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So, You're Thinking About Jumping Ship... How Departing Executives and Employers Can Minimize their Risks

Increasingly in these challenging economic times, executives are leaving their jobs in search of greater opportunities. *See* Dana Mattioli, *Firms Poach Top Talent from Recession-Weary Rivals*, Wall St. J, Feb. 8, 2010, at B6. Many executives are bound by non-competition, non-disclosure, and non-solicitation agreements, however, which impact their ability to effectively compete against a former employer. Even if not bound by such restrictive covenants, an executive's fiduciary obligations may restrict competitive activity both before and after separation.

In an age of stiff competition in a difficult economy, companies are more and more willing to take aggressive steps to prohibit what they perceive as unfair competition by the departing executive. There are also circumstances where an employer may initiate litigation against a former executive even when it knows it is likely to lose on the merits on the theory that the costs of defending such a lawsuit may be enough to convince the new employer that this executive is simply not worth the trouble. The employer may also wish to send a message to its remaining workforce that they can expect a fight should they too decide to jump ship. Thus, when preparing to change jobs, executives should consider several legal and practical issues to reduce the risk of battle down the road.

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DO Review All Agreements

If an executive contemplates competing with an employer, he should carefully review his employment agreement and other contracts, such as non-competition, non-disclosure, or non-solicitation agreements, to determine the parameters of prohibited conduct. Non-competition agreements are enforceable to the extent they are necessary to protect the employer's legitimate business interests and are reasonable in time, geography and scope of proscribed activity. Employers typically succeed in enforcing agreements prohibiting solicitation of clients and other employees because such agreements do not present the same concerns about restricting freedom of employment as non-compete agreements. Although the executive may be able to assert various defenses (i.e. the agreements are overly broad or lack adequate consideration), the

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scope and likely enforceability of such restrictive covenants need to be thoroughly vetted ahead of time.

DO Understand the Nature of the Fiduciary Duties Owed to the Employer

Even executives who are not contractually restricted from competing with a former employer are still bound by fiduciary obligations to the corporation, particularly when still working for the company. The executive's fiduciary obligations – and the duty of loyalty specifically – significantly restrict an executive's competitive activities, as discussed below.

DO NOT Actively Compete with the Employer While Still Employed There

Absent a contractual agreement to the contrary, an executive can prepare to compete with a current employer without violating the fiduciary duty of loyalty to the company. Activities that constitute "preparation" include interviewing with competitors or leasing office space for a new entity. When preparing to compete, the executive should refrain from using any corporate resources, including company time and funds. An executive cannot actively compete with his employer while still employed there; otherwise he risks claims of misappropriating corporate opportunities and breach of fiduciary duty, in addition to any contractual claims the employer may have.

DO Inform Customers of Your Departure but DO NOT Solicit their Business.

Generally, executives cannot solicit their employers' clients while still employed by their employers. The definition of "solicitation" is murky, however. Executives are prohibited from directly asking a customer for business but can inform customers that they intend to open a new business or join a competitor. If the executive brought the clients to the firm, he may be entitled to directly seek their business. Executives who wish to inform clients of their move to a new company should draft a carefully worded letter that is informative in nature. This will minimize any accusations of improper solicitation. Such actions should be taken after the employee leaves the company.

DO NOT Solicit Other Key Managers

Often, an executive's fiduciary duty of loyalty prohibits the executive from soliciting other key managers to join the executive in his or her new venture because the fiduciary duty encompasses an obligation to maintain adequate managerial employees. This restriction protects the former employer from enduring a mass exodus of its critical managerial personnel. Although an executive should still exercise caution in directly soliciting employees of his former employer after departing the company, he no longer owes a fiduciary duty to the employer and his exposure to liability on this basis is significantly reduced.

DO NOT Use a Former Employer's Confidential Information to Compete

An executive can never exploit a former employer's trade secrets or confidential information. If the company has not defined what it considers confidential, the executive should determine whether certain information is readily available to the public and the measures taken by the employer to protect the information. While each case is fact-specific, courts have routinely held that client lists, business models, and financial data are trade secrets or proprietary information. In order to ensure compliance with this element of the duty of loyalty, the executive should return all company information and property to the employer upon separation and refrain from keeping copies for himself. Increasingly, companies are conducting a forensic analysis of an executive's computer following the executive's departure. If the company determines that the executive printed or emailed any confidential information when preparing to leave the company, this can be powerful ammunition in a future lawsuit. In short, the executive needs to leave without putting his hand in the cookie jar.

"In short, the executive needs to leave without putting his hand in the cookie jar."

DO NOT Plan Your Move on Company Time

While courts have consistently held that an employee can plan his move while still employed, that planning should not be undertaken on company time or at company expense. Use evenings and weekends to do the planning. Do not use company equipment (i.e., computers) to plan the move. There should be a clear line of demarcation concerning the executive's work for the employer and his plan to depart.

DO NOT Lie During the Exit Interview

The departing executive should anticipate how he intends to answer various questions during the exit interview. As a general matter, he should respond truthfully to any questions concerning where he is going; an executive who lies about who his next employer is may be telegraphing that he knows he is in violation of his restrictive covenants and

wishes to duck from potential confrontation. Most importantly, the departing executive should not sign any documents during the interview; rather, he should take them with him and review such documents with counsel.

DO Speak Candidly with Your New Employer About Existing Contractual Commitments

It is imperative that the executive inform his new employer about any restrictive covenants. The new employer needs this information in order to make an informed decision about the risk of entering into the employment relationship. In addition, depending on the value brought to the table – the executive may be able to get the new employer to indemnify him for legal fees, judgments, and settlement costs, in the event litigation ensues.

What an Employer can Do

An employer can also protect itself from competition from former employees and take steps to significantly enhance its position in a subsequent dispute. Following are some steps that an employer should consider taking:

- Conduct a thorough audit to determine which employees are (or should be) subject to restrictive covenants;
- Determine whether the agreements currently in place adequately safeguard the company in the event an executive decides to leave;
- Determine whether any changes in job circumstances, such as a promotion, require an employee's restrictive covenants to be updated;
- Ensure the employee's restrictive covenants are supported by adequate consideration;
- Confirm that definitions of trade secrets and confidential information are up-to-date in light of any recent company developments, such as recent business plans or product development;
- Implement (or update) appropriate safeguards to protect confidential information or trade secrets, such as limiting access to the information, identifying the information as confidential, or storing the information in a secure location;
- Make sure that such safeguards are complied with by all employees; and
- Develop an exit interview format for all employees to determine the employee's next place of employment and to remind the employee of his contractual obligations.

"An employer can also protect itself from competition from former employees and take steps to significantly enhance its position in a subsequent dispute."

Non-Employees Gain Important Protections in New Jersey

By Paulette Brown and Barbara A. Lee
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New Jersey courts have issued two rulings that make non-employees (whether they are suppliers or independent contractors) eligible for protection against discrimination under the state's Law Against Discrimination (LAD) and its whistleblower law, the Conscientious Employee Protection Act (CEPA). Both of these rulings greatly expand the potential pool of plaintiffs who can file claims against businesses in New Jersey's employee-friendly courts.

In *J.T.'s Tire Service, Inc. v. United Rentals North America* (issued on January 6, 2010), New Jersey's Appellate Court once again stretched the boundaries of the LAD by allowing plaintiff, an owner of a tire supply company, to move forward with her claim against a customer/vendor for quid pro quo sexual harassment. The Court rationalized its ruling based upon the LAD's prohibition against refusing to do business on the basis of sex, indicating the LAD contemplated the type of action engaged in by the defendant.

Plaintiff, a female owner of J.T.'s Tire Service, complained that a branch manager of defendant, United Rentals, North America, Inc., threatened to cease doing business with plaintiff's company if she refused his sexual advances. When plaintiff refused the sexual advances of defendant's branch manager, defendant stopped buying tires from plaintiff.

Ultimately, plaintiff acquiesced and agreed to have lunch with the manager, and defendant resumed its purchase of tires from plaintiff. Defendant's manager, however, insisted upon having a sexual relationship with plaintiff and when plaintiff refused, defendant began delaying payments and convinced his employer to cease doing business with plaintiff completely.

The Court recognized that this was a case of first impression and the provision of the LAD the Court

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"These two cases suggest that the state's courts are reading remedial legislation far more broadly than many employers and their attorneys might expect."

was seeking to apply, refusing to do business on the basis of sex, has only been judicially tested a few times. New Jersey Appellate Division cases, *Nini v. Mercer County Cmty. Coll; Rubin v. Forest S. Chilton* and *Horn v. Mazda Motor of Am., Inc.* are examples. Using these cases, the Court ruled there should be no distinction between a refusal to enter into a contract (prohibited by the LAD) and the termination of a contract based upon sex.

One further step was taken by the Court to justify its reversal of the lower court's decision to grant summary judgment to defendant, ignoring defendant's argument that sexual harassment is only prohibited in the employment context when there is an employee/employer relationship. Because the defendant had already conceded, and the court had already determined, that refusing to do business based upon one's gender violates the LAD, the Court ruled that the sexual harassment was conduct committed because of plaintiff's sex. That is to say, "sexual harassment is a form of sex discrimination that violates the LAD". Using the *Lehmann v. Toys 'R' Us., Inc.* standard, the Court concluded that plaintiff had been subjected to quid pro quo sexual harassment.

Just over two years earlier, the state Supreme Court issued a ruling in *D'Annunzio v. Prudential Insurance Company* that a non-employee who was an independent contractor could challenge his contract termination under the New Jersey Conscientious Employee Protection Act (CEPA). CEPA provides a cause of action for an employee who is dismissed or otherwise undergoes negative employer action as a result of reporting or refusing to participate in an allegedly illegal, unethical, or unsafe activity of the employer or its business partners. The Court interpreted the statute's definition of "employee" ("any individual who performs services for and under the control and direction of an employer for wages or other remuneration") as potentially including an independent contractor if the company closely controlled the work of the independent contractor. Using a test for employee/independent contractor status developed by the NJ Superior Court, Appellate Division in *Pukowski v. Caruso*, the Court in *D'Annunzio* determined that, because CEPA was social legislation designed to remedy the problem of employer retaliation against whistleblowers, "the test for an 'employee' under CEPA's coverage must adjust to the specialized and nontraditional worker who is nonetheless integral to the business interests of the employer." Applying the twelve *Pukowski* factors to the reality of D'Annunzio's work relationship with Prudential, the Court determined that he was an employee, and thus protected by CEPA because of 1) the extent of Prudential's control over D'Annunzio's work, 2) his economic dependence on the work relationship, and 3) the functional integration of his work with the core functions of Prudential's business. In particular, the Court noted the detailed instructions that D'Annunzio had been given with respect to how he was expected to do his work, the close supervision of his work, and the requirement that he spend four hours per day on site at the office to which he was assigned.

These two cases suggest that the state's courts are reading remedial legislation far more broadly than many employers and their attorneys might expect. In particular, the ruling that a supplier/purchaser business relationship is subject to the state's Law Against Discrimination has the potential to increase litigation claiming sexual or other forms of harassment that heretofore was primarily confined to the employment context. Although the LAD provision used by the successful plaintiff in *J.T.'s Tire Service* is not a new addition to the statute, it has been used infrequently to challenge alleged discrimination in supplier/purchaser or other business relationships. It is likely that we will see greater use of this litigation strategy in the future.

A Resource for Legal & Human Resources Professionals

The **Labor & Employment Practice Group** understands that our clients and friends cannot always fit continuing education into their busy schedules.

We are pleased to offer a library of complimentary recordings of all past webinars on http://www.eapdlaw.com/events/.

Topics that we've covered in the past year include:

- Managing Terminations and Reductions in Force
- New Federal Red Flag, Massachusetts and Other State Data Security Rules
- Preparing and Implementing Effective Employee Evaluations
- Overview of the ADA Amendments Act of 2008: Reasonable Accommodation Issues For In-House Counsel and Human Resources Professionals
- FMLA and New Jersey Paid Family Leave Update: New Responsibilities for Employers
- Preparing for the Employee Free Choice Act.

March 1, 2010: Massachusetts Security Regulation Affecting All Companies with Personal Information of Massachusetts Residents

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Under the Massachusetts Security Regulation (201 CMR 17.00) (the Regulation) promulgated by the Massachusetts Office of Consumer Affairs and Business Regulation (OCABR), every person or company that owns or licenses certain personal information about a Massachusetts resident must develop, implement, maintain and monitor a comprehensive written information security program (WISP).

The applicability of the Regulation extends to any company that has personal information of Massachusetts residents, whether or not the company is doing business in Massachusetts. The Regulation does not exempt any industry, sector or out-of-state business, and does not exempt a de-minimus number of Massachusetts customers, employees or other residents.

"The provisions of the Regulation concerning WISPs are both broad and very granular at the same time and effectively demand an entire systems review as well as policy and other reconfigurations where necessary. "

The Regulation protects the personal information of Massachusetts residents, which means the first name and last name or first initial and last name in combination with any one or more of the following of a Massachusetts resident: Social Security number; driver's license number or state-issued identification card number; or financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or password, which would permit access to a resident's financial account.

Standards for the Protection of Personal Information

The WISP must be reasonably consistent with industry standards and is required to contain administrative, technical and physical safeguards to ensure the security and confidentiality of records containing personal information. The provisions of the Regulation concerning WISPs are both broad and very granular at the same time and effectively demand an entire systems review as well as policy and other reconfigurations where necessary. In its WISP, a person or company must, among other things, do the following:

- Identify and evaluate internal and external risks;
- Regularly monitor employees' access to personal information;
- Block terminated employees' access to documents, devices and other records that contain personal information;
- Take all reasonable steps to ensure third-party service providers' compliance with the regulations;
- Review security measures annually, and update the WISP when there is a material change in the business operations;
- Develop and maintain a procedure for actions taken in response to any breach of security;
- Train employees about and discipline employees for violation of the policy; and
- Designate one or more employees to maintain, supervise and implement the WISP.

Computer Security Requirements

The WISP must also address the establishment and maintenance of a detailed computer security program, which includes the following as they pertain to personal information of Massachusetts residents:

- Encryption of all transmitted records and files, to the extent technically feasible, containing personal information that is stored on laptops and other portable devices and/or will travel across public networks or wirelessly;
- Secure user-authentication protocols and access-control measures, including control over user identifiers, passwords and access;
- A system for monitoring unauthorized use; and
- Up-to-date firewalls, anti-virus definitions and anti-malware programs.

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"In an effort to ease the burden on small businesses, the OCABR stresses the notion that there is no one-size-fits-all WISP."

Ensuring Vendor Compliance

The issue of third party vendor compliance is an equally important one. As noted above, companies must take all reasonable steps to select and retain third party service providers with access to the personal information of Massachusetts residents that are capable of complying with the Regulation. Companies with contracts already in place before March 1, 2010 have a two-year grace period to March 1, 2012 to amend their contracts with third party service providers to require them to implement and maintain security measures for personal information in accordance with the Regulation. The two-year grace period applies only to contracts that have been entered into before March 1, 2010. Contracts entered into after March 1, 2010 must contain a provision requiring the third party vendor to maintain appropriate security measures for personal information. Given that many contracts renew automatically, many companies are beginning the process of adding security provisions to existing contracts now.

Enforcement

In an effort to ease the burden on small businesses, the OCABR stresses the notion that there is no one-size-fits-all WISP. Compliance with the Regulation will be judged on a case-by-case basis to take into account the following factors: (i) the size, scope and type of business handling the information; (ii) the amount of resources available to the business; (iii) the amount of stored data; and (iv) the need for security and confidentiality of both consumer and employee information. This risk-based approach brings the Regulation in line with both the enabling legislation and applicable federal law, including two rules promulgated by the Federal Trade Commission: the Red Flags Rule, effective June 1, 2010, which require creditors and financial institutions to have a written Identity Theft Prevention Program to detect warning signs of identity theft and fraud, and the Gramm-Leach-Bliley Safeguards Rule (16 CFR Part 314), which requires financial institutions to have a security plan to protect personal consumer information.

As compliance is evaluated on a case-by-case basis, a WISP must be customized for each business. Deficiencies in compliance after March 1, 2010, especially in the event of a data breach, are sure to draw attention by regulators and perhaps by civil litigants, although no enforcement guidelines have yet been issued.

By Nancy H. Van der Veer
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Ninth Circuit Holds that ADA Retaliation Claim Does Not Warrant Compensatory and Punitive Damages

On December 11, 2009, a panel of the Ninth Circuit Court of Appeals, in *Alvarado v. Cajun Operating Company*, held that compensatory and punitive damages are not available to a plaintiff who brings an Americans with Disabilities Act (ADA) retaliation claim, greatly limiting the scope of damages available for a retaliation claim under the ADA. Joining district courts from the Fourth and Seventh Circuits, the Ninth Circuit instead held that plaintiffs alleging ADA retaliation claims are entitled only to equitable relief, such as reinstatement and back pay.

Background

Tannislado Alvarado, 65, was hired by Church's Chicken – a fast food restaurant – to perform part-time work, and eventually became a cook. During his first three and a half years working at Church's Chicken, Alvarado consistently received satisfactory performance reviews. However, three days after calling the company's hotline to report that his manager had made inappropriate comments about his age, Alvarado received his first negative written performance counseling, which outlined alleged deficiencies in his job performance. Over the next several months, Alvarado received six additional write-ups, some of which were issued by an

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assistant manager who later admitted to having been instructed to issue the write-ups by the manager about whom Alvarado had complained. Around this time, Alvarado also reported experiencing pain in his hand that prevented him from completing certain job duties. In response to the additional write-ups, Alvarado called the company hotline a second time, accusing his manager of retaliating against him for making the first hotline call. Soon after making this second complaint on the company hotline, Alvarado was terminated.

Alvarado's Retaliation Claim

In response to his termination, Alvarado sued his employer asserting several employment-related claims, including disability discrimination and retaliation under the ADA, and seeking, among other things, compensatory and punitive damages. The trial court dismissed Alvarado's ADA discrimination claim, finding that Alvarado did not establish that he was actually disabled, but allowed Alvarado's claim of retaliation for complaining about alleged discrimination to remain. However, the trial court barred Alvarado from seeking punitive or compensatory damages for the retaliation claim based on its reading of the plain language of 42 U.S.C. § 1981a(a)(2). In addition, because the court ruled that ADA remedies for retaliation are "equitable" and not "legal," the trial court also denied Alvarado's request for a jury trial on his retaliation claim. Alvarado appealed.

The Ninth Circuit's Ruling

On appeal, Alvarado argued that the remedies available under the ADA are coextensive with remedies available under the Civil Rights Acts of 1964 and 1991 and therefore, because compensatory and punitive damages are available under the Civil Rights Acts, compensatory and punitive damages are available for ADA retaliation claims. The Ninth Circuit, however, disagreed.

In affirming the lower court's decision and concluding that the remedies set forth in the ADA expressly provide for compensatory and punitive damages *only* for disability-based discrimination claims (e.g. claims that allege disparate treatment or failure to accommodate), the Ninth Circuit looked to the plain language of the ADA. The court noted that the sections of the ADA providing for such remedies noticeably omit any reference to the ADA's anti-retaliation provision. The court found that the omission was intentional, stating "Congress may have well-advisedly limited punitive and compensatory damage awards to those plaintiffs who are able to prove discrimination due to actual disability," something which plaintiffs need not prove to show retaliation under the ADA. Thus, the court held that compensatory and punitive damages remedies are not available in ADA retaliation cases, limiting the recovery to equitable remedies, such as reinstatement, back pay and front pay.

In affirming the lower court's decision, the Court also rejected the Equal Employment Opportunity Commission's (EEOC) position, set forth in its Compliance Manual, that the same damages should be available for ADA retaliation claims as are available for ADA discrimination claims. Although the court acknowledged that the EEOC's Compliance Manual is generally entitled to deference, the Court noted that the Manual "did not contain a reasoned analysis of the issue" and, therefore, the EEOC's position was not owed deference. In doing so, the panel discussed, exhaustively, the myriad of district court decisions reaching differing interpretations of the statute.

> *"The ultimate concerns for employers remain the same: awards of equitable damages can be significant and retaliation for protected activity remains unlawful under the ADA and other state and federal laws. "*

Accordingly, the Ninth Circuit joined the district courts in the Fourth and Seventh Circuits in taking the position that compensatory and punitive damages are not available in ADA retaliation cases. District courts in the Second Circuit have held the opposite.

What *Alvarado* Means for Employers

While *Alvarado* is an employer-friendly decision, employers should not allow it to impact their commitment to prohibiting and preventing unlawful discrimination and retaliation in the workplace. The ultimate concerns for employers remain the same: awards of equitable damages can be significant and retaliation for protected activity remains unlawful under the ADA and other state and federal laws. Workplace claims remain prevalent – EEOC enforcement show that 93,277 charges were filed with the EEOC in fiscal year 2009 and that allegations of retaliation were one of the most frequently filed charges.

In addition, it will be important to follow the legislative response to *Alvarado*, as Congress has a history of amending the ADA when judicial interpretations of the Act have conflicted with Congressional intent.

By Sheryl D. Hanley
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Legal Updates

Failure to Prove Replacement by a Younger Worker Was Fatal to Age Discrimination Claim in a RIF

The U.S. Court of Appeals for the Sixth Circuit recently held that an older worker whose employment was terminated in a reduction-in-force had failed to establish a prima facie case of age discrimination because she did not prove that she was replaced by a younger person.

In *Schoonmaker v. Spartan Graphics Leasing LLC,* Harriet Schoonmaker was terminated from her position as a bindery worker as part of a reduction-in-force at Spartan Graphics. She sued her former employer under the Age Discrimination in Employment Act, claiming that the company retained a 29-year-old employee while terminating the two oldest employees in the department.

To state a prima facie case of disparate treatment, the court noted that the plaintiff must establish that (1) she was a member of the protected class, (2) she was discharged, (3) she was qualified for her job, and (4) she was replaced by someone outside of the protected class. The parties agreed that Schoonmaker established the first three elements of a prima facie case, leaving only the fourth element at issue.

The court stated that when a termination arises as part of a RIF, the fourth element is modified to require the plaintiff to provide "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons," (citing *Barnes v. GenCorp Inc.*, 896 F.2d 1457 (6th Cir. 1990)). The court found that Schoonmaker showed "nothing more than the fact of an age differential," based on the company's retention of a 29-year-old employee. Schoonmaker failed to establish that she was replaced because she did not show another employee who was hired or reassigned to perform her duties

> *"The court ... found that the fact that the company's termination of the two oldest employees was not a statistically relevant sample to be probative of discrimination. "*

Schoonmaker argued that the court ignored her additional evidence, including that (a) a 29-year-old employee, Melanie Taylor, was retained and the two oldest employees on her shift were let go, (b) her supervisor did not use the criteria stated in the company's employee handbook, and (3) her supervisor did not review personnel files for criteria he admitted should have been considered.

The court held that although "additional evidence" can include a showing that employees outside of the protected class were retained in the same position, Schoonmaker would have to show that she possessed superior qualities to Taylor in order to meet her burden of establishing a prima facie case in the context of a reduction in work force. The court found that the fact that the company's termination of the two oldest employees was not a statistically relevant sample to be probative of discrimination. The court also held that even if Schoonmaker had established a prima facie case, she could not rebut Spartan Graphics' stated reasons for firing her—low productivity and the inability to get along with others—and prove that they actually were pretexts for age discrimination. "Even if Spartan Graphics' reasons were subjective, the evidence does not raise an inference of age-based discrimination," the court held.

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Recognitions

Congratulations to EAPD Partner, **Paulette Brown**, who will receive The Gertrude E. Rush Award at the 30th Annual Mid-Year National Bar Association in St. Louis, Missouri on April 10, 2010. The Award commemorates the life of Gertrude E. Rush, the only female founder of the National Bar Association. Paulette will receive this award for demonstrating leadership in the community and her profession; for showing a deep concern for human and civil rights; and for being a model of excellence in the legal education and perseverance in the law, public policy and social activism.

New York Now Requires Written Notice for New Hires

New York has imposed significant new notice requirements on employers with respect to new hires. Employers now must provide *written* notice to new employees at the time of hire stating their rate of pay, overtime rate of pay (for non-exempt employees), and the employer's designated regular pay day. If an employee is exempt from overtime, the law requires the employer to notify the employee of the basis for exemption. The New York State Department of Labor has issued newly-revised guidelines as well as model notices for employers to use. In accordance with the new guidelines, employers must have the employee sign a statement acknowledging receipt of the written notice and the employer must keep the signed notice for six years. In order to avoid any confusion or inadvertent contractual obligations, if applicable, employers should include a statement in the acknowledgement that the employment is at-will.

The guidelines also contain additional information regarding the information an employer must provide to commissioned salespersons and farm employees.

The guidelines and model notices may be found at: http://www.labor.state.ny.us/formsdocs/wp/LS52.pdf

These new requirements are in addition to employers' existing obligations under New York law to provide written notice *(e.g.*, by a posting or in a handbook) regarding their policies on sick leave, vacation, personal leave, holidays and hours. This information still may be communicated separately or it may be added to the newly required notice to new hires.

"These new requirements are in addition to employers' existing obligations under New York law to provide written notice (e.g., by a posting or in a handbook) regarding their policies on sick leave, vacation, personal leave, holidays and hours."

Psychotherapist-Patient Privilege Waived when Plaintiff Sought Damages for Emotional Distress

The U.S. Court of Appeals for the Tenth Circuit recently affirmed summary judgment in favor of an employer who terminated an employee for insubordination. In *Fisher v. Southwestern Bell Tel Co.*, Tonia Fisher was employed as a telephone customer service technician and was responsible for installing and repairing telephone equipment. She went out on disability leave for one year, and returned to light duty for two months. Once she was medically cleared to full duty, she was instructed that she would need to demonstrate her ability to climb a pole using hooks. She responded that she had never used hooks during her nine years of employment and was instructed to complete a retraining course on the safe method of climbing a pole using hooks. She refused to attend, claiming that the company was discriminating against her for an internal complaint she made three years earlier while serving a suspension, as well as for having called a hotline to protest the retraining.

She did not attend the class as directed and did not provide medical certification of any medical reason why she could not complete it and was terminated for insubordination.

Claiming that the training requirement was discriminatory and caused by her internal discrimination complaints, Fisher sued the company under Title VII of the 1964 Civil Rights Act and the Americans with Disabilities Act. Her ADA claim was premised on the theory that she was "perceived as" having a psychological impairment that substantially limited her major life activities "of being emotionally stable, thinking straight, eating, and working," by her employer. the trial and appellate courts both disagreed with this claim.

As part of her suit, she claimed that she was entitled to damages for emotional distress. On appeal, she argued that the trial court erred by allowing her former employer to have access to her psychotherapy records, citing the well-founded psychotherapist-patient privilege. Although the court acknowledged the existence of the privilege, the court found that the privilege was not absolute and that "a plaintiff waives the psychotherapist-patient privilege by placing his or her medical condition at issue." The court held that she waived the psychotherapist-patient privilege by placing her medical condition at issue when she sought damages for emotional distress.

The trial court concluded that although Fisher established prima facie cases of gender discrimination and retaliation, the company had set forth a legitimate, nondiscriminatory reason for her termination, namely, insubordination, and that she had failed to establish that the proffered reason was a pretext for discrimination. The court also found that the company had presented evidence that it applied a gender-neutral practice of requiring re-training after a period of absence and that Fisher had failed to show that this, too, was pretextual.

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Ledbetter Law Cannot be Used to Revive Untimely Claims Under ADEA

In *Schuler v. PricewaterhouseCoopers*, the U.S. Circuit Court of Appeals for the D.C. Circuit held that an employee cannot use the Ledbetter law, enacted in 2009, to breathe new life into claims that were not timely filed under the Age Discrimination in Employment Act (ADEA). Harold Schuler, an employee of the international accounting firm PricewaterhouseCoopers, alleged that the firm denied him a promotion to the partnership in both 1999 and 2000 because of his age.

In 1998, the practice group for which Schuler worked proposed to the firm's headquarters in New York that Schuler, then age 55, be promoted to partner. Notwithstanding this endorsement, he was passed over for partner in both 1999 and 2000. Instead, a 37-year-old employee in the same practice group was proposed for partnership in 1999 and promoted to partner in 2000. During 2001, the group did not propose anyone for partnership. The firm's partnership agreement provides that each partner shall retire upon reaching age 60 but that in extraordinary circumstances, a partner may work until age 62. In light of this, the firm's compensation and benefits package for new partners makes it undesirable for most employees over the age of 55 to become partners.

"The court stated that the fact "[t]hat the Congress drafted and passed the [Ledbetter law] specifically in order to overturn Ledbetter strongly suggests the statute is directed at the specific type of discrimination involved in that case and not to other unspecified types of discrimination in employment."

In 2001, Schuler filed charges with the D.C. Office of Human Rights and the Equal Employment Opportunity Commission, alleging age discrimination in partnership decisions that occurred in 1999, 2000, and 2001. In 2002, Schuler sued the firm, alleging violations of the ADEA, the D.C. Human Rights Act, and the New York Human Rights Law. The firm moved to dismiss Schuler's claims regarding the 1999 and 2000 promotion decisions for failure to file timely ADEA charges, as the charges had been filed more than 300 days after the alleged discrimination. In 2004, the U.S. District for the District of Columbia ruled Schuler's ADEA claims regarding the 1999 and 2000 promotion decisions as untimely, as well dismissing as all counts under New York state law.

In 2005, Schuler filed a new age discrimination suit, alleging that the firm engages in a "pattern or practice" of age bias in assignments and promotions. The district court granted summary judgment for the firm on Schuler's claims regarding the 2001 promotion decision and dismissed as untimely Schuler's claims under D.C. law regarding the 1999 and 2000 promotion decisions. The court held that in order to find in favor of the plaintiff in an ADEA case at the summary judgment stage, the plaintiff "must show that a reasonable jury could find his age was the 'but-for' cause of the employment action he challenges."

Schuler appealed and claimed that statutory language in the Ledbetter law applies to a "discriminatory compensation decision or other practice" affecting an individual's pay. He argued that his compensation was adversely affected by the allegedly age-based decision not to promote him to partner and that Ledbetter should control.

In affirming a district court's dismissal of the ADEA claim, the D.C. Circuit found that the Ledbetter law could not be used to revive Schuler's age discrimination claim regarding the denials of promotion. In reviewing the language and legislative history of the law, the D.C. Circuit stated that there was no indication that Congress intended either "discriminatory compensation decision" or "other practice" to refer to a denial of promotion, noting that "a discriminatory failure to promote is actionable regardless of whether it affects an employee's compensation." "In context, therefore, we do not understand 'compensation decision or other practice' to refer to the decision to promote one employee but not another to a more remunerative position."

In support of its decision, the court reviewed Congress' specific interest in overturning the U.S. Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.* In that case, Lilly Ledbetter claimed that her compensation was affected by discriminatory compensation decisions that had been made years earlier that left her pay depressed compared to that of men doing the same job. The court stated that the fact "[t]hat the Congress drafted and passed the [Ledbetter law] specifically in order to overturn *Ledbetter* strongly suggests the statute is directed at the specific type of discrimination involved in that case and not to other unspecified types of discrimination in employment."

Isolated Remarks Did Not Support Age Discrimination Claim

The U.S. Court of Appeals for the First Circuit, in *Ortiz-Rivera v. AstraZeneca LP*, recently ruled that isolated and ambiguous remarks were unrelated to the termination of a sales representative's employment and did not support her claim that the reasons AstraZeneca gave for terminating her were a pretext for age discrimination.

"the supervisors about whom she complained had participated in both hiring and firing her and they provided several valid concerns about her honesty."

Doris Ortiz-Rivera sued AstraZeneca under the Age Discrimination in Employment Act and Puerto Rico law after her employment was terminated when she was 40 years old. AstraZeneca countered that she had misrepresented expense account information, claimed that she made sales calls to multiple doctors within a five to seven minute period of time, violated company policy regarding report writing and failed to accurately disclose her educational background on her resume. It argued that "any one of these instances is grounds for termination and all of them together raised serious doubts about Plaintiff's honesty."

To rebut these proffered reasons, Ortiz-Rivera set forth "four allegedly ageist remarks" made by her supervisor and a coworker. First, she claimed that when she notified her supervisor that she had a medical condition, the supervisor replied, "These things come with age." Second, she claimed that a co-worker who was selling bikinis told her she was "too old" to wear a bikini. The court found that the two comments "were rude but not related to the decision to terminate Plaintiff's employment."

Ortiz-Rivera relied on two other age-related remarks as evidence of pretext. She claimed that when her supervisor was meeting with her to review the improper expense reports, the supervisor told her: "You are too old, Doris. You are too old for this. You are too old to be making these mistakes. This is unacceptable." She also claimed that she was told she "was old enough to know what it means to lie and to omit" information by two supervisors she met with to discuss questions about her performance and dishonesty.

The court found that those two remarks were "at best, ambiguous." "Though made by supervisors close to the time of Plaintiff's termination, the comments arguably reflect a belief that positive attributes such as honesty and accuracy come with age." The court found that both statements "could be expressions of confusion about Plaintiff's actions, admonishments to act responsibly, or remarks indicating animus." "Because these statements are ambiguous, they are insufficient to prove Defendant's discriminatory intent."

The court found that Ortiz-Rivera had failed to offer any additional proof of discriminatory intent. Moreover, the court noted that two of the supervisors about whom she complained had participated in both hiring and firing her and they provided several valid concerns about her honesty. Additionally, it noted that of the three people who participated in the decision to fire Ortiz-River, two were more than five years older than she was.

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