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COUNSELORS AT LAW

Employment Law Letter

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Labor & Employment Practice Group

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Cameras in the Workplace: Fodder for Litigation

There's a lot of concern these days about the privacy implications of the widespread use of cameras at traffic intersections, in stores and other businesses, and even mounted on drones overhead. Cameras figured prominently in two recent employment cases as well, to the detriment of the employee in both cases.

In one case a truck driver was fired for talking on his cell while driving. The only evidence of his offense was a film recorded by a camera mounted in his truck. Although he was granted unemployment compensation benefits at the initial level, that result was reversed by an appeals referee, whose decision was upheld by the Board of Review and ultimately by a Superior Court judge. He said the evidence was clear that the driver had knowingly violated a clearly articulated employer rule designed to avoid safety hazards and reduce potential liability in the event of a motor vehicle accident. He said the employee had thereby engaged in "willful misconduct," which disqualified him from benefits.

The other case involved a Bridgeport teacher who used a camera mounted on her computer to film the children in her class, presumably to document classroom behavior issues. When an assistant principal found out, she was ordered to remove the camera, since she had no parental or other permission to film the children. However, it was later discovered that she had reintroduced the camera to the classroom, and termination proceedings were initiated under the Teacher Tenure Act. After a hearing panel recommended dismissal, the Board of Education so voted, but the teacher went to court.

The judge said that the teacher, who had previously received warnings about insubordination, disregarded direct orders not to bring back the camera. He ruled that the facts "wholly supported" the recommendation of the panel and the decision of the Board.

Our opinion is that we will probably see more and more litigation that in some way involves cameras. These days, most adults and many children carry phones or other electronic devices that are capable of recording images wherever they go, including the workplace. However, employers should think twice before prohibiting the taking of photos at work. Today's activist NLRB has issued some decisions suggesting that such a prohibition may have the effect of interfering with employee rights to engage in concerted protected activity, for example by documenting unsafe working conditions,

or circulating photographs of a solidarity march conducted during lunch hour. These rulings apply to both unionized and non-union facilities.

Consider Non-Compete Agreements Carefully

Many companies want to protect their business assets such as trade secrets, confidential information, and the goodwill of the business by using non-compete agreements with employees. The key to doing so successfully is to tailor the agreement to fit the needs and circumstances of your company.

Connecticut courts will enforce restrictive covenants if they are "reasonable." The courts will look at the specific facts and circumstances of each case to determine whether a particular agreement is reasonable. Generally, the courts consider a number of factors.

Duration: Courts have repeatedly held that a one year restriction is acceptable. However, a longer restriction period may be justified to protect your business' assets. In general, if a prohibition against competition lasts longer than a year, the employer should be prepared to justify the need for it.

Geographic scope: Courts have found that if a company operates nationally or internationally, fixing geographic limits may not provide adequate protection. For those whose business is more local or regional, however, it may be appropriate to determine a more limited geographic scope by considering the location of customers, prospects, and suppliers as well as the company's efforts to penetrate new markets. Also, courts view time and geographic scope as intertwined, so a shorter time restriction may permit a broader geographic scope restriction and vice versa.

Type of work: Some employees know so much about your business that it would be almost impossible for them to work for a competitor and not divulge secrets about your business. Other employees may have a more limited role and less exposure to your "business jewels." In such a case, a less expansive restriction may provide suitable protection, for example by limiting it to the same type of work the employee has performed for your company.

Consideration: The law generally requires that an employee receive something of value in return for a contractual commitment such as an agreement not to go to work for a competitor. While there is no precise definition for what is adequate consideration for a particular agreement, it is generally accepted that if such an agreement is made a condition of hire or promotion, courts usually will find there is adequate consideration.

But what if an employer decides to require some of its employees to sign non-compete agreements after they have already been working for the company? A Connecticut court has recently held that in the absence of a promise of continued employment, such an agreement is not enforceable. That is only the opinion of one judge, but it highlights the importance of consulting your lawyer if you want to maximize the chances of a mid-career non-compete agreement being enforceable.

Our advice to employers is to engage in a thoughtful process to design reasonable and enforceable non-compete agreements, and avoid taking a "one size fits all" approach. Your company should assess the business assets to be protected, the role of the employees to be covered and the scope of the restrictions utilized, in order to achieve your goals and maximize your chances that a court will deem your agreement to be "reasonable." Ideally, explain the restrictions to employees at the time of hire, make sure they are understood and agreed to, and remind employees of the terms at the time of separation. If your company has in place a non-compete agreement that a court later finds is unenforceable, you might as well have no agreement at all.

Recent S&G Website Publications

Connecticut DOL Releases New FMLA Regulations for School Paraprofessionals
Published June 3, 2014

New Model COBRA Notices Issued by DOL
Published May 21, 2014

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Who is an Employer? It's Not So Clear Anymore

Once upon a time, an employee worked for one employer, and that was that. There were no joint employers, dual employers, or other permutations or combinations. Life was simpler then.

Today, many companies have parents, subsidiaries and other related entities, which raises new issues. State and federal labor departments are looking closely at employers such as hospital systems, to see whether several entities that were previously separate should be treated as a single entity for employment purposes. For example, if a nurse works 40 hours at one hospital, but then works a weekend shift at another hospital in the same system, is she entitled to overtime? The answer depends on a number of factors, but the point is that years ago, when each hospital was an independent entity, the question wouldn't even be asked.

That's just the beginning. What about leased or borrowed employees? Are they employees of the lessor, the lessee, or both? In a recent Superior Court case, a company that used leased employees tried to argue that an injured employee couldn't sue, because workers compensation provided the exclusive remedy. A judge ruled, however, that the Connecticut Lent Employee Statute requires that a leased employee remain the employee of the lender for workers compensation purposes, and therefore the employee could sue the company for which he was performing work when he was injured.

Workers comp exclusivity also was at issue in another recent case where a teacher in the Bethany Public Schools was injured in a Town parking lot while performing his duties as a teacher. He sued the Town, arguing that the Board of Education was his employer, so his claim was not barred by the principle that you can't sue your employer over an injury on the job. However, the court said a teacher is an employee of the municipality as well as the Board of Education, so workers comp exclusivity applies.

Another arrangement that's becoming more common is the purchase of services from a third party provider, such as a school bus company or a security firm. If some wrongful act is committed against an employee of the provider, who is responsible? A court decision last month involving Regional School District No.4 held that a school bus driver removed at the request of the District because of statements he made couldn't sue under Connecticut's Free Speech Law, because the District was not his employer. We can only guess whether the result might have been different if the employee had brought suit under a different statute.

Our advice to employers is to think through these issues with respect to all those who provide services to your business, including those who may be treated as independent contractors instead of employees. While you may not be able to eliminate all risks or anticipate all circumstances, at least you can try to avoid unpleasant surprises when an issue does come up.

Legal Briefs *and Footnotes*

Failure to Pay OT is Expensive: Many employers are too

SHIPMAN & GOODWIN® LLP
COUNSELORS AT LAW

ANDREANA BELLACH
GARY BROCHU
BRIAN CLEMOW*
LEANDER DOLPHIN
BRENDA ECKERT
CHRISTOPHER ENGLER
JULIE FAY
VAUGHAN FINN
ROBIN FREDERICK
SUSAN FREEDMAN
SHARI GOODSTEIN
GABE JIRAN
ANNE LITTLEFIELD
JARAD LUCAN
PETER MAHER
LISA MEHTA
RICH MILLS
TOM MOONEY
PETER MURPHY
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SONIA PEDRAZA
JESSICA RITTER
KEVIN ROY
REBECCA SANTIAGO
DANIEL SCHWARTZ
ANTHONY SHANNON
ROBERT SIMPSON
JESSICA SOUFER
GARY STARR
CLARISSE THOMAS
CHRIS TRACEY
LINDA YODER
HENRY ZACCARDI
GWEN ZITTOUN

* Editor of this newsletter. Questions or comments? Email bclemow@goodwin.com.

One Constitution Plaza
Hartford, CT 06103-1919
860-251-5000

300 Atlantic Street
Stamford, CT 06901-3522
203-324-8100

1875 K St., NW - Suite 600
Washington, DC 20006-1251
202-469-7750

289 Greenwich Avenue
Greenwich, CT 06830-6595
203-869-5600

12 Porter Street
Lakeville, CT 06039-1809
860-435-2539

casual about determining who is and is not exempt from state and federal requirements for time and one-half pay after 40 hours in a workweek. According to press reports, Premier Limousine of Berlin, CT just agreed to pay $500,000 in back wages to 183 drivers to settle a federal lawsuit brought by the U.S. Department of Labor. Improper use of overtime exemptions is a priority target of the DOL, which has announced its intention to "ensure a level playing field for law-abiding employers."

What's an Adverse Employment Action? In order to bring a claim for discrimination in the workplace, an employee must allege an "adverse employment action." A long-term reporter for the Connecticut Post made such an allegation when she filed a CHRO complaint of age discrimination, after she and some other senior employees were placed on performance improvement plans. When the matter got to court, however, an appellate panel ruled that since she had lost no pay or benefits, let alone been terminated, no adverse action had occurred. The judges found persuasive the reasoning of federal court decisions reaching the same conclusion.

Could *Noel Canning* Affect CT? Those who think the NLRB has been on an anti-employer campaign for the past several years no doubt took some comfort from the U.S. Supreme Court's recent *Noel Canning* decision, which invalidated President Obama's recess appointments to the Board, and thereby called into question many decisions made by those appointees. Some observers now wonder whether the same logic might apply to Regional Directors appointed by the NLRB during the same period. One of those was Jonathan Kreisberg, who heads the Boston office which now has jurisdiction over Connecticut. Mr. Kreisberg was previously Regional Director in Hartford, when Connecticut was a separate region.

Tenure Act Bypassed: A teacher terminated by Area Cooperative Education Services (ACES) went to the CHRO claiming discrimination. ACES argued that the claim should be dismissed since the teacher had failed to contest his termination through the procedures of the Teacher Tenure Act. However, a Superior Court judge recently ruled that while a teacher can make a claim of discrimination in a proceeding under the Tenure Act, failure to do so does not bar access to the CHRO.

Now We've Seen Everything: Some people think that too many public employees have a sense of entitlement, but this claim sets a new standard. An off-duty Enfield police officer was leaving a restaurant when he was spotted by a civilian who he had previously arrested. The man called the police department and reported (falsely) that the officer was driving under the influence. The department called the officer on his cell and instructed him to pull over, then sent two sergeants to check on him. When they found he was not impaired, they let him drive away, but he filed a claim for overtime based on the call-in pay provision in his union contract. His union took the grievance to arbitration, but the majority of the arbitration panel sensibly found that the officer was not working during the time in question, nor was he called in to work. Predictably, arbitrator Raymond Shea, a former public employee union president, dissented.

Save the Date:

Labor and Employment Fall Seminar
Friday, October 31, 2014
8:00 AM - 12:00 Noon
Hartford Marriott Downtown

Please join us for our annual fall seminar for an interesting and informative program regarding recent developments in labor and employment law. Our half-day seminar will include discussions of timely topics and updates on recent legislation and court decisions affecting employers.