EMPLOYMENT FLASH

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INSIDE

Ohio Supreme Court Reverses Decision on Surviving Merger Entity's Ability to Enforce Noncompetition Agreements

Updating a case reviewed in the September 2012 *Employment Flash*, the Ohio Supreme Court has reconsidered its decision in *Acordia of Ohio L.L.C. v. Fishel*, 133 Ohio St. 3d 345, 2012-Ohio-2297, 978 N.E.2d 814 (2012), which held that a surviving merger entity cannot enforce noncompetition agreements assumed in connection with a merger, unless the agreements explicitly state that they can be assigned or carried over to a successor.

On the employer's motion for reconsideration, the court ruled in a 6-1 decision in *Acordia of Ohio LLC v. Fishel*, 133 Ohio St. 3d 356, 2012-Ohio-4648, 978 N.E.2d 823 (2012), that its earlier opinion was erroneous, holding that a surviving merger entity can enforce noncompetition agreements assumed in connection with a merger, regardless of whether the agreements explicitly state that they can be assumed. The *Acordia* court reasoned that, while the merged entity, which is a party to the agreement, ceased to exist as a separate business entity, the merged entity does become a part of the surviving entity following the merger; accordingly, the surviving entity can enforce the agreements as if it had stepped into the shoes of the merged entity.

"Sweet" Decision for California Employers: Court Approves Time Rounding in Case Against See's Candy

When employers are devising their record-keeping policies for non-exempt employees who must clock in and clock out, they are faced with the issue of how to record and pay for small increments of time. For example, should an employer pay an employee for eight hours worked if the employee falls two minutes short and is at 7.966667 hours worked? Under federal law, employers long have been utilizing time rounding policies, pursuant to a regulation under the Fair Labor Standards Act (FLSA) that approves of rounding time to the nearest five minutes, 1/10th of an hour or 1/4 of an hour, "provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." 29 C.F.R. § 785.48(b). However, until recently, it has been an open issue as to whether California law permits any time rounding.

Now, a California appellate court has provided more certainty to California employers. In *See's Candy Shops, Inc. v. Superior Court of San Diego County*, 210 Cal. App. 4th 889 (2012), See's Candy maintained a policy that rounded employees' time to the nearest 1/10th of an hour at the three-minute mark. For example, See's Candy's time recording system recorded 8:00 a.m. for employees clocking in at 7:58 a.m. and 8:02 a.m. The *See's Candy* plaintiff brought a class action against the company, claiming, among other wage and hour violations, that the company's rounding practice resulted in unpaid time. The plaintiff argued that, while the company could use a

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Union Has No Duty to Disavow Threatening Statements Made by Its Members on its Facebook Wall During a Strike

An administrative law judge (the ALJ) for the National Labor Relations Board (NLRB) recently ruled that comments made on a union's Facebook wall by individual members are not the equivalent of comments made on a picket line. Therefore, a union has no duty to disavow threatening statements made on its Facebook wall in the midst of a strike.

In *Amalgamated Transit Union, Local Union No. 1433, AFL-CIO*, No. 28-CB-78377, 2012 WL 5954680 (N.L.R.B. Nov. 28, 2012), the union represented the bus drivers of Veolia Transportation, which provides public bus service to the city of Phoenix, Arizona. The union's vice president administered a Facebook profile for the union and, through this profile, only accepted "friend" requests from other union members. Once friended, individuals could post messages to the Facebook wall, and other friends were able to view, comment and indicate that they "liked" the post. During difficult contract negotiations that resulted in a strike, individuals posted allegedly threatening messages on the union's Facebook wall, and other members commented and "liked" the messages. One member wrote: "THINKING of crossing the line. THINK AGAIN! … THINK that the union will protect you. They may have to represent you, but will they give it 100%." Another comment stated that if a member crossed the line, another member would give him "2 black eyes." On the second day of the strike, the union's vice president posted the location of replacement workers on the union's Facebook wall. One union member commented, "Can we bring the Molotov Cocktails this time?" Another member "liked" the comment.

In the context of a picket line, if a union does not disavow coercive statements or take corrective action, it is responsible for the statements and, thus, in violation of Section 8(b)(1)(A) of the National Labor Relations Act (the NLRA), which prohibits statements that "restrain[] and coerce[] employees in the exercise of their right to refrain from engaging in this concerted activity by crossing the picket line and continuing to work." According to the NLRB's acting general counsel, the Facebook comments threatened employees who crossed the picket line with less favorable representation and physical harm. The acting general counsel did not argue that the Facebook posters were agents of the union; rather, the government argued that the union had a duty to disavow the comments on the union's Facebook wall because it was an "electronic extension" of the picket line.

The ALJ rejected the argument that the union's duty extends from a picket line to Facebook. In so holding, the ALJ distinguished Facebook from a traditional picket line. First, the ALJ noted that this particular Facebook page was not an extension of the picket line because it was created months before the strike began, so it "did not grow out of the strike." More generally, picket lines and Facebook walls have different purposes and audiences. The ALJ noted that a picket line is public and seeks to communicate to the public and employees "in a highly visible way." On the other hand, this Facebook wall was intended to be private. The ALJ also noted that a picket line "makes visible in geographic space the confrontation between the two sides," while a Facebook wall "does not draw any line in the sand or on the sidewalk." Finally, threats made on a picket line present employees with immediate choices, and "the coercive effect is immediate and unattenuated because it falls on the ears of an employee who, at that very moment, must make a decision concerning the exercise of his Section 7 rights." In contrast, a person reading a Facebook post is not confronted with an immediate choice.

The ALJ also noted his free speech concerns with the government's argument. First, the Facebook wall was "fashioned … to be a forum for the sort of unfettered, candid discussion which typifies the Internet," and under the government's theory, the union's speech would be burdened more than that of other Internet users. Second, to force the union to disavow its members' speech would be to compel the union to speak, which would violate the First Amendment.

The ALJ also considered Section 230 of the Communications Decency Act of 1996, codified at 47 U.S.C. § 230 (CDA), which states that, "'[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided.'" While neither party had addressed the CDA, the ALJ held that it required dismissal. The ALJ treated the union as the provider of an interactive computer service, and as such the union could not be treated as the speaker. Therefore, the ALJ could not order the union to retract threats which it had not made, because "to hold otherwise would compel speech."

The ALJ's opinion states that the refusal-to-disavow theory applied to the Internet is a novel issue. Employers should monitor this developing area of law, as the NLRB or a court could decide the issue of the duty to disavow speech differently from the ALJ.

NLRB's Office of the General Counsel Provides Further Guidance on At-Will Employment Acknowledgements in Employee Handbooks

In February 2012, an ALJ of the NLRB sent shock waves through the employment law world by ruling that a fairly common employee handbook at-will acknowledgment — "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way" — constituted a violation of Section 8(a)(1) of the NLRA because it essentially waived employees' right to collectively bargain to change their at-will status. *See Am. Red Cross Ariz. Blood Servs. Region*, No. 28-CA-23443, 2012 WL 311334, at 18 (N.L.R.B. Feb. 1, 2012).

The NLRB's Office of the General Counsel recently issued two advice memoranda, distinguishing the *American Red Cross* decision and concluding that at-will employment policies in two employers' handbooks did not violate Section 8(a)(1) of the NLRA. *See Rocha Transp.*, No. 32-CA-086799, 2012 WL 5866215 (N.L.R.B. Oct. 31, 2012); *SWH Corp.*, No. 28-CA-084365, 2012 WL 5866214 (N.L.R.B. Oct. 31, 2012). The advice memoranda noted that the NLRB follow a two-step inquiry to determine if an employer has violated Section 8(a)(1) of the NLRA by maintaining a work rule that would "reasonably tend to chill employees in the exercise of their Section 7 rights." First, if a rule explicitly restricts Section 7 activities, it is unlawful. If a rule passes the first test, it will nonetheless be unlawful if: (i) employees reasonably would construe the language to prohibit Section 7 activity, (ii) the rule was promulgated in response to union activity, or (iii) the rule has been applied to restrict the exercise of Section 7 rights. The advice memoranda further observe that, when analyzing a work rule its phrases must be considered in the proper context, and not read in isolation.

In *Rocha Transportation*, the at-will employment policy provided, in relevant part, as follows: "No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing." In finding that the policy was lawful, the advice memorandum noted that "the provision simply prohibits the Employer's own representatives from entering into employment agreements that provide for other than at-will employment" and explicitly permitted the president to enter into written employment agreements that modify the at-will relationship.

In *SWH Corp.*, the at-will employment policy provided, in relevant part, as follows: "No representative of the Company has authority to enter into any agreement contrary to the foregoing 'employment at will' relationship." Similarly, the advice memorandum concluded that the policy was lawful, finding that it simply highlighted the employer's policy that its representatives may not modify an employee's at-will status and "does not require employees to refrain from seeking to change their at-will status or to agree that their at-will status cannot be changed in any way." Further, because the handbook noted that nothing in it created an express or implied contract of employment, employees would not reasonably construe the provision to restrict their Section 7 rights.

While these advice memoranda may provide some clarity to employers, the law remains unsettled in this area, and the memoranda specifically invite regions to submit all cases involving employer handbook provisions that restrict the future modification of an employee's at-will status.

Even When Unions' Information Requests Are Irrelevant, Companies Commit Unfair Labor Practices by Failing to Object in a Timely Manner

The NLRB held 2-1 that a unionized employer violated its duty to bargain in good faith when it did not respond in a timely fashion to the union's request for information, even though it was later determined that the requested information was irrelevant. *Irontiger Logistics, Inc.*, 359 N.L.R.B. 1 (2012). In *Irontiger*, the employer and the union disputed the apportionment of freight delivery assignments, and the union requested certain information about drivers, destinations and mileage relating to bargaining unit employees. In response to the request, the employer — more than four months after the union made its information request — argued that the requested information was irrelevant to their dispute.

The ALJ agreed with the employer, finding that the requested information was irrelevant to the parties' dispute. However, the ALJ also found that the requested information was presumptively relevant (because it involved bargaining unit employees), and that the employer's delay in responding constituted an unfair labor practice. The NLRB agreed, holding that the employer was required to timely provide the requested information or to timely present the union with its reasons for not doing so. While the decision does not address an employer's duty to respond to requests for information that are not "presumptively relevant," the NLRB's decision shows that an employer always should respond to union information requests in a timely manner, even if it is simply to notify the union of the employer's reasons for not providing the requested information.

Newark, New Jersey Joins Growing Number of States and Cities Restricting the Use of Applicants' Criminal History

The city of Newark, New Jersey recently passed an ordinance limiting employers' consideration of applicants' criminal history. In passing the ordinance, Newark joins a growing number of states and municipalities that have restricted employers' inquiries about and use of criminal records. Broadly speaking, under the ordinance, employers may not ask about criminal records until after an applicant is deemed qualified for employment and has received a conditional offer, and even then the ordinance further limits the employer's use of such information.

Ordinance 12-1630, effective November 18, 2012, is intended "to assist the successful reintegration of formerly incarcerated people into the community by removing barriers to gainful employment … after their release from prison." Newark, N.J., Ordinance 12-1630 (Nov. 18, 2012), *available at* http://newark.legistar.com/LegislationDetail.aspx?ID=1159554&GUID=6E9D1D83-C8D7-4671-931F-EE7C8B2F33FD. The municipal council found that one in four Americans has a criminal record, and that New Jersey "has the highest per capita number of parolees of any U.S. city." The council also noted that Newark has a higher unemployment rate than the rest of the country, and that criminal records barriers "disproportionately affect racial and ethnic minorities." The city also recognized that "securing employment … significantly reduces the risk of recidivism."

The ordinance contains rules for different stages of the employment relationship, and it covers interactions with potential applicants as well as current employees. The ordinance bars employers from suggesting in advertisements for job positions that a criminal record will limit eligibility. During the "pre-application" stage (*i.e.*, recruitment and any attempts to identify candidates), employers may not inquire about criminal history, meaning that they may not engage in direct or indirect conduct intended to gather information about criminal history. Once an individual applies for a position, the ordinance still prohibits any inquiry into criminal history. Therefore, before an employer makes a conditional offer of employment, the employer may not seek information related to criminal history. For example, the employer may not ask about criminal history on an application or run a background check.

The ordinance allows an inquiry about criminal history only if three criteria are met. First, the employer must have made a conditional offer of employment. Thus, no inquiries about criminal history can be made before an applicant is extended a conditional offer. Second, the employer must have provided notice to the candidate that it is going to conduct a criminal history inquiry, and the candidate must have consented. The employer also must notify the candidate that (s)he will have the right to present evidence if an adverse decision is made, and the employer must provide a copy of the ordinance. Third, the employer must have "made a good faith determination that the relevant position is of such sensitivity that a criminal history inquiry is warranted." The ordinance does not provide guidance on what might constitute such a position.

If the employer has met the conditions for conducting an inquiry into criminal history, the scope of the inquiry is still limited. Employers may ask about indictable offense convictions for eight years following the sentencing, disorderly person convictions or municipal ordinance violations for five years following the sentence, and pending criminal charges. An employer may inquire about convictions for murder, voluntary manslaughter and certain sex offenses, regardless of the time that has elapsed since the conviction. Employers may not inquire about, or take any adverse action based on, any of the following: arrest or criminal accusations not then pending or which did not result in a conviction; erased, expunged, pardoned or nullified records; or juvenile delinquency adjudications or sealed records.

If the employer's inquiry leads to criminal history results, the employer is to consider certain factors. These factors include: the nature of the crime and its relationship to the position; any information regarding rehabilitation and good conduct; whether the position provides an opportunity for the candidate to commit a similar crime; whether the circumstances leading to the offense will likely reoccur; the amount of time that has elapsed; and any rehabilitation certificates. The employer must document its consideration of these factors in writing in an "Applicant Criminal Record Consideration Form."

If the employer makes an adverse decision regarding employment, the employer must notify the candidate and provide a copy of the results of the criminal history inquiry. The employer also must provide an opportunity for the candidate to present evidence regarding the accuracy and relevance of the results.

The ordinance applies where "the physical location of the prospective employment [is] in whole or substantial part, within the City of Newark." An employer covered by the ordinance is an individual or organization that has five or more employees and "does business, employs persons, or takes applications for employment within the city of Newark. …" The ordinance defines "employment" broadly as "any occupation, vocation, job, work or employment with or without pay, including temporary or seasonal work, contracted work, contingent work . …"

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Newark, New Jersey Joins Growing Number of States and Cities Restricting the Use of Applicants' Criminal History *(continued from page 4)*

Thus, the definition of "employee" is broad enough to include independent contractors and volunteers.

The statute contains exemptions, which are to be construed narrowly. It does not apply where any law or regulation requires the consideration of criminal history, and to any positions that are designated to participate in a government program designed to encourage the employment of individuals with criminal histories. In addition, apart from the exemptions, if the candidate voluntarily discloses any criminal history information, the employer may discuss the history disclosed. The statute provides for a fine of $500-$1000 for each violation, depending on whether it is a repeat violation.

The Newark statute is part of a broader trend of limiting the use of criminal records in employment law. These policies are referred to as "ban the box" reform, named for the check box for criminal history information that appears on some employers' applications. In April 2012, the Equal Employment Opportunity Commission (EEOC) published enforcement guidance limiting the use of arrest records in employment decisions. *See* Equal Employment Opportunity Commission, *Consideration of Arrest & Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, 2012 WL 1499883, at *13 (E.E.O.C. Guidance Apr. 25, 2012). The EEOC made findings similar to the Newark municipal council, and found that use of criminal records could constitute discrimination. Specifically, the EEOC Guidance Committee found that exclusion based on arrest alone is not job related and consistent with business necessity.

Beyond the federal level, according to the Newark ordinance, "at least 30 cities, counties, and states have passed ordinances and statutes or enacted policies to remove barriers to the employment of those with criminal histories by public and private employers." In New York, for example, employers may not inquire about nonpending arrests which did not result in a conviction, youthful offender adjudications or sealed conviction records. Under Article 23-A, New York Correction Law, New York employers may not automatically exclude an applicant or dismiss an employee based on a criminal conviction. N.Y. Correct. Law §§ 750-755 (McKinney & Supp. 2013). Instead, the employer must consider certain factors: the state's policy of encouraging employment of individuals with prior convictions; the duties and responsibilities related to the position; the seriousness of the offense; the time that has elapsed since the offense; the individual's age at the time of the offense; any bearing the criminal offense will have on the ability to perform the job; any information regarding the individual's rehabilitation and good conduct; and the employer's legitimate interest in protecting property and the safety and welfare of specific individuals or the general public. N.Y. Correct. Law § 753 (McKinney & Supp. 2013). Employers should note that while some of these factors overlap with the Newark ordinance, others are different. For example, under the Newark ordinance, employers must consider whether the position presents an opportunity for commission of a similar offense; New York has no parallel requirement.

As more states and municipalities take steps to "ban the box" in some fashion, employers are advised to review their policies and continue to monitor developments.

Employers May Offer Unpaid Leave to Exempt Employees in Only Full-Day Increments

In *Kulish v. Rite Aid Corp.*, No. ELH–11–3178, 2012 WL 6532414 (D. Md. Dec. 13, 2012), three pharmacists brought a putative class action, arguing that Rite Aid's policy of offering unpaid leave to exempt employees in only full-day increments caused the pharmacists to fail the applicable FLSA test for exempt employment status. Rite Aid treated its pharmacists as exempt employees under the FLSA because they were "professional" employees, which required Rite Aid to show that the pharmacists (i) meet certain tests regarding their job duties and (ii) were paid on a salary basis. While the pharmacists did not dispute that they satisfied the duties test, they argued that the salary-basis test could not be met because of Rite Aid's requirement that a pharmacist take unpaid leave in full day increments, even where he or she preferred to take less than a full day.

The *Kulish* court disagreed with plaintiffs and granted summary judgment for Rite Aid, citing multiple factors, including the fact that (1) the FLSA regulations specifically allow deductions "'when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability;'" (2) the FLSA generally does not permit an employer to make deductions for partial day absences for exempt employees; (3) Rite Aid did not make deductions to a pharmacist's biweekly salary for arriving late, as a result of store closures due to inclement weather, emergencies, breaks during shifts, illness or personal or family emergencies; (4) unpaid leave was offered in addition to sick leave and paid leave, and was taken as a result of the employee's voluntary decision to take time off from work and not "for absences occasioned by the employer or the operating requirements of the business;" (5) pharmacists were permitted to switch shifts in order to avoid taking leave; and (6) the adoption of the plaintiffs' approach would simply discourage employers from offering any unpaid leave.

California Supreme Court Upholds Laws Protecting Union Picketing

The California Supreme Court recently evaluated whether two state laws, which significantly protect a union's ability to peacefully picket on private property, violate the U.S. Constitution. *Ralphs Grocery Company v. United Food and Commercial Workers Union Local 8*, 290 P.3d 1116, 55 Cal. 4th 1083, 150 Cal. Rptr. 3d 501 (Cal. 2012).

Under California law, peaceful picketing is protected by California Code of Civil Procedure Section 527.3 (the Moscone Act) and California Labor Code Section 1138.1 (Section 1138.1). The Moscone Act generally does not permit an injunction against a union's peaceful picketing and publicizing of facts regarding a labor dispute. Section 1138.1 imposes heightened evidentiary burdens on a party that is seeking an injunction against labor speech, such as requiring live testimony (as opposed to written statements) and evidence that public officers are unable or unwilling to furnish adequate protection.

In *Ralphs Grocery*, a supermarket owner sought an injunction to prevent a labor union from picketing and handing out fliers, encouraging consumers to boycott the store, on the privately owned walkway in front of the store's entrance. The trial court denied the injunction, finding that Ralphs did not produce sufficient evidence to meet the requirements of Section 1138.1 or the Moscone Act. For example, Ralphs did not establish that the union had threatened to commit any unlawful act or that public officers were unable or unwilling to protect Ralphs' property; moreover, the supermarket failed show substantial and irreparable injury. On review, the appellate court held that the Moscone Act and Section 1138.1 violated the U.S. Constitution, reasoning that they impermissibly favor labor speech over other speech.

The California Supreme Court disagreed, reasoning that — even though the privately owned walkway was not a "public forum" that would have entitled the picketers to engage in speech protected by the California Constitution — the Moscone Act and Section 1138.1 permitted the speech and did not violate the U.S. Constitution. In so holding, the *Ralphs Grocery* court found that the Moscone Act and Section 1138.1 do not place any restrictions on speech and are consistent with the balancing that has been applied by previous cases weighing the rights of land owners and unions in the context of labor disputes.

California Supreme Court Limits Remedies in Mixed-Motive Cases

In *Harris v. City of Santa Monica*, No. S181004 (Feb. 7, 2013), the California Supreme Court upheld a lower court's ruling that, even if an employer's decision to terminate an employee substantially is motivated by discriminatory intent, a plaintiff will be denied a damage and back pay award, as well as reinstatement, under California's Fair Employment and Housing Act, if the employer can prove that it would have made the same decision in the absence of the discriminatory motive.

Wynona Harris was a bus driver for the city of Santa Monica, who alleged that the city terminated her employment because of her pregnancy. During the trial, the city requested that the court give the following jury instruction: "If you find that the employer's action, which is the subject of plaintiff's claim, was actually motivated by both discriminatory and non-discriminatory reasons, the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision." The trial court refused to give the instruction, instead instructing the jury that the plaintiff needed to prove that her pregnancy was a "motivating factor/reason for the discharge." A California Court of Appeals reversed the lower court and held that the city's requested instruction was in fact an accurate statement of California law and that the refusal to give the instruction was prejudicial error.

The *Harris* court held that, when a plaintiff is able to demonstrate by a preponderance of the evidence that discrimination was a substantial factor motivating his or her termination of employment, the employer is entitled to demonstrate that legitimate, nondiscriminatory reasons would have led to the same decision at the time. Although holding that damages, back pay and reinstatement are foreclosed to a plaintiff when an employer is able to make such a showing, the *Harris* court held that plaintiffs can still be awarded declaratory or injunctive relief to stop discriminatory practices and reasonable attorneys' fees and costs.

"Sweet" Decision for California Employers: Court Approves Time Rounding in Case Against See's Candy

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rounding policy, the company should be required to "unwind" the rounding every two weeks so it could pay employees for the exact amount of time worked.

The *See's Candy* court disagreed with the plaintiff, holding that a timekeeping policy that rounds non-exempt employees' time to the nearest 1/10th of an hour (*i.e.*, the nearest six-minute increment) is permissible so long as the policy is neutral, both as written and as applied, and that it will not result, over a period of time, in failure to compensate the employees properly for all the time they actually have worked. In reaching such a conclusion, the court took into account See's Candy's expert's statistical analysis, which showed that, over a long period of time, neither employees (as a whole) nor See's Candy gained the upper hand from the rounding practice — as the court noted, it was "virtually a wash." However, the *See's Candy* court limited its holding to the nearest 1/10th of an hour rounding policies, and did not sanction other rounding policies, such as the nearest 1/4th of an hour.

Attorney contacts appear on the next page.

Employment Flash **provides information on recent developments in the law affecting the corporate workspace and employees. If you have any questions regarding the matters discussed in this newsletter, please call one of the following attorneys or your regular Skadden, Arps contact:**

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