
ROSSWAY MOORE & TAYLOR

ATTORNEYS AND COUNSELORS AT LAW

JOHN E. MOORE, III*
BRADLEY W. ROSSWAY
HELEN E. SCOTT
JAMES A. TAYLOR, III*
THOMAS W. TIERNEY**

THE OAK POINT PROFESSIONAL CENTER
5070 NORTH HIGHWAY A-1-A, Suite 200
VERO BEACH, FLORIDA 32963
TELEPHONE (772) 231-4440 FACSIMILE (772) 231-4430
Web site: www.vero beachlawyers.com

SHANNON BANITT
LOUIS LUPIN
DEBORAH MARTIN-LEE
STEPHANIE VELASQUEZ

MICHAEL J. SWAN
Of Counsel

July 2009

*also admitted in
The District of Columbia
**also admitted in California

LEGAL AND LEGISLATIVE UPDATE

The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.

Miscellaneous

Homeland Security Proposes to Drop No-Match Rules

On July 8, 2009, Homeland Security Secretary (DHS) Janet Napolitano announced that DHS will soon propose a regulation to rescind the 2007 no-match rules. However, the next day the Senate moved to block the DHS from rescinding the no-match rules with an amendment that they attached to the DHS appropriations bill (H.R. 2892) and passed late on July 9, 2009. A conference committee must resolve the differences between the Senate and House version which did not include rescinding the no-match rule. Stay tuned for further developments.

IRS to Perform Random Audits

The IRS announced that its Small Business/Self-Employed Division will be conducting random employment tax audits of companies beginning in November 2009. It

plans to conduct 2000 audits per year over the next three years. Their purpose is to scrutinize employer's treatment of workers as independent contractors or employees, as well as fringe benefits, and expense reimbursement. They will also be scrutinizing employers' executive compensation policies and other employment tax matters.

Nationwide I-9 Audits

U.S. Immigration and Customs Enforcement (ICE) issued notices of inspection to 652 businesses nationwide on July 1, 2009. These Form I-9 audits are a new strategy to go after employers instead of undocumented workers and to build criminal cases against businesses suspected of hiring undocumented immigrants. There appears to be a correlation between Social Security no-match letters and where ICE is hitting the largest number of businesses. 26 businesses in Tampa, Florida received ICE notices. As a reminder, original I-9s must be retained for three (3) years after

the date of hire or one (1) year after the date of termination, whichever is longer.

Minimum Wage Increase

Federal minimum wage will increase effective July 24, 2009 to \$7.25 per hour. The minimum wage for tipped employees will increase to \$4.23 per hour. Florida employers must also pay this higher rate and can expect to see another increase in January 2010.

Discrimination

What Constitutes Manager for Title VII Harassment Purposes?

An employee heard about coworkers exposing themselves to others and assumed that her supervisors were aware as well. The next month, a coworker exposed himself in her presence on two occasions. She complained to a senior level manager and the human resource manager. An investigation was started the same day resulting in the employee's whole department receiving disciplinary warnings about inappropriate behavior. Several months later, the complaining employee was discharged for falsifying a machine log. She sued alleging that the employer failed to investigate and take remedial steps to eliminate a hostile work environment based on the original incidents that the employee had not witnessed. The trial court determined that the two employees and the supervisors were not management level employees so the employer was not held responsible for their failure to act. However, the employer took prompt and adequate remedial measures as soon as it received the plaintiff's complaint made to human resources. The appellate court agreed and took the opportunity to clarify the definition of "management level" employee for purposes of imputing knowledge of sexual harassment to the employer under Title VII. The court held that knowledge is imputed to the employer only when the knowledge is material to the duties performed for the employer either

because the employee is sufficiently senior in the governing hierarchy or is in a position to specifically deal with harassment complaints such as human resource, employee relations or personnel. *Huston v. Procter & Gamble Paper Products Corp.*, 568 F.3d 100 (3d Cir. 2009).

Reverse Discrimination

In a much publicized decision by the U.S. Supreme Court, the City of New Haven, Conn. was found to have engaged in unlawful race discrimination when it discarded the results of a firefighter promotional exam that resulted in no black candidates qualifying for promotion. The Court said that an employer's fear of litigation by racial minorities cannot justify intentional race discrimination against white employees unless the employer has a strong basis in evidence for believing racial minorities could prevail on a disparate impact claim. The City could not show any evidence that the test was not job-related or that a particular less discriminatory alternative was available. The court said that all the evidence demonstrates that the City chose not to certify the examination results based on race—i.e., how minority candidates had performed compared to white candidates. Without some other justification, this express race-based decisionmaking violates Title VII's command that employers cannot take adverse actions because of an individual's race. The standard that the employer must show a strong basis in evidence for believing it would be subject to disparate impact liability is also consistent with other Title VII provisions, including the law's ban on adjusting employment related test scores because of race, the court determined. If an employer cannot rescore a test based on race, an employer may also not discard the test results altogether to achieve a more desirable racial distribution of promotion-eligible candidates absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision. *Ricci v. DeStefano*, 129 S.Ct. 2658 (6/29/09)

Note: Disparate impact results when a neutral employment policy or practice (or in this case a valid test) has a disproportionate effect on individuals on the basis of race, color, religion, sex, or national origin and the employer fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

Florida Governor Can't Reject All-white List for Appeals Court Vacancy

The Florida Supreme Court held unanimously that the state Constitution leaves Governor Crist no choice but to pick one of the six white candidates submitted by a judicial nominating commission for a court vacancy even if the governor had wanted to make the judiciary more diverse. Writing for the state Supreme Court, Justice Jorge Labarga said that while the justices applauded the governor's "well-intentioned" interest in promoting diversity, he could not refuse to make an appointment from the list of recommendations under the Florida Constitution. *Pleus v. Crist*, No. SC09-565 (July 2, 2009).

New Legislation

Unemployment Benefits Extended

The state is providing up to 20 weeks of extended unemployment compensation benefits to eligible Florida workers. Payments will be retroactive to February 22, with some payment as high as \$5,100. The money for the extended benefits is coming from the federal stimulus funds and an increase in employer contributions. The minimum taxable wage will increase January 1, 2010 from the first \$7,000 of payroll per employee to \$8,500. The increase is set to sunset in 2015.

Time to Start Preparing for GINA

President Bush signed the Genetic Information Nondiscrimination Act into law in May 2008 and it will become effective

November 21, 2009. The definition of "genetic information" includes the results of "genetic tests" of the individual or family members, and "the manifestation of a disease or disorder" in family members of such individual, regardless of how the information is obtained. GINA prohibits not only the use of such information but also the collection of the information. This means that comprehensive physical examinations after a job offer has been made which include family medical history or genetic tests—not prohibited by the ADA—will be unlawful as of November 21, 2009. Presumably, any gathering of medical information will be prohibited, including requiring an applicant to complete a health assessment questionnaire, although that has not yet been confirmed. If an employer should receive genetic information it must be kept on a separate form and filed in a separate medical file. Such records must be kept confidential and stored in the same manner as medical records under the Americans with Disabilities Act. Remedies and enforcement of GINA Title II are the same as those under Title VII of the 1964 Civil Rights Act with the exception of disparate impact claims which are not allowed under GINA. Discrimination under GINA must be intentional to be actionable.

Proposed Legislation

Layoff Notification Bills Introduced

Congress wants to revise the Worker Adjustment and Retraining Notification Act (WARN). Bills have been introduced in the Senate (S. 1374) and House (H.R. 3042) to "strengthen" the law. The bills would give the Department of Labor the authority to enforce the WARN Act, would increase penalties for violations to double back pay, would reduce the mass layoff number from 50 workers to 25, would reduce the affected employer size from 100 employees to 75, and would lengthen the period of notification from 60 days to 90 days. Additional notification requirements are also included in the bills.

Labor Relations

Union Related Email Now Tougher for Employers to Ban

On July 7, 2009, the D.C. Circuit Court of Appeals reversed the Bush Administration's National Labor Relations Board precedent that employers could prohibit employees from using company email for solicitation purposes. In this case, an employee who was also the president of the union representing the company's employees used the company's email system to give her impressions of a recent union rally. The company issued a written warning. Three months later, the employee sent two more emails and the company gave her another written warning. The union filed an unfair labor practice charge arguing that the company had an overly broad no-solicitation policy. The NLRB ruled in December 2007 that the last two emails crossed the line by actually soliciting

employees to action on behalf of the union in violation of the employer's no solicitation policy. The Board ruled that employees have no statutory right to use employers' email systems for union matters. The Court of Appeals rejected the Board's rationale and held that the company applied its policy in a way that resulted in unlawful discrimination against union activity. *Guard Publishing Company d/b/a The Register Guard v. NLRB*, No. 07-1528, (D.C. Cir. 7/09)

This case signals a change in NLRB policy which was expected under the Obama administration. The case applies not only to unionized employers but non-union employers as well. The NLRB can find a non-union employer's no solicitation policies unlawful if they are not consistently enforced. No solicitation means no solicitation of any kind. Employers need to uniformly enforce their policies.