Weekly Wright Report (10/23/17)

EMPLOYMENT LAW

Recognizing Signs that Employees Need FMLA Leave

When a manager learns that one of her employees is in the hospital for several days, that's almost always enough information to have an inkling that the employee may need FMLA leave. But one employer didn't think so. Grace worked for the Center for Human Development (CHD). She became hospitalized due to a mental health condition. Upon her admission, she asked her son, Jim, to call CHD to report that she was in the hospital and unable to report to work. Jim called CHD the same day. And the next day. And the day after that. Each time, he reported that his mom was ill, in the hospital and could not come to work. At the same time, however, Candy, a supervisor who had taken one of his calls, became angry with Jim, telling him it was "not acceptable for him to call CHD instead of his mother." Then, she told him "not to call again." Candy informed the VP of HR that Grace was hospitalized and unable to work and later reported that Grace was a "no call/no show." Without asking any questions, the VP drafted a termination letter for signature by one of CHD's executives. When Grace came looking for her job, she learned she was terminated.

Those who understand the FMLA know that an extended hospitalization could very well trigger coverage. But beware about blindly approving FMLA leave without obtaining a medical certification. Communication and documentation are paramount under this complex federal law. For more information on administering the FMLA, ask Laura LRubenstein@wcslaw.com

Tortious Interference with a Non-Compete Requires Actual Knowledge of the Agreement

Employers hiring an individual known to have a non-compete contract can expect to be accused of tortiously interfering with that contract. On the other hand, the hiring employer should be innocent of wrongdoing if it has no idea the new hire is bound by a restrictive covenant. In *Acclaim Sys. v. Infosys, Ltd*. (3d Cir. 2017), the Third Circuit affirmed this common-sense approach by holding an employer lacking actual knowledge of a restrictive covenant cannot be liable for tortious interference with that covenant.

The Third Circuit examined—and rejected—Acclaim's position that Infosys could intentionally interfere with non-compete covenants of which it had no knowledge. First, Acclaim argued Infosys failed to ask the "right" questions of the new hires during the onboarding process. The Court rejected this position because Infosys asked each hire, specifically and directly, if they

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were subject to a non-compete, and the answer received from each was an unequivocal "no." Second, Acclaim argued Infosys should have presumed the existence of the non-competes because such restrictive covenants are standard in the IT industry. The Court maintained that a belief or suspicion that workers might be subject to a non-compete is not actual knowledge. Third, Acclaim argued Infosys turned a willfully blind eye toward the post-employment obligations owed by the new hires. The Court rejected that argument on the facts presented, namely that Infosys made adequate inquiries regarding whether the workers were subject to non-competes.

Employers should conduct reasonable due diligence during the onboarding process to determine whether a new hire (or even a subcontractor) is bound by a non-compete agreement or other restrictive covenant. Only by examining the candidate's post-employment restrictions under the applicable state's law may the new employer fully measure the risk of continuing the recruiting discussions. Ask Marc MCampsen@wcslaw.com

Protecting Secrets

Following precedents set in many states, Congress enacted the Defend Trade Secrets Act creating a federal cause of action for the theft of trade secrets. Although a powerful weapon in maintaining trade secrets, too many business owners fail to cross the threshold of first ensuring their information is, in fact, a protected secret. Many businesses focus only on identifying the information rather than the measures taken for its maintenance and protection. The recent decision out of New York in Art and Cook, Inc. v. Haber, demonstrates that only companies taking basic reasonable steps to protect their information can truly benefit from these statutory protections.

Simple steps such as password-protecting computer and database access, contracting a third-party cybersecurity services to protect against hacking, execution of confidentiality agreements with employees, reminders of confidentiality in handbooks, and then not taking "no" for answer when employees refuse to execute the agreements or abide by measures necessary for its protection all leave the information vulnerable to losing protection. Ask Don DWalsh@wcslaw.com

Statistics on Paid Parental Leave

According to the Society for Human Resource Management's 2016 Employee Benefits research report, 18% of U.S. organizations offer paid maternity leave and 12% offer paid paternity leave. Only 17% of employers have a paid parental leave plan for either parent. While paid parental leave can be an expensive proposition, turnover of key talent can be even more costly. In the end, the investment in paid parental leave makes economic and practical sense and demonstrates a caring workplace culture that places the value on the whole person, not just the employee. In addition, having a well written policy which is nondiscriminatory and accomplishes precisely what you hope to do in keeping your talent is critical. Ask Don DWalsh@wcslaw.com

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