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Veritas™

A newsletter of Human Resources highlights, helpful hints, suggestions and reminders to assist employers in their daily interactions with employees.

Human Resources Potpourri

Employer Reminder:

Pointers for helping an employer avoid liability for a supervisor's acts of sexual harassment when an employee has suffered no tangible adverse employment action:

- Maintain written anti-harassment policies that have a zero tolerance for any form of discriminatory conduct, including sexual harassment;
- Regularly publish your anti-harassment policies for all employees, and verify their receipt of same;
- Maintain and encourage the use of an effective complaint procedure for any and all forms of discriminatory conduct;
- Train, train, train, your employees, supervisors and managers on how to recognize and eliminate any form of harassment and discrimination in the workplace; and
- Promptly and effectively respond to all complaints of any form of harassment in the workplace, including sexual, and take the appropriate remedial action when improper behavior has occurred.

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CHANGING COLORS AND THE EMPLOYEE'S USE OF EMAILS ON THE JOB

Since 2007, the rule of the workplace, when it came to an employee's use of the company email system was a simple one, employees had no statutory right to use the employer's email system for activities covered by Section 7 of the National Labor Relations Act (NLRA), so long as the rule was consistently applied and enforced. (Register Guard, 351 NLRB 1110 (2007)). This rule made employers happy and left unions feeling blue. Fast forward to the "new" Labor Board and you have a ruling with the opposite effect. The employees and unions are happy but the employer is now feeling blue. So what's this all about? In *Purple Communications, Inc.,* 361 NLRB 126 (2014), the NLRB established a new rule: employees may use their employer's email systems during non-work time to engage in communications protected under Section 7 of the NLRA, such as communications regarding working conditions, union representation, and collective bargaining. The Board's logic, the company's rights in its email system were outweighed by its employees" "core Section 7 right to communicate in the workplace about their terms and conditions of employment". While this decision will likely be appealed and tested in the courts, until that happens, it is the law of the workplace.

Main points of the decision:

- An employer may deny company email access to employees for all purposes
- An employer who grants access to the company email system cannot prohibit employees from using the email system to communicate with other employees about workplace issues during non-working time
- An employer may prohibit employee solicitation of another employee during working time of either employee
- Under "special circumstances" only an employer may justify non-work time email use in order to maintain production or discipline (rare occurrences)
- An employer may review employee emails on its system for "legitimate business reasons" only, otherwise, it risks a claim of surveillance
- Use of company email system for solicitations by non-employees, the decision was silent, but the risk for such use exists

What should an employer do?

- Review your current email policy to make sure it is not overly broad
- Update your solicitation rules to include use of the company's email system
- Inform employees that there is no expectation of privacy in the use of the company email system and the procedures that will be followed by the company in reviewing email content
- Limit use of the company email system to employees only, decline the use to outsiders or unrelated to job duties

When union/NLRB issues arise in your workplace, a telephone call to an experienced Labor lawyer is recommended.

QUOTES OF THE MONTH

The only reason for time is so that everything doesn't happen at once - Albert Einstein

All great changes are preceded by chaos – Deepak Chopra

The two most important days of your life are "the day you are born and the day you find out why" – Mark Twain

Anger is our emotional response to something. A humble response to anger puts out fire, but an angry response fuels it – Aloysius Mugisa

Whether you think you can, or can't, you are usually right – Henry Ford

Vision is the art of seeing the invisible – Jonathon Swift

Things I Have Learned

That everyone wants to live on top of the mountain, but all the happiness and growth occurs while you're climbing it

That you shouldn't judge people too quickly. Sometimes they have a good reason for the way they act

That you don't really know someone until you've been to a casino together

That happiness is not how much you have but your capacity to enjoy what you have

That the copy machine can tell when I'm in a hurry

That sometimes all a person needs is a hand to hold and a heart to understand

HR Potpourri

It's just a hat!

Wearing baseball caps in the workplace is nothing out of the ordinary, or is it? The Court of Appeals for the District of Columbia recently issued an opinion on a NLRB finding that an employer's rule for wearing certain types of baseball caps at work was "overbroad" because, yes, you guessed it, the rule precluded employees from engaging in the protected activity of wearing caps with a union insignia at work. (*World Color (USA) Corp. v. NLRB*).

The discriminatory hat policy at issue stated "Baseball caps are prohibited except for Quad/ Graphics baseball caps worn with the bill facing forward". The Circuit Court, which remanded (sent back) the case to the NLRB for reconsideration, noted that while the hat policy restricted the type of hat to be worn, it did not say anything about whether a union insignia could be attached to a permissible hat.

The Board continues to take the simple and turn it into something difficult. When will this craziness end?

Veritas is a trademark publication of Robert F. Conte, Attorney at Law, Mishawaka, Indiana, and is intended for general information purposes only. It is not to be considered legal advice. Always consult with experienced legal counsel to determine how applicable laws apply to specific facts and situations.

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MAKING THE CASE FOR NON-COMPETE AGREEMENTS

At the outset it should be noted that courts do not like noncompetition restrictions in agreements that limit a worker's ability to earn a living and to pursue a career that he or she desires. The logic, by restricting employee mobility, non-compete agreements inhibit innovation. In limiting reinforcement of these agreements, the courts analyze whether the employer has a "protectable interest" at risk which requires protection, thereby limiting the employment opportunities of its former employee(s). Things such as customer lists, relationships, confidential or trade secret information may all fall under the "protectable interest" umbrella. If there is no such interest, a court is not likely to enforce the agreement.

Unfortunately, there is no all-encompassing language that covers every fact situation. In fact, in the recent Jimmy John's controversy, it was determined that a non-compete agreement that covered all employees regardless of whether they possessed confidential information or skills, is likely to fail and it did. When an employer attempts to overreach, as Jimmy John's did, the courts are not happy and employer enforcement fails. With these concerns in mind, should employers use non-compete agreements? Yes, and let's look at some of the reasons why.

Non-compete agreements tailored to protect an employer's legitimate business interests can (and should) be allowed to exist. Why, because they promote and encourage innovation by protecting a company's ideas, investments, goodwill and other legitimate business interests.

An enforceable non-compete agreement, in addition to protecting an employer's legitimate business interests should provide reasonable limitations for competition by narrowly tailoring its duration, geography and scope of restrictions. Simply stated, a non-compete agreement that is unreasonable in any of these areas will not be enforced. However, a reasonably tailored agreement that does not completely restrain an employee's ability to earn a livelihood rather than reasonably restrict work options, will work. The two concepts can co-exist.

If an employee can leave his employment and directly compete with his former employer without any restrictions in place, there is nothing to protect the business or its remaining employees from significant losses. Without adequate non-compete protections in place, a company could lose business or even go out of business. Other employees could also lose their jobs which in turn would have a negative impact on the economy.

Non-compete agreements, when properly drafted, can protect confidential and proprietary business information, trade secrets, and customer relationships in a variety of industries. In fact, reasonably tailored agreements, along with other types of restrictive covenants, can protect a company's ideas, investments, goodwill and other legitimate business concerns while at the same time not prevent an individual from earning a living. Compliance with state laws, which generally regulate this process, with the interests of both the employer and employee in mind, will go a long way toward protecting and advancing the objectives of all parties.

This memo is for general guidance only and is not intended as legal advice. When questions regarding non-compete agreements arise in your workplace, a telephone call to an experienced employment lawyer is recommended.

OSHA – INJURY POSTING UPDATE

Are you in compliance?

OSHA Form 300A, the summary report of the total number of job-related injuries and illnesses that occurred in the workplace during 2014, **must** be posted in a conspicuous location between February 1 and April 30, 2015. The posted summary report should include the total number of job-related injuries and illnesses in 2014 that were recorded in the OSHA Log of Work-Related Injuries and Illnesses (OSHA Form 300).

OSHA requires that the posted form be signed and certified by a company executive. Employers with ten or less employees and employers in certain industries are usually exempt from this injury and illness record keeping requirement. A list of exempt industries can be found on the OSHA website (www.OSHA.gov). (*See Veritas™* Alert, April 2014).

All covered employers must report work-related employee fatalities to OSHA within eight hours. Effective January 1, 2015, all work-related inpatient hospitalizations, amputations, or losses an eye must be reported (to OSHA) within 24 hours. (*See Veritas™* Alert, September 2014).