Employment Law Letter

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FOXWOODS ELECTION MAY BOOST UNION FORTUNES

Unions may only represent about one out of every ten employees in the U.S. workforce, but they seem to make a disproportionate amount of news for their numerical strength. One of the best examples of that in 2007 was the successful organizing effort by the UAW involving approximately 3000 dealers at the Foxwoods Resort Casino.

The Mashantucket Tribal Nation, which owns the casino, attempted to block a representation election by arguing that the National Labor Relations Board has no jurisdiction over an enterprise run by an Indian tribe on its own reservation. They asserted that any unionization effort should be conducted within the framework of a tribal law passed last summer to deal with such issues.

NLRB Regional Director Peter Hoffman rejected that argument, citing a recent decision involving the San Miguel Indian Bingo & Casino in California. In that case, the Board held, and a federal court agreed, that the location of a business on an Indian reservation isn't determinative of NLRB jurisdiction. The more important distinction, the Board said, is whether the enterprise is commercial or governmental in nature. As Hoffman pointed out, Foxwoods is unquestionably involved in interstate commerce.

Although the tribe sought review of Hoffman's decision by the NLRB in Washington, their request was denied in an unpublished decision, based again on the San Miguel case. Accordingly, the union election went ahead on November 24, and a solid majority of the dealers chose UAW representation.

The casino has filed various objections to the election, based on allegations of

IN SUMMARY:

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misconduct by the union and its supporters and other matters. It will take at least a few months to resolve these issues, but it is beginning to look like face-to-face bargaining may be a matter of when, not if.

Our opinion is that the significance of the Foxwoods election has yet to be determined. Other casino workers at both Foxwoods and Mohegan Sun will no doubt be watching closely to see whether the UAW can negotiate a contract that demonstrates significant advantages from unionization. Workers in other organizations in the region may also be influenced by the outcome of the Foxwoods negotiations. This is especially true in service businesses, which tend to be tied to a particular location, and can't easily move to other parts of the country or the world where labor costs are lower and unions are not so prevalent.

EEOC PERMITS BENEFITS CUTS AT AGE 65 IN RETIREE PLANS

Following through on an intention signaled some time ago, the Equal Employment Opportunity Commission has issued new regulations addressing retiree health insurance arrangements, and specifically permitting the reduction of such benefits at age 65 in recognition of Medicare eligibility.

Labor and management groups were in rare agreement endorsing the move, which is seen as easing the pressure of rising health care costs on both employer plans and union-supported (Taft-Hartley) funds. The concern was that in the absence of such relief, employers and perhaps even unions would stop providing retiree health insurance altogether. This would have a particularly significant impact on early retirees who might have difficulty obtaining any coverage at all until they were eligible for Medicare.

AARP, on the other hand, blasted the EEOC's move, saying it is "in direct conflict" with the Age Discrimination in Employment Act, which has been on the books since 1967. AARP tried unsuccessfully to block the EEOC action in federal court, and has now appealed to the Supreme Court. The organization claimed that ten million people over age 65 could be adversely affected by the new rule.

Many employers had anticipated the EEOC's action, and were already limiting or eliminating coverage for retirees over age 65. Since Medicare now offers drug coverage, there is even more logic in cutting back employer-provided coverage upon Medicare eligibility.

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NEW RULES ESTABLISHED FOR USE OF EMPLOYER EMAIL SYSTEMS

One of the more hotly debated issues in the workplace in the past few years is what use employees are permitted to make of their employer's email system. This question is particularly important in the context of a union organizing effort, since email provides a quick, easy and inexpensive method of communicating with potential voters.

Until recently, the rules were fairly clear and easy to follow. One, use of employer facilities and equipment such as email by non-employees (including union organizers) could be absolutely prohibited. Two, employers could prohibit all non-business use of their email systems by their employees if they wished. Three, if they permitted any non-business uses, they could not pick and choose between union-related use and other non-business uses. Therefore, unless an employer strictly enforced a business-only rule, and disciplined employees even for such trivial matters as exchanging email jokes or on-line shopping during the lunch hour, it was risky to prohibit union-related communications between employees.

Rule one still stands. However, challenges to rules two and three produced landmark results in a National Labor Relations Board case decided in late December. The case involved a newspaper in Oregon that maintained a policy banning the use of its email system by employees for "non-job-related solicitations." In practice, however, employees were permitted to send and receive emails on a variety of personal matters, some of which were clearly solicitations. The president of a union representing over 100 of the newspaper's employees was disciplined for sending messages soliciting support for the union, and charges were filed with the NLRB.

The union and its supporters argued that employers should not be allowed to make or enforce email rules that have the effect of prohibiting union-related communications. Email is such a common form of communication today, they asserted, that it should be treated like face-to-face conversations. Discussion of union issues in such conversations can't be prohibited as long as the participants are not on working time.

By a 3-2 vote, the Board rejected the union's position. The majority felt that employers have important property interests in their facilities and equipment, which should not be subordinated to employee rights to form or assist unions without some compelling justification. Where the opportunity for employees to converse in person is readily available, no such justification exists, they said.

The same majority went further, and dramatically changed the rules with regard to drawing lines as to what non-business uses of email are permitted. Adopting the logic of a federal appeals court, and overruling some of its own decisions, the Board majority said that union-related communications have to be treated like other communications of the same type, but that doesn't mean all non-business messages have to be treated equally. They said:

> "An employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g. a car for sale) and solicitations for the commercial sale of a product (e.g. Avon products), between invitations for an

organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business related use."

Our opinion is that these principles will apply to employer bulletin boards, mailboxes, and other facilities as well as email. Businesses that are concerned about possible union activity will no doubt want to consider the new NLRB position on these matters when adopting or revising their policies on workplace solicitation and similar matters. However, it may not be easy to draw clear lines between personal and organizational messages, or between solicitations and "mere talk". For example, where would a message about "why I think we need a union" fall?

For those employers who already have a union, of course, workplace rules can't be changed without dealing with the union first, unless the applicable collective bargaining agreement has a strong management rights clause. Also, workplace rules that overtly discriminate against union activity or communications may be found to constitute prohibited subjects of bargaining.

LEGAL BRIEFS
. . . and footnotes

Loose Lips Sink Suits: Two recent court decisions demonstrate how stray comments by managers can cause big problems in employment litigation. In one case, a lawsuit by a 56-year-old terminated employee survived a summary judgment motion because the company's president had said he was "getting killed on insurance premiums" because of the average age of the company's workforce, that the company "had to get younger," and that he "had to do something about" a 60-year-old employee with health problems. Apparently there was no direct evidence of any discriminatory intent toward the plaintiff, but the president's casual comments created an inference of bias toward older workers. In the other case, an employee of Hartford Financial Services sued because her position was eliminated and she was laid off despite being advised by her supervisor that she was a "shoo-in" for a promotion that ultimately went to someone else. Her claim of negligent misrepresentation also survived her former employer's summary judgment motion.

Problematic Probation Provision: The importance of carefully worded personnel policies was underlined in a recent court decision involving a manager terminated after about a year on the job. He sued based in part upon an employee handbook that referenced a 90-day "probationary at will period." A federal judge in Connecticut ruled that this phrasing created an argument that after 90 days, employment was no longer at will, and just cause was required for termination. The court found this might be enough to create an implied contract between the parties. Obviously, a legal review of the handbook could have avoided this problem.

Damned If You Do: The City of New Haven was involved in a dispute with a union over the displacement of an employee due to a reduction in the workforce, but managed to negotiate a resolution of the dispute by agreeing to restore the employee to his former rank

when a position became available due to a retirement. However, another employee (who has been a thorn in the City's side for years), sued to block the action. She claimed the settlement constituted a promotion, and since promotional procedures are not subject to collective bargaining in a municipality with a functioning civil service system, the City had no right to bypass that system to settle the union grievance. The state's Supreme Court agreed, and told the City it must fill the position through the normal procedure.

$10M Award Cut in Half: About a year ago we reported on one of the largest jury verdicts in an employment case in Connecticut history, a judgment in favor of a GE engineer that included $10,000,000 in punitive damages. The employee alleged that he was mistreated and ultimately terminated because of his age, ethnic origin, physical disabilities, and because he complained about the discrimination against him. GE argued the verdict was excessive. A federal judge agreed, and cut the award to $5,000,000, which he felt was justified based on GE's "reprehensible conduct." The plaintiff and his wife have both passed away, but his two teenage children will be quite wealthy.

Lunch Hour Injury Not Compensable: A Pratt & Whitney employee was in the habit of taking a walk on the company's grounds after eating lunch and before resuming work. The employer knew she and others engaged in this practice, and made no effort to stop it. After the employee fell and was injured on one of these walks, she was awarded workers compensation. The commissioner found the employee's exercise regimen benefited Pratt & Whitney, and therefore the "social and recreational exemption" from workers compensation coverage did not apply. The Compensation Review Board, however, disagreed. They pointed out the employer did not promote or encourage the employee's walking, nor was there any evidence that she exercised for the benefit of her employer. The Board distinguished a 1997 decision in which the Connecticut Supreme Court held that under the facts of that case, the activity of eating lunch, out of which the employee's injury arose, was incidental to his employment.

CT FEPA Broader Than Title VII: Just in case anyone needed a reminder, a recent decision involving the Milford Board of Education illustrates how much more expansive Connecticut's Fair Employment Practices Act is than its federal equivalent, Title VII of the Civil Rights Act of 1964. Under federal law, an employee is only deemed to have a physical disability if he or she is substantially limited in one or more major life activities. Under the Connecticut statute, however, that's not the case. In the Milford decision, a judge said an employee with severe hypertension may have a disability covered under the FEPA even though his ailment may be controlled with medication and may not limit any major life activity.

Quit Without Complaining is Without Cause: An employee may be able to quit work voluntarily and still collect jobless benefits if he leaves for "good cause attributable to the employer." That is, if working

conditions would cause a reasonable person to resign, an employee who quits may still collect unemployment compensation. A behavioral health worker invoked that principle when he left work due to additional burdens imposed on him after a promotion. These allegedly included having to perform elements of two jobs, and carrying an unreasonable caseload. However, the Compensation Board of Review found, and a Superior Court judge agreed, that the claimant had failed to discuss his concerns with his employer, ask for relief, request a transfer, or provide an opportunity to his employer to suggest other alternatives. Therefore, unemployment compensation benefits were denied.

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