



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.

MISSOURI CASELAW UPDATE

R. MICHAEL LOWENBAUM

THE LOWENBAUM PARTNERSHIP, L.L.C.
222 SOUTH CENTRAL AVENUE, SUITE 901
SAINT LOUIS, MISSOURI 63105
(314) 863-0092 TELEPHONE
(314) 746-4848 FACSIMILE

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?**

D. MICHAEL LINIHAN

THE LOWENBAUM PARTNERSHIP, L.L.C.
222 SOUTH CENTRAL AVENUE, SUITE 901
SAINT LOUIS, MISSOURI 63105
(314) 863-0092 TELEPHONE
(314) 746-4848 FACSIMILE



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 chosen body to the most extreme interests of corporate America is reaching unprecedented heights in aggression, seeking to gut the government. It is hard to believe that any more aggressive than the massive assault on worker rights by the Bush majority on the National Labor Relations Board last month.

In the month of September alone, on the eve of the close of the fiscal year, the Bush Board issued 14 costly anti-worker decisions - fully 20 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


THE LOWENBAUM PARTNERSHIP, L.L.C.

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.


THE LOWENBAUM PARTNERSHIP, L.L.C.

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

DANIEL R. BEGIAN

THE LOWENBAUM PARTNERSHIP, L.L.C.
222 SOUTH CENTRAL AVENUE, SUITE 901
SAINT LOUIS, MISSOURI 63105
(314) 863-0092 TELEPHONE
(314) 746-4848 FACSIMILE

The National Labor Relations Act

- A. Ground-Breaking Legislation Enacted in 1935 Established The National Labor Relations Board (“NLRB”).
- B. “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.

2

- C. As an Agency, the NLRB and its employees have generally earned high marks.
- D. Under The NLRA There Are Three (3) Critical Progression Points.
 - 1. The union campaign to get a 30% “showing of interest” – 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.

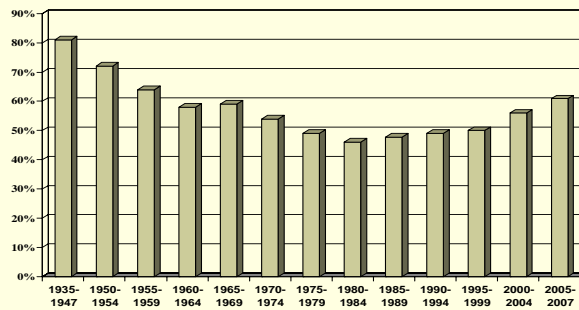
3

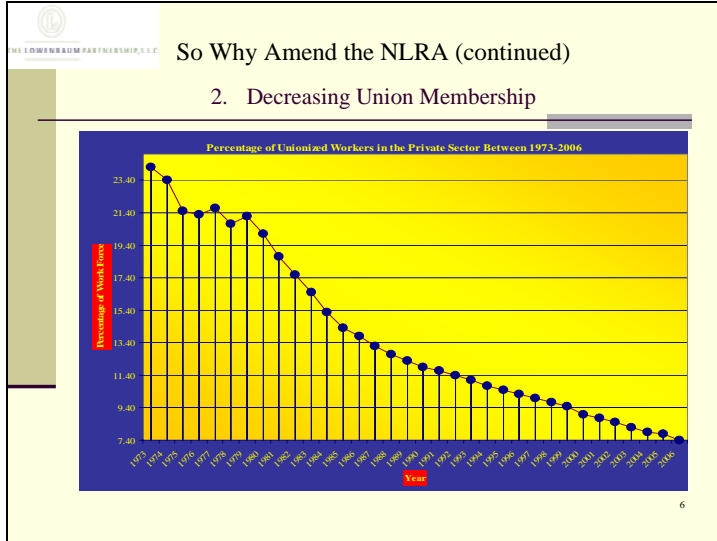
E. At Each of the Above Progression Points, an Employer Has Various Options.

1. The employer 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 NLRA 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"

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

1. Decreased Union Success in NLRB Elections.





So Why Amend the NLRA (continued)

3. Decreased Success In Attaining Initial Contracts.

32% of Workers Lack a Collective Bargaining Agreement One Year After Voting for Union Representation.

7

Employee Free Choice Act (“EFCA”)

- A. Political Climate and EFCA.
 - 1. Barack Obama was the co-sponsor of this legislation.
 - 2. Potentially, a Presidential veto may be over-ridden.
- B. From the Perspective of Employers, EFCA Represents the Most Substantive Change in the NLRA Since 1935.

8

- 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.

9

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).

12

3. Practical Considerations.
 - a. Does it promote employee free choice?
 - b. Does it promote good faith bargaining by employers?
 - c. Does it promote good faith bargaining by unions?
4. 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.

13



THE LOWENBAUM PARTNERSHIP, L.L.C.

**MISSOURI STATUTES THAT
CAN PICK YOU OFF**

ROBERT W. STEWART

THE LOWENBAUM PARTNERSHIP, L.L.C.
222 SOUTH CENTRAL AVENUE, SUITE 901
SAINT LOUIS, MISSOURI 63105
(314) 863-0092 TELEPHONE
(314) 746-4848 FACSIMILE

Time Off Work To Vote

Section 115.639.1 keys:

- Missouri Election.
- Employee must request time off to vote prior to day of election.
- Employee gets three (3) hours off work, **with pay**, while polls are open.
- Employer gets to specify the hours.
- Statute does not apply if there are three (3) consecutive hours while polls are open that he/she is not working.
- If employee votes – no discipline.

115.639.1 Any person entitled to vote at any election held within 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 three hours between the time of opening and the time of closing the polls for the purpose of voting, and any such absence for such purpose shall not be reason for the discharge of or the threat to discharge any such person from such services or employment; and such employee, if he votes, shall not, because of so absenting himself, be liable to any penalty or discipline, nor shall any deduction be made on account of such absence from his usual salary or wages; provided, however, that request shall be made for such leave of absence prior to the day of election, and provided further, that this section shall not apply to a voter on the day of election if there are three successive hours while the polls are open in which he is not in the service of his employer. The employer may specify any three hours between the time of opening and the time of closing the polls during which such employee may absent himself.

115.639.2 Any employer violating this section shall be deemed guilty of a class four election offense.

Political Contributions

Section 130.028.3 keys:

- Employer allows payroll deductions.
- Ten (10) or more employees make **voluntary written** request.
- Employer must deduct contributions and forward to “continuing committee.”
 - A “continuing committee” is essentially a PAC.

130.028.3. An employer shall, upon written request by ten or more employees, provide its employees with the option of contributing to a continuing committee as defined in section 130.011 through payroll deduction, if the employer has a system of payroll deduction. No contribution to a continuing committee from an employee through payroll deduction shall be made other than to a continuing committee voluntarily chosen by the employee. Violation of this section shall be a class A misdemeanor.

Worker's Compensation Retaliation

Section 287.780 keys:

- Employee exercise of Chapter 287 rights.
 - Workplace injury – or
 - Seek medical treatment – or
 - Receive TTD, TPD, PPD, PTD benefits – or
 - File a comp. claim.
- No discharge or other discrimination as a result.

287.780. No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.

Notice Of Pay Cuts

Section 290.100 keys:

- Must give 30 days notice of reduction.
- In writing.
 - Posted – or
 - By mail.
- Remedy: \$50 fine.
- Does not apply if bona fide change in duties.

290.100. Any railway, mining, express, telegraph, manufacturing or other company or corporation doing business in this state, and desiring to reduce the wages of its employees, or any of them, shall give to the employees to be affected thereby thirty days' notice thereof. Such notice may be given by posting a written or printed handbill, specifying the class of employees whose wages are to be reduced and the amount of the reduction, in a conspicuous place in or about the shops, station, office, depot or other place where said employees may be at work, or by mailing each employee a copy of said notice or handbill, and such company or corporation violating any of the provisions of this section shall forfeit and pay each party affected thereby the sum of fifty dollars, to be recovered by civil action in the name of the injured party, with costs, before any court of competent jurisdiction.

Final Pay Check

Section 290.110 keys:

- Discharged employee.
 - Not an employee whose remuneration is primarily commissions.
- Final pay is due on date of discharge.
- “Without abatement or reduction.”
- No effective remedy **unless**:
 - Employee makes written request for final check ...
 - Then, he/she must be paid in full within 7 days (not vacation and/or sick pay).
 - If not, employee stays on payroll until paid, with 60 days cap.

290.110. Whenever any person, firm or corporation doing business in this state shall discharge, with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of the servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of the discharge or refusal to longer employ and the servant or employee may request in writing of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station or office where a regular agent is kept; and if the money or a valid check therefor, does not reach the station or office within seven days from the date it is so requested, then as a penalty for such nonpayment the wages of the servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid; provided, such wages shall not continue more than sixty days. This section shall not apply in the case of an employee whose remuneration for work is based primarily on commissions and whose duties include collection of accounts, care of a stock or merchandise and similar activities and where an audit is necessary or customary in order to determine the net amount due.

Service Letter

Section 290.140 keys:

- Seven or more employees.
- Employed at least 90 days.
- Written request for service letter.
- Within one year after leaving employment.
- Certified, return receipt requested.
- Citation to statute.
- 45 days to issue letter.
- Letter must truthfully state:
 - Nature of service
 - Character of service
 - Duration of Service
 - True cause for discharge/quit.

- 290.140. 1. Whenever any employee of any corporation doing business in this state and which employs seven or more employees, who shall have been in the service of said corporation for a period of at least ninety days, shall be discharged or voluntarily quit the service of such corporation and who thereafter within a reasonable period of time, but not later than one year following the date the employee was discharged or voluntarily quit, requests in writing by certified mail to the superintendent, manager or registered agent of said corporation, with specific reference to the statute, it shall be the duty of the superintendent or manager of said corporation to issue to such employee, within forty-five days after the receipt of such request, a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such employee was discharged or voluntarily quit such service.
- 290.140. 2. Any corporation which violates the provisions of subsection 1 of this section shall be liable for compensatory but not punitive damages but in the event that the evidence establishes that the employer did not issue the requested letter, said employer may be liable for nominal and punitive damages; but no award of punitive damages under this section shall be based upon the content of any such letter.

Sales Commissions

Section 407.912 keys:

- Employer and salespersons can agree in **writing** when commission is due.
 - Permissible to agree that salesperson must be employed on date commission would otherwise be due.
- If no written contract – or if written contract does not address **when** commission is due or does so unclearly, the commission is due:
 - When purchaser accepts delivery, or
 - When Employer is paid, or
 - When custom and usage dictates.
- Upon termination of salesperson, all commissions due must be paid within 30 days, as well as commissions which become due after termination.
- Remedy: Actual damages plus annualized pro rata commissions until payment made plus costs plus reasonable attorney's fees (§ 407.913).

- 407.912.1. When a commission becomes due shall be determined in the following manner:
- (1) The written terms of the contract between the principal and sales representative shall control;
 - (2) If there is no written contract, or if the terms of the written contract do not provide when the commission becomes due, or the terms are ambiguous or unclear, the commission shall be paid when the product or service is delivered and accepted by the purchaser or the principal receives satisfaction in full;
 - (3) If neither subdivision (1) nor (2) of this subsection can be used to clearly ascertain when the commission becomes due, then the commission shall be due on the date the principal accepts the order and receives satisfaction in full, unless the custom and usage prevalent in this state for the parties' particular industry is different, in which event such custom and usage shall prevail.
- 407.912.2. Nothing in sections 407.911 to 407.915 shall be construed to impair a sales representative from collecting commissions on products or services ordered prior to the termination of the contract between the principal and the sales representative but delivered and accepted by the purchaser after such termination.
- 407.912.3. When the contract between a sales representative and a principal is terminated, all commissions then due shall be paid within thirty days of such termination. Any and all commissions which become due after the date of such termination shall be paid within thirty days of becoming due.

Time Off For Crime Victims/Witnesses

Section 595.209.1(14) keys:

- **Time off** for:
 - Victims of certain serious crimes (no written request required).
 - Victims of lesser crimes, and witnesses to crimes (written request required).
- **Purpose** of time off must be:
 - To honor subpoena to testify in criminal proceeding, or
 - To prepare testimony for criminal proceeding, or
 - To attend a criminal proceeding.
- **Prohibitions**
 - No discharge or discipline for missing time.
 - No forced use of vacation time, personal time or sick leave.
- Time off can be **unpaid**.

595.209. 1. The following rights shall automatically be afforded to victims of dangerous felonies, as defined in section 556.061, R.S.Mo., victims of murder in the first degree, as defined in section 565.020, R.S.Mo., victims of voluntary manslaughter, as defined in section 565.023, R.S.Mo., and victims of an attempt to commit one of the preceding crimes, as defined in section 564.011, R.S.Mo.; and, upon written request, the following rights shall be afforded to victims of all other crimes and witnesses of crimes:

- (14) An employer may not discharge or discipline any witness, victim or member of a victim's immediate family for honoring a subpoena to testify in a criminal proceeding, attending a criminal proceeding, or for participating in the preparation of a criminal proceeding, or require any witness, victim, or member of a victim's immediate family to use vacation time, personal time, or sick leave for honoring a subpoena to testify in a criminal proceeding, attending a criminal proceeding, or participating in the preparation of a criminal proceeding;



THE LOWENBAUM PARTNERSHIP, L.L.C.

**UPDATE ON ADMINISTRATION OF EMPLOYEE
BENEFIT PLANS**

STANLEY G. SCHROEDER

THE LOWENBAUM PARTNERSHIP, L.L.C.
222 SOUTH CENTRAL AVENUE, SUITE 901
SAINT LOUIS, MISSOURI 63105
(314) 863-0092 TELEPHONE
(314) 746-4848 FACSIMILE



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.

MISSOURI PUBLIC EMPLOYER UPDATE

IVAN L. SCHRAEDER

THE LOWENBAUM PARTNERSHIP, L.L.C.
222 SOUTH CENTRAL AVENUE, SUITE 901
SAINT LOUIS, MISSOURI 63105
(314) 863-0092 TELEPHONE
(314) 746-4848 FACSIMILE

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?

8th Circuit Cases

- *Taxi Connection v. Dalcota, Minn. and Eastern RR Corp.* 512 F.3d 823 (8th Cir. 2008)
 - statute of limitation begins to run on discrimination complain when contract is terminated
- *Engle v. Rapid City School District* 506 F.3d 1118 (8th Cir. 2007)
 - failure to terminate harassing supervisor after 2nd offense allows complaining employee to overcome summary judgment
- *Dovenmueller v. St. Cloud Hospital*, 509 F.3d 435 (8th Cir. 2007)
 - Nurse in chemical dependency remission is not disabled under ADA

Part II

Missouri Cases of Note

- **Decided**
 - *Independence NEA v. Independence School District* 223 S.W.3d 131 (2007)
 - All employees in Missouri have a constitutional right to bargain collectively, including public employees. Public union contracts are enforceable
 - *Wright v. State of Missouri* (Cole Co. Circuit Court No. 07AC-CC00068)
 - The initiative adopted by the voters amending the state's overtime law does not cover any governmental entity. (MO Dept of Labor and Industrial Relations will not enforce the law)
 - *Lomax v. Daimler-Chrysler Corp* 243 S.W.3d 474 (ED 12.18.07)
 - Employee entitled to trial in MHR and disability case
 - *Delmar Gardens North Operating, LLC v. The Honorable Gary M. Gaertner, Jr.* 239 S.W.3d 608 (Mo en banc 2007)
 - Employee privacy in employee files

- **Pending Decisions**

- MSTA v. Wentzville R-IV School District (St. Charles Co. Cir. Ct. #0811-CV03534)
 - Challenges constitutional rights violated for recognition of union without election
- Carpenters District Council v. City of St. Louis – seeks to force adoption of pay schedule negotiated by unions with personnel department
- FOP v. City of Jennings (St. Louis Cir. Ct.)
 - Seeks court order requiring City to recognize police union without election under state constitution.

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

- **SCS HCS HB 1883 – Employment Practices** (signed by Governor – 06.26.08)

This bill changes the laws regarding employment practices. In its main provisions, the bill:

- 1) Prohibits employers from requiring employees to have personal identification microchip technology implanted in their bodies. Any employer who violates this provision will be guilty of a class A misdemeanor;
- 2) Specifies that in applying the provisions of the Workers' Compensation Law it is the intent of the legislature to reject and abrogate Schoemehl v. Treasurer of the State of Missouri, 217 S.W.3d 900 (Mo. bane 2007) and all cases

interpreting, applying, or following this case and reaffirms that the right for compensation for the permanent total disability of an injured employee terminates on the date of the injured employee's death;

3) Re-enacts the federal overtime standards in effect prior to the passage of Proposition B (2006) regarding the minimum wage increase, including the exemptions for firefighters, commissioned employees, and flex-time pay rate employees; and

4) Prohibits public and private employers from terminating an employee for being activated to a national disaster response by the Federal Emergency Management Agency (FEMA) or for being absent from or late to work due to his or her volunteer emergency service. If an employee is absent from or late to work due to his or her service with FEMA, the employee may lose pay and may be required to provide a written verification from his or her supervisor as to the time and date of the emergency. The member must make a reasonable effort to notify his or her employer that he or she may be absent from or late to work due to an emergency.

The bill contains an emergency clause for the provisions regarding the Workers' Compensation Law.

- **SCS HCS HB 2041 – Employment** (signed by Governor – 06.26.08)

This bill changes the laws regarding employment.

DISCLOSURE OF CONFIDENTIAL INFORMATION

The Division of Employment Security within the Department of Labor and Industrial Relations may disclose confidential information obtained from any employing unit or individual regarding employment records required by the division in the administration of the Missouri Employment Security Law to a state or federal official or agency as required by law. It will be at the division's discretion for any other party to receive disclosures as authorized by state or federal law.

Any person who intentionally discloses or otherwise fails to protect confidential information in violation of these provisions will be guilty of a class D felony.

VOCATIONAL AND TECHNICAL EDUCATION

Currently, the Commissioner of Education in cooperation with the Director of the Division of Employment Security within the Department of Labor and Industrial Relations establishes procedures to provide grants to certain public schools for new programs, curriculum enhancement, equipment, and facilities in order to upgrade vocational and technical education in the state. The bill replaces the Director of the Division of Employment Security with the Director of the Division of Workforce

Development of the Department of Economic Development in their cooperative capacity with the Commissioner of Education to establish the procedures.

UNEMPLOYMENT CLAIMS QUALIFICATION REQUIREMENTS

Individuals are required to make an unemployment claim within 14 days from the last day of the week being claimed and report to an employment office to participate in a reemployment assessment and reemployment services in order to qualify for unemployment benefits unless these requirements are waived for good cause.

PROHIBITED EMPLOYMENT PRACTICES

Employers are prohibited from requiring an employee to have a personal identification microchip technology implanted.

An employer in violation of this provision will be guilty of a class A misdemeanor.

WAR ON TERROR VETERANS UNEMPLOYMENT COMPENSATION

A Missouri resident who is a member of a United States armed forces reserve unit or the National Guard located outside Missouri can qualify as a war on terror veteran for the purpose of receiving veteran's unemployment benefits.

Any overpayment of benefits will be recovered through billing, setoffs against tax refunds, intercepts of lottery winnings, and certain other recovery procedures authorized under Missouri law.

DIVISION OF EMPLOYMENT SECURITY

The Division of Employment Security is exempt from notifying contributing base period employers of an initial claim if the employer paid the worker \$400 or less in the worker's base period.

The division is allowed to deliver notices electronically if requested by an employer or claimant.

An employer is considered an interested party in a separation issue if the claimant was separated from the employer during a claimed week.

OVERTIME PAY

The bill reenacts the federal overtime standards in place prior to passage of Proposition B (2006) including exemptions for firefighters, commissioned employees, and flex-time rates.

The bill becomes effective October 1, 2008.

- **CCS SS HCS HB 1549, 1771,1395, and 2366 – Illegal Alien and Immigration Status Verification** (signed by Governor – 07.08))

This bill changes the laws regarding illegal aliens and immigration status verification.

ENFORCEMENT OF IMMIGRATION LAWS (Section 43.032, RSMo)

The Superintendent of the State Highway Patrol is required, subject to appropriations, to designate some or all members of the patrol to be trained in accordance with a memorandum of understanding between Missouri and the United States Department of Homeland Security concerning the enforcement of federal immigration laws during the course of their normal duties in Missouri.

SANCTUARY CITIES (Section 67.307)

Any county, city, town, or village is prohibited from enacting a sanctuary policy. Any municipality that enacts a sanctuary policy will be ineligible for money provided through grants administered by any state agency or department until the policy is repealed or is no longer in effect. Upon complaint by any state resident or before the provision or award of any funds or grants to any government entity, agency, or political subdivision, any member of the General Assembly may request that the Attorney General issue an opinion as to whether the government entity, agency, or political subdivision has a sanctuary policy. County and municipal law enforcement officers must be notified in writing of their duty to cooperate with state and federal agents and officials regarding matters of immigration.

PUBLIC BENEFITS (Section 208.009)

Aliens unlawfully present in the United States are prohibited from receiving a state or local public benefit unless it is offered under 8 U.S.C. 1621(b). Documentary evidence accepted by the Department of Revenue for obtaining a driver's license will suffice as proof of citizenship, permanent residency, or lawful immigration status when applying for benefits. Individuals can temporarily receive state or local public benefits for up to 90 days while obtaining the necessary documentation or indefinitely if the applicant provides a copy of a completed birth certificate application which is pending. Nonprofit organizations regulated by the Internal Revenue Service are not required to enforce these restrictions, nor are they prohibited from providing aid.

DRIVER'S LICENSES (Sections 302.063, 302.720, and 578.570)

The Department of Revenue is prohibited from issuing driver's licenses to illegal aliens and persons who cannot prove lawful presence in the United States. Missouri will not extend full faith and credit to out-of-state driver's licenses issued to illegal aliens.

The commercial driver's license written test must only be given in English. Translators will not be allowed for applicants taking the test.

Penalties for driver's license fraud are established. A person is prohibited from knowingly or in reckless disregard of the truth:

- a) Assisting any person in committing fraud or deception during a driver's license, nondriver's license, or instruction permit examination process;
- b) Assisting any person in applying for a driver's license, instruction permit, or nondriver's license that contains or is substantiated with false or fraudulent information or documentation, conceals a material fact, or is fraudulent; or
- c) Engaging in a conspiracy to commit any of the preceding acts or aids or abets the commission of any of the acts.

Any person who violates a driver's license fraud provision will be guilty of a class A misdemeanor.

MISCLASSIFICATION OF EMPLOYEES (Sections 285.309 and 285.500 -285.515)

Employers with five or more employees are required to file federal 1099-miscellaneous forms with the Department of Revenue within the same deadline as the filing of Missouri Form 99 forms. After the fifth violation, an employer will be fined up to \$200 for each additional violation.

Employers are prohibited from knowingly and willfully misclassifying a worker as an independent contractor by failing to claim the worker as an employee when the employer knows that the worker is an employee. The Attorney General is given certain investigative and prosecutorial powers regarding misclassification of workers. Anyone violating this provision will be subject to a fine of \$50 per day per misclassified worker up to \$50,000.

FEDERAL EMPLOYMENT AUTHORIZATION (Sections 285.525 - 285.560)

Business entities and employers are prohibited from knowingly employing, hiring, or continuing to employ illegal aliens to perform work in Missouri. Participation in a federal work authorization program which enables employers to electronically verify employment eligibility is required for all public employers and business entities receiving a state contract or grant in excess of \$5,000 or a state-administered tax credit, tax abatement, or loan from the state. Participation in a federal program is an affirmative defense to an allegation that a business entity knowingly hired an illegal alien.

A general contractor or subcontractor will not be held liable under the provisions prohibiting employment of illegal aliens, even if the general contractor's or subcontractor's direct subcontractor hires an illegal alien, if the contract binding the contractor and subcontractor states that the direct subcontractor is not knowingly in violation of the prohibition and will not violate the prohibition and the contractor or

subcontractor receives a sworn affidavit under penalty of perjury attesting to the fact that the direct subcontractor's employees are lawfully present in the United States.

Failing to provide identity information on employees within 15 business days after receipt of the request by the Attorney General will result in the suspension of a company's applicable local licenses, permits, and exemptions until the information is supplied.

Employing an illegal alien will result in the suspension of a company's applicable local licenses, permits, and exemptions for 14 days. A second violation will result in suspension for a period of one year. A third or subsequent violation will result in permanent suspension.

A violation of the prohibition against employing illegal aliens by a business entity awarded a state contract or grant or state-administered tax credit, tax abatement, or loan from the state will result in the termination of the contract and the suspension or debarment of the business entity from doing business in this state for a period of three years. A second or subsequent violation will result in the termination of the contract and the permanent suspension or debarment of the business entity from doing business in this state. The state may withhold up to 25% of the total amount due to the business entity upon termination of the contract.

Any person who files a frivolous complaint not shown by clear and convincing evidence to be valid will be liable for actual, compensatory, and punitive damages to the alleged violator.

Only the federal government can determine whether a worker is an unauthorized alien.

The Attorney General must maintain a database documenting any business entity whose permit, license, or exemption has been suspended or whose state contract has been terminated.

Failure by a municipality or county to suspend any applicable license or permit of a violator as directed by the Attorney General within 15 business days after notification by the Attorney General will be deemed a violation of Section 67.307 governing sanctuary cities and will subject the municipality or county to the specified penalties.

If the federal government discontinues or fails to authorize any work authorization program, Sections 285.525 - 285.550 will be reviewed by the General Assembly to determine if they need to be repealed.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA) TRAINING (Section 292.675)

Effective August 28, 2009, contractors and subcontractors who contract to work on public works projects must provide a 10-hour OSHA construction safety program, or similar program approved by the Department of Labor and Industrial Relations, to be completed by their on-site employees within 60 days of beginning work on the

construction project. Contractors and subcontractors in violation of this provision will forfeit to the public body \$2,500 plus \$100 a day for each employee who is employed without training. Public bodies and contractors may withhold assessed penalties from the payment due to contractors and subcontractors.

BAIL (Section 544.470)

If a judge reasonably believes that a person is an illegal alien, bail will be denied at least until the person can provide verification of lawful presence in the United States, at which time a judge must determine whether release on bail is otherwise warranted. If lawful presence verification cannot be provided, a person must be held in custody until discharged by due course of law.

TRANSPORTING OR CONCEALING ILLEGAL ALIENS (Section 577.722)

The crimes of transporting and concealing an alien knowingly or in reckless disregard of the fact that the alien has entered or remained in the country illegally are created. A violation of either of these crimes is a felony punishable by not less than a one-year imprisonment, a fine of not less than \$1,000, or both.

IMMIGRATION STATUS VERIFICATION UPON ARREST (Section 577.900)

An arresting law enforcement agency is required to verify within 48 hours through the United States Department of Homeland Security the lawful immigration status of a person charged with a crime and held in confinement if verification cannot be made from documents in the possession of the prisoner or after a reasonable effort by the arresting agency. Upon verification that the prisoner is an illegal alien, the arresting agency must notify the federal department. Until August 28, 2009, this provision will only apply to officers employed by the State Highway Patrol, State Water Patrol, Capitol Police, State Fire Marshal's Office, and Division of Alcohol and Tobacco Control within the Department of Public Safety.

COMMUNICATION WITH FEDERAL OFFICIALS (Section 650.681)

No government entity or official or political subdivision can prohibit or restrict any other government entity or official from communicating or cooperating with federal officials on the immigration status of any person in this state. No person or agency can prohibit or restrict any public employee from communicating or cooperating with local, state, or federal officials on the immigration status of any person in this state.

Upon complaint by any state resident or before the provision or award of any funds or grants to any government agency or political subdivision, any member of the General Assembly may request that the Attorney General issue an opinion as to whether the government agency or political subdivision has policies prohibiting or restricting public officials or employees from communicating or cooperating with local, state, or federal officials on the immigration status of any person in this state.

The provisions regarding sanctuary cities, federal employment authorization, and communication with federal officials become effective January 1, 2009, and the provisions regarding OSHA training become effective August 28, 2009.

DEPUTY SHERIFFS' SALARY SUPPLEMENT BILL

HB 2224 codified as
Section 57.278 RSMO, Section 57.280 RSMO, Section 488.435 RSMO,
Section 650.350 RSMO

- Effective August 28, 2008
- RELATED TO PAY & BENEFITS OF DEPUTIES
- No specified level of supplemental pay provided in law
- Supplemental amounts to be set periodically by MoSMART) – five sheriffs by governor

NO RULES SET UP YET

AMOUNTS TO BE DETERMINED PERIODICALLY

TAKE CARE WITH ANNUAL APPROPRIATIONS

- **do not put in base pay - NOT A BASE BUILDER OR CUMULATIVE FROM TIE TO TIME OR YEAR TO YEAR**
- **handle as supplemental payment when and as received**
- **do not over-anticipate**
- **have separate line item in County Commission budget, not sheriff's budget – TAKE CARE HERE**
- **watch second year appropriation**



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

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

COREY L. FRANKLIN
THE LOWENBAUM PARTNERSHIP, L.L.C.
222 SOUTH CENTRAL AVENUE, SUITE 901
SAINT LOUIS, MISSOURI 63105
(314) 863-0092 TELEPHONE
(314) 746-4848 FACSIMILE

-
- 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.