THOMPSON HINE

The Law@Work

Winter 2015

Litigation

Your Trade Secrets on Trial

By Deborah S. Brenneman

Most companies don't think about going to trial to protect their trade secrets until they discover that one of their key employees has gone to a competitor, armed with an arsenal of their most proprietary business information. At that point, they run into court to seek an injunction and other remedies . . . but by that time, it may actually be too late to protect those trade secrets.

In order to get relief under a trade secret theory, a company must show – among other things – that the information is not readily available in the public realm, and that the holder of the trade secrets has taken reasonable steps to protect the secrecy of the information. This requirement is becoming increasingly difficult to preserve in light of ever-present and ever-changing technology. Employees may tweet or post sensitive information to clients and inadvertently destroy its trade secret status; confidential client lists may be transformed into Facebook followers; or confidential information might be stored in the cloud without sufficient restrictions to protect it from unauthorized dissemination. If these things have happened during the employee's time with the company, the rush to the courthouse might be in vain.

Further, no trade secrets litigation can be successful without proving that the employee actually took the trade secrets. Employers often do not become suspicious about trade secret theft until after the employee has departed. The footprints of that theft are often left electronically, and a forensics examination of the employee's computer and mobile devices can provide the best evidence to support a trade secrets claim in court. However, if those devices are "wiped clean" upon the employee's departure and re-assigned to another employee, that evidence will be destroyed. Similarly, if a company representative turns on the computer herself to try to review the departed employee's activities, the very act of turning on the computer will taint the electronic record.

For more details on any of the topics covered in *The Law@Work*, please contact the authors via the links at the end of each article or Tim McDonald, editor-in-chief. For information on our Labor & Employment practice, please contact Stephen Richey, practice group leader.

Other complications arise if employees have been permitted to use their own personal computers or mobile devices to access and utilize the company's trade secret documents. Before the company has an opportunity to inspect them as part of discovery in litigation, those devices also may have been wiped clean by scrubbing software, leaving the employer with a diminished opportunity to determine where its trade secrets have gone.

In light of these obstacles, the best approach to trade secret litigation is to plan for it now, before your information leaves along with a key employee.

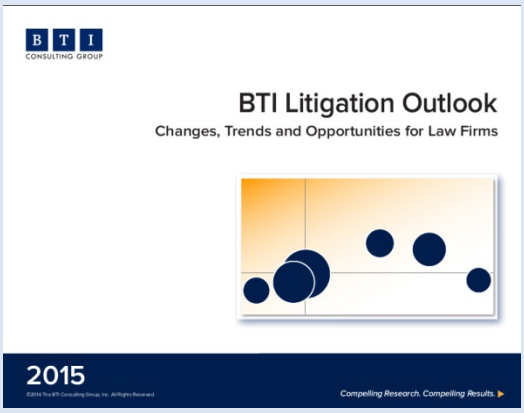
Companies should identify their trade secret information and take steps to ensure that it is properly protected. They should think about everything from how the building is secured and who has access to the information to what password and other computer based-protections are in place. Employees should be educated about both the nature of the company's trade secrets and about their obligations to protect them. Companies should establish clear and defined policies on how and when information can be shared via social media, should prohibit the use of personal computers and mobile devices to access trade secret information, and should take special care if utilizing cloud-based technologies. Information stored on a company cloud should be both labeled as confidential and encrypted to properly restrict its access.

Companies should also develop – and follow – protocols for how to handle the departure of key employees. These protocols should include everything from how to conduct a proper exit interview to preserving a pristine electronic image of the employee's electronic devices and examining the company's network to review recent emails and document access.

The bottom line is that no matter how swiftly you respond after an employee has stolen your trade secret information, if you don't act ahead of time, you won't be prepared for successful litigation.

For more information, please contact Debbie Brenneman or any member of our Labor & Employment group.

WHAT THE MARKET SAYS ABOUT THOMPSON HINE



BTI Litigation Outlook named Thompson Hine one of 15 Standout firms in Routine Employment Litigation, placing us among the top 18 nationwide.

Health Care Reform

The EEOC Takes on Wellness Programs

By Kim Wilcoxon

A popular mechanism for improving employee health is now coming under fire from the Equal Employment Opportunity Commission (EEOC).

Many employers are using wellness programs to encourage employees to achieve or maintain healthy lifestyles. Whether through a "know your numbers" campaign involving a health risk assessment (HRA) and biometric screening, or a "Biggest Loser" style competition involving rewards for actual physical changes, employers are encouraging employees to get healthy.

However, wellness programs require employees to provide medical data that could be used by employers to discriminate against them. The Americans with Disabilities Act (ADA) contains a provision designed to protect employees from this potential for discrimination by prohibiting employers from requiring medical examinations in most cases unless done as part of a voluntary wellness program. Neither the ADA nor the EEOC has defined "voluntary," except to say that a wellness program is voluntary if an employer neither requires participation nor penalizes employees who do not participate.

The EEOC's national office has not taken an official position on whether or how wellness programs can violate the ADA. The EEOC held hearings on this topic on May 8, 2013, and they have indicated on their regulatory agenda that they will be issuing wellness program regulations. However, there has been no indication that guidance will be issued any time soon.

In the meantime, the EEOC's Chicago District office has filed three lawsuits (all since August 2014) relating to wellness programs. The complaints filed in the following cases alleged that the following wellness program designs violated the ADA and, in the Honeywell case, the Genetic Information Nondiscrimination Act (GINA):

EEOC v. Orion Energy Systems, Inc.

- The employer paid 100% of the cost of the health plan for employees who completed an HRA and a fitness test.
- If an employee did not complete the HRA, the employee was required to pay the full cost of the health plan premium.
- If an employee did not complete the fitness test, the employee was penalized $50.

EEOC v. Flambeau, Inc.

- The employer mandated that employees complete an HRA and biometric screening in order to be eligible for the health plan.
- Employees who did not complete their HRA and biometric screening at the appointed time would be subject to disciplinary action.

EEOC v. Honeywell International, Inc.

- If an employee did not complete biometric testing, the employee would be required to pay a $1,500 premium surcharge for health coverage and would not be eligible for contributions (up to $1,500) that the employer would otherwise make to the employee's health savings account.
- If an employee's spouse also did not complete the biometric testing, the employee would be required to pay another $1,000 surcharge for health coverage.

Only one published case has addressed application of the ADA to wellness programs. In *Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012), an employee plaintiff complained about a program in which the employer deducted $20 per bi-weekly paycheck from any employee who did not complete an HRA and biometric screening.

The court sided with the employer in that case, relying on an exception under the ADA which provides that the rules on medical examinations do not prohibit employers from "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks or administering such risks that are based on or are not inconsistent with state law." The court reasoned that the wellness program fit

within this exception because, among other reasons, the employer used aggregate data from the HRAs to classify various employee health risks and decide on the types of benefits that should be offered in the future to reduce plan costs.

Many employers have taken comfort in that decision, but it did not deter the EEOC in the lawsuits listed above. In fact, the Memorandum in Support of EEOC's Application for a Temporary Restraining Order and Expedited Preliminary Injunction in *Honeywell* explicitly addresses the case and its reasoning. In that Memorandum, the EEOC argues that wellness programs should not qualify for the exception because the legislative history and purpose of the exception limit its use to actuarial studies and legitimate classifications of risk:

> Although Honeywell may argue that it is seeking control future health benefit expenses [*sic*], that intent is not the equivalent of performing an actuarial study to make legitimate classifications of risk. An employer could cast virtually any health-based inquiry as a cost-saving measure and seek immunity from the ADA's provisions, which is certainly not the intent of the ADA or its limited safe harbor provision.

Interestingly, the EEOC did not address a separate exception that Honeywell may be able to rely upon. The ADA also provides that the rules on medical examinations do not prohibit employers from "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to state laws that regulate insurance." Assuming Honeywell has a self-insured medical plan, that plan would not be subject to state laws that regulate insurance. It will be interesting to see whether Honeywell pursues this argument and whether and how the EEOC and the court respond.

The EEOC also addressed GINA in the *Honeywell* complaint. GINA prohibits employers from incenting employees to provide genetic information, including information about the manifested medical conditions of family members. The EEOC argued that because GINA defines the term "family member" to include a spouse, a spouse's medical information should be considered the employee's genetic information. By imposing an additional surcharge when spouses fail to complete the biometric screening, the EEOC reasons that the employer is incenting employees to provide genetic information in violation of GINA.

Employers who have seen good results from their wellness programs, and who offer wellness program incentives that are less substantial than those described above, might be tempted to dismiss these cases as atypical actions by an outlier EEOC office. After all, only the Chicago District office of the EEOC has so far filed these lawsuits. However, other offices have investigated employers in response to employee complaints, and the EEOC's position on spousal incentives could be troubling for employers.

As a result of the EEOC's increased activity in this area, we very well may see a shift in the legal landscape of wellness programs. Employers should pay close attention to these cases – and to the EEOC.

For more information, please contact Kim Wilcoxon or any member of our Employee Benefits & Executive Compensation or Labor & Employment practice groups.

This article was originally published in the December 2014 issue of the *CBA Report*.

Other Recent Publications

OSHA Reporting and Recordkeeping Changes Effective January 1, 2015 and Beyond

Employers' Email Systems Become Union Tools

Supreme Court Holds Time Spent by Workers in Post-Shift Security Screenings Is Not Compensable Time under the Fair Labor Standards Act

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OFCCP Issues New Proposed Antiretaliation Regulations for Government Contractors

OSHA

Whistleblower Complaints Filed With OSHA Increase in 2014

By M. Scott Young

A review of 2014 shows that 3,060 whistleblower complaints were filed with the Occupational Safety and Health Administration (OSHA). This is the largest number of whistleblower complaints filed with OSHA over the past ten years and reflects a 24 percent increase since 2010. OSHA's Whistleblower Protection Program enforces the whistleblower provisions of more than twenty whistleblower statutes protecting employees who report violations of various workplace safety, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime and securities' laws.

Where cases are filed under the Occupational Safety and Health Act, Asbestos Hazard Emergency Response Act, and the International Safe Container Act, the Secretary of Labor may file suit in federal district court to obtain relief for an employee. Under other statutes, the Secretary may order relief for the complainant, but the employer may contest that decision before an administrative law judge. The whistleblower statutes protect employees who exercise their rights under an applicable statute from unlawful retaliation, such as firing or laying off, reducing pay or hours, blacklisting, demoting, denying overtime or promotion, disciplining, denying benefits, failing to hire or rehire, intimidating, making threats or reassigning in a way that affects employees' prospects for promotion.

2015 may see another increase in the total number of whistleblower retaliation complaints filed with OSHA. Employers should ensure that supervisors and other members of management are trained to avoid actions that might lead an employee to file a whistleblower claim.

In 2014, 26 complaints were received and investigated by OSHA under the Affordable Care Act (ACA). This was more than a 30 percent increase compared to 2013. The ACA prohibits employers from retaliating against employees for reporting violations of the reforms found in the ACA or for receiving a premium tax credit or a cost-sharing reduction for enrolling in a qualified health plan.

Other enforcement actions by OSHA pursued in 2014 include its order in October 2014 finding a railway company to have violated the Federal Railroad Safety Act for disciplining a conductor in retaliation for taking leave in line with a treatment plan ordered by a doctor. The employee was ill, saw a doctor, and following the appointment notified a supervisor that the doctor had ordered him to stay out of work for the remainder of the day and over the weekend. The employee was subsequently disciplined for violating the company's attendance policy, for which the railroad was ordered to pay $2,000 in compensatory damages, $10,000 in punitive damages and reasonable attorney's fees to the conductor.

In September 2014, OSHA found a company to have wrongfully terminated a supervisor for raising safety concerns after a driver was instructed to pull a trailer without a valid license plate. OSHA ordered the company to reinstate the employee, pay back wages and damages of $261,787, and remove any references to the disciplinary action from the employee's record.

Also in September 2014, OSHA ordered a railway company to pay $51,000 in punitive damages and back pay to an employee after it suspended the employee for videotaping a safety inspection on his cellphone and sending it to the Federal Railroad Administration. The OSHA investigators found the company suspended the employee after he refused to delete video footage of an air compressor test aboard a locomotive, which the previous day the employee had deemed to be unsafe and unusable.

In August 2014, OSHA found a company to have violated the Surface Transportation Act for terminating a foreman and two truck drivers who had raised safety concerns with their employer about being required to work in excess of the U.S. Department of Transportation mandated hours of service for commercial truck drivers. OSHA reiterated that it is illegal for an employer to retaliate against employees who report work-related safety concerns. OSHA ordered the foreman to be reinstated and to receive back wages in the amount of $147,457 (less any applicable employment taxes), $50,000 in

compensatory damages and $200,000 in punitive damages. A second truck driver who had raised concerns about hours of work was ordered to receive back wages of $44,379 (less any applicable employment taxes), $30,000 in compensatory damages and $200,000 in punitive damages. The third driver who had been terminated from his employment after raising concerns about both vehicle maintenance and hours of work was ordered reinstated with back wages of $52,080 (less any applicable employment taxes), $30,000 in compensatory damages and $200,000 in punitive damages.

In May 2014, OSHA filed a lawsuit in federal court against a company on behalf of four employees who received disciplinary action and/or unsatisfactory performance appraisals for reporting workplace injuries in alleged violation of the Occupational Safety and Health Act. While the employer alleges that each employee violated a corporate workplace safety standard, OSHA asserted in the complaint that the company's actions were a result of workers reporting their injuries.

In March 2014, OSHA ordered an employer to pay a former employee $157,024 in back wages and $100,000 in compensatory damages and to take other corrective action for violating the antiretaliation provisions of the Sarbanes-Oxley Act. OSHA found that the employer blacklisted the former employee after he reported a vendor for submitting fraudulent invoices and testified at a deposition.

It's difficult to predict, but 2015 may see another increase in the total number of whistleblower retaliation complaints filed with OSHA. If the trends of the last five years continue, the vast majority – 87 percent in 2014 – will be filed under the Occupational Safety & Health Act itself (1729 cases) and the trucking, rail and aviation industry statutes (925 cases). We also expect whistleblower claims under the ACA to increase in 2015. Employers should ensure that supervisors and other members of management are regularly trained to avoid actions that might lead an employee to file a whistleblower claim.

For more information on the foregoing, or other matters involving OSHA, please contact Scott Young or any member of our Labor and Employment group.

Disabilities

The Implications of the Supreme Court's Forthcoming Decision in *Young v. United Parcel Service*

By Sedric D. Bailey

In December 2014, the Supreme Court of the United States heard oral arguments on one of the most-watched cases of the year. In *Young v. United Parcel Service*, the court will address the question of whether pregnant women are entitled to reasonable accommodations in the workplace. The result of the case will affect nearly every pregnant worker employed in the United States.

Peggy Young was employed as a delivery driver for United Parcel Service (UPS). UPS's employee policy requires their drivers to be capable of lifting up to seventy pounds. Young became pregnant while employed with UPS, and her doctor advised her to not lift more than twenty pounds while working. At the time, light-duty jobs were available at UPS only for workplace injuries, disabilities under the Americans with Disabilities Act (ADA) or as called for by an applicable collective bargaining agreement.* Young was unable to fulfill this work requirement, and because she had used all of her available family and medical leave, Young was required to take an unpaid leave of absence for several months of her pregnancy.

Young sued UPS, claiming that she had been discriminated against because of her gender and disability under the ADA and the Pregnancy Discrimination Act (PDA), a 1978 amendment to Title VII of the Civil Rights Act that prohibits discrimination based on pregnancy, childbirth or related medical conditions. UPS moved for summary judgment and argued that Young could not show that UPS's decision was based on her pregnancy or that she was treated differently than a similarly situated co-worker. UPS further argued that it was not obligated to offer Young accommodations under the ADA because Young's pregnancy did not constitute a disability. The district court dismissed Young's claim and the U.S. Court of Appeals for the Fourth Circuit affirmed.

The United States Supreme Court granted certiorari, and on December 3, 2014 the court heard oral arguments in the case. Specifically, the issue before the court is whether the PDA requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are similar in their ability or inability to work. Young has argued that if some form of accommodation is provided for any reason, it must also be provided for pregnant women. Conversely, UPS has argued that as long as each type of leave is available without regard to whether an individual is pregnant, then the policy is legal. Shortly before the Supreme Court granted certiorari, the Equal Employment Opportunity Commission (EEOC) issued guidance stating that employers must provide reasonable accommodations to pregnant employees or those with pregnancy-related conditions. This includes providing pregnant workers or those with pregnancy-related conditions with light-duty work or a leave of absence if the employer does so for other employees with similar limitations.

Employers should watch for this decision because it will determine whether the PDA is more like the ADA – which requires an affirmative accomodation for a pregnant employee – or Title VII and the Age Discrimination in Employment Act (ADEA) – which just require equal treatment. If the Court agrees with the EEOC's guidance, many employers will be faced, for the first time, with the task of developing and enforcing policies that address accomodation requests by pregnant employees. In essence, employers would be required to treat pregnancy and related conditions as disabilities. Regardless of the Supreme Court's ultimate holding, employers should be aware that in at least twelve states and the District of Columbia, a pregnant employee is already entitled to reasonable accommodation in excess of federal law. In advance of the Supreme Court's spring decision in this matter, employers may want to evaluate their existing policies to determine if they are in compliance with current state and local law and whether changes may be necessary in light of the *Young* decision.

For more information, please contact Sedric Bailey or any member of our Labor & Employment group.

* UPS has since changed its policy regarding work accommodations for pregnant workers.

Whistleblower Protections

Sixth Circuit Confirms Applicants Are Not Protected Whistleblowers Under ERA, FCA

By Jennifer Asbrock

On November 18, 2014, the U.S. Sixth Circuit Court of Appeals decided a novel statutory issue when it dismissed the claims of an applicant under the Energy Reorganization Act (ERA) and the False Claims Act (FCA) for lack of standing. In the case of *Vander Boegh v. Energy Solutions, Inc.*, the plaintiff was a former landfill manager who alleged that the employer failed to hire him because he reported environmental violations at a previous job. The plaintiff filed a whistleblower suit under six statutes, including the ERA, the FCA and four federal environmental laws. Although the ERA and FCA did not expressly cover applicants, the plaintiff argued that the undefined term "employee" was ambiguous enough to protect applicants from retaliation. His argument was not without support, as at least one other federal circuit court had assumed, without deciding, that applicants were "employees" under the ERA.

The Sixth Circuit declined to extend the undefined term "employee" to cover applicants under the ERA and FCA. The court noted that Congress could have defined the term "employee" to cover applicants, just as the term "employer" was given a detailed definition. But Congress chose not to define the term "employee," thus leaving the term to interpretation in accordance with its ordinary meaning. The court consulted the dictionary definition of "employee," as well as judicial rulings interpreting that term. Based on these sources, the Sixth Circuit concluded that, as a "mere applicant," the plaintiff did not fall within either the "plain" or "common law" meanings of the term "employee." There was simply no reason found within the statutes that the ordinary and common law definitions should not apply. The court noted that the plaintiff did not work for the employer to earn compensation, nor was he under the employer's control as an employee, contractor or agent. Accordingly, the applicant did not meet the requirement of being an "employee" for purposes of protection under the ERA or the FCA.

Notably, the protection accorded to employees versus applicants will depend on the wording and definitions of each individual whistleblower statute. The Sixth Circuit did not get to answer the question of whether applicants might be protected under the Safe Drinking Water Act, the Clean Water Act, the Toxic Substances Control Act or the Solid Waste Disposal Act because—first and foremost—the plaintiff had failed to fully exhaust his administrative remedies before seeking judicial review. Thus, the court lacked subject matter jurisdiction over the claims in the first place.

This case teaches a good lesson in statutory construction and interpretation: Courts should properly decline to find statutory protection where there is no basis in the law. Of course, each statute will require a separate analysis and may lead to different coverage results.

For more information, please contact any member of our Labor & Employment practice group.

Discrimination

U.S. Supreme Court Giving Abercrombie "The Look"

By Jennifer Asbrock

On October 2, 2014, the U.S. Supreme Court granted certiorari to review the Tenth Circuit's decision in *Equal Employment Opportunity Commission v. Abercrombie & Fitch*, which held that the retailer could not be liable for failure to accommodate an applicant's religion when it did not have actual notice of the need for a religious accommodation.

This case arose when a Muslim applicant applied for a position as a "model" or salesperson. Abercrombie has adopted a policy called "The Look," which requires all salespeople to model the company's clothing and does not allow employees to wear black clothing or "caps." Abercrombie has consistently enforced this policy in a strict manner, as the company relies almost exclusively on in-store advertising by store "models" to promote its wares rather than using more traditional marketing methods.

The Muslim applicant arrived for her interview wearing a black hijab, a traditional religious headscarf. The interviewing manager briefly described Abercrombie's dress requirements but did not mention "The Look" policy by name. The manager did not ask the applicant about her religion or black headscarf during the interview, although she admittedly assumed the applicant was Muslim because of her headscarf. The applicant also did not mention her religion or explain that she wore the black headscarf for religious reasons, including while working. Given that store "models" may not wear black clothing or "caps," the manager rated the applicant a "one out of three" in the "appearance and sense of style" category, which ultimately cost the applicant the job.

The EEOC filed suit on behalf of the Muslim applicant, claiming that Abercrombie violated Title VII by failing to accommodate the applicant's need to wear a black hijab as part of her sincerely held religious beliefs. Echoing its recent guidance, the EEOC explained that Title VII may require employers to make exceptions to their normal policies and expectations regarding dress and grooming to accommodate sincerely held religious beliefs, observances, or practices, unless doing so would pose an undue hardship on the company's operations. (Notably, customer preference is not a defense to a religious discrimination claim.) The EEOC argued that Abercrombie had "enough information" about the applicant's religious needs "to permit the employer to understand the existence of a conflict" between "The Look" policy and the applicant's religious practices.

Abercrombie responded that it should not be forced to assume that anyone who dons a headscarf is wearing it for religious reasons. Rather, the company argued that the duty to accommodate sincerely held religious beliefs should not arise unless and until the employee has made an adequate request for accommodation. Indeed, in warning employers not to base decisions on assumptions or religious stereotypes, the EEOC has previously emphasized that "the same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons."

Although the EEOC prevailed at the trial court level, the Tenth Circuit reversed that decision, holding that a Title VII failure-to-accommodate claim requires a showing that (1) the applicant/employee had a bona fide religious belief that conflicted with the employer's requirements; (2) the applicant/employee informed the employer of the conflicting belief; and (3) the applicant/employee suffered an adverse action because of the conflict. The Tenth Circuit therefore held that Abercrombie was entitled to judgment as a matter of law because the Muslim applicant had not made her need for accommodation known to the company, despite being generally aware of the dress requirements. (One Tenth Circuit judge dissented because he disagreed with the "direct notice" approach in circumstances where religious practices are apparent from the outward appearance of the applicant/ employee.) While this is a good decision for employers in the Tenth Circuit, the decision appears to conflict with the broader view adopted by several other circuit courts, which have rejected a requirement of express notice to the employer.

In agreeing to review the case, the U.S. Supreme Court will decide whether the onus to broach the topic of religion rests with the employer or the applicant/employee.

For more information, please contact any member of our Labor & Employment practice group.