

March 2003

Virginia Limits Scope Of Non-Compete Agreements

Under the law of most states, the restrictions of a non-compete agreement must be narrowly tailored to extend no greater than is necessary to protect the employer's legitimate interests. This is particularly important under Virginia law. Unlike many other states, in which a court will narrow the scope of an overly broad non-compete agreement (but still enforce the agreement as modified), under Virginia law an overly broad non-compete agreement may be struck down entirely. The Virginia courts normally will not revise or "blue pencil" an overly broad agreement.

In light of a recent decision of the Virginia Supreme Court, Virginia employers and others who have non-compete agreements that may be governed by Virginia law should review the language of those agreements. In that case, the court struck down as overly broad a non-compete agreement prohibiting a former employee from working **in any capacity** for a competitor. The agreement in that case, like the agreements many employers use, provided that the employee would not "directly or indirectly, own, manage, operate, control, be employed by, participate in or be associated in any manner with the ownership, management, operation or control of any business similar to the type of business conducted by the company . . . , which competing business is within a fifty (50) mile radius of the home office or any business location or location of the Company." The court ruled that this restriction was not enforceable because the employer did not demonstrate that restricting the employee from providing services for a competitor different than those provided to the employer was necessary to "protect a legitimate business interest."

In short, non-compete agreements that broadly prohibit an employee from working for a competitor in any capacity will not likely pass muster under Virginia law. Instead, in most instances, the restrictions of a non-compete agreement should be tied to the work the employee performed for the employer.

Disability Case Highlights Need For Engaging In Interactive Process

A recent case demonstrates that employers must not dismiss out-of-hand accommodation requests by disabled employees. Under the Americans with Disabilities Act (ADA), when an individual with a disability is qualified to perform the essential functions of a job except for functions that cannot be performed because of related limitations and existing job barriers, an employer must try to find a reasonable accommodation that would allow the employee to perform those functions. The ADA regulations make clear that when a qualified employee with a disability requests an accommodation, the employer must work with the employee to try to identify the appropriate accommodation.

The court allowed this case to proceed because a factual issue existed as to whether the employer engaged in such an interactive process with a former employee who had requested a transfer to another position as a reasonable accommodation. Among other things, the court found the employer did not investigate other feasible positions, contact the employee to discuss the possibility of accommodation or request information from the employee's physician. The court found that the employer's refusal to engage in the "interactive process" reflected a lack of a "good faith" effort to accommodate the employee. The court noted that the result might have been different if the employer had engaged in such a process.

This case makes clear that employers must carefully evaluate accommodation requests, obtain necessary information and engage in a dialogue with the employee before determining that a requested accommodation is not required.

Requiring General Diagnosis To Support Sick Leave Request May Violate ADA

The Americans with Disabilities Act (ADA) restricts an employer's ability to request medical information that could reveal an employee's disability. An employer may only request medical information if it is job-related and consistent with business necessity. For example, medical information may be sought from an employee when it is necessary to determine whether the employee is able to perform the essential functions of the employee's job or whether the employee will pose a direct threat to health and safety in the workplace.

A federal district court recently ruled that an employer's sick leave policy violated the ADA because the employer could require an employee using sick leave to provide a medical certificate containing a diagnosis of the employee's condition. The court concluded that the employer's policy would be likely to cause employees to reveal a disability and that it was not justified by business necessity because the policy allowed the employer to request a medical certification, including a diagnosis, whenever the employee was absent for any length of time (even a single day). The court reasoned that a single day's absence from work is not sufficient reason to suspect an employee is unable to perform the job or poses a health and safety threat.

Employees Are Not Required To Specifically Request Leave Under Family And Medical Leave Act

An employee may not need to explicitly request leave under the federal Family and Medical Leave Act ("FMLA") or use any "magic words" in order to be afforded the protections of the FMLA. In a recent federal district court case, an employee was

fired after advising her employer that she needed leave to "care for" her mother who was "very sick." The employer argued that such a vague statement did not put it on notice that the employee was requesting protected "family" leave. The court disagreed, ruling that such a request, although vague, put the employer on notice that the need for leave might be covered by the FMLA. Once the employer was on notice that the leave **may** be protected under the FMLA, the court stated that the employer was responsible for making further inquiries to determine if it was covered.

Employers subject to the FMLA or similar state laws (such as the District of Columbia Family and Medical Leave Act) must be cautious when receiving leave requests. Even if a leave request is unclear, if the leave request **could** be covered by the FMLA, an employer must investigate further. Failure to do so could result in substantial liability to the employer.

Handbook Disclaimers Need To Contain "At Will" Statement

A disclaimer in an employee handbook stating that the handbook was "not to be construed as a contract" did not defeat a former employee's claim that the handbook prohibited her termination without cause, according to the District of Columbia Court of Appeals. The court held that a handbook disclaimer must expressly reserve the employer's right to terminate employees "at will" in order to prevent the formation of an implied contract.

Employers should review the disclaimers in their employee handbooks to make sure they contain both "no contract" and "at will" language. They should also review their handbooks to make sure that other provisions are not inconsistent with the disclaimer. For example, a court may disregard an "at will" disclaimer if the handbook elsewhere limits the reasons for which an employee may be terminated.

Be Cautious Before Disclosing Social Security Numbers

Employers who need to disclose employees' social security numbers, whether internally or to outsiders (such as credit reporting agencies or for background checks) should take precautions to ensure that the confidentiality of the numbers is maintained and that the numbers are not improperly used. A court recently found that an employer that disseminated lists of the names and social security numbers of some of its employees could be liable for such disclosure as an invasion of privacy if it could not show that reasonable measures were taken to contain the risk of more widespread dissemination and that the measures were effective. The court concluded that a person's social security number is a "private fact" which an employer has a legal duty to keep confidential given the sensitive, personal information about an employee that can be obtained with a social security number.

Victim's Use of Offensive Language Does Not Preclude Sexual Harassment Claim

In a sexual harassment case, the victim must prove that the harassment was "unwelcome." The fact that the complaining employee engaged in conduct similar to that on which the complaint is based does not necessarily mean that the conduct was "welcome" and will defeat a claim of sexual harassment. In a recent case, a female employee based a "hostile environment" sexual harassment complaint on, among other things, her male co-worker's sexual banter and frequent use of sexually offensive language. The employer argued that the plaintiff could not establish that such conduct was unwelcome, because she had admitted participating in the banter and using the same language in different situations. In ruling against the employer, the court found that there was a "profound difference" between a woman's use of words with sexual connotations and the use of the same words in different contexts by male employees, particularly when those employees are supervisors.

Employers should make clear to their employees that it is not easy to determine whether any particular conduct is "welcome" even if the other person is also doing it and, therefore, that they

should refrain from engaging in questionable behavior in the first place.

Overtime Claims Can Be Arbitrated

The federal appeals court covering Maryland and Virginia recently held that claims for overtime under the Fair Labor Standards Act ("FLSA") are not precluded from arbitration. In this case, the employee was required to arbitrate her FLSA claim because her employer's job application form, which she completed, specifically required arbitration for "any disputes arising out of [an employee's] employment."

The court's decision is helpful to those employers who require employees to arbitrate any claims against the employer. However, requiring employees to arbitrate their claims has both advantages and disadvantages. Employers should consult with their legal counsel before making this decision.

California Requires Paid Family Leave

Beginning in 2004, California employers will be required, under certain circumstances, to allow employees to take some paid family or medical leave. Employers with offices in California should be aware of this law and take appropriate action to comply with it.

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Discouraging Employees From Communicating With The EEOC May Be Improper

Employers commonly require employees being paid severance to sign release agreements. Often those agreements provide that the employee will not assist anyone, including government investigators, in claims against the employer unless compelled to do so (by subpoena, court order, etc.)

or without first notifying the employer. One court recently ruled, however, that an employer cannot discourage current or former employees from communicating freely with the EEOC either in a release agreement or the employer's code of conduct. The court reasoned that such a provision violated public policy because it could have a "chilling" impact on potential claimants. Should other courts follow this ruling, many employers may need to revise their release agreements.

The Employment Law Alert is published periodically by the Employment Law Practice Group of Shulman, Rogers, Gandal, Pordy & Ecker, P.A. This bulletin is not intended as legal advice or opinion with respect to any particular facts or issues. If you have any questions or desire further information, please contact Michael Froehlich at 301-230-5221 or Fred Sommer at 301-230-1990.

Employment Roundtable Discussion:

New or Old, Large or Small: What Every Employer Should Know

- Times change and so does the law - keeping up
- "At-will" - what it means and how to preserve
- Hiring do's and don'ts - applications, interviews and offer letters
- Employee handbooks - the good, the bad and the ugly
- Protecting your business - non-compete and confidentiality agreements
- Overtime- to pay or not to pay?
- Discipline and termination - how to do it right

Date: Thursday, March 20, 2003

Time: 7:30am - 8:00am - Registration and continental breakfast

8:00am - 9:00am - Program

Place: The Shulman Rogers Conference Center
11921 Rockville Pike in Rockville
Fourth Floor

To R.S.V.P., call 301-231-0924 by Monday, March 17th. There is no charge for the program, but reservations are required as seating is limited.

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