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Our “Top Five to Ten” List of Important Recent Cases June 18, 2019

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In order to keep our readers abreast of recent developments and legal trends, we are continuing our “top five to ten” list of cases and topics of importance to executives and professionals. This time, we are addressing cases and topics in the following fields: non-competition / non-solicitation agreements; disability discrimination; fiduciary duties; overtime law; and wrongful termination. Included in our list is also a “heads up” regarding an important Wage Act case likely to be decided soon.

NON-SOLICITS AND NON-COMPETES

1. “Wedding Style” Announcements from Former Employee Is Not Solicitation;

Fidelity Brokerage Services LLC v. Callinan, C.A. No. 1884CV02098-BLS1 (Mass. Super. Feb. 7, 2019)

The story is a common one – a financial advisor leaves an employer for greener pastures, and wants to notify clients where he or she is headed. The employer, unhappy about the departure, seeks to enforce a non-solicitation agreement to stop the financial advisor from contacting clients. That’s precisely what happened in *Fidelity Brokerage Services LLC v. Callinan.*

As a general matter, reasonable non-solicitation agreements are enforceable in Massachusetts. A key question is: what constitutes “solicitation”? The *Callinan*decision provides guidance. The court noted that “verbal departure announcements are innately problematic.” Instead, the court offered this guidance:

[T]he best practice for a departing financial advisor to follow is to send his or her former clients a brief letter or e-mail informing the client of the advisor’s departure and providing the client with the advisor’s new firm, phone number, e-mail address, and physical address.

This, the court reasoned, is not“solicitation.” But be careful; every non-solicitation agreement is different. A consult with legal counsel might have helped the financial advisor avoid the very type of litigation that resulted in this decision.

2. Court Suggests that the New Non-Compete Statute Evidences Public Policy;

Nuvasive, Inc. v. Day, et al., C.A. No. 19-cv-10800-DJC (D. Mass. May 29, 2019)

Under Massachusetts law, a non-compete agreement – no matter when it was signed – is unenforceable if it violates fundamental public policy. *See e.g.*, *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 103 (1979). Last fall, Massachusetts enacted non-compete reform, which substantially limits the enforceability of non-competition restrictions (read more about the new law: here) but the new law expressly applies only to agreements entered into on or after October 1, 2018.

Despite its express language, however, some have argued that the new statute is evidence of public policy which all non-compete agreements – no matter when signed – must comply. That argument gained traction with one federal judge in *Nuvasive, Inc. v. Day*.

In *Day*, the judge analyzed whether the employee's non-compete – signed in January 2018, *i.e.*, before the effective date of the new statute – met the new statute's substantive requirements, including that the agreement: be in writing, advise that the employee may consult counsel, and does not exceed 12 months post-cessation of employment. In *Nuvasive*, the non-compete at issue was ruled to have met the new statute's standards, and thus was enforceable.

This line of reasoning will certainly be tried again, and is worth watching to see if other judges give it similar credence.

DISABILITY DISCRIMINATION – REASONABLE ACCOMMODATIONS

3. Many Accommodations May Be Reasonable, If You Ask – and Keep Asking;

Incutto v. Newton Public Schools, C.A. No. 16-cv-12385 (D. Mass. Apr. 4, 2019) *Miceli v. JetBlue Airways Corp.*, 914 F.3d 73 (1st Cir. 2019)

We have written before about the importance of engaging in a dialogue with your employer about reasonable accommodations (*see* "When it Comes to Disability Accommodations – Keep Talking"). Two recent federal court decisions highlight what is possible when you do engage, and the possible harm to your case if you do not.

In *Incutto v. Newton Public Schools*, a teacher with fibromyalgia requested permission to work on a part-time basis. The employer refused, saying that full-time work was an essential function of the teacher's job. The court sided with the teacher, holding that part-time work *may be* a reasonable accommodation, and a jury would be free to find that full-time work was *not* an essential function of the job.

In contrast, in *Miceli v. JetBlue Airways Corp.*, an employee's failure to engage with her employer proved fatal to her claims. The employee, a flight attendant, requested, and JetBlue granted, pre-approved intermittent leave to deal with myriad health issues. At the same time, JetBlue advised the employee that she needed to take additional steps to keep her absences from being recorded as "unexcused." Ms. Miceli failed to heed this advice, despite receiving a number of reminders. Ultimately, JetBlue terminated her for having too many unexcused absences. Ms. Miceli filed suit, and the Court dismissed her claims.

FIDUCIARY DUTIES

4. Your Duties to Your Employer;

Balearia v. Calvo, C.A. No. 16-cv-23300 (S.D. Fla. Mar. 6, 2019)

Executive and professional employees often have common law (non-contractual) obligations to act loyally, in good faith and in the best interest of their employers. These obligations are commonly referred to as "fiduciary duties," the breach of which may leave the employee liable for damages.

A recent Florida decision, holding a former CEO liable for $2.8 million dollars in damages, serves as a cautionary tale. In *Balearia v. Calvo*, the CEO of a ferry company was presented with a business opportunity – to provide ferry services to a local casino. Instead of pursuing the opportunity on behalf of his employer, the CEO steered the opportunity to a competitor, for whom he subsequently began working.

Aside from denying the conduct, the CEO defended himself by noting that he had no written employment agreement, no confidentiality agreement, no non-competition agreement, and no non-solicitation agreement. The absence of such agreements had no bearing on the Florida court's analysis of the breach of fiduciary duty claim, and the CEO was found liable. The employer presented evidence that missing out on the business opportunity cost it $2.8 million dollars in lost profits, and the court held the CEO liable for every dollar.

OVERTIME PAY

5. Will State Law Expand Overtime Pay Eligibility?

H. 1609 / S. 1092

State and federal overtime statutes require eligible employees to be paid one-and-a-half times their regular hourly rate for each hour worked in excess of forty hours in a given week. In Massachusetts, however, executive and professional employees who otherwise qualify under the "white collar exemptions" are generally *not* eligible for overtime, so long as they are paid a salary over the statutory threshold.

Federally, that threshold is now $23,660 per year, although this may change to $35,308 by January 2020 if a recently proposed Department of Labor rule takes effect (find the proposed rule: here). The state threshold has not been updated in more than 50 years, and – believe it or not – sets the salary threshold at $4,160 *per year*.

Legislators on Beacon Hill are seeking to change that. Recently proposed bills in the Massachusetts legislature seek to gradually increase the salary threshold to $64,000 by 2024. If passed, this would mean that any executive or professional employee in Massachusetts who does not make at least $64,000 per year would be entitled to time-and-a-half for each hour over forty hours worked in a given week. According to estimates by MassBudget, this would mean that an additional 435,000 workers would be entitled to overtime pay.

6. Commissions Cannot Compensate Employees for Overtime Work;

Sullivan v. Sleepy's LLC, 482 Mass. 227 (2019)

State wage and hour law permits employers to pay inside salespeople on a commission only basis, so long as the employer guarantees *at least* the minimum wage for all regular hours worked. According to a recent decision from the Massachusetts Supreme Judicial Court, *Sullivan v. Sleepy's*,

such commission-only arrangements are insufficient if the employees work more than forty hours in a given week.

In *Sullivan*, inside sales employees – paid on a commission only basis – brought suit seeking additional pay for overtime worked (*i.e.*, each hour over forty hours in a given week). The employer pushed back, noting that each employee always earned weekly commissions equal to or greater than the minimum wage for each of the first forty-hours worked *and* one-and-a-half times the minimum wage for each hour over forty.

The Court sided with the employees, and rejected the employer's attempt to retroactively re-characterize earned commissions as overtime pay. The Court noted that the employer's position ran contrary to the purposes of the overtime statute – which includes encouraging the employment of more people, and the compensation of employees for the burden of a long workweek.

WRONGFUL TERMINATION

7. Employer Cannot Rely on Outburst Unlawfully Provoked;

USPS and Pretlow, 367 NLRB No. 142

After being forced to reinstate an employee, the United States Postal Service (USPS) initiated a retaliatory performance review. In response, the employee allegedly became loud and argumentative, which the USPS seized-upon to end the meeting and fire the employee *again*. That termination was also reversed because the National Relations Board decided that the USPS could not lawfully rely on an outburst that it unlawfully provoked. *See United States Postal Service and Larry Thurman Pretlow II,* 367 NLRB No. 142.

This result is consistent with "black letter" law that employers cannot rely on circumstances of their own making to defend against claims of unlawful conduct. *E.g., Verdrager v. Mintz Levin Ferris Glovsky and Popeo*, 474 Mass. 382, 398 (2016) (alleged performance deficiency that results from plaintiff being undermined supports finding of unlawful motive); *Boothby v. Texon*, 414 Mass. 468, 481-482 (1993) (alleged insubordination excused as caused by the nature of employer's request); *Harrison v. Boston Financial Data Services, Inc.*, 37 Mass.App.Ct. 133, 137-138 (1994) (employee's alleged limitations caused by employer's unlawful withholding of career opportunities); *Trustees of Boston University v. National Labor Relations Board*, 548 F. 2d 391, 392 (1977) (recognizing leeway for employee's impulsive behavior in response to employer's wrongful provocation); *but see Monteiro v. Poole Silver Company,* 615 F. 2d 4 (1980) (such leeway not extended to employee who cannot demonstrate he is acting in opposition to actual or supposed wrongful conduct).

HEADS UP

8. Are Lost Commissions Trebled Under the Wage Act?

Parker v. Enernoc, Inc., SJC-12703

The Massachusetts Wage Act (the "Wage Act") makes it unlawful for an employer to retaliate against an employee for asserting his or her rights to wages, and provides a prevailing plaintiff with three times his or her lost "wages." In *Parker v. Enernoc, Inc.*, the Massachusetts Supreme Judicial Court will soon decide whether lost commissions resulting from Wage Act retaliation are lost "wages"

which should be trebled.

In *Parker*, the plaintiff closed a very large deal, raised concerns about her compensation, and – the jury found – was terminated for doing so. Under the commission plan, sales employees received a commission payment one year into a deal – when it became clear that the customer had not canceled. The jury awarded Ms. Parker the commission payment she would have earned one year into the deal as damages.

The trial judge, however, declined to treble the amount. Under the Wage Act, commissions are "wages" – and thus trebled, when unpaid – if they are "definitively determined" and "due and payable." The trial judge reasoned that the lost commissions were not "due and payable" at the time of termination, and thus were not "wages" to be trebled.

The Supreme Judicial Court will be considering this case, likely sometime this year.

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