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Message From the Chair

by Domenick Carmagnola

Welcome to another excellent edition of the New Jersey State Bar Association's *Labor and Employment Law Quarterly*. As you have undoubtedly heard me proclaim at a seminar, meeting or Labor and Employment Law Section event, this publication is one of the crown jewels of our section and a terrific member benefit. I hope you enjoy the wonderful array of interesting, informative and resourceful articles this issue contains.

First, I hope that everyone is well and has rebounded from the devastating effects and impact of Hurricane Sandy. I want to thank all of the Labor and Employment Law Section members who reached out to colleagues to lend a helping hand, and who volunteered with the NJSBA as part of the relief effort. If you are still interested in volunteering, you can. If you are in need of assistance, the NJSBA is a resource that is available. In either case, go to the NJSBA website—www.njsba.com—and click on the link titled "Hurricane Sandy Response Program." There you will find the number for a free legal hotline, links and information about how to volunteer, and other available resources for those in need.

The Labor and Employment Law Section is ending the year on another high note. We recently concluded the NJSBA Mid-Year Meeting in Las Vegas. While the rule normally is "what happens in Vegas, stays in Vegas," I am inclined to break it temporarily. For those who were able to make it to the conference, you know it was an excellent one at a premier hotel. The seminars were top-notch; among them, the program put on by our section. The seminar focused on two diverse but interesting topics: the recent cases before the National Labor Relations Board dealing with social media policies in the workplace, and obtaining and defending punitive damages in employment cases. Our panelists, including Peter L. Frattarelli, Bruce McMoran and Dina Mastellone, were all excellent. I participated as well, just so we could balance out Bruce on the panel. I would not be surprised if the Institute for Continuing Legal Education makes a request for the seminar to be presented in New Jersey, given how well received it was by those who attended.

Also, for those who are unaware, our section has put together another compilation seminar/program similar to Labor Law Forum and Hot Tips in Employment Cases. Our new program, Employment Law Roundtable, is expected to be presented each year in December. At the recently concluded initial roundtable we covered a terrific array of topics, including panels on employment arbitrations, recent developments in whistleblowing and retaliation claims, data security and social networking, obesity and food addiction as a disability under the Americans with Disabilities Act and the New Jersey Law Against Discrimination, and an employee benefits update. The collection of speakers was terrific. We also had some new faces on our panels, which was an added benefit to this new program.

Lastly, I have learned that many of our members have terrific blogs, electronic newsletters and websites full of useful information. If you have a blog or similar resource you think would be valuable to our members, send me an email with information relating to it. I would like to highlight and discuss some of them in my upcoming columns.

Stay well, and I hope to see each of you at one of our excellent section events soon.

Message From the Editor

by Anne Ciesla Bancroft

Since the last issue of the *Labor and Employment Law Quarterly*, New Jersey has weathered a hurricane and a presidential election. Can it weather what the National Labor Relations Board (NLRB), the Office of Federal Contract Compliance Programs (OFCCP), and the courts have in store?

In this fall issue, Jed Marcus comments on the impact of recent NLRB initiatives. Patrick McGovern and Douglas Klein predict what employers might expect from the OFCCP's aggressive agenda. Alan Schorr asks if there is a new definition of collateral estoppel in New Jersey. Christina Stoneburner explains the new gender pay inequity posting requirements. Ken Rosenberg interviews Andrew Botwin of StrategyPeopleCulture Consulting, LLC regarding best practices for employers in conducting workplace investigations. August Heckman and James Walsh provide an overview and analyze recent decisions on the fluctuating workweek method of compensating employees. Colin Page analyzes potential employee defenses to employer claims against departing workers in the informational technology field. And finally, one of the many employment issues raised by the recent hurricane is the ability of employees to work from home, whether on a regular or emergent basis. In this issue, Chris Moran provides legal and practical guidelines for New Jersey telecommuters.

Inside this issue

Commentary

The National Labor Relations Board and Non-Union Employees: Partying Like Its 1939

by Jed Marcus

This year, the National Labor Relations Board (NLRB) is blazing a new path, aggressively inserting itself into the non-union workplace. The board, in a desperate attempt to remain relevant among unrepresented, educated workers, has surprisingly pitted itself against traditional unions in an effort to "represent the unrepresented." It fired up a website describing the rights of employees to act together for their mutual aid and protection, even if they are not in a union[1] and, in an interpretive *tour de force* epic in scope, outlawed class action waivers in arbitration clauses,[2] confidentiality rules,[3] social media policies,[4] at-will disclaimers,[5] courtesy policies,[6] and policies restricting an off-duty employee's access to the workplace.[7]

Certainly, the board has long been vested with the authority to strike down a work rule that "would reasonably tend to chill employees in the exercise of their Section 7 rights."[8] The board, in its seminal case on the subject, *Lutheran Heritage Village-Livonia*[9] instructed that if the work rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing that: 1) *employees* would reasonably construe it to prohibit Section 7 activity; 2) the rule was promulgated in response to union activity; or 3) the rule has been used to restrict the exercise of Section 7 rights.[10] The board has cautioned against "reading particular phrases in isolation,"[11] and will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity:

> Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.[12]

The problem is not jurisdictional but philosophical. This new board has subtly altered its *Lutheran Heritage Village-Livonia* test so that employer policies rise or fall based on how the general counsel, not the reasonable employee, interprets them. In none of the cases in which employer policies were struck down did the board rely on testimony, sociological data or other objective evidence tending to show how the 'reasonable employee' would interpret a particular rule. One can imagine lawyers for the general counsel sitting with their feet up on their desks, drinking coffee and torturing an employer policy until they figure out ways to find it illegal.

There are two important trends to watch. First, the general counsel is making an unprecedented attack on areas of employment law previously relegated to the states. In *American Red Cross Arizona Blood Services Region,*[13] the general counsel argued, and an NLRB administrative law judge found, that an employer violated the act by maintaining the following language in an acknowledgement form employees were required to sign: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." The judge concluded that this language effectively required an employee to waive his Section 7 rights to engage in concerted activity.[14] In another case, the general counsel issued a complaint against an employer who required its employees to sign an acknowledgement that nothing could change their at-will status except by agreement with the employer.[15]

Perhaps in response to strong employer backlash, the general counsel, through its Division of Advice, issued two advice memoranda clarifying his earlier position on employment at-will acknowledgements. In *SWH Corporation (Mimi's Café)*,[16] the Division of Advice concluded that the clause "No representative of the Company has authority to enter into any agreement contrary to the foregoing 'employment at will' relationship," did not violate the law.[17] Similarly, in *Rocha Transportation*,[18] the Division of Advice concluded that the following policy language was lawful:

> No manager, supervisor, or employee at Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.[19]

The distinguishing feature between these two cases and *American Red Cross* seems to be the use of the pronoun "I"; language that divests managers of the power to agree to alter the at-will relationship is fine but agreeing that the at-will relationship *per se* cannot be altered violates the law. What is clear, however, is that the general counsel will issue a complaint any time he finds a handbook provision that "restrict[s] the future modification of an at-will employee's at-will status."[20]

The second important trend involves the general counsel's penchant for rendering unenforceable any employer policy demanding courtesy and respect in the workplace. Take, for example, the board's analysis of social media policies. The acting general counsel, in a May 30, 2012, operational memorandum, issued guidance on social media policies that he believes violate the act.[21] Unfortunately, most of the policies discussed in the memorandum, under the general counsel's view, violate the act. His interpretation of what kind of policies violate the law is breathtaking in its scope.

For example, the board found that a confidentiality policy prohibiting employees from releasing confidential guest, team member and company information on social websites was unlawful. According to the board, this restriction "would reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves—activities that are clearly protected by Section 7."[22] It found unlawful provisions that threaten employees with discharge or criminal prosecution for failing to report unauthorized access to or misuse of confidential information. According to the board, "those provisions would be construed as requiring employees to report a breach of the rules governing the communication of confidential information set forth above. Since we found those rules unlawful, the reporting requirement is likely unlawful."[23]

In another case, the board interpreted as illegal a social media policy that recommended that employees, among other things, "make sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site." This recommendation for accuracy was deemed a violation of the law by the board because it was "overbroad," and could reasonably be construed as prohibiting discussions about, or criticisms of, the employer's labor policies or its treatment of employees.[24] For the same reason, the board found the prohibition of offensive, demeaning, abusive or inappropriate remarks unlawful.[25] Shockingly, the board even decided that it was unlawful to prohibit employees from revealing nonpublic company information on public sites, such as, for example, private financial information.[26]

Even policies asking employees to "adopt a friendly tone"; "adopt a warm and friendly tone"; not pick fights; avoid "ethnic slurs, personal insults, obscenity"; give proper consideration to privacy; avoid topics "that may be considered objectionable or inflammatory—such as politics and religion"; and, not defame or disparage customers, are deemed objectionable by the general counsel.[27] The general counsel's rationale is worth repeating:

> First, in warning employees not to 'pick fights' and to avoid topics that might be considered objectionable or inflammatory—such as politics and religion, and reminding employees to communicate in a 'professional tone,' the overall thrust of this rule is to caution employees against online discussions that could become heated or controversial. Discussions about working conditions or unionism have the potential to become just as heated or controversial as discussions about politics and

> religion. Without further clarification of what is 'objectionable or inflammatory,' employees would reasonably construe this rule to prohibit robust but protected discussions about working conditions or unionism.[28]

Of course, given the logic employed by the general counsel, it was hardly a leap to find illegal a clause that asked employees to resolve concerns by speaking directly with coworkers and supervisors.

> We found that this rule encouraging employees "to resolve concerns about work by speaking with co-workers, supervisors, or managers" is unlawful. An employer may reasonably suggest that employees try to work out concerns over working conditions through internal procedures. However, by telling employees that they should use internal resources rather than airing their grievances online, we found that this rule would have the probable effect of precluding or inhibiting employees from the protected activity of seeking redress through alternative forums.[29]

The board has picked up the gauntlet thrown down by the general counsel, punishing employers for asking employees to be courteous, respectful and not to post defamatory comments on the Internet. In *Karl Knauz Motors, Inc.*,[30] the board found unlawful a rule asking employees to be courteous, polite, respectful and to use language free of profanity on the basis that "employees could reasonably construe its broad prohibition against 'disrespectful' conduct and 'language which injures the image or reputation of the Dealership' as encompassing Section 7 activity."[31] In *Costco Wholesale Corp.,* the board found unlawful the maintenance of a rule prohibiting statements posted electronically that "damage the Company...or damage any person's reputation."[32]

At least three things are apparent from these cases. First, the general counsel and the board intend to intimate themselves into the terms and conditions of employment of the unrepresented employee. Second, it is obvious that the board has imposed its own perspective, rather than the "reasonable employee," in construing employer workplace rules. Member Brian Hayes, in his dissent to the majority's decision in *Costco* said it best:

> Purporting to apply an objective test of how employees would reasonably view rules in the context of their particular workplace and employment relationship, the analysis instead represents the views of the Acting General Counsel and Board members whose post hoc deconstruction of such rules turns on their own labor relations "expertise." In other words, the test now is how the Board, not affected employees, interprets words and phrases in a challenged rule. Such an abstracted bureaucratic approach is in many instances, including here, not "reasonably defensible."[33]

Third, and sadly, these recent pronouncements betray a crass cynicism about the intelligence of employees and the motivations of employers in the modern workplace. The board and general counsel seem to have a rather low opinion of human nature, employers, employees, and unions. Apparently, the board is convinced that employees and unions are incapable of organizing or complaining about work conditions unless they are rude, discourteous, disparaging and disrespectful.

As bad as these cases are for employers, they are even worse for unions. After all, a union trying to organize the unrepresented cannot compete with a government agency striking down employer policies, attacking at-will employment, reinstating discharged employees, and defending the right to disparage employers and their products on the Internet, all for free and without that campaign and election messiness. Employers will survive this board and may even turn these cases to their advantage in state court. Unions may not. The board, fighting to retain its own relevancy in what now amounts to a non-union world, has now declared unions irrelevant in the modern workplace. After all, who needs a union when you have the NLRB? ■

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Endnotes

1. www.nlrb.gov/concerted-activity.
2. *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012).
3. *Flex Frac Logistics , LLC*, 358 NLRB No. 127 (Sept. 11, 2012).
4. Memorandum OM 12-59 (May 30, 2012).
5. *American Red Cross Arizona Blood Services Region*, Case 28-CA-23443, 2012 WL 311334 (Feb. 1, 2012).
6. *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (Sept. 28, 2012); *Costco Wholesale Corp.*, 358 NLRB No. 106 (Sept. 7, 2012).
7. *Sodexo America LLC*, 358 NLRB No. 79 (July 3, 2012).
8. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).
9. 343 NLRB 646 (2004).
10. *Id*. at 647.
11. *Id*. at 646.
12. *Id*. at 647.
13. Case 28-CA-23443, 2012 WL 311334 (Feb. 1, 2012).
14. *Id*. slip op. at 20.
15. *Hyatt Hotels Corporation*, Case No. 28-CA-061114 (Feb. 29, 2012).
16. Case No. 28-CA-084365 (Oct. 31, 2012).
17. *Id*. slip. op at 4.
18. Case No. 32-CA-086799 (Oct. 31, 2012).
19. *Id*. slip. op. at 4.
20. *Id*. slip op. at 5.
21. Memorandum OM 12-59 (May 30, 2012).
22. *Id*. at 4.
23. *Id*. at 5.
24. *Id*. at 6.
25. *Id*. at 8.
26. *Id*. at 7,10.
27. *Id*. at 10.
28. *Id*.
29. *Id*. at 11.
30. 358 NLRB No. 164 (Sept. 28, 2012).
31. *Id*. slip op. at 1.
32. 358 NLRB No. 106 (Sept. 7, 2012).
33. *Id*., slip op. at 2.

Expect No Change in OFCCP's Aggressive Agenda Despite Election Year

by Patrick W. McGovern and Douglas J. Klein

Businesses and not-for profit organizations that enter into service or construction contracts, or receive certain minimum financing from federal or state agencies, may be subject to affirmative action requirements and similar state laws requiring employers to establish goals and timetables for the hiring and advancement of minorities, women and disabled persons.[1] Certain municipalities, such as Newark, also require as a condition of municipal financing of a construction and development project, that the developer or owner agree to aggressive goals and timetables for hiring local residents for the project.[2]

New Jersey contractors who are parties to federal government contracts could soon face substantial new compliance requirements from the Office of Federal Contract Compliance Programs (OFCCP), the arm of the U.S. Department of Labor (USDOL) charged with enforcing affirmative action and equal employment opportunity requirements under Executive Order 11246, Section 503 of the Rehabilitation Act,[3] and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA).[4] The requirements cover recruitment, retention and training of disabled workers and veterans; and recordkeeping and disseminating affirmative action policies, and also require affirmative action relating to hiring and advancing disabled individuals and veterans.

Background

Many New Jersey employers do not realize that they are subject to the executive order and its affirmative action requirements. The threshold for OFCCP jurisdiction over an employer can be as low as $10,000 for federal contracts to trigger basic requirements such as inclusion of a specific equal opportunity clause in many contracts and subcontracts.[5] The threshold is as low as $50,000 for federal contracts requiring development and maintenance of a comprehensive affirmative action program covering the employment and advancement of women, minorities and individuals with disabilities.[6] An employer's entry into a federal contract valued at $100,000 and above can subject the employer to broad affirmative action requirements applying to veterans, under VEVRAA.[7]

While OFCCP's existing affirmative action requirements impose considerable obligations on covered employers, the USDOL is proposing even more aggressive enforcement to address the 13 percent nationwide unemployment rate for disabled persons.[8] Beyond the proposed compliance requirements discussed below, the OFCCP has publicly stated its goal of conducting over 14 percent more compliance reviews in FY 2013 than in FY 2012.[9]

Proposed Rules Implementing Section 503 of the Rehabilitation Act

Section 503 of the Rehabilitation Act of 1973 prohibits employment discrimination by covered federal government contractors and subcontractors against individuals with disabilities.[10] In Dec. 2011, OFCCP issued a notice of proposed rulemaking (disability rules) introducing changes to the regulations implementing Section 503 of the Rehabilitation Act.[11] The comment period closed in Feb. 2012. OFCCP has announced no definite timetable to finalize the proposed rules. However, it is likely that there will be some action on these rules.

The proposed disability rules:

- introduce a utilization goal (seven percent of the workforce) for individuals with disabilities to assist in measuring the effectiveness of contractors' affirmative action efforts;[12]
- increase data collection requirements pertaining to individuals, resulting in greater accountability for contractors;[13]
- require contractors to invite individuals with disabilities voluntarily to self-identify at the pre-offer and post-offer stages;[14]

- require contractors to provide regular, anonymous opportunities to their employees to self-identify, to accommodate employees who chose not to do so during the hiring process;[15] and
- address the increased use of technology in the workplace by providing for electronic posting of employee rights and contractor obligations.[16]

Likely the most controversial of these proposals is the hiring goal of seven percent of the workforce to be comprised of individuals with disabilities. The OFCCP has suggested seven percent but invited comments on a range between four percent and 10 percent.[17] The OFCCP is also considering a "sub-goal option" of two percent for individuals with severe "targeted" disabilities such as total deafness, blindness, missing extremities, partial paralysis, complete paralysis, epilepsy, severe intellectual disability, psychiatric disability and dwarfism.[18] Critically, the utilization goal focuses less on contractors' good faith efforts than on outcome, which is consistent with the overall rigor of the proposed disability rules.[19]

In addition, the proposed disability rules would require that in the event a contractor claims that an accommodation would pose an undue hardship based on cost, contractors *must* give applicants the option to self-finance the portion of the cost that constitutes the undue hardship.[20] Also, while the current regulations require only a *periodic* review of personnel processes designed to support affirmative action, the proposed regulations require an *annual* review and *mandatory documentation* of all job qualification standards to ensure they are job-related and consistent with business necessity.[21]

The proposed disability rules would also strengthen Section 503 affirmative action provisions by specifying a contractor's outreach and recruitment obligations. New outreach requirements would include:

- annual self-reviews of recruitment and outreach efforts to evaluate their effectiveness (contractors will list all job openings, with limited exceptions, with the nearest One-Stop Career Center; this requirement will benefit both the contractor and the disability community by improving the contractor's ability to attract qualified applicants with disabilities);[22]
- priority consideration of individuals with disabilities in recruitment and hiring;[23] and
- new data collection and recordkeeping requirements, such as requiring contractors to document the processing of individuals' requests for reasonable accommodation.[24]

The proposed disability rules call for revising the definitions of *disability, major life activities, substantially limits*, and other key terms in the Section 503 regulations to conform to the Americans with Disabilities Act Amendments Act (ADAAA)[25] and the Equal Employment Opportunity Commission's final regulations implementing the ADAAA.[26]

Proposed Rules Implementing VEVRAA

In April 2011, OFCCP published a notice of proposed rulemaking (veteran rules) introducing new requirements for federal contractors and subcontractors concerning veterans protected by VEVRAA.[27] The proposed veteran rules largely track the proposed disability rules, including similar self-identification inquiry requirements,[28] annual surveys of personnel,[29] increased data collection analysis,[30] and record retention.[31] Under the proposed veteran rules, OFCCP would also require federal contractors to calculate a single numerical veteran availability estimate, which would then be used to establish the contractor's goals for hiring veterans.[32]

What Employers Are Saying

Several employer associations, such as the Equal Employment Advisory Council (EEAC), the HR Policy Association and the Center for Corporate Equality, contend that OFCCP grossly underestimated or ignored the time and cost burdens for contractor compliance. For example, OFCCP estimated in the disability rules that the total annual cost of the proposed disability rules is approximately $81 million, or $473 per contractor, including one-time costs of around $29.5 million and recurring costs to be approximately $51.5 million.[33] However, an analysis by Applied Economic Strategies found that, owing to OFCCP's failure to perform a complete and accurate analysis of the proposed requirements, employer compliance will cost at least $5.9 billion the first year and at least $2.6 billion per year afterwards.[34] This estimate is significantly higher than the $100 million threshold that triggers a more detailed review of the regulatory burdens and potential alternatives required under the Unfunded Mandates Act.[35] Costs include reading and comprehending the changes; modifying existing systems such as information technology (IT) systems to ensure electronic and online job application systems are compatible; preparing written explanations regarding why individuals with disabilities were not hired; annual reviews of all physical

and mental job qualifications; training on recruitment, screening and selection; data collection; and, revising written accommodation policies.

There are also concerns that the disability rules may conflict with ADA confidentiality requirements. For example, the disability rules' pre-offer invitation to applicants to self-identify as disabled potentially could run afoul of the ADA, which generally prohibits employers from asking applicants about disabilities prior to making a job offer. There are similar concerns about asking veterans to self-identify in light of statutes protecting veterans' civilian job rights, such as the Uniformed Services Employment and Reemployment Rights Act.[36]

The disability rules and the veteran rules provide that self-identification will allow contractors and OFCCP to better identify and monitor contractors' selection processes, and provide OFCCP with valuable information about the number of disabled individuals and veterans who apply for employment with the contractor.[37] The disability rules even acknowledge that the ADA generally prohibits inquiries about disability at the pre-offer stage but do not explicitly prohibit collection of this information for purposes of furthering Section 503 affirmative action.[38] OFCCP claims this invitation to self-identify is consistent with the ADA.

Takeaways

President Barack Obama, under the Administrative Procedure Act, has the opportunity to implement some or all of the proposed OFCCP regulatory changes, provided that he acts by Dec. 19, 2012.[39] From a management perspective, the proposed changes that are likely to take effect shortly will be significant. Employers that receive federal money, directly as contractors or service providers or indirectly as subcontractors, should immediately assess whether OFCCP compliance is required of their organization, and if so, to what extent the rulemaking changes will affect operations functionally and financially.

Ensuring clients' readiness to comply with the OFCCP's rulemaking changes should include establishing internal processes to make certain no federal contract is entered into or federal assistance is accepted without the consent of senior management and full disclosure and discussion of the implications of doing so; checking with department heads to determine whether any department is receiving federal money in the form of grants, aid or payments for goods or services; in anticipation of an OFCCP audit, in the event federal funds are already being received through a federal contract or federal financial assistance, performing a self-audit under the attorney-client privilege to protect confidentiality of results; and, assuring that managers, recruiting staff and other human resources professionals are trained on up-to-date legal requirements. ■

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Endnotes

1. Exec. Order No. 11,246; N.J.S.A. 10:5-31 and N.J.A.C. 17:27-1 provide New Jersey's affirmative action guidelines for awarding public bids. Contractors' programs must be approved by the Treasury Department pursuant to N.J.S.A. 10:5-32.
2. R.O. 2:2-28 *et seq.*
3. 29 U.S.C. § 701 *et seq.*
4. 38 U.S.C. § 4212, *et seq.*
5. 41 C.F.R. § 60-1.5(a).
6. 41 C.F.R. § 60-741.40(a).
7. 38 U.S.C. § 4212(a)(1).
8. OFCCP News Release dated Dec. 8, 2011. Available at http://www.dol.gov/opa/media/press/ofccp/OFCCP20111614.htm.
9. FY 2013 Congressional Budget Justification – Office of Federal Contract Compliance Programs, at p.27.
10. 29 U.S.C. § 701 *et seq.*
11. Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities, 76 Fed. Reg.77056 *et seq.* (proposed Dec. 9, 2011) (to be codified at 41 C.F.R. pt. 60-741) (hereinafter Disability NPRM).
12. *Id.* at 77099.
13. *Id.* at 77097-98.
14. *Id.* at 77094.
15. *Id.* at 77094.
16. *Id.* at 77067.

17. *Id*. at 77070.
18. *Id*. at 77071.
19. *Id*. at 77081 and 77099.
20. *Id*. at 77074.
21. *Id*. at 77094.
22. *Id*. at 77096.
23. *Id*. at 77099-100.
24. *Id*. at 77065-66.
25. 42 U.S.C. § 12101, *as amended* (2009).
26. *Id*. at 77060.
27. Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans, 76 Fed. Reg.23358 *et seq.* (proposed April 26, 2011) (to be codified at 41 C.F.R. pt. 60-250 and 60-300) (hereinafter Veterans NPRM).
28. *Id*. at 23373.
29. *Id*. at 23366.
30. *Id*. at 23381.
31. *Id*. at 23368-69.
32. *Id*. at 23419.
33. Disability NPRM at 77076.
34. AES Economic Analysis No. 2012-1 (July 19, 2012).
35. *Id*. (*citing* 2 U.S.C. § 1501 *et seq*.).
36. 38 U.S.C. § 4301 *et seq.*
37. Disability NPRM at 77062.
38. Disability NPRM at 77062.
39. 5 U.S.C. § 553(d).

Winters v. North Hudson Regional Fire & Rescue: A New Definition of Collateral Estoppel or Just Bad Facts?

by Alan H. Schorr

The New Jersey Supreme Court's decision in *Winters v. North Regional Fire And Rescue*[1] can have far-ranging effects on public employment law for the next decade. In trying to fashion a remedy around bad facts, the Court stretched the law regarding collateral estoppel practically beyond recognition. The core issue is what constitutes a prior hearing on the merits for purposes of collateral estoppel. According to the majority, a public plaintiff appealing discipline who believes he or she has suffered retaliation may be collaterally estopped from bringing a retaliation lawsuit, even if the issue of retaliation was not litigated or actually decided in the disciplinary hearing. The factual and procedural history is almost as strange as the holding.

Plaintiff Steven J. Winters was the equivalent of a captain in the North Hudson Regional Fire and Rescue, which is a regional fire department. Throughout his 22 years with the regional department and its predecessor, Winters was a frequent and vocal critic and whistleblower. Regional terminated his employment after two disciplinary actions.[2] The first was for allegedly falsely whistleblowing, which, in itself, sounds like retaliation.[3] The second, more serious infraction was for working for two other municipalities while out on disability and collecting full pay from his employer.[4]

There was discovery and a hearing before the Office of Administrative Law (OAL). Although the issue of retaliation was the elephant in the room, the issue was never addressed head on, and the administrative law judge refused to hear evidence of retaliation because he did not want to extend and multiply the administrative hearing. Ultimately, the administrative judge and the Civil Service Commission upheld the termination, finding that Winters had engaged in "egregious conduct."[5]

Winters appealed to the Appellate Division.

While the Appellate Division appeal was pending, Winters filed a complaint asserting violations of the Conscientious Employee Protection Act (CEPA), the New Jersey Law Against Discrimination (LAD) and the United States Constitution.

Regional moved for summary judgment on the basis of collateral estoppel.[6] The trial court denied the motion because the administrative decision did not address the issue of retaliation. Regional filed an interlocutory appeal, which affirmed the decision of the trial court for the same reasons.[7] Regional then appealed to the Supreme Court, which granted interlocutory review.[8] The Supreme Court wrote a letter inviting *amicus* to submit briefs on the subject, to which National Employment Lawyers Association–NJ and the Employers Association of New Jersey responded. The New Jersey Supreme Court then reversed, holding that Winters blew his opportunity to argue retaliation at the OAL, and because he had the opportunity to argue retaliation but chose not to do so, he was collaterally estopped, even though the issue was never adjudicated.[9]

This is where the bad facts come into play. The Supreme Court acknowledged that there may have been mixed motives at issue here. In other words, North Hudson Regional may have been motivated by both legitimate and unlawful reasons to terminate Winters. In such a case, the lower courts had ruled that Winters should have a fair opportunity to argue, even though he may have engaged in wrongdoing, that misconduct was not the real reason for his termination, which was instead retaliation for his whistleblowing activities. The Supreme Court, however, found that Winters' actions were so egregious that it was unnecessary for the Court to undertake that analysis, given that he was collaterally estopped.[10]

Justice Barry Albin dissented, commenting that the decision by the majority ignores the traditional elements of collateral estoppel, three of which were not met in this case. Citing *Olivieri v. Y.M.F. Carpet, Inc.*,[11] Justice Albin wrote that the doctrine of collateral estoppel applies when: 1) the issue to be precluded is identical to the issue decided in the prior proceeding; 2) the issue was actually litigated in the prior proceeding; 3) the court in the prior proceeding issued a final judgment on the merits; 4) the determination of the issue was essential to the prior judgment; and 5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.[12] He pointed out that three of the essential elements were missing in this case. The retaliation was not a clearly identified issue in the prior proceeding, the issue was never actually litigated, and there was no final judgment on the merits.[13] Justice Albin concluded that "collateral estoppel has been sacrificed on the altar of judicial economy."[14]

While it is clear that this case will create great confusion regarding the contours of collateral estoppel, it is unclear that the end result will be judicial economy. In fact, it is likely that this decision will result in additional litigation. The end result of this decision is that public employees who believe discrimination or retaliation was partially or entirely responsible for the decision to discipline must argue those issues exclusively at the OAL, or must forfeit their disciplinary hearing and head straight to superior court.

The likely effect of the *Winters* case is that disciplinary hearings at the OAL will necessarily become much longer and more complicated, as all issues of motive must now be resolved along with the disciplinary issues. In addition, many more lawsuits will now be filed because every disciplinary action where a motivation of discrimination or retaliation is alleged will now have to be brought to superior court, or else the LAD, CEPA, or constitutional claims will be forever forfeited.

The outer contours of this decision will be litigated for the rest of this decade, and possibly beyond. This decision leaves many more questions unanswered. For example, what about union grievance hearings, union arbitrations, and other administrative hearings involving discipline? The Supreme Court had previously ruled in *Olivieri* that unemployment appeal tribunal hearings do not have preclusive effect on future employment actions, but the issue in *Olivieri* involved an appeal tribunal hearing, not a board of review or appellate decision. Will the perceived egregiousness of Winters' actions limit this case to its facts, or will the enhanced application of collateral estoppel change the face of litigation of all disciplinary matters?

The following excerpt from the case will no doubt be scrutinized. Prior to recounting the 'egregious' actions of Winters, the Court wrote:

> The question at the heart of this matter is whether the issues in the two proceedings were aligned and were litigated as part of the final judgment in the administrative action. We hold that they essentially were. Winters cannot take advantage of his own tactic of throttling back on his claim of retaliation in the administrative proceeding after having initially raised it. Retaliation was a central theme of his argument and that he chose not to present there his comprehensive proof of that claim does not afford him a second bite at the apple in this matter.[15]

Counsel for both employees and employers will need to very carefully counsel their clients and rethink their strategies. Until there are more decisions regarding this opinion, it is difficult to know whether the law of collateral estoppel has actually been changed in New Jersey or whether courts will recognize that this is a case that should be limited to its unusual and bad facts. ■

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Endnotes

1. 212 N.J. 67 (2012).
2. *Id.* at 74.
3. *Id.* at 78.
4. *Id.* at 80.
5. *Id.* at 81.
6. *Id.* at 82.
7. *Id.* at 83.
8. *Id.* at 84.
9. *Id.* at 88-90.
10. *Id.* at 91.
11. 186 N.J. 511, 521-22 (2006).
12. *Id.* at 95-96 (*quoting Oliveri*, 186 N.J. at 521-22).
13. *Id.* at 96-97.
14. *Id.* at 98.
15. *Id.* at 88.

New Jersey Employers Have a New Posting Requirement Effective Nov. 19, 2012

by Christina A. Stoneburner

Governor Chris Christie recently signed into law Assembly Bill A2647/Senate Bill S1930, which supplements the New Jersey Equal Pay Act.[1] The law requires New Jersey employers with 50 or more employees to post a new notice that reminds employees of their rights against gender discrimination and gender pay inequity.

New Jersey employers currently must post equal employment opportunity (EEO) notices under Title VII and the New Jersey Law Against Discrimination (NJLAD). Both the federal EEO poster and the NJLAD poster already state that it is illegal to discriminate on the basis of gender in all terms of employment. Nonetheless, the new law requires covered New Jersey employers to post a notice reminding employees of their rights to be free of gender inequity or bias in pay, compensation, benefits or other terms and conditions of employment under the NJLAD, Title VII, and the Equal Pay Act.

When determining coverage under the law, the statute merely states that a covered employer is one with 50 or more employees. Those employees do not have to be located within the state of New Jersey according to the plain language of the statute. Thus, an employer with only one employee in New Jersey, but who has a total workforce of 100 employees would still be required to post the notice for its one New Jersey employee.

Under the law, the commissioner of Labor and Workforce Development must develop the poster. The poster is required to be in English, Spanish and any other language the commissioner determines is the first language of a significant number of workers in the state. Although the commissioner will translate the poster into multiple languages, employers must post the notice only in English, Spanish and any other language designated by the commissioner, and which the employer reasonably believes is the first language of a significant number of the employer's workforce.

Employers will have 30 days from the date the posters are issued to post them. To date, the commissioner has not yet created the required poster. According to a bulletin issued on the Department of Labor and Workforce Development's website, the poster is going to be created by regulation and will likely take several more months to complete.[2]

The law also requires employers to provide a written notification to employees, in addition to the posting.[3] This notice may be hand delivered, included in a handbook, posted on an intranet or Internet website, or delivered by email. Employees must sign an acknowledgement each year that they have received the written notification and return the acknowledgement to an employer within 30 days of receipt. This provision will require employers not only to distribute the notice but to make sure any returned acknowledgements are dated within 30 days of delivery to the employees.

Distribution to employees is required in the following circumstances:

- within 30 days of the issuance of the posting by the commissioner;
- if an employee is hired after the issuance of the posting and distribution to employees, at the time of the employee's hire;
- on or before Dec. 31 of each year; and
- at any time upon first request of a worker.

Employers should make sure they timely comply with both the posting and notice requirements when the new posting is issued. ■

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Endnotes

1. The New Jersey Equal Pay Act, N.J.S.A. 34:11-56.1-56.11.
2. Bulletin Regarding New Gender Equity Notice, http://lwd.dol.state.nj.us/labor/employer/content/employerpacketforms.html.
3. Gender Equity in Pay, Compensation, Benefits or Other Terms or Conditions of Employment, P.L. 2012, ch. 57, par. 1(b).

Workplace Investigations: What to do When an Employee Complains of Inappropriate Conduct
An Interview with Andrew Botwin

by Ken Rosenberg

(Editor's Note: Over the last decade, the Equal Employment Opportunity Commission (EEOC) has seen a rapid rise in individual charges against employers alleging workplace discrimination. In 2001, a total of 80,840 claims were filed, compared to 99,947 in 2011, representing a near 24 percent increase.[1] Many labor and employment attorneys would agree that many other discrimination complaints never rise to a formal EEOC filing. Clearly, workplace discrimination continues to be a serious issue for businesses. When complaints of adverse employment treatment arise, businesses are presented with the question of how to handle them. Typically, one of the first courses of action an employer should take is to conduct an internal investigation. We asked Kenneth Rosenberg to discuss with Andrew Botwin, an attorney, seasoned human resources practitioner and president of StrategyPeopleCulture Consulting, LLC, a workplace investigation firm, about his best practices on this subject.)

Q: Why are workplace investigations necessary?

A: Workplace investigations are necessary because both federal and state law prohibit discrimination against employees based on protected classifications. Further, the United States Supreme Court has indicated workplace harassment is a violation of Title VII of the 1964 Civil Rights Act.[2] Additionally, the Supreme Court has been very clear that employers will be held vicariously liability for unlawful acts of harassment by their supervisors.[3] An employer may establish an affirmative defense and avoid or limit its damages if it: 1) acts reasonably to prevent and correct harassing behavior, and 2) the victim unreasonably fails to take advantage of the internal investigative measures established by the employer to stop the misconduct. Similarly, 29 C.F.R.§ 1604.11(d) specifically provides that an employer will be held responsible for acts of harassment among coworkers if the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action. These responsibilities may even extend to acts of non-employees. Beyond the legal implications, an employer should investigate a claim for other intelligent business reasons. For example, if harassment is occurring in the workplace, the employer is likely to have profitability issues such as productivity, efficiency and employee turnover as a result. Investigating the matter and taking appropriate action may help raise the bottom line.

Q: When a complaint happens, what should the employer do from a practical standpoint?

A: In order to limit the employer's liability it must promptly and thoroughly investigate the claim.

Q: How quickly must an investigation occur after a complaint is made?

A: As a general rule, the sooner the better. Some of the goals of the investigation are: to fact find; to send a message to the person(s) complaining that the organization is listening and responding; and to understand what action, if any, is appropriate. Generally, the quality of fact finding will be the best when the investigator interviews potential witnesses more closely in time to when the incident(s) occurred. Also, the more quickly an employer acts, the stronger the message is to those involved that the issues surrounding the complaint are important to the employer and will be taken seriously. Furthermore, if a form of harassment is occurring, the more quickly an investigation begins, the more promptly the organization will be able to stop the continued harassment. Lastly, the employer will determine the best course of action to take. However, time passing should never be a deterrent. If days, weeks, or even months go by, conducting the investigation is the responsibility of the employer and should be done, regardless of the passage of time.

Q: What procedural steps should the employer/investigator take?

A: An employer must first decide who is going to do the investigation. There are four basic options. An employer may: 1) conduct the investigation itself, 2) hire external counsel, 3) hire an independent third-party investigator; or 4) investigate the matter both internally and with an external party. After the approach is determined, the investigator should engage in fact finding by interviewing all relevant potential witnesses and reviewing any potential applicable documentation.

Q: Does an employee who is subjected to harassment have to participate in the investigation? What should/can an employer do?

A: An employee who claims he or she has been subjected to harassment does not have to participate in the investigation. In a situation where the complainant refuses to participate in the investigation, the investigator or employer should instruct the complainant that by failing to participate it will be more difficult to verify the allegations and to resolve the employee's issues. The employee should be encouraged, but not forced, to participate. It is advisable to have the employee sign an acknowledgment form memorializing his or her refusal to participate in the investigation and stating that his or her refusal to participate will not result in any retaliatory action. If the complainant continues to refuse to participate, this resistance should be noted in the final report and the investigator should investigate the complaint as thoroughly as possible by interviewing all potential witnesses to determine the veracity of the allegation.

Q: When a complaint occurs, should the complainant and alleged harasser be separated?

A: It depends. In some cases, this approach may not be necessary or practical, or even possible depending on the size and organization of a business. In other cases, it may be both possible and practical. In either scenario, it is critical that the complainant is not retaliated against for coming forward with a complaint. Moving an employee who complains of harassment into a different role or onto a different assignment could be perceived as an adverse employment action, which constitutes retaliation. Likewise, moving the alleged harasser could harm that person's reputation, or at least appear as if he or she is deemed guilty before an investigation. I would recommend that the employer is very clear to both the complainant and the accused about what harassment is and what retaliation is, while reminding them neither will be tolerated. I would also suggest management closely scrutinize subsequent employment decisions to ensure retaliation is not occurring.

Q: Do you have some general tips you would give to someone conducting an interview?

A: It is advisable at the outset to collect any applicable background information that supports the investigation. For example, if someone complains he or she is being paid unfairly because of his or her membership in a protected class, the investigator should review compensation records for all employees in similar job functions. It is important to remember that any notes the investigator does maintain may become discoverable in the event of litigation. It is advisable to record the question and answer, and to omit any commentary or opinion in the margin. Additionally, it is highly important to ensure an objective person who is impartial to the circumstances conduct the investigation. This approach will help the business not only increase its chances of coming to the appropriate conclusion, but will also help provide more credible support should the issue rise to litigation in the future. Avoidance of the appearance of bias or conflict of interest is one of the reasons it may be preferable to retain an outside investigator.

Q: That is an interesting point about partiality. What are the pros and cons of using an in-house investigator or an outside party?

A: There are some good reasons to use internal investigators. To begin, internal investigators may know and understand the people, company culture, operations and policies/procedures better than an outside person. Additionally, using an internal investigator may provide the investigation a softer edge (not necessarily less serious) if someone from within the company speaks to witnesses and those involved. It is also possible, as a result of the previously stated reasons, that the employer may find a quicker remedy that makes all parties happy and resolves the issue before it escalates. Furthermore, hiring an outside party is more costly in terms of hard dollars spent on the investigation.

While those are some positives for handling the investigation in-house, the question the employer must ask is, do those benefits outweigh the other options?

Bringing this discussion back to the basics, the investigation is being done to identify what happened and resolve the matter. The investigation is also being done to insulate and protect the company. Hiring an external third party brings independence and credibility to the process. If litigation ensues, the investigation report will undoubtedly be contested. Having an independent third party brings neutrality to the investigation and strengthens the findings of the report in litigation. Additionally, by engaging a third party, the company is showing it is willing to absorb the extra costs to ensure it is getting unbiased results. Furthermore, investigating the matter in-house absorbs internal resources, creating additional soft costs to the investigation. Finally, hiring an outside party reinforces to everyone involved that the company takes these matters very seriously.

Q: Are there any reasons why labor/employment counsel would want to recommend a workplace investigation firm to handle an investigation?

A: In my opinion there are instances when employment law firms/attorneys would want to recommend a workplace investigation firm to handle an investigation. Let's say you are representing ABC Manufacturing, Inc. as its outside counsel and ABC has an issue it needs to have investigated. When ABC approaches you, it is working under attorney-client privilege and you are representing ABC's best interests, not the interests of the complaining employee, which a plaintiff's attorney could allege impairs your objectivity. Additionally, if the employment complaint goes to litigation, a potential conflict of interest between the objectivity of the investigation and your representation of ABC will likely be raised by opposing counsel to argue that the employer did not conduct a fair investigation and thus cannot take advantage of the affirmative defense. Further, as legal counsel, if you conduct the investigation, you may become a fact witness, which could jeopardize your ability to provide legal advice unless your firm takes appropriate steps to establish a screen between the lawyer handling the investigation and the attorney providing counsel to the company. Having an external third party conduct the investigation provides a true third-party interpretation of the facts to help the client and its counsel, when applicable, make better tactical and strategic decisions, as well as giving the client more credibility in a courtroom. Outside investigation firms do not compete with law firms to provide legal advice, and are therefore not a competitive threat to client relationships.

Q: What impact will the recent National Labor Relations Board's (NLRB) ruling in *Banner Health System*[4] have on investigations?

A: This decision is going to make it more difficult to conduct investigations because it holds that standard policies prohibiting employees not to speak to others about an interview is a violation of their rights to engage in "concerted activities" under the National Labor Relations Act. This case is a good example of why employers should be increasingly cautious about conducting workplace investigations on their own. One of the reasons for conducting the investigations is to help the company with better risk management policies. If the employer handles these on their own and makes a mistake, it could open up further liability for them.

Q: How can an employer preserve confidentiality post-*Banner Health System*?

A: The *Banner Health* ruling did not preclude employers from maintaining confidentiality in an investigation; rather, the decision determined it was wrongful to make a blanket policy surrounding confidentiality. If an employer can establish a legitimate business justification regarding an individual interview that outweighs an employee's Section 7 rights, the employer is not precluded from maintaining confidentiality. The NLRB has previously recognized the importance of confidentiality in investigations.[5] An employer can demonstrate a legitimate business justification by showing a witness needed protection; the employer reasonably believed evidence may be destroyed or fabricated; or, if maintaining silence was necessary to prevent a cover-up.

Q: Does the EEOC have a position on this issue?

A: In August 2012, the EEOC's Buffalo, New York, office sent a letter[6] suggesting that a policy prohibiting workers from discussing an ongoing investigation of harassment is illegal under Title VII of the 1964 Civil Rights Act on the basis that restricting the employee from telling others about the alleged harassment is a violation of Title VII. If a reasonable employee may interpret that he or she could face discipline by bringing a charge to the EEOC, this concern would further violate the employee's rights. The EEOC has not made the statements in this letter its official stance; however, it is apparent this issue is now also on the EEOC's radar.

Q: So what can employers instruct interviewee's about confidentiality?

A: The NLRB and EEOC both instruct that once an individual showing that a legitimate business interest exists and outweighs the employee's Section 7 rights, it is permissible to instruct an employee to keep an interview confidential. These recent directives still allow an employer to ask the witness not to discuss the specifics of the interview, presuming the above guidelines are met. Employers should still feel free to communicate to the witnesses that the employer will keep the conversation confidential to the extent possible. However, employers should never threaten or take disciplinary action if an employee refuses to maintain confidentiality during an investigation, and they should revise any policies or procedures that include blanket prohibitions.

Q: If a company receives a complaint and investigates the complaint properly through a third-party investigator, should the company expect a complete defense in litigation if the investigation is supportive of no wrongdoing on behalf of the company?

A: It would be a mistake to suggest any one effort will insulate a company from an unfavorable judgment. The Supreme Court noted there is "no hard and fast rule" when it comes to investigations determining the outcome of a case.[7] The better way to look at both the reasons and approaches to conducting workplace investigations would be to consider what the company gets out of it. There are many reasons for an employer to conduct independent workplace investigations. These include:

1) The company sends a strong message to all involved that it takes these situations very seriously. Though the formality of an independent investigator can be scary to employees, it reinforces the employer's commitment to ensuring inappropriate behavior doesn't exist in its workplace.

2) Objectivity is very powerful in seeing more clearly the circumstances and situation. This clarity may help bring a better assessment of the accuracy of the complaint.

3) By obtaining an outsider's collection of the facts, the employer and its legal counsel will be in a better position to evaluate legal exposure.

4) The employer will be able to identify if inappropriate patterns exist in its business and put corrective measures in place to mitigate future exposure.

5) By consistently investigating all workplace complaints, the employer may avoid additional claims and give credibility to its process by treating all claims with the same level of serious attention.

6) In instances of litigation, the court will have an independent third party to look to as a third-party witness in support of what did or did not occur.

In summary, handling workplace investigations is both an art and a science. When employees complain that they have been treated in some type of illegal way, the sound approach is to take these complaints seriously, bring independence to the process, and use the information obtained from the investigation to stop impermissible conduct, ensure compliance with the law and company policies, protect employee rights, and improve employee relations. ■

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Endnotes

1. www.eeoc.gov/statistics/enforcement/charges.cfm.
2. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
3. *See Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).
4. 258 N.L.R.B. No 93 (July 30, 2012).
5. *See Caesar's Palace*, 336 NLRB 271 (2001).
6. Lorene Schaefer, "Is Instructing an Employee Not to Discuss an Investigation a Violation of Title VII?" One Mediation Blog, One Mediation, Aug. 8, 2012, www.onemediation.com (accessed Oct. 19, 2012).
7. *See Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1193 (2011).

The Fluctuating Workweek: A Basic Primer for New Jersey

by James P. Walsh Jr. and August W. Heckman III

The Federal Fair Labor Standards Act (FLSA) was enacted in 1938 during the Great Depression in response to deplorable working conditions and high unemployment. The act's purpose is to protect workers from "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for [the] health, efficiency and general well-being of workers...."[1] The overtime requirement was meant to encourage employers to spread work among a greater number of employees, thus reducing unemployment.[2]

Where an employee's hours fluctuate from week to week, an employer may reach a "mutual understanding" with an employee that the employee will receive a fixed salary for all the hours worked in a week, and an additional one-half of the employee's "regular rate" for each overtime hour.[3] The regular rate is simply the fixed salary divided by the total number of hours worked in a week. This fluctuating workweek (FWW) method of compensation is "an alternative means of complying with the overtime provisions of the FLSA, it is no exemption from those provisions."[4] Payment for overtime hours (those hours worked in excess of 40 in a week) at one-half the regular rate in addition to the salary "satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement."[5]

Under the Supreme Court's decision in *Overnight Motor Transportation Co. v. Missel*, as interpreted by the United States Department of Labor (DOL), an employer may pay employees overtime in compliance with the FLSA's FWW method.[6] The U.S. DOL's interpretative guidance, found at 29 C.F.R. § 778.114, states in pertinent part:

> (a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week.[7]

Under the example provided in 29 C.F.R. § 778.114(a), an employer satisfies the FWW requirements provided:

1. The employee's hours of work fluctuate from week to week;
2. The employee receives a fixed weekly salary that remains the same regardless of the number of hours worked each week;
3. The employee and employer have a clear mutual understanding that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek;
4. The salary is sufficient to provide compensation to the employee at a regular rate not less than the applicable minimum wage rate;

5. The employee receives one-half of his or her regular hourly pay for all overtime hours worked in excess of 40 in a workweek.[8]

Pursuant to the DOL's interpretive guidance, all of these factors must be met. Some factors, like 1 and 3 above, may not be obvious, and are discussed in more detail below.

What Does Fluctuate Mean?

There is no standardized definition of fluctuate. Courts have recognized several types of schedules as satisfying the requirement that the employee's workweek fluctuates. For example, a nine-day regularly recurring cycle of 24.15 hours on-duty, 24 hours off-duty, 24.15 hours on-duty, 24 hours off-duty, 24.15 hours on-duty, followed by 96 consecutive hours off-duty was a held to fluctuate despite its regularly recurring nature.[9] Many schedules that fall outside of the standard nine-to-five, Monday through Friday schedule, will suffice. Moreover, there is no requirement that workweeks fluctuate over *and* under 40 hours. For example, in *Teblum v. Eckerd Corp. of Florida, Inc.*, the court held that the employees' workweek fluctuated despite the fact that they always worked a minimum of 50 hours per week.[10]

What is a Clear Mutual Understanding?

Simply put, the employee must understand that the fixed weekly salary covers all hours worked in a week, rather than a set number of hours. A clear mutual understanding "does not [however,] require that the employee know the hours expected to be worked, that the fixed salary is not being paid for weeks where the employee performs no work, or any other details of how the [fixed workweek] is administered."[11] Nor does the FWW method require an agreement between an employer and an employee about payment of overtime.[2] However, the employee must receive the fixed weekly salary regardless of whether he or she works a long or a short week.

How Does an Employer Compute the Overtime Premium Under the FWW?

When computing the 50 percent overtime premium for hours over 40, the employer must use the employee's regular rate. The regular rate is determined by dividing the salary by the actual number of hours worked for the given week. The employee is then paid an extra one-half of the regular rate for each hour over 40. The U.S. DOL's regulations provide this example for an employee whose fixed salary is $600 per week:

> If during the course of 4 weeks this employee works 40, 37.5, 50, and 48 hours, the regular hourly rate of pay in each of these weeks is $15.00, $16.00, $12.00, and $12.50, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $600; for the second week $600.00; for the third week $660 ($600 plus 10 hours at $6.00 or 40 hours at $12.00 plus 10 hours at $18.00); for the fourth week $650 ($600 plus 8 hours at $6.25, or 40 hours at $12.50 plus 8 hours at $18.75).[13]

Consequently, under the fluctuating workweek method, the greater the number of hours an employee works in a week, the lower his or her regular rate is for that week, which results in overtime pay that is less than it would be if the regular rate had been based on a fixed 40-hour workweek.

Is the FWW Available Under the New Jersey Wage and Hour Law?

While there is no New Jersey regulation equivalent to the U.S. DOL's, the New Jersey Department of Labor does not oppose the FWW method for calculating overtime.[14] The New Jersey Department of Labor, in a Feb. 21, 2006, letter, signed by the director of the Division of Wage and Hour Compliance, confirmed its support for the use of the FWW method provided affected employees are given prior notice of its use.[15] The FWW is also cited as an approved method of computing overtime in a publication prepared for the mercantile/retail industry.[16] Finally, there are no reported decisions (or unreported decisions the authors are aware of) by any New Jersey court rejecting the applicability of the FWW under New Jersey law. That said, there is an element of risk in the absence of statutory or precedential authority recognizing the FWW. Employers should check the law of each state where they use the FWW method. State law does not always allow for the FWW. For example, the U.S. District Court for the Western District of Pennsylvania decided Aug. 27, 2012, that a Kraft Foods Group Inc. sales representative may take her Pennsylvania Minimum Wage Act overtime claim to trial, holding that state law does not allow for the FWW method of paying overtime.[17]

New Jersey Courts Consider When a Salary is Fixed

In New Jersey, there are only a handful of FWW cases and only two that analyze the FWW in any depth. Both are federal district court cases that considered how the FWW method applied to a situation in which the employer paid certain premiums in addition to the fixed salary. In *Adeva v. Intertek USA, Inc.*, the plaintiffs received "the payment of differentials such as sea-pay differential or increased pay for working a 'night-shift.'"[18] These differentials were paid in addition to the fixed weekly salary. The court held that the fixed salary requirement was not met because the additional payments were tied to the type of hours the plaintiffs worked – i.e., at night or at sea. In *Brumley v. Camin Cargo Control, Inc.*, the court held that the fixed salary requirement was not met because the employer paid the plaintiffs a premium if they worked on a scheduled day off or a holiday.[19]

In each of these cases, the additional payments "were paid according to the time (such as night, weekend, holiday, or day off) or type (such as off-shore) of the employee's work assignment."[20] "Furthermore, [the] premiums were added to [plaintiffs'] non-overtime compensation for each week. Thus…the [] premiums caused non-overtime compensation to vary from week to week."[21] In each case, the court held that the weekly salary "for all hours worked" was not "fixed."

Recent Developments—The Fixed Weekly Salary

The most recent development concerning the FWW method addresses the same issue that the New Jersey federal courts addressed in *Adeva* and *Brumley*. In 2008, the U.S. DOL (under President George W. Bush) proposed to amend Section 778.114 to make clear that payment of bonus and non-overtime premiums (such as the shift in premiums at issue in *Adeva* and *Brumley*) did not invalidate the FWW method. At that time, the U.S. DOL recognized that the "payment of additional bonus supplements and premium payments to employees compensated under the fluctuating workweek method has presented challenges to both employers and the courts in applying the current regulations."[22] Therefore, the agency proposed to amend Section 778.114 to provide "that bona fide bonus or premium payments do not invalidate the fluctuating workweek method of compensation."[23]

Nevertheless, in April 2011, the U.S. DOL (under President Barack Obama) reversed its position.[24] In a preamble to a final rule titled "Updating Regulations Issued Under the Fair Labor Standards Act,"[25] the U.S. DOL asserted that the payment of "bonuses and other premium payments" (aside from overtime payments) is "incompatible" with the FWW method.[26] The U.S. DOL acknowledged, however, that its view at the time of the 2008 proposed revision was that bonuses were permitted under the FWW method, and that "the proposed modification clarified the rule and was consistent with the Supreme Court's decision in *Overnight Motor Transportation Co. v Missel*,[27] on which the existing regulation is patterned."[28] In the end, the DOL did not alter the FWW regulation.

The reaction of courts to the position set forth in the preamble has been mixed.[29] Ultimately, the U.S. DOL's current position on the FWW method may not be persuasive for several reasons. To start, in the preamble, the U.S. DOL analyzed the Supreme Court's decision in *Overnight Motor Transportation Co. v. Missel*.[30] However, the U.S. DOL's interpretation of Supreme Court authority is not entitled to any deference.[31] Next, the preamble is at odds with the U.S. DOL's prior decades-long position on the payment of supplemental compensation and the FWW method under Section 778.114. As recently as 2008,[32] the U.S. DOL's position was that such payments do not preclude application of the FWW method and, in fact, that "[p]laying employees bonus or premium payments for certain activities such as working undesirable hours is a common and beneficial practice for employees.[33] Some courts have found that this change in interpretation undermines the agency's position.[34] Indeed, Judge Richard Posner, in a similar vein, recently criticized the U.S. DOL's "gyrating" positions on the subject of whether "clothes-changing time" is compensable:

> It would be a considerable paradox if before 2001 the plaintiffs would win because the President was a Democrat, between 2001 and 2009 the defendant would win because the President was a Republican, and in 2012 the plaintiffs would win because the President is again a Democrat. That would make a travesty of the principle of deference to interpretations of statutes by the agencies responsible for enforcing them, since that principle is based on a belief either that agencies have useful knowledge that can aid a court or that they are delegates of Congress charged with interpreting and applying their organic statutes consistently with legislative purpose.[35]

Does the FWW Apply in Other Circumstances?

The FWW also can be applied to determine damages where overtime has not been properly paid. Specifically, some courts assessing damages have held that the FWW method is a proper measure of damages in cases in which an employer has misclassified an employee as exempt from overtime compensation. Courts in such cases have held that, at a minimum, the employees understood that they would receive a fixed salary. Thus, where the employees worked more than 40 hours in a week, the FWW method provided an adequate means of calculating the overtime premiums.[36]

Conclusion

New Jersey employers and employees need to be aware that while the New Jersey DOL has supported the FWW method in the past, there are no statutory or regulatory provisions expressly authorizing it under the New Jersey Wage and Hour Law. Further, there is an absence of well-grounded case law on which to rely to fill the statutory vacuum. In addition, recent developments indicate that the U.S. DOL intends to curtail the use of the FWW method in situations where an employer pays its employees bonuses or other premium payments in addition to the fixed weekly salary. An employer utilizing the FWW method can minimize the risk of an overtime violation by only paying non-discretionary premiums that are not tied to the number of hours an employee works but to some other criteria (*e.g.,* sales growth).[36] In addition, employers should review their current pay practices with counsel to ensure the best chance of prevailing on any challenge to the application of the FWW method. ■

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Endnotes

1. 29 U.S.C. § 202(a).
2. *See Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942), superseded on other grounds by statute, 29 U.S.C. § 260, as recognized in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 n. 22 (1985) ("The purpose of the FLSA was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work....By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the FLSA.").
3. 29 C.F.R. § 778.114(a).
4. *Davis v. Friendly Express, Inc.*, No. 02-14111, 2003 WL 21488682, at *3 n.4 (11th Cir. 2003); *see also Bailey v. County of Georgetown*, 94 F.3d 152, 154-55 n.5 (4th Cir. 1996) (noting that the FWW is an alternative method for computing the regular rate, not an exception).
5. 29 C.F.R. § 778.114(a).
6. 316 U.S. 572.
7. 29 C.F.R. § 778.114(a).
8. *See Teblum v. Eckerd Corp. of Florida, Inc.*, No. 2:03cv495FTM33DNF, 2006 WL 288932, at *3 (M.D. Fla. Feb. 7, 2006) (*citing* 29 C.F.R. § 778.114; *Davis*, 2003 WL 21488682, at *1; *O'Brien v. Town of Agawam*, 350 F.3d 279, 288 (1st Cir. 2003); and *Griffin v. Wake County*, 142 F.3d 712, 716 (4th Cir. 1998)).
9. *Flood v. New Hanover County*, 125 F.3d 249 (4th Cir. 1997).
10. *Teblum*, 2006 WL 288932, at *5-6.
11. *Samson v. Apollo Resources, Inc.*, 242 F.3d 629, 637 (5th Cir. 2001); *see also, e.g., Cash v. Conn Appliances, Inc.*, 2 F. Supp. 2d 884, 908 (E.D. Tex. 1997) (*citing Bailey v. County of Georgetown*, 94 F.3d 152, 156 (4th Cir. 1996) ("[N]either the regulation nor the FLSA in any way indicates that an employee also must understand the manner in which his or her overtime pay is calculated.").
12. *Griffin v. Wake County*, 142 F.3d 712 (4th Cir. 1998).
13. 29 C.F.R. § 778.114(b).
14. *See, e.g., N.J. Dep't of Labor v. Pepsi-Cola Co.,* No. A-918-00T5, 2002 WL 187400, at *96 (N.J. Super. Jan. 31, 2002) (recognizing that New Jersey follows the federal fluctuating workweek method when threshold standards met).

15. *See* Letter from Michael P. McCarthy, Director, Division of Wage and Hour Compliance (Feb. 21, 2006) (on file with author).
16. *See* New Jersey Department of Labor and Workforce Development, An Employer's Guide to New Jersey Wage and Hour Laws for the Mercantile/Retail Industry (Feb. 2006).
17. *Foster v. Kraft Foods Global Inc.*, No. 2:09-cv-00453, 2012 WL 3704992 (W.D. Pa. Aug. 27, 2012); *see also Cerutti v. Frito Lay, Inc.*, 777 F. Supp. 2d 920 (W.D. Pa. 2011) (holding that paying employees under the federal FWW nonetheless violates Pennsylvania law).
18. No. 09-1096, 2010 U.S. Dist. LEXIS 1963, at *8-9 (D.N.J. Jan. 11, 2010).
19. No. 08-1798, 2010 WL 1644066, at *6-7 (D.N.J. April 22, 2010).
20. *Brantley v. Inspectorate Am. Corp.*, 821 F. Supp. 2d 879, 889 (S.D. Tex. 2011).
21. *Id*.
22. 73 Fed. Reg. 145, p. 43662.
23. *Id*.
24. *See* 76 Fed. Reg. 18832 at 18850 (April 5, 2011).
25. *See* 76 Fed. Reg. 18832 (April 5, 2011).
26. *See* 76 Fed. Reg. 18832 at 18850.
27. 316 U.S. 572, 62 S. Ct. 1216, 86 L. Ed. 1682 (1942).
28. *See* 76 Fed. Reg. 18832 at 18849 (April 5, 2011).
29. *See, e.g., Switzer v. Wachovia Corp.,* No. H-11-1604, 2012 U.S. Dist. LEXIS 120582, at *4 (S.D. Tex. Aug. 24, 2012) ("The regulatory language does not preclude bonus payments that are not based on the number of hours the employee worked. The DOL's 2011 pronouncement is contrary to its publicly-disseminated prior position...."); *Smith v. Frac Tech Services, LLC*, 2011 U.S. Dist. LEXIS 64079, at *5-6 (E.D. Ark. June 15, 2011) (considering the DOL's statement in the Preamble at length and declining to follow it; "*Missel*, not section 778.114, is the source of authority for calculating damages based on the fluctuating work week method.").
30. 316 U.S. 572 (1942). *See also* 76 Fed. Reg. at 18849.
31. *Smith v. Frac Tech Services, LLC*, 2011 U.S. Dist. LEXIS 64079, at *5-6 (E.D. Ark. June 15, 2011) (considering the DOL's statement in the preamble at length and declining to follow it).
32. In its 2008 proposal, the DOL stated it was not providing a new interpretation of § 778.114, but rather "clarifying" the existing interpretation. 73 Fed. Reg. at 43662. This statement indicates that prior to 2008, the DOL believed one could pay other extra pay and use the FWW example of calculating overtime in § 778.114. *But see*, notes 20 and 21 *infra*, for example of contrary holdings.
33. *See* 73 Fed. Reg. 145 at 43655; 76 Fed. Reg. 18832 at 18849.
34. *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010) (declining to defer where DOL's position changed and its current interpretation was inconsistent with the statutory language); *Smith*, 2011 U.S. Dist. LEXIS 64079, at *7-8 ("[T]he Department of Labor's reasoning is unconvincing....A bonus given wholly at the discretion of the employer cannot be said to affect the mutual understanding between the employer and the employee that the employee's fixed salary comprises his entire compensation.").
35. *Sandifer v. United States Steel Corp.*, 2012 U.S. App. LEXIS 9302, 22-23 (7th Cir. May 8, 2012) (internal citations omitted).
36. *See Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 39 (1st Cir. 1999) (holding that employee misclassified by employer as exempt understood that her fixed weekly salary was to be compensation for potentially fluctuating weekly hours where employee understood that employer did not intend to provide overtime pay if she worked more than forty hours per week); *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138-39 (5th Cir. 1988) (holding that employee misclassified as exempt and employer agreed on a fixed salary for varying hours and applying fluctuating workweek method); *Donihoo v. Dallas Airmotive, Inc.,* No. 3:97-CV-0109P, 1998 WL 47632, at *6 (N.D. Tex. Feb. 2, 1998) ("[W] hen an employee is improperly classified as exempt, a formula based on the fluctuating workweek standard should be applied." (*citing Cox v. Brookshire Grocery Co.,* 919 F.2d 354 (5th Cir. 1990)); *Bailey*, 94 F.3d at 156 ("Neither [29 C.F.R. 778.114] nor the FLSA in any way indicates that an employee must also understand the manner in which his or her overtime pay is calculated."); *Tumulty v. FedEx Ground Package System, Inc.,* No. C04-1425P, 2005 WL 1979104, at *4-5 (W.D. Wash. Aug. 16, 2005). *But see Rainey v. Am. Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 100 (D.D.C. 1998) (holding that Contemporaneous payment of overtime compensation is a necessary prerequisite for application of the fluctuating workweek method).

Information Technology Agency Claims Against Departing Employees

by Colin M. Page

There is a community of information technology (IT) employment agencies in New Jersey that employ programmers and other computer professionals that they 'loan' to companies for extended periods to work on various IT projects. In many cases, these agencies rely heavily on foreign, H1-B employees. When employees leave such employment, they could be, and often are, subject to claims by their employers. The claims include breach of contract, violation of restrictive covenants and various tort claims, such as fraud and tortious interference. The damages sought include H1-B processing fees, the alleged value of 'training,' lost profits from the failure to complete projects and unspecified 'business' or 'reputational' damages. Often the damage claims are in the six figures.

The IT agencies contend they are merely seeking to recoup legitimate losses and investments they made in their employees. Employees and critics of such practices claim these agencies are using systematic litigation against departing employees as a means of punishing people for leaving, thereby coercing their existing workforce into staying with the agency.

This article will discuss the various defenses and counter-claims available to employees who are being sued by their agency-employer.

Employment at-Will—Not Just for Employers

The most obvious defense available to an H1-B employee when an employment agency makes a claim for a breach of contract is that employment is at-will. In New Jersey, "an employment relationship remains terminable at the will of either an employer or employee, unless an agreement that exists provides otherwise."[1] The author has seen claims against employees that were premised simply on the employee leaving. One IT agency in the state regularly sues employees for tortious interference for failing to complete projects assigned to them and for fraud for misrepresenting that they intended to work for the company permanently. Notably, the firm's standard employment agreement states that its employees are at-will. Therefore, the at-will defense ought to preclude employer claims that are premised on nothing more than the employee's decision to leave.

New Jersey's Private Employment Agency Act

Another defense available to employees arises from New Jersey's Private Employment Agency Act (PEAA).[2] The law was enacted in order to combat coercive employment practices by employment agencies, and requires that employment agencies register with the state and obtain approval for any fees to be charged to any employees or applicants.[3] Additionally, the PEAA expressly prohibits the seeking of fees that have not been approved.

> A person shall not bring or maintain an action in any court of this State for the collection of a fee, charge or commission for the performance of any of the activities regulated by this act without alleging and proving licensure or registration...[4]

PEAA defines a "fee, charge or commission" as: "any payment of money, or promise to pay money to a person in consideration for performance of any service for which licensure or registration is required by this act, or the excess of money received by a person furnishing employment or job seekers over what he has paid for transportation, transfer of baggage or lodging for a job seeker."[5]

The Appellate Division has liberally construed the PEAA's prohibition on seeking fees from employees. In *Peri Software Sol. Inc. v. Aggarwal*,[6] an employee entered into an employment agreement that prohibited him from working directly with the agency's customer for three years following the termination of employment. The employee went to work for the client less than

a year after terminating his employment with Peri.[7] Peri sought damages from the employee for breach of contract, breach of a restrictive covenant, tortious interference, breach of a covenant of good faith, and unjust enrichment.[8] However, the Appellate Division found that the damages sought by Peri were "fees" for the purposes of N.J.S.A. 34:8-45, and that Peri's failure to register in accordance with PEAA precluded it from seeking any fees from its employee.[9]

Agencies Registered as Temporary Help Services

Some agencies have registered with the state as temporary help services. Notably, to qualify as a temporary help service, the agency must represent to the Division of Consumer Affairs that it does not charge employees a fee. Also, the temporary help service cannot restrict the employee's ability to obtain other employment.[10] Employees can subpoena the employer's registration paperwork from the Division of Consumer Affairs. If the employer has represented to the Division of Consumer Affairs that it does not charge a fee, the employee can use that evidence to argue that the employer is not properly registered and cannot seek a fee under the PEAA.

H1-B Regulations

As noted above, many of the employees subject to these types of lawsuits are H-1B workers. There are protections available to such workers under the U.S. Department of Labor's H1-B regulations. When an employer files an application for approval of an H1-B visa for a particular employee, it is required to represent that it will comply with the Department of Labor's H1-B regulations.[11] The H1-B regulations prohibit employers from requiring nonimmigrants to "pay a penalty for ceasing employment with the employer prior to an agreed date."[12] The Department of Labor has found that employer breach of contract claims against departing employees constitute such a "penalty" for ceasing employment.[13]

Unpaid Wages

Several counterclaims may also be available to employees if their employer brings a breach of contract claim against them. It is not uncommon to find that employees in this situation have various wage claims. In some cases, their employer may have failed to pay them for overtime or during periods of training, in which case the employee would have claims under the Fair Labor the Fair Labor Standards Act (FLSA)[14] or the New Jersey State Wage and Hour Law (NJWHL).[15] Alternatively, the employer may have made improper deductions from the employee's pay or withheld their final paycheck in violation of the NJWHL.

U.S. DOL Complaints

H-1B employees may also be in a position to file a complaint with the Department of Labor based on the employer's failure to pay the prevailing wage for 'bench time.' If the Department of Labor becomes aware of 'benching' without properly paying wages, it will bring an action to recover back pay, and may also impose fines and other penalties on the employer.[16] In addition, H-1B employees can bring a DOL complaint related to the employer's effort to improperly assess a penalty for 'ceasing' employment. ■

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Endnotes

1. *Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385, 397 (1994).
2. N.J.S.A. 34:8-43, *et seq.*
3. N.J.S.A. 34:8-51(b)(1).
4. N.J.S.A. 34:8-45(b).
5. *Id.*
6. 2007 WL 1245955 (App. Div. May 1, 2007).
7. *Ibid.*
8. *Ibid.*
9. *Id.* at *2.
10. N.J.S.A. 34:8-46(h).
11. 20 C.F.R. Part 655, Subparts H and I.
12. 20 C.F.R. 655.731(c)(10)(i)(A).
13. *I.M.O. Administrator Wage and Hour Division, U.S. Dept. of Labor v. Novinvest, LLC*, 2004 WL 1739874 (DOL Adm. Rv. Bd. July, 30 2004).
14. 29 U.S.C. §206.
15. N.J.S.A. 34:11-4.1, *et seq.*
16. 20 C.F.R. 655.810.

Tips for Telecommuting After Telebright

by Chris Moran

In a case appealed from the tax court, the New Jersey Superior Court, Appellate Division, recently affirmed that an out-of-state employer was subject to the New Jersey corporation business tax because it allowed one of its employees to telecommute from New Jersey.

Factual Background

The employer, Telebright, is a Delaware corporation with its principal place of business in Maryland.[1] Telebright initially hired the employee in question to work for the corporation in Maryland.[2] In 2004, the employee relocated to New Jersey, after her husband received a job in the state. In order to retain the employee's services, Telebright agreed to allow her to telecommute.[3] Hereafter, the employee worked full-time from her home in New Jersey writing software code.[4] The software code she wrote was ultimately incorporated into a web application offered by Telebright to its clients.[5] Telebright withheld New Jersey gross income tax from the employee's wages, and remitted those withholdings to the New Jersey Division of Taxation.[6] Except for the one employee, Telebright had no other significant connections with New Jersey. It did not maintain an office or financial accounts in New Jersey, nor did it solicit sales in the state.[7]

In 2006, the division sent Telebright a 'nexus survey' inquiring about the corporation's contacts with New Jersey.[8] In its response, Telebright acknowledged that it employed one software developer who telecommuted from New Jersey, and that the corporation was withholding New Jersey income taxes from her wages.[9] The division responded by notifying Telebright that it was obligated to file a New Jersey corporation business tax (CBT) return.[10]

Initially, the division asserted that Telebright was obligated to file a CBT return because it maintained "an office" in the state. Later, the division changed its reasoning, and took the position that Telebright was obligated to file a CBT return because it was "doing business" in New Jersey by allowing the employee to work from her home in the state.[11]

Telebright subsequently challenged the division's determination that it was subject to the Corporate Business Tax Act (CBT), and argued that the application of the CBT to the company's activities in New Jersey would violate both the due process and commerce clauses of the United States Constitution.[12] The tax court of New Jersey rejected Telebright's arguments, and affirmed the position of the division that Telebright was doing business in New Jersey and, therefore, subject to the CBT.[13] Telebright then appealed to the New Jersey Superior Court, Appellate Division.[14]

The superior court began its analysis by noting that the CBT requires a foreign corporation to pay an annual franchise tax "for the privilege of doing business...in this State."[15] The court next noted that the reach of the CBT was to be "co-extensive with the State's constitutional power to tax," and that the statute was to be "construed broadly in light of that purpose."[16] The court had no difficulty concluding that Telebright was doing business in New Jersey and, therefore, under the statute was subject to the CBT.[17] In reaching that conclusion, the court analogized the software writing performed by the Telebright employee to work performed by a manufacturing employee who fabricated parts in New Jersey for a product that was later assembled outside the state.[18]

The court next considered Telebright's argument that applying the CBT to the company's limited activities in New Jersey would violate the due process clause of the United States Constitution.[19] The court noted that the due process clause primarily was concerned with the "fairness" of a state exercising authority over a business, i.e., whether, based on its activities within the state, a business should realize that it could be regulated by that state.[20] The court noted that the employee in question produced software code for Telebright while in New Jersey, and was entitled "to all of the legal protections th[e] State provides to its residents."[21] The court also noted that, if the employee violated the restrictive covenants in her employment agreement with Telebright,

and provided that Telebright had filed a business activities report with the state, Telebright could file suit in New Jersey state courts to enforce those restrictive covenants.[22] The court also noted that the United States Supreme Court had, in other cases, held that the presence of one employee within a state was sufficient to subject a company to that state's business and occupation tax without violating the due process clause.[23] The court, therefore, concluded that Telebright had sufficient minimum contacts with New Jersey to permit taxation without violating the due process clause.[24]

Lastly, the court considered Telebright's argument that application of the CBT to the corporation would violate the commerce clause.[25] The court noted that Telebright's argument in that regard focused on whether the tax was "applied to an activity with a substantial nexus with the taxing State."[26] Telebright argued that employing one person in the state was "*de minimus*," and did not constitute a sufficient link or connection to allow the imposition of the CBT.[27] Telebright also argued that taxing businesses on the basis of telecommuting would impose unjustifiable local entanglements and an undue accounting burden upon businesses employing telecommuters.[28]

The court had little difficultly rejecting both of those arguments.[29] The court found a sufficient nexus in that Telebright had a full-time employee working in the state who was producing a portion of the company's web-based product.[30] The court also rejected Telebright's argument that filing a CBT return would be an undue accounting burden, noting that Telebright was already withholding New Jersey state income tax from the employee's salary and was subject to New Jersey's labor and anti-discrimination laws concerning the employee.[31] The court, therefore, affirmed the decision of the tax court that Telebright was subject to the CBT.[32]

Analysis

At first glance, it may be tempting to view the *Telebright* decision as only relevant to employers who do not have brick and mortar offices in New Jersey. In fact, *Telebright* is also relevant to employers who have traditional offices in New Jersey for several reasons.

First, the position taken by the New Jersey Division of Taxation in *Telebright* represents the position taken by the tax departments in the majority of states throughout the country.[33] Consequently, New Jersey employers should consider that they may be required to pay business taxes imposed by states from which they allow employees to telecommute, even if they have no other significant contacts with those states.

Although taxation of businesses based on such limited contact with a state may seem unfair, it is unlikely that states imposing such taxes will voluntarily change their positions any time in the foreseeable future. It is also unlikely that federal legislation will be enacted that would restrict the ability of states to impose taxes in such situations. Federal legislation has been proposed that would prohibit a state from imposing gross income taxes on a telecommuting employee who is not physically located in that state.[34] However, as of this date, even that less-controversial legislation has failed to garner enough support to gain passage in Congress.

Second, *Telebright* also serves as a reminder that employers should consider the wider range of legal issues that may arise when employees telecommute, and they should plan accordingly. In addition to tax issues, significant legal concerns associated with telecommuting employees include compliance with laws covering wage and hour, workers compensation, occupational safety and health, discrimination and privacy. An employer can significantly reduce the risks associated with these issues by properly implementing a well-drafted telecommuting policy, and by requiring each telecommuting employee to execute an individual agreement. The individual agreement should confirm that the employee will abide by the telecommuting policy, and should also address matters that are particular to the employee.

Wage and Hour

Wage and hour laws typically require that *non-exempt* employees be paid for all hours spent working, and that employees be paid overtime for hours in excess of 40 in a week.[35] Uninterrupted meal breaks may typically be excluded from hours worked.[36] Employers are also required to maintain records of the actual hours worked by non-exempt employees.[37] When employees are working from home, it is often difficult for the employer to monitor the actual hours worked. Likewise, it is difficult for an employer to know whether a telecommuting employee took an uninterrupted meal break. As a result, allowing non-exempt employees to telecommute can increase the likelihood of claims for unpaid wages and/or overtime.

In an effort to reduce the likelihood of wage claims, the telecommuting policy should expressly require employees to record their working hours, and their breaks, accurately and on a daily basis. If practical, the employer should consider specifying in writing the daily schedules (*e.g.*, start and stop times) for telecommuting employees. Where the work of the employees is performed primarily on an employer's computer system, the employer should periodically compare the employees' reported hours with the records reflecting the employees' use of the computer system (*e.g.*, log on and log off times) to ensure that employees are not working outside of their assigned and/or reported hours. If employees fail to record their hours worked and breaks accurately, they should be subject to counseling and discipline as would be the case with any other infraction.

To a lesser extent, wage and hour concerns may also arise with *exempt*, salaried employees. The overtime exemptions for such employees may be dependent on their supervision of two or more employees or their exercise of discretion and independent judgment.[38] Employers should be vigilant to ensure that exempt employees, even though outside a typical office setting, actually exercise the requisite supervision or discretion, lest they lose their exemptions.

Workers Compensation

The law applying workers compensation to telecommuting employees is still developing.[39] However, there is growing recognition that, for a telecommuting employee "it can genuinely…be said that the home has become part of the employment premises."[40] New Jersey is among the states that have recognized that an employee's injury that arises out of and in the course of working for an employer at a home office is covered by workers compensation.[41] However, an issue that is arising with increasing frequency in cases involving telecommuting employees involves whether the injury suffered by the employee actually arose from their employment. In one recent decision, a New Jersey court affirmed an award of workers compensation death benefits based on a finding that the death of a telecommuting employee from a pulmonary embolism arose from her extended sitting at her computer while working.[42] The New Jersey Supreme Court has granted *certiorari* in that case.

In an effort to reduce the likelihood of workers compensation claims from telecommuting employees, the employer should have an individual agreement with each employee that specifies the activities the employee will provide for the employer, the precise location (*i.e.*, room) within the employee's home where those activities will be performed and, if practical, the precise hours during which those activities will be performed. The agreement should also state that the employee is not "on-call" during hours outside their regular shift.[43] The agreement with the employee and the telecommuting policy should require the employee to report any injuries immediately, and should allow the employer to inspect the workplace as part of its investigation into any workplace illness or injury.

Occupational Safety and Health

Another related concern involves the application of occupational safety and health laws to telecommuting employees. The federal Occupational Safety and Health Administration "will not conduct inspections of employees' home offices."[44] Nor does the Occupational Safety and Health Act (OSHA) require employers to inspect the home offices of telecommuting employees. However, OSHA regulations do require employers to keep track of any work-related injuries.[45] For that reason, as noted earlier regarding workers compensation, the telecommuting policy should require employees to report any injuries immediately. As part of the telecommuting agreement with the individual employee, the employer should also require the employee to confirm that the specified work area is safe (*e.g.*, has a smoke detector, adequate ventilation, at least two means of exit, no unsafe wiring, and an ergonomically adequate chair and desk). The employer should also require the employee to agree that, with reasonable notice, the employer may inspect the area where the employee will be working.

Accommodation of Disabilities

Another important legal consideration regarding telecommuting involves employees who have disabilities. Under New Jersey law and federal law, employers are required to provide reasonable accommodations for qualified employees with disabilities.[46] In general, a reasonable accommodation is a change in the work environment or the way the job is done that allows an employee with a disability to perform the essential functions of a job.[47] The Equal Employment Opportunity Commission (EEOC) has issued guidelines advising that

an employer should consider whether permitting an employee to work from home would be a reasonable accommodation under the Americans with Disabilities Act (ADA), *even if the employer does not allow other employees to telecommute*.[48] Likewise, several courts have recognized that telecommuting may be a form of reasonable accommodation, provided that the essential functions of the employee's position can be performed from home.[49]

The telecommuting policy should acknowledge that the essential functions of some positions cannot be properly performed by a telecommuting employee.[50] Likewise, an employer should establish and maintain job descriptions that accurately identify the essential functions of its various positions. If the position cannot be effectively performed from home, the job description should reflect the need for the employee to be present in the employer's facility. An employer is also permitted to refuse to allow a disabled employee to telecommute if it would pose an undue hardship and/or if the employer offers an alternate reasonable accommodation that would also be effective.[51]

Discrimination

A further consideration with respect to telecommuting is the possibility of discrimination claims from those persons whose requests to telecommute are rejected, as well as claims from those persons who are permitted to telecommute. In order to limit claims by persons whose request to telecommute are rejected, the telecommuting policy should set forth objective criteria concerning the jobs for which telecommuting will be permitted, and the employer should apply those criteria consistently. The objective criteria in the policy should be applied against the essential functions for the positions set forth in job descriptions. In order to limit claims by persons who are permitted to telecommute, the employer should offer the same training and promotion opportunities to telecommuting employees as it offers to those in similar positions working at its offices. This consideration can be of particular importance if a disproportionate percentage of those telecommuting are women, or in another protected category.[52]

Privacy

Implementation of a telecommuting program also raises privacy concerns. With respect to the material the telecommuting employee is using remotely, the policy should require the employee to protect the privacy of any sensitive information of the employer and/or its clients (*i.e.*, information security). Information security is particularly important if the information accessed by the employee is covered by state or federal laws protecting privacy (*e.g.*, the Health Insurance Portability and Accountability Act (HIPAA)). The employer's information technology department should also ensure that the employee has appropriate firewall and anti-virus protection.

With respect to the employee's privacy rights, in the telecommuting agreement, the employee should expressly consent to the employer accessing all forms of communication used by the employee while performing the work (*e.g.*, phone, email and Internet). As noted earlier, the employee should also expressly consent to the employer inspecting the workplace itself. Documenting the employee's consent to such monitoring and access is particularly important in New Jersey, where an employee's right to privacy has been recognized as a possible source of a "clear mandate of public policy that would support a wrongful discharge claim."[53]

Written Policy/Agreement

As noted above, many of an employer's legal risks associated with telecommuting can be reduced through a comprehensive, well-drafted telecommuting policy. In addition to the policy, the employer should have a written agreement with each telecommuting employee, which acknowledges the employee's understanding of the policy and commitment to comply with it, and also addresses items particular to the employee. Of course, although the items discussed above are among the most significant legal issues related to telecommuting, they are certainly not the only legal issues. The policy/agreement can also address practical guidelines, such as restrictions on dependent care while working and client/customer meetings at the telecommuting employee's residence.

Third, briefly mentioned in the *Telebright* decision is a procedural defense that may be available to New Jersey employers who are called upon to defend claims brought in New Jersey courts by foreign employers. In the section of the *Telebright* decision discussing the benefits the state afforded to the employer of the telecommuting employee, the court noted that the employer would be able to bring suit in state court to enforce restrictive covenants against the telecommuting employee "provided" that the employer had filed a "business activities report" with the state.[54]

Under New Jersey law, foreign corporations "carrying on activity or owning or maintaining any property in th[e] State," must generally file such a business activities report.[55] The failure to file such a report, if required, "shall prevent the use of the courts in this State" with respect to claims that arose or contracts that were executed during the period after the last such report was filed.[56] Thus, if an employer is sued in a New Jersey court by a foreign corporation, it may wish to investigate whether the foreign corporation failed to file a required business activities report and, if so, it may consider pursuing a motion to dismiss on that basis.[57]

Conclusion

Telecommuting can be one way employers can promote work/life balance and diversity. It can be an attractive benefit in recruiting and retaining employees, while lowering overhead and commuting costs. However, the *Telebright* case exemplifies the many legal and practical issues employers need to consider before permitting telecommuting in the workplace.

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Endnotes

1. *Telebright Corp. v. Director, New Jersey Division of Taxation*, 424 N.J. Super. 384, 388 (App. Div. 2012).
2. *Id*. at 389.
3. *Id*.
4. *Id*. at 388-89.
5. *Id*.
6. *Id*. at 389; *Telebright Corp. v. Director Division of Taxation (Telebright Tax),* 25 N.J. Tax 333, 341 (2010), *aff'd*, 424 N.J. Super. 384 (App. Div. 2012).
7. *Telebright Tax*, 25 N.J. Tax at 340.
8. *Id*. at 341.
9. *Id*.
10. *Id*. at 341-42.
11. *Id*.at 342.
12. *Id*.
13. *Id*. at 355.
14. *Telebright*, 424 N.J. Super. 384 (App. Div. 2012).
15. *Id*. at 389 (*quoting* N.J. Stat. Ann. §54:10A-2).
16. *Id*. at 390.
17. *Id*.
18. *Id*. at 391.
19. *Id*. The due process clause provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, Amendment XIV, Sec. 1.
20. *Id*.
21. *Id*. at 392.
22. *Id*.
23. *Id*. (*citing Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560, 562 (1975)).
24. *Id*. at 392-93.
25. *Id*. at 393. The commerce clause provides that "The Congress shall have Power....[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Constitution, Art. 1, Sec. 8, Clause 3.
26. *Id*. The court noted that the commerce clause test includes four factors: whether the "tax (1) is applied to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State." *Id*. (*quoting Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). However, the court found that Telebright's brief in support of its appeal did not take effectively challenge the second, third or fourth prongs of the test. *Id*.
27. *Id*. at 393-94.
28. *Id*. at 394.
29. *Id*. at 394-95.
30. *Id*. at 395. The court also stated that the company benefited "from all the protections New Jersey law afford[ed] this employee." *Id*.
31. *Id*.
32. *Id*.
33. In a 2012 survey of state tax departments conducted by the Bureau of National Affairs, 35 states responded that an out of state employer which allowed an employee to telecommute from within their state would create a sufficient nexus

to subject that employer to their state's business taxes. *Bloomberg BNA 2012 Survey of State Tax Departments*, at S-64 to S-66 (Tax Management, Inc. 2012) (*Nexus Creating Activities: Employee Activities—Non-Sales Related*). Only six states indicated that telecommuting would not generate a sufficient nexus for taxation purposes. *Id*.

34. *See, e.g., Telecommuter Tax Fairness Act of 2012*, H.R. 5615, 112th Cong. (2nd Sess. 2012); *Telecommuter Tax Fairness Act of 2011*, S.1811, 112th Cong. (1st Sess. 2011).
35. See, e.g., 29 U.S.C. § 207(a)(1) (generally requiring payment of one and one-half the employee's regular rate for hours in excess of 40 in a work week); N.J. Stat. Ann. § 34:11-56a4 (same); N.J. Admin. Code § 12:56-5.1 ("Employees entitled to the benefits of the act shall be paid for all hours worked.").
36. *See e.g*, 29 C.F.R. § 785.19 ("Bona fide meal periods are not worktime....Ordinarily 30 minutes or more is long enough for a bona fide meal period."); N.J. Admin. Code § 12:56-5.2(a) (noting that an employer is not required "to pay an employee for hours the employee is not required to be at his or her place of work because of...lunch hours....").
37. 29 C.F.R. § 516.2(a)(7) (requiring employers to maintain records of "[h]ours worked each workday and total hours worked each workweek"); N.J. Admin. Code § 12:56-4.1 ("Every employer shall keep records which contain the name and address of each employee...the total hours worked each day and each workweek....").
38. 29 C.F.R. § 541.100(a)(3) (stating that executive exemption is dependent upon the employee "customarily and regularly direct[ing] the work of two or more other employees"); 29 C.F.R. § 541.200(a)(3) (stating that administrative exemption is dependent "upon the exercise of discretion and independent judgment with respect to matters of significance"); N.J. Admin. Code § 12:56-7.2 (generally adopting federal executive and administrative exemptions).
39. David B. Torrey, *Telecommuter Injuries and Compensability Under Workers' Compensation Acts*, at 2 (2012) presented to the Workers Compensation Insurance Organizations Spring 2012 Meeting, available at http://www.iaiabc.org/files/WCandTelecommuters%202012.pdf.
40. Lex K. Lawson, *Lawson's Workers' Compensation Law*, §16.10[1] (2012).
41. *See, e.g., Renner v. AT&T*, 2011 N.J. Super. Unpub. LEXIS 1668 (N.J. Super. 2011) (awarding workers compensation benefits to telecommuting employee for death while at home), *cert. granted*, 209 N.J. 233 (Feb. 16, 2012); *Verizon Pennsylvania, Inc. v. WCAB*, 900 A.2d 440 (Pa. Commw. 2006) (awarding workers compensation benefits to telecommuting employee for injuries at home); *AE Clevite, Inc.v. Labor Commission*, 996 P.2d 1072 (Utah Ct. App. 2000) (same); *see also Wait v. Travelers Indemnity Co. of Illinois*, 240 S.W.3d 220 (Tenn. 2007) (recognizing that workers compensation applies to injuries of telecommuting employee arising from performance of duties, but denying benefits on particular facts).
42. *Renner*, 2011 N.J. Super. Unpub. LEXIS 1668.
43. If the telecommuting employee suffers an injury in a different state than the state in which the employer is located, the question may arise as to which state's workers compensation law applies. The answer to that question typically requires an examination of the laws of both states involved.
44. OSHA Directive No. CPL-2-0.125 (Feb. 22, 2000).
45. 29 C.F.R § 1904.4(a)(1) (requiring employers to report any injury or illness that is "work-related"); 29 C.F.R. § 1904.5(b)(7) ("Injuries and illnesses that occur while an employee is working at home, including work in a home office, will be considered work-related if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting.").
46. N.J. Admin. Code §13:13-2.5(b) ("An employer must make a reasonable accommodation to the limitations of an employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business."); 29 C.F.R. § 1630.9(a) (regulations under the Americans with Disabilities Act applicable to employers with 15 or more employees) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation

would impose an undue hardship on the operation of its business.").

47. *See, e.g.*, 29.C.F.R. §1630.2(o)(1)(ii); *see also* N.J. Admin. Code §13:13-2.5(b)(1) (setting forth examples of reasonable accommodations).
48. EEOC, *Work at Home/Telework as a Reasonable Accommodation* (*EEOC Telework Guidance*) (last modified Oct. 27, 2005) (Question No. 2; "May permitting an employee to work at home be a reasonable accommodation, even if the employer has no telework program? Yes. Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework."), available at http://www.eeoc.gov/facts/telework.html.
49. *See, e.g., Core v. Champaign County Bd. of County Commissioners*, 2012 U.S. Dist. LEXIS 105956 (S.D. Ohio July 30, 2012); *Bixby v. JPMorgan Chase Bank*, 2012 U.S. Dist. LEXIS 32974 (N.D. Ill. March 8, 2012).
50. Positions that may be more suitable for telecommuting include those where the employee does not need either close supervision or direct contact with clients or coworkers.
51. *See, e.g., Bixby*, 2012 U.S. Dist. LEXIS 32974, at *20 (recognizing undue hardship defense); *EEOC Telework Guidance* (Answer No.5) (recognizing that employer "can select any effective accommodation, even if it is not the [telecommuting] one preferred by the employee").
52. *See, e.g.*, Michelle A. Travis, Equality in the Virtual Workplace, 24 *Berkley J. Emp. & Lab. L.* 283, 303-11 (2003) (discussing situations where employers have implemented telecommuting programs that had a disparate impact on female employees).
53. *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81, 98-99 (1992).
54. *Telebright*, 424 N.J. Super. at 392. The same defense would apply to actions in New Jersey federal courts that are based on diversity. *See Horgan Bros., Inc. v. Monroe Property, LLC*, 2010 U.S. Dist. LEXIS 65144, at *11 n.7 (D.N.J. June 30, 2010).
55. N.J. Stat. Ann. § 14A:13-15.
56. N.J. Stat. Ann. § 14A:13-20(b). An employer may cure its failure by filing the appropriate reports and paying all taxes, interest and penalties, or posting an appropriate bond. *See First Family Mortgage Corp. v. Durham*, 108 N.J. 277, 291-92 (1987); N.J. Stat. Ann. § 14A:20(c).
57. *See, e.g., Horgan Bros.*, 2010 U.S. Dist. LEXIS 65144, at *13 (granting motion to dismiss based on plaintiff's failure to file business activities reports).