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ACCOLADES

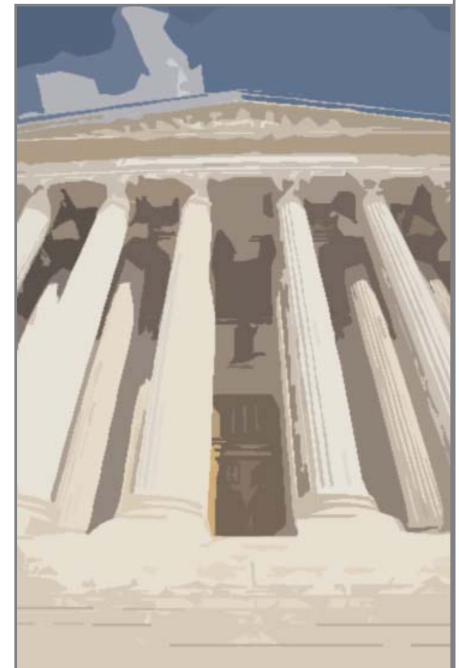
Please join us in congratulating Dallas associate **Sean Urich** on becoming Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization.

SAVE THE DATE

02/22/2007 - Dallas. Firm attorneys will conduct the second annual all-day *Seminar on Labor & Employment Law Developments*. Registration information about this seminar can be found at www.thompsoncoe.com.

TEXAS SUPREME COURT CHANGES STANCE ON ENFORCEABILITY OF NON-COMPETE AGREEMENTS IN AT-WILL EMPLOYMENT

The Texas Supreme Court recently handed down a favorable decision to employers who require their employees to sign agreements not to compete as a condition of employment. In *Alex Sheshunoff Management Services v. Johnson, et al.*, a unanimous Texas Supreme Court held that an at-will employee's agreement not to compete was enforceable. Although the decision was long awaited, the ruling came as a surprise for many practitioners who would have predicted that the non-compete was unenforceable. Not only did the Court rule that the non-compete was enforceable, the Court also modified its prior landmark, covenant not to compete decision, *Light v. Centel Cellular Co.*



Under *Light*, in order for a non-compete to be enforceable, the employer was required to show that it performed its promise to provide the employee with confidential information at the very same time the employee signed the non-compete agreement. The Texas Supreme Court now holds that an at-will employee's non-compete agreement becomes enforceable when the employer performs its promise to provide the confidential or trade secret information, even if that occurs in the future, after the employee has signed the non-compete agreement, so long as the employee received the confidential information before he leaves the company. After the *Sheshunoff* decision, there is no longer a requirement that the exchange of promises be simultaneous with the employee's execution of the non-compete agreement.

The case arose in Austin, Texas. Kenneth Johnson started working for Alex Sheshunoff Management Services ("ASM") as an at-will employee in approximately 1993. ASM provides consulting services to banks and other financial institutions. After working at ASM for four years, Mr. Johnson was promoted to Director of ASM's Affiliation Program, a program designed to maintain relationships with ASM's clients and prospective clients. After his promotion, Mr. Johnson was required to sign a non-compete agreement as a condition of continued employment. Mr. Johnson signed the agreement in 1998. The agreement he signed contained the following promise from ASM:

See *"Agreement Regarding Special Training"* on Page 2

AGREEMENT REGARDING SPECIAL TRAINING (CONT'D FROM PAGE 1)

> To assist Employee in the performance of his/her duties, Employer agrees to provide to Employee, special training regarding Employer's business methods and access to certain confidential and proprietary information and materials belonging to Employer, its affiliates, and to third parties, including but not limited to, customers and prospects of the Employer who have furnished such information and materials to Employer under obligations of confidentiality.

The agreement also specified information deemed to be confidential and required Mr. Johnson to maintain the information as strictly confidential. The agreement also included a covenant not to compete, providing that for one year after his termination, Mr. Johnson would not provide consulting services to any of ASM's clients to whom he had provided services in excess of 40 hours within the last year of his employment. Additionally, Mr. Johnson agreed that he would not solicit or aid any party in soliciting any affiliation member or previously identified prospective client or affiliation member to do business with a company other than ASM.

"...Texas courts will still require the non-compete agreements to contain reasonable restrictions as to time, geographic area, and scope of activity to be restrained.'"

In 2001, Mr. Johnson began receiving confidential information about ASM's plans to introduce a bank overdraft protection product. During that same time frame, Strunk & Associates, a major competitor of ASM, contacted Mr. Johnson about hiring him. Ultimately, Mr. Johnson left ASM and joined Strunk & Associates.

ASM sued Mr. Johnson, alleging that he had breached his non-compete agreement. The company sought injunctive relief and monetary damages. Mr. Johnson's new employer, Strunk & Associates, intervened in the lawsuit. Mr. Johnson argued that because ASM did not share its confidential or trade secret information with him at the time he signed the non-compete agreement, the non-compete agreement was, therefore, unenforceable under the *Light* decision. The trial court agreed and held that the non-compete agreement was unenforceable. The Third Court of Appeals in Austin affirmed the trial court's decision.

The Texas Supreme Court disagreed with the two courts below it and stated that Mr. Johnson's non-compete agreement was enforceable. The Court stated that an at-will employee's non-compete agreement becomes enforceable when the employer makes good on its promises to provide the confidential information to the employee. In so holding, the Texas Supreme Court modified its decision of *Light*, which did require the employer to perform on its promise at the same time the employee signed the non-compete agreement.

Although this decision is a major victory for employers in the State of Texas, Texas courts will still require the non-compete agreement to contain reasonable restrictions as to time, geographic area, and scope of activity to be restrained. Courts will not only focus upon the confidentiality of the information the employee received, the importance of the information to the employer, and when the employee received the information, but also whether the restrictions that the employer places on the employees are justified.

Employers should also not be lulled into a false sense of security on the amount of time it has to share the confidential information with the employees to be restrained. An employer who waits until the eve of the employee's departure to share the confidential information may be deemed to be acting in bad faith, placing the enforceability of the non-compete agreement into issue.

Alex Sheshunoff Management Services v. Johnson, et al.

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New Federal Rules Address "Electronically-Stored Information"

On December 1, 2006, several changes to the Federal Rules of Civil Procedure went into effect which will impact litigation pending in federal court. Most significantly, several of the changes to the Rules address the preservation and production of "electronically stored information," or "e-discovery," which includes employee e-mails, individual computer hard drives, network drives, backup tapes, optical disks, and other electronic data; and the amendments penalize parties who delete—in compliance with company policy or otherwise—electronic data when a lawsuit can be reasonably anticipated.

Once a party reasonably anticipates litigation, under the new Rules and several recent federal court opinions, any routine document retention or destruction policy should be immediately suspended and steps should be taken to preserve relevant electronic documents. Together with legal counsel, parties must work to identify individual computers, servers, network drives, and backup tapes, among other things, that may contain relevant information. In an employment context, it will be important to search for personnel, payroll, and benefit records for the employee and any similarly-situated employees on the employee's computer, on human resources computers, and on the computers of the employees' supervisors and co-workers. The employee's electronic work product, as well as electronic versions of employer handbooks and written workplace policies in effect during the employee's time with the company, should also be preserved.

Further, in employment discrimination lawsuits, e-mail is frequently used to establish the existence of a hostile work environment. Therefore, e-mails sent to and from the employee, as well as e-mails sent between supervisors, human resources, and other employees will need to be maintained and searched for relevant information. In addition to searching company computers, employers will need to determine whether relevant information exists on their employees' home computers, floppy disks, zip or thumbnail drives, handheld devices (including Palm Pilots/PDAs, Blackberries, and iPods), cell phones (including text messages), and digital cameras. Once relevant information is located, it should be copied or imaged for preservation and production if a lawsuit results. Computer files should not be accessed or opened except by an appropriate expert, so that important metadata relating to the creation and alteration of the file is not changed. Also under the amended Rules, parties are no longer able to print and then delete electronic data, as the metadata associated with the information would be lost.

In addition, under the amended Federal Rules, a party is only allowed to withhold the production of electronically stored information from sources that are not reasonably accessible due to undue burden or cost, subject to the court's determination of whether the case justifies the production of the data.

Parties who dispose of electronically stored information out of "routine good faith operation" may be protected by the new Rule changes, but only where they put litigation holds in place when the litigation begins. Where steps are not taken to preserve electronically stored information, and especially where documents are intentionally deleted, federal courts have in the past allowed evidence of such destruction to be presented to the jury. The intentional destruction of evidence is known as "spoliation," and where spoliation is established, the requesting party is typically entitled to an adverse inference instruction to the jury that the material would have been detrimental to the company. Less severe sanctions for negligent or unintentional destruction could include requiring the party at fault to bear the cost of restoring the electronic evidence, if possible, which could be costly.

In sum, it is important to begin preserving electronically stored information when there is any indication that a lawsuit may result, and consulting with legal counsel with questions about how best to accomplish this.

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NLRB Decision Provides New Guidelines and Expansive Interpretation of “Supervisor” Under the National Labor Relations Act

In one of the more important National Labor Relations Board (the “NLRB”) decisions in years, the NLRB ruled in *Oakwood Healthcare, Inc.* that certain “charge nurses” were “supervisors” under the National Labor Relations Act (the “Act”) because they regularly designated significant duties for other employees, were accountable for the employees’ performance, and exercised independent judgment in directing the employees. Although this decision should not radically impact the supervisory status of an employer’s workers in most job sectors, it is a victory for employers because it provides objective and reasonable guidelines for making the “supervisor” determination.

In 1947, the Act was amended to exclude “supervisors” from the definition of “employee” under the Act, such that “supervisors” in the workplace were no longer entitled to have union representation, to engage in collective bargaining, or to engage in activities in support of a union. Individuals are statutory “supervisors” if (1) they hold the authority to engage in, or effectively recommend, one or more of 12 supervisory functions (i.e., hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, “responsibly to direct,” adjust grievances); (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and (3) their authority is held “in the interest of the employer.”

At issue in *Oakwood* was the supervisory status of numerous permanent and “rotating” (*i.e.*, part-time) charge nurses. The NLRB explained charge nurses, among other things, “are responsible for overseeing their patient care units, and they assign the RNs, licensed practical nurses, nursing assistants, technicians, and paramedics to patients on their shifts.” Initially, the NLRB concluded none of the charge nurses had the authority “responsibly to direct” employees because there was no evidence they were accountable for the performance of the employees they oversaw. Nevertheless, 12 of the permanent charge nurses were held to be statutory “supervisors” because they “assigned” nursing personnel to patients in the hospital based upon the skill, experience, and temperament of nursing personnel and on the acuity of the patients, which constituted the exercise of independent judgment.

In deciding 12 of the permanent charge nurses were supervisors, the NLRB defined and differentiated between “assign” and “responsibly to direct” for the first time. The NRLB explained “assign” is to designate an employee to a certain place (*e.g.*, location, department, wing) or time (*e.g.*, shift or overtime) or to give significant overall duties or tasks to an employee; whereas, “responsibly to direct” means the individual must have the authority to direct an employee’s work, be accountable for the employee’s performance of the tasks in question, and have some authority to correct errors made by the employee. These definitions, as well as the NLRB’s definition and interpretation of “independent judgment” (*i.e.*, “free of the control of others” and not merely “routine or clerical”), will be critical in “supervisor” determinations under the *Oakwood* guidelines.

So what does the *Oakwood* decision mean to employers? As indicated above, the NLRB has, for the first time, provided an objective and understandable framework for making the “supervisor” determination. A worker’s classification as a supervisor remains significant because, in addition to the inability of a supervisor to engage in union activity, an employer may demand absolute support from its supervisors in dealing with unions. On the other hand, an employer may be held accountable for unfair labor practices committed by a supervisor against an employee.

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WAGE AND HOUR RETALIATION SUITS: CALCULATING DAMAGES FOR EMPLOYEES THAT MAKE MORE MONEY AFTER THEY LEAVE

Retaliation cases under the Fair Labor Standards Act (FLSA) are similar to retaliation cases in other areas of employment law. Essentially, an employee argues that the employer retaliated against him or her for making a complaint about unpaid wages or overtime. An FLSA retaliation claim generally focuses on the employer's actions after the company receives notice of the complaint as opposed to whether or not the employer correctly paid the required wages under applicable law.

Recently, the federal appellate court that governs Texas and several other states issued a decision on determining damages for an FLSA retaliation case in the following situation:

Employees Cora Johnson and Delores Seay filed claims for unpaid regular and overtime wages. The company Bayou Home Bureau (Bayou) discharged these employees. These employees sued the employer claiming FLSA retaliation. After the discharge of their employment, both employees secured jobs. At issue was whether their subsequent earnings could offset the amount of damages sought by these two former employees against Bayou.

Traditionally, Courts have offset a Plaintiff's lost wages with earnings received after the separation from employment. However, the FLSA does not "explicitly address" whether wages earned after the termination of employment offset lost wage damages. Thus, there was a dispute about whether the same procedures should be followed under the FLSA with the former employees arguing there should be no offset.

Ultimately, the Court decided that a wage offset should occur for a FLSA retaliation claim. The Court decided to apply an offset since offsets occur for claims made under the Age Discrimination in Employment Act, which has the same statutory remedies provision as the FLSA. Applying the offset to the case at bar, the Court noted that Ms. Johnson had "suffered no damages" because her post separation earnings offset any potential losses. She was making more money now than before the separation of her employment. As for Ms. Seay, while she was entitled to recover some damages, her damages were also limited as a result of her subsequent earnings.

This decision is good news for employers on several fronts. First, it allows the company to make inroads into the damages calculation on an FLSA retaliation claim if an employee is able to find subsequent employment. Second, the potential wage offset may discourage the filing of FLSA retaliation suits especially where the employee makes more money in another job after the separation from employment.

Nevertheless, avoiding these types of lawsuits in the first place is an even better proactive approach. Examining your company handbook to make sure there is a complaint procedure in place is one step that may help avoid any liability and a lawsuit. Additionally, be sure to have your HR Department timely investigate any complaints about unpaid wages or overtime. In short, avoiding a lawsuit is always the best option, but at least if a suit is filed, the employer may have an additional defensive argument to minimize its exposure in these types of cases.

Johnson v. Martin

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THE "REASONABLENESS" OF A NEUTRAL ABSENCE CONTROL POLICY

In July 2006, the Dallas Court of Appeals, in *Ramirez v. Encore Wire Corp.*, affirmed a trial court's dismissal of an employee's retaliation claim and upheld the employer's neutral absence control policy as a defense to the claim. The plaintiff, Martin Ramirez, worked as a cabler with Encore Wire Corporation. In April 2002, Ramirez suffered an injury to his lower back while working on the job. Subsequently, Ramirez reported the injury to Encore and took a disability leave of absence.

Encore's disability leave policy stated, "*An employee whose absences exceeded thirty-six calendar days in a twelve-month period, exclusive of any leave to which he was entitled by law, would be subject to automatic termination*." Ramirez was entitled to twelve weeks of disability leave under the Family Medical and Leave Act ("FMLA"), in addition to the thirty-six days stated in Encore's policy. Therefore, Encore allowed Ramirez a total of one hundred and twenty days of leave from work. Accordingly, Encore terminated Ramirez after he failed to return to work after his one hundred and twenty days of leave had expired.

Ramirez filed suit against Encore claiming that he was discharged by Encore in retaliation for filing a workers' compensation claim. The Court of Appeals relied on the Texas Supreme Court's holding in *Tex. Division–Tranter, Inc. v. Carrozza*, that held the uniform enforcement of a reasonable absence control policy does not constitute retaliatory discharge under the Texas Labor Code. Although Ramirez argued that Encore failed to provide proof of the "reasonableness" of its absence control policy, the court disagreed and stated that on its face, the terms and conditions of the leave policy were reasonable. Thus, the court held that a facially reasonable absence control policy is proof of the reasonableness of that policy.

This ruling reiterates that in cases where an employee files a retaliation claim alleging his/her employment was terminated for filing a workers' compensation claim, the employer may use a neutral absence control policy as a defense, only if the same policy is applied in the same manner against employees who have not filed workers' compensation claims. In other words, an employer's neutral absence control policy must be applied neutrally and consistently towards each of its employees. Additionally, neutral absence control policies are not only useful for employees with workers' compensation claims, they are also applicable for situations regarding employees that take FMLA leave and fail to return to work.

Ramirez v. Encore Wire Corp.

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QuickTips

- It is not uncommon in a discrimination lawsuit to receive a request for another employee's personnel file. The employee's social security number should be redacted before producing the personnel file. An employee's medical information should be maintained separately and in confidence. The company should also strictly limit access to an employee's medical information to only those with a legitimate business reason to review the contents.
- If you are faced with an unemployment compensation claim by an employee who is alleging he or she "quit" due to alleged problems on the job (pay, harassment, major and adverse changes in the job, unsafe working conditions, or unfair discipline), be advised that all evidence submitted to the Texas Workforce Commission is discoverable in a subsequent lawsuit.
- A new employee must complete Section 1 of a Form I-9 no later than by the close of business of the employee's first day at work. The employer must complete Section 2 of the Form by the close of business on the employee's third day of work. Employers who request more or different documentation than the minimum necessary to meet the requirements of the Form I-9 could be accused of committing an unfair immigration related employment practice.

EMPLOYERS SPEAK OUT IN FRUSTRATION REGARDING EXPERIENCES WITH THE FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act of 1993 ("FMLA" or the "Act") has been described as:

- "A real life nightmare to all Human Resources Professionals";
- "A 'blank check' for employees to abuse attendance"; and
- "A struggle for employers since its inception."

This is just a snapshot – but these, and other similar comments, were submitted in response to the Department of Labor's ("DOL") recent request for public commentary regarding the FMLA. On December 1, 2006, the DOL placed a "Request for Information on the Family and Medical Leave Act of 1993" in the Federal Register. The DOL invites parties with knowledge of the FMLA to submit comments.

As expected, many of the comments submitted are from human resources professionals, and the majority of the comments plead for clarification of the regulations, while also identifying particular "real life" problems encountered in administering the Act in the workplace.
Although comments are sought on the following key issues, the DOL's invitation is not strictly limited to these issues:

(1) **Employee Eligibility**: Comment is sought regarding confusion surrounding the 12-month eligibility requirements and the timing of eligibility determinations. For instance, the employer must determine whether an employee has met the 12-month requirement as of the date leave is commenced under 29 CFR §825.110(d), yet the determination of whether an employee works for an employer who employs 50 or more employees within 75 miles of the worksite must be made as of the date that the leave request is made under 29 CFR §825.110(f).

(2) **Definition of "Serious Health Condition"**: The DOL seeks comment on whether the definition of a "serious health condition" should be clarified to reflect the intent of the Act, which precludes minor illnesses, such as colds and earaches.

(3) **Different Types of FMLA Leave**: Although several questions are presented in this section, several address intermittent leave problems, including: (a) Does intermittent leave present different problems as compared to leave taken in one continuous block of time?, and (b) Is there a way to balance the employer's need for absence control with legitimate employee use of unscheduled, intermittent leave?

(4) **Communication Between Employers and Their Employees**: The DOL additionally seeks comment regarding steps which could be taken to notify employees that their leave is being charged to FMLA, and methods of improving awareness of FMLA rights and responsibilities among employees.

In addition to the above topics, comments are also sought with regard to: (a) the Definition of a "Day," (b) Substitution of Paid Leave, (c) Attendance Policies, (d) Light Duty, (e) Essential Functions, (f) Waiver of Rights, and (g) Employee Turnover and Retention.

The DOL estimates, based on several studies referenced in the Request for Information, 6.1 million workers took FMLA leave in 2005. Of this amount, almost one quarter of employees took their leave intermittently. Many employers submitted comments and fact-based scenarios regarding perceived excessive abuse of intermittent leave under the Act. Because intermittent leave problems are raised so frequently in the comments, it is expected that the DOL will address the regulations with respect to this issue.

While this article provides only a brief overview of the comments, instructions for viewing the full collection of comments are contained on the DOL's website (www.dol.gov/esa/whd/fmlacomments.htm). The Request for Information invites public comments on the FMLA until February 2, 2007, and public comments may be submitted by email to whdcomments@dol.gov.

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