

Employment Law Outlook

DUTY OF LOYALTY DOES NOT END WHEN EMPLOYEE QUILTS

~ Susan R. Blackman, Esq. ~

A circuit court judge in Fairfax County recently issued an injunction prohibiting an employee from engaging in certain business activities in competition with his former employer. The case is interesting because the employee had not signed a noncompetition covenant. In fact, the employer had requested that the employee sign a covenant, but the employee had refused. However, the court issued the injunction based on the employee's continuing fiduciary duty to preserve the confidentiality of the proprietary methods he had learned during his employment.

The ruling is significant because it clarifies that an employee's fiduciary duties to his employer do not end when the employee resigns. In this case, the company sued the former employee, claiming that he was unfairly using the company's proprietary information regarding its radon remediation services to interfere with its relationships with customers. The company argued that the employee had learned these proprietary techniques entirely through his affiliation with the company, and that he owed a legal duty not to use these techniques to compete against the employer from whom he learned them.

The court agreed that, while the claims of tortious interference, breach of duty of loyalty, conspiracy, and unfair trade practices are pending, the defendant employee should not be permitted to utilize the company's proprietary techniques to provide radon remediation services to customers. The injunction states that the defendant shall not conduct any such remediation utilizing the techniques and/or methodologies that he learned from his previous employer, except for any information that is within the public domain.

EMPLOYERS SHOULD WATCH OUT FOR "REGARDED AS" CLAIMS UNDER THE ADA

~ William M. Furr, Esq. ~

Legal analysts are reporting a proliferation of "regarded as" claims of disability discrimination under the Americans with Disabilities Act (ADA). The ADA prohibits employers from discriminating against employees "regarded as" having disabilities as well as employees with disabilities.

The United States Postal Service recently settled a claim for \$2,000,000 in which 200 job applicants were denied positions because they were regarded as disabled. Although the applicants for data entry jobs had performed the work for a temporary agency supplying labor to the Postal Service, they were denied employment when they applied directly with the Postal Service because they were deemed to be

Continued on Page 2

OPPOSITION BUILDS AGAINST OSHA ERGONOMICS RULE

~ Wm. E. Rachels, Jr. Esq. ~

Since the Occupational Safety and Health Administration (OSHA) released its fall ergonomics standard in November (see our Fall 2000 Newsletter), opposition to the rule from employers has manifested itself in various ways. It is uncertain, however, whether the opposition to the rule will be enough to forestall employers' obligations under the rule. The ergonomics rule became effective on January 16, 2001, but employers' obligation to provide information to employees under the rule is not triggered until October 14, 2001.

Legislation is slated to be introduced to allow the House and Senate to pass a resolution of disapproval of agency rule making. If successful, the legislation would invalidate the OSHA ergonomics standard and prevent OSHA from issuing a substantially similar standard in the future. The legislation is known as the Congressional Review Act of 1996. Business groups are also challenging the ergonomics rule in court.

Continued from Page 1

medically unsuitable for the positions. A large number of the applicants who were denied employment had a history of either carpal tunnel syndrome or back injuries. In settling the case, the Postal Service agreed to pay over \$2,000,000 to the plaintiffs.

Employers need to be aware that they can be liable even if the employee is not actually “disabled” as that term is defined in the ADA. If the employee can prove that he or she was regarded as disabled by the employer, he or she can establish standing to sue under the ADA. Employers should be especially careful when concluding that an applicant is medically unsuitable for a position.

COCA-COLA TO PAY \$192.5 MILLION TO SETTLE DISCRIMINATION SUIT

~ Timothy M. McConville, Esq. ~

In perhaps the largest race discrimination settlement ever, the Coca-Cola Company in November agreed to pay \$192.5 million and to revamp its personnel policies and practices to settle a class action race discrimination suit by approximately 2,000 salaried employees. The settlement still must be approved by the federal judge handling the case in the Northern District of Georgia.

Under the terms of the settlement, \$58.7 million will go into a compensatory damages fund to resolve claims of emotional distress, hostile environment, and non-wage-related disparate treatment. The average class member is estimated to receive about \$40,000, and the four original plaintiffs in the case will receive no more than \$300,000 each. In addition, \$23.7 million (about \$28,000 per class member) will be placed in a back-pay fund. The settlement also allocates \$43.5 million toward salary adjustments over ten years.

The Coca-Cola Company also agreed to allow oversight of its human resource procedures for a four-year period. Like a similar settlement in a race-bias suit four years ago at Texaco, Inc., the Coke settlement will require the company to create a seven-member task force that for the next four years will review how Coca-Cola pays, promotes, and evaluates African American employees. The task force will include labor and civil rights experts to oversee an extensive review of the company’s human-resource practices and will prepare annual reports on the company’s compliance with the settlement. The recommendations of task force will be binding on the company. The estimated cost to Coca-Cola to implement changes in its human resources program is \$36 million. Three members of the panel are to be designated by

VIRGINIA’S LEGAL ELITE

Fifteen Willcox and Savage lawyers including three lawyers from the firm’s employment section were selected by their peers as members of “Virginia’s Legal Elite.” *Virginia Business* polled lawyers across the state regarding the best lawyers in various practice areas and the magazine published the results in its December 2000 issue. Bill Rachels and Billy Furr were listed among the top employment lawyers in the state and Susan Blackman was listed among the best business immigration lawyers.

Coke and three by the plaintiffs in the suit. A seventh, who will serve as chairman, will be selected jointly.

The settlement also creates a promotional achievement fund and provides for the plaintiffs’ attorneys’ fees. Under the settlement, the plaintiffs’ lawyers apparently will receive \$20 million.

The settlement underscores the importance of sound human resource policies and practices which foster an environment of equal employment opportunity. Willcox & Savage’s labor and employment attorneys, of course, are available to counsel employers on fair employment practices.

NEW CHANGES MAKE H-1B PROGRAM MORE EMPLOYER FRIENDLY BUT MORE EXPENSIVE

~ Susan R. Blackman, Esq. ~

The Immigration and Naturalization Service (INS) recently enacted changes to the H-1B visa program used by employers to employ qualified foreign workers within specialty occupations. The INS defines specialty occupation

Continued on Page 3

MAINTAINING A UNION-FREE ENVIRONMENT

~ Timothy M. McConville, Esq. ~

When it comes to maintaining a union-free environment, the old adage that an ounce of prevention is worth a pound of cure is especially true. That’s why Willcox & Savage offers management training in how to maintain a union-free environment. Such training can be very helpful in countering efforts by organized labor to unionize workers. For more information about management training in staying union-free, please contact us.

Continued from Page 2

as one in which a Bachelor's Degree or equivalent experience is required as a minimum for entrance into the occupation. In addition, the foreign worker must possess a Bachelor's or higher degree or the required experience in the specialty or in a closely related specialty. The program has been very popular among technology firms and health care organizations, who face shortages of qualified employees.

This new legislation brings many positive changes to the H-1B programs, such as an increase in the number of visas available each year and the portability of these visas between employers, as well as new provisions for those employers who are H-1B "dependent". The changes also brought a \$500 increase in the application fee, making it necessary for employers, especially small businesses, to carefully assess the use of the program.

In recent years, the INS has not issued enough H-1B visas to meet the demand, but the new law has temporarily increased the number of these visas that may be issued. For each of the fiscal years 2001, 2002, and 2003, there will now be 195,000 H-1B visas available, with the number returning to 65,000 for fiscal year 2004. It is believed that this increase will mean that visa numbers will be available throughout the year and that employers will not be prevented from hiring foreign workers in a timely manner due to the reaching of the H-1B visa cap. In fiscal year 2000, the cap was reached March 17, making it impossible for employers to hire new H-1B workers with a start date earlier than October 1, the beginning of fiscal year 2001. The cap applies only to new applications, not to extension applications or applications involving a change in employer.

Another important development is the new, more flexible portability provision which allows an employer to hire a foreign worker currently working on an H-1B visa for another employer and to start that worker immediately. Previously, the new employer had to file a new petition and wait for approval before the H-1B worker could begin. Depending upon which INS Service Center had jurisdiction over the worker's intended place of work, this process could take several months. Under the new regulations, employers will not have to wait to benefit from the new recruit's talents if: the employee has a valid H-1B visa issued for a previous employer; he or she has not violated that status; and he or she will be performing the same type of job with the new employer. The new law also provides for one-year extensions of the six-year maximum stay of any H-1B visa holder for whom the employer has timely filed an application for adjustment of status for permanent residence (a "green card").

There have been significant developments for qualified employers in the non-profit, governmental research, and education sectors. Such employers will have an unlimited number of H-1B visas available to them and will be exempt from paying the filing fee normally associated with the H-1B petition. The law also contains two new, more employee-friendly provisions, including non-displacement (layoff) and recruitment attestations by AH-1B dependent" employers and those employers who willfully violate the H-1B regulations, as well as a stipulation that requires employers to offer the same fringe benefits to H-1B workers on the same basis as it offers those benefits to U.S. workers.

The trade-off for these improvements in the program is the increased filing fee for H-1B petitions, which is now \$1,110.00. This figure includes the \$110 application fee and a \$1000 fee to be used for the training and development of U.S. workers. This fee does not include the costs of attorneys fees or credential evaluation fees associated with preparing an H-1B application.

For those businesses who seek to hire for hard-to-fill technology, nursing, engineering, and other positions requiring at least a Bachelor's Degree or equivalent experience, the H-1B program can be an important tool.

7TH ANNUAL WILLCOX AND SAVAGE EMPLOYMENT LAW SEMINAR

Mark your calendars now to attend the 7th Annual Willcox and Savage Employment Law Seminar, November 1, 2001.

CLASS ACTIONS AGAINST EMPLOYERS FOR WAGE AND HOUR VIOLATIONS INCREASE

~ William M. Furr, Esq. ~

In the last year, we have seen a tremendous increase in the number of class actions filed against employers for violations of the wage and hour laws. An estimated class of 14,000 current and former employees of Taco Bell sued the restaurant chain for overtime and minimum wage violations. In a wage and hour case against Cracker Barrel, notices were sent to 100,000 employees or former employees. Albertson's settled a claim by 150,000 workers for alleged violations of the Fair Labor Standards Act (FLSA).

The FLSA was enacted in 1938 and generally requires employers to provide overtime pay to nonexempt employees

Continued on Page 4

Continued from Page 3

who work more than 40 hours in a work week. It also requires employers to pay the minimum wage for all hours worked.

Plaintiffs' employment lawyers have recently recruited classes of employees to sue their employers or former employers. In FLSA class actions, co-workers can "opt-in" in a collective action against the employer. A plaintiff's lawyer who initiates a lawsuit against employer with five or ten plaintiffs could conceivably end up with hundreds of plaintiffs before the end of the case.

The vast majority of employers who lose FLSA cases have misclassified their employees as exempt from the overtime requirements of the FLSA. If an employee can prove that he or she is not exempt and that the employer failed to pay overtime, the employee may recover back pay, an equal amount in liquidated damages and his or her attorneys' fees.

We advise employers to conduct self-audits of their wage and hour practices. If you have misclassified employees as exempt, you should reclassify them and begin paying overtime to them for hours worked more than 40 hours in a work week.

**WILLCOX & SAVAGE
LABOR, EMPLOYMENT & EMPLOYEE
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