Spring 2014

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The Midwest Employer

A Bulletin on Employment, Labor, Benefits and Immigration Law for Clients and Friends of Jackson Lewis P.C.

EEOC Opens New Battle Front on Severance Agreements

Using a novel procedural mechanism, the Equal Employment Opportunity Commission's Chicago District Office has begun to challenge often-used provisions of severance agreements that, according to the Commission, violate Title VII, but which employers view as important to protecting their business interests. Their regular inclusion constitute a pattern or practice of resistance to the full enjoyment of rights protected by the Civil Rights Act by deterring separated employees from filing charges with the EEOC and interfering with an individual's ability to communicate voluntarily with the EEOC and state agencies, the federal agency maintains.

The Commission's challenge stems from a regular employer practice whereby employees who are involuntarily terminated are paid money or other benefits to which they normally would not be entitled conditioned on executing a severance agreement releasing the employer from any liability that may have arisen from the employment relationship and termination. These agreements sometimes contain a confidentiality clause, a covenant not to sue and a promise not to disparage the employer in the future (non-disparagement clauses).

The Older Workers Benefit Protection Act ("OWBPA"), EEOC guidance and courts have found that severance agreements/releases must not prohibit an employee from filing a charge or participating in an investigation with the EEOC or a state agency. Therefore, many severance agreements state the separated employee continues to have a right to participate in an administrative investigation, including an EEOC investigation. Some employees who sign releases later file a charge or otherwise consult with the EEOC. As part of its investigation, the EEOC may obtain a copy of the employer's severance agreement.

Paradoxically, the EEOC claims these agreements deter former employees from contacting the Commission. Of particular concern to the EEOC are broadly worded confidentiality provisions, non-disparagement clauses and covenants not to sue. According to federal court filings, the EEOC believes that "right to participate in administrative investigation" language, in some cases, is not sufficient to overcome provisions that otherwise require an employee not discuss the employee's separation, not take legal action against the employer and not criticize the employer.

This new aggressive strategy can be vexing. The EEOC does not allege the targeted severance agreements are discriminatory, retaliatory or fail to comply with OWBPA's detailed requirements for releases obtained under the Age Discrimination in Employment Act. Instead, the EEOC claims the severance agreements violate Section 707(a) of Title VII, which provides:

> Whenever the [EEOC] has reasonable cause to believe that any person or group of persons is engaging in a pattern or practice of resistance to the full enjoyment of any of the rights secured [by Title VII], and that pattern or practice is of such a nature and is intended to deny the full exercise of the rights described herein, the [EEOC] may bring a civil action in the appropriate district court of the United States.

The Commission claims the "full exercise" of statutory rights is denied by a pattern or practice of using these agreements. Moreover, the EEOC takes the position that it need not send charges to employers, conduct an administrative investigation and, if reasonable cause is found, engage in conciliation under this new EEOC initiative, as is generally required under the statute.

The first employer to be sued by the EEOC under this new initiative settled the lawsuit with a consent decree entered in federal court. The employer agreed to utilize a new EEOC-drafted provision in its severance agreement and permit those who had executed severance agreements and could no longer file timely charges 180 days to do so.

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Many attorneys will argue the EEOC's theory is flawed because Title VII does not permit the Commission to challenge conduct unless that conduct is discriminatory or retaliatory. They will also argue Title VII requires the EEOC to follow its normal administrative procedures before filing such a lawsuit. Until a court ruling is made, employers who regularly utilize severance agreements are encouraged to review the contents of those agreements with their attorney.

For more information, please contact Paul Patten, at PattenP@jacksonlewis.com.

Wisconsin Limits Employers' Access to Personal Social Media Accounts of Employees, Job Applicants

Restricting employers' ability to access the social media accounts of employees and job applicants, Wisconsin has joined 12 other states with similar legislative restrictions.

Wisconsin Public Act 208, effective April 9, 2014, prohibits employers, regardless of size, from requiring or requesting passwords or access information for the social media and other personal Internet-based accounts of employees and job applicants. The new law also imposes similar restrictions on educational institutions as to students and prospective students, and landlords as to tenants and prospective tenants.

The Wisconsin law bars an employer from requiring or requesting an employee or applicant for employment, as a condition of employment, to disclose access information for the individual's personal Internet account or to otherwise grant access to or allow observation of that account. A "personal Internet account" is any Internet-based account created and used by an individual exclusively for the purpose of personal communications.

An employer is prohibited from suspending, discharging, refusing to hire or otherwise retaliating against an employee or applicant for exercising his or her right under the Act.

However, an employer may demand access information to an electronic communications device supplied or paid for in whole or in part by the employer or to an account or service provided by the employer obtained by virtue of the employment relationship or used for the employer's business purposes.

An employer also may discipline or discharge an employee for transferring the employer's proprietary or confidential information to the employee's personal account without authorization. Further, an employer can require access information to investigate such alleged unauthorized transfer. A Wisconsin employer also may restrict an employee's access to certain Internet sites using an employer-supplied device.

An employer that inadvertently obtains or accesses information for an employee's personal Internet account through monitoring of the employer's network is not liable for possessing the information, so long as the employer does not use the information to actually access the account. The Wisconsin statute contains similar prohibitions applicable to educational institutions and landlords.

Any person who violates the law "may be required to forfeit not more than $1,000." An employee or applicant who is discharged or otherwise discriminated against in violation of the law may file a complaint with the department of workforce development.

Other states with restrictions on employers' access to the social media access information of employees or applicants are Arkansas, California, Colorado, Illinois, Maryland, Michigan, Nevada, New Jersey, New Mexico, Oregon, Utah and Washington.

If you have any questions about the new law, please contact V. John Ella, at EllaJ@jacksonlewis.com.

Donning, Doffing Time was *de Minimis*, Not Compensable, Seventh Circuit Rules

Employers have seen a steady increase in wage-and-hour litigation from employees seeking to recover overtime pay for time spent in "donning and doffing" (putting on and taking off) work-related clothing or equipment before or after performing their work. While the law remains unsettled, the U.S. Court of Appeals in Chicago has found employees' donning and doffing time was not compensable work time under the federal Fair Labor Standards Act (FLSA) and the Illinois Minimum Wage Law (IMWL), thus delivering relief for employers. *Mitchell v. JCG Ind., Inc.*, No. 13-2115 (7th Cir., Mar. 18, 2014).

The plaintiffs, unionized poultry processing workers, alleged they had not been paid overtime to which they were entitled under the FLSA and the IMWL. They claimed they were required to don and doff "a sterilized jacket, plastic apron, cut-resistant gloves, plastic sleeves, earplugs, and a hairnet," as well as wash their hands, at the beginning and end of their shifts and lunch breaks.

The district court granted summary judgment in favor of the employer. In a 2-1 decision, the Seventh Circuit affirmed, ruling the plaintiffs were not entitled to additional compensation for their donning and doffing activities. Judge Richard Posner wrote the majority opinion.

The Court pointed out that the FLSA (Section 203(o)) exempts from the definition of compensable work time any time spent "changing clothes or washing" if those activities are excluded by "the express terms of or by custom or practice under a bona fide collective bargaining agreement." The Court held that donning and doffing before and after the workers' lunch break was covered by Section 203(o), as is pre-shift and post-shift donning and doffing.

On whether the plaintiffs could recover for time spent donning and doffing protective equipment, which does not qualify as "changing clothes" under Section 203(o), the Court held the plaintiffs could not recover because the time spent was *de minimis*, that is, minimal and inconsequential. Under the Seventh Circuit's ruling, if the time spent donning and doffing protective equipment is "minimal," then *all* time spent donning and doffing items falls within Section 203(o)'s exemption from compensable time, not just the time spent changing "clothes" or washing.

The Court next held that, even apart from the operation of Section 203(o), the claimed donning and doffing time was not compensable under the *de minimis* doctrine under both federal and Illinois law.

This latter holding is helpful for employers generally, as it is not limited to employers with unionized workforces. Affirming its decision in another case, the Court stated, "It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." *See Sandifer v. U.S. Steel Corp.*, 678 F.2d 590, 593 (7th Cir. 2012), *aff'd*, 134 S.Ct. 870 (2014). Further, in applying the Illinois law's definition of compensable time, the Court found that "the *de minimis* rule is alive and well in Illinois's law of employee compensation."

Judge Diane Wood dissented from the majority's decision. Among other things, Judge Wood criticized the majority for ignoring what she considered to be a factual dispute about how long the donning and doffing at issue actually took.

Employers should seek appropriate legal advice to determine whether donning and doffing time is compensable for their workforce.

Please contact James A. McKenna, at McKennaJ@jacksonlewis.com, or Michael C. Stepien, at Michael.Stepien@jacksonlewis.com, if you have any questions.

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Minnesota Passes Minimum Wage Increases

Minnesota Governor Mark Dayton has signed a law increasing the minimum wage in the state to $9.50 an hour by 2016.

The state minimum wage for employees of "large" employers (employers with at least $500,000 of annual gross revenue) will increase as follows:

$8.00 an hour on August 1, 2014

$9.00 an hour on August 1, 2015

$9.50 an hour on August 1, 2016

The minimum wage for employees of "small" employers (employers with less than $500,000 in annual gross revenue), workers under the age of 18, and trainees under the age of 20 for the first 90 calendar days of employment will increase as follows:

$6.50 an hour on August 1, 2014 (unless subject to the federal minimum wage of $7.25)

$7.25 an hour on August 1, 2015

$7.75 an hour on August 1, 2016

In addition, effective January 1, 2018, the state's minimum wage will be indexed for inflation, which will be capped at 2.5 percent per year. Minnesota's Commissioner of Labor and Industry may suspend an inflation increase in a severe economic downturn.

Since Minnesota employers must pay the higher wage of either the federal or state wage law, starting August 1, 2014, large Minnesota employers must pay the new *state* minimum wage. Smaller employers in virtually all cases will still be required to pay the *federal* minimum wage.

Restaurants and other Minnesota employers with tipped employees should be mindful that Minnesota does not permit tip credits and the Legislature did not adopt proposals that would have created a separate minimum wage for tipped employees.

If you have any questions about the new law, please contact David J. Duddleston, at DuddlestonD@jacksonlewis.com, or Nora R. Kaitfors, at Nora.Kaitfors@jacksonlewis.com.

Tips for Missouri Employers from the Courts

Missouri courts have again tipped their hats in favor of employees in a handful of employment cases, offering best practices for employers with respect to charges, workers' compensation and arbitration.

Objections to Charge

In the first case, the Missouri Supreme Court found an employer waived its timeliness defense in an employee's discrimination claim when it failed to raise the issue at the administrative level. The former employee had filed a charge of discrimination and retaliation under the Missouri Human Rights Act with the Missouri Commission on Human Rights 230 days after she was terminated, which is 50 days past the 180-day statutory deadline. The Commission issued a right-to-sue letter without first seeking a response from the employer.

The employee then filed suit in civil court, again alleging discrimination and retaliation under the Missouri Human Rights Act. The employer sought dismissal of the suit, arguing the employee failed to timely file her charge with the Commission. The trial court agreed and dismissed the claims, finding in favor of the employer. On appeal, the Missouri Supreme Court reversed, explaining that the 180-day time limit was a jurisdictional issue applicable to the charge filed with the Commission. The Court reasoned that when the Commission issued the right-to-sue letter, it implicitly found the employee's claim was timely. Therefore, the Court explained, the employer waived any timeliness argument when it failed to raise the defense with the Commission either upon notice of the charge or by filing an action for judicial review after the Commission issued the right-to-sue letter.

Workers' Compensation

The Missouri Supreme Court's decision in a second case likely will bring an increase of Missouri workers' compensation retaliation suits. Prior to this decision, Missouri case law applied an "exclusive causation" standard, requiring the complaining employee to prove that his filing of a workers' compensation claim was the exclusive cause of an adverse employment action. The Court changed this by concluding the exclusive causation standard is unsupported by the statutory language. Rather, it said, the plain language of Missouri's workers' compensation law prohibits an employer from discharging or in any way discriminating against an employee for exercising his or her workers' compensation rights. Thus, the Court reasoned, the appropriate causation standard is whether the

filing of a workers' compensation claim was a "contributing factor" to the adverse employment action, which is consistent with other Missouri employment discrimination laws.

Arbitration

In the third case, the Missouri Court of Appeals refused to enforce an arbitration agreement found in the employee handbook. The employer sought enforcement of the arbitration agreement originally contained in its employee handbook. The employer had removed the agreement from the handbook, obtained the signatures of the employee and the Director of Human Resources, and placed the agreement in the employee's personnel file. Affirming the lower court's order denying the employer's motion to stay proceedings and compel arbitration, the appellate court found the arbitration agreement was not a contractual offer but rather part of the employee handbook that provided general guidelines to employees. In support of its position, the court pointed to language both preceding and following the arbitration agreement notifying the employee the handbook was not a contract but general guidelines that could be unilaterally modified at any time, which, the court noted, is consistent with Missouri law governing employee handbooks. Furthermore, the handbook provided that "[n]o statement or promise by a supervisor, manager, or department head . . . will . . . constitute an agreement with an employee" and that only the President could bind the employer to an employment contract. Because the agreement contained within the handbook was not a contractual offer, the court ruled, the employer failed to demonstrate an enforceable arbitration agreement.

Finally, in another case, the Missouri Court of Appeals refused to compel arbitration because the employer failed to produce an enforceable arbitration agreement. At issue was a dispute resolution agreement requiring arbitration that was signed by the employee but never executed by the employer despite the "Management Signature" line. Because the agreement required both parties to resolve eligible disputes through the employer's dispute resolution process, which included arbitration, the appellate court determined the agreement was a bilateral contract that required an offer, acceptance and bargained-for consideration. By failing to sign the agreement, the court ruled, the employer failed to establish mutual assent to the dispute resolution process agreement and, ultimately, an enforceable arbitration agreement.

Best Practices

Employers should consider integrating the following practices into your company's regular routines:

- Immediately evaluate a Notice of Charge of Discrimination when it is received to determine whether timeliness or any other jurisdictional-related defenses apply. Any jurisdictional deficiency, including timeliness, should be raised at the time the Charge is received. Do not wait for the agency to request a response to the Charge to raise such deficiencies.
- If a response to the Charge of Discrimination is filed with the administrative agency, raise any and all additional defenses (e.g., jurisdictional deficiencies) early in the proceedings.
- Evaluate potential risks of a workers' compensation retaliation claim prior to disciplining or terminating an employee who has recently filed a workers' compensation claim. Consult with legal counsel regarding any questions or potential issues.

Employers that use arbitration agreements also should consider these tips:

- Do not include an arbitration agreement in the employee handbook. Rather, present the arbitration agreement to employees separately and independently from any other employment-related document.
- Ensure no provisions in your employee handbook are inconsistent with the arbitration agreement. For example, if the handbook limits who may bind the employer to a contract, make sure that person executes the arbitration agreement.
- Include the signature of both employer and employee on the actual agreement to arbitrate.
- Ensure timely execution of the arbitration agreement by all parties (e.g., immediately upon the start of employment).
- Ensure the obligations set out in the arbitration agreement are mutual to the employer and the employee.
- Limit rights to make changes unilaterally (i.e., give advance written notice and grandfather existing claims).

For more information on the issues discussed here, please contact Brian J. Christensen, at Brian.Christensen@jacksonlewis.com, Jessica L. Liss, at Jessica.Liss@jacksonlewis.com, or Amy J. White, at Amy.White@jacksonlewis.com.

Additions in Midwest

We are pleased to announce the opening of our **Kansas City Regional** office. Jackson Lewis' 55th is led by Managing Shareholder **Brian J. Christensen**, joined by Shareholder **David M. Kight** and Of Counsel **Kyle Russell**.

Mr. Christensen's practice includes representing management in traditional labor relations matters and employment litigation. His clients include local, regional and national employers in an array of industries such as meat packing, transportation, health care, not-for-profit, charitable institutions, retail, construction, professional athletics, public education and various public entities.

Mr. Kight has a diversified practice that includes traditional labor relations matters, human resources counseling and all aspects of employment litigation, including non-compete agreements and contract disputes. Mr. Kight is a frequent speaker on employment, labor, and social media matters. He serves as a Contributing Editor to several publications, including "Trade Secrets: A State by State Survey," "Covenants Not to Compete: a State by State Survey" and "The Developing Labor Law."

Mr. Russell's practice is focused on labor law and employment litigation. His background includes serving as in-house counsel of a Fortune 500 diversified financial services company.

We welcome Shareholder **Kirsten A. Milton** to our **Chicago** office. Ms. Milton has experience representing and counseling management on a wide range of labor and employment issues, with a particular emphasis on employment litigation, the Civil Rights Act of 1964, the Employee Retirement Income Security Act (ERISA), the Fair Labor Standards Act (FLSA) and other federal employment laws. She also represents employers before the federal EEOC and various other state and local fair employment agencies.

We are pleased to have Shareholder **Scott J. Preston** join our **Indianapolis** office. Mr. Preston has significant experience advising management on all facets of labor and employment matters. With extensive litigation experience, he regularly represents clients before state and federal courts and administrative agencies in all aspects of workplace law, including complex civil litigation and appeals. In addition, he provides employers with litigation avoidance training as well as strategic advice and counsel. Mr. Preston will be presenting this summer on Dealing with Toxic Employees and Mitigating Risk Before it Damages Your Reputation. He also will be presenting on Whistleblowing and Retaliation Inside Collegiate Athletic Departments.

Three attorneys have joined the firm's growing **Minneapolis** office: Shareholder **Brian T. Benkstein**, Shareholder **Lee Lastovich** and Associate **Anna R. Hickman**.

Mr. Benkstein is certified as a Labor and Employment Law Specialist through the Minnesota State Bar Association. He regularly counsels clients through all aspects of workplace disputes, including discrimination claims, workplace safety investigations and citations, and the planning, defense and prosecution of non-compete agreements. In addition, Mr. Benkstein has significant experience developing best practices for employers involving performance management, discipline and discharge; responding to agency charges; and representing clients in employment investigations. Mr. Benkstein also regularly provides compliance advice as well as management training on harassment and discrimination, and defends claims involving the Americans with Disabilities Act and the Family and Medical Leave Act.

Mr. Lastovich brings to Jackson Lewis more than 21 years of experience in all aspects of labor and employment litigation. He regularly defends employers against claims of discrimination, retaliation and harassment, as well as whistleblower, trade secrets, non-compete and non-solicitation claims. He also represents clients in business litigation matters, including business and shareholder disputes, unfair competition and contract claims.

Ms. Hickman advises clients on a broad range of workplace law matters, including disability and leave management, wage and hour law, employment discrimination, employee performance management and terminations. She also litigates single- and multi-plaintiff employment law cases.

We are pleased to announce **Stephanie Zorn** has joined our St. Louis office as Of Counsel. Ms. Zorn, who joins the firm after serving as Senior Employee Benefits and Labor Counsel to Energizer Holdings, Inc., brings over a decade of senior management experience in employment and labor counseling within the United States as well as globally. At Energizer, Ms. Zorn held worldwide responsibility for advising on and managing reductions-in-force, large-scale employee outsourcings, acquisition personnel issues, and departmental reorganizations. In addition, she regularly presented management training programs, drafted employee handbooks and employment policies, negotiated union contracts and managed the defense of employment claims and litigation.

Superior Client Service

Jackson Lewis P.C. is honored to have earned a spot on the *BTI Power Elite* in the BTI Consulting Group's *2014 Client Relationship Scorecard* report as one of the top law firms in building and maintaining client relationships.

Firm Chairman Vincent A. Cino said, "This truly reflects our attorneys' hard work and dedication to developing and strengthening their client relationships, and it is gratifying to know the companies we work with recognize and value this commitment."

The BTI Consulting Group's *2014 Client Relationship Scorecard* report shows that Jackson Lewis, in building and maintaining client relationships, outperformed more than 95 percent of the market serving large corporate clients. BTI's report is based on interviews with more than 500 general counsel and chief legal officers or their direct reports that gauge a firm's ability to establish long-term relationships with clients, the clients' vote of confidence and enthusiastic recommendations to their peers, and a firm's superior levels of client satisfaction, among other factors.

MANAGEMENT EDUCATION OPPORTUNITIES

TRAINING TO WIN: Training Your Front-Line Supervisors to Improve Your Odds and Reduce Liability

May 15, 2014

Hamburger University at the McDonald's Campus
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Topics include:

- Beyond Compliance: Developing Effective Training Programs for an Ever-Evolving Workplace
- Managing Legally Required Employee Leave: Avoiding Pitfalls and Common Supervisory Mistakes
- The Top Ten Things that Your Supervisors Don't Know That Can Put You in the EEOC's Crosshairs
- Training Supervisors to Minimize Wage and Hour Exposure
- Training Supervisors and Human Resources in Preventative Strategies to Improve Labor/Employee Relations

Question? Contact Laura Levitan at 312-803-2551 or laura.levitan@jacksonlewis.com.

GAME ON! Workplace Law Strategies & Solutions for 2014

May 20, 2014

Great American Ball Park
100 Joe Nuxhall Way
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Topics include:

- Training Camp: Establishing Effective Training Programs to Reduce Litigation
- Season Opener: What's New in 2014?
- Taking the First Pitch: Proceeding with Caution when Managing Mental Health Disabilities
- The Stat Sheet: What the Numbers Say
- Businessman's Special?: Sexual Stereotyping and Navigating Gender Identity Issues in the Workplace
- Grand Slam or Strike Out?: A Panel Discussion

Question? Contact Becky Frondorf at (513) 719-5726 or rebecca.frondorf@jacksonlewis.com

MANAGEMENT EDUCATION OPPORTUNITIES

All About Hiring

June 5, 2014

Sheraton Bloomington
(formerly the Sofitel)
5601 W 78th St
Bloomington MN 55439

A panel of Twin Cities HR Professionals will discuss trending topics and best practices in hiring and recruiting, including social media, background checks and ban-the-box, I-9s, testing, non-competes and offer letters. Bring your questions and be ready for a lively discussion! Moderated by Gina K. Janeiro of our Minneapolis office.

Questions? Please contact Jennifer Holmes at (612) 359-1778 or holmesj@jacksonlewis.com

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Jackson Lewis P.C. represents management exclusively in employment, labor, benefits and immigration law and related litigation.

The firm has more than 770 attorneys practicing in 55 locations throughout the U.S. and Puerto Rico.

Jackson Lewis represents employers before state and federal courts and administrative agencies on a wide range of issues, including discrimination, wrongful discharge, wage/hour, affirmative action, immigration, and pension and benefits matters. Jackson Lewis negotiates collective bargaining agreements, participates in arbitration proceedings and represents union-free and unionized employers before NLRB and other federal and state agencies. The firm counsels employers in matters involving workplace health and safety, family and medical leaves and disabilities.

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