Business Counseling UPDATE

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Lamson, Dugan & Murray Creates Anti-Harassment Training Program to Benefit Clients

In the wake of several recent U.S. Supreme Court decisions, the need for employers to adopt and implement effective anti-harassment programs (including supervisor and employee training) is more compelling than ever before.

Employers are now strictly liable for sexual harassment by their supervisors, even in cases where the sexual demands or threats are not accompanied by any tangible employment action. Employers can be liable even without a showing that the employer knew or should have known of the harassing behavior or were otherwise at fault for the supervisor's action. The employer, however, will have an affirmative defense to liability and damages for acts of a supervisor that do not involve a tangible employment action if certain criteria are met.

In response to our clients' needs and requests, we have created a comprehensive anti-harassment training program for both management personnel and non-management employees, consisting of role playing scenarios and videotape vignettes. We can support and assist your efforts to prevent harassment in your workplace and to protect your company from potentially explosive liability.

Brian J. McGrath

Inside this Issue

Employment

- *Lamson, Dugan & Murray Creates Anti-Harassment Training Program to Benefit Clients*
- *What Employment-Related Records Are You Retaining Now?*
- *Department of Labor: Proposed FLSA Exemption Changes for "White Collar" Employees*

Immigration

- *Update Regarding Immigration Issues Facing Employers*

Workers' Compensation

- *Nebraska Supreme Court Recognizes Workers' Compensation Retaliation Wrongful Discharge*

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What Employment-Related Records Are You Retaining Now?

A basic record retention policy is vital for any organization. Human resource departments, however, have a particular need for an organized system of record retention and destruction. The term "record" does not mean just paper, but includes all e-mails and electronic files as well. A record is information created during and maintained as evidence of business transactions, regardless of its format. Because of the expanded definition of record, it is more vital now than ever to have an efficient record retention policy. Below are some recommendations for creating a record retention policy.

A retention policy needs to address certain goals. A policy should ensure that all records are made in compliance with applicable laws and are retained for the minimum statutory or regulatory period. Destruction of records should be according to a schedule set by policy, with a corresponding mechanism for ceasing destruction in the event that management so requires, such as when litigation begins. Records must be adequately identified and safeguarded, with the privacy and security of records maintained by proper measures.

We recommend you review your record retention policy to ensure its compliance with current statutory requirements.

Records containing privileged information, such as attorney-client communications or trade secrets, should never be intermingled with non-privileged information. As an added security precaution, when setting up a retention system, all records that are considered privileged could be copied onto colored paper, which would distinguish them from other records in the file, should they accidentally be intermingled with non-privileged records.

Companies may consider conducting a comprehensive inventory of all records before developing a filing system in order to flag the year when certain records should be destroyed. Flagging can be accomplished with a color-coded filing system which assigns color for each year, or a decimal system that assigns numbers to the department, type of record, and year to be reviewed for each file.

Once a policy is in place, every organization needs to be aware that if there is potential litigation or an investigation, then the destruction schedule should be suspended. The destruction of evidence during litigation is spoliation, and doing so could result in the imposition of civil and criminal sanctions. If it is reasonably foreseeable that future litigation or investigations will require inquiry into certain information, then an employer must preserve such relevant information.

We recommend that you review your record retention policy to ensure its compliance with current statutory requirements. Also determine whether your policy is being uniformly adhered to.

Craig F. Martin

Nebraska Supreme Court Recognizes Workers' Compensation Retaliation Wrongful Discharge Claim

The clear rule in Nebraska is that unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. In the past, however, the Nebraska Supreme Court has recognized a limited public policy exception to the at-will employment doctrine. Under the public policy exception, the Court has allowed an employee to claim damages for wrongful discharge when the motivation for the firing contravenes public policy.

The Court recently ruled that a cause of action exists for wrongful termination when an employee is terminated for filing a workers' compensation claim.

The Court has applied the public policy exception in several cases. In one case, an employee alleged that he was terminated because he refused to take a polygraph test. A Nebraska statute prohibits an employer from conditioning employment on a requirement that a person submit to a truth and deception examination. The Court has also recognized a public policy exception when an employee claimed he was discharged for reporting his suspicions that his employer was violating state odometer fraud laws. The Court

refused to find a public policy exception when an employee was discharged for asserting a claim for unpaid wages under the Nebraska Wage Payment and Collection Act. The Court noted that, unlike the cases noted above, the wage payment act did not contain a specific provision restricting an employer's right to discharge an at-will employee. Furthermore, unlike the cases cited above, there was no crime that was allegedly committed.

In its latest decision in this area, the Court recently ruled that a cause of action exists for wrongful termination when an employee is terminated for filing a workers' compensation claim. The Nebraska Workers' Compensation Act does not specifically prohibit an employer from discharging an employee for filing a claim, nor does it specifically make it a crime for an employer to do so. However, the Court held that the workers' compensation act has a "much wider scope and purpose" than does the wage payment act. The Court stated that the wage payment act is "largely remedial in nature and provides specific procedures for the enforcement of substantive rights to compensation for work performed that arise not from the statute itself but from the employment relationship itself." The workers' compensation act, however, "creates a range of substantive rights that arise from the statute itself."

Employers need to keep the public policy exception in mind as they consider the termination of an employee in Nebraska. This analysis is often forgotten and can lead to expensive wrongful discharge claims.

Brian J. McGrath

Department of Labor: Proposed FLSA Exemption Changes for "White Collar" Employees

On March 31, 2003 the U.S. Department of Labor proposed new regulations which could change the current exemption definitions of "white collar" employees under the Fair Labor Standards Act ("FLSA"). The proposed rule changes will directly affect whether your employees continue to qualify as exempt employees under the FLSA.

A few highlights of the new rules favor increasing salary levels and abandoning the "long" and "short" tests used to classify exempt employees based upon their duties. In doing so, the proposed rules increase the minimum weekly salary levels from $155 to $425 and call for a single standard test within each category defining an employee's necessary duties to qualify as exempt. For example, to classify as exempt, the duties of an executive must now consist of (1) a primary management duty, (2) regularly directing two or more employees, and (3) being involved in the hiring and firing process.

The proposed rules will change the duties of an administrative employee from a "discretion and independent judgment" test to a requirement that an employee must hold a "position of responsibility." Furthermore, the changes will abandon the requirement limiting non-exempt work to no more than 20% of total work performed.

A change in "learned professional" duties allows employees to meet their "advance knowledge" requirements through work experience as well academic instruction. The current rules only allow "advanced knowledge" to be met through academic instruction. The proposed rules also eliminate the 20% restriction on non-exempt work for outside sales employees. The significant change relating to "computer" employees is the adoption of more explicit criteria for the position, including the design, development or analysis of computer system programs.

The proposed regulations will also identify the types of compensation (e.g., non-discretionary bonuses) that may be included to determine whether employees are "highly compensated." Finally, another proposed rule change will allow employers the ability to issue full day suspensions without pay for a broader range of disciplinary actions without impacting exempt status.

The proposed regulations will now go through a comment period during which employers and employee groups will provide their analysis of the changes. Once the comment period is completed, the Department of Labor will then be in a position to issue final rules which may apply to your business. We will continue to closely monitor these activities and will alert you to the changes once they become final.

Craig F. Martin

Update Regarding Immigration Issues Facing Employers

In our last update, we provided information regarding the latest efforts among the Social Security Administration (SSA), the Internal Revenue Service (IRS) and the Immigration and Naturalization Service (INS) at ensuring employers' compliance with the employment-authorization provisions. Since that report a substantial change has occurred in that the INS has been replaced by the Bureau of Citizenship and Immigration Services (BCIS) within the Department of Homeland Security. Whether this change is substantive or merely a name change remains to be seen. Interestingly, the BCIS website is identical to the old INS website, so much so that three months after the overhaul of the department several of the informational pages still refer to "INS Enforcement".

The laws regarding work authorization compliance remain the same. Employers are still required to verify the employment authorization of potential employees under the Immigration and Naturalization Act and the Immigration Reform and Control Act. Employers are still subject to criminal and civil sanctions for failing to take steps to ensure that the employees they hire and retain are authorized to work in the U.S.

The INS has been replaced by the Bureau of Citizenship and Immigration Services.

Further, employers are still subject to prosecution by the Office of Special Counsel (OSC) for employment-related discrimination based upon race, citizenship or national origin. Finally, the co-operation by the SSA and IRS will likely continue under the BCIS. BCIS's mission statement stresses the importance of inter-departmental co-operation to ensure compliance with immigration laws. To that end, we expect that employers will continue to receive notices from SSA regarding mis-matched employee information. An employer's response to such a letter is crucial in avoiding civil and criminal sanctions from BCIS, as well as civil sanctions from the IRS. Lamson, Dugan & Murray, LLP has attorneys experienced in handling employment-related immigration issues.

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Time to Review COBRA Notices

The Department of Labor recently issued proposed rules concerning COBRA notices. The rules clarify COBRA notice requirements and provide guidance and model forms for use in COBRA notification. It is expected that the new rules will become final and effective on January 1, 2004.

Under the new rules, plans must provide notice to an employee and spouse within 90 days. Plans must establish reasonable procedures for beneficiaries to provide notice of certain qualifying events. Summary plan descriptions must be modified to set forth changes from the Trade Act of 2002, which establishes a second 60-day COBRA election period due to loss of work under that Act.

To download the proposed rules and model notice form, visit the Government Printing Office website at: http://frwebgate4.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=74510714852+0+1+0&WAISaction=retrieve

Brian J. McGrath

PROFILE

JON S. REID

Practice Areas:

- Workers' Compensation
- Employment Law

Mr. Reid is a partner of Lamson, Dugan & Murray, LLP and the Chairman of the Employment and Workers' Compensation Practice Group. He has over 25 years of experience litigating many types of cases including workers' compensation and labor law actions. Mr. Reid's practice also encompasses advising employers, self-insured entities and insurance companies in all areas of workers' compensation and employment law matters.

Mr. Reid's litigation experience includes actions in State and Federal Court. He also has over 15 years of experience in private placement adoptions, and acts as a mediator in all types of disputes.

Mr. Reid graduated from the University of Nebraska in 1970 with a B.S. in Business Administration. He earned his J.D. degree from the University of Nebraska in 1974.

BRIAN J. MCGRATH

Practice Areas:

- Employment Law
- Labor Law

Mr. McGrath recently joined the firm's Labor and Employment Practice Group after spending ten years with a Kansas City based law firm in both Omaha and Kansas City. Prior to law school, Mr. McGrath spent three years as a legislative assistant to former Nebraska U.S. Rep. Virginia Smith in Washington, D.C., where he monitored employment legislation for the congresswoman.

Mr. McGrath has a successful litigation practice focusing on employment cases, filed in both federal and state courts. He participates in Alternative Dispute Resolution to effectively resolve employment litigation claims. As part of his proactive practice, Mr. McGrath regularly counsels employers on human resource matters and conducts in-house training sessions for employers and supervisors on employment discrimination issues. Mr. McGrath also works with employers on traditional labor issues.

Mr. McGrath graduated form the University of Virginia with a B.A. in American Government. He earned his J.D. degree, with distinction, from the University of Nebraska in 1992.

CRAIG F. MARTIN

Practice Areas:

- Employment Law
- Commercial Litigation
- Creditors Rights

Mr. Martin is a member of the firm's Labor and Employment Practice Group and the Litigation Department where he handles a wide variety of litigation with an emphasis in representing employers and management in employment related matters. His counseling focuses on developing proactive management practices and policies in all aspects of the employment relationship. In addition to advising and counseling, his practice emphasizes defending employers against lawsuits brought in state and federal courts and administrative claims and hearings. Prior to joining Lamson, Dugan & Murray, LLP, he was an Assistant Attorney General with the Missouri Attorney General's Office, where he served as general counsel to the Missouri Department of Agriculture and represented state agencies in employment related matters before administrative tribunals and state and federal courts.

He has also been a regular presenter at various employment seminars, speaking on such topics as wage and hour laws, federal EEO compliance, the Americans with Disabilities Act, COBRA, sexual harassment and wrongful discharge.

Mr. Martin received his B.A. in philosophy from Creighton University. He received his J.D. degree from Washington University in St. Louis, Missouri, where he was the Chair of the Moot Court Board and Order of the Barristers.

ROBERT A. MOONEY

Practice Areas:

- Immigration Law
- Commercial Litigation
- General Civil Litigation

Mr. Mooney is a member of the firm's Litigation Department with responsibility for assisting clients in the preparation and trial of cases in a variety of fields.

Prior to joining the firm in 1999, Mr. Mooney served as a judicial clerk for Justice Michael McCormack of the Nebraska Supreme Court. As well as serving as a judicial clerk, Mr. Mooney practiced for a time with the Douglas County Attorney's Office in Omaha, Nebraska. While at the County Attorney's Office, Mr. Mooney gained experience in the prosecution of a wide range of crimes on both the juvenile and adult levels.

Mr. Mooney received a B.A. in political science with an emphasis in history from the University of Nebraska. He received his J.D. degree from the University of Nebraska, College of Law.