ASK and Answered Business Exec Newsletter

ILLINOIS CHAMBER OF COMMERCE

January 25, 2012

Pro-Union NLRB Thumbs Its Nose at the U.S. Supreme Court: Declares Employee Class-Action Waivers Violate Labor Law

On January 3, 2012, the National Labor Relations Board (NLRB) held that a nationwide home builder committed an unfair labor practice under the National Labor Relations Act (NLRA) by implementing a mandatory arbitration agreement that waived the rights of employees to participate in class or collective actions *(D.R. Horton Inc. and Michael Cuda,* 357 NLRB 184, 1/3/11*)* (https://www.nlrb.gov/news/board-finds-certain-mandatory-arbitration-agreements-violate-federal-labor-law). In short, the NLRB held that employers may not compel employees to waive their right to collectively pursue litigation of employment claims in all forums, arbitral and judicial.

Michael Cuda, a superintendant for Horton, claimed that he and other similar superintendants for the company were prevented from pursuing a wage and hour class-action/collective-action under the Fair Labor Standards Act (FLSA); alleging that they were misclassified as exempt employees. Horton required Cuda and other employees to execute an arbitration agreement whereby they individually agreed to forego class-action relief of all types relating to any employee dispute. NLRB Chairman Mark Gaston Pearce (D) and Member Craig Becker (D) found that this mandatory arbitration procedure violated Section 8(a)(1) of the NLRA because it interfered with the statutory right of employees to engage in “protected concerted activity for their mutual benefit.”

In so holding, the NLRB took issue with the U.S. Supreme Court’s recent decision in *AT&T Mobility LLC v. Concepcion*, U.S., No. 09-893, 4/27/11. In *Concepcion,* the Court, in a 5-4 decision, enforced AT&T’s customer cellular telephone contract that provided for mandatory arbitration on an individual basis and prohibited class action proceedings despite conflicting California state law. The Court essentially held that the Federal Arbitration Act (FAA) preempts state laws that prohibit contracts from preventing class-action lawsuits. In judicial decisions that have since followed *Concepcion*, courts throughout the U.S. have concluded that employees may waive class-action rights by agreeing to individualized arbitration through employment arbitration agreements.

In distinguishing *Concepcion*, the NLRB held that employment arbitration agreements (unlike consumer contracts) cannot prevent employees from waiving their rights protected by the NLRA (i.e. collectively pursue wage/hour claims and/or disputes over terms and conditions of employment). The NLRB also reasoned that *Concepcion* involved a conflict between the FAA and aCalifornia state law, which implicated the U.S. Constitution’s Supremacy Clause; whereas in D.R. Horton the Supremacy Clause was not called into question as the issues involved purely federal statutes (FAA vs. the NLRA).

Illinois Employers Ask: Can I Require My Employees to Work Seven Days in a Row

The brief answer is: yes, sometimes.

Illinois has a very detailed and multi-part law called **One Day Rest in Seven Act** (820 ILCS 140/1 et seq.).

The **One Day Rest in Seven Act** requires at least 24 hours of rest for an employee in every calendar week. It is a law intended to give employees a break from the strain of work. A calendar week is defined as seven consecutive 24 hour periods starting at 12:01 a.m. Sunday morning and ending at midnight the following Saturday.

Under this Act, employers may ask the Illinois Department of Labor (IDOL) for a "relaxation" of the law. If the IDOL grants a relaxation to the employer, the IDOL requires a statement from the employer demonstrating that all employees who will be working seven days in a row are in fact volunteers.

In other words, employees cannot be forced into working 7 days in a row.

EXEMPTIONS: This law does not apply to part-time employees whose total work hours for one employer during a calendar week do not exceed 20.

It also does not apply to employees needed in case of breakdown of machinery or equipment or other emergency requiring the immediate services of experienced and competent labor.

Also exempt from this law are employees employed as watchmen or security guards.

The following exempt employees are not guaranteed one day of rest in seven: Employees who are employed in a bonafide executive, administrative, or professional capacity or in the capacity of an outside salesman, as defined in Section 12(a)(1) of the Fair Labor Standards Act, as amended.

VIOLATIONS: Under the **One Day Rest in Seven Act**, any employer who violates any of the provision of the Act is guilty of a petty offense and is fined for each offense in a sum of not less than $25 nor more that $100. The law is enforced by the IDOL.

A violation of the Act is charged for each employee during each week in which the employee works seven days of the calendar week when no permit authorizing work on the designated day of rest has been granted by the Director.

PERMITS:A permit is required under the Act during any week in which one or more employees, not excluded by the Act, work all seven days of the week.

Fortunately, permits for eight weeks of the year are granted without "justification of necessity."

However, permits in excess of eight weeks in a year shall require justification of necessity as follows:

1. A statement that the necessity cannot be remedied by increasing the number of employees or by adjusting work scheduled and
2. Business necessity and economic conditions making such a request necessary.

An employer desiring a permit shall submit to the Director of the IDOL ("Director") in written form a request for each permit. Such request shall contain the following:

1. A statement that all employees involved are truly **volunteers**.
2. The anticipated number and skills of said volunteer employees.
3. Number of days covered by the permit including inclusive dates and hourly times starting on Sunday.
4. A statement that no person possessing skills in subsection (b) above is laid off.

Telephone requests to the Director shall be honored; however, the employer shall within two working days of the telephone call forward to the Director a letter consistent with the requirements in Section 220.300.

Employers shall retain for two years (and make available to the Director upon request) letters and related correspondence granting permits.

CONCLUSION: There are other provisions and exemptions under this detailed law, so check the entire **One Day Rest in Seven Act** before making any decisions under it. The entire Act and Administrative Rules can be found on the IDOL website.

DOL Publishes Summary of Prevailing Wage Laws Throughout the U.S.

Although some states do not have prevailing wage laws, most do. Additionally, many contractors throughout the United States have come across the federal prevailing law by way of Davis-Bacon and its related laws (aka Davis-Bacon and Related Acts – DBRA). DBRAs apply to contractors and subcontractors performing on federally funded or assisted contracts in excess of $2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works. Davis-Bacon contractors and subcontractors must pay their laborers and mechanics employed under the contract no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area. Davis-Bacon directs the U.S. Department of Labor to determine such locally prevailing wage rates. Davis-Bacon applies to contractors and subcontractors performing work on federal or District of Columbia contracts. Davis-Bacon prevailing wage provisions apply to the "Related Acts," under which federal agencies assist construction projects through grants, loans, loan guarantees, and insurance (i.e. HUD). Under state law, prevailing wage requirements (including the administration and enforcement of such requirements) are specific and unique to each state.

In December 2011, the U.S. Department of Labor (DOL) revised and updated a concise summary of the general applicability and thresholds for state prevailing wage law purposes

in all jurisdictions that continue to have such laws on the books (see link: http://www.dol.gov/whd/state/dollar.htm). For any employer performing prevailing wage work on a state or federal level, intimate knowledge and familiarity with applicable prevailing wage laws is critical.

Illinois Gender Violence Act-Another Reason to be Vigilant in the Enforcement of Anti-Sexual Harassment Policies

The Illinois Gender Violence Act ("GVA") §§740 ILCS 82/1 et seq., became effective in January, 2004. There were few published cases decided under the GVA until last year when the U.S. District Court for the Northern District of Illinois ("Northern District") had several occasions to review various aspects of this law.

The title of the GVA does not immediately suggest application to the workplace. In fact, however, this relatively recent vintage statute does have workplace application. Perhaps even more surprising, the GVA may, under certain circumstances, give rise not only to liability on the part of the harasser, but the employer as well. Moreover, the statute of limitations on this Act is much longer than the 180/300 day limitations for employment discrimination claims filed with, respectively, the Illinois Department of Human Rights or Equal Employment Opportunity Commission. The limitation period for claims involving physical conduct under the GVA is seven years. Additionally, the GVA may apply to any employer, regardless of size. Damages under the GVA are not capped and provide for attorney fees and punitive damages.

The GVA provides for a private civil action for "damages, injunctive relief, or other appropriate relief against a person or persons perpetrating . . . gender–related violence." "Gender-related violence" is defined in the GVA as:

(1) One or more acts of violence or physical aggression satisfying the elements of battery under the laws of Illinois that are committed, at least in part, on the basis of a person's sex, whether or not those acts have resulted in criminal charges, prosecution, or conviction.
(2) A physical intrusion or physical invasion of a sexual nature under coercive conditions satisfying the elements of battery under the laws of Illinois, whether or not the act or acts resulted in criminal charges, prosecution, or conviction.
(3) A threat of an act described in item (1) or (2) causing a realistic apprehension that the originator of the threat will commit the act.
While the use of the word "battery" may seem to restrict the GVA to very severe conduct, this is not so. Under Illinois law a "battery" is simply the unauthorized touching of another person. Luss v. Village of Forest Park, 377 Ill. App. 3d 318, 878 N.E.2d 1193 (1st Dist. 2007); §720 ILCS 5/12-3. In other words, pretty much any type of sexual harassment involving physical contact is a battery.

The language of the GVA that has been found to give rise to employer liability is under §10 of the GVA which provides for a private cause of action, "against a person or person perpetrating that gender-related violence." "Perpetrating" is then defined under the GVA as either

“committing” the gender-related violence or “personally encouraging or assisting the act or acts of gender-related violence.” §740 ILCS 82/10. There is no Illinois state court case addressing the question of employer liability under the “encouraging or assisting” language. However, decisions of the Northern District have found that this section of the GVA can be used to impose liability on a supervisor who “turns a blind-eye” to repeated acts of gender violence, Stanfield v. Cook County, 2011 U.S. Dist. LEXIS 98452 (N.D. IL Sept. 1, 2011), and upon an employer who failed to take action to address complaints of sexual harassment. Cruz v. Primary Staffing, Inc., 2011 U.S. Dist. LEXIS 29237 (N.D. IL March 3, 2011).

In effect, at least as interpreted by the Northern District, the GVA provides additional liability for sexual harassment through this separate statute. It is not, therefore, surprising that arguments have been made by employers that the GVA is preempted by the Illinois Human Rights Act (“IHRA”) or the Illinois Workers Compensation statute. The Northern District has, however, thus far rejected these preemption efforts. The workers compensation preemption argument has failed because the allegations of harassment assert intentional, not accidental, conduct. See Cruz v. Primary Staffing, 2011 U. S. Dist. LEXIS 29237 (March 22, 2011). On the other hand, the IHRA preemption claims have failed due to the fact that the Northern District has found that claims under the GVA are based upon legal duties separate from those created under the IHRA. See Stanfield v. Dart, 2011 U.S. Dist. LEXIS 40668 (N.D. IL, April 14, 2011) and Vince v. Ill. Central School Bus, LLC, 2011 U.S. Dist. LEXIS 12858 (N.D. IL, Feb. 9, 2011).

In sum, while the decisions of the Northern District federal courts are not the last word with regard to issues of GVA preemption or scope, at this point, the 2011 decisions of the Northern District have given sharp teeth to the GVA. Until an Illinois court rules otherwise, employers should recognize that the improper handling of sexual harassment may give rise to additional liability for Illinois employers, without caps and with significantly longer periods of exposure due to the GVA’s longer limitation period.

Why Employers Have No Reason to Smile over the Smiley Decision

Susan Smiley, a 10-year employee, was terminated for insubordination. Smiley’s employer had a policy requiring non-exempt employees to take a 30-minute lunch. Employers familiar with Illinois and federal wage and hour laws typically have similar policies because Illinois law generally entitles non-exempt employees to a 20-minute meal period, and federal law indicates that non-compensable breaks should be at least 30-minutes in length. Practically speaking, this results in a 30-minute unpaid meal period for non-exempt employees. According to the decision, Smiley’s employer apparently recognized that employees cannot waive their wage and hour rights (i.e. employers cannot allow an employee to forego a lunch break).

Smiley’s employer also had a “no food at your desk” policy, which Smiley often ignored by eating breakfast at her desk. Such policies are common because eating can result in spills that damage documents, equipment, etc., and it can appear unprofessional to customers/suppliers– such as in Smiley’s situation because her desk was located near the front door. Such policies also help avoid a situation where an employee claims to have worked during the lunch period (this can result in liability unless the employer can prove no work was performed during that

time). In Smiley's case, the policy was in the handbook and had been in practice for Smiley's entire 10 years with the company.

Smiley's refusal to follow the rules came to a head when Smiley wouldn't obey her supervisor and refused to take a lunch. During a meeting with her supervisor and the HR Director, she became confrontational. She was ultimately terminated for insubordination.

Smiley filed for unemployment benefits. The IDES Hearings Referee determined that Smiley was discharged for misconduct based on her refusal to obey her supervisor's directive to take a lunch break despite her knowledge of the handbook and legal requirements to do so, and, therefore, was ineligible for unemployment benefits.

Smiley appealed to the IDES Board of Review, but the Board agreed with the Hearing Referee. Smiley then filed for administrative review where the judge reversed the IDES determination.

The IDES appealed to the First District Appellate Court of Illinois. The appellate court issued a decision on January 11, 2012, approximately two years after Smiley's termination, and upheld the lower court's decision resulting in Smiley receiving unemployment benefits.

This decision has garnered some media attention often invoking sympathy for Smiley because she was allegedly terminated just for being a hard worker. However, a thorough reading of the appellate court's decision indicates that Smiley had a history of performance issues and insubordination—this may not be a person who was diligently trying to give up her lunch hour just to get work done.

The saying goes, "bad facts lead to bad law" and this decision is yet another example. Employers trying to discipline/terminate an employee for not taking a lunch period – something required law – can result in an employee being eligible for unemployment benefits, which, of course, often leads to a higher tax rate for the employer.

New Illinois Supreme Court Decision on Enforceability on Non-Compete Agreements: Good News for Employers!

In a dramatic decision issued by the Illinois Supreme Court on December 1, 2011 (***Reliable Fire Equip. Co. v. Arredondo*****,** 2011 IL 111871), the Illinois Supreme Court announced a test making it easier for an Illinois employer to go into court and enforce a non-compete agreement.

The Illinois Supreme Court overturned the decision of the Appellate Court below as well as the Circuit Court of DuPage County. In what turns out to be good news for employers, the Illinois Supreme Court found that whether or not a legitimate business interest is supported by a reasonableness finding should be based on the totality of the circumstances.

The Illinois Supreme Court announced a new balancing test to determine the reasonableness of a non-competition agreement. The Circuit Court inDuPageCountyhad found the non-compete agreement at issue to be unenforceable. The Appellate Court upheld the DuPage Circuit Court's opinion. The Illinois Supreme Court reversed in favor of the employer.

The successful employer at issue (Reliable Fire Equipment Company) sells, installs and services portable fire extinguishers. The employee (accused by Reliable of violating Reliable's non-compete agreement) was a systems technician and salesperson for Reliable. The Illinois Supreme Court noted that a non-compete agreement will be upheld if it contains a reasonable restraint and the agreement is supported by adequate legal consideration.

In its December 1st decision, the Illinois Supreme Court flatly rejected the old "legitimate business interests test." The Illinois Supreme Court stressed **the totality of the circumstances must be determined on the case's own particular facts**. The Illinois Supreme Court noted that the same identical non-compete contract and non-compete restriction may be reasonable and valid under one set of circumstances and unreasonable and invalid under another set of circumstances! The Illinois Supreme Court Decision states:

Whether a legitimate business interest exists is based on the totality of the facts and circumstances of the individual case. Factors to be considered in this analysis include, but are not limited to, the near-permanence of customer relationships, the employee's acquisition of confidential information through his employment, and time and place restrictions. No factor carries any more weight than any other, but rather its importance will depend on the specific facts and circumstances of the individual case.

A Look Ahead . . .

The Illinois Chamber's webinar schedule for Spring 2012 is shaping up. Here are a few of the dates and topics to be offered. Check back with the Illinois Chamber's website and events calendar for added details.

February 2 - Workers Comp 101 - The Basics of the Illinois System

February 7 - Personal Liability for Violations of Fair Labor Standards Act and More

February 9 - The Latest on Prevailing Wage, Responsible Bidder and Project Labor Agreements

February 14 - Digging into the Updates of the WC & UI Legislation

February 16 - New Tobacco Use Cessation Coverage Law and What Employers Need to Know

March 6 - Maximizing the Value of Your Business, and Staging the Company for Sale

March 7 - Workers Comp 102

March 15 - Turning the Tables: How to Sue or Countersue an Employee

April 10 - Conducting the HR Audit: Where to Start and How to Finish

April 25 - Illinois Workers' Comp is Still Bad: Now What?