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Looking Back At Employment Litigation In 2010

Law360, New York (February 11, 2011) -- Last year was a busy year for employment litigation. As companies continued to reduce head count, former employees increasingly turned to the courts for relief. Some of those employees won; others lost. Along the way, the courts offered practical tips for employers to navigate the maze of state and federal employment laws governing the workplace. This article briefly highlights just a few of the lessons learned from court decisions across the country.

Employment Policies Matter, and Can Make All the Difference to a Judge

An employer's policies can make all the difference in an employment lawsuit. Frequently policies help the company. But depending on how policies are drafted, even the most sophisticated corporations can face significant exposure.

The U.S. Equal Employment Opportunity Commission has made clear its intent to prosecute cases involving "systemic discrimination." In recent months, the EEOC has taken an increasingly aggressive approach to targeting large corporations with so-called inflexible leave policies where employees are automatically terminated for failure to return to work following a maximum period allowed for a leave of absence.

On the heels of a $6.2 million settlement with Sears Roebuck & Co., the EEOC recently entered into a $3.2 million settlement with SuperValu Inc.

The EEOC had alleged that certain SuperValu Jewel-Osco stores in Illinois, Wisconsin and Indiana operated an arbitrary and inflexible leave policy and by applying this policy had illegally discharged more than 100 employees since 2003. The EEOC alleged that such policies ignored the "individualized analysis" and accommodation requirements of the Americans with Disabilities Act.

In addition to its high dollar value and public announcement, the SuperValu settlement also contained a number of non-monetary obligations, including a revision of Jewel-Osco's leave policies, additional manager training, recordkeeping requirements and the submission of reports to the EEOC on Jewel-Osco's efforts to accommodate disabled employees attempting to return to work.

While it remains undecided whether all similar policies violate the ADA, in light of the EEOC's attack on inflexible leave policies, employers are well advised to review and consider revising their existing policies so as to potentially avoid being the focus of the next EEOC investigation or lawsuit.

It is also important for employers to have policies regarding computer usage by employees. Unfortunately, when employees leave their employment, many do not leave empty-handed; some use their computers and other electronic storage devices to take their former employer's information with them. In addition to state law trade-secret remedies, employers have been turning to the federal Computer Fraud and Abuse Act (CFAA) to prosecute the misappropriation of confidential, proprietary and trade-secret information.

The CFAA is a notoriously complicated statute that has received varying interpretations by the federal courts. But increasingly, courts are interpreting the statute in light of an employer's policies regarding an employee's "access" and "authorization" to certain electronic information.

Most recently, in United States v. Rodriguez, the U.S. Court of Appeals for the Eleventh Circuit held that an employee's violation of an employer's policy prohibiting access to its databases for any nonbusiness purpose gave rise to a CFAA claim.

In light of these ever-morphing developments, employers are wise to ensure that their computer-usage policies limit employees' access to information for specific purposes and, as in Rodriguez, prohibit use of such information for any nonbusiness reason.

The importance of well-crafted policies was further emphasized by the U. S. Supreme Court in City of Ontario v. Quon, when it upheld the city's audit of text messages sent by a police officer on his department-issued pager.

While Quon dealt with a public employer and the Fourth Amendment (which does not apply to private employers), the court analyzed closely the city's policies and communications to employees, which made clear that the city reserved the right to monitor and log usage of Internet, e-mail and text messages, and that employees had no expectation of privacy in these communications. Private employers should ensure that their policies are similarly clear.

You Know Too Much: Noncompetes, Trade Secrets and the Inevitable Disclosure Doctrine

2010 saw an uptick in noncompete and trade-secret litigation, as companies continued to vigorously assert and defend their rights in preventing or securing competitive hires and found themselves locking horns in hard-fought litigation. Given the patchwork of varying restrictive covenant laws in the 50 states and an increasingly competitive marketplace for top talent, restrictive-covenant litigation is expected to increase or remain steady in 2011.

One of the more interesting cases came out of the U.S. Court of Appeals for the Third Circuit, which reaffirmed the validity of the "inevitable disclosure doctrine," at least under Pennsylvania law. That court affirmed the issuance of a preliminary injunction prohibiting a former Bimbo Bakeries USA Inc. executive from moving to a rival business, finding that there was a "substantial threat" that the executive would inevitably disclose Bimbo's trade secrets.

One of the keys to Bimbo's success at the injunction hearing was its ability to put on expert evidence that the former executive had accessed sensitive strategic documents on Bimbo's network soon after he told Bimbo that he was moving to a competitor.

The trial court also concluded that the former executive gave "confusing" deposition testimony regarding his use of USB devices and ultimately found the executive's testimony "simply not credible." Even though there was limited evidence that the executive had used Bimbo's trade-secret information, the trial court held, and the Third Circuit affirmed, that Bimbo only needed to show a "substantial threat" of disclosure to obtain the preliminary injunction.

The case serves as a useful reminder that hiring from a direct competitor poses significant risks that need to be managed carefully, and that employers need to know who they are hiring and should take proactive steps to ensure that the new hire has not lifted confidential information from his or her prior employer.

Trade secret violations can also result in criminal charges. In March 2010, a former DuPont Co. engineer and salesman was sentenced to 18 months in prison after pleading guilty to misappropriating trade secrets and providing them to a DuPont rival.

In a recent plea agreement, a former Valspar Corp. technical director admitted to downloading trade secrets from Valspar's secured computer system and transferring electronic files to USB devices with the intent of using trade secrets for the benefit of one of Valspar's competitors.

While most civil trade-secret lawsuits do not involve criminal prosecutions, authorities are increasingly cracking down on misappropriation of trade secrets, especially if the trade secrets are worth a significant amount of money or involve malfeasance abroad.

Investigations Are Key to Preventing Employer Liability

Employers who learn of possible discrimination or harassment by employees may fear that very knowledge will ensure the employer is liable for the discriminatory treatment. Several 2010 cases may ease this fear by showing that thorough investigations of alleged instances of harassment can help relieve employer liability.

Two recent decisions from the U.S. Court of Appeals for the Eighth Circuit (Cross v. Prairie Meadows Racetrack and Casino, and Alvarez v. Des Moines Bolt Supply Inc.) emphasized the importance of employer's actions following a report of potential discrimination.

In both of these cases, the Eighth Circuit analyzed the employers' liability for the actions of its employees. Supervisors in both cases knew of the harassing behavior and did not initially report the incidents to human resources. Instead, the supervisors engaged in an investigation of the facts of the situation, speaking to the employees who were allegedly involved in the harassment.

In both cases, the incidents were eventually reported to human resources. Promptly upon learning of the complaints, HR personnel took action and fully examined the claims. The Eighth Circuit held that both employers were not liable for the harassing behavior based on their reasonable response to the complaints, and stressed the importance of an employer's prompt investigation of complaints by employees.

Beware of Stray Discriminatory Remarks in the Workplace

Employers may be aware of the long-established "stray remarks" doctrine. Under this doctrine, which was first articulated in the 1989 U.S. Supreme Court case Price Waterhouse v. Hopkins, statements made by nondecision-makers — or statements by decision-makers that are unrelated to the decisional process itself — are "stray remarks" that cannot be used as direct evidence to meet the employee's evidentiary burden at summary judgment.

But a California case indicates that the stray remarks tide may be turning. In Reid v. Google Inc., the California Supreme Court considered supervisors' remarks about Reid, a discharged 54-year-old employee (including that he was "slow," "fuzzy," that his ideas were "obsolete" and "too old to matter") and co-workers' comments referring to Reid as an "old man," and "old fuddy-duddy," in concluding that Reid had presented enough evidence to survive summary judgment on his age discrimination claim, despite the fact that none of the remarks were made in the context of an employment decision.

The court rejected the stray remarks doctrine and instead considered the "totality of the circumstances" and emphasized that such remarks should be considered "on a case-by-case basis in light of the entire record."

On the other hand, other courts have continued to disregard stray remarks to a certain degree. In Clark v. Matthews, for example, the Eighth Circuit held that a 57-year-old employee had failed to establish a prima facie case of age discrimination. In support of his claim, the employee relied upon comments by his supervisor asking if he was "just trying to make it to retirement" and a suggestion to another worker that he could "always become a greeter at Wal-Mart."

The Eighth Circuit dismissed the employee's claim, noting that the isolated remarks were not made in the course of the termination decision and therefore were insufficient evidence of age discrimination to survive summary judgment.

Misclassification Issues Continue to Puzzle Employers

Misclassification of employees continued to be a focus of both agency investigation and litigation in 2010. The impact of misclassification on employer liability has been massive, resulting in wage and hour litigation under the Fair Labor Standards Act (FLSA), Title VII, workers' compensation and tort claims. A handful of specific industries were analyzed in high-profile matters that continue to make classification an issue at the forefront of employment law.

Pharmaceutical Sales Representatives

Sales positions may be exempt positions under the FLSA based on the outside sales exemption. The U.S. Court of Appeals for the Second Circuit issued a decision in a significant class action holding that pharmaceutical sales representatives do not qualify for the outside sales exemption (In re Novartis Wage and Hour Litigation).

The court relied on the fact that FLSA regulations provide that a person is not exempt if she promotes products, but does not actually make the sale. In this case, the representatives promoted products to physicians but only distributed free samples and could not take purchase orders or receive commitments from physicians to prescribe any particular drug.

The court also determined that the representatives did not qualify under the administrative exemption in exercising discretion and independent judgment because the company placed extensive limitations on their sales strategies. Many other courts have been grappling with these same issues.

Delivery and Truck Drivers

The independent contractor status of delivery and truck drivers has risen in awareness based on a multidistrict litigation matter involving FedEx delivery drivers (In re FedEx Ground Package System Inc., Employment Practices Litigation). A recent decision highlights the courts' struggle with the analysis of these positions as independent contractors or employees under several state laws.

A federal court in Indiana determined that in all but a few of the 25 states involved in the litigation, drivers were properly classified as independent contractors under applicable state laws. The drivers in these situations primarily owned and operated their own vehicles, were allowed to hire helpers or other drivers to complete routes, and could not be terminated at will.

Even though the court concluded that FedEx significantly controlled the drivers' work by requiring them to conform to truck and uniform appearance standards and restricting delivery schedules, it went on to hold that despite this level of control, the drivers were properly classified as independent contractors under most state laws.

Several other courts have considered similar misclassification cases with varying results, leaving the question of the proper classification of these types of service providers — and many other categories of workers across other industries — unsettled. The increase in litigation and government audits related to misclassification issues serves as a reminder to consult with legal counsel when analyzing thorny classification issues.

Old Decisions Can Come Back to Haunt You — Even Outside the Statute of Limitations

Continuing the recent trend of effectively extending statutes of limitations — initiated by the 2009 Lilly Ledbetter Fair Pay Act — the U. S. Supreme Court held in Lewis v. City of Chicago that a statute of limitations runs from the latest application of a discriminatory practice, not the adoption of that practice.

In 1995, the city of Chicago administered a written examination to applicants to its fire department. In 1996, the city announced that it would draw randomly from the top tier of scorers on the examination to proceed to the next phase of the application process.

The city selected groups of applicants, based on their scores on the 1995 exam, repeatedly over the next six years. A group of unsuccessful applicants filed charges of discrimination with the EEOC, claiming that the test had a disparate impact on African-Americans.

The city argued that the charges were untimely because they were not filed within 300 days after the administration of the 1995 examination. The Supreme Court held that the charges were timely, because each time the city used the results of the 1995 examination, it committed an additional allegedly unlawful employment practice.

Employers may now face disparate-impact discrimination lawsuits based on acts that occurred years earlier — and for which relevant and necessary evidence and witnesses may no longer be available. Employers are well advised to take great care to discontinue employment practices that have — or could be argued to have — an unintentional disparate impact on a particular group of employees or applicants.

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