Zinsergram a/k/a Legal Update

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1. NLRB and "At-Will Employment Policies"

The NLRB's Division of Advice has recently issued two memoranda regarding at-will employment policies. Although such memoranda are not binding precedent, they do give us an idea on the types of policies that will be prosecuted as unfair labor practices by the agency.

The Division of Advice advised the NLRB regional office to dismiss a charge against an employer concerning the following handbook language:

> *No manager, supervisor, or employee at Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time, or to make an agreement for employment other than at-will. Only the president of the company has the authority to make such agreement, and then only in writing.*

The advice memo opines that this language would not reasonably be interpreted to restrict employees' § 7 rights. The employer's president would be permitted to enter into written agreements that modify the at-will relationship – thus providing for the possibility of potential modification of the at-will relationship through collective bargaining.

In a second case, the Division of Advice concluded the NLRB regional office should dismiss a charge involving the following policy:

> *No representative of the company has authority to enter into any agreement, contrary to the forgoing "employment at-will" relationship.*

The NLRB Division of Advice opined that the provision did not require employees to refrain from seeking a change in "at-will" status, or to agree that their at-will status could not be changed. The clear meaning of the clause is to reinforce the employer's unambiguously stated purpose of its at-will policy; it reads, "Nothing contained in this handbook creates an express or implied contract of employment."

2. Title VII Does Not Protect Secret Recordings

The U.S. Court of Appeals for the 6th Circuit recently ruled that surreptitious workplace recordings were not protected activity under Title VII of the Civil Rights Act of 1964. An employee was fired because she violated a stated company policy against recording conversations in the workplace. The court stated:

Jones has not shown why she needed to violate the recording policy in order to oppose defendants' alleged discrimination. She might have taken notes of the conversations, obtained the same information through legal discovery, or simply asked her interlocutors for permission to record. Jones argues that her conduct was reasonable because the recordings were not illegal, did not breach confidential information, were not disruptive of business operations, and were not disseminated beyond the litigation. But none of this suggests that the recording policy was illegitimate or that it would have been futile to oppose the alleged discrimination in ways that did not violate the policy. In light of these considerations, we declined to hold that Jones' recordings were protected.

Editor's note: all employers should have a policy that prohibits recording in the workplace. You never know when an employee is going to try to smuggle a recording device into a termination or other meeting.

3. Wage-Hour Victory for Employers

The employer had a 30-minute unpaid meal break that was automatically deducted from its employees' wages. An employee brought a collective action pursuant to the Federal Wage-Hour Law, claiming that the employer violated the Fair Labor Standards Act's requirement that employees be paid for all hours worked because employees worked during their lunch breaks and were not properly paid for this time. The hospital did have an exception procedure, whereby employees were to report such work so they could be paid for it. The exception procedure was not uniform and varied from department to department.

The U.S. Court of Appeals for the 6th Circuit ruled that automatic deductions are lawful under the FLSA and found that the putative class was properly decertified because there was insufficient evidence of a common injury among class members as a result of the automatic deduction policy.

The court also ruled that the named plaintiff could not recover because he failed to file the requisite consent under the statute. § 256(a) of the FLSA provides that a collective action is commenced for statute of limitation purposes "on the date when the complaint is filed, if the plaintiff is specifically named as a party plaintiff in the complaint *and* his written consent to become a party plaintiff is filed on such dates in the court in which the action is brought." The named plaintiff never filed his written consent to become a party plaintiff, and as a result, the statute of limitations expired and the plaintiff's claims were time-barred.

Finding the employer to be the prevailing party, the court rewarded the employer over $55,000 in fees and costs in defending the action.

4. What is coworker.org?

Coworker.org is a recently launched website that allows employees to "start, run, and win" campaigns to change their workplaces. Employees can create online petitions through this website. Currently, coworker.org has one active campaign against Walmart,

which seeks the reinstatement of an employee who was allegedly fired for speaking out against having to work on Black Friday.

Employers should pay attention to coworker.org to see if their employees are complaining about their workplaces. Note: retaliation against any employees who post on coworker.org "may" be illegal under the National Labor Relations Act, depending upon the post. On the other hand, it may be "cause" for discharge if the post goes beyond complaining about wages, hours, and working conditions.