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Employment Law Letter

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Labor & Employment Practice Group

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New Year's Resolution: Review Employee Manual

Most employers have added employment-at-will disclaimers to their personnel policies or employee manual at some point in the last several years, and accordingly think all they have to do is update specific provisions of their policies when a new statute is passed or amended. Recent developments make it clear that's not enough.

For one thing, the NLRB has issued several decisions holding that fairly common personnel policies violate employee rights to engage in concerted activities. These include restrictions on rude or disrespectful behavior, entering the employer's premises outside normal working hours, and use of the employer's email system for personal purposes, including union activities.

Employer groups have complained that today's NLRB is so activist that it's difficult to know what policies the Board might find to be objectionable. And the fact that less than 10% of the civilian workforce is unionized makes no difference, since most of the NLRB's decisions on these issues have involved non-union employers. Also, while the NLRB only has jurisdiction over private sector entities, Connecticut's State Board of Labor Relations has a tradition of following the NLRB's lead. Therefore, nearly all employers, including state and local government entities, should be concerned.

A December decision of a U.S. District Court in Connecticut raises another concern about employee handbooks. In that case, a Costco employee complained of workplace harassment because of his disability, Tourette's syndrome. However, his statutory cause of action was time-barred because of the limitations in state and federal anti-discrimination laws. Nevertheless, the judge ruled he could pursue the same claim under a breach of contract theory.

Why? Because Costco's anti-harassment policy went well beyond the protections of the ADA or CFEPA. Its employee handbook, which it called an "employment agreement," contained a commitment to address and remedy workplace harassment, "regardless of whether the inappropriate conduct rises to the level of any violation of law." While Costco's commitment to stopping harassment is admirable, this seems like another example of the old axiom, no good deed goes unpunished.

Our advice to employers is to take a fresh look at their personnel policies. If you have a practice of periodically getting a legal review of your employee handbook, this might be a good time to do so. A well-written set of employment policies can be a real asset, but too many employers are finding the opposite can be true as well.

What's Up With The Yelmini "Layoff"?

Most of what we write in this publication has a particular perspective. After all, we generally represent employers, occasionally executives and never rank and file employees or unions. However, this is as close as we've ever come to an editorial.

First, a disclosure: we've known Linda Yelmini, the longtime head of Connecticut's Office of Labor Relations, for decades. She has represented the state in collective bargaining, contract administration and arbitration through several administrations, both Republican and Democrat. She has a reputation for being firm but fair, and you always know where she stands. A smooth politician she's not, but you won't find a more knowledgeable and capable labor relations professional anywhere in Connecticut.

So why was she notified just before Thanksgiving that her position was being eliminated and she was being laid off in January? There was no answer from Ben Barnes, Secretary of the Office of Policy and Management and Linda's boss, or from anyone else in the Malloy administration. "I must have made someone angry," was Linda's best guess.

Maybe so, given the number of tough personnel decisions she has made, both in her role at OLR and as a member of the State Retirement Board. But that's her job, and the fact that she does it without regard to whose feathers get ruffled should be a plus, not a minus. Apparently this administration doesn't see it that way, given their decision to replace her with a political appointee.

That will be Lisa Grasso Egan, a labor and employment lawyer who has worked at several local law firms, and who was a labor relations director for the City of New Haven in the 1990s. Let's hope she's allowed to use her own best judgment in dealing with state employee unions. If Connecticut really is serious about balancing its budget, the last thing it needs is to have politicians rather than professionals making labor relations and personnel decisions.

Public Policy In Eye of Beholder

We have written more than once about arbitration and court decisions on what sort of conduct disqualifies an individual from employment, as a matter of public policy. There are more and more cases in which employers pursue this issue, perhaps because it's almost impossible to know whether they will be successful, so why not take a shot?

Take the case of the Stratford police officer who was fired because he failed to disclose important facts in a medical exam regarding his fitness for duty. He had been out of work after crashing his cruiser during an epileptic seizure, and he neglected to tell the examining physician about other seizures and about his alcohol use, which increased the risk of future seizures.

After he was fired for dishonesty, a state arbitration panel reinstated him without back pay, apparently concluding his dishonesty was understandably driven by his desire to return to work. Stratford went to court. A lower court judge refused to set aside the arbitration award; an appellate panel vacated the award because it violated public policy; and a divided Supreme Court reinstated the arbitrators' decision. The majority opinion noted that the officer "was not dishonest while performing his official duties," but the dissent pointed out that "intentional and serious dishonesty by the police is so … damaging to our justice system that it requires the strongest possible response."

If you're wondering how one can predict the outcome of "public policy" arguments in cases like this, you're not alone. Situations involving off-duty misconduct are especially difficult to deal with, because they often come down to whether such conduct has a "nexus" to the employee's work. A Superior Court judge recently upheld an arbitration award validating the discharge of a firefighter who falsely reported the theft of his motorcycle in order to get the insurance proceeds. He said the decision was justified because firefighters often have to

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enter unoccupied homes, and a conviction for larceny was directly related to that work.

The latest battle in the public policy arena involves the use of marijuana, which is now legal, at least in certain circumstances. When a maintenance employee at UConn Health Center drove his state-owned vehicle to a secluded spot so he could smoke pot while on duty, he was fired. An arbitrator found the state should have used progressive discipline, and reduced the discharge to an unpaid suspension.

The state took the matter to court, where a Superior Court judge overturned the award, finding that Connecticut has a "clearly defined public policy" against the use of marijuana, at least where (as here) no doctor had prescribed marijuana to treat the employee's medical condition. However, according to the Connecticut Law Tribune, the employee's union has vowed to appeal, claiming that current marijuana laws are not black and white regarding use of that drug, so there is no clear public policy requiring termination for using pot on duty.

Our advice to employers is not as definitive as we would like it to be, at least if you have unionized employees who are entitled to take disciplinary decisions to arbitration. Arbitrators are notoriously unpredictable, and it's beginning to look like courts, even the Connecticut Supreme Court, are almost equally so. As our headline suggests, it seems that public policy is whatever any given judge on any given day says it is.

Groton Fire District Dodges a Bullet

Anyone who negotiates collective bargaining agreements under Connecticut's Municipal Employee Relations Act is familiar with the statutory requirement that when a tentative agreement is reached, it must be submitted for approval by the legislative body of the municipal employer. Specifically, "a request for funds necessary to implement" the agreement, and for approval of any terms that conflict with certain statutes or ordinances, "shall be submitted" within 14 days after the agreement is reached.

This language was tested by the Poquonnock Bridge Fire District in Groton when newly elected members of its board voted to rescind approval of a ten-year union contract which provided raises of 3% per year plus many other benefits. The new members argued that their predecessors had simply voted on the contract; no request for funds had been submitted.

The Fire Union took the matter to the State Board of Labor Relations, which ruled that submission of the agreement for approval by the board was in effect a request for funds to implement it. They pointed to a distinction between the municipal and state bargaining laws; the latter specifically requires a "statement setting forth the amount of funds necessary" to implement the contract, while the former does not. The SBLR required the Fire District to honor the 10-year contract.

The Fire District and the Town of Groton went to court, and last month a Superior Court judge rejected the Labor Board's reasoning. He pointed out that requiring submission of a negotiated agreement *and* a request for funds to implement it clearly contemplates two separate documents. He also noted that the Labor Board's quote from the state employee bargaining law related specifically to interest arbitration awards, not negotiated agreements, so it didn't apply to this particular situation.

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Our advice to municipal employers is to take pains to comply with the specific requirements of MERA when submitting union contracts for approval by the legislative body, in order to avoid questions about a contract's validity. These include not only a request for funds to implement the deal, and a listing of provisions that differ from state laws or local ordinances, but also an actuarial study detailing the financial implications of any negotiated pension changes. All this is intended to insure that members of the legislative body can make an informed decision when voting on a union contract.

Legal Briefs
and Footnotes

TNA Arbitrations Not Public: A divided Connecticut Supreme Court has ruled that binding arbitration panels under the Teacher Negotiations Act are not public entities, and their proceedings are not open to the public or the press. A majority of the justices rejected the Freedom of Information Commission's finding that such panels are in effect "committees of the Department of Education." They said a committee of a public agency is a sub-unit consisting of members of the agency, and TNA arbitrators have virtually nothing to do with the State Department of Education. The same logic would presumably apply to interest arbitration panels under the Municipal Employee Relations Act.

Perceived Disability Bias: In another split decision, the Connecticut Supreme Court has held that state law allows employees to sue for discrimination based on a perception of disability, even if the employee is not actually disabled. The decision reversed trial and appellate court rulings that said discrimination based on perceived disability is not actionable under Connecticut law. This ruling will have limited impact, however, since federal law already specifically prohibits employment discrimination based on a perception of disability.

Punitive Damages Revisited: In our last issue we reported on two Superior Court decisions that said punitive damages are not available under Connecticut's Fair Employment Practices Act. As luck would have it, only a few months later another Superior Court judge came to the opposite conclusion. It looks like this issue will have to be resolved by the Connecticut Supreme Court, unless the legislature decides to clarify the matter in the meantime.

Fed Ex Drivers Revisited: In yet another example of how far the NLRB is willing to go to support unionization, the Board has issued a decision finding that Fed Ex drivers in Connecticut are not independent contractors, but employees entitled to union representation. The Board's Hartford office originally reached that conclusion almost a decade ago, but while Fed Ex was contesting that decision, a prestigious federal appeals court ruled in a virtually identical case that Fed Ex drivers were independent contractors. The new NLRB ruling rejects that court's reasoning, which focused on the drivers' entrepreneurial opportunities, and used a different set of criteria, based on a common law agency test. Not surprisingly, Fed Ex vows to seek judicial review.

Save the Dates:

Labor and Employment Spring Public Sector Seminar
Thursday, March 19, 2015
8:00 AM - 12:30 PM
Sheraton Hartford South Hotel

Sexual Harassment Prevention Training
Hartford Office
8:00 AM - 10:00 AM
Feb. 26, April 9, April 23, May 7

Stamford Office
1:30 PM - 3:30 PM
April 23, May 7

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