EMPLOYMENT LAW BULLETIN

The Newsletter of

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TO OUR CLIENTS AND FRIENDS:

The practice of requiring employees to sign forms releasing employers of liability in exchange for severance pay is receiving increased scrutiny by the courts. If the individual is in the protected age group and the employer seeks a release of age discrimination claims, the employer must comply with the Older Worker Benefit Protection Act. This Act requires that the employee receive 21 days to decide whether to sign the release and 7 days to change his/her mind if the employee executes the release. If the release is offered to a group of employees, the employee must receive 45 days to decide and pertinent information regarding others who are retained and also terminated. Under both situations, the employee must be advised in writing to consult with an attorney.

The case of Fuentes v. United Parcel Service, Inc. (11th Cir. June 20, 1996) concerns a release of claims of race and national origin discrimination, not age discrimination. Thus, the Older Worker Benefit Protection Act did not apply. Two employees were offered releases in exchange for severance pay. They were given only 24 hours to accept the offer, and did so. They later filed suit. The district court judge who heard the case granted summary judgment for UPS, concluding that the employees had signed statements releasing any race or national origin claims against UPS. The Eleventh Circuit Court of Appeals remanded the case to the district court, for the district court to analyze whether the releases were signed voluntarily and knowingly. The Eleventh Circuit was particularly concerned about the 24-hour period for the employees to make up their minds. According to the Court, "If in fact the plaintiffs were only given 24 hours to decide whether to sign the releases, that was insufficient time. It is undisputed that neither plaintiff consulted with an attorney before signing the releases, and a 24-hour time limitation would have substantially impeded their ability to do so. Indeed, when pressed at oral argument, UPS's attorney could offer no justification for such a short time period."

In another case involving a release, the United States Supreme Court ruled that ERISA does not prevent an employer from requiring a signed release in exchange for employees accepting incentives for early retirement. Lockheed Corp. v. Spink (June 10, 1996). According to the Court, "If an employer can avoid litigation that might result from laying off an employee by enticing him to retire early...it stands to reason that the employer can also protect itself from suits arising out of that retirement by asking the employee to release any employment-related claims he may have." The Court concluded that ERISA does not prevent an employer from requiring a release of claims against the employer in exchange for an employee receiving early retirement incentives.

Courts scrutinize releases, such as those in these cases, because they want to be sure that employees are fully and fairly informed and understand the rights they are releasing. We suggest that employers should follow the guidelines of the Older Worker Benefit Protection Act as a model for releases, even if the claims released do not include age discrimination.

UNION ELECTION NUMBERS DOWN

According to an analysis recently released by the Bureau of National Affairs, the number of NLRB-conducted elections in 1995 was 2,716, down from 3,052 during 1994. The number of representation elections in 1995 was 1,309, down from 1,501 in 1994. Unions won 48.2% of all elections in 1995, down from 49.2% in 1994, but still a very high win rate to us. In decertifications in 1995, unions won 29.7% of the total 458 elections, down from 30.9% out of 488 elections in 1994.

These statistics also show the trend that the smaller the unit, the greater the union chance of victory. For example, in bargaining units in 1995 with 50 or fewer employees, unions won 53.5% of those elections. For bargaining units of 50 to 99 employees, unions won 44.3%. In units of 100 to 499 employees, unions won 33.3% of all elections and in units of 500 or more employees, unions won only 22.2%. Ironically, the results are opposite in decertification elections; the larger the unit, the greater the union chance of victory. For example, unions won 66.7% of all decertification elections in units of more than 500 employees; 48.8% of all elections in units of between 100 and 499 employees, 50% of all elections in units between 50 and 99 employees and 22.6% of all elections in units of 49 or fewer employees.

Results by industry include unions winning 85.7% of all elections in the mining industry (7 elections); 58.8% of all elections in services other than health care (352 elections); 56.3% of all elections in health care (135 elections); 55.1% of all elections in construction (98 elections); 52.4% of all elections in finance and insurance industries (21 elections); and 51.7% of all elections in wholesale industries (87 elections). Unions took heavy losses in transportation and utilities (45.2% wins out of 228 elections); manufacturing (45% out of 320 elections); and retail (38.8% out of 98 elections).

The 1996 results will mark the first full year under John Sweeney's leadership of the AFL-CIO. Because he has so aggressively pushed union organizing, we look forward to reviewing with you the union results for this year as soon as they become available.

NATIONAL FOOTBALL LEAGUE SCORES ONE FOR EMPLOYERS IN NEGOTIATIONS, RULES UNITED STATES SUPREME COURT

The case of Brown v. Pro Football, Inc. (June 20, 1996) involves a question of the intersection between labor and anti-trust law. The anti-trust implications arose because a group of competitors, the National Football League, agreed during labor negotiations to implement a proposal to create "developmental squads" of players during the 1989 season and to pay those players a fixed salary of $1,000.00 each per week. These salaries were lower than those paid to employees who were on what was referred to as "injured reserve" during 1988. The owners' developmental squad proposal was implemented when they and Professional Football Players Union reached an impasse during labor negotiations. As an outcome of the owners implementing this proposal, the players sued, claiming a violation of the Sherman Anti-Trust Act. A jury granted the players $10 million in damages due to lost salary, which was tripled to $30 million as required under the Act.

The United States Supreme Court upheld the lower court ruling that set aside the jury's award. According to the Supreme Court, "When there is multi-employer bargaining, professional football players enjoy no greater protection from collective employer action than employers in other industries." The Court added that, "We cannot find a satisfactory basis for distinguishing football players from other organized workers. . .it would be odd to fashion an anti-trust exemption that gave additional advantages to professional football players that transport workers, coal miners, or meat packers would not enjoy. We therefore conclude that all must abide by the same legal rules."

One method unions have used to challenge multi-employer bargaining efforts is to sue those employers under the anti-trust laws. This decision clearly states that the bargaining process under the National Labor Relations Act supersedes the anti-trust laws. Therefore, employers are immune from anti-trust liability based upon their actions within the collective bargaining process.

EMPLOYEE WHO DECLINES REASONABLE ACCOMMODATION LOSES ADA PROTECTION

An employee claimed that her migraine headaches qualified as a disability under the ADA, and resulted in her making errors on the job. Even assuming that migraine headaches qualify as a disability, the court concluded that the employee failed to accept the employer's reasonable accommodation and, therefore, was not protected under the ADA. Hankins v. The Gap, Inc. (6th Cir. June 5, 1996).

Hankins worked as a merchandise handler in the warehouse. She was responsible for selecting items that would be shipped to various Gap stores. She had a high error rate, sending wrong items to wrong stores. She claimed that it was due to her migraine headaches, and that the company failed to accommodate her by refusing to transfer her to areas where she felt she would have fewer errors.

The Gap was generous with Hankins, providing her with an extensive amount of leave based upon her doctor's recommendations. The Gap claimed that the area Hankins wanted to work in would have been worse for her headaches, and that Hankins could have used other forms of accommodation offered by The Gap, such as paid leave, voluntary time off, and treatment with rest time at a company medical center. Hankins argued that The Gap did not make her aware of those specific accommodations, but the court said that, "An employer has no duty to reiterate self-evident options to an employee when she is clearly already aware of them." The court characterized Hankins' request for a transfer as "dubious accommodations," and concluded that her failure to use available accommodations "rendered [her] incapable of maintaining accuracy, an essential function of the merchandise handler's job."

— HEALTH CARE SUPPLEMENT —

Health care employees agree that wage increases should relate to patient satisfaction

On June 7, 1996, 13,000 employees represented by the Service Employees International agreed to a contract with Kaiser Permanente in California that connects wage increases to patient satisfaction. According to the terms of the contract, employees are eligible for a 2.5% lump-sum payment depending upon the company's service ratings by the members of its health plan. Kaiser Permanente is one of the country's largest HMOs. The company also agreed to provide enhanced lay-off benefits and extend medical insurance coverage to domestic partners.

In other recent negotiations involving health care employers, 5,000 employees at Group Health Cooperative in Seattle agreed to a 1% pay cut, then a 2-year freeze on pay. For the first time, it also includes employee contributions to insurance costs. In exchange for these cuts, the company agreed to limit lay offs to 10% of the employees over a 2-year period. In another contract involving Kaiser Permanente, 10,000 employees in Southern California agreed to a five and a half year contract that includes an eighteen-month wage freeze. The company insisted that it needed to cut wages in order to remain competitive with other HMOs.

— PUBLIC SECTOR SUPPLEMENT —

City not responsible for falsely-credentialed EAP counselor

The City of Philadelphia established an employee assistance program that provided for eight in-house counselors who were available to employees. One counselor , who turned out to have a doctor of theology, represented to an employee that he was a medical doctor. Based upon the counselor's "medical opinion" to the employee, the employee

voluntarily checked herself into a psychiatric hospital. She was referred to the EAP by her supervisor, after she told her supervisor that she feared for her safety, was unable to perform her duties, started drinking heavily, and sought to leave the department. The employee sued the City and the counselor, claiming fraudulent misrepresentation and intentional infliction of emotional distress. In holding that the City was not liable for the employee's claims, the court ruled that, "Absent some evidence that a person with policy-making authority either authorized or acquiesced in the alleged practice, no reasonable juror could find that there was a city policy or practice that caused Young's injuries. The city, therefore, may not be held liable on this theory." The court permitted Young to pursue her case against the counselor.

DID YOU KNOW. . .

. . .that an employer was ordered to disband an employee committee that discussed pay, policy, and benefits? Polaroid Corp. and Charlascivally, NLRB Case No. 1-CA-29966 (June 14, 1996). The administrative law judge ordered Polaroid to disband the committee. The committee was created to establish a partnership with the company on pay and benefits issues, but the company retained the final decision. The committee served as a "filter" for employee ideas. Committee members joined voluntarily and the committee process was administrated by the Human Resources Director. The problem for the company, however, was that it expected the committee to reflect the views of employees. According to the court, "By constant communication with the employee population, and by indicating to [committee] members that management expected them to hear and report the views of non-member employees, the company endeavored to assure itself that the views and attitudes expressed by [committee] members actually represented or reflected those of the employee population." Therefore, the judge concluded that the committee constituted impermissible employer domination of an employee organization.

. . .that on June 5, 1996, representative Harris Fawell (R - Il.) introduced a bill that would require union members to give unions written authorization before unions could use dues for political, legislative, or charitable purposes? The bill, called the "Worker Right to Know Act," would require unions to obtain written permission on an annual basis from each member to spend money for reasons that are legislative, political, or charitable. An independent auditor would then determine the amount of money the union was authorized to spend on those matters. Speaker of the House Newt Gingrich stated that this bill arose from the AFL-CIO's pledge in March to raise $35 million to spend for Democratic candidates in the 1996 elections. "Remember that 40% of the union members who voted in 1994 voted Republican," Gingrich said. Therefore, according to Gingrich, unions should give $14 million out of the $35 million to Republican candidates.

. . .that in the case of Shaw v. Titan Corp. (D.Ct. Va., June 7, 1996), a 62-year old male was awarded $415,000.00 where he claimed that he was added to a RIF in order to make the RIF statistics "look good" to avoid race and gender discrimination claims? The plaintiff was a senior analyst who received a series of bonuses, raises, and complementary communications from clients and supervisors. A work force reduction included a 10 to 1 ratio of women and minorities. Shaw was actually told that he was added to the RIF in order to improve those statistics. The jury awarded $65,000.00 in compensatory damages and $400,000.00 in punitive damages, which was reduced to $350,000.00 in order to comply with Virginia's cap on punitive damages.

. . .that the Industrial Union Department of the AFL-CIO is possibly disbanding? The IUD is unnecessary, according to the Auto Workers, which suspended their per-capita payments from 700,000 UAW members as of June 1, 1996. According to the UAW, the new AFL-CIO focus on union organizing makes the IUD unnecessary and redundant. The IUD was part of the Congress of Industrial Organizations, which merged with the American Federation of Labor in 1955. Approximately 3.3 million members out of 45 unions pay a per-capita tax to the IUD to assist them in union organizing efforts. This payment is in addition to their dues to the AFL-CIO.

. . .that an employee who was terminated for causing disruption by suggesting that she would have an abortion was protected under the Pregnancy Discrimination Act? Turic v. Holland

Hospitality, Inc. (6th Cir. June 17, 1996). The employee worked as a restaurant helper at a Holiday Inn in Holland, Michigan. After she became pregnant, she talked to other employees about the possibility of having an abortion. This talk caused great disruption, and subsequent to the disruption, Turic was told not to discuss the matter any further with other employees. Shortly thereafter, she was terminated for performance problems which the employer could not prove existed. The jury awarded $9,400.00 in back pay, $50,000.00 in compensatory damages, and $30,000.00 in punitive damages. According to the Sixth Circuit, "Since an employer cannot take an adverse employment action against a female employee for her decision to have an abortion, it follows that the same employer also cannot take adverse employment action against a female employee for merely thinking about what she has a right to do."

. . .that on June 26, 1996, the House Economic and Educational Opportunity Committee approved a bill to provide private sector employees with paid time off instead of overtime? Based on the public sector law, the bill would allow up to 240 hours of compensatory time off per year, instead of overtime payments. The time over 40 hours per week would accrue at a time and a half rate. The employee and employer would have to agree to the system. If the employee sought to take time off at a time that could create a hardship for the employer, the employer could refuse to grant it for that time.

The Employment Law Bulletin is prepared and edited by Richard I. Lehr and Brent L. Crumpton. Please contact Mr. Lehr, Mr. Crumpton, or another member of the firm if you have questions or suggestions regarding the Bulletin.

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