COZEN O'CONNOR

LABOR AND EMPLOYMENT OBSERVER
WINTER 2010

IN THIS ISSUE

MESSAGE FROM THE CHAIR

To the friends of Cozen O'Connor:

Our Winter 2010 *Labor and Employment Law Observer* covers a multitude of topics of interest to in-house counsel, human resources professionals and corporate management. These articles include:

- A discussion of Immigration and Customs Enforcement's ("ICE") aggressive enforcement measures;
- The Dos and Don'ts of Managing Restrictive Covenants;
- The effect of same-sex marriages on a variety of employment issues; and
- A discussion of recent case law developments regarding sanctions and e-discovery.

You can read about these and other recent labor and employment developments in this issue of the *Observer*.

We welcome your inquiries on the articles in this Observer, other matters of interest to you and suggestions for future topics.

The Labor and Employment Group also welcomes a new attorney to the group – Marcy Stras. Marcy, a resident of the Washington, D.C., office, specializes in business immigration and international trade & customs issues. Please feel free to contact Marcy, or Cozen O'Connor attorney Elena Park, with any immigration questions or issues that you may have.

Very truly yours,

Mark J. Foley
Chair, Labor & Employment

The confidence to proceed. COZEN O'CONNOR®

BE NICE TO ICE

Marcy B. Stras

Immigration and Customs Enforcement ("ICE") continues to make headlines both in major newspapers and on television for its aggressive enforcement of U.S. immigration laws. ICE was created in March 2003 and is the largest investigative branch of the Department of Homeland Security ("DHS"). It was created after 9/11 by combining the law enforcement functions of the former Immigration and Naturalization Service ("INS") and the U.S. Customs Service to more effectively enforce immigration and customs laws and to protect the United States against terrorist attacks.

"ICE's aggressive enforcement means that it is more vital today than ever that all employers ensure they are complying with the Immigration Control & Reform Act of 1986..."

ICE's aggressive enforcement means that it is more vital today than ever that all employers ensure they are complying with the Immigration Control & Reform Act of 1986, as amended ("IRCA"), which penalizes employers for employing aliens that are not authorized to work in the United States. IRCA mandates that employers verify the employment eligibility of all new employees through the Form I-9 process.

INCREASED WORKSITE ENFORCEMENT

Worksite enforcement has become a priority in the Obama Administration. Most recently, on November 19, 2009 ICE Assistant Secretary John Morton announced that the agency had issued Notices of Inspection ("NOIs") to 1,000 employers throughout the United States. The NOIs alert business owners that ICE will audit their hiring records to ensure compliance with employment eligibility verification laws. According to Assistant Secretary Morton, "We are increasing criminal and civil enforcement of immigration-related employment laws, and imposing smart, tough employer sanctions to even the playing field for employers that play by the rules."

Although the names of the businesses were not released, ICE said that it selected them as a result of investigative leads and intelligence and because the companies are connected to public safety and national security. The audits will involve an in-depth review of all Form I-9 documents. All U.S. employers must complete a Form I-9 document within three-days of hiring all workers. The form requires employers to review and record each worker's identity and work eligibility documents. The employer is expected to review the documents and determine, if they appear genuine and specific to the worker. Although the employer is not expected to be a document expert, it is expected to use a "reasonable person" standard in reviewing them to spot potential fraud.

Earlier, in July 2009, ICE issued 654 NOIs to businesses nationwide suspected of using illegal workers. As a result of these audits, ICE released the following statistics on its website (www.ice.gov):

ICE agents reviewed more than 85,000 Form I-9s, identifying 14,000 suspect documents or approximately 20% of all documents reviewed.

To date 61 Notices of Intent to Fine ("NIF") have been issued with $2,310,255 in fines, an additional 267 cases are pending and being considered for NIFs; and 326 cases were closed after ICE found them in compliance with employment laws or after they were served with a Warning Notice.

It is clear that today ICE considers effective worksite enforcement an important part of its role in promoting homeland security. As ICE Assistant Secretary Morton stated on November 19, 2009, "We are increasing criminal and civil enforcement of immigration-related employment laws and imposing smart, tough employer sanctions to even the playing field for employers who play by the rules." This new aggressive enforcement using criminal sanctions, fines and imprisonment, means that all employers must comply with the IRCA laws and regulations and ensure that all workers are authorized to work in the United States.

EMPLOYER PROTECTIONS

In these turbulent times, at a minimum, all employers should have documented I-9 compliance policies and procedures. In addition, I-9 training, voluntary audits, I-9 "experts" within the company and I-9 compliance programs should be adopted to establish a good faith attempt of employers to comply with IRCA. Another option is to join ICE's Mutual Agreement Between Government and Employers ("IMAGE") program. This is a voluntary program designed to help employers comply with the law. As part of the program, ICE and U.S. Citizenship and Immigration Services ("USCIS") provide the employer with education and training on proper hiring procedures, fraudulent document detection, use of the Basic Pilot Employment Verification program and anti-discrimination procedures. To join IMAGE and employer must submit to a voluntary I-9 audit by ICE. After enrolment, the employer must implement the following required Best Hiring Practices:

1. Use the Basic Pilot Employment Verification Program for all hiring;
2. Establish an internal training program, with annual updates, on how to manage completion of Form I-9 (Employee Eligibility Verification Form), how to detect fraudulent use of documents in the I-9 process, and how to use the Basic Pilot Employment Verification Program;
3. Permit the I-9 and Basic Pilot Program process to be conducted only by individuals who have received training – and include a secondary review as part of each employee's verification to minimize the potential for a single individual to subvert the process;
4. Arrange for annual I-9 audits by an external auditing firm or a trained employee not otherwise involved in the I-9 and electronic verification process;
5. Establish a self-reporting procedure for reporting to ICE any violations or discovered deficiencies;
6. Establish a protocol for responding to no-match letters received from the SSA;
7. Establish a Tip Line for employees to report activity relating to the employment of unauthorized aliens, and a protocol for responding to employee tips;
8. Establish and maintain safeguards against use of the verification process for unlawful discrimination;
9. Establish a protocol for assessing the adherence to the "Best Practices" guidelines by the company's contractors/subcontractors; and
10. Submit an annual report to ICE to track results and assess the effect of participation in the IMAGE program.

Companies that comply with the program are "IMAGE certified." ICE hopes that this distinction will be an industry standard. Because IMAGE is still fairly new it is difficult to judge its effectiveness. However, the requirement of an I-9 audit and strict adherence to the Best Practices may hinder the growth of the program.

CONCLUSION

Many of the worksite investigations to date have involved egregious violations of criminal statutes by employers and widespread abuses. By uncovering such violations, ICE is sending a strong deterrent message to all employers that knowingly employ illegal aliens. These worksite enforcement cases often involve additional violations such as alien smuggling, alien harboring, document fraud, money laundering, fraud or worker exploitation. However, ICE is growing, increasing its budgets and manpower, and its number of investigations so all employers must be vigilant in their employment policies.

One day, when you get that knock on the door or letter in the mail from ICE, "Be nice!" Then call us.

For more information, please contact Marcy B. Stras at 202.912.4875 or mstras@cozen.com.

DOS AND DON'TS FOR MANAGING YOUR RESTRICTIVE COVENANTS IN A RECOVERING ECONOMY

Jonathan R. Cavalier

One of the few benefits to employers in a down economy is that they can typically count on a relatively stable workforce. During a recession, employees are generally less willing to jeopardize their current employment by looking to change jobs, and are less able to find open positions even if they are willing to switch. However, as the economy recovers, you can expect that to change significantly, especially for key employees whom competitors may look to hire as a way to jumpstart business by poaching your company's customers or knowledge base. Recently, we have seen a significant increase in litigation involving noncompete agreements as companies look for quick and easy ways to gain market share and increase revenues. Hiring one of your key employees is an easy, cost-effective way for your competition to eliminate your competitive advantage in an instant, and as a result, you can expect your competition to be more willing than ever to fight you for the right to hire your most valuable employees.

You can prevent this from happening to your company by using well-drafted, specifically targeted restrictive covenants that will help you avoid litigation where possible, and win it when necessary. With that goal in mind, this article provides helpful "dos" and "don'ts" to be used in constructing and evaluating employees' noncompete, nonsolicitation and confidentiality agreements.

DO REVIEW YOUR EXISTING NONCOMPETE AGREEMENTS

As a preliminary matter, you should ensure that you have signed noncompete, nonsolicitation and confidentiality agreements for your key employees. Often, employers believe that an employee previously signed a noncompete agreement, only to find that the employee never returned the agreement, or that they are unable to locate the signed document.

You should also take the opportunity to review existing restrictive covenants for reasonableness and enforceability. What may have seemed reasonable at the time may have changed as the scope and extent of the employee's duties and responsibilities have shifted over time. What might be adequate with respect to a lower level salesperson may no longer offer enough protection if that salesperson has been promoted to upper management. It might be time to have those employees who have moved up the corporate ladder sign new agreements commensurate with their positions.

DON'T OVERREACH

Often, employers try to use restrictive covenants as a way to handcuff employees to prevent them from leaving or from ever working for a competitor. Doing so virtually guarantees that your restrictive covenants will be challenged in court. Restrictive covenants are a defensive shield, not an offensive weapon. Most states, including Pennsylvania, look at noncompete agreements with disfavor, and will only enforce them to the point reasonably necessary to protect the employer's legitimate business interests. If the employer has overreached, and has sought to restrict the employee beyond what is reasonably necessary, the court might refuse to enforce the agreement at all.

To avoid this, you should use the type of agreement that offers your company the protection it needs, without gratuitously restricting the employee. Courts are more willing to enforce nonsolicitation agreements than noncompete agreements, and will almost always enforce a confidentiality agreement. Therefore, if a confidentiality agreement or a nonsolicitation agreement offers adequate protection, you should opt for those agreements over a full noncompete agreement.

For example, because companies are presumed to have a legitimate interest in protecting against solicitation of their customers by former employees, nonsolicitation agreements do not have to have geographic limitations and can offer protection on a nationwide or worldwide basis. Often, nonsolicitation agreements offer the best protection against departing salespersons, since such an agreement will prevent them from capitalizing on the relationships that they developed with your customers. However, for a vice president or chief engineer, a full noncompete is often necessary to guard against disclosure of your company's accumulated information and know-how.

If you must use a noncompete agreement, you should make sure that it is narrowly tailored in terms of duration and geography. For example, if you do not have customers or significant business on the west coast, do not use a nationwide noncompete. Similarly, if your sensitive information becomes obsolete after 18-months, use an 18-month noncompete period. The narrower your noncompete is tailored, the easier it will be for you to enforce it when necessary. The key is to find the balance between your company's legitimate need for protection and the scope of the restrictions within the noncompete.

DO USE CLEAR, PLAIN LANGUAGE AND AVOID LEGALESE, WHERE POSSIBLE

It is imperative that you use unambiguous language in your noncompetes that can only be interpreted in one way - - your way. In other words, say exactly what you mean, and say it clearly. All states view restrictive covenants as restraints of trade, and will construe them strictly against enforcement. If your noncompete agreement contains an ambiguous provision that could be interpreted to have multiple meanings, a court will construe the provision in favor of the employee and against enforcement of the covenant. Furthermore, a restrictive covenant must clearly define what the employee can and cannot do. Courts are reluctant to enforce clumsily drafted agreements that do not clearly set forth the restrictions against the employee.

Ambiguity in restrictive covenants often leads to the expensive, protracted litigation. An unclear, ambiguous restrictive covenant can give departing employees all the motivation they need to challenge the enforceability of the agreement. Often, these challenges can cost the employer leverage in reaching a favorable settlement or force the employer to defend the agreement in court. Even if the employer is successful in court, the result is often a pyrrhic victory due to the time and money expended.

DON'T SKIMP ON CONSIDERATION

Another problem that often leads to expensive litigation is an agreement is challenged for lack of consideration. Often, employers who have existing employees sign restrictive covenants will either forget to provide proper additional consideration or will substitute a non-monetary benefit such as "training," "access to customers," or "additional responsibilities." Don't fall victim to this trap. If the employee is valuable enough to be worth restraining, the employee is valuable enough to warrant a bonus, raise or some additional form of compensation to which he or she would not otherwise be entitled. With respect to restrictive covenants, money talks.

Remember, continued employment is will not provide adequate consideration in many states. Where continued employment is sufficient, the employee generally must remain employed for a substantial period of time after signing the covenant, which the employer cannot control. Thus, unless the employee signs the restrictive covenant at the inception of employment, the employee must receive something of value in exchange for agreeing to the restrictions, especially if the employee is signing a noncompete agreement. By offering the employee a significant cash payment, the employer can avoid challenges to the agreement and expensive litigation over whether the employee received a benefit of real value. A few thousand dollars in consideration can save a few hundred thousand in litigation costs. In other words, an adequate monetary payment for a restrictive covenant can often pay for itself.

DON'T FORGET THAT IF YOU TERMINATE EMPLOYEES FOR "POOR PERFORMANCE," YOUR NONCOMPETE AGREEMENT MAY NOT BE ENFORCEABLE

As the economy remains in flux, many companies continue to make adjustments in personnel to account for reduced demand or to cut costs. Typically, these cuts begin with those who have failed to perform. If your company is forced to terminate one or more employees for performance or financial reasons, you should be aware that, in many states including Pennsylvania, courts may refuse to enforce noncompete agreements against those employees. Often, the courts reason that by terminating an employee for performance or financial reasons, the employer has deemed the employee "worthless," and therefore has no legitimate interest in preventing that employee from competing against it. Additionally, courts may find it inequitable or unfair to prevent an employee from working when that employee has been terminated involuntarily from his or her prior job.

In many cases, employers are generally content to let such employees join competing firms. However, you may find yourself confronted with a soon-to-be-terminated employee who, despite failing to perform for your company, could nevertheless harm your company if he or she is hired by a competitor. For example, your company might be forced to terminate an underperforming salesperson whose contacts and relationships with your customers would prove valuable to a competitor, even if the salesperson is not soliciting those customers directly. Likewise, certain employees laid of for financial reasons may have intangible confidential information that would give your competitors an edge if disclosed.

If you must terminate an otherwise valuable employee for financial or performance reasons, but still wish to restrain them from competing against your company, consider entering into a new, post-termination restrictive covenant with the employee in exchange for a severance payment to which the employee would not otherwise be entitled. Courts are more willing to enforce restrictive covenants against terminated employees where the employee accepted severance, since the payment of severance shows that the employee had some value to the employer, and provides a financial cushion for the employee during the restricted period. Make sure, however, that any severance pay intended to provide consideration for a noncompete agreement is in addition to any other separation payments that the employee would have received in the absence of the noncompete.

DO CONSIDER "INEVITABLE DISCLOSURE"

When all else fails, and your most valuable employee, who has refused all requests to sign a noncompete agreement, tenders her notice of resignation and intends to join your largest competitor, consider whether the inevitable disclosure doctrine is available to you. Inevitable disclosure is a controversial doctrine, recognized in some form in most states, which can prevent employees with access to confidential information or trade secrets from going to work for a competitor. The doctrine recognizes that certain employees possess intangible confidential information that cannot be returned to the company at the end of their employment, and that these employees cannot go to work for a competitor without "inevitably" disclosing this confidential information in their new position. As a result, inevitable disclosure can act as a sort of de facto noncompete agreement in your favor.

Employers should not rely on inevitable disclosure as a viable alternative to noncompete agreements, as courts are loathe to restrain employees who never explicitly agreed to the restrictions. Rather, it should be used only as a last resort, and only then, against key employees who possess very valuable, highly sensitive information, the disclosure of which would severely harm the company. Generally, the doctrine may apply when the employee (1) leaves to go to a direct competitor, (2) takes a position substantially similar to her prior position, and (3) had access to intangible confidential and trade secret information in her prior position, which would be highly valuable to her new employer. Courts are also more willing to apply the doctrine and restrain an employee where the employee departs in bad faith. Consequently, employers seeking to employ the inevitable disclosure doctrine should carefully examine the departing employee's computer to see if the employee took any confidential information at the time of her departure.

CONCLUSION

As the economy rebounds, employers can expect to see increased mobility in the employment sector and heightened turnover in their own ranks. Many valuable employees who have patiently waited out the recession will begin seeking opportunities for advancement. Companies looking for a competitive advantage and the ability to speed their recovery will welcome your employees with open arms. Restrictive covenants provide employers with a tool to prevent this from occurring, but they must be used appropriately and with restraint. When used effectively and appropriately, employers can not only protect themselves against competition from their own employees, but can decrease their anticipated litigation costs in the process.

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MEDICAL MARIJUANA IN THE WORKPLACE

Jeffrey I. Pasek

On January 18, 2010, New Jersey became the 14th state to permit the use of medical marijuana. What implications does this have for employers, especially those companies that have policies against the use, sale or possession of drugs?

Does an employer have to accommodate the use of medical marijuana under the Americans with Disabilities Act? What about the applicable state disability discrimination law? Does it violate public policy to discipline or discharge an employee for doing what state law permits?

So far, the trend is running in favor of employers on these issues. Despite changes in some states, marijuana remains classified as a Schedule I drug under federal law, which makes its possession or use unlawful. The ADA does not require employers to accommodate illegal drug use. Thus, as long as marijuana remains a Schedule I drug, changes in state law will not trump the ADA.

At the state level, the Supreme Courts of California and Montana have ruled in recent years that employers have the right to terminate employees who use medical marijuana on the advice of their physicians to treat medical conditions. An appeals court in Washington reached a similar result last year. While it might be unlawful to discharge an employee because of the underlying condition, employers are not obligated to accommodate violations of federal law.

All of this is not to suggest that it is safe to do nothing. Many employers have policies on drugs in the workplace that have not been updated since 1988 when the federal Drug-Free Workplace Act first obligated federal contractors to have a policy prohibiting the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the workplace and specifying what actions will be taken in the event of violations.

Typical policies at the time did not address the use of drugs during non-working hours and in non-working places. They also did not address the problem of employees who use legally prescribed substances and report to work potentially impaired because of the effects of their medication. Even in states that have not adopted medical marijuana laws, employers need to ensure that their policies on drugs are sufficiently nuanced to take these situations into account.

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WAIVING GOODBYE TO CLASS ACTIONS – A POTENTIAL WAY OUT

Michael C. Schmidt

It is no secret by now that employers, particularly those in such industries as the financial services, retail, and health care, continue to be hit with the legal tsunami that are class action lawsuits. Employers are especially vulnerable, with limited defenses, when it comes to wage and hour lawsuits, where a large class of employees allege that their employer failed to pay minimum wage or overtime compensation. That vulnerability has been increased recently by the current economic climate, where employers look for ways to cut certain employee-related costs, and by advances in technology (e.g., the use of Blackberries) that make it more difficult to monitor working hours and activities.

> *"One way to reduce potential exposure for alleged wage and hour violations is to review the company's internal policies and practices..."*

One way to reduce potential exposure for alleged wage and hour violations is to review the company's internal policies and practices to determine whether there are any compliance issues that should and can be addressed before a lawsuit is filed, or before a government agency commences an audit. Another option has been re-affirmed by a federal district court within the Second Circuit, which permitted an employer to obtain a written waiver prohibiting its employees from pursuing employment-related claims on a class-wide basis in court. Such a "class action waiver" may be a valuable strategy for limiting the significant exposure and leverage that is presented with class action lawsuits in this context.

THE CLASS ACTION DILEMMA

Wage and hour obligations are generally found in the federal Fair Labor Standards Act ("FLSA"), and in similar state and local laws. These statutes provide significant remedies for aggrieved employees, including compensatory damages equal to the amount of the unpaid wages, as well as additional statutory damages in certain cases equal to 100% of the unpaid wages (under federal law), attorneys' fees, interest, and costs. The potential monetary exposure increases exponentially because the federal and state wage and hour laws permit aggrieved individuals to bring these cases on behalf of themselves, and as representatives of a proposed class of other similarly situated employees.

For example, the FLSA authorizes multiple-plaintiff lawsuits as "collective actions." A collective action under the FLSA is procedurally different from a traditional class action under Rule 23 of the Federal Rules of Civil Procedure (the procedural vehicle for prosecuting class-wide claims under state wage and hour laws). While members of a state Rule 23 class are bound by the outcome unless they choose to "opt out" of an action, potential parties to an FLSA collective action are instead required to "opt in." Whether styled as a collective action or a class action, the impact is the same. Thus, because of the sheer number of individuals who can either opt in for federal collective action purposes, or who are included in a state class action merely by falling within the definition of a broad class of allegedly aggrieved workers, these collective and class actions generally increase the parties' litigation costs and present unique case management challenges for Judges.

THE ARBITRATION DILEMMA

Companies often struggle with the threshold question of whether to require arbitration of employment disputes, rather than proceed through the normal course of litigation in court. Whether arbitration is a desirable dispute resolution method invariably depends on the nature of the particular company and its workforce, and the types of employment disputes that the company views as likely to occur. For some, arbitration is viewed positively because of the potential for a less public, generally quicker and potentially less costly forum. On the other hand, arbitration is seen by some as less predictable in terms of the application of established precedent, more relaxed in terms of procedural and evidentiary rules that might not apply in arbitration to the benefit of an employee presenting his or her case, and much more difficult to obtain relief from a negative outcome.

The current state of the law generally favors reasonable agreements that require the submission of an employment dispute to arbitration. Indeed, back in 1991, the United States Supreme Court strongly approved arbitration of statutory claims in the leading case of *Gilmer v. Interstate/Johnson Lane Corp*. The Court in *Gilmer* (a case involving alleged age discrimination) "did not perceive any inherent inconsistency between those [important social policies underlying the employment statutes] . . . and enforcing agreements to arbitrate age discrimination claims."

Ten years later, the Supreme Court again ruled, in *Circuit City Stores, Inc. v. Adams,* that agreements to arbitrate employment disputes should be favored and are not unenforceable per se except in cases involving employment contracts of seamen, railroad workers, and similar laborers. While members of Congress have discussed potential legislation to prohibit the use of pre-dispute arbitration agreements in the employment context, unless and until that is done, courts are likely to continue to enforce arbitration agreements that are not determined to be procedurally or substantially unconscionable.

FAVORING CLASS ACTION WAIVERS AND ARBITRATION

As noted above, one potential strategy for reducing a company's exposure to a class action lawsuit, particularly in the wage and hour context, is to require employees to submit such claims to arbitration, and further require that any arbitration proceed solely on behalf of the individual employee, rather than on behalf of a putative class. Just last month, a federal court in Connecticut, in the Second Circuit, upheld a company's use of a class action waiver in an employment arbitration agreement, and provided guidance on how to create enforceable waivers.

In *Pomposi v. Gamestop, Inc.*, 2010 WL 147196 (D. Conn. 2010), the plaintiff alleged that his employer failed to pay him minimum wage and overtime compensation in violation of the federal FLSA and Connecticut law. Prior to answering the complaint, the employer moved to dismiss the lawsuit on the basis that the plaintiff freely and voluntarily signed an agreement requiring the submission of any employment dispute to arbitration, and waiving his right to proceed as a class action.

Specifically, the employer created an internal dispute resolution referred to as "C.A.R.E.S.", or "Concerned Associates Reaching Equitable Solutions." The C.A.R.E.S. program set forth a mandatory three-step resolution procedure for any employment dispute. First, an employee can speak informally with a supervisor, manager, or Human Resources representative to resolve the dispute. Second, if that process is not successful, the issue would be reviewed and determined by an "Executive Review Officer" in the Human Resources Department. Lastly, if that step still does not resolve the issue, the dispute must be submitted to a neutral arbitrator for a final decision that is binding on both parties. Of critical import, is that the rules and procedures of the C.A.R.E.S. program expressly provide that any disputes submitted to arbitration by an employee may proceed only as an individual claim, and that the employee agrees that he or she cannot bring any claims on behalf of a class of employees.

The District Court granted the employer's motion, and compelled the employee to submit his dispute to arbitration solely on his own behalf. In reaching that decision, the Court noted the existence of the following facts demonstrating that the C.A.R.E.S. program was reasonable and enforceable:

1. The C.A.R.E.S. program was presented to the company's workforce at a conference, during which all employees were given a brochure and handbook that described the program in detail, and in easily understood language. The class action waiver included in the program documents was neither hidden nor obscure.
2. The plaintiff (as did the other employees) signed a written acknowledgement form in which he agreed to abide by the C.A.R.E.S. program as a condition to his continued employment with the company. In many states, such as Connecticut and New York, continued employment of an at-will employee is sufficient consideration for entering into an arbitration agreement or class action waiver.
3. Notwithstanding any perceived unequal bargaining power, the plaintiff "speaks and writes in English, graduated from high school, and he completed 60 credits of college course work." In his acknowledgement form, the plaintiff admitted that he understood the nature and specifics of the program, including the class action waiver.
4. The program did not provide for any mandatory arbitration filing deadline that is contrary to any deadline allowable by law for the type of claim raised, and unequivocally stated that the program applied equally to disputes brought by the company and the employee.
5. The program did not impose any prohibitive fees, stating instead that the filing fee paid by an employee ($125 paid directly to the American Arbitration Association) would be waived when required by law, and can be recouped by a successful employee who can be awarded his or her reasonable attorneys' fees and costs under the program.

Thus, the plaintiff was required to pursue his claims for minimum wage and overtime compensation in arbitration, rather than through the courts, and could not have his claims proceed on a class action basis. Through its program, determined under the facts of the Pomposi case to be both procedurally and substantively reasonable, the employer effectively limited the potential exposure that it might otherwise have faced if the employee had been permitted to proceed with his wage and hour claims in the normal course through litigation in court. Moreover, the employer's policy arguably creates a disincentive for other employees (and, perhaps just as importantly, plaintiff's attorneys) to bring this type of high stakes lawsuit against the company.

It is worth emphasizing that the District Court in *Pomposi* cautioned that not all class action wavers "will be enforceable in every case." Instead, and as the Second Circuit Court of Appeals has ruled, such waivers must be viewed on a case-by-case basis to determine enforceability. Nevertheless, if drafted properly, and presented to employees in an effective manner, class action waivers may be a valuable tool in preventing class action lawsuits in the employment context.

For more information, please contact Michael C. Schmidt at 212.453.3937 or mschmidt@cozen.com.

SAME-SEX MARRIAGES: WHAT EMPLOYERS NEED TO KNOW

Kimya S.P. Johnson

As states continue to pass legislation allowing same-sex marriage and the issue remains in the national spotlight, employers may be required to adjust some workplace policies to comply with state laws, and in other instances, some employers may choose to do so when it is not legally required.

DETERMINE STATE LAW REQUIREMENTS

State laws concerning same-sex marriage differ and, depending on in which state an employer operates, employers' workplace obligations may vary widely. The first step to determining whether a company's policies comply with state law involves understanding the state legal requirements.

Currently, five states, Connecticut, Iowa, Massachusetts, New Hampshire and Vermont, as well as the District of Columbia[1] allow same-sex marriage. These states join seven countries in permitting same-sex marriage: the Netherlands, Belgium, Spain, Canada, South Africa, Norway and Sweden.

Laws supporting same-sex marriage have recently been defeated in Maine, New Jersey and New York, while the majority of remaining states have passed legislation expressly recognizing marriage as between a man and a woman only. The status of same-sex marriage in California is unique in that it formerly granted marriage licenses to same-sex couples but no longer does do. However, marriages performed in California between June and November 2008 are recognized and confer full state-level marriage rights to same-sex couples. While a state may not legally recognize same-sex marriages performed within its borders, some states, such as New York, have enacted legislation recognizing same-sex marriages legally performed in other states. Other states, such as New Jersey, recognize "civil unions," "domestic partnerships" or grant other rights, even though legislators in these states have not been willing to pass laws recognizing same-sex marriage. Thus, even in states that currently do not allow same-sex marriage, employers might similarly confront same-sex partnership issues.

MONITOR FEDERAL LAWS

The federal government does not recognize same-sex marriages and is prohibited from doing so by The Defense of Marriage Act ("DOMA") (see 1 U.S.C. § 7 and 28 U.S.C. § 1738). The DOMA, passed in 1996, explicitly defines marriage as between one man and one woman for federal law purposes. As a result, no agency of the federal government currently recognizes same-sex marriage. And despite recent legislative and judicial trends, the great majority of states currently have laws that echo the DOMA and similarly limit marriage to heterosexual couples.

Many workplace benefits, such as retirement plans and health benefits, are regulated by the Employee Retirement Income Security Act ("ERISA"). While state recognition of same-sex marriages would have little or no impact on the benefits regulated under ERISA, employers should be aware that some workplace benefits—such as health, death, and disability insurance provided through group-insured plans—are regulated by state insurance laws.

Notwithstanding, the increasing number of same-sex marriages could build up momentum for changes to federal law. For example, currently, there is a bill pending (H.R. 2132) that would expand the reach of the Family and Medical Leave Act ("FMLA") to allow employees to take leave to care for a same-sex spouse or a domestic partner, among others, who suffers from a serious health condition. Such an extension of the FMLA would require employers to adjust their leave practices and policies, whether or not the DOMA is repealed.

MONITOR STATE LAWS

There are other state-regulated benefits that could be impacted by changes to state laws, which include some disability and workers' compensation benefits, survivors' benefits, and state family and medical leave. Additionally, same-sex marriage recognition may also impact various employer-sponsored benefits, such as employee discounts, bereavement leave, family leave and additional miscellaneous benefits. Thus, even though federal law currently does not recognize same-sex marriage and confer benefits to same-sex couples, employers may still find themselves bound by state laws that will require employers to adjust various policies accordingly.

WHAT SHOULD EMPLOYERS DO?

For employers, what has become known as "the gay marriage debate" makes for more than interesting news. Rather, general issues surrounding employees' sexual orientation and same-sex marriage legislation, in particular, can have tangible effects within the workplace.

- First, employers should monitor the legal status of same-sex marriage in the states in which their employees work and monitor the issue on the federal level to determine what, if any, state and federal requirements exist.
- Second, employers should realize that many workplace policies that extend to or benefit "spouses" may not comply with new changes to state laws. To ensure policies and practices comply with current state laws, employers should revisit their heath insurance, workers' compensation, disability and death benefits. In addition, employers may also revisit employer-sponsored policies including bereavement leave, family and medical leave, and absence policies, among others.
- Third, once workplace policies have been adjusted to account for same-sex partnerships, employers must ensure that their policies are administered in compliance with state laws and are followed consistently—to reduce the risk of related litigation.
- Finally, employers should be well aware that there are a variety of laws that prohibit discrimination in employment on the basis of sexual orientation or marital status. And companies, particularly those with offices in multiple locations, should review their nondiscrimination policies and human resource training to reflect this.

Some companies have voluntarily adopted sexual-orientation nondiscrimination policies and have extended benefits to same-sex couples without being required to do so because, in some cases, they have decided it makes good business sense. Historically, the business community has been ahead of the general public and legislators in extending benefits, for example, to all employees without regard to sexual orientation. But, in an economic downturn, employers may be less willing today to provide nonmandatory benefits because of increased associated costs. For some employers, however, particularly those operating in multiple jurisdictions, creating uniform company benefits policies that conform with new same-sex marriage laws is an attractive option.

The laws in this emerging area vary greatly and are complex. And employers would be well-served to consult labor and employment counsel and employee-benefits counsel to ensure they are in compliance with ever-evolving state laws.

1. *The District of Columbia's law was subject to congressional approval and the District is expected to start issuing marriage licenses on March 3, 2010.*

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REVISITING ZUBULAKE:
Discovery Sanctions in the eDiscovery Context

David J. Walton

On January 11, 2010, Judge Scheindlin, who authored the groundbreaking *Zubulake* opinions, issued a new opinion regarding sanctions in eDiscovery.[1] Pension Comm. of the Univ. of Montreal Pension *Plan v. Banc of Am. Scs.,* 2010 U.S. Dist. Lexis 1839 (S.D.N.Y. Jan. 11, 2010), involved an action against defendants who were connected to a hedge fund that lost money. These defendants sought sanctions against the plaintiffs for their alleged failure to properly preserve and produce documents, including electronically stored information and for submitting false declarations relating to their collection and production efforts.

In an 87-page opinion, Judge Scheindlin extensively reviewed the law governing the imposition of sanctions for failure to produce electronically stored information. She focused on the connection between sanctions and culpability – what sanctions should be imposed for negligent vs. grossly negligent and willful conduct and what does a party need to prove to get sanctions for negligent as opposed to grossly negligent and willful conduct? In the end, Judge Scheindlin held that all of the plaintiffs were either grossly negligent or just negligent in complying with and satisfying their discovery obligations. She issued a permissive spoliation/adverse inference instruction against the plaintiffs. In reaching this decision, Judge Scheindlin touched on four key points.

First, Judge Scheindlin analyzed the plaintiffs' level of culpability in determining whether their conduct was negligent, grossly negligent or willful. She found that the failure to issue a written litigation hold constitutes gross negligence because it is likely to result in the destruction of relevant information. She also found that "the failure to collect records – either paper or electronic – from key players constitutes gross negligence or willfulness as the destruction of email or backup tapes after the duty to preserve has attached." By contrast, the failure to obtain all records from employees -- as opposed to key players -- will likely constitute just mere negligence. In addition, the failure to employ all appropriate measure to preserve ESI, also in most cases, will constitute negligence.

Second, Judge Scheindlin focused on the interplay between the duty to preserve evidence and spoliation. She stressed that the duty to preserve is well developed and should be well known to litigants and their counsel alike.

Third, Judge Scheindlin looked at which party should bear the burden of proving that evidence has been lost or destroyed and if the "innocent" party was somehow prejudiced by the loss of the data. She explained that relevance and prejudice can be presumed when the spoliating party has acted in bad faith or in a grossly negligent manner. However, when the spoliating party is merely negligent, "the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction."

Judge Scheindlin also held that regardless of the level of culpability, any presumption relating to spoliation is rebuttable. As such, the spoliating party should always have the opportunity to show that there is no prejudice caused by the absence of missing information. She then adopted a burden-shifting test, where the burden of proving non-relevance or lack of prejudice shifts to the alleged spoliator if the alleged spoliator engaged in grossly negligent or willful conduct in failing to preserve potentially relevant information.

Fourth, the opinion is also instructive on the appropriate level of sanctions that should be imposed by the court. An appropriate sanction must be the least harsh sanction that is available and should be molded by the three-factor test previously adopted by the Third Circuit.

So what does all of this mean for employers?

1. **Issue a written litigation hold:** In the Second Circuit, at least, a failure to issue a written litigation hold is gross negligence. Once you are on notice of a potential lawsuit (i.e., litigation is reasonably anticipated), then employers should issue a written litigation hold to avoid the destruction of potentially relevant evidence. At a minimum, a written litigation hold must be issued once

an employee files a claim with an administrative agency like the PHRC and EEOC. The duty to preserve could trigger even earlier base don an employee's "informal" claims of discrimination or retaliation.

2. **Monitor the collection of potentially relevant data:** The failure to collect all relevant data from key players may be gross negligence. Gone are the days where we can blindly rely on individual custodians of evidence to comply with the company's discovery obligations. Employers must actively monitor their employees' efforts to gather potentially responsive information.

3. **Preserve early; preserve broad:** By now, all employers must know that their duty to preserve evidence is triggered when a lawsuit is reasonably anticipated. This is a fact-sensitive analysis. Understand what factors in your business affect your reasonable notice of a lawsuit. And always keep in mind that courts review your preservation efforts with 20/20 hindsight. So preserve early and preserve broad.

4. **Prejudice is a key consideration:** Whether you are defending or asserting a spoliation claim, prejudice (or lack of it) is a key consideration. Spoliation sanctions are, right now, the "vogue" litigation tactic. However, if the loss of evidence does not cause actual prejudice, sanctions should not be granted. Alternative sources of information undermine a showing of prejudice. So, if you are accused of spoliation, focus on alternative sources that provide the same information. If you are seeking spoliation, make sure the evidence is actually "missing" and the other side cannot point to alternative sources of information that remedy any technical failure to preserve.

5. **Not every failure to preserve should result in a termination sanction:** Even though she issued sanctions, Judge Scheindlin stressed that any sanction imposed should be the least harsh for deterring spoliation, placing risk of erroneous judgment on the spoliator, and make up for any prejudice suffered by the non-spoliator. This focus on the "least harsh" sanction is important. As spoliation motions become more prevalent and discovery becomes more about the process of discovery rather than substantive merits, it is important to remember that termination sanctions and adverse inferences are not appropriate to remedy most forms of spoliation.

1. *The opinion was amended with minor changes on January 15, 2010.*

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Summary - What Employers Need to Know

1. *Issue a written litigation hold.*
2. *Monitor the collection of potentially relevant data.*
3. *Preserve early; preserve broad.*
4. *Prejudice is a key consideration.*
5. *Not every failure to preserve should result in a termination sanction.*

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