Neel, Hooper & Banes, P.C.

Counsel Leaders Trust

VOL. XXIX, No. 1 **SPRING UPDATE** **APRIL 2010**

IN MEMORIUM

Samuel E. Hooper, 1942-2009. It is with deep sorrow that we at Neel, Hooper & Banes informed our friends and clients of the passing of our beloved colleague, Samuel E. Hooper, last year. Sam was a good friend and mentor, not only in our firm, but also to all of who knew him. His kind and helpful demeanor was his trademark. In his professional life, Sam leaves a stellar legacy in the field of management-side labor and employment law, and was recognized as one of the best labor and employment lawyers in the nation. We miss him very much!

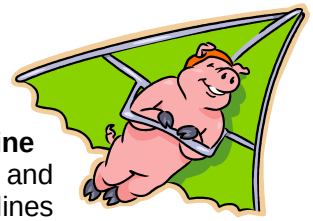
FIRM NEWS

Neel, Hooper & Banes was named a "leading firm" in Labor and Employment Law by Chambers USA.

Congratulations to **Sean D. Forbes**, who is now a partner at our firm. Sean was also named a 2010 Texas Rising Star in Government Contracts by Super Lawyers.

We welcome **Stormy N. Hendershott** to the firm as a Junior Associate.

ADA ISSUES



Love In The Time Of Cholera … Or At Least Work In The Time Of Swine Flu (H1n1). This past fall and winter newspaper headlines warned of a swine flu epidemic. Many employers questioned what can and can't be done in the workplace to limit the spread of germs when a major illness threatens to impact most of their employees.

Here are some basic guidelines for any **"pandemic**." A pandemic means the same thing as a global epidemic. It is a measure of how widespread a disease has become, not a measure of how severe the symptoms are. Pandemic planning and preparedness includes an individual employer's plan about how to continue operations. The EEOC has issued a document which focuses on implementing strategies in a manner that is in compliance with the ADA. This document has answered questions such as:

Q: During a pandemic, may an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?

A: Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported to work. Employers may ask employees if they are experiencing flu-like symptoms. Employers must maintain all information about employee illness as a confidential medical record.

Q: Before an influenza pandemic occurs, may an ADA-covered employer ask an employee to disclose if he or she has a compromised immune

system that could make him or her more susceptible to complications of flu?

A: No. Such an inquiry is likely to disclose the existence of a disability. The ADA does not permit such an inquiry unless there is evidence that pandemic symptoms will cause a direct threat. Such evidence is absent before a pandemic occurs.

Q: Are there ADA-compliant ways for employers to identify which employees are more likely to be unavailable for work in the event of a pandemic?

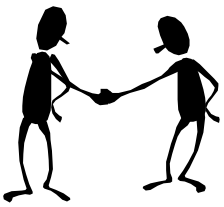
A: Yes. Employers may make inquiries that are not disability-related. The inquiry should be structured so that the employee gives one answer of yes or no to the whole inquiry without specifying which of the factors applies. The answer need not be anonymous. (If you are interested in making such an inquiry, please contact us and we will help you draft one that is not in violation of the ADA.)

Q: May an ADA-covered employer send employees home if they display flu-like symptoms?

A: Yes. It is not a disability-related action if the illness is akin to seasonal flu or a virus.

More questions? Don't hesitate to take an aspirin and call us in the morning!

EMPLOYMENT-AT-WILL ISSUES



Promises, Promises. A company official in San Antonio allegedly promised an employee he could serve as a store manager for the rest of his life as long as the store made a four percent profit over the preceding year and inventory shrinkage remained under one percent. But things went bad and the manager was accused of theft and ultimately terminated. The employee sued for breach of contract and for intentional infliction of emotional distress and won at the district court level. But the appeals court reversed and found in favor of the employer. The court noted that the employer's standard job application and handbook stated that employment was at-will and this rule could only be modified by the company president or vice-president. Also, the promises of life-long employment were not made by persons with authority to modify the at-will status.

The appeals court also noted that Texas courts have declined to recognize intentional infliction of distress claims for ordinary employment disputes and such claims exist only in the most unusual circumstances. The court realized that employers must have some discretion to supervise, review, criticize, demote, transfer and discipline workers. A word of caution: Be very careful about making promises to employees that you may not be able to keep.

Deferred Compensation—Ya Gotta Pay The Piper. The Texas Supreme Court recently settled a question that has been floating around in the employment-at-will pool lately and causing some confusing ripples. Here was the question: Is an employer's promise to pay some type of deferred compensation (think bonus, profit-sharing, vacation or sick leave pay) to the employee who continues to work until the triggering event (such as bonus date or vacation day) an enforceable promise? Or is it just an illusory promise because the employment-at-will status allows the employee to be terminated before the accrual date? Some courts had denied the enforceability of such unilateral contracts. But the Texas Supremes have spoken and the answer is … if an employee actually satisfies the conditions of the promise, she has accepted the employer's offer and the employer is bound to pay the promised compensation.

Dream On … Is It A Religion? An airline employee was involved in an on-the-job accident and when the company investigated the incident, the employee said it was not his fault, he did everything he could to avoid the accident, but it was caused by fate. His wife had told him that she had a dream in which he would have an accident that day and the employee said that his faith in the power of dreams was part of his religious beliefs. The employer required the employee to undergo psychiatric testing and the employee sued claiming religious discrimination. The court denied the company's motion for summary judgment noting that there was at least an issue of fact on whether the employer had required the testing because of the employee's religious beliefs. We'll have to wait to see how this turns out if it goes to trial. But here's a nightmare to consider: if an employee absolutely rejects the idea that he can control his actions due to his religious belief in dreams and fate, is the employer taking a chance in employing such an individual in a risky job?

Breakin' Up Is Hard To Do … Severance Pay And Termination. A Houston employee had an agreement that provided for severance pay in case of involuntary termination unless the employer determined the termination was for "cause." Because the employer terminated the employee for cause, there was no severance pay. As you might expect, the employee was not happy about this and filed a breach of contract lawsuit arguing his termination was not for cause. The court held: 1) the agreement's provisions allowed for the employer to determine whether there was cause for termination and the employer's decision was final, not subject to review by a judge or jury; 2) the contract did not require the employer to treat the employee the same as it treated similarly situated employees; and 3) there was no evidence of bad faith in the employer's decision that there was cause for the termination.

And Speaking Of Terminations … Often referred to as the COBRA subsidy, the American Recovery and Reinvestment Act of 2009 (ARRA) was extended again. The Temporary Extension Act of 2010 (the Act) was signed into law on March 2, 2010, and extended the COBRA subsidy eligibility period until March 31, 2010. It also creates new eligibility rules for certain individuals that experience a qualifying event that is a reduction in hours of employment that is subsequently followed by an involuntary termination of employment.

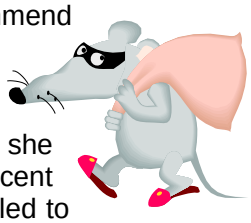
Basically employees who were laid off through March 31, 2010, are eligible for the subsidy which requires that employee will pay no more than 35% of the cost of the health insurance premium for nine months. The remaining 65% of the premium's cost will be paid by the company which will get credit for the payment on its tax bill.

New Notice Requirement. Individuals described above must receive a notice describing these new rules within 60 days of experiencing the involuntary termination of employment.

With Apologies To Randy Travis And Carrie Underwood … I Told You So!

Have A Good Policy, Follow The Policy And Keep A Paper Trail! Once again, the above three steps saved the day … or at least a bunch of money … for a company dealing with a union grievance about pay practices when an employee volunteered to move to a new position. The union had insisted on taking a worthless complaint and making a formal grievance out of it. The parties had picked an arbitrator and a date for the arbitration. The company lawyers had started preparing witnesses for the arbitration and gathering all necessary papers and policies. It seemed like a big waste of time and money, but the union insisted on pushing forward with the arbitration. The company decided to try one more time to show the union the error of its ways. The company reminded the union of company policy that governed how employees were paid when voluntarily moving to a new position, they reminded the union of other employees who had been paid under that policy and they showed the union president the emails he had sent a few years earlier agreeing that was the policy. Finally, when confronted with the facts and the paperwork, the union realized it did not have any proof to contradict the company's position and ultimately did not have a leg to stand on. Further, the union president did not want to testify in such a situation. The union agreed to withdraw the grievance and to pay all arbitrator's costs up to that point. We told you so … it pays to have a good policy, to follow it consistently and to keep a paper trail!

Negligent Hiring … We recommend doing background checks on applicants. And just because the applicant has a conviction does not always mean he or she should not be hired. In a recent case, a Houston burger joint failed to conduct a complete background check on one of its new managers. Had the background check been done correctly, it would have revealed that the manager had prior convictions for dealing cocaine and nonpayment of child support. But the Court said even that record would not have made it foreseeable that the manager would participate in an armed robbery of the restaurant which led to a death. In this case the burger joint barely escaped being liable for wrongful death under a theory of negligent hiring. But it's best practice to do the check and consider the results carefully.



Watch Your Mouth … Or You Talk Too Much! A good employee handbook and a good investigation prior to termination, can cover a multitude of sins for a company! A Texas company had a long-time employee, Jack, who just couldn't keep his mouth shut and his hands to himself. A female employee complained that on many occasions Jack had engaged in sexually harassing behavior that made her feel uncomfortable, was inappropriate for the workplace and was in violation of company policy. One of the executives did a thorough investigation and found several employees corroborated the allegations against Jack. The company terminated the 69-year-old for violation of company policy on harassment and replaced him with an employee who was 42. Of course Jack denied everything, claimed he was as pure as the driven snow and a victim of age discrimination. Also during the termination interview, Jack admitted he was a vindictive sort of fellow and would try to get back at those making the claims against him.

True to his word, Jackson brought suit against the company for age discrimination. It seems that the executive who had fired him also could not keep his mouth shut and a year earlier had made a comment to another co-worker that Jack was "an old gray-haired fart."

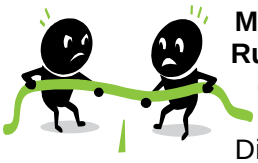
But luckily for the company, the Fifth Circuit held that Jack had not raised the comment at the lower court level, it was made a year before the termination and had no connection to the events that led to Jack's termination. The court also noted the company had conducted a good investigation, the overwhelming evidence showed Jack was fired for violation of the company's sexual harassment policy and the age comment was a stray remark wholly unrelated to his termination. All employees … even executives … should be warned against making inappropriate comments. Here the stray remark about age was distant in time and irrelevant to the sexual harassment so the company dodged a bullet.

GOVERNMENT CONTRACTING

HUBZone Business Alert: In January 2010, the Obama administration issued a directive that will prohibit federal contractors that are delinquent on their taxes from receiving new government contracts. The White House estimates that the total amount in unpaid taxes owed by contractors is more than $5 billion. Contact us if you need assistance in challenging a contract-related determination of tax delinquency or to correct an erroneous contracting certification.

What Is The Definition Of An Employee? At the end of 2009 the Small Business Administration (SBA) released a significant change in the definition of the term "employee" that will take effect after May 3, 2010. The major change will be that an employee will be one who works 40 hours or more i*n a month*, rather than the current 30 or more hours *in a week*. The new definition will include all individuals employed on a full-time, part-time or other basis as long as that individual works a minimum of 40 hours per month. This will also include employees from a temporary agency or a union agreement. It will not include volunteers who receive no compensation. But it does include owners who have an interest in and work for the HUBZone SBC a minimum of 40 hours per month regardless of whether the individual receives compensation.

Organizational Conflict of Interest – Change in Tides? Ethical rules dictate that companies who acquire confidential information regarding potential government work cannot then be awarded a bid for the project as they have an unresolved conflict of interest. Or, if they do submit a bid, they must disclose those potential conflicts of interest and a plan of mitigation. Typically, deference has been given to the contracting officer when determining if there is a conflict of interest. This power vested in the contracting officer has, until very recently, gone unchecked by the Government Accountability Office (GAO). However, two recent cases on this issue demonstrate a possible shift in the GAO's mindset. In both cases, the GAO found that the contracting officer acted unreasonably in concluding that the mitigation strategy presented by a company with a conflict of interest was acceptable. This shows that the GAO is beginning to take notice of the agencies' lackadaisical enforcement of the ethical rules in government contracting, which we welcome.



May or Shall … Which Rules? There has been a tug of war between the HUBZone Program and the Small Disadvantaged Business/8(a) Program in an effort to determine which of the two should be given priority when awarding government contracts. Existing HUBZone Legislation states that "a contract opportunity ***'shall'*** be awarded to any qualified HUBZone small business concern," while the legislation regarding the 8(a) Program states that contracts ***'may'*** be awarded to program participants. Case law has suggested that by virtue of the statutory language, the HUBZone Program should have priority over the 8(a) Program. The Court of Federal Claims recently issued an opinion that supported the priority of the HUBZone. The Government Accountability Office (GAO) had likewise given priority to the HUBZone Program over the 8(a) Program in a 2009 decision. However, in July of 2009, the Office of Management and Budget (OMB) issued a memorandum urging government agencies to disregard the GAO ruling. In conjunction with the OMB, the Office of Legal Counsel (OLC) of the Department of Justice issued a memorandum opinion which disagreed with GAO's priority of the HUBZone Program, that all set-aside programs had "parity," and further stated that the GAO's decision would not be binding on the executive branch of the government. The new Court decision overrules the OMB and OLC guidance and moves the struggle between the HUBZone Program and the 8(a) Program into the halls of Congress. We recommend all contact their local legislator with any concerns you may have.

UNION NEWS

Just Like Mama Said … Two Wrongs Don't Make A Right. An employer's duty to bargain is limited to some extent by the union's effort to bargain and notice of its desire to bargain. But just because a union fails to pursue bargaining does not necessarily let the employer off the hook. In a recent Fifth Circuit case the employer had made it pretty clear that the union's efforts to bargain would be futile. In this case, the employer refused to bargain or to recognize the union after the collective bargaining agreement expired. Then along came hurricane Ike and the employer shut down. When it reopened, it started hiring people from outside the laid-off workforce. As you can guess, the union then filed charges with the NLRB. The employer's defense was the union had not requested to bargain. But the court agreed with the NLRB that the union's failure to request bargaining did not relieve the employer of its duty, especially since the employer had made it clear that any requests would be rebuffed.

Just Hurry Up And Change Your Clothes Already! The time employees spend changing into work clothes and changing back into street clothes (aka donning and doffing) can be "compensable" time that must be included in any determination of overtime or minimum wage obligations under the Fair Labor Standards Act (FLSA). However, there is an exception to this rule: the time is NOT compensable if the employer has excluded it by the express terms, or by terms implied by custom, under a collective bargaining agreement. The Fifth Circuit recently applied this exception to a case and made the following rulings: 1) the practice that parties to a collective bargaining agreement have followed need not have been specifically negotiated by the parties to qualify as a custom; and 2) the party alleging an unlawful failure to count this time has the burden of proving the employer's practice did not qualify as an exempt custom.

Texas Code Differs From Federal Law … At Least For Now. For the moment there is an important difference between federal employment discrimination law and the Texas Labor Code, Chapter 21. Under federal law, the U.S. Supreme Court's decision in *Ledbetter* was reversed by congressional action. And under that action a discrimination claim based on unlawful pay practices continues to accrue and starts a new time line whenever another paycheck is issued that is less than it would have been but for the prior discriminatory decision regarding pay. So there is no real statute of limitations on bringing such a claim under federal law. However, in Texas the legislature has yet to enact those changes to Chapter 21. In a recent case the Texas court held that a claim for equal pay continues to be governed by the *Ledbetter* case. This means the plaintiff's time line started when the employer first made the decision on pay that was causing the disparity and in this situation the plaintiff waited too long to bring the claim and was time-barred. But be aware … Texas law may change so we'll keep you advised on this matter.

UNION ACTIVITY

Union Organizational Activity Since Our Last Newsletter. Seven (7) petitions for certification were filed by unions and no petitions for decertification were filed by management. Of the seven elections held, management won three (3).

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* Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization

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