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Company Security

Enforcing Non-compete Agreements—No Easy Task

Maureen Minehan

Picture this. A key employee resigns. Soon, co-workers and subordinates associated with this employee start to quit too. At the same time, several long-term customers disappear. What is going on?

Chances are, a quick check of the former employee's whereabouts will reveal the answer. Mass departures of workers and customers are leading indicators that an employee has joined the competition.

If this turns out to be true and you have a non-compete agreement with the former employee, you'll have to choose whether to take action. While your initial reaction may be an immediate "yes," the decision requires careful consideration. Enforcement of non-compete agreements can be time-consuming and costly. A complete risk analysis must be done before an enforcement action is taken.

What are non-compete agreements?

At their simplest, non-compete agreements are contracts between employers and employees that prohibit employees from joining or starting competitive businesses for a specific period of time. The agreements may also include prohibitions against employees taking other employees or customer accounts with them when they leave as well as protections for trade secrets and other intellectual property.

While state laws vary, in general, non-compete agreements must have reasonable time and geographic restrictions; clearly protect legitimate business interests; and protect employees and/or the public from undue harm. Examples of the latter include preventing a worker from earning a living or creating a health care crisis by preventing a key provider from providing care within an underserved community.

Enforcement challenges

Non-compete agreements are challenging to enforce for several reasons. First, the variations among state laws are significant. California, for example, does not recognize non-compete agreements. In Arizona, they are permitted in some industries, but not in others (e.g. broadcasting). Florida is at the other end of the spectrum, with one of the toughest non-compete laws on the books. While many states traditionally weigh evidence in the light most favorable to employees, Florida did away with this presumption through legislation passed a decade ago.

Second, agreements must be consistently enforced—a tough challenge given the high financial costs associated with such actions. While it may seem to make sense to let a case go if the costs of pursuing it outweigh the potential for harm, the long-term implications of this decision must be considered.

“Immediate injunctive relief lawsuits are expensive so employers have a disincentive to file in every situation,” John Balitis, a director in the Phoenix office of Fennemore Craig, tells *HRWire*. “But one of the first questions opposing counsel will ask is why you are enforcing this non-compete when you had a similar noncompete for a similar position, but didn’t take any action.”

“You can argue that in every case in which you’ve had an employee in identical circumstances, you’ve enforced it, but it can hurt your credibility in court if you have to defend selective enforcement,” Balitis says.

Strategy suggestions

What can employers do to make enforcement easier? Consider the following suggestions:

Use clearly written non-compete agreements that comply with applicable state laws.

“The best deterrent to violations is to make sure agreements are clearly written and explained at the outset,” Balitis says.

“The first step is to check the laws in your jurisdiction and see what is enforceable in a non-compete,” says Ronald S. Langacker, an attorney and HR director at EP-Direct, a national quick printing company. “The purpose of a non-compete is to protect the employer from losing their confidential client data and goodwill. The purpose is NOT to punish the employee for leaving the employment and disqualifying him/her from working for a competitor.”

“The more stringent a non-compete is in relation to time and territory, the more likely a court will strike it down. Cover in the non-compete what you know will be enforced,” he says.

Langacker also says employers should educate employees about the agreement. “Make sure the employee has a clear understanding of what will be acceptable and unacceptable after employment, so everyone knows the ground rules.”

Hold up your end of the deal. Some agreements release employees from non-compete requirements if they can show the employer breached the employee agreement. “To be entitled under the contract, you have to have performed all of your obligations under the contract,” Suzanne Youmans Labrit, a partner at Shutts & Bowen in Florida, tells *HRWire*. “He who seeks equity must do equity.”

Consider preventative measures. Balitis says he sees more employers taking a proactive approach to preventing breaches of non-compete agreements. “As the labor market is heating up and this is becoming a bigger issue, employers are stepping up their efforts to find out if their agreements are being violated. New techniques I’m seeing, especially with existing employees, include surveillance, e-mail and voice mail monitoring.”

“The key is to make sure you comply with federal wiretap rules and the Fair Credit

Reporting Act's requirements for investigations. If you have written permission from employees that satisfies these acts, you can use monitoring to keep an eye on what workers are doing," he says.

Kerry Solomon, vice president of HR for SecureWorks, a Georgia-based Internet security services firm, recommends reminding departing employees of their obligations. "In an effort to mediate any temptation to violate an agreement after leaving one's employment it is often beneficial to provide a second copy of the executed agreement at the exit interview—reiterating commitments made during the employment period."

Act quickly when violations are discovered. The chief vehicle for enforcing non-compete agreements are lawsuits that request immediate injunctive relief. Winning an injunction depends on convincing the court that irreparable harm will occur unless the injunction is issued. Making that argument successfully is far more difficult if time has lapsed between discovery and action.

"Don't sit around and wait very long because it will undercut your case. If you wait for three months before asking for an immediate injunction you have no credibility. You also risk further losses in terms of other employees and customers the longer you wait," Labrit says.

Evaluate potential harm vs. risk. Langacker says that when his organization becomes aware of a clear violation, "we have to review the cost of filing a suit, which can be expensive, against the potential damage. Once you take the emotion out of the picture, the company's time may be better spent developing new sales as opposed to starting litigation."

Steve Fox, a partner at Fish & Richardson in Dallas, says employers should consider the larger impact of potential cases. "If the court throws out the non-compete for one employee, it invalidates the non-compete agreements of anyone else at the firm."

While this may be true, Balitis argues that aggressive enforcement of the first few violations can eliminate the need for future litigation because employees will know that violations are actively pursued. It may make sense, he says, to "take the hit now, spend a lot of money up front to litigate it and don't be shy about letting people know about it."

Taking this approach means "the likelihood of the next two or three or five people doing it will diminish. If employees know the employer has taken the breach seriously and taken action, it discourages people down the line," Balitis says.

Work with legal counsel to craft violation notifications. Many employers start enforcement by sending the employee in question a letter notifying him or her of the breach and requesting corrective action. While this may be good first approach in some cases, Balitis says it also can backfire. "About 75 percent of the time this type of letter goes out and about 75 percent of the time it's ignored and you end up escalating the

action anyway. By starting with the letter, you eliminate the element of surprise. They know you are coming.”

Both Balitis and Labrit say employers should consider including the other employer in any enforcement action. “The new employer can have separate liability if it acts in concert with the employee who is restricted,” Balitis says.

“At least in Florida, hiring employers can be made party to the injunction or sued for tortious interference,” Labrit says. As a result, they need to calculate whether the risk of employing or continuing to employ an allegedly restricted worker is worth it.

An executive search firm in San Francisco is an example of a company that decided it wasn’t. A recruiter told *HRWire* that the firm had a promising candidate for a national sales position who had signed a non-compete with his current employer. While the non-compete was technically unenforceable because the new position was based in California, the candidate’s employer made it clear that it would take other measures to undercut him and his new employer if the hire went through. “Needless to say, this particular match was not made!” the recruiter says.

The bottom line

Non-compete agreements can be challenging to enforce. Employers need to take steps before violations occur to minimize their likelihood and impact and eliminate the need for difficult decisions. Designing well-crafted agreements, aggressively discouraging violations and working with legal counsel to develop appropriate responses can make the process less traumatic—and more importantly, less costly.

Endnotes

Contacts: John Balitis, director, Fennemore Craig, jbalitis@fclaw.com
Suzanne Youmans Labrit, partner, Shutts & Bowen, Slabrit@shutts-law.com
Ronald S. Langacker, vice president, HR, EP-Direct, www.ep-direct.com
Kerry Solomon, vice president, HR, SecureWorks, www.secureworks.com
Stephen E. Fox, Fish and Richardson, www.fr.com

Occupational Hazards

The Eyes Have It

Paula Santonocito

Vision problems are all too common in a world that has become increasingly dependent on computers. But computer use isn’t the only cause. Poor office lighting can contribute to vision difficulties, as can a number of other easily controlled variables. Then there's the matter of the age factor. As the workforce ages, more employees will be experiencing problems related to eyesight.

What can employers do to provide assistance—and safeguard their own eyesight?

Computer Users See Problems

According to the U.S. Census Bureau, nearly 175 million Americans use computers—and more than 75 percent of U.S. workers use computers on the job. As computer use has become more prevalent, so too have vision-related difficulties. The problem is so common, in fact, that it's even been given a name: Computer Vision Syndrome (CVS).

The American Optometric Association (AOA) provides a definition of CVS: “CVS is the complex of eye and vision related to near work which are experienced during or related to computer use. CVS is characterized by visual symptoms, which result from interaction with a computer display or its environment. In most cases, symptoms occur because the visual demands of the task exceed the visual abilities of the individual to comfortably perform the task.”

AOA has been instrumental in bringing attention to computer-related ailments, and has recently launched the Computer Vision Syndrome Information Center, a web site focused exclusively on CVS, <http://www.cvseyeinfo.com>. Here employers can find information about the symptoms of CVS, as well as a checklist that can help identify the problem.

Gwenda Gnadt, O.D., an optometrist based in Lake Ronkonkoma, N.Y., tells *HRWire* computer-related problems are very common. “To the best of my knowledge, about one in five to one in eight patients that present for an eye examination are attributing their problems to their computer use,” she says.

Taking Control of the Environment

One major issue is that office lighting and computer screens are often at odds. “In general, the computer screen should be brighter than the surrounding room lighting,” says Gnadt. “Also, the monitor should be set so that any windows are not behind it or reflecting into it. Diffusers on overhead fluorescent lights are helpful, as well as anti-glare screens over the computer and anti-reflective coatings on their glasses.”

In addition, AOA offers the following recommendations to help the eyes of all computer users:

- Make a conscious effort to blink more.
- Use a lubricating eye drop to alleviate dry or itchy eyes.
- Remember to look away from the computer on a frequent basis.
- Make sure your screen is slightly lower than eye level and straight in front of you.
- Clean your screen often.

Understanding Eye Care

Although a person may already wear glasses, the prescription may not be adequate for computer use. This is particularly true for older workers.

“In general, as we age we need a different prescription for near tasks than for distance tasks,” explains Gnadt. “This difference becomes more amplified for computer users. For

persons on a computer over two hours a day, often a different prescription is needed for the computer/near tasks than for general viewing.”

There are also glasses, with special lens designs, that are made exclusively for computer use. The PRIO Corporation, for example, makes a lens it calls the computer or browser lens. Magnification is in the center of the lens, so that from the top of the lens, a person can see beyond the computer, and from the bottom of the lens, printed material and the keyboard can be viewed.

Accommodating Workers

Recognizing that today’s environment is hard on the eyes, several organizations have increased web site font sizes. Others have an adjustment feature that enables a site visitor to make the change if he or she chooses. Lesley University’s web site, www.lesley.edu, for example, features plus and minus buttons for this purpose. These buttons are available on every page except the home page.

For older workers, larger font sizes can be particularly helpful. To assist older workers, Gnadl also recommends:

- provision of computer-specific eye examinations, and possibly material;
- larger monitors, that are also adjustable;
- anti-glare screens for computers; and
- adjustable desk chairs.

Providing Assistance

Employers can provide assistance by providing better tools, but information is also important. To this end, Gnadl recommends that companies educate their employees.

“Some people do not even realize that some of the problems they are having are associated with their eyes until the problem is corrected. I cannot tell you how many patients I have had come back to me year after year thanking me for providing them with computer specific glasses,” she says.

Offering vision care as part of a benefits package is also advisable, says Gnadl. “The benefit of correct vision and vision correction enables the person to be more visually efficient and therefore more economical to the company. In some cases, what it costs for an examination and glasses could be saved in one day’s work,” she says.

Yet, despite the benefit, vision benefits are not widespread. As is the case with other health care benefits, vision care is most frequently offered by large organizations.

Mark Hennen, O.D., an optometrist based in St. Paul, Minn., shares his vision coverage research with *HRWire*:

According to a 2004/2005 Watson Wyatt survey, 78 percent of all employers offer a vision benefit, and 84 percent of employers with more than 2,500 employees offer coverage.

According to a 2003 Mercer survey, 54 percent of large employers (more than 500 employees) offer vision coverage beyond an annual exam. Of those with more than 20,000 employees, 72 percent offer vision coverage beyond an annual exam. According to a 2003 Hays Benefits survey, 68 percent of all firms in all industry groups offer vision coverage, and 80 percent of those with more than 10,000 employees offer coverage.

In an era where health care benefits are scrutinized for cost savings, it may be difficult for organizations, particularly small ones, to add eye care coverage.

Yet, Kerry Beebe, O.D., chair of the AOA Clinical Care Group, points out that assistance isn't an all or nothing proposition. "If a full benefit is not affordable to an employer, an examination every year and a certain allowance towards glasses or a payroll deduction or flex plan allowance is beneficial," he tells *HRWire*.

Regardless of whether an employer provides eye care coverage, educational material, workplace accommodations, or all of the above, one thing is for certain. As the population ages, and an older workforce spends more time in front of the computer screen, it's likely employers will need to keep eye care issues in sight.

Endnotes

Contact: Susan Thomas, public relations manager, American Optometric Association (AOA), slthomas@aoa.org, for Gwenda Gnadt, O.D., Mark Hennen, O.D., and Kerry Beebe, O.D.

Online: Computer Vision Syndrome (CVS) Information Center, <http://www.cvseyeinfo.com/>.

Related Articles: **Related Articles:** HRW, Feb. 22/99, "Computer Glare's Wear and Tear," <http://www.hrwire.com/story.asp?99022211.htm>; HRW, June 23/97, "Fixing Office Health Problems Shouldn't Be Brain Surgery," <http://www.hrwire.com/story.asp?97062302.htm>.

Benefit Trends

Filing Form 5500—To What End?

Michael B. Snyder, Esq.

It has been around for so long that most professionals do not even question its existence or worth. But grumblings have begun from all sides, and the form that is so popular that it is known only by its number—5500—and for the first time in decades there is serious movement afoot to change either the form or the amount of work it takes to prepare it.

As is common knowledge, tax-qualified plans generally are required to file Form 5500, an annual return and report, regarding their financial condition, investments, and operations. The form is entitled Annual Return/Report of Employee Benefit Plan, with any required attachments. Thomas C. Nyhan, working group chairman, is executive director and general counsel for the Rosemont, Ill.-based Central States Southeast and Southwest Health and Welfare and Pension Fund. He stated that it is the DOL's objective for fee reporting and then determining whether or not the Form 5500 meets these objectives." Based upon testimony thus far, it appears the clear answer is that it does not.

In the latest scud, a Department of Labor ERISA Advisory Council working group listened to evidence presented by practitioners. Donald Stone, president of Chicago-based Plan Sponsor Advisors LLC, told the group on August 4 that Form 5500 simply does not capture the way pension plan fees are charged today, thus questioning the efficiency of the filing process.

Mr. Stone noted that "(t)he industry has experienced a shift in how fees are charged over the past ten years that, on the whole, has made fees less transparent and often more expensive." In other words, current fee practices do not allow participants to understand how their account balances are being adversely affected by current fee practices, and Form 5500 is ineffective in assisting either the plan sponsor or participant in righting that wrong. He properly observed that plan sponsors are unlikely to seriously address this issue until the department issues clear guidance on fees and takes enforcement action, and that vendors are "reluctant" to provide the fee information plan sponsors need in order to understand fees. We would take that a step farther, and suggest that vendors simply will not assist plan sponsors in understanding fees until required to do so.

Mr. Stone advocated for complete disclosure of all investment expenses on Form 5500 as a way of forcing mutual fund companies and plan sponsors to communicate, or at least make available, how much plan participants are paying for their investments. He testified that the automatic increase in fees as assets grow (because fund companies take a percentage of assets) is information that plan participants are entitled to receive. In addition, we believe that most plan sponsors are unaware of the fees as well, and are not making informed decisions on behalf of plan participants due to this lack of information.

The government somewhat defended Form 5500. Scott C. Albert of the Labor Department's Division of Reporting and Compliance, Office of Chief Accountant, told the working group that the filing of Form 5500 and audits of the employer "promotes a discipline whereby plan administrators will focus on the performance of the plan, plan assets, and the like." John J. Canary, chief, Division of Coverage, Reporting, and Disclosure, Office of Regulations and Interpretations, told the working group that making changes is not that simple, because it would require a notice and comment regulatory process to occur. It is not clear what the purpose of that statement to the committee meant, whether it was to discourage changes or simply to inform.

He further cautioned that such a process would involve a notice of the proposal, an opportunity for the public to comment on the proposal, a review of the public comments

by the agency, and then, as appropriate, the publishing of final regulations. He further cautioned that even an instructional change to the form, which could be considered to either increase or decrease the burden of filing the form, probably would require the same regulatory process. Such a message seems out of place to a committee where understanding investment information is at issue -- a mixed message at least from a governmental employee where the government is looking for ways to improve communication.

Clearly, the current Form 5500 lacks the information the DOL says it desires. Broker compensation is not shown if paid by the mutual fund, nor are stable value management fees and transactions fees. Mr. Stone recommends that disclosure of fees and vendor revenue streams should be required. He also suggested that education regarding the impact of fees over the long-term be made mandatory. The bottom line for Mr. Stone is that he believes that "(m)any plans are paying unconscionably high fees and often don't know it." His estimate was that vendor target gross margins typically run from 20 percent to 40 percent.

Mr. Stone accused vendors of highlighting funds that pay high revenue sharing, and that they often do not draw attention to funds with less revenue sharing and lower overall fees. There are as many as six different tiers of revenue sharing at some vendors frequently offering the same fund but different share classes to improve profit.

Health care plans are also at issue in the committees review. In another meeting, Janice M. Wegesin, president of Palatine, Ill.-based JMW Consulting speaking on behalf of the American Society of Pension Actuaries, told the panel that it is not clear how the filing of Form 5500 information for health benefit plans provides any useful data to the government. In her words, "Certainly, participants are not receiving any information about the funding of the plan." Her comments followed the statements of three Department of Labor officials who also did not indicate a high degree of usefulness for the information.

Joseph Piacentini, deputy director for Research and Regulatory Analysis in the Labor Department, told the working group on health and welfare plans that the DOL does not use much of the Form 5500 information, that it is simply used to fill in the gaps of other data sources. He noted, however, that the insurance information on Schedule A is reviewed, but "not extensively used."

Mr. Piacentini also noted that small plans with fewer than 100 employees are not required to file Form 5500, and as a result, large plan filers represent less than 2 percent of all health plans. He also noted, however, this 2 percent represents a large portion of the employee universe covered by such plans.

Dennis Quigley, the Labor Department's chief of the Division of Field Operations, Office of Enforcement, told the working group that Form 5500 may or may not be used to begin investigations. Confirming long-standing belief, he noted that investigations are begun

due to complaints received, media reports, and computer targeting, as well as a review of Form 5500.

Scott C. Albert of the department's Division of Reporting and Compliance, Office of Chief Accountant, told the working group that DOL is the "hub in the middle of the enforcement wheel," and that they do what they can to ensure that the current requirements are met. If a submitted form is not complete, his department may refer the matter to enforcement, but the primary function is to ensure collection of all data.

Ms. Wegesin suggested that, if specific data is needed for analysis by the DOL, perhaps the creation of a Schedule W that specifically captures welfare (health) plan data would be more appropriate rather than fitting a square peg in a round hole. She was referring to the Form's apparent lack of connection to DOL's stated goal of collecting certain data. She believes that the same standards currently required of employers for employee contributions to pension plans should be applied to welfare plans to ensure conformity and full disclosure.

As an actuary, however, Ms. Wegesin noted that there is a "disconnect" between gathering data and reality, a problem that which DOL is "well aware" because insurance companies are required to provide Schedule A data to plan sponsors under ERISA, but DOL does not enforce the rule. Accordingly, plan sponsors are guessing when completing Schedule A.

The working groups will meet again in September to hear from other speakers, but the answer is becoming clear. The problems each practitioner was having individually are issues for everyone. The DOL, despite its reluctance to change, is figuratively fulfilling the age-old myth that Forms 5500 are put in railroad cars and never reviewed. With all of the concern over mutual fund expenses and health care costs, it seems that the working groups will have no alternatives but to recommend an overhaul in reporting requirements—if DOL is serious about uncovering true costs.

Corporate Ethics

Hypocrisy and Favoritism: Is Your Organization Suffering from Either or Both?

Paula Santonocito

Financial scandals may appear to epitomize unethical business practices, but monetary misdeeds aren't what America's employees cite when asked about ethical lapses at work. They see hypocrisy and favoritism as bigger problems.

Indeed, a recent survey by global consulting firm Watson Wyatt paints a less than favorable picture of the seemingly small and often overlooked aspects of day-to-day workplace interaction that could be eating away at the credibility of many organizations.

Asking the Average Worker

As part of its series “WorkUSA 2004: An Ongoing Study of Employees Attitudes and Opinions,” the firm surveyed 1,200 United States workers. The term “worker” shouldn’t imply that those polled are at the lower end of the earnings spectrum, and are therefore perhaps more likely to be disgruntled. Bruce Pfau, practice director of organization effectiveness for Watson Wyatt Worldwide, tells *HRWire* respondents represent a cross-section of employees who hold various positions in a range of industries; the only criteria for survey participation was that they were employed full time.

The message from this cross-section of employees is that honesty/integrity—or lack of—is an issue. Although 72 percent of those surveyed believe their immediate bosses behave with honesty/integrity, workers do not rate top management as highly. Only 56 percent give top management high marks.

Respondents also have serious doubts about their co-workers. In fact, only 60 percent feel their co-workers behave with honesty/integrity in their business activities. Moreover, another 31 percent appear to be on the fence, citing “somewhat agree/somewhat disagree” as their response.

Pfau says the feedback about immediate bosses is consistent with other findings; people generally rate their bosses favorably. The ratings for top management are likewise similar to other surveys. How workers view one another, though, is unexpected. “The co-worker data was a little surprising to me. I thought it would be more similar to the bosses data,” says Pfau.

Sources of Doubt

When asked about the reasons for their doubts, employees consistently cite hypocrisy and favoritism, as opposed to dishonest financial dealings.

How does hypocrisy manifest itself in the workplace? “People not doing what they say, or behaving in ways that are different from what their professed values are,” Pfau explains. He gives the example of how someone may profess that quality is job one, but then push inferior products out the back door. Employees view that as a lack of integrity, he says.

Favoritism is also seen in the context of day-to-day activity. Pfau describes it as “blatant, inconsistent treatment of people based on personal relationships vs. merit or policy.” He gives the example of how excessive absenteeism may be overlooked for one person, while another person is held accountable for violation of policy. Favoritism generally results from inconsistencies related to some sort of personal relationship, Pfau explains. In the worst cases, it’s the result of nepotism.

Impact of Environment

In addition to revealing how employees view one another and the people for whom they work, the survey also sheds some light on individual behavior. Pfau says the findings in this area are the most disturbing piece of information.

Nine percent of employees say work demands “almost always” or “often” put pressure on them to do things that conflict with what they think is right. And another 22 percent say this is “sometimes” the case.

Pfau says that although these numbers may seem small, when you multiply the percentages by millions of workers, the impact is significant. Taking an organization that employs 30,000 people as an example, 29 percent of the workforce equates to 8,700 people who feel inclined to compromise their values. Even if only 1 percent acts on what they perceive as pressure, this means that 87 people may be behaving in ways that compromise the organization.

Hypocrisy and favoritism may also be impacting employee commitment levels, which the survey shows are approximately 6 percentage points lower than they were two years ago.

Drawing Conclusions

Pfau acknowledges that this brief study only sets up certain assumptions, and that Watson Wyatt hasn't asked about ethical behavior on a consistent basis. He tells *HRWire* that in a few months the firm will be releasing a more in-depth study of 13,000 American employees, which will take a more detailed look at these and other issues.

However, he indicates the day-to-day behavior of management does have an impact. “In general, we know from our work that trust in top management is a key driver in commitment,” he says.

Pfau points out the economy may also be a factor in the findings of this particular study. “People are feeling they've taken the brunt of the economic downturn and may be harboring some resentment toward their management teams,” he says. “As the pie has gotten smaller as a result of the total wealth created by the economy, there's more friction about who gets what share, and these kind of ethical issues come into greater relief.”

What Management Can Do

In this type of environment, Pfau recommends that management focus on doing all the things they would do in good times. “Management needs to walk the talk. Employees see through the B.S.,” he says. “Apply policies consistently, play by the rules. Be fair in the way rewards are allocated.”

Another key element is how management is evaluated, Pfau says. Promoting people based on demonstrated values is essential.

In addition, Pfau advocates identifying and eliminating policies that could lead to comprising behavior. For example, a sales policy with wild expectations that encourages overselling should be re-evaluated, he says.

Pfau also advises organizations to make sure they have the staff in oversight functions that are appropriate for the issues. One HR person for 600 employees is not adequate, he says.

According to Pfau, it is a combination of actions that sets an overall tone. “We’re talking about a cultural backdrop, and that is not defined by one speech or banner,” he says.

For the organization seeking to implement improvements, Pfau offers advice on approach. “I think knowing what the situation is, is sort of the first step in making some change to it,” he says. But he points out that identifying problems and finding solutions is not a one-time process. “People should be assessing these things on an ongoing basis,” Pfau tells *HRWire*.

Endnotes:

Contact: Bruce Pfau, practice director, organization effectiveness, Watson Wyatt Worldwide, 609/799-5494, bruce.pfau@watsonwyatt.com.

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Benefit Trends

The Pros and Cons of Organizational Psychologists

Maureen Minehan

Stocks, bonds and...shrinks?

The latter isn’t what usually comes to mind when one thinks of the U.S. Securities and Commission (SEC), the government agency that protects investors and maintains the integrity of the securities markets. However, a recent report by the Associated Press (AP) indicates a psychologist may soon play an important role within the organization. The agency reportedly has created a full-time position for an organizational psychologist to improve employee attitudes and job satisfaction among SEC staff.

According to the job description obtained by the AP, the SEC expects the psychologist to make recommendations on productivity, team building and diversity and to develop “innovative solutions to complex psychological issues.” A two-year appointment with an option for renewal, the position pays up to \$147,978 per year.

In the wake of large-scale corporate fraud investigations, the specter of overworked, burned-out SEC employees is not hard to imagine. But, the AP says, some workers think

hiring an organizational psychologist is just a waste of time. The online job posting for the position reportedly circulated throughout the staff and was met by both jokes and grumbling.

Employee resistance

The SEC's experience is not unique. According to Dr. Ted Sun, president and CEO of Creative Innovations, LLC, an Ohio-based firm specializing in organizational development, the poor reception among SEC employees is typical.

“This attitude is common as the norm within American culture looks at psychology as a head doctor—someone you go to when you have head problems or you're ‘psycho,’” he tells *HRWire*.

Dr. Mark Goulston, author of *Get Out Of Your Own Way: Overcoming Self-Defeating Behavior* and senior vice president for executive coaching and emotional intelligence at Sherwood, a national management consulting firm, agrees. “Organizational psychology suffers from the same stigma as psychotherapy. Employees and patients are likely to share the same bias against both, namely, ‘Where's the beef?’ It's very difficult for people with tangible concerns or analogous physical symptoms to buy into psychology.”

Dr. Joel Quintela, an industrial and organizational psychologist who serves as managing director of Performance Assessment Inc., an Indiana-based assessment firm, says distrust of company leadership is another driver of poor employee attitudes toward organizational psychologists. “A partial driver behind these feelings could be employee cynicism or belief that management is not willing or able to make the necessary adjustments to correct the issues.”

Reasons to hire an organizational psychologist

If employees are going to resist the idea of organizational psychologists, does it make any sense to hire one? Yes, experts say, as long as you take the right approach.

According to the Society for Industrial and Organizational Psychologists (SIOP), organizational psychologists contribute to an organization's success by improving the performance and well-being of its people. Organizational psychologists research and identify how behaviors and attitudes can be improved through hiring practices, training programs, and feedback systems.

Specific areas of contribution include development of tests and assessments; performance management; succession planning; learning; leadership development; effectiveness measures; employee attitude initiatives; change management; employee motivation; job design; team building; workforce planning; diversity and customer service.

Quintela says the “key benefit of bringing a dedicated organizational psychologist (or someone similar) on board is that it strengthens the organization's ability to quickly and accurately identify, clarify and correct costly/demoralizing employee issues.”

Strategy suggestions

Reaping the benefits of an organizational psychologist is not automatic. In addition to employee resistance, skepticism by managers and reluctance to implement needed changes also can limit psychologists' effectiveness.

The following suggestions are designed to help organizations determine whether an organizational psychologist is needed and if so, how to get the most out of the relationship:

Do your own work first. John Putzier, a Philadelphia-based organizational behaviorist and president of FirStep Inc., a human strategy consulting firm, says companies should try to resolve problems on their own first. "You may not believe you are hearing this from me, but in the overwhelming majority of cases in which an organization brings in an organizational psychologist, it is a waste of time and money because the answers are usually right under their noses, but the management is either too lazy or too disconnected (or afraid of litigation) to grab the bull by the horns themselves."

"The first question an organization must ask before bringing in outside help is 'what are we trying to cure?'" Putzier says. If that question has been answered and it's been determined that the organization can't resolve the issue on its own, then the services of a psychologist may be helpful.

Choose the right person. Dr. Leslie Austin, a New York-based psychotherapist, tells HRWire that understanding the differences among various mental and organizational health professionals is critical. "There are major differences in approach, style, and working methods between the more theoretically and statistical model-oriented people and the more real-time, behavior-oriented people. Personally, I've seen many companies throw out lots of good money because they had unrealistic expectations, poorly defined goals, and/or chose the wrong type of person or intervention for situation."

Sun advises employers to pursue candidates who combine psychological expertise with an understanding of business principles. "Not all organizational psychologists have a business mindset... The ability to create systematic change by leveraging people and technology is crucial to long term success and return on investment."

Identify...and implement. Carlotta Tyler, a principal with Organization Development Consultants in Massachusetts, reminds employers that "any consultant can observe and recommend. Only a good one values seeing the contract through by staying with you and your people through systemic implementation."

Commit yourself to change. Sun says not everyone is ready to acknowledge the need for change. "I've fired clients in the past where they simply refuse to change. No matter how real the reflection of some organizational cancer might be, they are not serious about the change. Since the organizational psychologist has no real authority, many get carried on for looks. Some also sacrifice their values and training just to get a paycheck as well."

Sun recommends asking, “is the CEO/president ready to embrace change?” If they’re not, now isn’t the right time to hire an organizational psychologist.

“Bringing about organizational change is a tall order for any one person. True, lasting change requires the commitment and resources of the entire organization,” Quintela says.

Consider the cultural fit. While one of the goals of hiring an organizational psychologist may be to change the workplace culture, the reality is the person must be able to work within the context of the existing culture to succeed. “The person must have credibility and be accepted by those on their team to have a positive impact. For example, if the organization's population has a large number of people with advanced degrees, it may be necessary to have that credential to build credibility,” says Martha Duesterhoft, principal with Human Resource Ally in Texas.

Educate employees. Finally, employees should be brought into the process early on to quell rumors and discontent. By explaining why an organizational psychologist is coming on board; the company’s commitment to action; and, the likely impact on employees, employers can overcome some of the resistance to the hire.

The bottom line

Organizational psychologists can help employers improve the efficiency and morale of employees, but it takes careful planning and management to maximize their contribution. Development of specific objectives, selection of the right person for the job and early, frequent communication with employees are critical to success.

Endnotes

Contacts: Ted Sun, Creative Innovations LLC, www.creativeinnovationsllc.com; Mark Goulston, Sherwood Partners, www.shrwood.com;

Joel Quintela, Performance Assessment Inc., www.panpowered.com;

John Putzier, www.firststepinc.com;

Leslie Austin, Austin Consulting, 212-460-9177;

Carlotta Tyler, Organization Development Consultants, www.odconsultants.org;

Martha Duesterhoft, principal, Human Resource Ally, www.humanresourceally.com.

Online: Society for Industrial and Organizational Psychologists: www.siop.org.

Work Conditions

Decent Behavior 101

Does your workplace sometimes remind you of an elementary school where a few bad apples display uncivil, harassing or even abusive behavior? If you said yes, it may be that you were thinking of some of the managers or executives in your organization, or maybe even your top brass. While no one *wants* to confront these people, it may be up to HR to help rein them in.

“Teaching Big Shots to Behave”

That was the gist of a presentation at the 56th annual Society of Human Resource Management (SHRM) conference given by Stephen M. Paskoff, president of Employment Learning Innovations (ELI), <http://www.eliinc.com>.

He gave examples of the types of people that cause problems for organizations—such as the “No Rules Ruler”, the “Pitiless Tyrant” or “Perfection in Person”—and when he asked the audience of several hundred HR professionals if any of these types were represented in their organizations, hands shot up all around the room. People who fall into these and other categories exhibit behaviors that can be considered:

- Offensive/illegal
- Abrasive/bullying/humiliating
- An abuse of power or authority
- Contrary to the organization’s values

Several audience members offered examples of specific behaviors in their organizations that they were at a loss to control and listened attentively to Paskoff’s suggestions.

He said that these people often get away with misbehavior because of power or perceived competence, but that such people really undermine the organizations they work for. They can be senior executives, brilliant professionals, top producers, long-term employees who are well connected, or others that are somehow seen as ‘untouchable’ for financial or political reasons. He said that it is important to understand that even though such persons may say they ‘get results’ and that they are focused on business goals, their behavior works at cross-purposes with the true well-being of the organization, and can lead to:

- Decreased retention/increased turnover rates
- Loss of productivity
- Legal claims
- Negative publicity/damage to corporate reputation
- Poor role model for company values (since inappropriate behavior breeds more of the same)

He also said that this kind of behavior can exist where there is an organizational problem such as the lack of a credible system for raising complaints without fear of retaliation, especially where the offender is one’s boss. And even though an organization may say it has supports certain policies and values designed to regulate behavior, the offenders themselves often have a belief that the rules just don’t apply to them. It’s not that they “don’t get it,” they just don’t want to do anything about it and, unless an organization has a true commitment to upholding its own stated values, the behavior will continue.

Intervention should come from both HR and respected colleagues (or perhaps an outsider, if that’s the only way to get through), and in a way that gets these people to really think about the potential costs of their behavior, both personally and professionally, and hold them accountable for their behavior, Paskoff said. For example, he suggested asking them

direct questions about the behavior they are exhibiting—how exactly do you think performance is improved by calling people idiots, for example, or making people worried about their jobs? Or, do you really think you are insulated—what makes you think the company would defend you if your behavior ultimately results in a lawsuit? One of the best tactics, Paskoff said, is to show these people concrete examples of what has happened to people who exhibited similar behaviors to their own in the workplace (X behavior resulted in damage to a career, for example, or Y behavior in a lawsuit). Then, turn the tables on them and ask them how they can distinguish their own behavior. If they really think about it they won't be able to, and ideally the whole process will serve as a wake-up call.

And if it doesn't? Paskoff concluded the session by playing "Hit the Road, Jack" to the delight of the audience.

Online: Employment Learning Innovations (ELI), <http://www.eliinc.com>.

Case Study

Employee Fails to Prove Denial of Transfer Was Adverse Employment Action

Angela Fanelli

Plaintiff, Charlina Williams (Williams) appealed from a judgment of the United States District Court for the Southern District of New York, granting summary judgment to her employer, R.H. Donnelley Corporation (Donnelley), on her Title VII claims that Donnelley discriminated against her on the basis of race and sex discrimination.

Williams was hired by Donnelley in 1996 as an entry level employee in Donnelley's Las Vegas office. Between 1998-1999 she was promoted several times: first, in 1998 to Account Executive; second, in July 1998 to full Account Executive; and finally, in January 1999, to Sales Training Manager (STM). Williams' voluntary acceptance of the STM position required her to relocate to New York.

Williams sought to return to Las Vegas, where she still maintained a home. In October of 1999, she applied for an Account Manager position in the Las Vegas office. This position required two to three years of proven performance working with medium to large accounts. Williams alternatively requested that, if she were found unqualified for the Account Manager position, Donnelley create a new management position in the Las Vegas office. Approximately two months later, Donnelley denied her application for the position offering it to another woman. On December 21, 1999, Williams requested to be transferred to Las Vegas as an Account Executive, the position she had held before being promoted to STM. Donnelley denied this request, as well. In January 2000, Donnelley advertised a vacant DSM III position in its Las Vegas office and Williams inquired about this position. Donnelley rejected Williams' application and, in February 2000, gave the DSM III to an African-American male, who up until that time held a DSM II position. Williams subsequently went on an indefinite disability leave of absence and remained on

leave until July 2000. Donnelley, without soliciting applications, filled the newly vacant DSM II position with a white male. In September 2000, Williams resigned and on January 5, 2001 initiated suit.

The district court granted summary judgment in favor of Donnelley on her race and sex discrimination claims. Williams appealed.

Failure to promote to Account Manager and DSM III positions

On appeal, Williams argued that Donnelley previously interpreted the requirements for the Account Manager loosely and, consequently, interviewed candidates without the required experience. She asserted that another white male applicant for the Account Manager position had qualifications similar to hers but was granted an opportunity to interview for the position. The Court found that it was undisputed that Alan, unlike Williams, had two to three years experience in sales, and had ranked in the top third of his peer sales group. Thus, Donnelley's decision to interview Allan, rather than Williams, did not suggest that Donnelley relaxed the qualifications necessary for the position. Similarly, Williams failed to establish her qualifications for the DSM III position, which required two years of experience as a DSM II.

Failure to create management position

Williams next contended that Donnelley's refusal to create a management position for her was discriminatory. She alleged that Donnelley appointed a white male to a management position in the Las Vegas office several months later, and that two white males were appointed to District Manager position in the Las Vegas office in 1999. The Court found no evidence that any of the later-filled positions were created for the appointed white employees. On the contrary, the evidence suggested that the District Manager positions were vacant, and Donnelley filled the vacancies with qualified employees.

Failure to transfer to Account Executive

Williams asserted that the denial of her transfer request constituted an adverse employment action because she was unable to return to Las Vegas, where she still maintained a home. The Court disagreed finding that Donelley's *denial* of her request for a transfer *did not* create a materially significant disadvantage in her working conditions. The court noted that, if anything, Williams would have suffered an adverse employment action if she *had* been transferred to the Account Executive position which paid less than and organizationally was a demotion from the STM position she held when she requested the transfer.

Failure to promote to DSM III

Donnelley did not challenge Williams' contention that she possessed the necessary skills and experience for the DSM II. Instead, it argued that because Williams was on indefinite disability leave at the time the position became vacant she was not available to assume the DSM II position. The Court agreed and held that where an applicant has taken an indefinite leave of absence, and has given no indication of return to the workplace, the applicant need not be considered available to fill a position for which there is an

immediate need and will be deemed unqualified. Therefore, because Williams was unavailable, her claim failed.

Endnotes

Casefacts: *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123 (2d Cir. 2004). For the full text of the case see <http://caselaw.lp.findlaw.com/data2/circs/2nd/027681p.pdf>.

Case Study

Homestore Says Asset Sheltering Justifies Withholding Defense Costs

At a trial in a closely watched legal battle over whether a company can withhold payments for its CEO's defense costs if he is sheltering assets to avoid repaying those funds, Homestore Inc. has told the Delaware Chancery Court that it will prove that the officer's hands are dirty. The CEO claims he bought a multimillion-dollar home in Florida to spend more time with his family, but Homestore says it is the protection of the state's homestead law that won his heart. *Tafeen v. Homestore Inc.*, No. 023-n, hearing held (Del. Ch. July 1, 2004).

The case represents the first time a company has refused to advance legal payments to an officer for otherwise legitimate defense costs based on alleged bad faith related to the indemnification action itself, rather than in the underlying case.

In an earlier ruling, Chancellor William Chandler said Homestore might be entitled to withhold the funds if it can show that Peter Tafeen sank millions into the Florida property mainly because the state's law would make it difficult for the company to recoup that money later.

In that earlier decision, Chancellor Chandler said Homestore sufficiently showed a trial will be needed to examine the company's "novel" defense against Tafeen's indemnification suit.

Homestore argues it did not violate Delaware's law requiring companies to advance legal costs to officers and directors because it has good reason to disbelieve Tafeen's promise to repay the money if it is later determined he is not entitled to it.

Homestore, a Delaware-chartered company that provided online media and technology support for the real estate industry, was sued by government regulators and shareholders after an investigation into its accounting practices revealed that it overstated its revenues by \$41.4 million in 2000 and by more than \$119 million in the first three quarters of 2001.

Tafeen was investigated by the U.S. Department of Justice to determine whether he engaged in any criminal conduct in connection with those accounting problems and later was named in 10 lawsuits by shareholders and insurers.

The lawsuits alleged violations of the federal securities laws and breach of fiduciary duty. Some asserted wrongdoing in connection with Homestore's acquisition of another company in a deal partially financed by allegedly inflated Homestore stock. Other lawsuits were filed by insurers that sought to rescind director and officer insurance policies.

When Tafeen sought indemnification from Homestore for his legal bills in those lawsuits, the company initially complied, he said, but with a large number of restrictions and conditions. Later, it stopped paying the bills entirely, and Tafeen filed this suit.

Homestore said it was within its rights when it demanded reasonable assurances from Tafeen that if it were later determined that he was not qualified for indemnification—because of criminal conduct or because his alleged wrongdoing did not occur in connection with his duties as a corporate officer—he could and would repay the money advanced to him.

Both sides moved for summary judgment.

In a March 22 opinion Chancellor Chandler noted that Homestore had revealed it overstated its revenues by almost \$250 million in 2000 and 2001—all on Tafeen's watch—and that about the time the inquiry into the accounting practices began, Tafeen bought the Florida home, which would fall under that state's "extremely protective" homestead laws.

Homestore told the court in a pretrial brief that even the limited discovery it was able to obtain clearly shows Tafeen is sheltering assets and should not receive advancement.

The company claims Tafeen delayed seeking an advancement of legal costs so he could send his mortgage lender a \$686,000 payment on a house he had just bought in Florida.

Only after Tafeen had sent in that payment and another mortgage payment of \$43,000 did he seek an expedited advancement of legal costs on grounds that he was nearly out of money, Homestore argued.

Since the indemnification began, Tafeen has sold the first house and bought a second one for even more money, Homestore contends.

Even though the first home was purchased almost a year before the accounting trouble surfaced, "Tafeen knew that Homestore's financials were a house of cards built on fraud and that it was only a matter of time before that fraud was uncovered," Homestore asserted. "[W]hat Mr. Tafeen was really doing was jumping off a sinking ship before the board and the public figured out that there was a leak."

Homestore contended that the real estate transactions are just a part of Tafeen's alleged asset-sheltering scheme. When Tafeen bought the first house in Florida in June 2001 he

claimed to have liquid assets of \$15 million to \$20 million but two years later, his lawyers said he was out of money.

The company said, "Homestore is left, and, we submit, the court is left, to wonder, 'Where did all the money go?'"

Tafeen is represented by William Lafferty and Charles Reed of Morris, Nichols, Arsht & Tunnell in Wilmington, Del., and Marc Fenster of Russ, August & Kabat in Los Angeles.

Homestore is represented by William Johnston and Sara Reyburn of Young Conaway Stargatt & Taylor in Wilmington.

Judge: Chancellor William Chandler

Endnotes:

This article originally appeared in the July 26, 2004 issue of Andrews Corporate Officers and Directors Liability Litigation Reporter.

Andrews Publications, a West business, is celebrating over 30 years as the nation's foremost publisher of litigation reporters, newsletters, special reports and online services dedicated to helping the business and legal communities track case developments nationwide in specific areas of litigation, including employment law and corporate liability. Andrews was recently acquired by West (<http://www.west.thomson.com>), the foremost provider of integrated information solutions to the U.S. legal market. West is a business within The Thomson Corporation (<http://www.thomson.com>) a global leader in providing integrated information solutions to business and professional customers.

Immigration Immigration Update

In recent immigration news of note, the Department of Labor's Employment and Training Administration (ETA) has issued an interim final rule to address the backlog in pending permanent labor certification applications; the U.S. Citizenship and Immigration Services (USCIS) published a notice effective July 23, 2004 which supplemented information issued in February regarding the procedures the Department of Homeland Security plans to follow as the fiscal year 2004 H-1B nonimmigrant numerical cap is reached; and the USCIS also recently announced that certain foreign health care workers from Canada and Mexico will remain exempt, for a period of one year, from the foreign health care worker certification requirement.

ETA issues interim final rule to centralize permanent labor cert processing

The Department of Labor's Employment and Training Administration (ETA) has issued an interim final rule, effective August 20, 2004, to address the backlog in pending permanent labor certification applications. The rule will allow the National Certifying Officer (NCO) to transfer to a centralized ETA processing center(s) "some or all"

applications now awaiting processing by State Workforce Agencies (SWAs) or ETA Regional Offices. The rule does not affect the pending proposal to streamline procedures for permanent labor certification under 20 CFR part 656 (published in 67 Fed. Reg. 30466-521 (May 6, 2002), which the ETA said is "expected to be finalized in 2004."

The rule affects only applications filed under existing regulations, while the streamlined certification regulation will govern processing of new applications filed after that regulation takes effect. At the American Immigration Lawyers Association's annual conference in June 2004, during a session on the upcoming permanent labor certification regulations (perm regs), Bill Carlson, the Department of Labor's (DOL's) Chief of Foreign Labor Certification, said that after the perm regs come out, for a while, processing will take place under two sets of rules and the transition may take several years. Following publication of the perm regs, Mr. Carlson said that the DOL will hold a series of public working meetings to explain where the filing centers will be and other details. The meetings will be in Atlanta, Chicago, San Francisco, and Washington, DC, he said; a website will be set up for electronic registration for the four meetings. Mr. Carlson also said that the ultimate goal is to move to a center-based model. He said that as of June, there was a backlog of at least 300,000 cases at the state workforce agencies. If the DOL receives its full requested budget, he noted, it will take an estimated two fiscal years to eliminate the backlog.

If the labor certification presents a "special or unique" problem, the interim final rule states, the centralized processing site, in consultation with or at the direction of the NCO, may refer the application to the NCO for a determination. If the NCO has directed that certain types of applications, or specific applications, be handled in the national office, the centralized processing site will refer such applications to the NCO.

Comments may be submitted in writing by August 20, 2004, to the person named in the notice. Submissions must include the RIN 1205-AB37 for this rulemaking, and the ETA is encouraging early mailing because of continuing postal mail delays in the Washington, D.C., area.

The interim final rule was published in 69 Fed. Reg. 43716-18 (July 21, 2004).

Status to be extended for certain F and J nonimmigrants, deadline imminent, USCIS says.

U.S. Citizenship and Immigration Services (USCIS) published a notice effective July 23, 2004, and published the same day, which supplemented information issued in February in 69 Fed. Reg. 8675-76 (Feb. 25, 2004) regarding the procedures the Department of Homeland Security plans to follow as the fiscal year 2004 H-1B nonimmigrant numerical cap is reached. The notice states that the Secretary of Homeland Security will extend the

status of certain F and J nonimmigrant students "if DHS has received from their prospective employer[s] a timely filed request for change of nonimmigrant status to that of an H-1B nonimmigrant no later than July 30, 2004, and the employment start date on the petition is no later than October 1, 2004."

Additionally, in the case of a J-1 student, the alien must not be subject to the two-year home residence requirement of INA § 212(e), the notice states (8 USCA § 1182(e)). The duration of status for dependents of affected F-1 or J-1 nonimmigrants is also extended under the notice until October 1, 2004. The notice applies only to J-1 exchange visitor students, and does not apply to other categories of exchange visitors, USCIS said.

USCIS noted that the February notice stated that the agency would not process any additional petitions with an employment start date on or before September 30, 2004, once the cap was reached. The new notice states that the extension will "prevent a lapse of status for aliens who have maintained their status and would otherwise be eligible for a change to H-1B status if the annual H-1B numerical limitation had not been reached."

The notice was published in 69 FR 44044-45 (July 23, 2004).

USCIS announces extension of certification deadline for certain foreign health care workers from Canada and Mexico

U.S. Citizenship and Immigration Services (USCIS) announced on July 19, 2004, that certain foreign health care workers from Canada and Mexico will remain exempt, for a period of one year, from the foreign health care worker certification requirement. This exemption applies only to Canadian and Mexican Trade NAFTA (TN) health care workers who were employed as TN nonimmigrant health care workers before September 23, 2003, and held a valid license from a U.S. jurisdiction before September 23, 2003.

In July 2003, USCIS announced that, after July 26, 2004, foreign health care workers, other than physicians, who are subject to the foreign health care worker certification requirement, are inadmissible and ineligible for an extension of status or change of status if already in the U.S., unless they present a certificate granted by an approved credentialing organization.

That one-year transition period was sufficient for the vast majority of foreign health care workers, USCIS said. In the case of Canadian and Mexican TN health care workers, however, USCIS determined that an extended transition period was needed. Many Canadian and Mexican citizens working in the border regions regularly travel across their respective borders. Because the process of obtaining certification is not an immediate one, USCIS has extended the transition period for Canadian and Mexican TN health care workers only for an additional year. This will ensure that there is no disruption to the regional health care systems along the Canadian and Mexican borders, USCIS said.

Endnotes

Related Products: Derived from Interpreter Releases, which offers weekly reports and analysis of up-to-the-minute information on all significant immigration matters; for more information see <http://west.thomson.com/product/15867076/product.asp>.

Organized Workplace

Nondiscrimination Key to Giving the Boot

Maria Howland

The American Postal Workers Union (APWU) petitioned for review of an order of the National Labor Relations Board (NLRB) that the United States Postal Service did not violate the National Labor Relations Act (NLRA) when it excluded two nonemployee union organizers from an employee break room because the employer ejected the organizers pursuant to its no-solicitation policy.

One evening in June 2000 three agents of the APWU entered the Postal Service's Bulk Mail Center to solicit drivers employed by Mail Contractors of America (MCOA), a company that hauls mail by truck for the USPS. They were: Hardy, an MCOA driver; Brown, the president of APWU Local 32; and Grimes, an APWU organizer. These three, none of whom were employed by the Postal Service, went to the lounge used by MCOA drivers waiting for Postal Service employees to load mail into their trucks. Brown left the lounge around 10p.m., and at approximately 10:30p.m. Johnson, a Postal Service employee, joined Hardy and Grimes there. Upon discovering the three men attempting to organize MCOA drivers, a Postal Service supervisor, after consulting with a manager, instructed them to leave the Bulk Mail Center. The supervisor and the manager acted pursuant to the Postal Service's Southeast Area Office Policy. The Postal Service also had a general policy predating the Southeast Area Office Policy which prohibited solicitation for commercial or charitable purposes.

The Union filed an unfair labor practice charge, and the General Counsel of the NLRB issued a complaint alleging the Postal Service violated § 8(a)(1) of the NLRA, by denying the three men access to the break room for the purpose of organizing. Section 8(a)(1) of the NLRA makes it "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 of the NLRA provides that "Employees shall have the right to self-organization, to form, join, or assist labor organizations." The Administrative Law Judge held the Postal Service had violated § 8(a)(1).

On review the Board affirmed the decision of the ALJ with respect to the employee, but held excluding union president Grimes and MCOA driver Hardy from the contract drivers' lounge did not violate § 8(a)(1). The Union appealed, arguing the Southeast Area Office Policy on its face discriminates against union solicitation.

After quickly disposing of the Board's claims that it lacked jurisdiction, the court turned its attention to the main issue in the case. The Union argued the Board's decision was inconsistent with *National Labor Rel. Bd. v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S. Ct. 679, 100 L. Ed. 975 (1956), and with the Board's own prior decisions, because a facially discriminatory no-solicitation rule is facially invalid because it "singles out" union solicitation.

According to the Board, the Southeast Area Office Policy, which as described by its author directed employees neither to "aid...nor to hinder" union organizing, was not discriminatory because it was part of a more general policy prohibiting solicitation for any purpose. The Board argued, therefore, the Postal Service could lawfully deny Grimes and Hardy access to the Bulk Mail Center unless the General Counsel showed the Postal Service "disparately denied nonemployee union organizers access to solicit in the contract drivers' lounge."

The court determined that it was clear the Postal Service did not single out union solicitation for prohibition. The employer's policies in this case, providing that the Postal Service will "remain neutral" with regard to the Union's efforts to organize MCOA drivers, together with the employer's preexisting rule against commercial or charitable solicitation, meet this requirement. Therefore, absent evidence of differential treatment, "there can be no finding of discrimination." Since there was no evidence the Postal Service permitted solicitation by nonemployee entities other than the union, there was no violation of § 8(a)(1).

American Postal Workers Union, AFL-CIO v. N.L.R.B., 370 F.3d 25 (D.C. Cir. 2004).

Surveys in the News

HR News Briefs—8/16/2004

In recent HR surveys of note, Hewitt Associates finds that organizations nationwide are struggling to become compliant, and according to a new poll by the legal Web site FindLaw® (www.findlaw.com), more than one in five Americans say they have experienced employment discrimination.

Companies Not Prepared for New FLSA Regulations

New regulations for the Fair Labor Standards Act (FLSA) take effect August 23. However, organizations nationwide are struggling to become compliant, according to Hewitt Associates.

The U.S. Department of Labor (DOL) recently announced the first comprehensive overhaul of FLSA in more than 50 years. The new regulations redefine the "white-collar" exemption tests used to determine whether an employee must be paid overtime, or is exempt from the minimum wage and overtime requirements. Virtually all employers need

to review existing job classifications and wage levels to ensure compliance with the new rules, which will be enforced beginning August 23.

Hewitt surveyed more than 150 major companies and found that 20% don't believe they will meet the late-August deadline, while 23% said they will meet the required date, but only with additional resources allocated to the effort. Among those that need more time, the median is an additional 80 days past the deadline.

The most significant issues in complying with FLSA legislation involve categorizing current jobs and interpreting new FLSA rules. Specifically, 26% of companies said their biggest challenge is that existing job documentation is old, incorrect or inconsistent. Another 24% said their primary issue is with understanding the new rules. Jobs presenting the greatest classification problems are IT (57%) and shift/production supervisors (42%).

Hewitt's study also revealed that most companies have not yet determined the financial cost of the new regulations. In fact, 65% of organizations don't know how the new FLSA legislation will affect their payroll, and 81% said they are unsure of the general administrative costs involved in compliance.

With major issues outstanding, the majority of organizations have yet to communicate FLSA's impact throughout their organizations. Specifically, 65% have not discussed FLSA changes with their CEOs, while 86% said only a handful of employees are aware of the new overtime rules. What's more, 68% of organizations have not yet developed an FLSA communications plan.

Additional Survey Highlights:

- Nearly one-third (32%) of companies said they currently pay overtime to exempt employees
- Almost all (91%) companies described their compliance philosophy as either "conservative" or "objective" in terms of classifying jobs nonexempt, if there is any ambiguity

More information is available at www.hewitt.com.

1 in 5 Experience Employment Discrimination

More than one in five Americans say they have experienced employment discrimination, according to a new poll by the legal Web site FindLaw® (www.findlaw.com). Twenty-two percent of those surveyed said they had been unfairly denied a promotion or raise by an employer because of their gender, race, age, religion or disability.

Gender bias was the most commonly cited type of employment discrimination, according to the FindLaw survey. Sixteen percent of women said they felt they suffered discrimination because of their gender, compared with only five percent of men. The survey interviewed 1,000 adults, with results accurate to plus or minus three percent.

A U.S. District Court judge recently certified a class-action lawsuit covering more than 1.6 million current and former female employees of Wal-Mart stores. The suit charges the retail giant with systematically discriminating against women in pay and promotions. Last week, Boeing settled a sex-discrimination lawsuit and agreed to change its compensation and promotion practices and pay as much as \$72.5 million to as many as 29,000 current and former female workers in its Seattle-area aircraft plants.

According to the FindLaw survey, the most commonly cited types of employment discrimination were:

- Gender: 10%
- Age: 9%
- Race: 8%
- Disability: 4%
- Religion: 3%

A nearly equal percentage of men and women said they've been victims of employment discrimination: 23 percent of women and 22 percent of men. Thirty-three percent of non-whites said they have experienced employment discrimination, compared with 18 percent of whites. Non-whites reported higher levels of discrimination than whites for all causes, whether gender, age, race, disability or religion. Younger workers age 18 to 34 were also more likely to say they've experienced employment discrimination for all causes 27 percent compared with 20 percent of older workers.

"Anyone who feels they have been discriminated against by their employer should first contact the Federal Equal Employment Opportunity Commission or their state or local human rights commission," said Rosalie Levinson, the Phyllis & Richard Duesenberg Professor of Law at Valparaiso University and co-author of *State and Local Government Civil Rights Liabilities*, published by West. "It can be very difficult to prove intentional discrimination. There must be evidence, such as company documents, records of statements by supervisors or witnesses that can establish that the reason given by the employer for denying the promotion or raise is not credible. An employee can also amass statistics to show that there was a pattern of discrimination, such as unequal pay or a systematic lack of promotions for certain groups of employees, such as women or minorities."

"In addition, there are some strict requirements for filing employment discrimination actions," cautioned Prof. Levinson. "Complaints must be filed within a certain time limit, typically 180 to 300 days. Also, there are various state and federal requirements on how large a business needs to be before it is subject to anti-discrimination laws."

Employees who feel they have been unfairly denied promotions or raises due to discrimination can learn about relevant labor and employment laws, find links to government agencies such as the Federal Equal Employment Opportunity Commission and use directories for finding employment law attorneys in their area at helpful free Web sites such as www.findlaw.com. Online resources such as FindLaw are also helpful for

employers who wish to research employment laws and find legal counsel that can help ensure they are in compliance with laws that apply to their business.

The national survey used a representative sample of 1,000 adults nationwide, with a margin of error of plus or minus three percentage points, and was conducted by Ipsos Public Affairs.

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