Courts Push Down Their Blue Pencils

Recent trends affect drafting of restrictive covenants

BY NEAL R. ISAACSON AND DONALD L. MUSALLAM

Several recent decisions at both federal and state levels have seen courts decline to impose restrictive covenants that they believe are unreasonable in scope.

Additionally the Southern District of New York recently held that an employee could be held liable for not adhering to an unreasonable restrictive covenant, even if the covenant was not enforceable in the first place.

The court agreed that the employee owed a duty to refrain from using confidential information.

The N.Y. Court of Appeals has also reversed the lower court's decision and enjoined enforcement of an ABD Covenant. For many employees, the most restrictive employment agreements include their employers' social media accounts and policies.

All of these agreements may be perforated by bringing into play that employees that restrict an employer's ability to perform certain activities following their employer's termination.

Three restrictive covenants vary from prohibitions on work- related social media use to outright prohibitions on any use of email or social media accounts, including those that are personal to the employer.

The N.Y. Court of Appeals of the Second Circuit decided in the recent case of ABD v. Weis for the defendant, and the employer, should provide for their employees' "denial of service" rights and compensation for services, which prevents the employer from terminating an employee without good reason.

The court dismissed the employee's claim that the employer had improperly terminated the employee.

The court found that the employee's actions did not constitute a violation of the ABD covenant and that the employee was not entitled to damages for breach of contract.

The court concluded that the employee's termination was justified and that the employer had not acted in bad faith.

In this case, the court found that the employer had acted in good faith and that the employee's termination was justified.

The court further found that the employer had acted in good faith and that the employee's termination was justified.

The court also found that the employer had acted in good faith and that the employee's termination was justified.

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Contracts Face Uncertainty Amid New Labor Law-Related Requirements

BY KATHARINE PARKER

O n July 31, 2014, President Barack Obama issued yet another executive order to address 24,800 federal government contractors. The order, entitled “Fair and Workable Procurement and Facilities Management,” imposes significant new regulatory requirements and administrative burdens on contractors and bidders for contracts valued in excess of $500,000.

The order’s stated purpose is to “create incentives for better compliance and a process to identify and address uncorrected violations of laws, regulations, policies, and guidance, and to promote more efficient and effective compliance enforcement requirements with contractors and subcontractors who will review the disclosures and take action against contractors, including exclusion of a bid and debarment, based on the disclosures.” As discussed below, the provisions will cumulatively and significantly increase the costs of doing business with the government.

Self-Reporting of Violations

The order’s self-reporting provisions require holders and contractors of federal contracts and subcontracts, valued in excess of $500,000, to disclose violations of “various laws, regulations, policies, and guidance that are applicable to any of the Freedom of Information Act’s exemptions for contracts and subcontractors.” It also requires contractors to solicit information from covered subcontractors about their labor law violations and report these disclosures to the Department of Labor. The disclosures are aimed at rewarding contractors and subcontractors for self-reporting.

The order mandates the self-reporting of labor law violations by contractors and subcontractors. Contractors and subcontractors, valued in excess of $500,000, must report violations of certain laws, regulations, policies, and guidance. If a contractor or subcontractor discloses all labor law violations, if any, and its employees correct those violations or improve compliance, the contractor and subcontractor will be effective within five months. In addition, at least every six months, contractors and subcontractors must update their disclosures and describe any steps taken to correct those violations or improve compliance.

Bidders will also be required to represent that, to the best of their knowledge, they have disclosed all labor law violations, if any, and to describe any steps taken to correct those violations or improve compliance.

Overview Schemes and Consequences of Reporting

The order directs each contracting agency to designate a “business ethics” officer to review the self-reporting of violations. Contractors must report any violations under the Federal Acquisition Regulation (FAR) to the Department of Labor. Contractors and subcontractors may need to reconsider their reporting obligations and hinder the government’s ability to do business.

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The company should require an intern to sign a document acknowledging, at a minimum, that he or she is not an employee. The company does not expect to be paid for the internship and, at a minimum, that he or she is not an employee.

2. The internship experience is analogous to the close relationship between an attorney and an intern to train an intern. To further complicate things, any time an agency interprets a new piece of legislation, a reaction may be extreme and an interpretation of the legislation is not an employee. The company should immediately and the direction of people who are knowledgeable and experienced in the area of the internship; and

3. The employer and the intern are managing and supervising the intership. They are not involved in the activities of the company. The employer must provide a written statement acknowledging, at a minimum, that he or she is not an employee, does not expect to be paid for the internship, and may not be entitled to a job once the internship ends. The company should immediately and

4. The employer that provides the internship advantage from the actions of the intern. This advantage can be a reaction may be extreme and an interpretation of the legislation is not an employee. The company should immediately and

5. The intern is not necessarily an employee. The company does not expect to be paid for the internship and, at a minimum, that he or she is not an employee. The company should immediately and

6. The employee that provides the internship advantage from the actions of the intern. This advantage can be a reaction may be extreme and an interpretation of the legislation is not an employee. The company should immediately and

7. Any clinical training is performed under the supervision of the company. The company should immediately and

The FLSA contains exemptions for volunteers for state or local government agencies and those who volunteer “solely for humanitarian purposes to promote nonprofit organizations” or who perform “any work for which the Department of Labor, in accordance with applicable law, determines that the work is performed by an employee or volunteer.” The Department of Labor generally considers interns in the legal sector to be employees within the meaning of the FLSA, unless all of the following elements are met:

- The intern is performing services for an educational institution.
- The internship is part of an educational program.
- The intern is not performing services in the usual course of the employer’s business.
- The intern is not receiving benefits.
- The intern is not being paid.
- The employer is not dependent upon the intern’s performance.
- The employer is not required to have any specific educational qualifications.
- The intern is not performing services as an employee but as a volunteer.
- The intern is not being paid for the services.
- The intern is not an employee.
- The employer is not dependent upon the intern’s performance.
- The employer is not required to have any specific educational qualifications.
- The intern is not performing services as an employee but as a volunteer.
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Recent case law suggests that a litigator who is willing to spend the time and resources necessary to discover social media evidence should try to think "outside the box." In the hotly contested, gender-based breach of contract case: V. City of Boca Raton v. Gelpi (S.D. Fla. 1995), the court in V. City of Boca Raton v. Gelpi (S.D. Fla. 1995) noted that the plaintiff was able to locate and recover valuable evidence that was only available in social media. The plaintiff was able to use social media to track the defendant's activities, recover evidence of takeover attempts, and even locate the defendant's personal information. This case highlights the importance of social media evidence in litigation and demonstrates that adequate discovery techniques may lead to the recovery of critical evidence.

Social media evidence can be obtained from a variety of sources, including but not limited to: personal social media profiles, work-related social media accounts, and social media accounts that are used for business purposes. This evidence can include, but is not limited to, written communications, photos, videos, and other digital content. Social media evidence can also include information that is stored on a third-party server, such as email and chat logs.

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