



FIRST CIRCUIT UPDATE: OCTOBER 2005

This bulletin provides an update of recent employment law decisions for employers in Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico, which are all served by the United States Court of Appeals for the First Circuit. Please contact us if you have any questions about these decisions or about their effects on your organization.

Think Twice Before Relying On E-mail To Distribute Employment Policies

As one employer learned in a recent case, although e-mail can be a useful tool it is not necessarily the best means of communicating important policies to employees. In *Campbell v. General Dynamics Government Systems Corp.*, 407 F.3d 546 (1st Cir. 2005), General Dynamics sent a mass e-mail to employees announcing a new policy mandating arbitration of all workplace discrimination disputes and providing an electronic link to the policy. When employee Roderick Campbell later sought to bring a lawsuit against General Dynamics under the Americans with Disabilities Act, General Dynamics argued that Campbell should be compelled to arbitrate the claim, instead of pursuing his remedies in court. The court held that General Dynamics could not compel Campbell to arbitrate his claims, because the e-mail was not sufficient notice of the policy.

For an employer to compel arbitration, it must show the existence of a contract between the employer and employee in which the employee agrees to arbitration. This need not be a written contract, and an employer may establish an agreement by showing a communication to the employee which provided some minimal level of notice that continued employment would amount to a waiver of the right to pursue discrimination claims in court.

In this case, the e-mail did not provide even the minimal notice required to establish an arbitration agreement, because the company had no history of communicating significant personnel matters to employees via e-mail, the e-mail required no affirmative response by employees, and the text of the e-mail did not explicitly state that the new policy contained an arbitration provision or that the new provision was mandatory.

The court suggested, however, that an employer may sometimes be able to change the terms and conditions of employment via e-mail. The court suggested that if an employer wishes to change the terms of employment by e-mail, it should consider requiring a reply to the e-mail and introducing more specific terms indicating that the e-mail is contractual in nature (such as,

“the mutual obligations set forth in the Policy shall constitute a contract between the Company and the Employee”).

Employers who wish to change the conditions of employment are usually safe in using a traditional, written communication. This case suggests, however, that the electronic age may introduce more options. Although the law in this area is not well-developed, employers who wish to use e-mail to accomplish more traditional objectives such as distributing employment policies should adhere as closely as possible to traditional ideals of acknowledgement and notice. Even with e-mail, employers can include contractual language in the text of the document and can obtain an employee’s “electronic signature” by requiring some type of electronic reply.

Pharmacists Not Entitled to Overtime

In a case of first impression, the First Circuit ruled that pharmacists were professionals under the Fair Labor Standards Act and, therefore, not eligible for overtime pay. In reaching this holding, the court reasoned that the positions required the “consistent exercise of discretion and judgment,” in that the pharmacists used specialized knowledge to make decisions such as how to follow up with a physician over a questionable prescription, when a drug should not be dispensed because of a potential danger to the patient, and how to oversee the work of technicians. *De Jesus-Rentas v. Baxter Pharmacy Servs. Corp.*, 400 F.3d 7 (1st Cir. 2005).

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