

EMPLOYMENT & IMMIGRATION LAW

Special Section of the Connecticut Law Tribune



Sending A BAD MESSAGE

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NOW YOU SEE IT, NOW YOU DON'T

Overtime pay exemption applies to some, but not all, commissioned salespersons

By **ROBERT MITCHELL**

Generally, federal and Connecticut state law both require employers to pay their employees overtime wages equal to one and one-half times the employee's regularly hourly pay for hours they work over 40 hours in any seven-day workweek. There are a number of exemptions from this requirement. One area where employers look for exemptions is to



The net effect is to provide minimum wage coverage to a whole class of employees that it is unlikely either state or federal policy really intended to protect.

cover the highly compensated inside commissioned salesperson, such as the successful, \$100,000-a-year executive recruiter, an employee who shall serve as an example in this article.

Whether a Connecticut employer can claim an overtime pay exemption in such case, however, is complicated and subject to sometimes contradictory federal and state rules.

The Fair Labor Standards Act exempts inside commissioned salespersons who work in a "retail or service" establishment, whose regular pay exceeds one and one-half times the applicable federal minimum wage, and who earn more than half their total compensation as commissions. The hitch here is what is a "retail or service establishment." Generally, these have been held to be businesses that sell products or services to the public, to the ultimate consumer. The local dime store, roadside fruit stand or laundry service all might fall into this category; however, the federal authorities very narrowly construe the term. Employment recruiting firms are not considered retail or service establishments.

To determine if a particular business will meet the test, counsel must review the federal precedents and hope for a close match to the client's specific problem. From the perspective of Connecticut law, the issue is much easier. It comes under section 31-76i(g) of the General Statutes, which exempts any inside salesperson whose regular rate of pay is twice the mini-

mum wage, who earns more than half of his compensation as commissions, who does not work more than 54 hours in a week, and whose sole duty is sales.

Job Duties

So the inside commissioned salesperson, devoted to sales, who works for a retail or service establishment, who makes at least twice the minimum wage and who does not work more than 54 hours a week, will fall outside the scope of the class who must be paid overtime under either the state or federal law. Of course, there are a very large number of commissioned inside sales people who do not meet these tests, including our hypothetical recruiter.

His employer has run into the proverbial brick wall as far as the various common commissioned sales exemptions are concerned. He will have to look elsewhere if he wants to avoid paying overtime. He might next look at the job duties — defined executive, administrative, professional, etc., minimum wage exemptions created under the FLSA and Connecticut law. It is unlikely that any but the administrative exemption will provide any hope for relief from the overtime pay requirements in the case of an inside sales employee.

An inside sales employee might fit within the scope of the FLSA and state tests for administrative status. The FLSA requires that: (1) the employee's compensation be \$455 a week or more; and (2) that he be primarily engaged in administrative duties that require an exercise of discretion and independent judgment and which consist of either (i) performing office or non-manual work directly related either to the employer's management policies or to the employer's (or a customer's) general business operations; or (ii) the performance of administrative functions in an educational setting directly related to academic instruction and training. The educational issue does not arise in our commissioned employment recruiting example.

'Independent Judgment'

Assuming that the employee's work does relate to employer or customer management policies and general business operations, the employer must next demonstrate that the employee's primary duty includes the exercise of "discretion and independent judgment" about matters of "significance." This involves comparing and evaluating possible courses of conduct, and acting or making a decision about them. While the Connecticut rules read

a bit differently, particularly in their continuing to apply the pre-2004 federal 20 percent (non-retail or service establishment) to 40 percent (retail or service establishment) non-qualifying work test, their effect and application is often coincident to the FLSA.

The severe restriction on how much time an administrative employee may spend working at non-administrative tasks limits the exemption's utility as a means of fitting commissioned inside salespeople into the exempt employee class. When one completes the analysis, we are still left with most inside commissioned sales people standing as non-exempt employees entitled to overtime payments.

The FLSA provides one last exemption refuge from overtime pay requirements; the highly compensated employee exemption. Fitting an employee into this exempt classification requires only that: (1) earnings total an annual \$100,000 or more; and (2) he regularly performs any one of the exempt duties or responsibilities of an executive, administrative or even professional employee. Many highly compensated commissioned sales people, including our executive recruiter, will probably meet this test. Unfortunately, Connecticut law presently prevents our recruiting firm from taking advantage of this rule. Indeed, there is a trap for the unwary here that can trip up the employer and his counsel and lead to serious liability on the employer's part.

The closest Connecticut comes to the FLSA's highly compensated employee exemption is in the Section 31-76i(g) commissioned inside sales exemption, but 31-76i(g) prohibits the employee from performing any duty other than selling. It precludes that salesperson from undertaking any administrative duties, exactly the opposite of the FLSA's highly compensated employee rule.

If you meet the federal, you fail with the state test. Intentionally or not, this leaves a gap. If our recruiter is not classified as an executive or administrative employee, there is no overtime exemption that covers her, even if she makes over \$100,000 a year in commissions.

The net effect is to provide minimum wage coverage to a whole class of employees that it is unlikely either state or federal policy really intended to protect. It is a problem that exists with many inside commissioned sales positions and one which the Connecticut legislature should correct either by creating a state highly compensated employee exemption or by removing the limitation on 31-76i(g) that limits a covered employees duties to sales alone. ■

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SENDING A MESSAGE ABOUT E-MAILS

NLRB says unions can't use employers' communications systems

By **BRIAN CLEMOV**

The National Labor Relations Board has finally answered a question that labor and management representatives have been arguing about ever since the use of e-mail in the workplace became common. Do employees have the right to use a company's

tions until the union president sent her messages.

The union argued that the policy was invalid on its face, because e-mail has become a universal method of workplace communication, and therefore workers should have the same rights with respect to e-mail that they have with respect to one-

on behalf of any outside organization, whether the Red Cross or a union. However, both cases arose in the Seventh Circuit, where enforcement was denied, because the judges felt that discrimination involved the unequal treatment of equals, and they did not agree that personal notices and organizational notices were of a similar character. In their view, if the Red Cross and a union were treated the same way, there could be no discrimination.

The NLRB majority, over a vigorous dissent, adopted the Seventh Circuit's approach. They held that "an employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g. a car for sale) and solicitations for the commercial sale of a product (e.g. Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business-related use."

Solicitation Questions

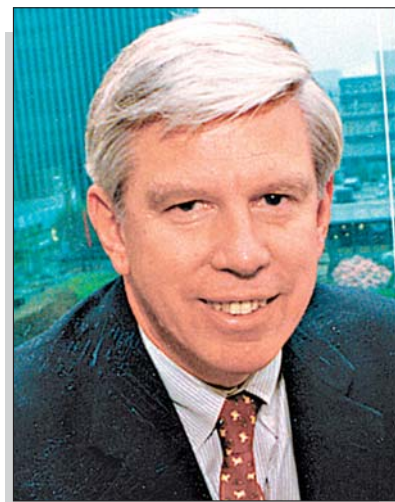
The *Fleming* and *Guardian* cases were overruled.

However, that did not end the inquiry. The board found that in the *Guard Publishing* case, while two of the union president's e-mails involved solicitations, and therefore could be prohibited under the employer's policy, the third did not, since it only explained the union's view of the facts on a particular issue. Disciplining the employee for that message went beyond the employer's own policy, and was therefore a violation.

Drawing a distinction between solicitation and other forms of communication may prove problematic in future cases, if sophisticated union advocates develop techniques for encouraging employee support without actually asking for it. The same may be true of line-drawing between personal messages and organizational messages. Employers will need to think through these issues before issuing revised rules about the use of bulletin boards, email, and other company-owned facilities and equipment.

Further, we may not have heard the last word on this subject from the NLRB. The decision in *Guard Publishing* was released on the last day of the term of board Chairman Robert J. Battista. Members of the board have become at least as polarized as the rest of Washington, and nobody knows what the NLRB will look like under a new administration. The board has reversed itself more than once in the recent past as its makeup has changed, so practitioners should stay tuned. ■

The union argued that the policy was invalid on its face, because e-mail has become a universal method of workplace communication.



e-mail system for union business? That question has taken on more significance as traditional methods of union organizing have failed to stop the decline of union membership as a percentage of the nation's workforce.

In *Guard Publishing d/b/a Register-Guard*, 351 NLRB No. 77, decided on Dec. 16, 2007, the board ruled 3-2 that workers do not have a right to use their employers' electronic communication systems for such purposes. The majority also affirmed the longstanding principle that employers cannot establish or enforce policies or practices that discriminate against union-related communication, but in so doing adopted a new approach that will make it much more difficult to prove that such discrimination has occurred.

Newspaper Workers

The case involved a newspaper in Eugene, Ore., that was involved in contract negotiations with a union representing more than 100 employees. The publisher disciplined the union president for sending three e-mail messages to fellow employees. The first was composed and sent from her workstation during a break, and was intended to correct what the president thought was misinformation distributed by management about a union rally. The other two were sent from the union office to the work e-mail addresses of co-workers, urging them to support union activities or the union's position in negotiations.

The employer maintained a policy that prohibited employees from using its e-mail system for "non-job-related solicitations." In practice, however, workers were allowed to send and receive e-mails on a variety of personal matters, including party invitations, requests for a dog walker, offers of sports tickets, etc. Apparently there were no e-mail solicitations on behalf of organiza-

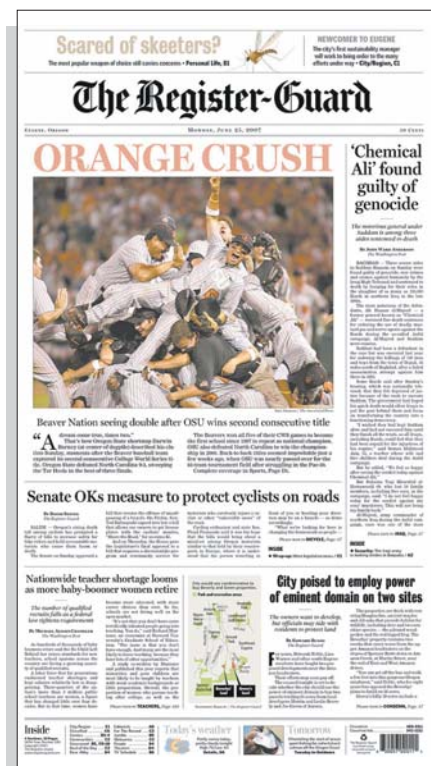
on-one conversations. That is, they should be able to discuss union matters as long as it isn't on working time. Even if the policy was not found to be invalid on its face, however, the union claimed it was discriminatory as applied, because longstanding NLRB precedent holds that an employer can't permit some non-business use of its equipment or facilities but deny similar use for union-related purposes.

The majority found that the principles of *Republic Aviation Corporation v. NLRB*, 324 U.S. 793 (1945), which established that employees may discuss union matters in the workplace as long as it isn't on working time, do not apply to the use of e-mail. For one thing, employers have substantial property rights in their electronic communication systems, and for another, employees have available alternatives, especially face-to-face conversations. Therefore, the majority declined to find that employers must make their email systems available for union business.

Swap And Shop

The question of discriminatory application was a tougher one. In *Fleming Company*, 336 NLRB 192 (2001), the board ruled that an employer cannot allow its facilities (in that case a bulletin board) to be used for some non-work purposes, such as personal announcements, and yet deny use for union business.

Earlier, in *Guardian Industries*, 313 NLRB 1275 (1994), the board reached the same conclusion where the employer permitted "swap-and-shop" postings, but not postings



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NATIONAL Outlook

WORKPLACE LAWS MAY BE IN FOR MAJOR CHANGE

Union organizing, paid sick leave, arbitration on the table in Congress

By **TRESA BALDAS**
ALM Media

A legislative movement is afoot in Washington this year that could radically reform labor and employment laws, which has employers crying foul and unions applauding.

Pending legislation could do everything from expanding union organizing to mandating paid sick leave, thereby exposing companies to even more regulation and litigation.

"Big changes could be afoot," said Adam Forman, a management-side attorney at Detroit's Miller, Canfield, Paddock and Stone who believes the upcoming election will have a "direct impact" on labor and employment laws.

"There's a groundswell of interest in correcting perceived inequities in the labor and employment world ... I'm not sure any employment law will be immune from an examination," he said.

And they shouldn't be, said Julie Martinez-Ortega, a former employee rights attorney and current research director at American Rights at Work, a nonprofit labor advocacy group in Washington. "There is a severe crisis right now for workers," said Martinez-Ortega, who believes labor laws specifically have been misinterpreted over the years to favor employers.

Topping nearly every management-side law firm's list of major concerns is the Employee Free Choice Act (EFCA), which would do away with secret-ballot union elections and allow unions to organize just by collecting cards from a simple majority of employees.

Ballots and Definitions

That means, if a company has 50 employees and 26 sign the cards, the business is unionized. Management-side lawyers say that's a significant departure from current law, which requires signatures first to be collected, then a private election to be held before a company is organized, giving employers a heads-up and a chance to voice their concerns to employees.

Equally troublesome for employers is the Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers (RESPECT) Act, which would widen the pool of those eligible to join a union by changing the 60-year-old definition of "supervisor" under the National Labor Relations Act (NLRA).

The new definition would require employees to spend a majority of their time in actual supervisory roles before they could be classified as a supervisor. Lawyers say changing the NLRA definition of a supervisor could have a trickle-down effect



Adding to employers' fears is the eventual changing of the guard at the National Labor Relations Board, which currently has three openings. Unions in recent months have criticized NLRB rulings as being too employer-friendly, and are calling on lawmakers to fill the vacant slots with pro-labor members.

on wage-and-hour laws, which also exempt certain supervisors from overtime, and could lead to even more employees suing for overtime.

There's also the Healthy Families Act, which would guarantee seven paid sick days for employees who are sick or need to care for a family member. There is no current federal or state law mandating sick leave. Lawyers say this bill could put undue pressure on employers and affect the Family and Medical Leave Act, which allows employees to take 12 weeks of unpaid sick leave, and permits employers to require employees to take FMLA concurrently with paid sick days.

labor and employment law partner at New York-based Proskauer Rose. "I'm no psychic, but I predict that if a Democrat or even a moderate Republican wins the presidency in 2008 and Congress stays in Democratic control, these legislative efforts could become law, resulting in major labor law reform."

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Unions in recent months have criticized NLRB rulings as being too employer-friendly, and are calling on lawmakers to fill the vacant slots with pro-labor members.

Lawyers say
changing the NLRA definition of a supervisor could have a trickle-down effect on wage-and-hour laws, which also exempt certain supervisors from overtime.

Also pending is the Arbitration Fairness Act, which would ban mandatory binding arbitration clauses in consumer and employment contracts, making it illegal for companies to require consumers and workers first to go through arbitration to resolve disputes rather than to go directly to the courts.

'A Real Crossroads'

"There seems to be a pent-up demand for legislative action concerning certain workplace issues," said Paul Salvatore, a

The president makes the final decision on filling the vacancies.

"I think we're at a real crossroads in the area of traditional labor law," said management-side attorney Don Schroeder of Boston-based Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, who believes that unions could get their long-awaited boost from Congress this year. "Unions actually have a platform that they're expecting the Democrats to run on, and what's currently on the table — there's actually some meat on the bones." ■

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HABEAS LAW NOT FOR IMMIGRANT DETAINEE

2nd Circuit rules against Nigerian man in case first heard by Mukasey

By **MARK HAMBLETT**
ALM Media

Immigration detention is not custody within the meaning of the federal courts' habeas statute, the 2d U.S. Circuit Court of Appeals has ruled in a case of first impression. *Ogunwomoju v. U.S.*, No. 06-3734-pr. The court said that, as Nigerian immigrant Adeniyi Ogunwomoju is in custody solely for immigration reasons, he can't challenge his state convictions and try to remain in the United States. The court said a district court lacked jurisdiction to consider Ogunwomoju's habeas petition because he was no longer in state custody for his criminal offense.

Ogunwomoju filed his habeas petition in the U.S. District Court for the Southern District of New York after several criminal convictions led to removal proceedings against him. He claimed that a 2000 drug conviction should be undone because his guilty plea was involuntary or unlawfully induced, trial counsel was ineffective, and evidence was seized from him in violation of the Fourth Amendment to the U.S. Constitution.

Then-Judge Michael Mukasey dismissed the petition, finding no basis for relief under 28 U.S.C. 2254. Mukasey found that Ogunwomoju was not in custody pursuant to his criminal conviction, as he had already served his sentence, but was instead in immigration custody.

Therefore, the judge found he lacked jurisdiction over the petition.

Repeated References

On appeal, the issue was the meaning of Section 2554(a), which requires as a prerequisite to a district court entertaining a habeas petition that the application be made "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

The U.S. Supreme Court, in *Carafas v. LaVallee*, 391 U.S. 234 (1968), said custody is "required not only by the repeated references in the statute but also by the history of the great writ. Its province, shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of the person."

Writing on behalf of the 2d Circuit, Judge Roger Miner said that the justices in *Carafas* had rejected an argument by the state that the petitioner's release from state custody during the pendency of his appeal rendered the petition moot. The justices said the "collateral consequences" of the conviction, such as loss of employment opportunities, justified continuing to hear the petition.

Ogunwomoju cited *Carafas*, but to no avail, because the high court later said, in *Maleng v. Cook*, 490 U.S. 488 (1989), that it did not rest its holding in *Carafas* on collat-



Former federal Judge Michael Mukasey, now the U.S. attorney general, dismissed a habeas petition from a Nigerian immigrant. Mukasey said he lacked jurisdiction because the man was not in custody pursuant to his criminal conviction, but was instead in immigration custody.

eral consequences "but on the fact that the petitioner had been in physical custody under the challenged conviction at the time the petition was filed." Miner said,

"Although Ogunwomoju was in immigration detention at the time he filed the habeas petition to challenge his New York conviction, he was not in custody pursuant to a judgment of the state court."

Miner said the circuit had never determined "whether a petitioner in immigration detention or under an order of removal as the result of a criminal conviction is 'in custody' for the purpose of a §2254 challenge to that criminal conviction. We do so now, and join our sister circuits that have determined that one held in immigration detention is not 'in custody' for the purpose of challenging a state conviction under §2254."

Miner went on: "Removal proceedings are at best a collateral consequence of conviction, and we must bear in mind that once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purpose of a habeas attack upon it. That is precisely the situation in which Ogunwomoju now finds himself." ■

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CHANGING RULES WITHOUT NEGOTIATIONS

NLRB upholds rights of employers to sometimes take unilateral action

By **KENNETH R. DOLIN**

The National Labor Relations Board, in a 2-1 panel decision, upheld the traditional waiver standard in determining whether an employer's unilateral action is unlawful. *Provena St. Joseph Medical Center*, 350 NLRB No. 64 (Aug. 16, 2007). It rejected the use of a "contract coverage" analysis that has been enunciated by two circuit courts of appeals.

Unilateral changes by an employer during the course of a collective bargaining relationship concerning matters that are mandatory subjects of bargaining are normally regarded as *per se* refusals to bargain. A labor union, however, may contractually waive its right to bargain over a mandatory subject. When such a waiver is claimed by virtue of the collective bargaining agreement, the test is whether the putative waiver is in "clear and unmistakable" language. Under this test, the employer's conduct is unlawful unless the contract clause "clearly and unmistakably" waives the union's right to bargain. When a "management rights" clause is the source of an asserted waiver, it is normally scrutinized to ascertain whether it affords specific justification for the unilateral action.

The board has adhered to its waiver analysis, notwithstanding judicial criticism and the application by at least two circuit

courts of appeal of the alternative, less rigid "contract coverage" analysis. Under this contract-coverage approach, once a matter is reasonably deemed "covered by" the collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant.

Staff Incentive Policy

In *Provena*, the employer and union had been parties to successive collective bargaining agreements since 1993. The agreement at issue was effective from March 24, 1999, through March 23, 2002, and contained the following management rights terms: Except as specifically limited by express provisions of the agreement, the employer retained exclusively to itself the traditional rights (as existed prior to union organization) to operate and manage its business and to direct its employees; the employer was permitted "to change or eliminate existing methods, equipment, facilities and reporting practices and/or to introduce new or improved ones;" the employer was authorized "to suspend, discipline, and discharge employees;" and the employer was allowed to "make and enforce the rules of conduct, standards, and regulations governing the conduct of employees." Also, the right to determine or change the methods and means by which its operations are to be carried on and "to take any and all action it determines appropriate ... to maintain efficiency and appropriate patient care" was

reserved to the employer.

On Dec. 8, 2000, because of short-term staffing concerns over the holidays resulting in job vacancies, the employer implemented a staff incentive policy, providing that nurses who signed up between Dec. 8, 2000, and Jan. 1, 2001, would qualify for premium payments. This was the employer's third incentive policy in 13 months.

Admitting that it did not offer the union an opportunity for bargaining, the employer maintained that it had that authority to act

The employer informed the union that it would be implementing a revised attendance and tardiness policy.

unilaterally under the management rights clause, in the absence of a specific limitation to the contrary, and because the union had historically acquiesced in its implementation of staffing incentives. Thereafter, the employer informed the union that it would be implementing a revised attendance and tardiness policy, replacing one that had been in effect for about four years.

The union filed a grievance and demanded bargaining. The employer argued that the union's failure to request bargaining promptly upon receiving two weeks' advance notice of the employer's plan constituted a waiver and privileged its action. The employer also relied on the provision of the management rights clause and its unilateral formulation of attendance and tardiness policies in 1997 and 1998 to support its position that it had unilateral authority in this area.

Applying the board's waiver standard, the administrative law judge found that the union did not clearly and unmistakably waive its rights to bargain over the implementation of the incentive policy or the change in the attendance and tardiness policy.

The board, in a 2-1 decision, found that the employer's unilateral implementation of its incentive policy was unlawful, but that the union waived its bargaining rights with respect to the employer's newly implemented disciplinary policy on attendance and tardiness. The board panel applied the clear and unmistakable waiver standard, and rejected the contract-coverage standard, reasoning that "the clear and unmistakable waiver standard is firmly grounded in the policy of the NLRA favoring collective bargaining;" the standard has been consistently applied by the board for more than 50 years; and the waiver standard has been approved by the Supreme Court.

The panel majority found that the waiver standard best reflected the board's interpretation of the statutory duty to bargain during the terms of an existing agreement, and the board's interpretation should be entitled to judicial deference as long as its interpretation is "rational and consistent with

the act." It concluded that the two circuits that had rejected the waiver standard are in a distinct minority, and there were neither persuasive reasons for abandoning the well-established waiver standard, nor evidence that a different approach would further the board's statutory mandate.

In applying the waiver test, the panel found that the employer acted unlawfully by unilaterally implementing the incentive policy. It reasoned that there was no express substantive provision in the collective bargaining agreement regarding incentive pay, and there was neither evidence that incentive pay was consciously yielded in bargaining nor evidence that the union intentionally relinquished its right to bargain over the topic.

As to the newly implemented disciplinary policy on attendance and tardiness, the panel found that several provisions of the management rights clause, taken together, explicitly authorized the employer's unilateral action. Specifically, the portions of the clause providing that the employer has the right to "change reporting practices and procedures and/or to introduce new or improved ones," "to make and enforce rules of conduct," and "to suspend, discipline, and discharge employees" were sufficient to find that the union relinquished its right to demand bargaining over the implementation of the policy prescribing attendance requirements and the consequences for failing to adhere to these requirements.

Chairman's Dissent

Chairman Robert J. Battista dissented, stating that the contract-coverage approach was "the better approach" and this case offered the board an opportunity to eliminate the conflict between it and the two circuits on this important issue and to harmonize its views with the grievance-arbitration process. According to Battista, when the parties have bargained about the subject and having reached some accord, the issue should not be whether the union has waived its right to bargain but whether the parties have bargained about the relevant subject matter. Battista would find no refusal to bargain when the parties have bargained about the subject matter.

Battista also pointed out that the contract-coverage analysis would serve to minimize the conflict between the board and the grievance-arbitration process because the board, viewing a case through the "waiver prism," would find a violation, while an arbitrator, viewing the same case through normal principles of contract interpretation, would likely find that the clause privileges that conduct, albeit not "clearly and unmistakably so."

Thus, there is a distinct possibility of different results depending on the choice of forum.

Applying the contract-coverage test, Battista would find no unlawful conduct by the employer's implementation of the staff incentive policy because the contract contained provisions relevant to the dispute about overtime work and the compensation to be paid for it, permitting "extraordinary pay" for extra hours worked. He thus concluded that the issue should be left for the arbitral process. ■

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WHEN A LETTER ISN'T PERFECT

Doctors' missive sometimes not enough to prove disability

By **SID STEINBERG**

If an employee's physician writes that the employee cannot work due to a "permanent disability," this would seem to be a sufficient basis for the employer to remove the employee from the workplace. In the case of *Wishkin v. Potter*, however, the 3rd U.S. Circuit Court of



The court held that if the letter from Wishkin's physician was obtained under duress, it could not form the basis for a legitimate conclusion that he was not qualified for his position.

Appeals held that such a representation would not necessarily be enough to prompt the employer's action.

Richard Wishkin is a mentally disabled man who began his employment with the U.S. Postal Service in 1969. In 1983, he suffered a work-related injury that resulted in him being limited to a 20-pound lifting restriction.

In 1998, there were rumors that Wishkin's unit would be closed. Wishkin became concerned that he would be unemployed if this occurred. As such, Wishkin requested that his urologist write a letter to his supervisor recommending that he be considered for permanent disability, ostensibly because of his health problems and limitations. Wishkin's doctor reluctantly agreed, despite the fact that Wishkin's ability to work was unchanged.

After Wishkin delivered the letter to his supervisor, he was sent for a fitness-for-duty examination. The examination lasted more than two hours and, at the conclusion, Wishkin was advised that he was "fit for duty." He claimed that when the "fit for duty" report was delivered to his supervisor, she became irate and called the examining doctor to advise that Wishkin's own physician had declared him eligible for permanent disability. The examining physician then changed his evaluation from "fit for duty" to "unfit for duty" a few minutes later.

No Benefits

The supervisor then accompanied Wishkin to process his disability retirement paperwork, which he refused to complete. The supervisor then told Wishkin that he was not to return to his place of employment, but because he did not complete the appropriate paperwork, he received no disability benefits. Almost a year later, when Wishkin's health benefits were scheduled to expire, he submitted another physician's assessment that he could return to his employment with his previous restrictions — which he did until a heart condition forced his retirement four years later.

After Wishkin's retirement, he brought suit against the Postal Service, claiming that he was discriminatorily placed on leave in violation of the Rehabilitation Act. The district

court granted summary judgment in favor of the Postal Service on the grounds that Wishkin's physician's letter was the basis for his employer's finding that he was "unfit for duty." This finding meant that he was not "otherwise qualified" to perform the essential functions of his job. Wishkin, therefore, could not create a *prima facie* case of disability discrimination.

Wishkin appealed, claiming that the district court had ignored evidence that could create an issue of fact as to the Postal Service's finding that he was "unfit for duty."

The appellate court began its analysis by recognizing that the traditional burden-shifting paradigm was applicable to cases under the Rehabilitation Act, just as it was to other discrimination claims. It then found that Wishkin's mental disability clearly qualified him for coverage under the Rehabilitation Act as a "substantial limitation of a major life activity."

'Unusual Circumstances'

The 3rd Circuit found, however, that the record contained evidence that Wishkin's supervisor had pressured him (and possibly other mentally disabled co-workers) into seeking substantiation for a "disability retirement" by telling them that their jobs would soon be eliminated and that such a retirement was the only way to "save himself." The court noted that a number of Wishkin's disabled co-workers were given fitness-for-duty examinations on the same day, and that a large percentage of the co-workers took

disability retirements in the same time frame.

The court continued: "The unusual circumstances surrounding the fitness for duty examinations of the all the disabled employees and the consistent and routine warnings given to the disabled employees regarding their job status could support Wishkin's contention that [his disability leave] was motivated by discrimination."

The court held that if the letter from Wishkin's physician was obtained under duress, it could not form the basis for a legitimate conclusion that he was not qualified for his position.

While clearly an employee cannot be pressured into declaring himself "disabled," the decision may have the effect of requiring employers to confirm an employee's own representations of disability before acting on them. In this case, while there was agreement that Wishkin sought the "permanent disability" letter to avoid layoff if his position was eliminated, the evidence was that Wishkin's unit was, in fact, closed approximately two years later. The decision contains no discussion of whether Wishkin's supervisor genuinely believed that the unit would be closing.

Moreover, while the court noted that there had been no significant change in Wishkin's physical abilities at the time he sought "permanent disability" classification, the fundamental point remains that Wishkin sought the classification out of his own self-interest.

Under those circumstances, it would be difficult for an employer to assess the employee's motivation for presenting evidence of his permanent disability. ■

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NEED Header

PENNSYLVANIA CASE MAY HAVE WIDE IMPACT

Judge rules town can't crack down on undocumented immigrants

By Vesna Jaksic
ALM Media

Ordinances approved by local officials in Hazleton, Pa., would have required every apartment dweller to prove lawful citizenship status in order to get an occupancy permit. They would have fined anyone employing or providing housing or most goods and services to illegal aliens. They would have declared English the city's official language.

Those ordinances won't be enforced — at least, not anytime soon. Last summer, a legal team led by attorneys from Philadelphia's Cozen O'Connor persuaded a federal judge to block the measures. The legal victory, which is under appeal, could provide a corrective for other local officials from cracking down on noncitizens who lack official permission to live and work in the United States. *Lozano v. Hazleton, No. 3:06cv1586 (M.D. Pa.)*.

The victory also will protect citizens and legal residents who are perceived as not belonging, said Thomas G. Wilkinson, a member of the commercial litigation group in Cozen's Philadelphia office. He led the legal attack on the ordinances.

"If the ordinance is allowed to stand, anyone who looks or sounds 'foreign' — regardless of their actual immigration sta-



A decision by Hazleton, Pa., leaders to pass ordinances aimed at addressing the city's growing population of undocumented immigrants sparked protests last summer. A judge's decision to block the measures could influence other communities considering similar measures, immigration experts say.

tus — will not be able to participate meaningfully in life in Hazleton, returning to the days when discriminatory laws forbade cer-

tain classes of people from owning land, running businesses or living in certain places," the plaintiffs' team argued in court documents.

Cozen took the case *pro bono*, investing more than 3,500 hours worth about \$1.5 million, Wilkinson said. "We had the opportunity to litigate issues and put on expert witnesses on topics that had never really played out in the courtroom in this country before," he said.

immigrants. About 20 lawyers contributed on the plaintiffs' side.

During a two-week bench trial in March, they argued that the ordinances would violate a host of constitutional rights, including the 14th Amendment right to due process. They also attacked the city's justifications for the provisions, presenting evidence that — contrary to the city's assertions — recent immigration to Hazleton was economically beneficial and that

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**Whatever
frustration officials of the City of
Hazleton may feel about the current
state of federal immigration enforce-
ment, the nature of the political system
in the United States prohibits the City
from enacting ordinances.**

The central legal issue was whether a local government could enforce its own immigration laws. Hazleton, a city of about 30,000 people in northeastern Pennsylvania, enacted its immigration ordinances in summer 2006.

Due Process Rights

Wilkinson and his team of about five lawyers were joined by attorneys from groups including the Puerto Rican Legal Defense Fund and the American Civil Liberties Union. They represented a group of landlords, business owners and legal immigrants as well as anonymous illegal

undocumented immigrants actually were involved in fewer crimes than other groups.

Furthermore, they said, city officials lack the authority and training to determine anyone's residency status. Just because someone cannot prove lawful residency does not necessarily mean he or she is here illegally — that person could be in the process of a status change, for example, or awaiting asylum documentation.

On July 26, U.S. District Judge James Munley issued a 206-page ruling barring enforcement of the ordinances.

"Whatever frustration officials of the

City of Hazleton may feel about the current state of federal immigration enforcement, the nature of the political system in the United States prohibits the City from enacting ordinances that disrupt a carefully drawn federally statutory scheme," Munley wrote. "Even if federal law did not conflict with Hazleton's measures, the City could not enact an ordinance that violates rights the Constitution guarantees to every person in the United States, whether legal resident or not."

'Watershed Decision'

To Wilkinson, it was a "watershed decision" that "showed why it's important for immigrants to have their right to press their legal issues in federal courts and why they would have a fundamental right to housing and a fundamental right to work."

Joan Friedman, immigration policy director in the Washington office of the National Immigration Law Center, which promotes immigrants' rights, said the trial was closely watched by parties on both sides of the immigration debate.

"The judge's decision was on the merits, and so it had a substantial impact not just on Hazleton but other places that are considering similar ordinances," Friedman said.

Although a federal judge recently declined to block an Arizona law barring businesses from knowingly hiring illegal aliens, the Hazleton ruling has been cited in cases involving similar ordinances in Valley Park, Mo., and Riverside, N.J., Wilkinson said.

"The ordinances obviously have major impact on a lot of people's lives and are very

important from a civil rights point of view," said Thomas B. Fiddler, another member of the Cozen O'Connor team.

Hazleton officials planned to file an appeal challenging "virtually all of the facts" Munley cited in his ruling, said Kris Kobach, a professor at the University of Missouri-Kansas City School of Law, who helped represent the city. Still, Kobach had nothing but praise for Cozen's lawyers. "I obviously disagree completely with their view, but they are great attorneys and did a good job," he said.

Hazleton raised more than \$40,000 for its defense team through donations, Kobach said. Wilkinson and Fiddler were joined by other members of Cozen O'Connor, including Linda S. Kaiser Conley, Doreen Yatko Trujillo, Elena Park and Ilan Rosenberg.

The 500-attorney firm quickly volunteered after the ACLU of Pennsylvania reached out to Philadelphia firms with immigration experience, said Witold Walczak, that organization's legal director.

Another firm initially volunteered but withdrew after taking a closer look at the case, Walczak said. Wilkinson said a couple of area firms did not want to get involved in a politically unpopular issue.

Cozen O'Connor has received hate mail, threatening e-mails and telephone calls from the public as a result of its involvement, but also received support from the legal community, Wilkinson said. For example, the 29,000-member Pennsylvania Bar Association has passed a resolution opposing state and local regulation of immigration. ■

HEALTHY BALANCE

Corporate wellness programs have risks as well as benefits

By DAVID S. BAFFA

The astronomical costs of health insurance coverage and prescription drug plans for employees continue to plague employers. Some predictions estimate that by 2008 the average *Fortune 500* company may be spending as much on health benefits as it earns in profits.

Illustrating the practical economic implications of these costs, General Motors Corp. reported that health care costs alone add \$1500 to the sticker price of every automobile it makes, and estimates that by 2008 that number could reach \$2000. An overwhelming amount of these costs are related to the treatment of preventable illnesses, which commonly result from the use of alcohol and tobacco products, and unhealthy diets.

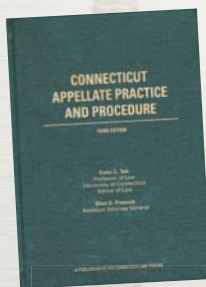
With the understanding that preventable illnesses means preventable costs, many employers have instituted programs aimed at improving employees' overall physical and mental health. These strategies are commonly referred to as "wellness programs." This is a broad term that encompasses a range of plans geared toward improving employees' well being. These programs typically focus on smoking cessation, coping with various forms of mental illness (e.g., stress, anxiety and depression), combating obesity and risks related to unhealthy diets, and lowering alcohol consumption.

Wellness programs have taken different forms and each form presents varying degrees of risks and benefits. This article examines the types of wellness programs that have been used with increasing frequency, as well as the benefits and risks associated with those programs. Among the risks, wellness programs have the potential to run afoul of both the Americans with Disabilities Act of 1990 and the Health Insurance Portability and Accountability Act of 1996. In addition to those important considerations, there are numerous other legal risks and economic

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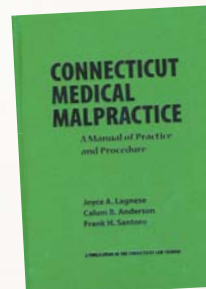
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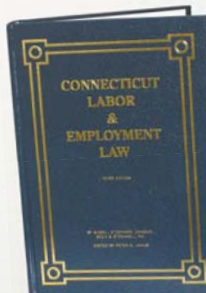
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WORKPLACE POLICIES STRUCK DOWN

Businesses tried to promote confidentiality, limit fraternization

By **HOWARD S. LAVIN**
and **ELIZABETH DiMICHELE**

In two recent decisions, the U.S. Court of Appeals for the D.C. Circuit has ruled overbroad workplace policies unlawful, even when those policies did not expressly prohibit protected workplace discussions about terms and conditions of employment, and even when there was no evidence that the policies had been enforced to punish protected workplace discussions. This article discusses these decisions, and their implications for employers that have adopted, or are contemplating adoption of, workplace policies that might be deemed overbroad.

Cintas Corp. Case

In *Cintas Corp. v. National Labor Relations Board*, 482 F.3d 463 (D.C. Cir. 2007), the D.C. Circuit held that a confidentiality rule promulgated by Cintas Corp. was unlawful because it could be construed to prohibit employees from discussing the terms and conditions of their employment, even though: 1) the rule did not expressly forbid protected workplace discussions; and 2) there was no evidence that the rule was used to prohibit such protected workplace discussions.

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Cintas employs approximately 27,000 workers and supplies workplace uniforms to customers throughout North America. The "Cintas Partner Reference Guide," an employee handbook distributed to all employees, includes a discussion of how employees are expected to treat confidential information. Under the heading "Cintas Culture," the handbook stated: "We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters."

In a separate section on discipline, the handbook warned employees that they could be sanctioned for "violating a confidence" or for the "unauthorized release of confidential information."

The Union of Needletrades, Industrial and Textile Employees, also known as UNITE HERE, filed an unfair labor practice charge with the National Labor Relations Board, alleging that the confidentiality rule violated §§7 and 8(a)(1) of the National Labor Relations Act. Section 7 of the NLRA protects the right of employees to engage in protected concerted activities (with or without a union) — typically group activities aimed at improving working conditions, such as wages and benefits. Examples of such protected concerted activities include: 1) two or more employees addressing their employer about improving working conditions and pay; 2) one employee speaking to

her or his employer on behalf of herself or himself and one or more co-workers about improving workplace conditions; and 3) two or more employees discussing pay or other work-related issues with each other. The administrative law judge held that the mere existence of the confidentiality rule violated the NLRA, and the board unanimously affirmed the law judge's decision.

Court of Appeals Decision

On appeal, Cintas argued, among other things, that: 1) the challenged sections of its handbook did not explicitly prohibit employees from engaging in legally protected activity; 2) there was no evidence that any employee actually interpreted the confidentiality rule to prohibit protected activity; 3) Cintas never interpreted nor applied the confidentiality rule to prohibit protected activity; and 4) the board misinterpreted the confidentiality provision.

The D.C. Circuit, however, rejected these arguments, citing both NLRB and Circuit Court precedent and holding that even in the absence of an express limitation on employee rights, a company policy statement still violated §8(a)(1) of the NLRA if employees would reasonably construe the policy to prohibit them from discussing the terms and conditions of their employment. Moreover, the court found that the board was required to determine only whether employees would reasonably interpret the rule to interfere with their rights, not whether any employee actually reached that conclusion.

The D.C. Circuit also rejected what it described as the "gravamen" of Cintas' appeal — that the board's interpretation of the confidentiality rule itself was too broad. In this regard, the court explained that the NLRB's interpretation of the rule was "reasonably defensible."

The court distinguished the Cintas confidentiality rule from others that have been upheld, noting that such rules were specifically limited by the context or language "so as to be clear to employees that the rules did not restrict employees' Section 7 rights." The court observed that a "more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the company's presumed interest in protecting confidential information."

Guardsmark Case

The Cintas case was decided on the heels of the D.C. Circuit's decision in *Guardsmark, LLC v. NLRB*, 475 F.3d 369 (D.C. Cir. 2007), another instance where overbroad workplace policies were held to violate employees' Section 7 rights to engage in protected concerted activities. In that case, Guardsmark, a nationwide company providing security guard services, distributed an employee handbook to its uniformed security employees that included among its policies these following rules: 1) a chain-of-command rule, which prohibited employees from registering any complaints with any client representative; 2) a no-solicitation rule, which prohibited solicitation "at all times while on duty or in uniform," and 3) a no-fraternization rule, which prohibited employees from "fraterniz[ing] on

duty or off duty" with other employees.

The Service Employees International Union Local 24/7, which represented Guardsmark's employees in San Francisco, filed an unfair labor practice charge. Thereafter, the NLRB's general counsel issued a complaint, asserting that all three rules violated the employees' right to engage in protected concerted activities. The NLRB ruled that both the chain-of-command rule and no-solicitation rule were unlawful, but that the no-fraternization rule was permissible because it only applied to personal relationships.

Overbroad And Unlawful

The Court of Appeals agreed with the board's conclusion that the chain-of-command rule, which explicitly stated, "do not register complaints with any representative of the client," violated the NLRA. The court explained that under the NLRA, employees have a "protected right to solicit sympathy, if not support, from the general public ... [and] customers" regarding their terms and conditions of employment. Because the chain-of-command rule's prohibition against complaining to clients was not limited to the period while the employees were on duty, it was overly broad in violation of the NLRA.

Similarly, the court upheld the board's conclusion that the solicitation rule was overbroad and unlawful. The court noted that the NLRB presumes that "a rule prohibiting employee solicitation, which is not by its terms limited to working time" would violate the NLRA, and as such the board's decision was defensible.

The NLRB had ruled that the employees would understand that the no-fraternization rule only targeted "personal entanglements," not NLRA-protected activity. The D.C. Circuit, however, disagreed. The no-fraternization rule specifically stated: "You must NOT ... fraternize on duty or off duty, date or become overly friendly with the client's employees or with co-employees." The court analyzed the language by giving independent meaning to each and every word. As a result, the court rejected the NLRB's interpretation of the word "fraternize," which the board had found to be synonymous with "dating" and "becoming overly friendly." The court concluded that "fraternize" must have some other meaning, separate and apart from the other words and phrases in the rule itself. As the most common meaning of the word "fraternize" is to associate or mingle on fraternal terms, the court held that the rule explicitly prohibited fraternal discussions of terms and conditions of employment. Therefore, the court held that the rule was in direct violation of the NLRA.

Practical Impact

These decisions serve as a reminder that the mere existence of a policy that is likely to chill protected activity — whether explicitly or through reasonable interpretation — can be deemed to be an unfair labor practice, even absent evidence of enforcement. Therefore, policies should be narrowly tailored so that employees cannot reasonably interpret those policies to prohibit discussing the terms and conditions of their employment. ■

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■ From HEALTHY on PAGE 9

considerations of which an employer must be keenly aware when crafting and implementing a wellness program.

Voluntary Programs

Wellness programs are usually offered to employees on a voluntary basis, and various incentives often are added to foster continued participation. A number of the nation's leading employers have realized tremendous benefits by investing in comprehensive voluntary and incentive-based wellness programs.

Motorola Inc., for example, maintains a wellness program known as the "LIVES-MART Challenge." This program provides monetary incentives for employee participation in programs within four areas: health screenings and self-care; nutrition and weight management; exercise and stress management; and health conditions management. Motorola employees also receive their medical plan at discounted rates if they participate in a voluntary health risk assessment. In connection with the LIVES-MART Challenge, Motorola provides on-site Wellness Centers in locations across the country, and offers services ranging from flu immunizations and health screenings to risk appraisals, smoking cessation programs and "24-7" health care hotlines.

In recognition of its program, Motorola received a C. Everett Koop National Health Award in 2002. According to Motorola officials, it has saved \$3.93 for every dollar invested in wellness benefits.

Caterpillar Inc. also has developed a wellness program known as "Healthy Balance." Employees are given a health risk assessment form on a semi-annual basis, and are offered a reduction on premiums for Caterpillar-sponsored health care if they complete the form. According to Caterpillar officials, approximately 90 percent of Caterpillar's employees complete the form, and the data they provide is used to determine the type of wellness services that are appropriate for employees and their spouses.

Caterpillar employees who demonstrate lower health risks are given general educational materials. Those who show higher risks of serious medical conditions, such as heart disease or diabetes, are offered entry into comprehensive programs that are tailored to their particular needs. Healthy Balance also places a particular emphasis upon smoking cessation. About 1,800 employees (or spouses of employees) have participated in the smoking cessation program.

When considering the cost savings associated with wellness plans, it is noteworthy that last July, Senators Thomas Harkin, D-Iowa, and Gordon Smith, R-Ore., introduced the "Healthy Workforce Act," which would provide a tax credit to employers for the costs of implementing wellness programs. If employers provide the type of comprehensive wellness program that this bill contemplates, they would be eligible for a tax credit of up to \$200 per employee for the first 200 employees, and up to \$100 per employee thereafter, for up to 10 years.

In addition to lower health care costs, Motorola, Caterpillar and others have found that the benefits of voluntary and incentive-based wellness programs include: higher productivity; greater morale; lower

absenteeism; and less attrition.

Mandatory Programs

A minority of employers provide comprehensive wellness programs, which not only encourage employees to get healthier by providing extensive health care services, but require employees to get healthier by prohibiting certain conduct, such as using alcohol and tobacco. Mandatory programs also may impact employees' diets by targeting obesity and cholesterol rates.

Some of the risks attendant to mandatory wellness programs, such as lower morale and attrition, are rather obvious. Indeed, employees can be expected to respond unfavorably when employers tell them they must

cut out the occasional smoke, high-calorie brew or rib-eye steak, even on weekends.

Less obvious risks linked to mandatory wellness programs include certain landmines in varying state laws. Scores of states have enacted laws that protect legal, off-duty conduct, and employees can be expected to seek protection under these laws if they are subjected to other adverse employment actions as a result of engaging in statutorily protected conduct.

Connecticut is among the states that generally protect employees' off-duty, legal activities that do not directly conflict with their employers' legitimate interests.

Employees who are denied jobs or discharged as a result of failing to comply with

a mandatory wellness program also can be expected to claim that their privacy rights were violated. In particular, they can be expected to invoke the protections of state privacy statutes and argue that their employers "intruded upon their seclusion."

Although employers may face substantial exposure by violating these laws, it is important to explore whether such claims are preempted by the Employee Retirement Income Security Act. More specifically, wellness programs offered in connection with group health benefit plans may be governed by ERISA, and courts have recognized that Section 514 of ERISA preempts state laws that directly or indirectly regulate employer-sponsored health plans. ■

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