



THE **LOWENBAUM** PARTNERSHIP, L.L.C.

PRESENTS ITS 2008 SEMINAR ON:

**CURRENT LABOR, EMPLOYMENT,
BENEFIT AND CORPORATE LEGAL ISSUES
FACING EMPLOYERS**

September 17, 2008 – Regency Conference Center, O'Fallon

September 25, 2008 – Saint Charles Convention Center, St. Charles



THE LOWENBAUM PARTNERSHIP, L.L.C.

ILLINOIS CASELAW UPDATE

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RECENT EIGHTH CIRCUIT AND MISSOURI STATE EMPLOYMENT AND LABOR LAW CASES

EMPLOYER CAN BE LIABLE FOR DISCRIMINATION AGAINST EMPLOYEE FOR HIS ASSOCIATION WITH A DISABLED INDIVIDUAL.

In *Francin v. Mosby, Inc.*, 248 S.W.3d 619 (Mo. Ct. App. 2008), the Missouri Court of Appeals, Eastern District, recognized claims under the Missouri Human Rights Act (MHRA) for employees who are associated with a disabled individual.

In this case, the employee alleged that the employer discriminated against him by terminating him because of his association with his wife, who suffered from amyotrophic lateral sclerosis. In contrast, his employer claimed that the termination decision was based on the employee's inability to satisfactorily perform the functions of the position he was rehired for after the company underwent organizational restructuring. In overturning the grant of summary judgment for the employer, the appellate court held that there was a genuine issue of material fact concerning whether the employee's wife's disability was a contributing factor in the decision to terminate his employment.

Here, Randall Francin met with his supervisor at multiple times in August and September 2004. Discussion during these meetings included performance reviews where Francin's supervisor specifically asked him how he was adjusting to his new position. At one point, Francin communicated that he did not see himself as a good fit. Francin's record, moreover, contained proof of some errors he made while on the job. Other evidence gathered, however, showed that Francin performed adequately and received a few merit-based raises although Francin's ability to perform his job appeared to have suffered during the final months of his employment when Francin knew his wife was sick. At the meetings, Francin also brought up his wife's condition, specifically asking about his potential rights for leave under the Family Medical Leave Act (FMLA) and about the possibility of working part-time. A few weeks after their last meeting, Francin's supervisor made the decision to terminate his employment.

As a threshold matter, the Court found that Francin presented a cognizable claim for association discrimination under section 213.070(4), because the plain language of section 213.070(4) of the MHRA provides that it is unlawful to "discriminate in any manner against any other person because of such person's association with any person protected by this chapter."

When turning to the merits, the Court found that the contradictory evidence regarding Francin's job performance and the repeated discussions of Francin's wife's illness, coupled with the close timing of Francin's termination, was sufficient to create a genuine issue of material fact as to whether Francin's wife's illness was a contributing factor in the termination decision. To surpass summary judgment in MHRA discrimination cases, the employee need only show that the alleged discrimination was a "contributing factor" in the termination decision. Thus, the Court found that summary judgment was not proper here.

EMPLOYER’S VIDEOTAPE OF EMPLOYEE’S WASHING CAR AND DOING YARD WORK – CONTRARY TO DOCTOR’S RESTRICTIONS – NOT FATAL TO EMPLOYEE’S DISABILITY DISCRIMINATION CLAIMS.

In *Lomax v. DaimlerChrysler Corp.*, 243 S.W.3d 474 (Mo. Ct. App. 2007), the appellate court overturned the trial court’s entry of summary judgment in favor of the employer on an MHRA disability discrimination claim, concluding that a genuine issue of fact existed as to whether the employee could work with or without reasonable accommodation and also as to whether the employee’s alleged disability was a contributing factor in his discharge.

Here, Gary Lomax worked as an Inspector on the assembly line at DaimlerChrysler’s plant. During his employment, Lomax experienced a series of medical problems that interfered with his ability to work for extended periods of time. Consequently, he went on disability leave from May 1984 through August 1996, on and off leave from 1996 through 2001, and for the last time in December 2001 through his termination date in July 2003.

During the last period of his disability leave, Lomax claimed that he had a burning sensation in his foot and could not put weight on it. Lomax stated that he needed to wear a protective boot and that the pain he experienced prevented him from performing tasks necessary to do his job including bending, kneeling, and walking. He also claimed to have a burning sensation and numbness in his arm and fingers which made it impossible for him to hold onto objects and necessitated surgery.

In response to an anonymous tip received in June 2003, DaimlerChrysler had video surveillance conducted on Lomax and observed him walking, driving, bending, and squatting while performing yard work and washing his car. Lomax performed all tasks without his protective boot and without a limp or other visible signs of pain. After requesting two different doctors examine Lomax and compare the surveillance videos with his alleged conditions, both doctors concluded that the Lomax-claimed medical limitations were inconsistent with the video and that Lomax was capable of performing his ordinary job without restrictions.

DaimlerChrysler’s senior human resources manager held a meeting with Lomax, told him about the surveillance video, and ultimately terminated his employment. The manager stated that his termination decision was because Lomax had provided false information to DaimlerChrysler regarding his disability. Subsequently, Lomax claimed DaimlerChrysler denied him the reasonable accommodation of additional time off of work and retaliated against him for a previous claim of disability discrimination by terminating his employment.

To be “disabled” for purposes of the MHRA, a person must have an impairment that limits a major life activity and with or without reasonable accommodation that impairment must not interfere with performing a job. The appellate court reasoned that since DaimlerChrysler admitted that it never considered whether Lomax could be

accommodated given his allegedly dishonest conduct, then the evidence was insufficient to support a grant of summary judgment on the issue. Despite the fact that Lomax was receiving Social Security and long-term disability benefits due to his claimed inability to work, furthermore, the court concluded that this should not be dispositive on the issue of whether he was totally disabled under the statute and could not be accommodated.

The appellate court then looked to see whether Lomax's disability could have been a "contributing factor" in DaimlerChrysler's termination decision and found that there was a genuine issue of fact on the question. The Court determined that a fact issue existed as to whether Lomax had acted fraudulently and thus the decision to terminate him was premature and potentially a pretext for discrimination. The Court, furthermore, noted that credibility determinations, such as the credibility of an employer's proffered reason for a challenged termination, are jury questions and not for the court to decide. Thus, the Court held that summary judgment was not appropriate. This case is an excellent example of the dangers of the "contributing factor" analysis adopted by the Missouri courts for discrimination claims.

EMPLOYER MUST ADEQUATELY RESPOND TO INITIAL COMPLAINT OF HARASSMENT AS WELL AS SUBSEQUENT COMPLAINTS.

In *Engel v. Rapid City School Dist.*, 506 F.3d 1118 (8th Cir. 2007), the Eighth Circuit found that even if an employer responds adequately to an initial report of sexual harassment, it does not discharge the employer's responsibility to respond properly to subsequent reports of offending conduct by the harasser.

Here, DeDe Engel brought claims against the Rapid City School District (RCSD) alleging sex discrimination based on a hostile work environment created by a co-worker's sexual harassment. Specifically, Engel said that the co-worker made sexually suggestive comments to her and leered at her. After Engel and another co-worker filed written complaints describing the harassment, RCSD investigated and disciplined the co-worker by suspending him without pay, directing him to undergo counseling, and monitoring him in the building. RCSD further advised the co-worker that any future complaints would result in termination.

After his suspension, Engel's co-worker returned to work in the same building. Engel verbally complained of continued leering and asked that the co-worker be moved. The complaints resulted in another unpaid suspension and reimposed restrictions though not termination or the requested location change. Months later, Engel resigned and filed suit against RCSD, alleging sexual discrimination among other claims.

The Eighth Circuit found that in response to Engel's initial complaint, RCSD employed proper remedial action reasonably calculated to stop the co-worker's harassment. Thus, RCSD could not be held liable for the hostile work environment that occurred prior to the initial complaint. The Eighth Circuit, however, overturned the district court's grant of summary judgment for RCSD on this claim by finding that a

genuine issue of fact existed as to whether RCSD responded adequately to Engel's subsequent verbal complaints regarding the co-worker's continued leering. Specifically, the Court noted that RCSD's decision to respond to the co-worker's continued harassment by decreasing, rather than increasing, its threatened sanctions may reasonably be viewed as contributing to a negligent response. Thus, the Eighth Circuit found that RCSD could potentially be held liable for contributing to a hostile work environment by not responding adequately to Engel's subsequent complaints.

EIGHTH CIRCUIT RULING REVEALS ADVANTAGES OF FEDERAL COURT OVER STATE COURT.

In *Buboltz v. Residential Advantages, Inc.*, 523 F.3d 864 (8th Cir. 2008), the Eighth Circuit affirmed the district court's grant of summary judgment for the employer, finding that the removal of some of the employee's job functions was not an adverse employment action and further, that the changes made to the employee's working conditions did not constitute constructive discharge. This case illustrates the advantages of federal court over state court for employers.

Monica Buboltz sued her employer, Residential Advantages, Inc (RAI), under the ADA and Rehabilitation Act. RAI is a corporation that provides residential services to disabled individuals who cannot live independently or without supervision, and Buboltz worked as a direct service provider (DSP) to their clients. Buboltz alleged that she had been discriminated against and constructively discharged because she was legally blind. She further alleged that RAI failed to accommodate her disability.

Buboltz worked for RAI for nearly five years without any complaints. Officials at RAI, however, became concerned about her performance when she was observed touching the crotch of a resident to see if she had urinated on herself, holding documents upside down during an attempt to read them, and failing to realize the presence of another person who was standing in the same room. Two months later, RAI told Buboltz she could no longer dispense medication or work alone with residents. Buboltz said she had devices she could use to improve her eyesight but she appeared to receive no response to that statement. Buboltz, furthermore, was responsible for telling her co-workers about her new job restrictions. RAI also restructured Buboltz's schedule, so she worked every other weekend like the other DSPs even though she had not previously worked weekends and began reducing her hours. A few months after the changes were made, Buboltz resigned her position and filed suit.

The employer was granted summary judgment, because Buboltz had not shown that she suffered an adverse employment action. The Eighth Circuit affirmed, holding that she had not suffered a materially significant enough disadvantage to constitute an adverse employment action. The removed job functions were not essential to her job, the added weekend work hours reflected the hours the other DSPs worked, and other shift changes could not be specifically linked to her blindness.

In regard to her other claims, the Court found that Buboltz's constructive discharge claim failed, because she did not put forth any evidence that RAI acted deliberately to render her working conditions intolerable. The Court also noted that Buboltz's failure to accommodate claim could not succeed, because Buboltz failed to make a request for accommodation and thus RAI had no duty to accommodate her. The Court, instead, construed her statement regarding the devices she could use as Buboltz essentially saying that she did not need RAI to accommodate her. Thus, the majority of the Court affirmed the district court's grant of summary judgment.

In an opinion more reflective of what a state court would hold, a dissenting judge held Buboltz had suffered an adverse employment action, found that she was in fact constructively discharged from her job, and that RAI failed to engage in the interactive process to identify potential accommodations. Contrary to the majority's opinion, the dissent found the administration of medicine and ability to work alone with patients were essential functions of Buboltz's job and that the elimination of these functions resulted in an adverse employment action. The dissent also found that the elimination of these responsibilities was materially adverse, unfair, and tantamount to accusing Buboltz of incompetence. The dissent, furthermore, held that by materially altering her working conditions, RAI should have foreseen her resignation as a result of their actions. Finally, the dissent argues that RAI had a responsibility to determine whether Buboltz could have been reasonably accommodated before RAI removed some of the essential functions of her position. Thus, the dissent would have reversed the decision and remanded for trial.

EVEN COURTS ARE SUED FOR DISCRIMINATION – BUT THEY HAVE BETTER DEFENSES THAN A TYPICAL EMPLOYER.

In *McKlentic v. 36th Judicial Circuit Court*, 508 F.3d 875 (8th Cir. 2007), the Eighth Circuit affirmed the district court's decision, holding that a terminated state court employee was barred by the Eleventh Amendment from bringing a FMLA claim under the self-care provision of the FMLA. The Eighth Circuit, furthermore, held that the state did not waive immunity by offering FMLA leave in the employee handbook.

In this case, Larry McKlentic brought suit against his employer, the 36th Judicial Circuit Court of the State of Missouri, seeking relief under the self-care provision of the FMLA, which grants employees a right to leave on account of the employee's own illness. McKlentic also argued that the state court waived immunity by offering FMLA leave in the employee handbook.

In reviewing the case, the Eighth Circuit relied on recent Supreme Court and Eighth Circuit precedent to uphold the district court's decision. Citing to *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court noted that while the family-care provisions of the FMLA did abrogate the State's Eleventh Amendment immunity, according to the Eighth Circuit in *Miles v. Bellfontaine Habilitation Center*, 431 F.3d 1106 (8th Cir. 2007), the self-care provisions of the FMLA did not. Thus, McKlentic was barred from bringing suit under the self-care provision. Recognizing the seeming inconsistency, one judge wrote a concurring opinion, specifically stating that an argument can be made that the self-care provision of the FMLA permits a suit against the State and that the issue needed to be resolved by the Supreme Court.

The Court, furthermore, found that even though FMLA leave was offered in the employee handbook, the state entity had not waived its immunity, because the state body had not made a "clear declaration" that it intended to submit itself to federal jurisdiction. Thus, the federal court could not step in.

EMPLOYER MUST PAY EMPLOYEE REQUIRED TO ATTEND DOCTOR’S APPOINTMENT BY EMPLOYER’S WORKERS’ COMPENSATION ADMINISTRATOR.

In *Copeland v. ABB, Inc.*, 521 F.3d 1010 (8th Cir. 2008), the Court found that under the Fair Labor Standards Act (FLSA), the employer is required to compensate the employee for time spent at a doctor’s appointment scheduled during the employee’s working hours by a third party worker’s compensation administrator.

Here, Cynthia Howser left work during her shift to attend a follow-up appointment with her doctor regarding her work-related injury. She had communicated with the third party worker’s compensation administrator, who had helped schedule the appointment, but neither she nor the administrator ever communicated with her employer, ABB, Inc. Rather, the worker’s compensation administrator had never received authorization from ABB to make follow-up appointments and Howser marked down the hours off as “unpaid leave.” Howser later requested that she be paid for those hours she missed as “hours worked” under the FLSA and filed suit when ABB refused to pay.

Under the FLSA, employers are required to pay employees for time spent “receiving medical attention at the premises or at the direction of the employer during the employee’s normal working hours.” In reviewing the case, the Court found that the worker’s compensation administrator was an agent of ABB; thus, ABB was required to pay Howser for the hours of work she missed. Moreover, even though Howser designated the time as “unpaid leave”, the court noted that FLSA rights are statutory rights that cannot be waived, so she was entitled to payment from her employer. Thus, the Eighth Circuit affirmed the district court’s grant of partial summary judgment for Howser and its order directing ABB to pay Howser’s attorneys’ fees and costs for the proceedings.

EMPLOYER’S PROMPT ACTION TO COMPLAINT OF TWO PLUS YEARS OF HARASSMENT PREVENTS EMPLOYER’S LIABILITY.

In *Adams v. O’Reilly Automotive, Inc.*, 2008 WL 3540588 (8th Cir. 2008), the female plaintiff claimed her male supervisor sexually harassed her for over two and a half years. The employer moved for summary judgment on the basis that it had satisfied the *Faragher/Ellerth* affirmative defense: that it exercised reasonable care to avoid harassment and to eliminate it when it did occur; and the employee unreasonably failed to utilize the employer’s safeguards or to otherwise avoid the harm.

The employer had an anti-harassment policy that required investigation and documentation of every complaint of harassment. The policy provided employees with a number of options as to whom to report harassment. Any complaints were treated as confidential and the policy provided that no employee would be retaliated against for complaining about harassment. The policy was provided to new employees and posted on walls. The employer also required employees to watch a training video about

harassment. The court held this was sufficient to establish the first prong of the defense – that the employer exercised reasonable care to avoid and eliminate harassment.

The employee claimed that the employer's requiring evidence to corroborate a complaint of harassment before taking action against an alleged harasser revealed the complaint process was unreasonable. The Eighth Circuit, however, disagreed, and recognized that the burden of proof is on the accuser and the employer is free to require some corroboration of the accuser's allegations. The court also recognized that the employer may credit one party in a he said-she said dispute so long as it would not be unreasonable to do so.

The employee also claimed the company had a history of failing to actually investigate prior complaints. The employee cited four past allegations of harassment that she claimed had not been investigated. The company, however, was able to produce documentation about its investigation of three of the four incidents. The final one was insufficient to establish a practice of not investigating complaints.

The second prong – that the employee unreasonably failed to take advantage of the employer's safeguards – was met by the fact that the employee failed to report harassment for over two and a half years. Once she did report it, the employer responded in two days by investigating and terminating the alleged harasser. This case demonstrates the importance of documenting complaints, investigating them, and taking swift action in response to them. This diligent employer was rewarded by not having to proceed to trial.

RECENT SEVENTH CIRCUIT AND ILLINOIS STATE EMPLOYMENT AND LABOR LAW CASES

MOM CAN MAKE VALID HARASSMENT COMPLAINT ON BEHALF OF HER MINOR DAUGHTER – POLICY MUST BE TAILORED TO BE UNDERSTOOD BY TYPICAL EMPLOYEE.

In *E.E.O.C. v. V & J Foods, Inc.*, 507 F.3d 575 (7th Cir. 2007), the Court of Appeals for the Seventh Circuit held that retaliation against a minor employee for intervention by employee's mother constitutes retaliation under Title VII.

The EEOC brought suit on behalf of a sixteen-year old high school employee, Samekiea Merriweather, alleging hostile work environment and retaliation. Specifically, the plaintiff argued that the 35-year old general manager of the restaurant created a hostile work environment by having sexual relations with several young employees, making sexual advances towards the 16-year old plaintiff, rubbing against the plaintiff, and trying to kiss the plaintiff. Merriweather complained to shift supervisors and to the assistant manager who did nothing to correct the problem. The events culminated when Merriweather's mom came to the store to complain about the way her daughter was being treated. Merriweather was terminated shortly after that incident.

The district court dismissed the plaintiff's suit because Merriweather failed to follow company procedure for reporting sexual harassment. The Court of Appeals for the Seventh Circuit found that the company procedure must be tailored so that the average employee can understand and follow that procedure. In this case, the reporting procedure should have been tailored to the understanding of a teenage student. The Court further found that Merriweather's mother acted as her agent and as such in retaliating against Merriweather for her mother's action was retaliating against Merriweather. The judgment of the district court was reversed and remanded.

THE ADVANTAGES OF RELIGIOUS EMPLOYERS – IT IS NOT A FLSA VIOLATION TO DISCRIMINATE AGAINST MINISTERS.

In *Schleicher v. Salvation Army*, 518 F.3d 472 (7th Cir. 2008), the Court of Appeals for the Seventh Circuit found the plaintiffs fell within the "ministers exception" to the Fair Labor Standards Act (FLSA) by creating a presumption that clerical personnel are not covered by the FLSA.

The plaintiffs brought suit against their former employer, the Salvation Army, alleging violations of the minimum wage and overtime provisions of the FLSA. The district court dismissed the suit for lack of jurisdiction basing the decision on the "ministers exception." The plaintiffs were ordained ministers of the Salvation Army. Ministers do not receive wages, instead, they receive an allowance of approximately \$150 a week.

The Court explains that the purpose of the “ministers exception” is to avoid judicial involvement in religious matters. The courts want to keep some separation from church and state and thereby prevent courts telling a church how to allocate authority. The plaintiffs argued that since this is not a discrimination case, in other words, a case in which the courts could limit the organization’s right to determine who will perform religious functions, the exception should not apply. The Seventh Circuit disagreed, adopting a presumption that clerical personnel are not covered by the FLSA. This presumption can be rebutted by a showing that the church is fake, the minister title is applied arbitrarily, or the minister’s function is more commercial than religious. Since the plaintiffs’ work included preaching and leading worship, it did not rebut the presumption that clerical personnel are not covered by the FLSA.

EMPLOYER CAN BE LIABLE FOR DISCRIMINATION AGAINST EMPLOYEE FOR HIS ASSOCIATION WITH A DISABLED INDIVIDUAL – PART 2.

In *Dewitt v. Proctor Hospital*, 517 F.3d 944 (7th Cir. 2008), the Court of Appeals for the Seventh Circuit held that the plaintiff presented evidence of association discrimination under the Americans with Disabilities Act, by arguing the termination of her employment resulted from the employer’s desire to cut the medical costs associated with her husband’s disability.

The court recognized three categories of disability association discrimination claims: 1) expense; 2) disability by association; and 3) distraction. The plaintiff in this case would fall under category one, expense, as in that scenario, the employee is fired because her spouse has a disability that is costly to the employer. The second category, association, involves an employer’s discrimination against an employee due merely to the employee’s relationship with a disabled individual. The final category involves an employer’s discrimination against an individual due to the employer’s belief the employee will be distracted from work due to having to care for an individual with a disability.

The plaintiff survived summary judgment by presenting evidence that Proctor Hospital was in financial trouble, concerned about cutting costs, and those in power at Proctor Hospital were motivated by the costs of the plaintiff’s husband’s treatment, because it provided his insurance.

EMPLOYER HELD NOT LIABLE FOR CO-WORKER’S RAPE OF THE PLAINTIFF.

In *Lapka v. Chertoff*, 517 F.3d 974, (7th Cir. 2008), the Court of Appeals for the Seventh Circuit held that alleged rape constituted unwelcome physical conduct based on sex and was sufficiently severe to create a hostile work environment. The Court of Appeals, however, did find that the Department of Homeland Security’s (DHS) response did not subject it to liability for the hostile work environment claim.

In the plaintiff's claim, she alleged that she was raped by a fellow DHS employee while attending mandatory training; DHS failed to adequately investigate the assault and protect her. The District Court granted summary judgment on all the plaintiff's claims which the Court of Appeals was in agreement with. The Seventh Circuit recognized that for an employer to be liable for harassment, it must either know of, or have reason to know of, the harassment and fail to take appropriate remedial action reasonably likely to prevent its recurrence.

The plaintiff argued that DHS did not investigate the alleged assault and that no action was taken against the alleged perpetrator. The Court found, however, that the employer responded with proper remedial action. The employer called in an investigator and the police department after plaintiff reported the rape. The employer took further action when it responded to the plaintiff's complaints by making the visitor policy stricter. The Court quoted *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1049 (7th Cir, 2000), "the question is not whether the punishment was proportionate to [the] offense but whether [the employer] responded with appropriate remedial action reasonably likely under the circumstances to prevent the conduct from recurring."



THE LOWENBAUM PARTNERSHIP, L.L.C.

**GOOD NEWS FROM THE NLRB, IS
IT HERE TO STAY?**

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THE LOWENBAUM PARTNERSHIP, L.L.C.

NLRB Developments

A review of important decisions, and guidance on balancing the right of employees to engage in certain political activity and management's right to maintain order and efficiency

THE LOWENBAUM PARTNERSHIP, L.L.C.

The Bush Board has been vilified by union and Democratic party leaders

Bush Board Launches Massive New Assault on Workers

With its term coming to an end, the Bush Administration's own lobby to the most national interests of corporate America is reaching maximum effort to bring to a close the Bush Administration's governance of the National Labor Relations Board. The Board has been vilified by the Bush Administration's own lobby to the most national interests of corporate America. In the month of September alone, in the case of the Board of the Board, the Bush Board has issued 100 decisions, a 70% percent of its total output of decisions for the year.

It's hardly the only bad decision by the National Labor Relations Board under the Bush Administration, which has been the most anti-worker, anti-labor, anti-union NLRB in history. The Board has let workers down at every turn. It has blocked efforts to gain union representation, undermined workers' attempts to improve their pay and benefits, and exposed them to penalties for seeking to improve their working conditions.

- Senator Ted Kennedy

Important Decisions

- **Dana Corp:** Permits employees to file a decertification election within 45 days of their employer voluntarily recognizing a union to represent them.
- **Oakwood Healthcare:** Provides a definition for who is a supervisor, a question that has confounded the NLRB for years. Unions were terrified employers would use this new standard to strip thousands from union ranks.

Important Decisions

- **Shaws Supermarkets:** Permits employers to withdraw recognition during a collective bargaining agreement.
- **Register Guard:** Employers can prohibit employees and unions from using the employer's e-mail system and electronic bulletin board for union organizing activity.

Guidance from the NLRB on Political Activity

- Stemmed from Immigration rallies in the Spring of 2006.
 - Thousands of workers, many of them in this country without proper documentation, attended rallies or withheld their services to protest proposed immigration legislation and prove their value as indispensable parts of the economy.
- In July 2008 (yes 2 years later) – the NLRB published guidance on whether such activity was protected under the NLRA.

The Test Used by NLRB Investigators and Regional Directors

- Employees have the right to engage in protected concerted activity for their mutual aid and protection.
 - All employees have this right and it is much broader in scope than just union activity or union represented employees.
- Political Advocacy will be protected if there is a direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern.

Political Advocacy Test

- If the nexus exists, the NLRB next looks to the type of activity engaged in and when and how it was engaged in:
 - Activity during non-work time in a non-work area is generally protected and employees cannot legally be disciplined.
 - Employers have the right to maintain discipline and efficiency in the workplace and therefore can place restrictions on their employees during work time and in work areas but must consistently enforce those policies.

3 Guiding Principles

- Non-disruptive political advocacy for or against a specific issue related to a specifically identified employment concern, that takes place during the employees' own time and in nonwork areas, is protected;
- On-duty political advocacy for or against a specific issue related to a specifically identified employment concern is subject to restrictions imposed by lawful and neutrally applied work rules; and
- Leaving or stopping work to engage in political advocacy for or against a specific issue related to a specifically identified employment concern may also be subject to restrictions imposed by lawful and neutrally applied work rules.



What's Next?

That will be up to the next President and Congress to decide.



THE LOWENBAUM PARTNERSHIP, L.L.C.

EMPLOYEE FREE CHOICE ACT

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The National Labor Relations Act

- A. Ground-Breaking Legislation Enacted in 1935.
- B. Established A Federal Agency – National Labor Relations Board (“NLRB”).
- C. “Task” of NLRB is two-fold.
 - 1. Via “Representation” Proceedings – create and monitor election procedures which allow employees to decide whether they do or do not want union representation.
 - 2. Via “Unfair Labor Practice” Proceedings – investigate and, if necessary, prosecute employers who “restrain or coerce” employees who engage in “protected concerted” activities; discriminate against employees who support unions; and/or fail to comply with “good faith” bargaining obligations.

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- D. Generally, as an Agency, NLRB and its employees have earned high marks.
- E. Under The NLRA There Are Three (3) Critical Progression Points.
 - 1. The union campaign to get a 30% “showing of interest” to file a Petition for Election – but even if a union obtains a “card-majority,” the Company has the right to insist on a secret ballot election.
 - 2. The NLRB supervised/secret ballot election and the union’s need to obtain a minimum of 50% plus 1 “yes” votes.
 - 3. The winning union then bargains with the company to attain an initial collective bargaining agreement.


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F. At Each of the Above Progression Points, an Employer Has Various Options.

1. The employer campaign can lawfully discuss the pros/cons of unionization and, as a result, the union may not achieve the 30% showing of interest.
2. Even if the union obtains a sufficient “showing of interest,” an employer can vigorously campaign prior to an election.
3. Even if a union wins an election an employer can engage in “hard” bargaining.
4. While the NLRB regulates whether the parties engage in good faith bargaining:
 - a. NLRB agents do not tell the company or the union what the terms of the contract will be; and
 - b. Section 8(d) of the NLRB expressly says that the obligation to engage in good faith bargaining “... does not compel either party to agree to a proposal or require the making of a concession”

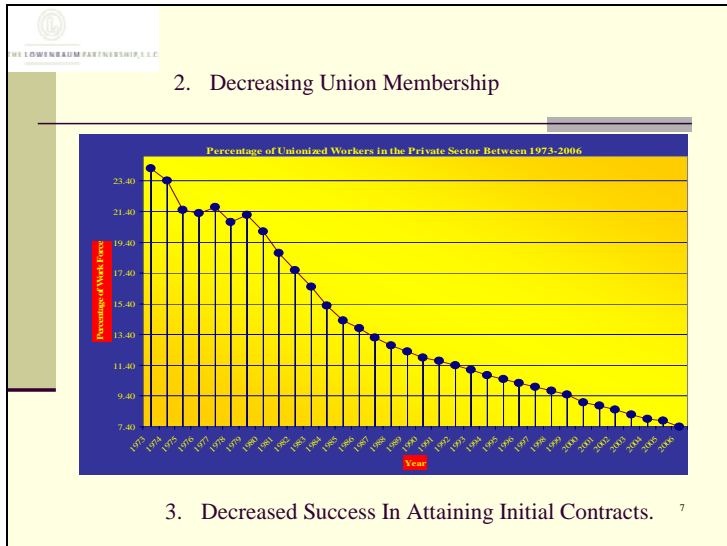
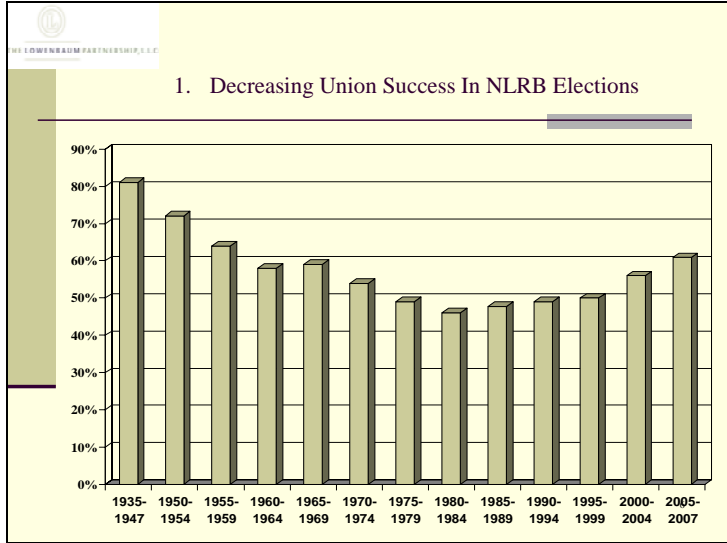
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G. So Why Amend the NLRA, Why Fix the NLRA

1. Decreased Union Success in NLRB Elections.
2. Decreasing Union Membership.
3. Decreased Success in Attaining Initial Contracts.

5



Employee Free Choice Act (“EFCA”)

- A. Political Climate Favors Passage/Ultimate Enactment.
 - 1. Barack Obama was the co-sponsor of this legislation.
 - 2. Even Republican President veto may be over-ridden.
- B. From the Perspective of Employers, EFCA Represents the Most Substantive Change in the NLRA Since 1935.

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- C. What Does EFCA Change.
 - 1. EFCA “Streamlines” Union Certification by Eliminating “Secret Ballot” Elections.
 - a. Union files Petition with NLRB alleging that a majority of employees in a “unit appropriate for bargaining” wish to be represented by the “labor organization.”
 - b. NLRB “investigates” Petition.
 - c. NLRB investigation concludes:
 - i. Unit appropriate for bargaining.
 - ii. Majority of employees signed valid authorizations.
 - iii. No other labor organization currently represents the employees.
 - d. What does the NLRB do:
 - i. No election.
 - ii. NLRB Shall certify the labor organization.

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2. EFCA “Facilitates” negotiation of an initial collective bargaining agreement.
 - a. “Certification” issues from the NLRB.
 - b. Labor organizations makes written request for bargaining.
 - c. Bargaining is to commence within 10 days after employer’s receipt of written request (unless the parties agree to a larger time frame).
 - d. Bargaining must be completed within 90 days (unless the parties agree to a larger time frame).
 - e. What happens if the 90 day period expires without a signed CBA.
 - i. Either party may notify FMCS of the contract dispute and request mediation.
 - ii. The FMCS is to use its best efforts to bring the parties to an agreement.
 - f. What happens if FMCS mediation/conciliation does not result in a CBA.
 - i. FMCS refers the matter to arbitration.
 - ii. The arbitration panel shall render a decision settling the dispute.
 - iii. Such a decision will be binding upon the parties for a period of 2 years.
 - iv. Employee contract ratification not required.

3. EFCA “Strengthens” Enforcement of the NLRA.
 - a. Mandatory Injunctions for unfair labor practices during organizing drives.
 - b. Enhanced remedies for violations
 - i. Traditional “make whole.”
 - ii. Plus two times that amount in liquidated damages.
 - c. Civil penalties.
 - i. In addition to “make whole”
 - ii. Civil penalty not to exceed \$20,000 for each violation.

D. The “Dangers” of EFCA.

1. Employee Perspective.
 - a. Elimination (in most circumstances) of Secret Ballot Elections.
 - b. Elimination (via interest arbitration) of contract ratification.
2. Regulatory Perspective.
 - a. What is a valid “Collective Bargaining” Authorization Card (NLRB to develop “Guidelines & Procedures”).
 - b. What is the “Arbitration Panel” that will determine the CBA (FMCS to develop).
 - c. What factors are relevant to dispute settlement (EFCA provides no guidance).

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3. Employer Perspective.

- a. Company campaign begins now.
- b. Have to assume union “underground” campaign.
- c. Critical “self-assessment.”
- d. Evaluation of entire company employment philosophy inclusive of communication strategies, from hire to discharge.
- e. Fast track supervision/management training.
- f. Review/revise/implement and evaluate policies & procedures.

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THE **LOWENBAUM** PARTNERSHIP, L.L.C.

**ILLINOIS STATUTES THAT
CAN PICK YOU OFF**

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Time Off Work To Vote

10 ILCS 5/17-15 keys:

- Illinois election.
- Employee must request time off to vote prior to day of election.
- Employee gets two (2) hours off work, **with pay**, while polls are open.
- Employer gets to specify the hours off duty, but if the employee's work hours begin less than 2 hours after polls open **and** end less than 2 hours before polls close, employee must be given 2 hours off duty during working hours.
- Must employee actually vote?

§ 17-15. Any person entitled to vote at a general or special election or at any election at which propositions are submitted to a popular vote in this State, shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of 2 hours between the time of opening and closing the polls; and such voter shall not because of so absenting himself be liable to any penalty; Provided, however, that application for such leave of absence shall be made prior to the day of election. The employer may specify the hours during which said employee may absent himself as aforesaid, except that the employer must permit a 2-hour absence during working hours if the employee's working hours begin less than 2 hours after the opening of the polls and end less than 2 hours before the closing of the polls. No person or corporation shall refuse to an employee the privilege hereby conferred, nor shall subject an employee to a penalty, including a reduction in compensation due to an absence under this Section, because of the exercise of such privilege, nor shall directly or indirectly violate the provisions of this section.

Time Off Work: Blood Donors

820 ILCS 149/10 keys:

- Private employers with 5 or more employees (as well as local governments and boards of election commissioners).
- Must, upon request, grant full-time employees with 6-months of service.
 - Definitions of “full-time?”
- 1 hour of paid leave every 56 days.
- To donate blood.

820 ILCS 149/10: Paid leave for blood donation; administration.

- (a) On request, a participating employee subject to this Act may be entitled to blood donation leave with pay.
- (b) An employee may use up to one hour, or more if authorized by the employer or a collective bargaining agreement, to donate blood every 56 days in accordance with appropriate medical standards established by the American Red Cross, America's Blood Centers, the American Association of Blood Banks, or other nationally recognized standards.
- (c) A participating employee may use the leave authorized in subsection (b) of this Section only after obtaining approval from the employer.
- (d) The Department must adopt rules governing blood donation leave, including rules that (i) establish conditions and procedures for requesting and approving leave and (ii) require medical documentation of the proposed blood donation before leave is approved by the employer.

Time Off Work: VESSA: Victims' Economic Security And Safety Act

820 ILCS 180/20 and 30 keys:

- Public employers and private employers with at least 50 employees.
- Must grant up to 12-weeks unpaid leave per 12-month period.
- To employee who
 - Is a victim of domestic or sexual violence.
 - Has a family member who is a victim of domestic or sexual violence.
 - Has a household member who is a victim of domestic or sexual violence.
- For certain statutory purposes.
- Complicated details.
- Much like FMLA, except applies to all employees with 1-minute of service.

§ 15. School conference and activity leave.

- (a) An employer must grant an employee leave of up to a total of 8 hours during any school year, and no more than 4 hours of which may be taken on any given day, to attend school conferences or classroom activities related to the employee's child if the conference or classroom activities cannot be scheduled during non-work hours; however, no leave may be taken by an employee of an employer that is subject to this Act unless the employee has exhausted all accrued vacation leave, personal leave, compensatory leave and any other leave that may be granted to the employee except sick leave and disability leave. Before arranging attendance at the conference or activity, the employee shall provide the employer with a written request for leave at least 7 days in advance of the time the employee is required to utilize the visitation right. In emergency situations, no more than 24 hours notice shall be required. The employee must consult with the employer to schedule the leave so as not to disrupt unduly the operations of the employer.
- (b) Nothing in this Act requires that the leave be paid.
- (c) For regularly scheduled, nonemergency visitations, schools shall make time available for visitation during both regular school hours and evening hours.

Time Off Work: Nursing Mothers

820 ILCS 260 keys:

- All public employers, as well as private employers who have 6 or more employees.
- Must provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child.
- The break time must, if possible, run concurrently with any break time already provided to the employee.
- An employer is not required to provide break time if to do so would unduly disrupt the employer's operations.
- Employers shall make reasonable efforts to provide a room or area in close proximity to the work area where the employee can express her milk in privacy.

820 ILCS 260: Break time for nursing mothers. An employer shall provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child. The break time must, if possible, run concurrently with any break time already provided to the employee. An employer is not required to provide break time under this Section if to do so would unduly disrupt the employer's operations.

Worker's Compensation Retaliation

820 ILCS 305/4(h) keys:

- Employee exercise of Section 305 rights.
 - Workplace injury – or
 - Seek medical treatment – or
 - Receive TTD, TPD, PPD, PTD benefits – or
 - File a comp. claim.
- No discharge – refusal to rehire or recall to work – or other discrimination as a result.

820 ILCS 305/4(h): It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him or her by this Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his or her exercise of the rights or remedies granted to him or her by this Act.

It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted to him or her by this Act.

Vacation Pay At Termination

820 ILCS 115/5 keys:

- If employer provides for paid vacations.
- Employee quits or is discharged.
- Employee has not taken all vacation time earned.
- Must cash out all earned, but unused vacation, at final rate of pay.
- Policy cannot provide for forfeiture.
- **Exception to cash out duty:** union contract can trump statute.

820 ILCS 115/5: Unless otherwise provided in a collective bargaining agreement, whenever a contract of employment or employment policy provides for paid vacations, and an employee resigns or is terminated without having taken all vacation time earned in accordance with such contract of employment or employment policy, the monetary equivalent of all earned vacation shall be paid to him or her as part of his or her final compensation at his or her final rate of pay and no employment contract or employment policy shall provide for forfeiture of earned vacation time upon separation.

Deductions From (Final) Pay Checks

820 ILCS 115/9 keys:

- No deductions unless (1) required by law, (2) garnishment, etc., (3) benefits employee or (4) employee consents in writing at time deduction is made.
- Procedure for bona fide disputes: make the deduction and simultaneously notify Illinois D.O.L. in writing of amount/reasons for deduction.
 - Illinois D.O.L. investigation and ruling within 30-days.
 - Employer must comply within 15-days.
- Cap on deductions: 25% of net pay.

820 ILCS 115/9: Except as hereinafter provided, deductions by employers from wages or final compensation are prohibited unless such deductions are (1) required by law, (2) to the benefit of the employee; (3) in response to a valid wage assignment or wage deduction order; (4) made with the express written consent of the employee, given freely at the time the deduction is made; ***** provided, however, that the amount deducted from any one salary or wage payment shall not exceed 25% of the net amount of the payment. *** For purposes of this Section, "net amount" means that part of the salary or wage payment remaining after the deduction of any amounts required by law to be deducted. ** Where the legitimacy of any deduction from wages is in dispute, the amount in question may be withheld if the employer notifies the Department of Labor on the date the payment is due in writing of the amount that is being withheld and stating the reasons for which the payment is withheld. Upon such notification the Department of Labor shall conduct an investigation and render a judgment as promptly as possible, and shall complete such investigation within 30 days of receipt of the notification by the employer that wages have been withheld. The employer shall pay the wages due upon order of the Department of Labor within 15 calendar days of issuance of a judgment on the dispute.

The Department shall establish rules to protect the interests of both parties in cases of disputed deductions from wages. Such rules shall include reasonable limitations on the amount of deductions beyond those required by law which may be made during any pay period by any employer.

In case of a dispute over wages, the employer shall pay, without condition and within the time set by this Act, all wages or parts thereof, conceded by him to be due, leaving to the employee all remedies to which he may otherwise be entitled as to any balance claimed. The acceptance by an employee of a disputed paycheck shall not constitute a release as to the balance of his claim and any release or restrictive endorsement required by an employer as a condition to payment shall be a violation of this Act and shall be void.

(Source: P.A. 91-443, eff. 8-6-99; 92-109, eff. 7-20-01.)



THE LOWENBAUM PARTNERSHIP, L.L.C.

**UPDATE ON ADMINISTRATION OF EMPLOYEE
BENEFIT PLANS**

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LaRue v. DeWolff, Boberg & Assoc. – 401(K) Plan Screw Ups

FACTS

- 401(k) Participant Directed Administrator to Transfer Funds Among Plan Funds
- Administrator Did Not Do It – The Direction Failed for Some Reason
- Participant Alleged He Lost Approximately \$150,000 as the Result



LaRue v. DeWolf, Boberg & Assoc. – 401(K) Plan Screw Ups

THE LAWSUIT

- Participant Sued For Damages Alleging Fiduciary Breach
- Claimed Under ERISA §502(a)(3) Which Only Allows Actions for Equitable Relief
- How Do Participants Get Money Relief?

LaRue v. DeWolf, Boberg & Assoc. – 401(K) Plan Screw Ups

THE THEORY

- Defense: No Remedy for Individual Breaches under 502(a)(2); No Cash Recovery Under 502(a)(3); QED No Recovery But for Benefits???
- Plaintiff: Recovery is Actually Against “Incompetent Fiduciary” For Plan – But Only Affects Single Plan Account??

LaRue v. DeWolf, Boberg & Assoc. – 401(K) Plan Screw Ups

WHAT HAPPEND

- Motion to Dismiss Filed – **NO FACTS**
- District Court Said NO – Seeking Damages For Screw Up is Not “Equitable Relief”
- On Appeal, Plaintiff Tried a Finesse – Raising 502(a)(2) Claim; 4th Circuit **Denied**
- Supreme Court **REVERSED**



LaRue v. DeWolf, Boberg & Assoc. – 401(K) Plan Screw Ups

SUPREME COURT'S CONCLUSION

- Dominant Fiduciary Duty Is Management, Administration, and Investment of Assets
- In “Old DB Plan Days” Focus Was on Entire Plan
- DC Plans Have Replaced DBs. For DC Plans Misconduct Need not Threaten Entire Plan – Landscape Has Changed
- Regardless of Whether Breach Harms All or Just a Few Participants, ERISA Provides a Remedy



Metropolitan Life Ins. Co. v. Glenn – Defending Benefit Decisions

FACTS

- MetLife Administered and Insured Sears, Roebuck's LTD Plan
- MetLife Had Discretionary Authority to Determine Benefit Claims
- Plaintiff Received 24 months of Benefits for a Heart Disorder (Own Occ.)
- MetLife Encouraged Her to Apply for, and She Obtained, SSDI as Being PTD
- MetLife Then Concluded She Could Do Sedentary Work and Ended LTD (“Any Occ.”)

Metropolitan Life Ins. Co. v. Glenn – Defending Benefit Decisions

THE LAWSUIT

- Simple Claim for Benefits
- Glynn Sued Saying she Satisfied “any Occupation” Rule

Metropolitan Life Ins. Co. v. Glenn – Defending Benefit Decisions

WHAT HAPPENED BELOW

- District Court sided with MetLife
- 6th Circuit **Reversed** Citing: (1) Conflict; (2) Irreconcilability of SSDI Result; (3) MetLife’s Focus Upon one Physician While Ignoring More Detailed Reports; (4) MetLife’s Failure to Disclose Data to its Experts; and (5) MetLife Ignoring Evidence
- MetLife **Appealed**

Metropolitan Life Ins. Co. v. Glenn – Defending Benefit Decisions

THE THEORY

- MetLife Argued Administrator That Evaluates and Pays Claims Does Not Operate Under a Conflicts of Interest
- Critical Because Courts Give Deference to Decisions of Administrators Who Have Discretion to Make Decisions
- Decisions Are Much More Difficult to Overturn

Metropolitan Life Ins. Co. v. Glenn – Defending Benefit Decisions

SUPREME COURT'S CONCLUSION

- Trust Law Controls and Benefit Determinations Are Fiduciary Acts Wherein the Administrator Owes a Special Duty of Loyalty to Beneficiaries
- Trust Law Requires *de novo* Review Unless the Plan States Otherwise
- If Plan Grants Discretion to Determine Eligibility for Benefits, Deference is Provided
- But, if the Fiduciary Pays Claims and Reviews Them, This is a Conflict That “Must Be Taken Into Account”

Metropolitan Life Ins. Co. v. Glenn – Defending Benefit Decisions

SUPREME COURT'S CONCLUSION

How to Take The Conflict Into Account?

No Instructions *Per Se*

No Automatic *De Novo* Review

No Mandate for Burden Shifting Rules

Simply Should be a "Factor" to Consider

Consider Separating Decider from Payer



THE LOWENBAUM PARTNERSHIP, L.L.C.

ILLINOIS PUBLIC EMPLOYER UPDATE

THE ILLINOIS PUBLIC SECTOR LEGAL UPDATE 2008

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PART I

U.S. Supreme Court Cases

- **Decided**

- CBOCS West Inc. v. Humphries, 2008 WL 216 7860 (May 27, 2008)
 - Retaliation claims are actionable under 42 USC1981 even though the statute does not expressly address retaliation as do other civil rights laws.
- Sprint/United Management Co. v. Mendelsohn, 128 S. Ct. 1140 (2008)
 - “Me too” evidence from non-parties may be admissible in ADEA matter after a “fact intensive, context specific inquiry.”
- Federal Express v. Holowecki, 128 S. Ct. 1147 (2008)
 - Any document that can reasonably be construed as a request for protection of employee’s rights is a “charge” within the meaning of the ADEA
- Davenport v. Washington Education Association, 127 S. Ct. 2372 (2007)
 - Statute prohibiting use of agency fee collections in political elections without employee approval does not violate union’s free speech rights under 1st Amendment
- LaRue v. De Wolff, Boberg & Associates, Inc., 128 S. Ct. 1020 (2008)
 - allows individuals covered by 401(k) and similar plans ability to obtain monetary relief if the plan suffered losses because of a breach of duty or by statutory violations by the plan fiduciary.
- Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162 (2007)
 - the charging period begins to run with the 1st distinct unlawful practice and a new but continuing violation does not change the time to commence an action

- **Pending Decisions**

- 14 Penn Plaza LLC v. Pyett (U.S. No. 07-581)
 - Is arbitration clause waiving employee anti-discrimination statutory rights enforceable?
- Crawford v. Metropolitan Government of Nashville and Davidson County, TN (U.S. No. 06-1595)
 - Does anti-retaliation provision of Civil Rights Act protect worker against dismissal because workers cooperated with employer’s internal investigation of sex harassment?
- Huber v. Wal-Mart Stores, Inc (U.S. No 07-480)

- If disability prevents employee from performing essential function of job, does ADA require reassignment to vacant, equivalent position for which employee is qualified or permit employee to compete with others for the vacant, equivalent position?
- *Ysura v. Pocatello Education Association* (U.S. 07-869)
 - Does state statute prohibiting use of payroll deduction for political contributions violate 1st Amendment?
- *Locke v. Karass* (U.S. No. 07-610)
 - May state condition continued public employment on payment of agency fees to pay for union litigation outside of bargaining unit for non-union employees?

PART II

State Court Decisions

Senese v. Village of Buffalo Grove – police officer sitting in squad car was injured when another vehicle drove into him. The Court determined that this act was "unlawful" and therefore officer obtains PSEBA benefits.

Bahr v. Bartlett Fire Protection District – relates to level of pay due to employee on PEDDA leave. The Court also extended leave time to 12 months for each injury even though employee returned to work after first injury.

PART III

Federal Enactments

- **The Family and Medical Leave Action of 1993**, as amended
29 USC 2601 (as amended by PL 110-181 Sec. 85)
Effective as of 01.28.08
- New Proposed Regulations (FMLA 29 CFR 825 as published 73 Fed Reg. 7875 (02.14.08) (pending approval, delay of original effective date)
- **The Genetic Information Non-discrimination Act** (H.R. 493, effective 05.21.08)

PART IV

State Enactments:

Public Act 095-0136 and 95-0356 Amend County Code & Municipal Code concerning police & firefighter rights to compel bargaining regarding disciplinary acts under non-home rule communities and under the Sheriff's Merit System

Law. Makes disciplinary matters into MANDATORY subjects of bargaining.

Public Act 095-0025 Amends the IL Human Rights Act to make it a violation to refuse a pregnant peace officer or firefighter request for temporary transfer under some conditions.

Public Act 095-0128 Adds local governments and school districts to definition of “Employer” under the “Whistle Blower & Whistle Reward & Protection Act”; adds retaliation as additional protected acts; expands coverage protections for law enforcement personnel.

Public Act 95-0490 Prohibits the use of persons as temporary workers if not qualified for a regular appointment unless agreed otherwise under a collective bargaining contract.

Public Act 95-0316 Creates a presumption that certain injuries or illnesses for fire fighters and EMTs are work related for compensation purposes unless rebutted by evidence.

Public Act 095-0142 Grants firefighters unpaid leaves of absence to serve in the IL General Assembly.

Public Act 095-0243 Permits employee to file an action in circuit court if IHRD dismisses complaint or does not complete investigation within 365 days after charge filed.



THE **LOWENBAUM** PARTNERSHIP, L.L.C.

**10 CRITICAL ISSUES IMPACTING THE
ENFORCEMENT OF RESTRICTIVE COVENANTS**

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-
- Almost every day, clients contact the Lowenbaum Partnership's attorneys seeking advice regarding the enforcement of restrictive covenants, *i.e.*, noncompetition agreements, nonsolicitation agreements and confidentiality agreements.
 - These questions can be characterized as falling within one of two broad categories:

-
1. Drafting enforceable noncompetition, nonsolicitation and confidentiality agreements; &
 2. Litigating the enforceability of noncompetition, nonsolicitation and confidentiality agreements.

Drafting Enforceable Restrictive Covenants

- Employees typically execute agreements containing restrictive covenants either at the inception of their employment with a company, when their job changes to encompass additional responsibilities or upon receiving a new position. A savvy HR professional should evaluate the following issues prior to having an employee execute an agreement containing restrictive covenants:

1. Do the restrictive covenants sufficiently address the employer's protectable interests?

- Courts generally consider workforce stability, customer contacts & relationships, and trade secrets to comprise protectable interests.

2. Is the noncompetition provision narrowly tailored with respect to both duration and geographic proximity?

- Courts will not enforce agreements that are broader than necessary to protect a company's legitimate, protectable interests;
- Courts are loathe to enforce agreements that prohibit a former employee from accepting employment across a broad class of jobs in a wide geographical area;
- Example of an agreement that likely would be deemed unenforceable: *Employee (a car salesman) shall not accept employment with any person or entity involved in the automotive industry within a 500 mile radius of the Employer's automobile dealership in Du Quoin, Illinois.*

3. Does the nonsolicitation provision prohibit the solicitation of particular customers that are explicitly identified or does the provision prohibit the solicitation of an undefined class comprised of *all* the employer's customers or prospective customers?

- If the nonsolicitation provision expressly addresses particular customers, the employer must be sure to update the list to reflect new customers and provide the employee with the revised list;
- If the agreement is drafted to prohibit the solicitation of *any* of the *employer's* customers or prospective customers, it may be difficult to enforce the agreement where the former employee had little contact with customers or had no contact with some of the employer's customers.

4. Does the nonsolicitation provision prohibit the solicitation of the *employer's* other employees?

- In Missouri agreements prohibiting the solicitation of an employer's employees are conclusively presumed enforceable so long as their duration does not exceed one year;
- In Illinois, courts look to whether the agreement is reasonable with respect to duration and geographic scope.

5. What types of information does the confidentiality agreement characterize as "confidential"?

- Information that is generally available in the public domain or among individuals operating in a particular industry is generally not protectable;
- If there are particular documents or types of information that are unique to an employer, such documents/information should be described with particularity in the confidentiality agreement. General classes of information should be narrowed to the greatest degree possible.

Litigating Restrictive Covenants

- From time to time, companies hire and fire employees subject to restrictive covenants. As restrictive covenants become more and more common, it is quite likely your company will find itself either seeking to enforce a restrictive covenant or assisting an employee whose former employer is seeking to enforce a restrictive covenant.
- These key issues must be considered when litigation appears likely:

1. What do you do when an employee subject to a restrictive covenant begins work or walks out the door?

■ The employee who is walking Out the Door:

- Remind the employee of his/her contractual obligations to the company;
- Terminate the employee's access to the company's files, electronic data, voicemail or other information;
- Immediately secure the employee's company issued computer and mobile telephone and do not immediately re-issue to another employee;
- If possible, have a forensic copy of the employee's computer hard drive made.

New employees and potential hires:

- Ask whether s/he entered into an employment agreement containing restrictive covenants or agreements specifically addressing post-employment competition, post-employment solicitation of customers/clients or the protection of confidential information and trade secrets with his/her previous employer;
- If the answer to this question is "yes" ask for a copy of the agreement and advise the employee that his or her employment is contingent upon his or her ability to lawfully accept a position with the company without violating his/her contractual obligations to his/her prior employer;
- Will the employee's job place him in jeopardy of violating his/her contractual obligations to his/her prior employer?

2. Will the employee indemnify the company if he violates the terms of his agreement?

- If the agreement does not prohibit merely employing a potential new hire, consider having the employee execute an acknowledgement whereby:
 - S/he agrees to faithfully abide by the terms of his or her contractual obligations (under these circumstances, likely non-solicitation and confidentiality obligations) and to indemnify the company from any liability arising from his/her failure to abide by his/her obligations to his/her prior employer;
 - S/he acknowledges s/he will be terminated should the company have any reason to believe the employee violated his/her post-employment contractual obligations to his or her prior employer in the course of his/her current employment;
- This is an easy, self-serving way to help limit your company's exposure to a tortious interference claim.

3. Is the restrictive covenant enforceable?

- Was there consideration exchanged at the time the agreement was executed?
- Was the employee terminated without cause?
- What is the interest at issue and is it "protectable" under the law?
- Did a material breach occur that may invalidate the agreement?

-
4. What law governs the interpretation of the restrictive covenant at issue and what court has jurisdiction over the dispute?
- This is a very complex and nuanced area of the law;
 - Just because an agreement says that “the law of the State of Pennsylvania shall govern the interpretation of this agreement” does not mean that is actually the case;
 - Similarly, just because an agreement says “all disputes, claims and or causes of action arising under this agreement shall be subject to the jurisdiction of the Hamilton County, Ohio Court of Common Pleas or the United States District Court for the Southern District of Ohio” does not mean that is actually where a lawsuit arising under the agreement will be tried.
 - Simply stated, what appears to be a case that can be litigated locally may morph into litigation in a foreign jurisdiction.

-
5. What evidence exists that will either prove the agreement's enforceability or establish the new employee at issue did not violate his or her agreement with his/her prior employer?
- Electronically stored information (ESI) – if there is any indication that a former employee's departure or a new employee's hiring may result in litigation regarding the enforcement of a restrictive covenant, make sure that all ESI is handled in accordance with the company's existing retention/preservation policy;
 - Preserve all salient paper records;
 - If you receive a “preservation letter” from an attorney, make sure you contact your counsel to discuss the scope of your obligation to preserve relevant documents and electronic data.