WILLCOX SAVAGE

Employment Law Outlook

Winter 2012

CAN'T YOU HEAR THAT WHISTLE BLOW?

Samuel J. Webster

Recently, employee whistleblowing has taken on a new and enhanced life. Statutes growing out of the 9/11 terrorist attacks and the economic meltdown have led to an alphabet soup of federal and state whistleblower legislation. Common examples of whistleblowing statutes include OSHA (workplace safety), SOX (Sarbanes-Oxley securities violations), the Title VII's anti-retaliation provisions (employment discrimination), and the anti-retaliation provisions of the Fair Labor Standards Act.

While many of these statutes have the laudatory purposes of protecting the public from corporate cover-ups and conspiracies and protecting employees from retaliation, typically whistleblower claims arise from employees who have some ax to grind with the employer – performance issue, personality clash, general dislike of the work, "unfair" treatment. Here are some suggestions for employers to protect against these burgeoning claims.

Document employee performance issues. We have stressed for many years the need for systematic review of employee performance and accurate documentation of that review. The pervading whistleblower mentality makes those needs even more critical. Document employee performance and memorialize conversations regarding employee performance and maintain those records.

A *non sequitur*. Treat all complaints seriously. The cases are legion in which employers have not taken a complaint of harassment or discrimination seriously. Juries do not like cavalier treatment of employee complaints. The risk is too high – potential punitive damages and injunctive relief. Employers should take all complaints very seriously and investigate them thoroughly and professionally. More often than not, the complaining employee just wants to know that he/she has been heard. A side effect of the disdainful approach to employee complaints is potentially bad legislation. Because whistleblowers were not heard in the Enron fiasco, Congress enacted enhanced legislation protecting whistleblowers. While laudable in principle, the legislation has taken on a life of its own and led to perverse claims.

Do not react to employee complaints. Managers/supervisors should be trained not to react to employee complaints, especially with any expression of disappointment, anger or resentment. Use your well-documented personnel policies and performance evaluations as the defense for the company.

(CONTINUED ON PAGE 2)

EXTENDING BENEFITS TO FORMER EMPLOYEES - A LESSON LEARNED

Cher E. Wynkoop and Corina V. San-Marina

It is common in severance or retirement situations to promise extended group health or life insurance benefits to separating or retiring executives. In fully insured health plans (and plans utilizing a stop-loss carrier), employers must consult their insurers before committing to such a promise. In a recent court case, Bekaert Corporation learned a difficult lesson.

In *Bekaert Corp. v. Standard Security Life Ins. Co. of N.Y.,* the court agreed with the stop-loss insurance carrier's decision to deny coverage under its policy to a former employee whose coverage: (1) was based on a Separation Agreement with the employer that was never disclosed to the insurer, and (2) was not included in the terms of the health plan sponsored by the employer.

Bekaert Corp. contracted with Standard for a medical stop-loss insurance policy (Policy). The Policy indicated that the parties' agreement consist of the Policy, Bekaert's Application for coverage, a Disclosure Statement by Bekaert indicating known, large claims that potentially exceeded the policy deductible, and a copy of the Bekaert Employee Health Benefit Plan (Plan). The Policy excluded coverage for expenses for any COBRA continuee or retiree whose continuation of coverage was not offered in a timely manner or according to COBRA regulations. The Policy also provided that amendments to the Plan are not covered unless Standard has accepted the proposed change in writing.

In 1999, Bekaert entered into a Separation Agreement with Jerry Padgett. Under the terms of the Separation Agreement, Padgett elected "Option D," which entitled him to receive the health benefits available to active employees under the Plan

(CONTINUED ON PAGE 3)

In This Issue...

CAN'T YOU HEAR THAT WHISTLE BLOW?

(CONTINUED FROM PAGE 1)

Train, train, train! Having an anti-retaliation policy is not sufficient. Companies must train managers/supervisors thoroughly on their obligation to avoid retaliation against employees who make complaints. Companies must also assure that their employees are trained and encouraged to report issues internally. Training creates a culture of compliance and could help the employer in defending against retaliation complaints.

Be mindful of possible protected activity. With so many laws containing whistleblower anti-retaliation provisions, employers must have a heightened sense of awareness of potentially protected activity. Be extra-sensitive to any form of employee complaint, no matter how trivial it may be.

Respond prudently to the whistleblower. If an employee has engaged in protected activity, consider cautiously whether to take any action against that employee. What may look like a justifiable adverse action today will likely look bad in two or three years when the whistleblower retaliation complaint surfaces.

Carefully draft the company's anti-retaliation policy. Phrase the anti-retaliation policy in mandatory words, rather than permissive words: "If you believe a problem exists, you **must** report it to human resources. . . ." Make the reporting of problems mandatory and communicate that fact to the entire workforce. Then, an employee may not hide behind claims of intimidation or ignorance. The company then must uniformly enforce the anti-retaliation policy.

We have made these suggestions for many years in relation to the various discrimination and compliance issues that employers face. With the advent of the whistleblower anti-retaliation cottage industry, we can only re-emphasize these best practices. By undertaking these practices, you may reduce the risk of a whistleblower retaliation complaint, as well as increase the opportunity for a good defense of a whistleblower retaliation case. ■

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TIPS TO MANAGING FOREIGN NATIONAL I-9 FORMS

Luba I. Seliavski

Companies employing foreign nationals pursuant to H-1B, L-1, E-1, E-2 and TN status have to make sure that these foreign nationals are continuously authorized for employment in the United States and that their continuous employment authorization is properly documented on I-9 Forms. Timely preparation of the documents for status extension/visa renewal and filing them with proper U.S. immigration authorities is key to ensuring the foreign nationals' continuous employment authorization in the United States.

For a foreign national in H-1B or individual L-1 status, the employer should file an I-129 Petition for a Nonimmigrant Worker with the U.S. Citizenship and Immigration Services ("CIS") before the foreign national's current H-1B or L-1 status expires. Foreign nationals working in the United States pursuant to Blanket L-1, E-1, E-2 or TN status (Mexican citizens only) have the option of leaving the United States before their current status expires and renewing their visas at a U.S. Consulate office abroad. Since Canadian citizens do not require a visa to enter the U.S. in TN status, they can leave the U.S. before their current TN status expires and reapply for TN status at one of the designated U.S. Customs and Border Protection Ports of Entry. If the foreign national in E-1, E-2, TN or Blanket L status does not plan to leave the U.S. before his/her current status expires, the employer has the option of filing an I-129 Petition with CIS seeking to extend the foreign national's E-1, E-2 or TN status and file an individual L 1 petition on behalf of the foreign national whose L-1 status is based on a Blanket L-1 visa.

Since there is a limit to the total maximum period of stay in the United States in L-1 and H-1B status, employers should discuss with their immigration counsel their long-term employment plans for foreign nationals in L-1 or H-1B status. There is no limit for a maximum period of stay for foreign nationals in E-1, E-2 and TN status. However, employers should seek legal advice from their immigration counsel if they plan to employ foreign nationals in E-1, E-2 or TN status long-term.

If an employer files an I-129 Petition with CIS before a foreign national's H-1B, L-1, E-1, E-2 or TN status has expired and the I-129 Petition is pending with CIS when the foreign national's nonimmigrant status expires, the employment authorization of this foreign national will automatically extend for 240 days from the date his/her nonimmigrant status expires and until adjudication of the I-129 Petition by CIS.

The employer should retain the following documents with the foreign national's existing I-9 Form to show that a petition to extend the foreign national's nonimmigrant status was timely filed with CIS:

- A copy of the I-129 Form pending with CIS;
- Proof of payment for filing the I-129 Form; and

(CONTINUED ON PAGE 4)

EXTENDING BENEFITS TO FORMER EMPLOYEES - A LESSON LEARNED

(CONTINUED FROM PAGE 1)

with no lifetime maximum at no cost for one year, and thereafter, provided he paid the required monthly premiums for coverage, until he reached age 65 or was covered by Medicare or another health plan. Padgett continued paying monthly premiums until 2009, when he underwent heart bypass surgery and died shortly thereafter. Bekaert determined that Padgett was covered under the Plan as a COBRA participant and paid his medical claims. Bekaert, through its third-party administrator, submitted the claim to Standard under the stop-loss Policy and Standard denied it.

Standard denied the claim for the following reasons: (1) Padgett was not a covered person under the Policy, as he was neither an active full-time employee nor was he eligible for retiree coverage under the terms of the Plan; (2) Option D, elected by him, extended beyond the maximum COBRA mandated coverage, and therefore, the claim was excludable as not offered in accordance with COBRA regulations; and (3) Bekaert never provided the Separation Agreement and the benefits under Option D to Standard, nor were they referenced in the Plan or the Policy. The Plan's only reference to Option D was contained in a Schedule of Benefits, which provided that employees who elected Option D were not eligible for retiree health benefits.

The court found that the relevant issue was whether Padgett was eligible for coverage under the Plan and not otherwise excluded by the terms of the Policy. To make that determination, the court first analyzed the terms of the Plan and agreed with Standard that Padgett was not covered under the terms of the Plan. Bekaert argued that Padgett was entitled to COBRA coverage, but the time limits imposed by the Plan did not apply to him because he has not experienced a "qualifying event," as defined in the Plan, which referred to termination of employment (except for gross misconduct). The court did not agree with Bekaert's narrow interpretation of "termination of employment" to include only involuntary separation. COBRA is triggered not only by involuntary, but also by voluntary separation, including retirement and/or resignation. As a result, based on the Plan document, the maximum coverage period was 18 months. Also, the court found that if Padgett had not experienced a "qualifying event," as defined in the Plan, then he was not eligible for COBRA coverage for any period of time.

The court also rejected Bekaert's argument that its interpretation of the Plan was reasonable. Bekaert could not interpret the Plan language to include any undisclosed agreement with Padgett and the Option D retirees to extend their COBRA benefits beyond the time limits imposed in the Plan. Bekaert's undisclosed and unexpressed intention to extend COBRA benefits for more than 18, or even 36 months, to option D retirees did not bind Standard, absent a revision or modification of the Plan terms, to include the extended coverage.

Bekaert also tried to argue that Standard knew that Padgett was a COBRA continuee at the time the Policy was signed, as he was listed in its Application for insurance and accepted premium payments on his behalf, and was estopped from denying coverage. The court found that even if Padgett was covered under the terms of the Plan or incorporated into the stop-loss agreements by the Application, the Policy unambiguously excluded coverage of Padgett's claim. The Policy excluded from coverage charges for any COBRA continuee or retiree whose continuation of coverage was not offered according to COBRA regulations. Bekaert argued that, so long as its offer to extend COBRA coverage did not violate COBRA, it is "according" to COBRA. The court rejected the argument and found that COBRA regulations must be the only source from which the coverage determination was made.

Practical Implications for Employers

Employers should be aware of the terms of its health and life insurance policies when negotiating severance or retirement agreements that contain special post-employment coverage extension. Former employees with this kind of post-employment coverage should be listed as "additional insureds" by name and date and incorporated into an addendum of the policy with the written agreement of the insurer. ■

Welcome New Partners

Christopher A. Abel & Gregory A. Giordano

Christopher A. Abel practices in our Norfolk office. He represents maritime clients in a wide variety of matters and will be leading the firm's Maritime practice.

He also advises employers in a variety of other industries who face employment law challenges, both in and out of court.

Gregory A. Giordano practices in our Virginia Beach office. He represents clients faced with labor law, employment law or commercial litigation matters.

He is currently an adjunct Professor teaching Labor Law at the Marshall-Wythe School of Law at the College of William and Mary.

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TIPS TO MANAGING FOREIGN NATIONAL I-9 FORMS

(CONTINUED FROM PAGE 2)

- Evidence that the I-129 Form was mailed (or sent via FedEx, etc.) to CIS.

When the employer receives a Receipt Notice from CIS acknowledging that the I-129 Petition is pending, the employer should retain this Receipt Notice with the foreign national's I-9 Form.

Once the employer receives the Approval Notice for the I-129 Petition on the foreign national's behalf, the employer should record this document title, number, and the status expiration date in Section 3 of the I-9 Form.

When the employer reverifies the foreign national's employment eligibility on the I-9 Form, the employer should write "240-Day Ext." and record the date the I-129 Petition was submitted to CIS in the margin of the I-9 Form, next to Section 2. The employer must reverify the foreign national's employment authorization in Section 3 once the employer receives a decision from CIS on the I-129 Petition or by the end of the 240-day period, whichever comes first. ■

Virginia Supreme Court Strikes Down Employee Non-Compete

David A. Kushner

On November 4, 2011, the Virginia Supreme Court continued a now decade long pattern of striking down employee non-competition agreements (non-competes). Indeed, since 2001, the Supreme Court has refused to enforce every single non-compete it has had opportunity to review. In *Home Paramount Pest Control v. Shaffer*, the Supreme Court underscored its increasing hostility towards non-competes by striking down an agreement that was identical to an agreement it had declared enforceable in 1989. As the Supreme Court noted in *Shaffer*, the law of non-competes has been "gradually refined" in the last decade, such that a non-compete which would have been enforceable only a few years ago, may be vulnerable today.

The *Shaffer* case is just the latest reminder of the importance of having your employment lawyer review your non-compete agreements on a routine basis. If you are concerned that it may be time to update your non-compete or non-solicitation agreements, please feel free to call any of the employment attorneys at Willcox Savage.