Fenwick Employment Brief

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Victor Schachter Editor 650.335.7905
Kimberly Culp Contributor 650.335.7138
Fenwick
FENWICK & WEST LLP

CALIFORNIA COURT STRIKES DOWN NO-HIRE CLAUSE BUT LEAVES DOOR OPEN TO ENFORCEMENT OF NARROWLY DRAWN RESTRICTION

In an unusual decision specifically addressing a "no-hire clause," a California appellate court articulated some guidelines as to the enforceability of such provisions. In *VL Systems v. Unisen*, the plaintiff company (VLS), a computer software consulting firm, entered into a short-term computer consulting contract with defendant Star Trac, whereby Star Trac would assist VLS in migrating to a new server. The contract prohibited Star Trac from hiring any VLS employee for 12 months after the contract's termination, regardless of whether the employee was involved in the Star Trac contract or employed by VLS during the pendency of the contract. The contact also required Star Trac to pay VLS a fee for each employee hired in violation of the no-hire.

Following the completion of the Star Trac contract, VLS hired David Rohnow as a senior engineer. Shortly thereafter, Star Trac posted an IT Director job listing. Rohnow responded to the posting, and Star Trac hired him believing that the no-hire with VLS did not apply because VLS hired Rohnow after the completion of the Star Trac contract, and Rohnow performed no work on the VLS-Star Trac contract.

VLS sued, and a trial court ruled that the no-hire clause was enforceable and Star Trac breached it by hiring Rohnow. On appeal, the court struck down the no hire provision as violative of state law (B&P Code 16600) since the clause: (i) unreasonably restricted the mobility of employees to leave one company and join the other, and (ii) was broader than necessary to protect the business interests of the party whose employees were off limits. Specifically, the court emphasized that Ronhow did no work on the VLS contract. However, the court suggested that if the no-hire clause had been limited to employees who performed work on the contract, the court may have upheld it. Presumably, under those circumstances, the employer would have protected a legitimate interest to retain its employees who were working with an outside contractor. Given the undeveloped nature of the law in this area, great care must be exercised in implementing and enforcing no-hire clauses.

ADMINISTRATIVE REVIEW BOARD RAISES THE BAR FOR EMPLOYEES CLAIMING WHISTLE-BLOWING RETALIATION

In 2002, the former CFO of Cardinal Bankshares, David Welch, sued Cardinal for unlawful retaliation for Welch's alleged whistle-blowing of Sarbanes-Oxley violations. An administrative law judge concluded that Welch reasonably believed that Cardinal had violated SOX and that Welch was terminated for reporting his concerns about SOX violations. The ALJ supported this determination by the fact that Welch was terminated in close proximity to the time when he raised alleged SOX violations. The ALJ ordered that Welch be reinstated to his former position.

Five years later, the Administrative Review Board rejected the ALJ's conclusion, explaining that SOX affords protection only for employees who hold a "reasonable belief" that the reported conduct constitutes a violation of federal securities laws. That standard requires the employee to prove both an actual belief as to the unlawfulness of the conduct and that a similar person with the employee's expertise and knowledge would hold that same belief. The ARB concluded that a reasonable CPA and CFO, such as Welch, could not have reasonably believed that Cardinal's behavior was unlawful.

As a result of the ARB's opinion, Welch's complaint was dismissed and his job reinstatement was voided. The ARB's determination sets a higher bar for employees who assert claims of retaliation for whistle-blowing than was applied by the ALJ, thus making it more difficult to bring such a claim.

NEWSBITES

EEOC Adopts Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities

The EEOC adopted new enforcement guidelines on how an employer's disparate treatment of workers with caregiving responsibilities may violate Title VII or the ADA. The EEOC's guidance sets forth different, illustrative, factual situations which may violate Title VII or the ADA and demonstrates the growing acknowledgement that caregivers may be entitled to protection. The EEOC asserts that its guidance is not intended to create a new protected category, but it illustrates how stereotyping or other disparate treatment of workers with caregiving responsibilities may be unlawful.

Failure to Provide Unrequested Data on Available Jobs is Not Bad Faith

The Sixth Circuit Court of Appeals (Cincinnati), in *Kleiber v. Honda of Am. Mfg. Inc.*, considered whether Honda's failure to provide data on job availability during the interactive process with an employee seeking a reasonable accommodation constituted in "bad faith." The Court held that while Honda's interactive process was not a "model," its failure to provide information on possible jobs does not amount to "bad faith" when the employee never requested the information. Notwithstanding the Court's ultimate conclusion, employers should carefully consider whether to provide this information to employees, even if has not been requested.

Federal Minimum Wage Will Increase to $7.25 Per Hour

On May 25, President Bush signed a law which will increase the Federal minimum wage to $7.25 per hour. The increase will take place in three steps, the first of which will commence this month. Effective July 24, 2007 the minimum wage will increase to $5.85 per hour, then on July 28, 2008 to $6.55 and finally on July 29, 2009 to $7.25 per hour.

GE General Counsel Files Gender Discrimination Class Action Lawsuit Seeking $500 Million in Damages

General Electric's highest ranking legal employee in its Transportation Division filed suit alleging that General Electric paid its female Executive level employees and female attorneys less than male counterparts. The complaint alleges that all of General Electric's male General Counsel had been promoted above the Executive level whereas the two female General Counsel have not. The complaint also alleges that the proposed class was denied promotional opportunities, senior management positions, equal pay, bonuses, and other benefits of employment. In addition to injunctive and other available relief, the complaint seeks $500 million in damages.