Fenwick Employment Brief

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NEWS BITES

NLRB Posting Rule Held Unconstitutional

The NLRB's controversial requirement that employers post notices informing employees of their rights under the National Labor Relations Act (as reported in our January and May 2012 FEBs) has been held unconstitutional by the District of Columbia Court of Appeals in *National Association of Manufacturers v. NLRB*. On May 7, the court determined that the NLRB's enforcement mechanisms for the rule – which made failure to post the rule: (i) an unfair labor practice, (ii) evidence of anti-union animus in other cases, and (iii) reason to toll the limitations period for the filing of an unfair labor practice charge – interfered with employers' free speech rights under both the Constitution and the NLRA. The court vacated the rule, which means that employers are now relieved of any obligation to post the NLRB notice.

Substantive Fairness Overcomes Elements of Procedural Unconscionability in Mandatory Arbitration Agreement

In yet another case addressing the enforceability of mandatory arbitration agreements in California, a Southern California federal district court in *Williams v. Department of Fair Employment and Housing* recently held that despite some elements of procedural unconscionability, a mandatory arbitration agreement entered into at the inception of employment would be enforced because the substantive terms of the agreement were fair.

Under California law, an arbitration agreement must be both procedurally (*i.e.*, fairness in the formation of the contract) and substantively (*i.e.*, fairness in the terms) unconscionable to be unenforceable. In *Williams*, the court found elements of procedural unconscionability because the contract was presented on a "take it or leave it" basis by a party of superior bargaining power and the arbitration rules referred to in the agreement were never provided to the employee. However, there was no substantive unconscionability because the terms of the agreement were fair. Therefore, the agreement to arbitrate was enforceable.

Software Programmer Criminally Charged For Hacking Former Employer's Network

The federal Department of Justice recently filed criminal charges against a 41-year old software programmer and system manager who hacked into his former employer's computer network, causing $90,000 in damage. The complaint alleges that the individual, who had previously voiced displeasure over being passed over for promotions, resigned and gained unauthorized access to the computer network after his network access was terminated. Over a three week period, the former employee attempted to sabotage his former employer's business through stolen security credentials (including passwords) by corrupting the network, disrupting production and finance operations and attempting to alter the business calendar by one month. If convicted, the individual faces a maximum sentence of 10 years in prison, a $250,000 fine and restitution. This prosecution is a reminder for employers to take extra precautions to secure their electronic systems when an employee with such credentials departs.

Unreimbursed Expense May Result in Minimum Wage Violation, But Not a Labor Code § 450 Private Cause of Action

In *Sanchez v. Aerogroup,* the plaintiff alleged that as a condition of her employment she was required to purchase at least eight pairs of shoes from her employer without reimbursement. She asserted

violations of both minimum wage laws and Labor Code Section 450, which provides that no employer may compel or coerce any applicant or employee to patronize his or her employer. A California federal district court held that Section 450 establishes misdemeanor criminal liability, but does not authorize a civil suit by private citizens, and therefore Sanchez had no civil recourse under the statute. However, the court also held that Aerogroup's failure to reimburse Sanchez for the shoe purchases had the effect of reducing her wages below the minimum, and therefore Sanchez could pursue a claim for minimum wage violations (both the underpaid amount plus an additional equal amount as liquidated damages).

This case is a reminder that the failure to reimburse an employee's business expenses may not only trigger liability under California Labor Code 2802, but it may also result in a more costly minimum wage violation.

California Jury Awards $2.6 Million in Age Discrimination Case

Finding that two women were unlawfully terminated on account of their age by their employer, in *Behar v. Union Bank*, a California Superior Court jury awarded both plaintiffs a total of $2.6 million in damages. The two women, ages 49 and 63, alleged that their terminations were motivated by their age. The employer claimed that the two women were terminated for misconduct (investing in a condominium complex with a bank customer), but the evidence suggested that the investment occurred two years prior to the firings and the employees' supervisor was aware of the investment but did nothing about it, and the plaintiffs were never disciplined for the investment.

State-Level Social Media Legislation Spreads

Arkansas, New Mexico and Utah are the most recent states to enact legislation that limits employer access to the private social media accounts of employees and job applicants. Earlier this year, a similar federal bill – the Social Networking Online Protection Act – was re-introduced in Congress.

In general, these new laws prohibit employers from compelling employees and job applicants to disclose user names or passwords to their private social media accounts. The laws do not restrict an employer or potential employer's ability to view social media information that is otherwise publicly available.

Supreme Court Decision Regarding Definition of Title VII "Supervisor" Expected Soon

The United States Supreme Court is expected to issue an opinion in *Vance v. Ball State University* before the end of the Court's term (June 30). In *Vance*, the Court will address the issue of who qualifies as a supervisor – one who has the ability to hire and fire, or a broader category of workers who direct the work of others – for purposes of Title VII sexual harassment claims. The case is important for employers, because under Title VII, an employer's legal defenses to sexual harassment claims are significantly limited if a supervisor carries out the harassment.

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