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Employment Alert

Fall 2007

In this issue:

Employee Handbook Confidentiality Provision Held to Violate the NLRA

In *Cintas Corp. v. NLRB*, decided in 2007, the Circuit Court for the District of Columbia affirmed the National Labor Relations Board's ("NLRB") decision that an employee handbook provision requiring confidentiality violated Section 8 of the National Labor Relations Act ("NLRA"). Section 8 prohibits employers from "interfer[ing] with, restrain[ing] or coerc[ing] employees," in the exercise of their Section 7 rights "to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for . . . mutual aid or protection." Even though the handbook policy did not expressly prohibit employees from organizing, forming, joining or assisting labor organizations, the Court held that employees could reasonably construe the provision to prohibit these activities because it required employees to keep all information regarding employees confidential and imposed discipline for any violations. In light of this decision, employers should be cautious when designating certain employee information as confidential or restricting discussions about employees and their wages, either in handbooks or in other agreements or policies.

Should you have any questions regarding employee handbooks, contact Randi Kochman at (201)525.6309, or rkochman@coleschotz.com.

Law Firm Shareholder Held to Be Employee

On July 24, 2007, in *Kirleis v. Dickie, McCamey & Chiocolte*, the Western District of Pennsylvania held that a shareholder in the Dickie law firm was an "employee" and, therefore, permitted to pursue her firm for discrimination under Title VII and the Pennsylvania Human Rights Law, and bring her wage and hour claims under the federal Fair Labor Standards Act. The Court analyzed many factors before concluding that Kirleis was an employee. Specifically, the Court relied on the fact that Kirleis was closely supervised, had no meaningful influence in the law firm and did not enjoy a fair share of firm profits. This case is strikingly similar to claims brought by the EEOC against Sidley Austin, LLP alleging that certain partners may be deemed employees and, therefore, entitled to protection against discrimination. The *Kirleis* case is also significant as one of the first cases alleging "family responsibilities discrimination." Kirleis claims she was discriminated against because of her status as a mother with young children.

Should you have any questions, contact Randi Kochman at (201)525.6309, or rkochman@coleschotz.com.

Final Regulation Outlines New Rules on "No-Match Letters"

On August 10, 2007, the Bush Administration introduced its new rule on the Social Security Administration's ("SSA") no-match letters. "No-Match Letters" refer to the letters issued to employers when the SSA determines that a Social Security number does not match the information provided by the employer. Pursuant to the new regulations, upon receipt of a no-match letter, an employer has 30 days to verify whether the mismatch was the result of a recordkeeping error by the employer. If the error is not the result of a recordkeeping problem, the employer is obligated to ask the employee to resolve any discrepancies. If, after 90 days, the problem still remains, the employer must complete a new I-9 form within three days and, in doing so, the employee must present a document containing a photograph in order to establish identity. If the employer still cannot confirm an employee's authorization to work in the United States, the employer will be liable for civil and criminal violations if it allows the employee to remain employed. Although the rule is set to go into effect on September 14, 2007, various labor and immigrant groups have engaged in efforts to block implementation, including the filing of a lawsuit.

Should you have any questions on no-match letters, contact Randi Kochman at (201)525.6309, or rkochman@coleschotz.com.

U.S. Supreme Court Narrows the Scope of Discriminatory Pay Claims Under Title VII

In a landmark decision, decided on May 29, 2007, *Ledbetter v. Goodyear Tire & Rubber Company*, the U.S. Supreme Court has made it more difficult for employees to challenge past discriminatory pay decisions under Title VII of the Civil Rights Act ("Title VII"). In *Ledbetter*, the plaintiff claimed that she and other female area managers were paid less than their male counterparts. In affirming the Eleventh Circuit's decision overturning a jury verdict in Ledbetter's favor, the Supreme Court held that Ledbetter "should have filed an EEOC charge within 180 days after each alleged discriminatory pay decision was made and communicated to her" instead of after the final pay decision. Writing for the majority, Justice Alito found that Ledbetter had asserted a "series of discrete discriminatory acts" instead of a single wrong. Accordingly, the Court held that Ledbetter was obligated to file a charge after each act or lose the claim forever. The *Ledbetter* decision has been condemned by employee rights groups as it will make it more difficult for employees to remedy pay discrimination and will allow employers

a "free pass" on long-time discriminatory pay practices. One crucial yet undecided issue is whether the courts will apply a "discovery rule," thereby measuring the time period in which employees must file their charge of discrimination arising out of a pay disparity from the time they *discover* the disparity. Legislation may also override this decision.

Should you have any questions concerning discriminatory pay claims, contact Steven Adler at (201) 525-6273, or sadler@coleschotz .com.

N.J. Supreme Court Holds That an Independent Contractor Can Be Entitled to Protection Under CEPA

In an expansive new ruling, on July 25, 2007, the New Jersey Supreme Court held that a chiropractor hired by Prudential Insurance Company as an "independent contractor" is an "employee" under New Jersey's whistleblower statute. The case is significant to New Jersey employers because it broadens the class of workers entitled to assert claims under New Jersey's Conscientious Employee Protection Act ("CEPA"), a statute already recognized as the most far-reaching whistleblower statute in the nation.

CEPA prohibits an employer from taking adverse employment action against any employee who exposes an employer's criminal, fraudulent or corrupt activities. Workers are protected from retaliation and employers are deterred from activities that are illegal or fraudulent, or otherwise contrary to a clear mandate of public policy concerning the safety, health and welfare of the public. In *D'Annunzio v Prudential Ins. Co. of Am.*, the Supreme Court ruled that the term "employee" should be read broadly in order to reflect the changing workplace and to protect the public policy interests advanced by CEPA. Thus, employers should be careful to ensure that their practices comply with CEPA for both employees and independent contractors.

Should you have any questions concerning CEPA, contact Jamie Clare at (201) 525.6354, or jclare@coleschotz.com.

Employers Received an Extension to Adopt Documents Complying with Section 409A

On October 22, 2004, President Bush signed into law the American Jobs Creation Act that created Section 409A of the Internal Revenue Code aimed to curb corporate corruption. Section 409A brought about sweeping changes to the tax treatment of nonqualified deferred compensation, an arrangement where a portion of an employee's income is paid out at a date after that income is actually earned ("deferred compensation"). Examples of deferred compensation plans include bonus arrangements, severance payments and stock options. Deferred compensation plans are sometimes found in a stand-alone document or contained in an employment contract.

Section 409A generally prohibits deferred compensation plans from accelerating distributions and restricts distributions to be no earlier than: (1) separation from service; (2) death; (3) disability; (4) a specified time; (5) change in control; and (6) unforeseeable emergency. Section 409A also provides for strict timing requirements for initial and subsequent deferral elections. Operational compliance with section 409A has been required since the January 1, 2005 effective date, and as a result of Notice 2007-78 released on September 10, 2007, all documents must be brought into compliance by December 31, 2008. If the requirements are not satisfied, in addition to income inclusion, the employee is charged with interest at the underpayment rate plus 1% and an additional 20% penalty.

Section 409A specifically exempts qualified plans, tax-deferred annuities, 457(b) plans, SEPs, SIMPLEs and qualified governmental excess benefit arrangements under Section 415(m). Bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plans are exempt under the statute as well. If an equity plan, severance pay plan or employment benefit arrangement does not meet the requirements of any exemption, it does not mean that the plan "fails" Section 409A and that the recipient is automatically taxed and penalized. However, it is important for employers to act now to identify those plans that are not compliant and to redesign them in accordance with Section 409A. This process may be easy or difficult, depending on the type of plan or employment contract and may require employers to consult with a tax professional in addition to legal counsel.

Should you have any questions concerning Section 409A, contact Geoffrey Weinstein at (201) 525-6282, or gweinstein@coleschotz .com.

N.J. Expands The LAD to Include Transgender Discrimination

On June 17, 2007, New Jersey joined a growing number of states by amending the New Jersey Law Against Discrimination ("NJLAD") to explicitly prohibit transgender discrimination. The amendment creates a new protected category under the NJLAD— "gender identity and expression." The phrase "gender identity and expression" is defined to mean "having or being perceived as having a gender-related identity or expression whether or not stereotypically associated with a person's assigned sex at birth, including transgender status." The amendment protects not only employees who have undergone sex assignment surgery, but employees who identify or express themselves as members of the opposite sex. The amendment expressly addresses the latter by protecting an employee's right "to appear, groom and dress consistent with the employee's gender identity or expression."

Should you have any questions concerning transgender discrimination, contact Michael Morea at (201) 525.6274, or mmorea@coleschotz.com.

IN THE TRENCHES

Steven Adler (Chair) handled a complex employment case involving a machinery manufacturer in the converting industry. The matter included claims of age discrimination, misrepresentation and breaches of an employment manual and oral company policies. After one week of trial in New Jersey state court, the matter was successfully resolved.

Steven Adler (Chair), **Michael Morea** (Associate) and **Lauren Rainone** (Associate) successfully obtained a temporary and preliminary restraining order against a former employee of our client and his new employer, preventing the former employee from using our client's confidential information to compete with our client. The employee was a key salesperson in our client's travel industry advertising business. The restraints were obtained even though the former employee was not subject to a non-competition agreement.

Michael Morea (Associate) obtained temporary restraints against a shareholder in closely-held family businesses. The restraints prevented the defendant from entering our clients' business premises or disrupting the smooth operation of our clients' business and ultimately resulted in a favorable settlement for our clients.

Would you like to receive future issues of the Cole Schotz Employment Alert via e-mail? If so, please send your e-mail address to alevine@coleschotz.com

FOR THE RECORD

On October 17, the Cole Schotz Employment Department will present a program, "How to Litigate an Employment Discrimination Case," to the Bergen County Bar Association.

In early December, Cole Schotz will present an employment law seminar for firm clients.

Randi Kochman (Member) was one of nine attorneys at Cole Schotz named as a "New Jersey Rising Star."

James Kim (Member) was selected by the *New Jersey Law Journal* as one of its "40 Under Forty."

Co-Editors: Randi W. Kochman and Michael N. Morea

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