

THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER

HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES

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A "REASONABLE RESPONSE" TO NO-MATCH LETTERS

George is a superb worker. Only problem, you received a letter from the Social Security Administration (SSA) advising that George's name and social security number do not match. The letter says don't fire George based solely on the letter, and George has never told you he is in the U.S. illegally. But can the letter be used against you by the Department of Homeland Security (DHS) if George is, in fact, an illegal alien? "Yes," unless you take reasonable steps in response.

What is a reasonable response to a no-match letter? On August 15, 2007, DHS adopted final regulations giving employers an answer. The steps are similar to those proposed by DHS in June 2006 only slightly more employer-friendly. They are:

1) Within 30 days of receiving the no-match letter, check your own records to make sure there has been no clerical error; correct any clerical errors; report the corrected information to the appropriate agency (SSA or DHS) and verify with the agency that its records now match. Make a record of the

manner, date, and time of the verification and retain this with the I-9 Form.

- 2) If there is no clerical error, within the same 30-day period you should request the employee to verify that the employer's records are correct. If the records are in error, make the correction, inform the agency and verify with the agency that its records now match. Record and retain.
- 3) If your records are correct, according to the employee, ask the employee to pursue the matter personally with the agency.
- 4) Within 90 days after receiving the no-match letter, check with the agency to verify that the records now match. If the no-match still exists after 90 days, the Employer should require the employee to complete a new I-9 form within another 3 days. Use the same procedure as for a new hire, only the documents produced by the employee must not use the same social security number as the number subject to the no-match letter. The document confirming identity must have a photo of the employee.

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- 5) If the employee can not complete a new I-9 form with supporting documents by the end of day 93, the employer must either fire the employee or risk DHS finding you have knowledge of the employee's illegal status based on these circumstances.

“Knowledge” of illegal status can be actual or constructive. “Constructive knowledge” exists when illegal status may be “reasonably inferred” from the facts or circumstances. The above steps protect you from liability based on the no-match letter. However, these steps do not provide immunity from liability if you have actual knowledge of illegal status (George admits that he is not authorized to work in the U.S.). *NOTE: Implementation of this final rule has been delayed by a federal court order until a hearing on October 1, 2007 to determine DHS's and SSA's authority.*

“TOO OLD, TOO BAD...THAT’S OUR POLICY”

. . . explained Ruth Less, the CEO of Vandalay Publishing when she terminated one of her long-time senior editors, Dee Minished. “You know our policy,” continued Ruth. “When you hit 68, you’re out of here. And when I was at your birthday party the other day, I counted 68 candles on your cake.” Dee started to protest, but Ruth countered, “I know we all think you’re doing a good job still, but studies confirm there is a drastic drop in reading comprehension for individuals above the age of 68. The policy ensures that employees leave on a high note, before they become incompetent.”

Needless to say, Dee was a tad disappointed by the news—particularly, because she had not saved enough for a retirement villa in Italy, as she had always dreamed. She blamed her predicament on Vandalay’s lack of any retirement benefits and the

fact that it had never promoted her to VP, which would have given her input into policy decisions and garnered her a higher salary. So, it was not surprising that one night, after sipping a few glasses of Chianti while listening to Pavarotti, Dee got the idea to sue Vandalay for age discrimination under the Age Discrimination in Employment Act.

Under the ADEA, it is generally unlawful to make any adverse employment decision against individuals 40 and older based on age. In order to maintain a claim of age discrimination, an employee must show that he or she 1) is at least 40; 2) met the employer’s legitimate job performance expectations; 3) experienced an adverse employment action; and that 4) the employer had a continuing need for the services.

Unfortunately for Ruth and Vandalay, Dee meets all of the initial criteria to file an ADEA claim. She’s over 40, a good performer, and was terminated although the services she performed are still needed. There is a narrow exception to the ADEA’s prohibition against age discrimination for certain high-level employees. That exception states that employers may mandate retirement if: 1) the employee is 65 or older; 2) the employee has been a bona fide executive or higher policymaker for the last two years; and 3) the employee will be entitled to an immediate nonforfeitable annual retirement benefit amounting to at least \$44,000.

To be considered a “bona fide executive,” the employee must: 1) have a salary that exceeds \$455 a week; 2) have the primary duty of management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; 3) customarily and regularly direct the work of two or more other employees; 4) have the authority to hire or fire other employees or whose suggestions

and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight; and 5) must be among the very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business.

A “higher policymaker” is an “individual who has little or no line authority but whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend its implementation.” In sum, someone whose job responsibilities are mostly intellectual and advisory.

Dee does not fall within the ADEA exception allowing mandatory retirement at age 65. She may be an “executive” for FLSA-overtime purposes, but a “bona fide executive” under ADEA must be “among the very few top level employees,” like the President, VP, CEO, or CFO. Dee is not this high up; and she does not have policy making authority. Further, Vandalay cannot meet the third requirement for this ADEA exception because, when fired, Dee was not entitled to an immediate, nonforfeitable annual retirement benefit amounting to at least \$44,000. In sum, Ruth and Vandalay are in trouble!

Practice Tip: The ADEA does not permit mandatory retirement policies based on age, unless all requirements of the exception are met, or in narrow instances where age limitations are “reasonably necessary for the operation of the employer’s business,” such as jobs that have a clear impact on public safety like airline pilots, firefighters, police officers, and bus drivers.

THE REAL RISK OF INADEQUATE TIME RECORDS

When an employment relationship turns sour, the employee may seek some way to sue the employer. Improper payment of overtime under the Fair Labor Standards Act (FLSA) is an increasingly popular claim by employees against employers. Attorneys are willing to take employee FLSA claims because the employee can recover not only the unpaid wages and a 100% penalty, but the costs and attorneys fees incurred in the litigation. The incentive to sue for overtime is particularly high when the employer has been lax in maintaining adequate time records of the hours nonexempt employees work each day and each work week. Not only are time records required, they are the employer’s shield against liability for unscrupulous exaggerations of overtime.

In a recent case from New York, the Plaintiff, Siew Riviera, alleged that she regularly worked more than 40 hours a week during the entire period of her employment without receiving compensation for her overtime hours. A nonexempt employee, she received \$500 per week in pay.

The employer defended the FLSA claim by arguing that Riviera provided no evidence that she worked overtime, other than her own generalized statement. She failed to mention specific dates and times on which she worked overtime. Further, the employer produced evidence that Riviera was not credible because she lied to federal agencies in the past by filing false income tax returns and failing to report the full amount of her income during a previous bankruptcy proceeding. Riviera responded that because her employer failed to keep accurate time records, her general recollection of overtime hours worked was sufficient evidence for a jury to decide the issue. She also argued that although she

admitted lying to federal agencies in the past, her admission was insufficient to find her testimony not credible as a matter of law.

The court agreed with Riviera on both issues and refused to dismiss her case. The employer admitted that it did not keep daily time records of hours worked. It presented Riviera's W-2s, and some letters prepared during Riviera's employment. These records were insufficient because they did not show the hours worked by Riviera. One of the owners testified that he threw away the sheets of paper that the supervisors gave him each week containing the employees' hours.

Under the FLSA, an employee has the burden of proving that she performed work for which she was not properly compensated. When the employer's records are inaccurate or inadequate, the employee may meet this burden by relying solely on her recollection. Riviera's testimony that her normal hours were 9:00 a.m. to 5:00 p.m., Monday to Friday, and that at least three times per week she worked until 7:30 p.m., worked three Saturdays a month for six hours, and one Sunday a month for six hours, without compensation for her overtime work was sufficient to support her claim. The company contended that if Riviera worked late or on a weekend it was not "overtime" because she was just making up lost hours. But it had no supporting time sheets. *Rivera v. Ndola Pharmacy Corp.*, 497 F.Supp.2d 381 (E.D.N.Y., 2007).

Lesson: The FLSA requires employers to maintain written records of how many hours nonexempt employees work each day and each week. The records must be retained for at least three years (we recommend seven to ten). Compliance is crucial.

NEW COLORADO CASE ON NONCOMPETE AGREEMENTS

PCI is an investment bank that provides brokerage assistance to financial institutions and investors who buy, sell, and manage certain servicing rights associated with large mortgages. PCI initially employed Mr. Dowell as a senior portfolio analyst and required him to sign an agreement, under which he was prohibited, in the event he left PCI, from competing with PCI or soliciting its customers or employees for one year.

Over the next five years, Dowell received several promotions, and when he resigned to join one of PCI's competitors, Dowell managed the analytics division. According to PCI, he then actively solicited PCI's clientele, assisted his new company in competing with PCI for brokerage work, and solicited two key employees to join his new company.

PCI instituted a law suit, seeking injunctive relief and damages for past violations of the noncompetition and nonsolicitation provisions in Dowell's employment agreement. The Colorado Court of Appeals recently affirmed the trial court's determination that the noncompete provision was void under Colorado law, though it found that the nonsolicitation of employees provision was enforceable. CRS §8-2-113(2)(d) declares that noncompete agreements with employees are void, except if the employee is an executive, manager, officer, or professional staff to executive or management personnel. There are other exceptions allowing noncompete agreements to protect trade secrets, as part of the sale of a business, or to recoup training cost when an employee leaves within two years of being hired. But the executive, management, professional staff exception was the only one considered in this case.

The court explained that Dowell's job position when he signed the agreement was controlling, not the position he held when he left the company. At the time he left, he was clearly management and could have signed an enforceable noncompete agreement. But at the time he actually signed the agreement, he was only a "senior portfolio analyst," which did not qualify as an executive, manager, officer or professional staff to an executive or manager. An agreement that is void at the time it is signed does not become legal when the employee's position changes. The company should have had Dowell sign a new noncompete when he became head of the division.

Although the court agreed that Dowell was "professional staff" when he signed the agreement, it denied that he was professional staff "to an executive or manager." True, he reported to managers and executives, but most of them doubled as salespersons and eighty to ninety percent of Dowell's work was performed in support of the sales staff, rather than in support of executive or management functions. The court reasoned that the purpose of this exception to the prohibition against noncompete agreements is "to protect employers from the disruption of operations which occur upon the loss of a key executive or member of his staff." The statute assures employers that "the very heart of their enterprise-business plans and high-level strategies-will not be subject to accidental (or intentional) disclosure to a competitor."

The nonsolicitation agreement was deemed enforceable as applied to other employees. The court rejected Dowell's assertion that, as a matter of law, an agreement not to solicit a former employer's employees cannot be enforced when an accompanying noncompetition provision is determined to be invalid. Where a nonsolicitation provision is limited to prohibiting only initiating

contacts or "active" solicitation of the employer's employees, it is enforceable, despite the invalidity of an accompanying noncompetition provision.

The prohibition against soliciting customers, however, was void because it was a form of noncompete agreement. Noncompete agreements restrain trade and affect the employee's right to make a living. In order to make a living, the former employee needs to be free to solicit (actively or passively) former customers, as long as he or she does not use the employer's trade secrets to do so. In contrast, an agreement not to solicit employees would not impair the former employee's ability to make a living. Because PCI conceded that the case did not present any issues relating to trade secrets, the court perceived no legal basis upon which to distinguish the unenforceable noncompetition agreement from the agreement not to solicit PCI's customers.

HINT: If you have a noncompete agreement with an employee, make sure the employee signs a new agreement as a condition of promotion to any higher level position. Also, prohibit only active solicitation of other employees. Finally, identify what are the company's trade secrets (a customer list can be a trade secret) and prohibit the employee from using these trade secrets to compete with the company at any time during employment and after termination. *Phoenix Capital, Inc. v. Dowell*,--- P.3d ----, 2007 WL 2128330 (Colo.App.).

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Q & A

Q. If an employee is on FMLA leave during a paid holiday, must we give the employee holiday pay?

A. You must treat the employee the same as you would treat employees on leave for other reasons. For example, if the employee is using paid time off simultaneously with FMLA and it is your policy to give holiday pay during a paid leave, then you must give the FMLA employee holiday pay. But if the employee's FMLA is unpaid and you do not give holiday pay during unpaid leaves, you need not pay the employee on FMLA.

Q. Pregnancy is rampant among our employees. Should the company adopt a maternity leave policy so that we treat all pregnant employees the same regarding time off?

A. It is good to have a policy that tells you and the employees what leave benefits are available for pregnancy. However, this policy should not be a separate "maternity leave" policy because if the maternity leave is more generous than for other temporary disabilities, the policy may generate sex discrimination claims from male employees. And if it is less generous, it may create pregnancy discrimination claims from female employees. Adopt, instead, a temporary disability leave policy that treats pregnancy the same as any other temporary disability. If you allow mothers leave after delivery for parenting purposes, this period of parental leave should apply equally to male employees who have a new born. Of course, if your company has 50 or more

employees and is covered by the Family Medical Leave Act, the Act dictates the minimum leave you must allow for any "serious health condition," including pregnancy, and for mother and father parenting after the birth of a child (up to 12 weeks per year). A complying FMLA policy is what you need.

Q. John has post-traumatic-stress disorder from his experience in Iraq. On two occasions it has caused him to hit another employee who accidentally startled John. John says his PTSD is getting worse and that he may strike others if they startle him. Since we know John has this disability, must we continue to employ him even though he is violating our "workplace violence" policy?

A. Employers do not have to tolerate violence in the workplace, even if the violent acts are the product of a disability. Additionally, an employee who is a "direct threat" to others in the workplace is not a "qualified" individual protected under the Americans with Disabilities Act. But the specific facts must be analyzed. For instance, if you have tolerated violent acts (physical horseplay, hitting, pushing) by employees, terminating John could be disability discrimination. Whether his condition is a direct threat depends on the severity and likelihood of potential harm to others. *Jarvis v. Potter*, 2007 WL 2452686 (10th Cir., 2007).

Q. What is the minimum wage in Colorado?

A. Currently, \$6.85 per hour (subject to change each January).