subscribe—that is the question many employers have about the state's workers' compensation plan. A recent ruling by the Fifth Circuit may persuade employers that it is better to subscribe. An employee of a non-subscribing company was injured on the job. The employer did not participate in the Texas workers' compensation program, but maintained an occupational injury benefit plan that was governed by ERISA. Subsequently, the employee filed a lawsuit in state court alleging that his injuries were caused by the employer's negligence. The Fifth Circuit sided with the employee in allowing the suit, holding that the injured worker's lawsuit would be preempted by the company's ERISA plan only if the lawsuit related to the plan itself. In this case the lawsuit was based exclusively on the alleged breach of a common law tort duty and did not seek to recover benefits under the plan. Therefore, according to the Court, the employee's suit was not preempted. The Court noted that an employer cannot gain immunity from state court tort actions for all job-related accidents, regardless of negligence, just by creating an ERISA plan. Additionally, the Court said if the company really wanted to shield itself from liability for employment-related injuries, it should have chosen to participate in the state workers' compensation program. Ouch!

There's no denying workers' compensation plans can be expensive. But as this employer discovered, the cost of choosing not to participate can be hefty!

II. EMPLOYMENT CONTRACTS

Interpretation Clauses Are A Smart Move. Two recent cases illustrate the benefit of having an interpretation clause in employer/employee contracts. The first case deals with a salesperson working in Texas for a New England-based company. While operating under the terms of a contract for 2000, the salesperson greatly exceeded his targeted compensation of $180,000 and was able to earn $897,000. Based on this huge windfall,

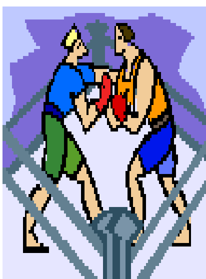
the company sought to adjust the salesman's quota, lower his commission rate and reassign some of his most lucrative clients. The salesman refused to sign the new agreement (are you surprised?) and received permission from his immediate supervisor to continue working under the 2000 agreement while negotiations with the management continued. The company eventually paid the salesman partial commissions for 2001 and his total compensation for the year dropped to $278,900. As a result, they wound up in court.

Texas courts have held that when one enters into an employment situation for a definite term and continues employment after the expiration of that period without entering into a new contract, the presumption is that the employment is continued under the terms of the original contract. However, the company wisely had a provision in the 2000 agreement that unambiguously gave management the right to establish or adjust quotas as well as make final and binding decisions regarding the amount of compensation earned and paid. SAVED BY THE CLAUSE!

The second case concerns a newly hired Vice President who was paid an annual salary and was eligible for earning a sales incentive based upon performance. Despite meeting his target revenue goal, making him eligible for $275,000 in incentive pay, the company capped his incentive pay at $150,000. The Vice President sued claiming a breach of contract. The provision relating to incentive pay in the contract was ambiguous. However, because the company had wisely inserted a contract interpretation provision, the court held that the company had sole authority to resolve any aspects of the plan. Because of this provision, the company was granted summary judgment.

The moral: Add provisions that allow management to adjust the terms as needed.

III. ARBITRATION/LABOR LAW



Labor Agreement v. Employee Handbook...And...FIGHT! Maybe employees won't notice if their paychecks suddenly start to look a little slimmer than usual. Fat chance! In a recent arbitration case, union employees were upset about a substantial deduction in their pay. The employer had decided to require each employee to contribute 25% of the monthly health insurance premium instead of the employer paying the full 100%.

The employer representative consulted and approved the plan with the local union president at the time. They agreed that the plan stated in the handbook would allow amendments to the relevant provisions of the labor agreement.

The union president waited to sign off on the agreement until each employee had executed a signed acknowledgment of the new plan. What makes this story interesting is that later when an employee actually noticed the reduction in his pay and complained, the union president who negotiated the agreement had passed away and the successor president was unaware of the agreement.

The arbitrator ultimately found that the clear and straightforward terms of the labor agreement superseded the provisions in the employee handbook, so the handbook yielded to the labor agreement. The employee acknowledgments proved to be invalid because the form contained a provision that conditioned union membership on eligibility for health and welfare benefits–a direct conflict with a clause of the labor agreement.

It was a close fight, but the simple fact is employers cannot change the rules of a labor union agreement just by updating their handbook.

Former Union Employees Cannot Hide From Arbitration Clauses. Recently, the Federal District Court in the Southern District of Texas held that a former union employee could not bring an FMLA (Family and Medical Leave Act) claim in federal district court. This ruling was based on the former employer's argument that the arbitration clause and grievance procedures of the applicable collective bargaining agreement were the former employee's sole means of redress. The arbitration clause at issue covered all contractual disputes, even anti-discrimination ones. Thus, this clause subjected FMLA disputes to arbitration. To this end, the district court found that it did not have subject matter jurisdiction to hear the claim since the bargaining agreement contained a clear and unmistakable waiver of the former employee's federal rights.

IV. ADA

You Don't Need 20/20 to Shop Online. Everyone does Internet browsing, shopping, and bill-paying these days. The convenience of being able to "run errands" on the computer has become extremely valuable to all consumers – including the blind. Recently a federal court in California (and we can only assume it is a matter of time before Texas courts do the same) found that public accommodation includes equal accessibility to the Internet. This ruling does not make web sites actual "places of accommodation" but rather services and benefits of the store locations that the web sites reference.

The case involved an employer's website that ultimately violated the American with Disabilities Act (ADA) specifically for people with limited eyesight.

Designating a website that is accessible to the blind is not only technologically simple but economically feasible. Therefore, if you have not already done so, consider adding alternative text image maps and invisible text to the pertinent pages of your website (such as the homepage and the checkout page). These efforts will not only keep employers out of the courtroom but will also increase their overall sales. Now who wouldn't want that?

It's A Bear Not To Be Bullish On ADA Compliance! Two companies recently found out the hard way that it does not pay to ignore an employee's complaints about disability harassment and retaliation. Coincidently, both of the companies are securities and investment firms, both had employees who suffered from bipolar and manic depressive disorders and both wound up paying big bucks- $500,000 and $1.25 million respectively. Where did the companies go wrong?

For one thing, after one of the employees took a medical leave of absence to deal with the illness and received a "return-to-work with no restrictions," the company did not return him to his prior position. Instead he was demoted, got a pay cut and company officials would not discuss returning him to his higher-level position. All the signs of an FMLA disaster waiting to happen…which is just what the arbitration panel found. Nor did it help that the employee also testified that co-workers shunned him after his return and said they had been told not to talk to him. The employee claimed that the company refused to provide reasonable accommodations and he was constructively discharged. The arbitration panel agreed.
Ca-ching!

In the other case the employee claimed to be the frequent target of derogatory comments from both co-workers and supervisors about his disability, use of medication and the possibility that he could "go postal." The employee maintained that after he complained to the human resource department, the company's top officers threatened him with termination and harm to his future career. Besides paying a hefty settlement, the company also agreed to significant remedial relief including training of employees and revisions of relevant policies.

Dealing with employees with medical problems, especially those in the mental or emotional health arena, can be tricky. But, as these companies discovered, failure to invest a little time and effort in learning and following ADA rules can result in negative returns—and a big hit to your company's bottom line!

V. COBRA

When Employees Wear Two Hats. When two employees are married and both work for the same company, COBRA issues can be confusing. For example, a COBRA qualifying event occurs if there is a divorce of a covered employee and spouse. But if both are employees, who is the covered employee and who is the spouse? A Louisiana company recently found out how tangled this web can be.

We know regular readers of our newsletter have all memorized COBRA requirements. But, for the rest of you, here is a quick tutorial: COBRA provides that a termination or reduction in hours of employment is a qualifying event that entitles qualified beneficiaries up to 18 months of COBRA coverage. However, in the case of a divorce that results in the loss of coverage, the ex-spouse may be entitled up to thirty-six months of COBRA coverage. So if the employee/spouse gets divorced and is terminated, how much COBRA coverage is allowed? As usual in questions of law, the answer is: it depends!

In this case, the court found that the employee had

not lost her coverage when the divorce occurred because she still remained employed by the company. However, six months after her divorce, she was terminated and lost her coverage. Accordingly, she was entitled to eighteen months of COBRA coverage measured from her termination date. The company won its case on the length of coverage issue, but it still ran into problems on notice and payment issues.

We should also report that in another case the employer was able to win on a COBRA notice claim because it had good documentation to prove notices were timely sent to the qualified beneficiary's last know address. In cases where there is such proof, courts have uniformly found that a qualified beneficiary cannot win a COBRA notice case based solely on the claim that he did not receive the notice.

So the moral of the story is, COBRA issues can be confusing! Call us if you need help.

VI. FMLA

A Few Friendly FMLA Factoids. We usually advise any of our clients who are covered by the FMLA that they should require employees to use all paid vacation days, sick days and personal days first. This prevents a situation where an employee is out for twelve weeks, often causing the employer to scramble to cover the position, and then shortly after returning to work the employee takes two weeks of vacation.

However a recent case out of the Seventh Circuit reminded us to remind you there are some exceptions to this general rule. The law does not allow an employer to require paid vacation, sick and/or personal days to be taken concurrently with FMLA if the FMLA leave is being paid. This would typically happen when an FMLA leave is under a workers' compensation injury or short term disability.

Another twist to the general rule is that an employer can not require an employee to use sick leave if the employee is taking FMLA leave to care for a sick family member. The requirement to use up paid sick leave only applies when the employee is taking FMLA leave for his or her own illness.

FMLA has many such twists and turns—when in doubt - ask questions!

VII. USERRA

Who Has the Burden? In a recent case from the First Circuit, the court took a close look at a company which terminated an employee who also happened to be a reservist in the Marines. The employee, who had a clean record as a good employee, claimed he was fired because of discrimination due to his military service. The company countered that it fired him for violating the company code on business conduct and won a summary judgment at the lower level. However, on appeal the case was reversed and remanded.

The company's arguments were weak on several fronts. For one thing, the business code of conduct was never given to employees nor was the employee ever told his conduct could lead to termination. (Several months prior to termination he had set up a side business of cashing employees' checks). Others who violated the code were not terminated. Additionally, the supervisors had frequently made him the butt of jokes, calling him "little lead soldier," "Girl Scout" and "G.I. Joe", but claimed they were just stray remarks. Supervisors also complained about the difficulty of working around his military schedule. Finally, the timing of his termination was suspect. He had just finished paying back the company for overpayments because he received both company pay and military pay while on active duty. Taken together the court believed there was enough to warrant a trial.

To make matters worse for the company, the lower court used the wrong standards for a Uniformed Services Employment & Reemployment Rights Act of 1994 (USERRA) case. Unlike a Title VII case where the employee has the ultimate burden of persuasion, in a USERRA case the employee does not have the burden of demonstrating the employer's reason is a pretext. Instead, the employer must show that the termination would have taken place even if the employee had not been in the military.

If you have employees on active military duty, it is imperative that you know the USERRA guidelines.

VIII. ADEA

Age Matters. How can an employer discriminate against a job applicant because of age? Well, let us count the ways! A recent case out of the Second Circuit lists several things the court believed could

show evidence of age discrimination. Pat was forty-nine at the time he was first interviewed for a job as a pharmacist. According to his interview scores, his first interview went well and he had a second interview by which time he was fifty years old. Although Pat stated he was willing to work anywhere and any hours, ultimately the job was offered to two other applicants, both of whom were younger than Pat, but still in the protected class. Pat filed suit.

A review of the facts convinced the court to reverse the employer's summary judgment. What did the court see that caused it to raise its collective eyebrows and reverse the lower court opinion? One of the employer's problems was offering the job to someone who had twenty-five years experience, but advertising the job as entry level. This applicant also happened to be younger than Pat. The interviewer told Pat no other full-time jobs were available in the area, but in fact there were eight other such jobs open at the time. Additionally, the company said another reason for not offering Pat the job was because it believed he had indicated he wanted something close to public transportation and the particular drugstore was not accessible by public transportation. This turned out to be false. And when pressed by Pat for the store's location, the company would not tell him. The person ultimately hired was forty-two years old, but at the end of the day the court found enough factual discrepancies to have the case remanded.

Two cautionary lessons to learn from this case: 1) when defending your decisions, make sure those reasons can withstand scrutiny; and 2) don't think that just because the successful applicant is also in the protected class that you are completely off the hook for age discrimination. As the court pointed out in this case, the person hired was forty-two and in the protected category, but according to some case law, an inference of discrimination may be based upon an age difference of as little as eight years even with both parties being in the protected class.

In the Win Column! The firm is happy to report a significant win in a hard fought case against the EEOC. In this case, Plaintiff, an African American man, was employed by a nursing home facility as a Certified Nurse's Assistant. One of his patients was an elderly 70-year old Hispanic male who had a long history of mental illness that included outbursts of psychotic behavior and racially disparaging remarks. Other employees and residents heard the patient use all sorts of racially derogatory terms toward many racial groups including the nurse's assistant.

The EEOC brought suit against the nursing home facility claiming that Plaintiff was subjected to a hostile work environment. The case was dismissed following the granting of Defendant's motion for summary judgment and it was affirmed on appeal to the Fifth Circuit. The Fifth Circuit's decision was based on the finding that the conduct of a mentally incapacitated patient/resident is objectively insufficient to meet the requirements for actionable harassment.

The court noted: "It is objectively unreasonable for an employee in such a workplace to perceive a racially hostile work environment based solely on statements made by those who are mentally impaired."

We agree!

IX. GOVERNMENT CONTRACTS

Task Order Protest Barred. There are many contractors who currently hold standing task order contracts with the Federal government. In a recent case, the Court of Federal Claims (COFC) removed one concern that both they and the government may have when awarding task orders pursuant to these contracts. Specifically, the COFC held that one of the multiple awardees under an indefinite-delivery, indefinite quantity (IDIQ) contract with the General Services Administration (GSA) for construction-related services was barred by statute, from protesting the award of a task order issued under the contract to another company.

The Court said that instead of allowing agency protests, Government Accountability Office protests, or judicial review, the law required agencies to appoint task and delivery order ombudsmen. These would be senior officials independent of the contracting officer–with responsibility for reviewing complaints from contractors on such multiple award contracts. This would ensure that they receive a "fair opportunity to be considered" for orders.

Congress Mandates Transparency For Federal Grants And Contracts. Congress has passed new legislation, the Federal Funding Accountability Transparency Act, which requires the Office of Management and Budget (OMB) to publish information on all federal awards and grants over $25,000.

The new legislation calls for a searchable Web-based database, which will allow anyone to search for all unclassified information on many items including: the name of any firm receiving a contract, or any grantee; the amount of the "federal award" (defined to include any federal "financial assistance and expenditure," including any "grants, subgrants, subcontracts, loans, awards, cooperative agreements, task orders, delivery orders, and other forms of financial assistance" over $25,000); and information on federal awards, including transaction type, agency, classification code, program and "an award title description of the purpose of the funding action".

Military Justice Code To Cover Contractors. The Uniform Code of Military Justice now applies to contractors in "contingency operations" such as Iraq. Previously, the uniform code applied only to contractors in a state of war as declared by Congress, which has not occurred since World War II. But the fiscal year 2007 Defense Authorization Act amended 10 USCA § 802(a) to require application of the uniform code in a time of "declared war or contingency operation." Effectively, the military court martial system now applies to individuals engaged in military contingency contracts, and they will be held accountable for rules that typically do not apply to civilians.

X. FIRM NEWS

We would like to congratulate Bryant S. Banes on recently becoming Board certified in Labor and Employment Law by the Texas Board of Legal Specialization. In addition, after passing the November Bar exam and becoming licensed in the State of Texas, Meredith Rambousek has become the newest associate at the firm. We would also like to welcome Adrian McDonald, a third year law student at South Texas College of Law, who will be helping the attorneys with various tasks.

Union Organizational Activity Since Our Last Newsletter. Twelve petitions for certification have been filed by unions. Two petitions for decertification have been filed by management. Three elections have been held, two of which have been won by management.

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The Quarterly Update is a newsletter providing recent items of interest to our clients in the various areas of employment law. While the Update is to alert you to potential new problem areas or changes in the law, it is not to be considered legal advice or a legal opinion. Such can only be given after careful consideration of the facts unique to any situation. The contents of this newsletter are copyrighted and may not be used without express written consent of Neel, Hooper & Banes, P.C.

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