Boston Bar Association

Labor & Employment Law Section

Spring 2009 Newsletter

A PUBLICATION OF THE BOSTON BAR ASSOCIATION LABOR & EMPLOYMENT LAW SECTION

Section Co-Chairs' Corner

Since the last Newsletter, one issue has dominated the nation's interest as well as the Labor and Employment Section's: the economy. The current recession, combined with the changes in the White House and Congress, have made for lively discussion among Section members at Brown Bags, CLE programs, and Steering Committee meetings. And Section volunteers have stepped up to provide up-to-date information to the membership and the public.

For example, on December 2, Stephen Paterniti and Kathleen Joyce spoke on the ADA Amendments Act of 2008 at a Brown Bag Lunch that was standing room only. People came from all over to get important information and tips on the changes to federal disability-discrimination law. We started 2009 off with a blockbuster CLE program: "Damages in Employment Discrimination and Retaliation Cases." Ellen Zucker and Bret Cohen moderated an all-star panel with U.S. District Judge Nancy Gertner, Supreme Judicial Court Justice Ralph Gants, MCAD General Counsel Eugenia Guastaferri, and mediator extraordinaire Maria Walsh. While this program had plenty of employment-law goodness, the real benefit was the abundance of battle-tested tactics that the panel discussed and debated. Attendees learned more in this one evening about litigating and mediating employment cases than one could possibly learn in any law-school class. The program was well attended and very well received.

March came in like a lamb and went out like a Labor & Employment program machine (or something like that). On the third, Sara Smolik and Chris Kaczmarek ran a great Brown Bag on religious-discrimination claims. They explored the reasonable-accommodation and undue-hardship standards in religious-discrimination cases in light of the recent SJC decision in Brown v. F.L. Roberts & Co. On the 18th, Nina Kimball, Jackie Kugell, and Andy Orsmond led a terrific discussion on the new FMLA regulations. They expertly covered changes to the substantive and procedural rights of both employers and employees. In addition, they discussed the new categories of leave created by Congress to address the needs of injured and deploying military-service members and their caregivers. Later that same day, the Section held another blockbuster CLE — this time on litigating wage-and-hour class actions. The panel included experts Ellen Kearns, Brigitte Duffy, Philip Gordon, and Shannon Liss-Riordan. They covered the differences between Rule 23 class actions and FLSA collective actions, important discovery issues, bifurcation of damages and liability, and other tips and traps. Two great programs on one day: because that's how we roll.

Finally, on April 7, Andy Pickett and Sharen Litwin hosted a lively discussion on individual and group releases under federal age-discrimination and other laws. This well-attended Brown Bag covered the requirements for valid individual and group releases of federal age and other claims, as well as WARN Act concerns. Besides these terrific programs, the Section also cosponsored many other events.

In our current Public Service project, much work has progressed on the "translation" of Chapter 151B into plain English. The Committee members have taken two editing passes over the entire statute, using Web 2.0 wiki technology to aid in this collaborative effort. During the first phase of the project, all changes are governed by two questions: (1) Does the language say what it means as simply and clearly as possible? (2) Are we sure we haven't changed the substantive meaning of the language? The answer to both questions must be "yes." Once this phase is completed, the next step will be to fill in the gaps that exist in the statute. Committee members have worked hard and in a bipartisan manner to improve the law that most affects our Section.

It's been a busy year, but we want to keep the momentum going. Save the date for the 36th Annual Workshop for Public Relations Specialist on Saturday May 2 from 9:30 to 12:30 at Harvard Law School. This annual program for labor relation lawyers, Chaired by Amy Laura Davidson, Peter J. Berry and Mark Greenbaum and featuring a host of distinguished panelists, will review recent significant labor law decisions of the SJC and Appeals Court. Also save the date for the annual Spotlight program on June 9, from 4:00 to 7:00, which will cover new legislation and regulations that have gone into effect in 2009. Please feel free to reach out to us with any program ideas you might have. This is your Section, and we're here to help.

— Jay Shepherd and Jody Newman

Calendar of Upcoming Events

April 16, 2009, 12:30-2:00 p.m.
New Dimensions in Mediation: Professor Eric Green, one of the nation's most prominent mediators, and his partner at Resolutions, LLC, Carmin Reiss, will discuss new dimensions in mediation, including innovative use of scientific exchanges, handling disparate levels of claim development in the ephedra personal injury bankruptcy mediation/allocations, and new approaches to judicial involvement in mediation. Location: Offices of Resolutions, LLC, 222 Berkeley Street, 10th Floor, Boston.

May 2, 2009, 9:00 a.m.-12:30 p.m.
36th Annual Workshop for Public Sector Labor Relations Specialists: This annual program is designed to familiarize labor relations practitioners with current trends in collective bargaining and other issues affecting public employees. Featuring "Significant Labor Law Decisions of the Supreme Judicial Court and the Appeals Court." Location: Langdell Hall, North Classroom, Harvard University, Cambridge.

June 9, 2009, 4:00-7:00 p.m.
Spotlight on Employment Law: Hot New Employment Legislation and Regulations. The panel, chaired by Nina Kimball, and including Anne Josephson, Andy Orsmond, and Andy Pickett, will discuss the newest employment laws and regulations that have gone into effect since January including the Lilly Ledbetter Fair Pay Act, the COBRA premium assistance under the Stimulus bill, the ADA Amendments, the FMLA regulations,the GINA regulations, and bills that are on the horizon such as the Employee Free Choice Act. Location: Boston Bar Association, 16 Beacon Street.

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Inside this Issue

Judicial Update

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Supreme Court

Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 129 S.Ct. 846 (2009). The Supreme Court held that the anti-retaliation provisions of Title VII apply to an employee who opposes discrimination not by initiating a complaint, but by answering questions during an employer's internal investigation.

Beginning in 2002, the metropolitan government had begun investigating sexual harassment claims made against a school district human resources executive. During the investigation, a human resources officer asked school district employee Vicky Crawford if she had witnessed any inappropriate conduct by the executive, a question Crawford answered in the affirmative. After the investigation ended, Crawford's employment was terminated. The district court and Sixth Circuit granted summary judgment to the metropolitan government on Crawford's retaliation claim on the grounds that Title VII requires that an employee actively oppose discrimination, such as by filing a complaint or taking other affirmative action, to enjoy protection from retaliation.

The Supreme Court reversed the lower courts, holding that an employee's statement that he or she has witnessed or been subject to sexual harassment in response to a question posed during an internal investigation qualifies as opposition under Title VII. The Court reasoned that the commonly accepted meaning of "oppose" includes passive disapproval of an action, and does not require active efforts to stop the action.

Locke v. Karass, 129 S.Ct. 798 (2009). The Supreme Court, resolving a circuit split, held that a local union representing government employees in a closed-shop environment may require non-member employees to pay a pro-rata share of national litigation expenses paid by the local union to its national union via an affiliation fee, provided (a) the subject matter of the national litigation is of a kind that would be chargeable if the litigation were local (i.e. litigation appropriately related to collective bargaining rather than political activities) and (b) the charge is reciprocal in nature.

Ysursa v. Pocatello Education Association, 129 S.Ct. 1093 (2009). In this case, the Supreme Court held that Idaho could constitutionally prohibit public employees from authorizing payroll deductions to fund union political activities, rejecting the union's First Amendment arguments to the contrary.

Fitzgerald v. Barnstable School Committee, 129 S.Ct. 788 (2009). In a unanimous decision written by Justice Alito, the Court ruled that Title IX is not the exclusive remedy for gender discrimination claims in schools or a substitute for enforcing constitutional claims under 42 U.S.C. § 1983, and that the plaintiff could proceed with her claim under Section 1983.

First Circuit

Tobin v. Liberty Mutual Insurance Co., 553 F.3d 121 (1st Cir. 2009). The First Circuit affirmed the trial court's award of damages to plaintiff Kevin Tobin on a disability failure to accommodate claim, in a case that points out the need for employers to carefully consider the reasonableness of requested accommodations.

Tobin was a long-time sales representative for Liberty Mutual. He suffered from bipolar disorder, which caused him to have difficulty with focus and concentration, as well as prioritizing and completing work, and which led to his failure to meet annual new policy sales targets. On more than one occasion, he requested that his disability be accommodated by assigning him to a "mass market" account, a group account at a business or similar institution through which employees or members can purchase insurance. Although Tobin believed such an assignment would allow him to improve his new sales rate, these requests were refused. Instead, Tobin was subjected to progressive discipline for poor performance, and eventually his employment was terminated.

On appeal, Liberty Mutual argued that the requested accommodation was unreasonable for two reasons, both of which the First Circuit rejected. First, the company argued that Tobin was unqualified for the position because he failed to meet the customary eligibility requirements. However, the Court held that an employer cannot deny a requested accommodation simply because the employee does not meet such requirements where granting an exception will not prejudice other employees with superior rights. Because the evidence showed that mass market account assignments were made on a discretionary basis and not according to a fixed seniority system, the Court held that the jury was justified in determining that the requested assignment was reasonable.

Second, Liberty Mutual claimed that assigning Tobin to a mass market account would have been unreasonable because it would not improve his poor new sales rate, reasoning that his disability made him incapable of handling the stress of working on such an account. Here, the Court held that there was sufficient evidence in the record from which the jury could have found that Tobin could competently handle the mass market account, as well as evidence that the decision maker denied the requested assignment because he found Tobin undeserving, rather than on the basis of a reasoned determination that the assignment would not permit him to improve his sales performance.

Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 554 F.3d 164 (1st Cir. 2009). In this case, the First Circuit affirmed a jury verdict for Michelle Monteagudo against her former employer AEELA on sexual harassment claims, notwithstanding the organization's Faragher-Ellerth defense based on her conceded failure to report the harassment pursuant to its sexual harassment policy.

During Monteagudo's employment in a clerical position at AEELA, she was subjected to unwanted touching and comments by her supervisor, a human resources manager. Some of this conduct was witnessed by the harasser's superior, the human resources director. It was also witnessed by a union steward, who counseled Monteagudo not to file a grievance with the union, citing the sensitivity of the matter given the harasser's position. Monteagudo also believed that the human resources director had a friendly relationship with the executive director of AEELA.

AEELA's sexual harassment policy called for employees to first report harassment to the human resources director. In the event that the harasser was the director or a person close to him, the employee was to report the harassment to the executive director.

In rejecting AEELA's claim that it should have been granted a directed verdict because Monteagudo did not report the alleged harassment, the First Circuit held that the evidence was sufficient for the jury to find her non-reporting reasonable, noting that to be reasonable "more than ordinary fear or embarrassment is needed." Here, the Court pointed to the evidence of relationships between and among the harasser, the human resources director and the executive director, the advice of the union steward and the age differential between Monteagudo and the supervisor (she was 22, he 45) as sufficient to allow the jury to find in her favor on this issue.

Day v. Staples, Inc., 555 F.3d 42 (1st Cir. 2009). The Court of Appeals affirmed summary judgment for Staples on the Sarbanes/Oxley whistleblower claim of former employee Kevin Day, holding as a matter of law that Day lacked an objectively reasonable belief that the conduct of which he complained constituted securities fraud.

Day was employed by Staples for approximately three months in 2005 as an analyst working in its Reverse Logistics Department, which handles customer returns. During his employment, Day complained to his supervisors about three practices in the department which he believed were unlawful and unethical: (a) issuance of credits to customers without proper documentation, (b) under-issuing certain credits to contract customers and (c) canceling and reissuing courier pick-up orders.

The Court applied the test of reasonableness set out in the applicable regulations and case law, analyzing Day's claims for both subjective and objective reasonableness. As to the first prong, the Court found that Day had acted in subjective good faith.

However, the Court held that Day's concerns were not objectively reasonable. The applicable provision of the Sarbanes-Oxley Act provides whistleblower protection to employees who report violations of specific federal criminal fraud statutes, SEC rules or regulations, or other federal laws relating to shareholder fraud. Interpreting these provisions for the first time, the Court of Appeals held that, while the employee need not prove an actual violation of one of these enumerated laws, he must show that his communications to his employer specifically related to one of them and that his theory at least approximates the basic elements of a violation. Here, because Day alleged securities fraud, the Court analyzed his complaints for allegations of intentional misrepresentation or omission of certain facts in communications to investors, that were material and that risked loss. Because none of Day's complaints concerned communications with investors and likewise did not meet the materiality requirement, the Court held that his Sarbanes-Oxley whistleblower complaint failed as a matter of law.

Noonan v. Staples, Inc., 556 F.3d 20 (1st Cir. 2009). The First Circuit reversed summary judgment for Staples on Alan Noonan's libel claim in an opinion that should caution employers about making an example of employees who engage in misconduct.

Noonan was a salesman for Staples. After discovering that another employee had been embezzling money from the company by submitting fraudulent expense claims, Staples began an investigation of expense reporting practices that included a review of Noonan's expense reports. The investigation revealed numerous departures from Staples' written travel and expense policies as well as numerous errors resulting in both over- and under- payment of expenses to Noonan. Following the investigation, Staples terminated Noonan's employment. The next day, a senior executive sent an e-mail to some 1,500 Staples employees stating that Noonan's employment had been terminated after an investigation discovered that he had failed to comply with the company's policies.

Noonan claimed that the e-mail was libelous, a claim the district court rejected on the grounds that the statements contained in the e-mail were true and thus not actionable under General Laws ch. 231 s. 92. Noonan appealed, arguing that the exception contained in section 92 for statements made with "actual malice" should apply, permitting him to recover for damage to his reputation.

Both the district court and the First Circuit initially applied the "actual malice" standard developed by the U.S. Supreme Court in *New York Times v. Sullivan*. That standard, applicable in cases involving false statements about public figures, requires a finding that the defendant acted with knowledge of a statement's falsity or reckless disregard for its truth or falsity. However, Noonan argued that ch. 231 s. 92's reference to "actual malice" should be read as referring to the traditional common law standard of actual malevolent intent.

After a panel rehearing, the First Circuit agreed with Noonan, holding that section 92's reference to actual malice must be read to mean actual malevolent intent. The Court noted that the statute, adopted in 1902, could not be read to have incorporated the *Sullivan* standard developed by the Supreme Court much later. Also, because the statue dealt with the traditional defense of truth in libel cases, it made sense to apply the traditional tort understanding of actual malice. In contrast, it would be unusual to apply the *Sullivan* standard, which applies to false statements made about public figures, to true statements made outside that context.

Turning to the merits, the Court held that there was sufficient evidence from which a jury could find that the Staples executive acted with malevolent intent when he sent the email. The Court noted that the executive had never before made an example of another employee in a mass e-mail. Specifically, the executive had not sent a similar e-mail naming the employee whose embezzlement had triggered the investigation that ensnared Noonan. Finally, the executive had sent the e-mail to numerous employees who allegedly would not have occasion to use the travel and expense policy. Each of these facts, the Court held, could support inferences by a jury that would permit a verdict for Noonan.

Supreme Judicial Court

Retirement Board of Salem v. Contributory Retirement Appeal Board, 453 Mass. 286 (2009). The Supreme Judicial Court held that an employee who had suffered a permanently disabling heart attack caused by the emotional stress of being told by her supervisor while at work that her employment was to be terminated was eligible for disability retirement benefits under the contributory retirement system.

Claire Cole was a thirty-five year employee of the city of Salem. In March, 2000, her supervisor informed her that her position would be eliminated as of July 1. Cole became distressed and received permission to take the remainder of the day off. Within an hour, she suffered a heart attack that left her permanently disabled. After lengthy proceedings, the Contributory Retirement Appeal Board (CRAB) determined that she was eligible for disability retirement benefits and Salem's retirement board appealed.

The issue before the SJC was whether Cole's disability was caused by "a personal injury sustained . . . as a result of, and while in performance of [her] duties" as required by the retirement statute, General Laws c. 32, § 7(1). Because that statute does not define "personal injury", the courts have consistently applied the definition contained in the workers' compensation statute, General Laws c. 152, § 1(7A), which excludes any "mental or emotional disability arising principally out of a bona fide, personnel action."

The SJC held that Cole's heart attack was a physical disability and therefore constituted a "personal injury" as that term is defined by the statute, which focuses on the nature of the disability, not its cause. Further, the Court held that the heart attack was sustained during the performance of her work duties inasmuch as the stress that caused the heart attack resulted from her compliance with her supervisor's instruction to come to his office to speak to him during the work day about her employment status.

Weems v. Citigroup, Inc., 453 Mass. 147 (2009). Answering a certified question from the United States District Court for the District of Massachusetts, the Supreme Judicial Court held that it was not a violation of the Weekly Payment of Wages Act for Citibank to require forfeiture of unvested restricted stock granted to employees through either a discretionary bonus program or a voluntary payroll deduction program.

The plaintiff employees had obtained restricted stock in Citibank through three programs. The bonus and branch manager programs involved discretionary bonuses paid partially in restricted stock that vested over three years. The third program involved voluntary deductions from earned wages used to purchase restricted stock that vested over two years. In all programs, the employee was required to remain employed through the stock vesting date in order to receive the stock.

The SJC held that the forfeiture of unvested restricted stock acquired by the employees through the bonus and branch manager programs did not violate the Weekly Payment of Wages Act, General Laws c. 149, §148 et seq., because the unvested restricted stock was not "wages" within the meaning of the Act. The Court reached this conclusion because the bonuses provided under the programs were discretionary and because the stock was restricted, meaning that the employees had acquired only a contingent right to it. Further, the SJC held that the restricted stock acquired under the payroll program was explicitly excluded from the scope of the Act by General Laws c. 154, §8, which governs voluntary deductions for, among other things, employee stock purchase plans.

Brown v. F.L. Roberts & Co., Inc., 452 Mass. 674 (2008). In this discrimination action under chapter 151B, the SJC held: (a) that an employee's initial request for a blanket exemption from the employer's grooming policy on religious grounds did not relieve the employer of its obligation to attempt to find a reasonable accommodation of the employee's beliefs, and (b) that an exemption from a grooming policy cannot constitute an undue hardship as a matter of law, reversing summary judgment for the employer.

Bobby Brown was a lube technician at a Jiffy Lube owned by the defendant. In 2001, Jiffy Lube implemented a grooming policy requiring all employees with customer contact to be clean shaven. Brown, a practicing Rastafarian, told Jiffy Lube that he wished to be exempted from the requirement on religious grounds. Jiffy Lube managers refused to accommodate Brown, and no longer permitted him to work in customer contact positions, although his employment continued for more than a year.

The SJC rejected Jiffy Lube's contention that it was not required to engage in the customary interactive process to find a reasonable accommodation because Brown had initially requested a total exemption. The Court, noting that the record did not demonstrate that Brown had refused to accept any other accommodation, held that the mere fact that he had requested an exemption in his initial request for accommodation did not relieve the company of its obligation to engage in the interactive process.

Likewise, the SJC rejected the argument that an exemption from a grooming policy is an undue burden as a matter of law, on the grounds that such an exemption will always have a detrimental effect on the employer's public image. The Court reasoned that such a rule would run counter to the clear language of 151B and would upset the balance of employee needs and employer interests set by the Legislature in the statute.

Stimulus Bill Imposes New Cobra Premium Obligations on Employers

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If your company was one of the many who had to lay off employees in the past eight months, you've already sent out a bunch of COBRA notices. Thanks to the Obama Administration and Congress, now you have to do it again.

In February, President Obama signed into law the American Recovery and Reinvestment Act of 2009, commonly called the Stimulus Act. The new law weighed in at 407 pages and roughly $800 billion. Hidden in the thicket of "shovel-ready" projects is a provision that dramatically changes employers' COBRA responsibilities.

COBRA continuation coverage applies to workers at companies employing 20 or more employees. [See Editor's Note below.] When an eligible worker loses health-insurance benefits after leaving a job, COBRA provides the employee the opportunity to receive the same benefits for up to 18 months. Until now, the employee was solely responsible for the premiums.

But under the Stimulus Act, employers now have to pay 65% of the worker's premiums for nine months. The federal government will then reimburse the employer by allowing it to take a credit on payroll taxes. In effect, though, the employers are lending this money to the federal government to help finance the economic recovery.

The COBRA subsidy does not cover every employee equally. The law phases out the subsidy for so-called "high-income individuals" – people making more than $125,000 a year (or $250,000 a year for married joint filers) – in a complicated scheme involving taxable premium reductions. And while the subsidy only applies to workers who are "involuntarily terminated," the Act does not define that term. The Conference Committee report suggested that people fired for gross misconduct would not be eligible.

What's particularly tricky is that the Act reaches back in time to cover employees laid off since September 1, 2008 (and goes forward through December 31, 2009). That means that employers who sent out COBRA notices to laid-off employees over the past eight months now have to contact them to give the workers another chance to elect COBRA coverage. A new and improved COBRA notice form was issued by the Department of Labor in March. What's not clear is how to treat employees who got their COBRA coverage paid for as part of a severance agreement. Like the recovery process itself, this issue is a work in progress.

What you can do

- Read the text of the Stimulus Act of 2009 at: http://sn.im/cpkvu
- Check the Department or Labor website for more information at: www.dol.gov/ebsa/cobra.html
- mmediately reexamine COBRA eligibility over past eight months
- Talk to your employment counsel about how to handle employees already laid off

Editor's Note: While COBRA itself applies only to employers with 20 or more employees, the premium assistance provided under the stimulus bill will apply to employers with less than 20 employees who are covered by state "mini" COBRA laws.

Legislation Update

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1. The Lilly Ledbetter Fair Pay Act of 2009

One of President Obama's first official acts as President was to sign the Lilly Ledbetter Fair Pay Act of 2009, which establishes that the statute of limitations for compensation based claims of discrimination restarts with the receipt of each new discriminatory paycheck. This allows employees to classify such claims as "continuing violations." The law was enacted to overturn *Ledbetter v. Goodyear Tire & Rubber, Inc.*, 550 U.S. 618 (2007), in which the U.S. Supreme Court held that the statute of limitations for filing a wage discrimination lawsuit begins to run upon the initial act of discrimination at the time the discriminatory wage rate was established. In *Ledbetter*, the plaintiff discovered that she had been receiving unequal pay for the nineteen years that she worked at Goodyear. She sued to recover her lost wages for that nineteen year time period. Although the lower courts had found Goodyear liable for discrimination, the Supreme Court reversed, reasoning that the limitations period began to run upon the first act of discrimination nineteen years earlier, and had expired by the time Ledbetter filed her claim.

Under the Ledbetter Act, each time a paycheck is issued it is considered a new act of discrimination, which resets the clock (i.e., the "paycheck rule"). The Act, which is retroactive to May 28, 2007 (the date the Supreme Court issued the *Ledbetter* decision), allows employees to recover up to two years of back pay.

The Act applies not only to gender discrimination claims, but to all protected classes under Title VII; age discrimination claims under the Age Discrimination in Employment Act; and disability discrimination claims under the Americans with Disabilities Act.

2. E-Verify Controversy Continues

The ongoing criticism of, and resistance to, proposed legislation that would require certain employers to use E-Verify and drastically expand the manner in which E-Verify is used continues.

The E-Verify system, which is operated by the U.S. Department of Homeland Security's Citizen and Immigration Services, is a voluntary internet based employment eligibility verification system that allows employers to compare information from an applicant's I-9 form with information contained on Department of Homeland Security and Social Security Administration databases. Under current law, participation in E-Verify is voluntary for most employers. Proposed amendments (issued after President Bush signed an Executive Order), however, would require certain federal contractors (most government contracts over $100,000) and sub-contractors (most government contracts over $3,000) to use E-Verify. These contractors would be required to use E-Verify to verify the employment eligibility of new hires and existing employees.

In December 2008, several business groups, including the U.S. Chamber of Commerce, sued in Maryland federal court to enjoin and invalidate the proposed amendments. The parties agreed to stay the proceedings so the newly inaugurated administration can review the proposed amendments. As part of the stay, the government agreed to postpone the implementation of the new rules until May 21, 2009.

3. Proposed Massachusetts Bill To Prohibit Non-Compete Agreements

On January 12, 2009, Massachusetts State Representative Will Brownsberger filed a bill that would prohibit the use of non-compete agreements in Massachusetts, except in the context of the sale of a business. The bill, entitled "An Act to Prohibit Restrictive Employment Covenants," would render void and unenforceable "any written or oral contract or agreement arising out of an employment relationship that prohibits, impairs, restrains, restricts, or places any condition on, a person's ability to seek, engage in or accept any type of employment or independent contractor work, for any period of time after an employment relationship has ended." Any provisions contained in the agreement other than the non-compete clause would not be rendered void. This suggests that non-disclosure and non-solicitation provisions contained within agreements that also contain a non-compete clause would still be enforceable. Under the proposed bill, any party that violated the prohibition on non-competes would be liable for the employee's attorneys' fees.

Agency Update

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EEOC

Proposed Genetic Information Nondiscrimination Act Regulations

On February 25, 2009 EEOC Acting Chairman Stuart Ishimaru presented the agency's proposed regulations to implement the Genetic Information Nondiscrimination Act ("GINA"), which marks the first expansion of EEOC jurisdiction since the Americans with Disabilities Act was enacted in 1990. GINA prohibits an employer from discriminating against an employee or prospective employee on the basis of the individual's genetic information and limits employers, unions, and other covered entities from collecting, acquiring, or publicizing such private medical information, unless it falls under one of several specific statutory exemptions. A sixty-day comment period has commenced and will end on May 1, 2009. The EEOC must finalize the rules by May 21, the one-year anniversary of GINA's enactment.

DOL

Confirmation of Secretary of Labor Hilda Solis

On February 24, 2009, the United States Senate confirmed Hilda Solis, a former congressional representative from California's 32nd district, as Secretary of Labor. During Solis's eight years in Congress, she authored the Green Jobs Act, which supplied funding for "green" job training for veterans, displaced workers, at-risk youth, and individuals from impoverished families, and also solidified her reputation as an advocate for environmental justice through her work on the Committee on Energy and Commerce and the Committee on Natural Resources. Secretary Solis is also known for her dedication to improving the lives of working class families and for supporting labor causes, such as serving on the board of American Rights at Work, a pro-union organization. Earlier in her career, Secretary Solis served in the California State Assembly and in 1994, was the first Latina elected to the California State Senate. In the state senate, she acted as chairwoman of the Industrial Relations Committee and championed legislation to raise the state's minimum wage. Secretary Solis succeeds former Secretary Elaine Chao.

Executive Order 13495: Nondisplacement of Qualified Workers Under Service Contracts

On January 30, 2009, President Obama issued Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts, which provides workers with protection when a federal service contract expires and the government awards a second contractor the contract to perform the same service. The order, with some exceptions, provides the predecessor employer's workers with the right of first refusal for jobs for which they are qualified. Department and agency heads have discretion to grant exemptions to the order's requirements. The order empowers the Secretary of Labor to ensure compliance with the order and to issue sanctions and remedies, including reinstatement and payment for lost wages. If a contractor fails to comply with a secretary's order or willfully violates the executive order, the labor secretary may declare the contractor ineligible for federal contracts for a period of up to three years.

Executive Order 13496: Notification of Employee Rights Under Federal Labor Laws

On January 30, 2009, President Obama issued Executive Order 13496, which revoked Executive Order 13201, a Bush-era order requiring federal contractors to post workplace notices informing workers of their rights not to join a union and not to pay agency fees for nonrepresentational union expenses. The new order requires contractors and subcontractors to post notices which state employee rights under federal labor laws, the form and content to be determined by the Secretary of Labor. The Department of Labor is to commence rulemaking within 120 days of the notice. Failure to adhere to the provisions of the order or any associated rules or regulations may result in penalties ranging from cancellation of the contract to ineligibility for future Government contracts.

Federal Acquisition Regulatory Council

Executive Order 13494: Economy in Government Contracting

On January 30, 2009, President Obama issued Executive Order 13494, which prohibits federal contractors and subcontractors from using federal disbursements to attempt to influence employees' choices concerning whether or how to engage in collective bargaining. The order is effective immediately and the FAR Council has 150 days to adopt regulations to implement it. Costs incurred to foster relations between the contractor and its employees, such as the establishment and maintenance of a labor-management committee, are allowable under the order.

National Labor Relations Board

New E-filing Policies

On February 19, 2009, the National Labor Relations Board amended its e-filing program to streamline and promote electronic filings:

1. The NLRB and the General Counsel will accept electronic filings up until 11:59 p.m. local time at the receiving office on the due date.
2. The Board and General Counsel will require parties who e-file documents to serve the documents to the other parties by e-mail whenever possible.
3. The Board and General Counsel will no longer require parties to provide hard copies of long documents that they file electronically.

   With these changes, the Board anticipates fewer late filings, but cautions that while a technical failure on the e-filing system may excuse late filing, user-end technical issues will not. Therefore, e-filers are still encouraged to file early. If service to the other party by e-mail is not possible, as now required, the e-filing party must call the other party to notify them of the substance of the filed document and then serve a copy of the document, no later than the next day by personal service, overnight delivery service, or by fax with the permission of party receiving the document. These new e-filing policies and frequently asked questions are available at http://mynlrb.gov/efile.

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