MARYLAND STATE BAR ASSOCIATION
SECTION OF LABOR AND EMPLOYMENT LAW
NEWSLETTER

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From The Chair

By J. Michael McGuire

Mark your calendar for Wednesday, April 20th, as the Labor and Employment Section will be having two (2!) Programs that day. First, at Noon Assistant Attorney General Jonathan Krasnoff will provide an "encore" performance of his "Maryland Wage Payment Law" program. This "Brown Bag Lunch" special was presented to a packed house in Bethesda last Fall, and will be repeated for our closer-to-Baltimore members on April 20, 2005, at 12 Noon, at Whiteford Taylor & Preston's conference room, 7 St. Paul Street, 15th Floor, Baltimore, Maryland.

Our second big event that same date (April 20) will be our Spring Dinner Program "It's NOT Discrimination, It's RETALIATION!" This Program, featuring United States District Judge Catherine C. Blake, United States Magistrate Judge James K. Bredar, Gary Gilbert (speaking for the Plaintiff's side) and Bruce Harrison (speaking for the Employer's side) will focus on the recurring issues that arise in advising both employees and employers concerning retaliation claims and associated litigation issues.

Employment law practitioners have noticed that employers frequently prevail on the "main" employment discrimination claim (alleged age and sex discrimination, for example), but then lose on the employee's claim that she was retaliated against after she made complaints of age and sex discrimination. While many fact-finders (judges and juries) may be predisposed to believe that managers do not usually discriminate against their subordinates due to age, race or sex, the same fact-finders too often seem predisposed to believe that if an employee sticks her head up above the crowd and complains that she is being discriminated against, something bad happens to her in the workplace! As a result, practical and legal issues abound as the courts try to balance the employee's right to make a good faith complaint free from unlawful retali-

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EDITOR'S CORNER

By Albert W. Palewicz

Maybe, if we are fortunate, it will be spring when you are reading this. As I am writing it at the very end of March it most certainly is not yet spring. The winter may have been mild in the sense of not producing a lot of snow, but it is surely seems to have been here for a long time. On the other hand, this Newsletter does not seem to have been around for a very long time, yet we are very close to completing our tenth year of publication. The Section began the Newsletter with Volume I in 1996. We are now working on Volume X. It does not seem like ten years are nearly done, but they are.

We have decided to celebrate our tenth year of publication formally in the next issue, the one that will be issued just before, and made available to those attending, the Maryland State Bar Association's Convention in Ocean City in June of this year. During the ten years in which we have been publishing, many dozens of firms, and more than a hundred Section members have contributed articles to the Newsletter.

The articles have been timely, sometimes controversial, but always informative and useful to our members. The Section Council would like to invite any Section members who would like to contribute, to send some expression of the use they have made of the Newsletter over the years. We will publish these in our Anniversary Issue in June. If anyone has an article to publish, please send that to me electronically (albert.palewicz@nlrb.gov), and we will find space for it either in the Anniversary Issue, or in a later one this year.

This issue is sponsored by the firm of Hogan and Hartson, with Gil Abramson as Coordinator. Those who have edited the articles agree they are very useful and timely. Our next issue will be sponsored by the firm of Blank and Rome, with Brooke Iley as Coordinator.

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EDITOR'S CORNER (continued)

Included in this issue is an article by Wayne Gold, the Regional Director of the National Labor Relations Board's Baltimore Regional Office. The article was presented at a meeting of the American Bar Association, and deals with the Board's rules and practice on the acceptance of electronic submissions. As more courts, and federal and local agencies, adopt the practice of electronic filing for initiation of cases and for the follow-up submission of briefs, arguments, and motions, the rules governing this development are becoming more and more necessary for all attorneys to learn. You will find this article in dealing with the National Labor Relations Board by electronic submission both thorough and useful.

FROM THE CHAIR (continued)

ation, with the employer's right to continue running the business and fairly manage the employee.

Plaintiff's and Defense counsel may both enjoy reading Fabela v. Socorro Independent School District, 329 F.3d 409 (5th Cir. 2003) as an illustration of how a weak retaliation claim can be reinvigorated by a manager who lets his emotions get the best of him. In 1991 Ms. Fabela filed a charge of sex harassment against her boss with the EEOC. The EEOC investigated and ruled that her charges were unsubstantiated. The employer "managed" Ms. Fabela for the next 6½ years, but ultimately discharged her for various performance issues. At her termination meeting, the decision-maker told Ms. Fabela that she was a "problem employee" and pointed to the fact that she had filed an "unsubstantiated" EEOC charge 6½ years earlier. He then directed the personnel manager to read the EEOC's "no cause" Determination letter to her (ouch! I hope that made him feel better). That got the employer's favorable summary judgment decision reversed by the Fifth Circuit and remanded to trial, the Appeals Court holding that while lack of temporal proximity can render a retaliation claim meritless, the time lapse was rendered irrelevant when the decision-maker listed Ms. Fabela's protected activity as among the factors leading to his decision!

Don't miss our April 20th Spring Dinner Program where we will explore these retaliation issues with advocates of both sides, and, most significantly, a "View from the Federal Bench."

ARTICLES

Considerations for the 2005 Proxy Season: Equity Compensation Plan Issues

By William L. Neff, Margaret de Lisser, Joseph Rackman, Kim Stahlman

There have been a number of recent developments affecting equity compensation plans that public companies should review in connection with planning for 2005 equity compensation awards and the 2005 proxy season. These developments include enactment of new Section 409A of the Internal Revenue Code of 1986, as amended (the "Code"), relating to deferred compensation arrangements and the issuance of FAS 123R, "Share-Based Payments," which will require expensing of stock options for financial accounting purposes commencing July 1, 2005 for calendar year public companies. This paper addresses some of the implications of these and other developments.

Section 409A—Deferred Compensation.

Under new Section 409A, generally effective for tax years beginning after December 31, 2004, stock options granted at fair market value are not deferred compensation subject to Section 409A. However, options that are granted with a deferral feature (e.g., a right to elect at some future date to defer option gains) and options granted with an option exercise price of less than fair market value will be treated as deferred compensation from the date of grant. This would result in taxation on vesting, and imposition of a 20% penalty tax if exercise of the option does not coincide with vesting. In addition, while stock appreciation rights ("SARs") that can be settled solely in stock (i.e., on exercise the holder receives stock equal to the value of the appreciation in the value of the stock subject to the SAR) and have a base price of at least fair market value at grant have been specifically exempted from the definition of deferred compensation, SARs that can be settled in cash will be considered deferred compensation (taxable on vesting and potentially subject to the 20% penalty tax) unless the SAR will only be paid out on a schedule established at the date of grant, without regard to when the SAR is exercised. As a result of new Section 409A, companies may decide no longer to grant any SARS that could be settled in cash, any discounted stock options or SARs or any stock options with deferral features in the future. In additional, companies may consider whether the Board of Directors should amend the company's equity compensation plans to eliminate any deferral features for stock option gains, cash-

settled stock appreciation rights and to provide for the grant of options and SARs at fair market value or above. These types of amendments do not require shareholder approval, unless the plan provisions require shareholder approval.

Accounting for Stock Options.

Significant changes in accounting rules, most notably the requirement that stock options be expensed, make it imperative for companies to reconsider the accounting effects of their equity awards. In particular, the Financial Accounting Standards Board (FASB) has finally published Financial Accounting Standard 123R, "Share Based Payment," which provides that, effective for periods beginning after June 15, 2005, public companies will be required to report compensation expense for stock options. While we are not accounting experts and cannot offer accounting advice, a number of the steps companies are considering in response to the new FAS 123R standard have come to our attention. As a preliminary matter, companies need to engage their internal or external accounting and compensation advisors in advance planning, including determining the cost of stock options using one of the acceptable option valuation methodologies and a reasonable set of assumptions.

In light of the prospective accounting charges for options, companies are considering, among other things:

Restricted Stock/Restricted Unit Grants.

Companies should consider whether to award some or all of their equity compensation grants as restricted stock or restricted stock units and whether to use performance vesting for such arrangements. Because there is generally no purchase price for the restricted stock/restricted stock units, a smaller number of shares would be granted as restricted stock or restricted stock units in order to have the same value as an option grant. Stock options have a built-in performance feature (they only have value if the stock price goes up) which does not exist for restricted stock or restricted stock units. It is this performance feature that can be relied upon to grant fair market value options that are exempt from deductibility limits under section Code 162(m) (the $1 million limit on deductibility for certain executive compensation). Therefore, compensation committees may want to consider whether to have a performance vesting feature to restricted stock/restricted stock unit awards, not only because the feature otherwise is lacking in restricted stock/restricted stock units, but in order to structure the award to be exempt from the deduction limitation under section 162(m). If an equity compensation plan does not authorize restricted stock, the Board of Directors would need to amend the plan to provide for restricted stock and such an amendment would be subject to shareholder approval.

Stock-Only Stock Appreciation Rights.

Stock appreciation rights that can be settled solely in company stock ("stock-only SARs" or "SOSARs") are not considered deferred compensation if appreciation is based on fair market value of the stock at the award date and are accounted for essentially the same as stock options under FAS 123R. With SOSARs, the optionee does not directly pay the option exercise price. Rather, on exercise of the SOSAR, the optionee receives the spread value of the SOSARs over the base price set at grant. This reduces the dilutive impact compared to stock options and may reduce the downward pressure on stock prices from the sale of shares in connection with cashless exercises of options. We have received some feedback noting that SOSARs reduce the cash flow to the company because the company does not receive the option exercise price. However, stock options are not considered to be primarily capital raising so this may not be an important point. Plans that do not authorize SARs would need to be amended to add this feature, but such an amendment would not generally require shareholder approval as long as the plan currently provides for stock options.

Reducing the Option/SAR Exercise Period.

Many companies are considering reducing the exercise period for future stock option grants to seven or eight years, compared with the standard ten year exercise period, in order to reduce the accounting cost of stock options. (This modification would work to reduce the charge on SOSARs as well.) While we are not consultants, we have seen studies that show that comparatively few options remain outstanding for the full ten year period. Consequently, a compensation committee could determine that the reduction in benefit to the optionees or SOSAR holders was more than offset by the reduction in accounting cost to the company. In theory, the exercise period could reduce even further but such a decision should be based on analysis of whether the benefit to the company justifies the loss of benefits to optionees or SOSAR holders, as applicable.

Maximum Value Options.

These options limit the maximum gain an optionee can receive and may help to reduce the accounting expense under the new FAS 123R guidelines. For companies whose stock price has a high volatility, option valuation models may overvalue the options from what the companies think the options are worth. By limiting the maximum gain that can be received for an option, the accounting cost of the option may be reduced substantially. The company may conclude that the likelihood that the stock will increase more than the maximum value is sufficiently low to justify the cost savings to the company compared to the benefit reduction to the optionee. One approach to implementing a maximum value option would be to provide that the option exercise price is indexed to the

company's stock price once a certain level of appreciation has occurred. Companies should generally be able to implement maximum value options without amending their equity compensation plans.

Accelerate Vesting in Underwater Options.

Under FAS 123R, a company will be required to report a compensation expense commencing on the first accounting period commencing after June 15, 2005 based on the fair value of unvested options determined as of the date of grant of the options. If the company's stock price has declined in value subsequent to the grant date, the accounting expense may exceed what would be the reasonably expected future value of the options. An option that is significantly out of the money could still generate a surprisingly large compensation expense for the unvested portion of the options. Accelerating vesting does not result in the options becoming immediately exercisable since the options are out of the money. If it is unlikely that the options will be in the money during the vesting period, accelerating vesting may not have a substantial impact on optionees. Companies should review with their accountants and other advisors whether to accelerate the vesting in underwater options, or take other steps, prior to July 1, 2005 in order to reduce the future accounting expense. Accelerated vesting can be implemented by action of the compensation committee of the Board of Directors.

Account for Employee Stock Purchase Plans.

FAS 123R also impacted the treatment of employee stock purchase plans under section 423 of the Code (ESPPs), eliminating the favorable accounting treatment in most cases where the discount exceeds 5% or where the plan applies a "look back" method for determining the purchase price (i.e., selecting the lesser of the price at the start or the end of the purchase period). ESPPs still provide the same benefits to participants but an accounting charge now will be assessed, unless companies reduce the discount in the purchase price under the plans and eliminate the look-back. Consequently, companies will need to determine whether continuation of their ESPPs post-FAS 123R, with or without modification, makes sense.

Share Counting.

A common feature of equity compensation plans is to provide that any shares retained to pay withholding taxes or any shares surrendered in stock for stock exercises of stock options are added back to the number of shares available for grant under the equity compensation plan. Institutional Shareholder Services (ISS) has announced that, for its 2005 proxy guidelines, it will treat any add back of shares to an equity compensation plan (other than shares that are forfeited in accordance with vesting conditions) as if all the shares available for issuance under the plan could be issued with a zero option exercise price. This will increase the "transfer of shareholder value" number used by ISS in determining whether to recommend against approval of an equity incentive plan. Some companies do not view compliance with the ISS guidelines as very important in connection with submitting an equity compensation plan for shareholder approval. However, if ISS approval may make a difference in obtaining shareholder approval, companies submitting plans for shareholder approval should consider revising share counting under the plans to conform to the ISS requirement.

Minimum Vesting in Restricted Stock.

Fidelity Investments is a significant shareholder of some companies and has certain standards that it applies in determining whether to vote in favor of equity compensation plans submitted for shareholder approval. In prior years, one of the Fidelity requirements was that equity compensation plans granting restricted stock provide in the plan document for minimum vesting periods of three years for time vested grants (may be in equal annual installments) and one year for performance vesting grants. If Fidelity is a significant investor in your company and you are submitting a plan for shareholder approval, you may want to consider minimum vesting standards under the plans to conform to the Fidelity requirement.

Disclosure.

The SEC's disclosure rules (Item 201(d) of Regulation S-K) require disclosure in a table of equity incentive plans in the annual report on Form 10-K (which may be incorporated by reference from the proxy statement if the issuer prefers to keep its compensation information in one location), as well as in the proxy statements in years when an issuer is submitting a compensation plan (either a new plan or an amendment) for security holder action. The rules generally require the following:

· Disclosure in a table of certain information regarding shareholder approved plans and non-shareholder approved plans;
· Footnote disclosure in the table for certain items, including awards assumed in connection with a corporate transaction;
· A narrative description of the material features of each plan that has not been approved by the company's stockholders; and
· The filing of a copy of each nonstockholder approved plan (unless immaterial in amount or significance).

Review Status of Equity Compensation Plans in Light of New NYSE and Nasdaq Shareholder Approval Rules.

On June 30, 2003 the SEC approved listing standards proposed by NYSE and Nasdaq that require shareholder approval of adoption of equity compensation plans and material revisions to those plans. The rules are described in Release No. 34-48108 and in our SEC Updates dated July 29, 2003 and January 5, 2004.

Review Status of Equity Award Agreements in Light of New Form 8-K Rules.

The new 8-K rules generally require that grants to executive officers and directors under an equity compensation plan must be reported on a Form 8-K unless the material terms and conditions of the awards, other than the identity o the recipient, the grant date, the number of securities covered by the award, the strike price and the vesting schedule, are disclosed in the plan and, if necessary, a "form of" award agreement previously filed as an exhibit to an Exchange Act report. As a result, public companies should examine their plans and other filings to make sure all material information other than the above award-specific terms has previously been disclosed. If not, to avoid the requirement of filing a Form 8-K at the time of any grant, we recommend that all such information should be filed prior to the making of any new grants.

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This Update is for informational purposes only and is not intended as a basis for decisions in specific situations. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship.

The Uncertain Future of Coordination of Retiree Health Benefits With Medicare Eligibility: Will the Practice of Providing a "Bridge to Medicare" Collapse?

By Gregory Petouvis

For decades, retiree heath benefits have been the subject of a variety of legal challenges. For the most part, however, these benefits escaped scrutiny under the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, the federal statute that protects individuals 40 and over from age discrimination in employment. This state of affairs changed in 2000, when the common employer practice of "bridging" retiree health care benefits to Medicare eligibility (i.e., providing health benefits to workers who retire before they become eligible for Medicare) was deemed to violate the ADEA by the U.S. Court of Appeals for the Third Circuit. The inevitable backlash against this ruling initially pitted the unusual alliance of employers and organized labor against the Equal Employment Opportunity Commission ("EEOC"), the agency responsible for interpreting and enforcing ADEA. After the EEOC abruptly changed its position on the issue, an even stronger foe to the "bridge to Medicare" practice emerged: the 35-million member AARP (formerly known as the American Association of Retired Persons). What follows is a summary of this dispute, a resolution to which may just a few months or many years away.

Erie County Retirees Association v. County of Erie, Pennsylvania

The genesis of this drama stemmed from the actions of a county tucked away in the northwest county of Pennsylvania. Erie County classified its retirees into two groups: Medicare-eligible retirees and Medicare-ineligible retirees. Initially, these groups of employees were offered separate but similar traditional indemnity coverage. Because of increasing health insurance costs, the County changed plans for each group of retirees. The Medicare-ineligible retirees (generally, those under age 65) were essentially given the choice to participate in either traditional indemnity coverage or an HMO, while the older Medicare-eligible retirees were only offered the HMO coverage.

In response to the County's actions, the Medicare-eligible retirees sued the County under the ADEA, alleging that it adopted a facially discriminatory health insurance policy that provided them inferior coverage compared to the coverage extended to Medicare-ineligible retirees. The U.S. District Court for the Western District of Pennsylvania held that retirees are not "employees" within the meaning of the ADEA and thus were not entitled to protection under the statute. See Erie County Retirees Ass'n v. County of Erie, Pennsylvania, 91 F.Supp.2d 860 (W.D. Pa. 1999).

On review, the Third Circuit (which includes New Jersey, Pennsylvania, Delaware, and the Virgin Islands) reversed the district court, holding that the ADEA applies even when retiree benefits are structured in a discriminatory manner after such employees retire. See Erie County Retirees Ass'n v. County of Erie, Pennsylvania, 220 F.3d 193 (3d Cir. 2000), *cert. denied*, 532 U.S. 913 (2001). The court further determined that the County's disparate treatment of the Medicare-eligible and Medicare-ineligible retirees constituted an age-based distinction, since Medicare-eligibility "follow[s] ineluctably upon attaining age 65." Id. at 211. As a result, the court held that the County's actions violated the ADEA when it reduced or eliminated retiree health benefits available to Medicare-eligible retirees, unless the County could show either that the benefits available to the Medicare-eligible retirees (including government-provided benefits) were equal to those provided to the Medicare-ineligible retirees, or that the County itself was expending the same amounts of money for both groups of retirees.

Initial Responses to Erie

In response to Erie, the EEOC (which had filed an amicus brief in support of the retirees in the Erie litigation) officially adopted the position that:

[I]f an employer eliminates health coverage for retirees who are eligible for Medicare – or if it refuses to continue to cover its older retirees for the benefits it provides that are not offered by Medi-

care – older retirees will get lesser coverage than younger retirees on the basis of their age. Unless the employer can meet the equal cost defense, the law does not permit this age discrimination.

U.S. Equal Enforcement Opportunity Commission, EEOC Compliance Manual Chapter 3 (Oct. 3, 2000). The EEOC's position, however, created unintended and counterproductive consequences. Instead of raising the level of benefits for Medicare-eligible employees (the EEOC's desired result), a number of employers faced with rising health care costs and increasing numbers of retirees elected either to reduce the coverage they provided to Medicare-ineligible employees or eliminate retiree health benefits for all retirees in order to remain in compliance with the EEOC's dictate. Facing this widespread employer response, labor unions began to express concern about the EEOC's position. In light of these pressures, the EEOC backed off its initial position and rescinded this portion of its Compliance Manual on August 20, 2001 in order to assess whether certain employer practices, including the provision of retiree health benefits only until Medicare eligibility is attained, is in fact permissible under the ADEA.

EEOC's Proposed New Regulation

On April 22, 2004, the EEOC approved a rule which creates a narrow exemption from the prohibitions of ADEA for the practice of coordinating employer-sponsored retiree benefits with eligibility for Medicare or a comparable state retiree health benefit program. Under this regulation, employers would be permitted to reduce or eliminate retiree health benefits when a retiree becomes eligible for Medicare without violating ADEA, irrespective of whether the retiree receives Medicare or equivalent state benefits. The exemption also applies to health benefits provided to the spouse or dependants of a retiree, permitting the alteration, reduction, or elimination of health benefits to these individuals, irrespective of whether the health benefits provided to the retiree are similarly altered, reduced or eliminated. (This exception would not cover employer-sponsored health plans for current employees and would not apply to the provision of non-health retiree benefits, such as life insurance or disability programs.)

The AARP Enters the Picture

The EEOC's new regulation was scheduled to become final after it was reviewed by numerous federal agencies and published in the Federal Register, which was expected to occur in September 2004. Because the regulation was supported by both the employer community and organized labor, the EEOC expected that the regulation would move fairly routinely through the remainder of the regulatory process. See Daily Labor Report (July 30, 2004). However, vehement opposition from AARP, and resulting election-year pressure on Bush administration officials, led to a halt to the regulatory process, which remained stalled in the interagency review stage. Further muddying the picture, AARP threatened to institute legal action in the event that the regulation was implemented as drafted. See id. Shortly following the November elections, rumors again began spreading that publication of the regulation was imminent. See Daily Labor Report (Dec. 13, 2004). The EEOC, the business community, and organized labor anxiously awaited AARP's inevitable response.

AARP v. Equal Employment Opportunity Commission

On February 4, 2005, the AARP and six AARP members filed a lawsuit in the U.S. District Court for the Eastern District of Pennsylvania seeking to block implementation of the regulation. See AARP v. Equal Employment Opportunity Commission, No. 2:05-cv-00509 (E.D. Pa. Feb. 4, 2004). These plaintiffs challenged the regulation on the grounds that:

(a) the exemption was contrary to the Third Circuit's decision in Erie, the language and legislative history of the ADEA, and to the EEOC's own regulations and enforcement policy;

(b) the EEOC allegedly exceeded the scope of its authority under Section 9 of ADEA (29 U.S.C. § 628), which permits EEOC to create exceptions to the statute "as it may find necessary and proper in the public interest"; and

(c) the EEOC rulemaking process itself was flawed, as the agency allegedly is not authorized to make health care policy, and the rulemaking record was allegedly "incomplete and inadequate."

See Pls. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction, and Stay of the Effective Date of Agency Regulations, AARP v. Equal Employment Opportunity Commission, No. 2:05-cv-00509 (E.D. Penn. Feb. 4, 2004).

Plaintiffs requested that the court enter a preliminary injunction enjoining EEOC from publishing or taking any steps to enforce its regulation during the pendency of the case. Briefing on the motion (including numerous amicus briefs filed in support of EEOC) was set to continue throughout the month of March, with oral argument scheduled on the motion scheduled for March 31, 2005. In the meantime, the EEOC has stipulated that it will not implement the challenged regulation until April 5, 2005.

What Next?

If the court denies the plaintiffs' request for a preliminary injunction (and any interlocutory appeal is also denied), the EEOC likely will be able to publish its regulation in the Federal Register on or after April 5. Certainly, a defeat at the preliminary injunction stage would be a massive blow to AARP's efforts, and could foretell a

similar defeat regarding its request for a permanent injunction, effectively sounding the death knell for Erie.

On the other hand, should the court grant plaintiffs' request for a preliminary injunction, the EEOC's regulation could not go into effect (if it goes into effect at all) until after a full trial on the merits occurs, which may not happen until later in 2005 or even in 2006. In the meantime, Erie would remain good law in the Third Circuit and, in the face of increasing doubt about the viability of the EEOC's regulation, other courts outside the Third Circuit may elect to follow the dictate of Erie. Should AARP then prevail at trial (and any subsequent appeal to the Third Circuit), EEOC would be left hoping essentially that Congress would amend the ADEA itself to add a statutory exemption for Medicare bridging practices.

So, what should employers who are contemplating the reduction or elimination of retiree health benefits for older employers do in the meantime? In light of the fast-moving developments in this area, the best advice would be simply to wait and see what happens next.

Protecting Your Trade Secrets Without the Inevitable Disclosure Safety Net

By Mark S. Saudek

Trade secrets and confidential information are critical assets in today's economy. Intangible assets may account for at least 50%, and possibly as much as 85% of the value of U.S. companies.[1] Recent case law highlights the need for a thorough and up to date program to protect a company's trade secrets and confidential and proprietary information. This update summarizes recent changes in trade secrets law and sets forth practical ways to protect a company's critical business information.

Could This Scenario Happen To You?

Your market is highly competitive, so you invest heavily in research, development, marketing, and sales. You take reasonable efforts to protect your confidential, proprietary and trade secret information. You decide, however, not to require employees to enter into non-competition agreements.

Then the unthinkable happens:

A trusted employee, Sue, has worked for you in sales, service and marketing for more than ten years. You promote Sue repeatedly, based on her outstanding performance, her relationships with your customers and her extensive understanding of your products and business. Before long, Sue is a district manager in charge of sales in four states. She develops your pricing structures, marketing and business initiatives and sales strategies. Then, unbeknownst to you, Sue decides to go to work for your main competitor. Before leaving, she burns onto cd-roms many of your company's highly confidential documents containing such information as manufacturing costs, pricing information and profit margins. She tries to cover her tracks by deleting all records of these downloads. Sue also retains copies of documents relating to the highly confidential technical specifications for your newest product; later, she will claim that she did not return them because you did not ask. Sue then begins work for your competitor in a capacity that you consider directly competitive. You do not have evidence that she is disclosing or using trade secrets, but you believe it would be impossible for her to do her job without using your trade secret information.

What Do You Do?

Can Sue harm you by working for your direct competitor? Absolutely.

Will you be able to stop Sue from working for the competitor? Maybe, although perhaps not under Maryland law.

Did you do everything you should have done to protect your company? No.

In a case of first impression, the Maryland Court of Appeals in LeJeune v. Coin Acceptors, Inc., 381 Md. 288 (2004) recently held that facts similar to those above did not warrant injunctive relief because the former employer lacked specific evidence of the employee's use or disclosure of trade secrets. The former employer argued instead that its former employee could not work in a competitive role for a direct competitor without inevitably using its trade secrets. That is, it asserted the "inevitable disclosure doctrine": that the former employee could not do his new job without using or disclosing trade secret information from his previous employer and, whether or not he disclosed trade secrets, he certainly would not pursue blind alleys, which he knows are fruitless based solely on the former employer's trade secrets. The Court, however, refused to adopt the inevitable disclosure doctrine as a theory for finding threatened future disclosure of trade secrets and refused to enjoin the former employee. The Court did not want to give the former employer "the benefit of a [noncompetition] provision it did not pay for," and hinted that the outcome might have been different had the former employer required its employee to sign a confidentiality agreement or a non-competition agreement.

This rejection of the inevitable disclosure reflects what presently is the minority view. Courts in the following states have recognized some form of the inevitable disclosure doctrine: Arkansas, Connecticut, Delaware, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Texas, Utah and Washington. Courts in the fol-

lowing states have rejected the inevitable disclosure doctrine: California, Florida, Maryland, and Virginia. Even in the states that have recognized the inevitable disclosure doctrine, some courts have limited its applicability significantly.

What Should You Do?

Immediate injunctive relief is absolutely critical in a trade secrets case. Trade secrets are valuable only as long as they remain secret. No court or jury can reverse time and undo lost trade secrets — once disclosed, they are gone forever. Even if damages are available, the prevailing company may not be around to collect.

To maximize the chances for obtaining injunctive relief, all companies should review their intellectual property protections. Most important, ensure that all employees with access to trade secrets or critical confidential or proprietary information agree to reasonable non-disclosure, non-competition and non-solicitation agreements. Most jurisdictions, including Maryland, will enforce reasonable post-employment limitations, without needing to rely on the doctrine of inevitable disclosure. Further, companies should consider implementing some or all of the following procedures to protect their trade secrets and confidential and proprietary information:

Recruitment & Hiring
· Inform and require all candidates that as a condition of employment they will have to enter into the company's form confidentiality, proprietary information and trade secrets agreement, potentially including non-competition and non-solicitation provisions;
· Ensure that the recruitment, hiring and orientation process includes explicit reference to the company's intent not to use or access other parties' confidential information;
· Examine applicants' confidentiality and non-competition restrictions from current or past employers; and
· Ensure that applicant does not engage in misconduct as she leaves her present employer, including the retention of confidential materials, beginning work for the new employer or failing her obligations of loyalty to the present employer.
During Employment Period
· Prohibit new employees from the use or disclosure of any confidential or proprietary information acquired in previous employment;
· Communicate in employee handbook the confidential nature of proprietary business and personnel information and require employees to keep this information confidential;
· Require all employees and independent contractors with access to confidential or proprietary information to sign restrictive covenants, including reasonable non-competition and non-solicitation agreements;
· Consider reasonable limits on activities of new employee so as to avoid opportunities for use or disclosure of past employers' confidential information; and
· Restrict the copying, forwarding, and downloading of confidential, proprietary and trade secret information.
Upon Termination
· Immediately remove employee's access to confidential, proprietary and trade secret information, including hard copy documents and computer files;
· Immediately deactivate the employee's security access codes and any login IDs used by the employee;
· Review confidentiality obligations and restrictive covenants with terminating employee;
· Provide employee with a copy of any documents containing confidentiality obligations or restrictive covenants;
· Require that terminated employees return all confidential, proprietary, and trade secret information, regardless of the medium in which it is contained;
· Retrieve from terminating employee all documents, materials, and copies thereof;
· Require that terminated employees certify in writing that they have returned all confidential, proprietary, and trade secret information;
· Conduct an exit interview;
· Consider whether to inform terminating employee's new employer of the employee's restrictions; and
· Be aware of the business activities of key former employees and ensure that they are not competitive with your business.
General
· Require all employees and independent contractors with access to confidential information to sign agreements protecting confidentiality, proprietary information and trade secrets;
· Avoid disclosure to third parties and require a non-disclosure agreement in the event of disclosure;
· Implement electronic safeguards, such as passwords, encryption and firewalls between users;
· Encrypt all electronic communications;
· Limit access to confidential information to a need-to-know basis;
· Implement effective physical security of premises and property;
· Inform those with access of the importance and confidentiality of certain information;
· Ensure that all confidential information bears the "Confidential" legend;
· Implement and enforce effective policies and procedures for ensuring the integrity of trade secret information;
· Require all premises visitors to sign in and out, have an escort and wear a badge that identifies them as guests;
· Retain drafts and copies of materials in accordance with an effective and lawful document retention policy; and
· Consider all means of protecting intellectual property, including patent, copyright, and trademark.

(Footnotes)

[1] Margaret Blair, New Way Needed to Access New Economy, Los Angeles Times (Nov. 13, 2000) at B7.

Leave Bank and Wage Deductions for Partial Day Absences

By Gil A. Abramson

The Department of Labor recently issued an Opinion Letter clarifying whether an employer may deduct from an exempt employee's Paid Time Off Bank (PTO) for absences of less than a day due to personal reasons, accident, or illness. The letter also addressed whether it is acceptable for an employer to reduce an employee's salary for similar absences when the employee's PTO bank has been exhausted.

The Department stated that deductions from an exempt employee's PTO bank for absences of less than a day are permissible. The employer can take a partial day deduction from the leave bank without affecting the employee's salary basis of payment so long as the employee receives his or her guaranteed salary for that day. To maintain the salary basis the employer must pay the guaranteed salary, even if the employee misses a partial day and has no accrued benefits in the leave bank.

Employers, however, may not deduct a partial day from the employee's salary. The law permits only full day deductions. If the employee is absent for one and one-half days, the employer may only deduct one day from his or her salary.

Application of the Retail Sales Exception

In a separate Opinion Letter, the Department of Labor offered guidance on the application of the retail sales exception. With regard to retail versus non-retail sales, the Department concluded that two corporate entities that record the sales of a third entity may be able to avoid being classified as a "retail or service establishment" where the original two entities' employees are not performing the actual sales. In calculating the annual dollar volume of each establishment for the purpose of establishing whether it qualifies as a retail or service establishment, the Department stated that the sales made in Establishment "A," even though recorded on the books of Establishment "B" and "C," belong only to Establishment "A."

Internet Sales

The Department also issued guidance on internet sales, concluding that employees handling vehicle sales through an internet site are eligible for the automobile sales exemption, so long as the time spent selling financing and other products was not included in the time calculation.

Sales Representatives Delivering Displays

In another letter, the Department concluded that sales representatives who visited customers, drove commercial motor vehicles, and delivered sales displays and supplies to customers were exempt under the retail sales exemption. The Department focused on the fact that all of the property crossed state lines, and that at the time the property was shipped across state lines, it was "the shipper's fixed and persistent intent that the products be delivered to the specifically designated retail establishment by the sales representative."

Employer Bonus and Incentive Schemes

The Department concluded that a bonus plan whereby employees were offered an additional $3.00 per hour if the employee's work group met production goals violated the FLSA. The problem with the plan, according to the Department, was that the law requires that, in calculating overtime with bonuses, the percentage of the straight time and the overtime must be the same. Paying $3.00 per hour for both straight time and overtime resulted in a smaller percentage of the overtime being paid than the percentage of the straight time. In order for an incentive plan to qualify for exclusion from the overtime requirements, the bonus must be paid without prior contract, promise, or announcement and the amount of the bonus should be determined at the end of the pay period.

In a separate letter, the Department concluded that an employer could not exclude a "piece rate bonus" when calculating overtime. The employer paid workers either a piece rate or a guaranteed $6.00 an hour, whichever was higher in a two-week period. If the hourly rate was higher, overtime was based on the hourly rate. If the piece rate was higher, overtime was still calculated at the hourly rate and the employer provided a "bonus" made up of the excess created by the piece rate. Because the FLSA does not exclude the non-discretionary "bonus," the employer should have included the amount of the piece rate "bonus" when determining the employee's regular rate for the calculation of overtime pay.

In a third letter, the Department stated that an employer could not provide a lump-sum overtime premium based on the volume of deliveries to induce employees to work overtime. The employer paid a guaranteed salary of $600.00 a week for all hours worked, but offered a bonus to employees who made more deliveries and worked overtime. The bonus varied based on the volume of deliveries. The Department said this scheme violated the FLSA because the overtime had not been calculated at a rate of one-and-a-half times the base salary. by electronic submission or in hard-copy. All documents must include a *statement of service* meeting the expedited service requirements of Sec. 102.114(i) of the Board's Rules, and must include the addresses and fax numbers of the persons served.

Electronic Filings With The National Labor Relations Board: A Practical Guide
March 2005

This outline was prepared by Wayne Gold, Regional Director of Region 5 of the NLRB, for presentation to the Midwinter Meeting of the Technology Committee of the ABA Section of Labor and Employment Law. While the contents are believed to be correct as of February 2005, the guidance provided is not official and the National Labor Relations Board is not bound by or responsible for this information. Any views expressed are solely those of the author.

General

Caution: Different filing rules apply depending on which office/ branch of the NLRB is involved. In general, all filings to the *five-Member Board* in Washington MAY be made in electronic format through the NLRB's website (but not through direct e-mail), while filings with the *Division of Judges* and the *General Counsel's Washington offices* MAY NOT be made in electronic format at all (except for extension of time requests addressed to the Office of Appeals). Some, but not all, documents may be filed with the *Regional Offices* through direct e-mail but, as of this date, not through the NLRB's web site.

All filings must be timely!! E-filings are subject to the same time requirements as traditional filings (Rules and Regulations, Sec. 102.111.), but have special service requirements. (Rules and Regulations, Sec. 102.114(i), discussed below.)

Document Format:

· Adobe's Portable Document Format (.pdf) is strongly preferred. For persons who can not submit documents in PDF format, Microsoft Word (.doc) or simple text (.txt), in read-only format, is acceptable.

· All documents must be virus-free. *Note: The NLRB's computer servers scan all outside e-mails and attachments for viruses; if a virus is found, the communication is automatically destroyed, without notice to the sender. Therefore, it is important to virus-check your documents prior to transmitting them to the NLRB.*

Filings With the Board's Executive Secretary

What Can Be Filed Electronically: ANYTHING, except petitions for advisory opinions, may be filed electronically through the Board's web site; *Provided,* the document size does not exceed 10 MB, and *Provided further,* for documents over 15 pages in length (but under 10 MB in size), the appropriate number of hard copies (usually 8) are received by the Executive Secretary's office within 3 days of the electronic filing.

Examples of documents that may be filed electronically include:

Unfair Labor Practice Cases

Exceptions
Cross Exceptions
EAJA Applications
Requests for Special Permission to Appeal
Briefs to Board
Motions to Board
Oppositions to Motions and Requests

Representation Cases

Exceptions to Post-Election Reports/Decisions
Requests for Review
Requests for Special Permission to Appeal
Briefs to Board
Motions to Board
Oppositions to Motions and Requests

Filing Mechanics: All documents must be complete, with any attachments converted into electronic form and included as part of the document. No attachments may be filed separately, whether by electronic submission or in hard-copy. All documents must include a *statement of service* meeting the expedited service requirements of Sec. 102.114(i) of the Board's Rules, and must include the addresses and fax numbers of the persons served.

To File:

1. Go to NLRB's website (www.nlrb.gov)

2. Either: (1) From Menu on left side under "E-Gov", select "Online Filing" and then "Board"; or (2) click in the selection box titled "NLRB services on-line", then select "File Documents with Executive Secretary". Complete the on-line form, including identifying your document attachment.

3. After submitting your filing, a "Congratulations" page appears *and* you will receive an e-mail acknowledgment of your filing. The e-mail acknowledgment will include the date and time your filing was received by the Board. Be sure to print your e-mail confirmation for your records; it is your proof of filing!

Service Requirements: There is a specific Rule [Sec. 102.114(i)] setting forth special service requirements when a party files documents electronically through the Board's web site. That Rule requires the party making the electronic filing to notify by telephone the other party or parties of the substance of the electronically-transmitted document, AND to serve a copy of that docu-

ment by personal service no later than the next day, by overnight delivery, or, with the permission of the receiving party, by facsimile transmission.

Filings With the Division of Judges

The Division of Judges does NOT presently accept electronic filings. (Some ALJs may, however, utilize e-mail for scheduling and other informal communications.)

Filings With the General Counsel's Washington Offices

Except for extension of time requests to the Office of Appeals, the General Counsel's Washington offices do not presently accept electronic filings. Extension of time requests for filing an appeal of a Regional Director's dismissal of an unfair labor practice charge may be filed by the Charging Party through the NLRB's website. A special access code is required. Instructions for electronic extension of time requests are contained in an Access Code Certificate included with every dismissal letter.

N.B.: Electronic requests for an extension of time must be received before 5:00 p.m. EST on the appeal due date.

Filings With the Regional Offices

There is no present capability to use the Board's web site to file documents electronically with the Regional Offices. (Hopefully, soon???) Many documents, however, may be filed electronically by direct e-mail. In addition, all docketing letters contain the name, phone number, and individual e-mail address of the assigned investigator. Board agents will accept and send e-mails to arrange appointments, schedule witnesses, and exchange case-relevant information. All "documents" must, however, be sent to the Region's official e-mailbox.

Filing Mechanics: Every Region has an "official" e-mailbox to receive permitted filings; the e-mail address is region*x*@nlrb.gov (substitute the appropriate region number for the ***x*** — e.g., **region5@nlrb.gov** – no spaces, dots, or underscores). All e-mails that contain a substantive discussion of the merits of a case, whether or not they contain attachments, are considered to be "documents" and must be submitted to the official e-mailbox of the appropriate region. Attachments must be in an electronic format that can be opened, read, and printed by the Microsoft Office software suite, and should be in a "read-only" format. Due to the inherent uncertainties of e-mail, hard copies of all documents submitted to a Region by e-mail also must be faxed or mailed to that office. *The responsibility for the timely receipt and usability of a document rests exclusively upon the sender*!

What Can Be Filed Electronically:

Position Statements
Requests for Extension of Time for Filing Documents with a Regional Director or Hearing Officer
Copies of all documents filed electronically with the Board
Notices of Appearance
Excelsior Lists
Observer Designations
Requests to Proceed
Disclaimers of Interest
Withdrawal Requests (C or R)
Special Appeals from Hearing Officers' Rulings

What Can NOT Be Filed Electronically:

Election Objections
Briefs to ALJs
Representation Petitions
Unfair Labor Practice Charges
Answers to Complaints
Petitions to Revoke Subpoenas (unless filed electronically with the Board)
Representation Case Briefs to Regional Directors or Hearing Officers (Many Regions, however, request parties to provide courtesy copies of R-case briefs by e-mail.)
Showings of Interest
Motions for Summary Judgment (unless filed electronically with the Board)