Employment & Labor Relations Law
FROM THE SECTION OF LITIGATION EMPLOYMENT & LABOR RELATIONS LAW COMMITTEE

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How Far May a State Labor Law Reach?

By William A. Munoz and Kerri L. Ruzicka – March 27, 2012

"So goes California, so goes the nation," it is sometimes said. Nothing could be more true after the California Supreme Court's recent decision in *Sullivan v. OracleCorp.* (*Sullivan II*), 51 Cal. 4th 1191 (Cal. 2011), which held that nonexempt employees who do not live in California, but who travel occasionally to California on business, must be paid overtime under California's strict overtime laws for work performed in California. The court declined to address the application of the myriad of California's laws related to overtime such as rest and meal periods, compensable travel time, accrual or forfeiture of vacation time, and overtime exemptions, although one must now consider these in determining the traveling employee's right to overtime.

Sullivan v. Oracle Corp.

Oracle, a software company headquartered in Palo Alto, California, employs "instructors" to travel to various client locations to train clients in the use of Oracle's products. In 2003, Oracle revised the instructors' classifications as hourly nonexempt employees but did not provide back pay for prior unpaid overtime.

Consequently, the instructors brought a class action under California Labor Code and the federal Fair Labor Standards Act (FLSA) for the unpaid wages. *Gable & Sullivan v. Oracle* (*Sullivan I*), No. SACV 03-348 AHS (MLGx) (C.D. Cal. Mar. 29, 2005). The court certified two classes—one for the plaintiffs seeking damages under the California Labor Code and one for the plaintiffs seeking damages under the FLSA. The matter ultimately settled. However, claims under California law for periods of time that out-of-state instructors worked in the state of California were expressly excluded from the settlement.

Plaintiffs Sullivan, Evich, and Burkow thereafter filed the suit that is the subject of this article (*Sullivan II*). It was undisputed that the plaintiffs performed the majority of their work in their home states but would occasionally travel to California to instruct various Oracle customers. Plaintiffs Sullivan and Evich resided in Colorado, which has its own overtime statute that generally requires 1.5 times the regular rate for hours exceeding 12 in one day or 40 in one week. Burkow resided in Arizona, which follows the FLSA in requiring 1.5 times the employee's regular rate for hours exceeding 40 in one week. 29 U.S.C. § 207.

The plaintiffs sought to certify a class on three claims: violation of overtime provisions under section 510 of the California Labor Code, violation of California's Unfair Competition Law (UCL) pursuant to Business & Professions Code section 17200 for failure to pay overtime for work performed within California, and violation of California's UCL predicated on violations of the FLSA for work performed outside California.

The U.S. District Court for the Central District of California granted summary judgment to Oracle, finding that applying the California Labor Code to work performed by nonresidents would violate the Due Process Clause of the Fourteenth Amendment. On appeal, the Ninth Circuit initially reversed, then ultimately withdrew its opinion and certified the questions regarding the applicability of California's overtime provisions to the California Supreme Court.

This article focuses on one of the questions certified: "[D]oes California Labor Code apply to overtime work performed in California for a California-based employer by out-of-state plaintiffs in the circumstances of this case, such that overtime pay is required for work in excess of eight hours per day or in excess of forty hours per week?"

The California Supreme Court's Analysis

Statutory Construction

In determining the question, the court first looked at the language of the statute, which it found to be clear and unambiguous. Section 510(a) of the California Labor Code provides, "*Any work* in excess of eight hours in one workday and . . . 40 hours in one workweek . . . shall be compensated at the rate of no less than one and one-half times the regular rate of pay. . . ." The California Labor Code also provides for penalties to "*any employee* receiving less than . . . the legal overtime compensation applicable to the employee . . ." Cal. Labor Code § 1194 (emphasis added). The court noted that the preamble to the penalty section of California's wage law also states that California's employment laws apply to *all individuals* employed in California.

The fact that the Labor Code did not explicitly differentiate between a resident and nonresident employee did not escape the court's notice. Rather, the court determined that the California legislature knows how to create exemptions when it intends to, as in California's workers' compensation statutes. The lack of an explicit exemption for nonresidents indicated to the court that an employee's residence is not relevant for purposes of California's overtime laws while he or she is working in California. To provide such an exemption would encourage employers to import unprotected workers from out of state, the court reasoned.

Oracle argued, however, that the legislature could not have intended for the statute to apply to nonresident employees because that would impose significant burdens on employers to comply with related overtime laws such as meal periods, compensable travel time, accrual of vacation time, and overtime exemptions, in violation of the Constitution's dormant Commerce Clause. Significantly, the court stated that it had not been asked to consider the applicability of any other wage laws or to undertake any analysis of the Commerce Clause to the facts presented and, consequently, declined to do so.

This was a case of first impression in California. Other courts addressing this issue have reached similar results. In 2004, the Seventh Circuit Court of Appeals was called upon to determine whether the Illinois Wage Payment and Collection Act applied to a nonresident who worked in Illinois for an Illinois employer. *Adams v. Catrambone*, 359 F.3d 858 (7th Cir. 2004). Like the

California Supreme Court, the Seventh Circuit held that the Illinois wage laws applied to all work performed within the state's boundaries regardless of where the plaintiff resides. However, in *Adams*, the plaintiff worked full-time in Illinois; in *Sullivan*, the California Supreme Court extended that rule to apply to as little as one day or one week of work.

The largest gap in the current status of California's overtime provisions is whether the court will eventually hold an out-of-state employer liable for overtime wages of a nonresident employee who occasionally visits California. Under the court's statutory analysis, which emphasized that the statutory overtime regulations cover "any work" by "any employee" and "all those employees employed in California," it could very well do so. Cal. Labor Code §§ 510(a), 1194(a), and 1171.5(a).

Conflict of Laws Analysis
The court resolved the conflict of laws issue—which involved the laws of California, Arizona, and Colorado—using the three-step governmental interest analysis. The first step required the court to determine whether the states' laws at issue were different. Because California's overtime laws are different from those of every state in the nation, the first step was easily resolved.

The second step was to determine whether a true conflict existed between California law and the laws of Colorado and Arizona and the states' interests in applying their own law to the terms of the plaintiffs' employment. Here, the court relied on the failure of Colorado and Arizona to provide any statute governing overtime outside their own boundaries. Arizona had no overtime provision at all, and Colorado's overtime law governed only "work performed within the boundaries of the state of Colorado." 7 Colo. Code Regs. § 1103-1(1) (2011). The lack of any expressed interest in the overtime pay of their residents outside their own borders indicated to the court that applying California overtime laws would negligibly affect the interests of Colorado and Arizona.

Oracle argued that the interests of Arizona and Colorado in protecting their businesses from more costly regulations in other states outweighed California's interests. The court rejected this argument, finding that, pursuant to the Full Faith and Credit and Due Process Clauses, the United States Constitution does not require one state to substitute another state's laws for its own law, applicable to persons and events within its borders (citing *Phillips Petroleum v. Shutts*, 472 U.S. 797, 822 (1985)). The court further found that the Constitution does not permit one state to project its own laws into those of another. *Healy v. The Beer Institute*, 491 U.S. 342, 336–37 (1989).

Nevertheless, in the final step of the governmental interest analysis, the court determined that California's interest in protecting workers within its borders would be significantly impaired if it was required to permit nonresidents to work without the protection of the overtime laws it affords to its residents. In addition, employers would be encouraged to substitute lower paid

temporary nonresident employees, thus "threatening California's legitimate interest in expanding the job market."

Jurisdiction and Extraterritorial Application of State Laws
The limitations of the court's analysis leave several issues wide open. Because the court answered only the question of whether the overtime wage orders apply to all employment within California, employers are left in a quandary as to how they should apply the related overtime provisions, such as exemptions, vacation pay, and pay stub requirements. In addition, the question remains whether a California court could exercise jurisdiction over an out-of-state employer or resident employees who work outside California, and, if so, whether California's overtime laws apply under those circumstances. The issue then becomes one of jurisdiction.

Liability of In-State Employer
The United States Supreme Court has long held that legislation is presumptively territorial and confined to the limits over which the law-making power has jurisdiction. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). The presumption is always against any intention to give the act an extraterritorial operation and effect. *McCullogh v. Scott*, 182 N.C. 865, 877–78 (1921).

For the most part, employers have not been held liable for violations of a state's wage laws for work performed by a nonresident employee outside the state. Courts have been very reluctant to apply state laws extraterritorially to work performed outside state boundaries by a nonresident employee.

For example, in a recent wage-and-hour case, the U.S. District Court for the Central District of California held that an Indonesian employee on a cruise ship, which sometimes stopped at the Port of Los Angeles, could not maintain a claim against his Dutch employer based in Seattle, Washington. *Priyanto v. M/S Amsterdam*, 2009 WL 175739 (C.D. Cal. 2009).

Other courts have also considered the extraterritorial application of state laws to nonresidents performing work outside the state's boundaries. *See, e.g., Vengurlekar v. Silverline Techs., Ltd.*, 220 F.R.D. 222 (S.D.N.Y. 2003); *Glass v. Kemper Corp.*, 920 F. Supp. 928 (N.D. Ill. 1996). With rare exception, the courts have declined to exercise any jurisdiction beyond state borders and apply state laws extraterritorially.

In *Sawyer v. Market Am., Inc.*, 661 S.E.2d 750 (N.C. Ct. App. 2008), the North Carolina Court of Appeals held that the North Carolina Wage and Hour Act does not apply to the wage claims of a nonresident independent contractor who worked and lived in Oregon. Similarly, the U.S. District Court for the Southern District of Ohio denied the wage claims of two employees who had never lived or worked in Ohio. *Mitchell v. Abercrombie & Fitch*, 2005 WL 1159412 (S.D. Ohio 2005).

Application of a State's Law
When a complaint is filed against an out-of-state employer, a court would first have to perform a

constitutional due process analysis to determine whether a nonresident defendant has certain minimum contacts with the forum state such that maintenance of suit comports with constitutional due process and does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *see also Liaquat Khan v. Van Remmen, Inc.*, 756 N.E.2d 902, 907 (Ill. App. Ct. 2d Dist. 2001). Under California's minimum contacts analysis, general jurisdiction will be conferred only if the contacts are substantial, continuous, and systematic.

General jurisdiction cannot be conferred where an employer does not maintain an office or place of business; has no bank accounts, assets, telephone listings; and is not, nor ever has been, licensed to do business within the forum state. *Stanley Consultants v. Superior Court*, 77 Cal. App. 3d 444, 449 (Cal. Ct. App. 3d Dist. 1978).

If general jurisdiction cannot be conferred, then the court may exercise specific jurisdiction if (1) the nonresident company purposefully directed its activities at the forum residents and availed itself of the privilege of conducting business within California, thereby invoking the protection of its laws; (2) the dispute arises out of those specific purposeful contacts and conduct; and (3) the exercise of jurisdiction is fair and reasonable. *Asahi Metal Indus., Co. Ltd. v. Superior Court of California, Solano Cnty.*, 480 U.S. 102, 112 (1987).

Purposeful availment has been established where the nonresident defendant had set up a toll-free number in California, maintained a national advertising campaign that reached California, and made two sales after the advertisement appeared; and where the defendant had specifically sought a California corporation to engage as an investor in a leveraged buyout. *See, e.g., Checker Motors Corp. v. Superior Court*, 13 Cal. App. 4th 1007 (Cal. Ct. App. 2d Dist. 1993). In addition, simply advertising in the forum is a means of purposefully directing activities at forum residents. *Asahi Metal*, 480 U.S. at 112.

However, no purposeful availment is found where a foreign corporation, as an incident to an interstate transaction, lends one of its employees to the purchaser of a machine to assist in installing the machinery, *Proctor & Schwartz v. Superior Court in and for San Mateo County*, 99 Cal. App. 2d 376, 221 P.2d 972 (Cal. Ct. App. 1st Dist. 1950), or where an out-of-state insurer processed insurance premium payments and claims of insureds domiciled in California who had moved there after purchasing the insurance policy, but the out-of-state insurer never directed sales or advertising toward California. *Elkman v. Nat'l States Ins. Co.*, 173 Cal. App. 4th 1305, 1316–17 (Cal. Ct. App. 2d Dist. 2009).

Conclusion

It is unlikely that California courts will apply California's overtime laws to nonresidents for work performed out of state. However, if a court can assert general or specific jurisdiction over an out-of-state employer, it could find that the California Labor Code applies to nonresident employees if they perform work in California. The jurisdictional and due process concerns posed

by the court's ruling in *Sullivan II* create a minefield for employers when it comes to nonresident employees performing work in California. Given the significant penalties that can be incurred for violations of labor laws related to overtime pay such as vacation accrual, meal and rest periods, and compensable travel time, defense attorneys should caution their clients who send employees to California for short-term projects or events, especially if they have California employees who could achieve the same result. For plaintiffs' attorneys, this is an exciting time to bring the unanswered issue to California courts for further clarification. A final resolution on the applicability of the related overtime laws will come only through further litigation and appeals to the California Supreme Court.

Keywords: litigation, employment and labor relations law, Sullivan v. Oracle Corp., resident employee, nonresident employee

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Lessons Learned from *Johnson v. City of Memphis*

By Katie Kiernan Marble – March 27, 2012

Avoiding discrimination in promotional processes can be an ongoing challenge, and correcting past discrimination can take considerable time and resources. This difficulty is demonstrated by the protracted lawsuits against the City of Memphis for its promotional testing methods. "Since the early seventies the employment practices of the City of Memphis have frequently been challenged in court as discriminatory against African Americans and women." *Johnson v. City of Memphis* (*2006 Johnson*), Nos. 00-2608 DP, 04-2017 DP, 04-2013 DP, 2006 WL 3827481, at *1 (W.D. Tenn. Dec. 28, 2006). Typically, these problems involved promotional procedures within the Memphis Police Department. In the early 2000s, the Memphis Police Department twice attempted to institute a nondiscriminatory promotional procedure for the promotion of patrol officers to the position of sergeant. Each time, the district court determined that these procedures had a disparate impact on minority candidates.

The *Johnson v. City of Memphis* litigation, challenging the two promotional processes, has been unfolding since 2000. The litigation includes three consolidated cases filed in the U.S. District Court for the District of Tennessee, Western Division. Both the district court and the U.S. Court of Appeals for the Sixth Circuit have issued multiple decisions offering guidance to employers and employees alike with respect to the legalities of promotional practices. This article does not address every issue raised by the parties over the past decade of litigation, but it offers a brief overview of key issues, followed by practical lessons learned. It should be noted that at the time this article was submitted, the *Johnson* litigation was still ongoing and possibly facing an appeal from the defendant City of Memphis.

The 2000 Promotional Process

In 2000, the City of Memphis conducted a promotional process to select patrol officers for promotion to the position of sergeant. *Johnson v. City of Memphis* (*2003 Johnson*), 73 F. App'x 123, 126 (6th Cir. 2003). Applicants were informed the test would consist of four components with different weights given to each: (1) a written test (20 percent); (2) a practical exercise test (50 percent); (3) performance evaluations from the previous two years (20 percent); and (4) seniority points (10 percent). Individuals who passed the written test were next required to take the practical test. *Johnson v. City of Memphis* (*2005 Johnson*), 355 F. Supp. 2d 911, 913 (W.D. Tenn. 2005). The department would then consider evaluations and seniority points. Initially, the Memphis Police Department had a "cut score" on the written test of 70 points. However, this resulted in a disparate impact against minority candidates, so it adjusted the cut score to 66 in an effort to satisfy the Equal Employment Opportunity Commission's (EEOC's) four-fifths rule.

During administration of the practical exercise test, the Memphis Police Department learned that unauthorized study materials had been released to the applicants, thereby compromising the test. *2003 Johnson*, 73 F. App'x at 127. In response, the department eliminated the practical exercise

test and instead increased the weight of the written test and performance evaluations from 20 percent to 45 percent.

On July 11, 2000, plaintiffs filed a complaint alleging that the Memphis Police Department had intentionally discriminated against them on the basis of race by eliminating and increasing the weight applied to certain portions of the promotional process. The plaintiffs alleged that the defendant had been warned that the modifications it undertook would have an adverse impact on African American candidates, but that it still chose to modify the process. Ultimately, the Memphis Police Department conceded that the 2000 promotional process was invalid.

The 2002/2003 Promotional Process

In 2002 and 2003, the Memphis Police Department took steps to revamp its promotional process to ensure that it was job-specific and tested skills required for the position of sergeant. *2005 Johnson*, 355 F. Supp. 2d at 914; *2006 Johnson*, 2006 WL 3827481, at *5. It hired a consultant to create a promotional process that would be "nondiscriminatory" and "legally defensible." *2006 Johnson*, 2006 WL 3827481, at *5.

However, after the new test was given, the defendant learned that the test had a significant disparate impact on African American applicants. *2005 Johnson*, 355 F. Supp. 2d at 914. The consultant advised the defendant that although the test did have such an adverse impact, the cause of which he could not find, the test was still content-valid, and the consultant recommended that the test results be used to make promotions. *2006 Johnson*, 2006 WL 3827481, at *5. The Memphis Police Department chose to rely on the tests and made its promotions accordingly. *2005 Johnson*, 355 F. Supp. 2d at 914. On January 10, 2003, 176 of 240 white candidates were promoted to the rank of sergeant, while only 86 of 274 African American candidates were promoted.

Disparate Impact under the 2002/2003 Process

The legal issues addressed by the district court and the U.S. Court of Appeals for the Sixth Circuit are numerous. This article focuses on the claims of disparate impact and disparate treatment. The plaintiffs attacked the 2002/2003 process on the grounds that it had not been validated and was unreliable, although the plaintiffs did not challenge any specific test item. *2006 Johnson*, 2006 WL 3827481, at *9.

The court followed the three-step analysis set forth in the U.S. Supreme Court decision of *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 432 (1974) to reach the conclusion that the plaintiffs had met their burden to prove disparate impact under the 2002/2003 process. The plaintiffs "must first establish a prima facie case by showing that a promotions process has a measurably discriminatory impact, regardless of motive or intent or appearance of even-handedness." *2006 Johnson*, 2006 WL 3827481, at *9. The plaintiffs met this step by showing that the defendant's own consultant recognized that the test led to a disparate impact on African American applicants and by bringing in their own experts to analyze the test results.

The burden shifts to the employer to show that "any given requirement [has] . . . a manifest relationship to the employment in question." *Id.* Here, the defendant was able to show that its promotional process was both valid and reliable. The court looked to EEOC Guidelines regarding acceptable methods of validating a promotional process, which include content validation, construct validation, and criterion-related validation. *Id.* at *10. As noted above, the defendant, through its expert, chose content validation. "[C]ontent validity is demonstrated by showing that the test content is a 'representative sample' of the important aspects of performance on the target job." 29 C.F.R. §§ 1607.5. The 2002 process focused on 44 knowledge, skills, abilities, and personal characteristics necessary for the position of sergeant. *2006 Johnson*, 2006 WL 3827481, at *10. Because the test took into account skills required for the position sought, the promotional process was deemed valid. In addition, after a cursory review of the expert testimony regarding the calculations used in the 2002/2003 process, the court found that the 2002/2003 test was reliable (i.e., it measured the quantities intended to be measured). Because the 2002 process was both valid and reliable, the defendant satisfied the burden of proving the process was job-related.

The burden then shifts to the plaintiffs to show that other testing modalities were available that would have allowed for merit-based promotions without disparate impact on minority candidates. "Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have a lesser adverse impact." *Id.* (quoting EEOC Guidelines on Employee Selection Process). The plaintiffs suggested three such alternative procedures: (1) practical exercise (simulation of on-the-job procedures); (2) assessments of integrity and conscientiousness; and (3) a merit promotion process that had been successfully used in another city. The district court found merit in each option.

Ultimately, the court determined that it did not need to scrutinize each alternative option put forward by the plaintiffs, and it simply found that "[i]t is sufficient to acknowledge that the existence of such alternative measures and methods belies . . . Defendant's position that they had no choice but to go forward with the 2002 promotion process despite its adverse impact because no alternative methods with less adverse impact were available." *Id.*

Disparate Treatment under the 2000 and 2002/2003 Processes

The analysis for disparate treatment is similar to the analysis for disparate impact, and a plaintiff "must show discriminatory motive, either by direct evidence or by influence based on a prima facie showing of discrimination." The plaintiffs argued that with respect to the 2000 process, the defendant's intent to discriminate was evidenced by the promotion of white candidates over black candidates based on an invalid process, even though the defendant knew that the process was invalid. With respect to the 2002 process, the plaintiffs submitted that the disparity between white and African American candidates, with no credible explanation, was evidence of

discriminatory intent; that the defendant did not report score reliability or other statistical indices; and that the manner in which the promotions occurred demonstrated that the defendant was trying to limit the possibility of court intervention.

In light of the considerable resources expended by the City in designing the 2000 and 2002 processes, the court found the plaintiffs' arguments to be unavailing. While the district court questioned the judgment of the defendant, it found "nothing to indicate that the judgment of the City was animated by racial animus or intent to discriminate."

Remedies Available to the Plaintiffs

In determining what remedies were available to the plaintiffs for the disparate impact claims, the court noted that Title VII was guided by two fundamental principles:

- The purpose of Title VII is to eradicate discrimination by facilitating a workplace environment in which hiring and promotion are driven entirely by merit.

- The goal of a remedy in a discrimination suit is to return the victim of discrimination to the state he or she would have been in if the discrimination had not taken place.

The court recognized that in the circumstances of this case, damages were difficult to assess because the court is not able to go back in time and change the plaintiffs' positions for the past couple of years and that it would be unfair to demote other individuals who have been promoted through no fault of their own. Therefore, the court ultimately reached the following conclusion:

> If demoting those already promoted under an invalid process and starting over is an untenable remedy, and identification of those individually injured is impossible, then the only remaining remedy is to compensate all plaintiffs such that a certain parity of treatment with those already promoted is achieved.

2006 Johnson, 2006 WL 3827481, at *19.

This remedy involved back pay, seniority credits, and promotion. The parties are today still attempting to determine the appropriate damage amount for each plaintiff.

Lessons Learned from the *Johnson* Decisions

The *Johnson* decisions offer insight into the steps necessary for a nondiscriminatory promotional system. Employers must develop processes that test potential promotional candidates on the basis of the skills required for the position. Most will need to hire consultants to analyze results and/or statistical data relating to disparate treatment of minority candidates, as well as possible alternative testing methodologies. This will allow employers to support the use of their tests with data and to show a clear link between the test and required job skills. It will also allow

employees to fully understand the skills required of them before being considered for promotion. The primary lesson learned from this litigation is that employers must take their obligations seriously and design a process that excludes even the possibility of discrimination against candidates. Other lessons learned include the following.

Make Sure to Analyze Alternative Options
When implementing a promotional system, an employer must be certain to analyze feasible, job-related alternative options and the potential for disparate impact that each option poses, and select the alternative that has the least potential for disparate impact. This might sound simple, but it may be necessary to retain a consultant with experience to understand the methods to measure disparate impact. The importance of this step is highlighted by the *Johnson* litigation, where the test methods were found valid and reliable, but the district court found the test to have a disparate impact because there were alternative methods that were job-related but had a lesser adverse effect on minorities.

Employers Cannot Always Rely on Their Experts
In the *Johnson* decision, the defendant relied not only on the experience of its consultant to design and implement a promotional process but also on his judgment that the testing should be used despite having a disparate impact on minority candidates. Employers should not rely solely on the judgment of outside candidates; they should think about the possible legal ramifications of following that advice. Consultants may be able to offer statistical analysis and guidance on testing options, but they are not legal experts. Legal counsel should be contacted if there are any concerns about implementing a promotional process that may have a disparate impact.

Meeting EEOC Guidelines May Not Be Enough
In defending the validity of the 2000 promotional process, the defendant argued that there could not be a finding of disparate impact because the written test results satisfied the EEOC's "four-fifths rule." The plaintiffs countered that this rule is not the only measure and that the court should examine other statistical evidence. The court agreed.

The four-fifths rule states that a selection rate of a group of less than four-fifths the selection rate of the majority group may be evidence of adverse impact. *2005 Johnson*, 355 F. Supp. 2d at 915–16. Although the defendant changed the cut rate to comply with this rule (lowering the minimum written test score from 70 to 66), the district court still found disparate impact because "small differences in selection rate may nevertheless constitute adverse impact where they are significant in both statistical and practical terms."

Ultimately, while EEOC Guidelines are often helpful in defining the contours of legal employment activity, employers should not rely on them as definitive legal precedent for their actions.

Damages May Be the Hardest Part

The trial in the *Johnson* litigation took place in 2005, but the litigation continues in part due to disputes over the appropriate damages to the plaintiffs. The parties disputed the appropriate amount of prejudgment interest to be awarded and whether certain plaintiffs are truly entitled to back pay and overtime pay, and at what pay rate. Recently, the Sixth Circuit expressed its frustration at the amount of time it has taken the district court to enter a final judgment on the issue of damages, noting that six months was an appropriate time frame to issue a final order. Only time will tell whether the district court will be able to meet that deadline, but the delay certainly must be a cause of frustration for the plaintiffs, who have waited over seven years to see the damages owed to them.

Conclusion

For employers who plan to use promotional processes to move candidates up the ranks in the organization, it can be a difficult, expensive, and time-consuming task to tailor the process to ensure that candidates are not discriminated against. However, carefully tailoring such a plan is necessary and important to prevent protracted litigation and ensure that employees are treated fairly and equally under the law. Time and energy devoted to creating a fair and nondiscriminatory system can prevent this type of lengthy and unnecessary litigation.

Keywords: litigation, employment and labor relations law, discrimination, promotion process

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When Can a Former Employee Challenge a Restrictive Covenant?

By Michael J. Miles – March 27, 2012

The requirement of Article III, Section 2 of the United States Constitution that an actual "case or controversy" exist before a party can bring a lawsuit and seek relief from the courts forces parties to be reactive in protecting their rights. In the world of employment law, this traditionally meant that a former employee could question the validity of a restrictive covenant, such as a noncompetition or non-solicitation agreement with his or her former employer, only by breaching it and defending against a subsequent action by the former employer on the grounds that the restrictive covenant was invalid.

The passage of the Declaratory Judgment Act, 28 U.S.C. § 2201, along with the development of the Uniform Declaratory Judgment Act, which has been enacted in one form or another by 41 states, relieved this concern to a certain extent. These laws allow parties to be proactive in protecting their rights by filing an action, before the breach of an agreement, to seek a declaration of its scope or validity. Nonetheless, courts will still not issue advisory opinions.

The Declaratory Judgment Act requires that an "actual controversy" exist for courts to have jurisdiction. Likewise, the courts of most states have construed their respective versions of the Uniform Declaratory Judgment Act to require an "actual controversy" before suit can be filed. Thus, for former employees bound by a restrictive covenant and for their current or prospective employers, the question becomes: When does an actual controversy exist between a former employee and former employer regarding the validity of a restrictive covenant?

It is not difficult to see how the answer to this question can have significant implications for both the individuals subject to the restrictive covenants and the companies that currently employ or would like to employ them. The limits on where or from whom an individual can solicit business can have a drastic impact on the value of that individual to a current or prospective employer. Further, the uncertainty surrounding the scope or validity of the former employee's restrictive covenant could force his or her current employer to choose between exposing itself to potential liability and forgoing business opportunities it may be entitled to pursue. The uncertainty could also lead prospective employers to decide not to hire the former employee in the first place. Unfortunately, determining when the former employee or his or her current employer can bring suit to challenge the scope or validity of a restrictive covenant often is difficult.

There is no precise test for defining a "case or controversy" for purposes of Article III, Section 2. The basic inquiry is whether the conflicting contentions of the parties present a real and substantial controversy between parties having adverse legal interests, and whether a dispute exists that is definite and concrete, not hypothetical or abstract. *See Babbitt v. United Farm Workers Nat'l Union, Ariz.*, 442 U.S. 289 (1979). Similarly, for a controversy to be "actual"

within the meaning of the Declaratory Judgment Act, the facts must set forth the existence of a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of declaratory relief. *See Step-Saver Data Sys. v. Wyse Tech.*, 912 F.2d 643 (3d Cir. 1990).

In *Chestnut v. Pediatric Homecare of America, Inc.*, No. 90-7920, 1991 WL 197319 (E.D. Pa. Sept. 26, 1991), the court addressed a former employee's action for declaratory judgment against a former employer seeking to void her noncompetition agreement. The former employer moved to dismiss the action, arguing that the former employee failed to present either a justiciable "case or controversy" under Article III, Section 2, or an "actual controversy" under the Declaratory Judgment Act. The former employee asserted that the covenant was unenforceable and that it impeded her ability to find new employment or engage prospective business partners. The former employer, on the other hand, asserted that the covenant was valid and maintained its right to enforce the covenant in the future. The court concluded that a case or controversy existed between the parties in light of the fact that the uncertainty regarding the enforceability of the restrictive covenant impaired the former employee's search for employment and the former employer would not relinquish its rights under the contract. In reaching this conclusion, the court emphasized the fact that the former employer "never state[d] that it would not seek to enforce the covenant against [the former employee] should she accept employment in the [industry]."

The level of controversy required to proceed under the different versions of the Uniform Declaratory Judgment Act enacted by the states varies significantly. For example, in *Enron Capital & Trade Resources Corp. v. Pokalsky*, 490 S.E.2d 136 (Ga. Ct. App. 1998), a former employee and his new employer sought a declaration that the restrictive covenants in the former employee's employment agreement with his former employer were unenforceable. The former employer argued that the matter did not present a justiciable case or controversy because declaratory judgment is not available to confirm the propriety of actions already taken, the former employee had already accepted a job with a competitor in violation of the restrictive covenant, and the plaintiffs could only speculate as to what the former employer's position on the former employee's new employment would be. Reviewing the question under Georgia's declaratory judgment statue, Ga. Code Ann. §§ 9-4-1 to 9-4-10, the court nonetheless found that declaratory relief was available, because "[a]t the time the lawsuit in this case was filed, [the former employee and his new employer] were uncertain whether their employment could legally continue in the future." *Pokalsky*, 490 S.E.2d at 138.

By comparison, *Stevenson v. Parsons*, 384 S.E.2d 291 (N.C. Ct. App. 1989) seems to set a slightly higher threshold. In *Stevenson*, a former employee brought a declaratory action against his former employer, seeking to void a covenant not to compete from his employment agreement. The former employer contended that the matter did not present an actual controversy between the parties and that litigation was not unavoidable. The court noted that while North Carolina's Uniform Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 to 1-267, did not expressly provide as much, the North Carolina Supreme Court has held that "courts have

jurisdiction to render declaratory judgments only when it is shown that an actual controversy exists between parties having adverse interest in the matter in dispute," and that for an actual controversy to exist, "it must appear that litigation is unavoidable." *Stevenson*, 384 S.E.2d at 292. The court then held that because the former employer had since filed a separate action asserting a violation of the covenant not to compete, an actual controversy existed and litigation was unavoidable.

A higher threshold still is apparent in *Rosenberg v. D. Kaltman & Co., Inc.*, 101 A.2d 94 (N.J. Super. Ct. Ch. Div. 1953), where the court was faced with an action by a former employee under New Jersey's Uniform Declaratory Judgment Act, N.J. Stat. Ann. §§ 2A:16-50 to 2A:16-62, seeking a determination that a second, less restrictive non-compete agreement superseded a first non-compete agreement with his former employer. The former employer argued that the former employee must seek new employment in violation of the non-compete agreement and wait to be sued before he could challenge the application of the first non-compete agreement. The court found, however, that a threatened lawsuit by the former employer and the harm this posed to the former employee's efforts to obtain new employment created an "actual and bona fide controversy affecting both the [former employee] in his future employment and the [former employer] in the conduct of its business." *Rosenberg*, 101 A.2d at 96.

Similarly, in *Schmidl v. Central Laundry & Supply Co., Inc.*, 12 N.Y.S.2d 817 (N.Y. Sup. Ct. 1939), the court found that a declaratory action by a former employee challenging the validity of a restrictive covenant was justiciable where a former employer threatened litigation against the former employee, which prevented him from obtaining new employment.

It is clear that a claim for declaratory relief will not be able to proceed for lack of an actual controversy where the former employee does not, at the very least, allege an intent to engage in conduct that implicates the restrictive covenant at issue. For example, in *Edwards v. Davis*, 286 S.E.2d 301 (Ga. Ct. App. 1981), the court dealt with an ophthalmologist who had entered a contract to transfer his practice to another ophthalmologist only to attempt to void the entire contract on the basis that a covenant not to compete contained therein was void. The court denied relief under Georgia's declaratory judgment statute on the basis that the first ophthalmologist had failed to demonstrate an "actual controversy." The court based its conclusion on the fact that the first ophthalmologist "asserted no specific right he wished to exercise and [the second ophthalmologist] has not contested the exercise of any right by [him]." *Id.* at 303.

Although there is no clear standard as to when a "case or controversy" or "actual controversy" exists when it comes to the validity of restrictive covenants, it is possible to glean some practical tips from the cases that have addressed this topic. First, particular attention must be paid to the express terms of the Uniform Declaratory Judgment Act enacted in your state and how it has been interpreted. As we have seen, what is deemed a sufficient controversy in one state may not be deemed sufficient in another. Second, a former employee or current employer should be prepared to demonstrate an intent to engage in conduct that could fall within the challenged

restrictive covenant. Finally, a former employee or current employer should consider investigating whether the former employer would seek to enforce the restrictive covenant or otherwise contest the intended conduct. Where the former employer has not manifested a position on the issue, whether by threatening suit or otherwise, the former employee or current employer could send a letter to the former employer, requesting guidance as to its position on the validity or scope of the restrictive covenant. The former employer's response would either establish a legitimate controversy and pave the way for a declaratory action or, even better, reveal that there is no controversy.

The question of how to deal with a potentially invalid or overbroad restrictive covenant is a challenging one for former employees and their current and prospective employers. Competing with a former employer or soliciting former customers could expose both the former employee and his or her current employer to liability. At the same time, forgoing legitimate business opportunities out of deference to an invalid or overbroad restrictive covenant brings harm as well. Thankfully, after taking steps to evaluate the existence of a "case or controversy" or "actual controversy," parties can obtain declaratory relief.

Keywords: litigation, employment and labor relations law, noncompetition agreement, non-solicitation agreement, Declaratory Judgment Act

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The NLRB and Social Media: A Work in Progress

By Anthony M. Rainone and Jason Watson – March 27, 2012

The National Labor Relations Board (NLRB) issued two Operations-Management Memos with the title of "Report of the Acting General Counsel Concerning Social Media Cases," one in August 2011 (OM 11-74) and another in January 2012 (OM 12-31). The reports summarize the NLRB's treatment of the cases involving social media policies or activities, which provides the labor and employment bar helpful preventive counseling guidance or guidance for dealing with unfair labor practice charges involving social media policies or activities.

Relevant Provisions of the NLRA

It is surprising that many private sector employers (and some lawyers) think that the National Labor Relations Act (NLRA) applies only to unionized workforces. That was never the case. In fact, the NLRA applies to any private sector employer in the United States whose activity in interstate commerce meets a minimum level. Therefore, we begin with a brief review of the provisions of the NLRA that are relevant to the social media cases.

Section 7 of the NLRA, in part, protects employees' right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with the employees' Section 7 rights. Finally, under Section 10, the NLRB is empowered to prevent any person from engaging in any unfair labor practice that affects interstate commerce, and that power includes awarding reinstatement and back pay to any affected employees. With those provisions in mind, we now turn to some of the decisions from the two reports, but you are strongly encouraged to read the full reports as they are filled with the most up-to-date insight as to the how the NLRB is treating social media and related issues.

Social Media Policies in General

In one category of cases, the NLRB passed on the validity of social media policies in general. In each case, the validity of the policy turned on the particular policy language. Some examples of policies the NLRB found to be unlawful are policies that prohibited

- making disparaging comments about the company through any media, including online blogs, other electronic media, or through the media;
- the use of social media to engage in unprofessional communications or unprofessional/inappropriate communications, because the policy could reasonably be interpreted to include protected statements relating to employee pay or treatment;

- the use by employees, on their own time, of micro-blogging features to talk about company business on their personal accounts because they could reasonably be interpreted to prohibit protected activities;

- employee use of the company name, address, or other information on their personal social media profiles; and

- identifying oneself as an employee unless discussing terms and conditions of employment in an appropriate manner.

The NLRB also rejected a policy requiring company approval for employees to identify themselves as employees on social networking sites or requiring the employees to state that their comments are their personal opinions and do not necessarily reflect the employer's opinions. Not surprisingly, the NLRB also found it is unlawful to discharge any employee pursuant to an overbroad social media policy prohibiting disclosure of private or confidential information of another employee because the policy did not provide guidance on what the employer considered confidential.

But the NLRB is not per se against social media policies that protect the legitimate interests of the employer. For example, the NLRB found it lawful to have a policy prohibiting the use of social media to post or display comments about coworkers, supervisors, or the employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the employer's workplace policies against discrimination and harassment. That policy could not reasonably be construed to apply to section 7 activity because it set forth a list of plainly egregious conduct—violations of the employer's workplace policies against discrimination and harassment.

It is also lawful to have a policy that requests that employees confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws; a policy prohibiting employees from using or disclosing confidential and/or proprietary information, including personal health information about customers or patients; and a policy prohibiting employees from discussing, in any form of social media, "embargoed information," such as launch and release dates and pending reorganizations. An employer may also lawfully preclude employees from pressuring coworkers to "connect" or communicate with them via social media where the policy clearly applies only to harassing conduct.

Employee Facebook Postings

In the next category of cases, the NLRB reviewed employer decisions based on employee postings and communications on Facebook and other social media. The cases involve the same factual scenario. That is, an employee posts comments on Facebook, the employer learns of the comments, and the employer then terminates or takes other adverse actions in response to the Facebook comments.

The general proposition that a protected activity needs to be concerted to be protected by section 7, or at least attempts to instigate concerted activity, still holds true. Thus, the NLRB found it unlawful for an employer to discharge an employee for a Facebook post that led to a Facebook discussion with coworkers about being transferred to a less lucrative position. The other unlawful discharge cases involved

- an employee who posted comments on Facebook, complaining about being reprimanded for her involvement in her fellow employees' work-related problems;
- two employees who made Facebook posts related to the promotion of an employee to co-manager and that included complaints about promotions, raises, mismanagement, and performance reviews (a case that also involved the disciplining of two other employees);
- an employee's Facebook comments regarding complaints about a manager's attitude and management style that was a continuation of a larger employee discussion about working conditions;
- several online postings and comments criticizing management and complaining of unfair labor practices;
- five employees who posted comments on Facebook relating to allegations of poor job performance previously expressed by one of their coworkers;
- Facebook postings provoked by a supervisor's unlawful refusal to provide an employee with a union representative during an investigatory interview and by his unlawful threat of discipline;
- an employee/salesperson's posting on his Facebook page, criticizing a sales event; and
- a Facebook discussion initiated by a former coworker about the employer's tax withholding practices.

Employers have not been entirely unsuccessful in defending unfair labor practice claims involving Facebook posts. For example, it was lawful to discharge an employee for Facebook comments to the effect that the employer did not appreciate its employees. This case turned on the fact that the incident that prompted the Facebook post was not a group concern. So, too, an employer acted lawfully when it discharged an employee for a Facebook post about a coworker who overcharged customers for drinks. The posts were motivated only by a concern that the service her employer was providing was deficient, and that is not a protected activity.

Another employer acted lawfully when it discharged an employee for Facebook comments that she hated people at work, they blamed everything on her, she had anger problems, and she wanted to be left alone. The employee's postings expressed her personal anger with coworkers and the employer, were made solely on her own behalf, and did not involve the sharing of common concerns. The postings also did not suggest that the employee sought to initiate or induce coworkers to engage in group action.

The reports describe eight other cases of differing fact patterns where the terminations or adverse actions were valid because the employees either were not engaged in protected activity or were not engaging in concerted activity.

The Most Important Lesson

The most important lesson from these reports is that drafting an overbroad social media policy, and then inserting a typical section 7 savings clause, on its own, will not protect an employer from an unfair labor practice charge arising out of the policy itself or adverse actions taken pursuant to such policies. Instead, in addition to the savings clause, employers need to draft clearly defined social media policies that contain concrete examples of the social media activity that an employer may lawfully prohibit so that no reasonable employee could construe the policy to interfere with section 7 activities. This requires a thorough understanding of your client's industry and its unique corporate culture, something that any long-term client relationship requires.

For example, the NLRB upheld a social media policy with rules that were reasonably construed to address only those communications that could implicate security regulations, privacy interests, and corporate information. In another case, the NLRB upheld a policy providing that when engaging in social networking activities for personal purposes, employees must indicate that their views were their own and did not reflect those of their employer, and employees must not refer to the employer by name or publish any promotional content. The reason this policy could not reasonably have been construed to interfere with section 7 rights was because the policy included a preface explaining that "special requirements apply to publishing promotional content online," and it defined such content as "designed to endorse, promote, sell, advertise, or otherwise support the Employer and its products and services," and then referred to FTC regulations.

To be able to effectively counsel clients, whether on the management or labor side, it is critical that attorneys understand how Facebook and other social media technology functions. That is because the NLRB's decisions show that it is *how* social media are used—not the fact that social media are used—that is determinative of whether there was an unfair labor practice. Fortunately, if you are in the dark on how the social media technologies work, your children and grandchildren should be able to show you how they work, and that is much cheaper than hiring a social media expert to explain it to you. As to employers, it should be standard practice to

consult with labor and employment counsel before basing any employment decisions, even in part, on a social media policy or an employee's social media activities.

Keywords: litigation, employment and labor relations law, social media, NLRA, Facebook

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NEWS & DEVELOPMENTS

Social Media and Employer Documentation: Risk Containment

The law often falls far behind technology and takes years to catch up. The tension between the sheer popularity and proliferation of social-media technologies and their use in the workplace, on one hand, and the proper documentation of ownership of such technologies, on the other, is both palpable and stark. Employers should stand up, take notice, and properly document these ownership issues to avoid lawsuits.

The common dispute that is surfacing these days centers around ownership of LinkedIn and Twitter accounts. When an employee departs—and the employee and the employer have a different view of who owns the social media accounts (as is often the case)—litigation ensues.

A recent case in the Eastern District of Pennsylvania, *Eagle v. Morgan*, 2011 WL 6739448 (E.D. Pa. Dec. 22, 2011), provides a glimpse of the types of claims that can surface when there is a dispute over ownership of such accounts. Linda Eagle and several colleagues formed Edcomm, Inc., a financial-services and training company. In 2008, she established a LinkedIn account that she used for both business and personal use. In 2010, Edcomm was sold with Eagle retaining an employment position with Edcomm. In 2011, she was terminated. While employed by Edcomm, Eagle had given her password to Edcomm employees for purposes of maintaining her LinkedIn account and updating it. When Eagle was terminated, the company took her laptop and cell phone, and thereafter locked her out of her LinkedIn account.

When Eagle accessed her account shortly after her termination, she discovered that her LinkedIn profile had been co-opted to basically display the name and photograph of the new CEO of Edcomm, with that new CEO bearing all of her background info, and enjoying her extensive "contacts" that she had built in LinkedIn over the years. Eagle filed suit in the EDPA alleging 11 separate causes of action, including a claim for damages under the Computer Fraud and Abuse Act, Lanham Act, conversion, and numerous other state-law theories. Edcomm filed and served counterclaims, making many of the same claims against Eagle. Among other things, the employer claimed it had the right to the Linkedin account and claimed that Eagle had violated the law by accessing the account.

Although the district court dismissed most of the employer's counterclaims on a motion, it did leave intact a common-law misappropriation claim against Eagle for her alleged misappropriation of the LinkedIn account and the connections she had gathered over the years, all of which, Edcomm claimed, had been assembled solely at its expense and exclusively for its own benefit.

The *Eagle* case is one of the first cases involving a claim of misappropriation of a social-media account, and points out the specific need for employers and employees to document exactly who owns that social-media account, and what will happen if employment is terminated. It is not uncommon to now see employers secure an agreement from the employee agreeing to "turn over" to the employer the "contacts" that are built up in a LinkedIn account prior to the employee's departure, and to forego use of those contacts after employment ends. That begs the question of whether such an agreement is enforceable to the extent the employer then seeks to restrict the employee's post-employment activities, such as solicitation of those contacts. For that, the law will resort to traditional tests of whether an employer has stated a protectable interest over the underlying contact lists and data.

Another unpublished decision that was released in 2010 came close to ruling on this latter issue, but stopped short. In *Sasqua Group, Inc. v. Courtney*, 2010 WL 3613855 (E.D.N.Y. 2010), a recruiting firm in the financial-services sector made a claim for injunctive relief stemming from a former recruiter's use of certain industry contact information in the recruiting industry. Magistrate Judge Kathleen Tomlinson undertook a rather exhaustive analysis of the proliferation of data in the recruiter industry, and also provided a good explanation for the unique role of LinkedIn in such business transactions. In the end, the court in *Sasqua* recognized the limited circumstances in which an employer can claim a protectable interest over industry data that is available in the public domain, and refused to give the employer an injunction.

Twitter and LinkedIn accounts are each different, and the degree to which an employer can claim "ownership" will change depending upon the context in which the technologies are used and developed. Employers would be well advised to take immediate action to incorporate clauses in their employee handbook and employment agreements to deal with these ownership issues, and minimize the risk of litigation later.

Keywords: litigation, employment and labor relations, Eagle v Morgan, Sasqua Group v Courtney

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Gender-Identity-Discrimination Prosecution Comes to Massachusetts

On November 23, 2011, Massachusetts became the 16th state to treat transgender citizens as a protected class. Governor Deval Patrick signed into law the Transgender Equal Rights Bill designed to protect transgender individuals from discrimination in employment, housing, education, and credit. The new law also increases protections for transgender individuals against hate-crime violence.

The amendment to the Massachusetts Fair Employment Practices Act (Mass. G.L. c. 151B) subjects employers to liability for discrimination in hiring, firing, compensation, or in any terms, conditions, or privileges of employment against an individual based on his or her "gender identity." The new law will take effect on July 1, 2012.

"Gender identity" is defined as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth. . . ." To be protected under the law, a persons' gender identity must be "sincerely held, as part of [the] person's core identity. . . ."

Currently Massachusetts residents are protected under state and federal law against discrimination in employment based on race, color, religious creed, national origin, sex, pregnancy, sexual orientation, genetic information, ancestry, age, disability, veteran status, military service, and gender identity.

Efforts to gain federal protection against discrimination on the basis of both sexual orientation and gender identity have been stalled for many years. The Employment Non-Discrimination Act (ENDA) has been introduced in some form in almost every Congress since 1994. Given the lack of action on the federal front, the individual states have been left to address the issue as they see fit.

Keywords: litigation, employment and labor relations, Transgender Equal Rights Bill, Massachusetts Transgender law

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