EMPLOYMENT LAWSCENE ALERT: NLRB GENERAL COUNSEL ISSUES GUIDANCE ON EMPLOYEE HANDBOOKS

On March 18, 2015, the NLRB General Counsel issued a report concerning recent cases that raise significant legal and policy issues regarding employee handbook rules. Recently, the NLRB has been focusing on non-union employer's handbooks and whether they violate Section 7 of the NLRA, which permits employees to discuss wages, hours, and other terms and conditions of employment and to otherwise engage in protected concerted activity. The most clear violation of Section 7 would be a ban on union activity; however, if an employee could reasonably construe a rule or policy to prohibit activities protected by Section 7, the NRLB will find that it is in violation of the law. The report gives specific examples of handbook policies that were found lawful and unlawful and why. The report specifically states that even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act are not allowed under the law. The rules and policies that are most frequently called into question are those covering confidentiality, professionalism, anti-harassment, trademark, photography/recording, and media contact.

Confidentiality policies cannot specifically prohibit employees from discussing the terms and conditions of their employment (e.g., wages, hours, workplace complaints), nor can the policies be reasonably understood to prohibit such discussions. Policies cannot broadly define "employee" or "personnel" information as confidential. However, the NLRB does recognize that employers have a substantial and legitimate interest in maintaining the privacy of certain business information.

Employee conduct policies will run afoul of the NLRA if they prohibit employees from engaging in disrespectful, negative, inappropriate, or rude conduct toward the employer or management absent sufficient clarification or context. Even false or defamatory statements can find protection under Section 7 unless they are "maliciously false." Employers can promulgate blanket rules that require employees to be respectful and professional to clients and competitors because there is a sufficient business interest in that behavior. Employers are also permitted to ban insubordinate behavior. However, employers cannot ban employees from negative or inappropriate discussions with their fellow employees because employees have the right to argue and debate with each other about unions, management, and the terms and conditions of employment, which can sometimes be contentious. Therefore, anti-harassment rules cannot be overly broad either. Employers cannot ban employees from discussing terms and conditions of employment with third parties, including news media. Although employers may designate who can make official statements to the media on behalf of the company, they cannot ban employees from speaking to third parties on their own behalf or on behalf of other employees.

Although employers have an interest in protecting their intellectual property, the NLRB has taken the stance that rules prohibiting employees' fair use of that property are unlawful. This "fair use" includes using things such as company names and logos on picket signs, leaflets, and other protest material because these are non-commercial uses. According to the report, employees have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings. Therefore, a total ban on photography, recordings, or use of personal devices is overbroad if it can be read to prohibit use during breaks and other non-work time.

Employer rules regulating when employees can leave work are unlawful if employees could reasonably read them as forbidding protected strikes and walkouts, as the right to go on strike is a fundamental Section 7 right. Policies should reflect that leaving their posts for reasons unrelated to protected activity will subject employees to discipline.

Because Section 7 allows employees to engage in activity to improve their terms and conditions of employment, which may be in conflict with the interests of an employer, broad conflict-of-interest policies are unlawful. Employer policies should be limited to legitimate business interests.

The differences between what is lawful and what is not are incredibly nuanced, and the General Counsel's report did not present what could be considered "bright line" rules. The NLRB has stated that it will read rules in context with other rules and not in isolation, which could lead potentially unlawful policies to be held lawful in context. Overall, the emphasis is that rules need to be narrowly tailored and include context and examples in order to steer clear of violating the NLRA.

It should be noted that the General Counsel's report is not law but, instead, represents the current enforcement policy of the NLRB. However, given the NLRB's recent aggressive position relative to enforcing Section 7 rights in non-union workplaces, employers should review their handbooks to determine if any of their rules or policies may run afoul of the NLRB's current set of enforcement policies concerning employee handbooks.

ATTORNEY GUMINA PRESENTS TO THE HFTP GREATER MILWAUKEE CHAPTER

On March 25, 2015, Joseph E. Gumina, who leads the firm's labor and employment practice, spoke to the Greater Milwaukee Chapter of the Hospitality Financial and Technology Professionals. Attorney Gumina spoke about the latest developments in labor and

employment law affecting the hospitality industry, including the latest developments before the NLRB and the EEOC. Attorney Gumina also spoke about wage and hour compliance and workplace harassment issues in the hospitality industry.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT ISSUES RULING ON ACCOMMODATING PREGNANT EMPLOYEES

On Wednesday, March 25, 2015, a divided U.S. Supreme Court issued a ruling in *Young v. UPS*. The Supreme Court was asked to decide whether the Pregnancy Discrimination Act ("PDA"), which amended Title VII of the Civil Rights Act of 1964, allows an employer to have a policy that accommodates some, but not all, workers with non-pregnancy related disabilities but does not accommodate pregnancy-related conditions. We covered the background of the case here. The majority opinion from the Supreme Court overturned the Fourth Circuit's decision to affirm summary judgment for the employer and returned the case to the Fourth Circuit.

The employer argued that the PDA Act doesn't require accommodations or special treatment for pregnant employees and that it was, therefore, entitled to treat pregnant employees the same as it treated employees with restrictions stemming from off-the-job injuries. The employee argued that employers who provide work accommodations to non-pregnant employees must do the same for pregnant employees who are similarly restricted in their ability to work. The majority opinion did not find either the employee or the employer's interpretation of the PDA persuasive.

The majority opinion rejected the employee's interpretation of the PDA because it essentially gave pregnant employees an unconditional "most-favored-nations" status because pregnant employees would have to receive the same accommodations that any other employee received for any reason. The majority agreed with lower courts that this was not Congress' intent in passing the PDA. Although the EEOC had supported the employee's position and published guidelines in line with her arguments, the majority stated that the guidelines were promulgated after certiorari was granted, took a position on which previous EEOC guidance had been silent, were inconsistent with positions long advocated by the government, and the EEOC did not explain the basis for the guidance; therefore, they found such guidance unpersuasive.

The Supreme Court's majority opinion disagreed with the employer's interpretation as well,

holding that it would cause the first clause of the PDA to be superfluous and would fail to carry out a key objective in passing the PDA.

The majority laid out that a pregnant employee can still use the *McDonnel Douglas* framework to prove a case of disparate treatment under the PDA by showing that she belongs to a protected class, that she sought an accommodation, that the employer did not accommodate her, and that the employer did accommodate others similar in their ability or inability to work. The employer may then justify its refusal to accommodate by relying on legitimate, nondiscriminatory reasons, although claims that it is more expensive or less convenient will generally not suffice. The employee may then show that the alleged legitimate, nondiscriminatory reason is pretextual. The Supreme Court sent the case back to the Fourth Circuit to determine whether there were genuine issues of material fact as to whether the employer's reasons for not accommodating her were pretextual.

The majority did make an interesting note that their holding may be of limited significance because of the change in the Americans with Disabilities Act expansion in 2008 and the EEOC's guidance that employers are required to accommodate employees whose temporary lifting restrictions originate off the job. Although the Court expressed no view on the statutory or regulatory changes and although pregnancy is generally not considered a disability but conditions related to pregnancy can be, this could cause employees to raise ADA claims when denied accommodations related to their pregnancies and pregnancy-related conditions.

Employers should carefully consider their policies on how to handle employee requests for accommodations. Although the ruling did not fully side with either party, it is likely to lead to additional litigation on accommodation requests by pregnant employees.

ATTORNEY WALSH TO PRESENT AT UPCOMING SFSP MILWAUKEE CHAPTER MEMBERSHIP MEETING AND NETWORKING EVENT

Attorney Peter J. Walsh will be presenting at the SFSP Milwaukee Chapter Membership Meeting and Networking event on Tuesday, March 24, 2015.

Mr. Walsh is a member of the Tax and Succession Planning Practice Group and will be presenting on how insurance products, such as life insurance and long term care insurance, can be used in asset protection planning for long term care. He first presented this topic to the Elder Law Section of the Wisconsin Bar in September 2013 and his upcoming

presentation will be updated to reflect recent changes in the law.

TAX AND WEALTH ADVISOR ALERT: SUCCESSION PLANNINGTHE SEVENTH SIN — "PROCRASTINATION"

I hate the term procrastination. Why? It has a negative connotation. I think instead, to be fair, when evaluating behavior we should use the term “waiting,” and then determine what waiting gets you. If waiting gains the waiter an advantage, it is not procrastination, it is savvy. On the other hand, if waiting has a cost, it is procrastination; a negative behavior.

So, for business owners who have waited to put together a succession plan, and may be deciding whether to wait even longer, the question is whether that wait has gained them something or lost them something? First, what does waiting get them? Maybe it delays having to make hard decisions, decisions like if not them, who (should run the business). Maybe it delays having to communicate to some of the children that their sibling (or even a non-family employee) is the right person to run the business.

In this situation, waiting is understandable. Those conversations are hard; peace is a valuable thing. But remember Sin #6? In the absence of this information, what assumptions are the children making? The key employees? Customers? Suppliers? The bank? The truth is, they are all probably assuming the worst. And the worst is likely not the truth. So waiting causes people to make negative assumptions that are likely worse than the truth; not good.

Waiting also allows the business owner to take more time to observe how the talent develops. That would appear to be a good thing. But is it? Would it be better to test that talent in new leadership roles? Aren’t those experiments better conducted in a safe laboratory environment, where Dad and Mom are still around with the wisdom to prevent a decision making tragedy?

Of course, sometimes the unexpected does happen. Dad gets on the wrong road at the wrong time and does not make it home. Or Mom is beset with an illness before her time. If those things happen, the plan that is in their head, but not on paper, may never come to fruition, to the detriment of the business and therefore to the detriment of their loved ones who count on its income. Or, if the plan would require the purchase of insurance, that illness might make that plan impossible as Mom or Dad become uninsurable.

So is it okay to wait to plan? Sure. But our clients need to know the costs of waiting and, in

my experience, that cost usually outweighs the benefits.

ATTORNEY LAING SPEAKS AT MARQUETTE UNIVERSITY LAW SCHOOL SEMINAR

On March 6, 2015, Dean Laing spoke at the 2015 Marquette University Law School Civil Litigation and Evidence Conference for attorneys. The topic of his presentation was "Deposition Practice," and included discussion on errata sheets, sequestration, videotape depositions, telephonic depositions and behavior at depositions. The presenters at the Conference included some of the top trial attorneys in Wisconsin.

EMPLOYMENT LAWSCENE ALERT: GOVERNOR WALKER SIGNS RIGHT-TO-WORK BILL

Wisconsin Governor Scott Walker has officially signed Right-to-Work legislation, which, as discussed in last Friday's blog, will allow workers covered by union representation to not pay union dues if they do not wish to. Although the union will still have the right to collectively bargain on behalf of all private-sector employees in a bargaining unit, employees can elect not to pay the union dues or fees. This law affects new collective bargaining agreements, as well as the renewal, modification, or extension of a current collective bargaining agreement. However, employees who are currently under a collective bargaining agreement will have to continue paying union dues until that agreement expires or is renewed, modified, or extended. The full text of the bill can be found here.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN ASSEMBLY PASSES RIGHT-TO-WORK BILL — GOVERNOR WALKER EXPECTED TO SIGN BILL

ON MONDAY

Today, Friday, March 6, 2015, the Wisconsin State Assembly after a marathon session passed right-to-work legislation by a vote of 62 to 35. The State Senate had previously approved the right-to-work legislation by a vote of 17 to 15 the previous week. The votes were cast according to party lines. The fast-tracked bill will be sent to Governor Scott Walker for signature, which could occur as early as Monday. The bill is aimed at making Wisconsin more attractive to businesses by prohibiting as a condition of employment membership in a labor organization, and, accordingly, provides employees the freedom to choose as to whether they want to pay union dues. Union supporters strongly opposed the bill arguing that the bill harms unions and slows job growth. However, Republican Assembly Speaker Robin Vos said that in Indiana, which passed a similar bill in 2012, unions have not shrunk and jobs have grown.

Once Governor Walker signs the bill, Wisconsin will become the 25th right-to-work state in the country following recent right-to-work legislation passed in Indiana and Michigan. The right-to-work legislation will affect only private-sector workers. The Wisconsin bill would make it a crime punishable by up to nine months in jail to require a worker who is not in a union to pay dues.

Right-to-work is an often misinterpreted concept, as it does not guarantee any right to employment. Under federal labor law, a union that is elected to represent a bargaining unit must represent all workers, even those who have voted against the union. In states that do not have right-to-work laws, all employees in the bargaining unit are required to pay their fair share of union dues for that representation, even if they voted against the union and do not wish to pay union dues. In right-to-work states, however, which Wisconsin will soon be, employees cannot be compelled to pay any union dues or fees in a workplace where an union represents employees through a collective bargaining agreement even though such employees will be covered by the collective bargaining agreement. Wisconsin's right-to-work legislation also makes it unlawful to require any individual to become or remain a member of an union.

Once Governor Walker signs the bill, the new right-to-work law will apply upon the renewal, modification, or extension of any private sector collective bargaining agreement. This means that for collective bargaining agreements currently in place as of the time of enactment of the law, employees would still be required to pay their fair share of union dues and remain members of the union for the remaining term of the agreement. However, for any collective bargaining agreement entered into, renewed or modified after enactment of the legislation, any union security clause requiring employees to be members of the union or any requirement for employees to pay union dues would no longer be enforceable.

ATTACK OF THE ZOMBIE PROPERTY

On February 17, 2015, the Wisconsin Supreme Court, in *The Bank of New York Mellon v. Carson,* 2015 WI 15, decided that, under Section 846.102 of the Wisconsin Statutes, banks and others who file mortgage foreclosure cases may be legally compelled to hold judicial sales of abandoned properties within a reasonable time after the borrower's redemption period expires. This decision flies in the face of the foreclosure practices of many lenders and, therefore, is worthy of careful consideration.

To avoid the problems highlighted by this case, it may be wise for lenders and others who foreclose mortgages to consider taking advantage of the receivership process to liquidate and dispose of abandoned or "zombie" properties, rather than using conventional mortgage foreclosure proceedings.

The facts of *BoNY v. Carson* are straightforward. In 2007, Countrywide loaned $52,000 to Carson, who signed a note and mortgage, pledging her Milwaukee home as collateral. Carson later defaulted on her loan payments and, BoNY, acting as the trustee for Countrywide, filed a foreclosure lawsuit. BoNY was unable to serve Carson with the foreclosure pleadings, but in the process of attempting service, BoNY's process server noted that Carson's house appeared vacant because the garage was boarded, the snow was not shoveled, and there were no footprints around the house.

Given its inability to serve Carson personally, BoNY published notice of the foreclosure action in a local newspaper and Countrywide's servicer filed a Registration of Abandoned Property with the City of Milwaukee. Carson did not respond and, in July 2011, a judgment for foreclosure and ordering sale of the property was entered in favor of BoNY. The circuit court declared Carson's indebtedness and directed that the property be sold at a sheriff's auction at any time after three months had passed based on Section 846.102.

Sixteen months later, BoNY still had not sold the mortgaged property via a sheriff's sale and had no plans to do so. Thus, the case involved what is sometimes called an "abandoned foreclosure," "bank walkaway," "zombie title/property," or "limbo loan." Moreover, despite obtaining a judgment of foreclosure, BoNY took no steps to secure the property. It was repeatedly burglarized and vandalized and, at one point, a fire started in the garage. The Department of Neighborhood Services ordered that the property be maintained, but neither BoNY nor Carson did so. As a result, Carson received notices of accumulated trash and overgrown vegetation and was fined $1,800 by the City of Milwaukee.

In an effort to force BoNY to sell the property, Carson filed a motion seeking to amend the judgment to include a finding that the property was abandoned, along with an order requiring

that the property be sold after five weeks had passed from the date of the amended judgment, relying on Section 846.102. The circuit court denied the motion, concluding that the statute did not grant it any authority to order BoNY to sell the property *at a specific time*.

On appeal, Carson argued that the trial court had the authority to order a sale of the property promptly upon expiration of the redemption period. The Court of Appeals agreed, deciding that "the plain language of the statute directs the court to ensure that an abandoned property is sold without delay, and it logically follows that if a party to a foreclosure moves the court to order a sale, the court may use its contempt authority to do so." BoNY sought review by the Wisconsin Supreme Court, which granted BoNY's request and identified two issues: (1) whether the statute authorizes a court to order a mortgagee to bring a property to sale; and (2) whether a court can require a mortgagee to bring a property to sale at a certain point in time.

After considering the plain language of Section 846.102 and related statutes, the Wisconsin Supreme Court rejected BoNY's argument that a mortgagee could not be ordered to sell a property within a particular time. Rather, the plain meaning of the statute gave the circuit court authority to order a sheriff's sale of abandoned property. But, the Supreme Court did not stop there. It went on to interpret Section 846.102 as *mandating* that a circuit court order the sale of abandoned property if certain conditions are met: "Those conditions do not depend on action by the mortgagee alone and are not dependent on its acquiescence or consent."

Having determined that a circuit court may (or sometimes must) compel a bank to sell an abandoned property, the Supreme Court next turned to the question of whether a circuit court has authority to order *when* the property must be sold. After again considering the plain language of Section 846.102, along with legislative history showing an intent to alleviate the problem of abandoned homes in Milwaukee's inner-city through prompt sales, the Supreme Court held that circuit courts indeed have authority to order a sale within a reasonable time after expiration of the statutory redemption period. Accordingly, *BoNY v. Carson* holds that a circuit court not only has the legal authority to order a prompt sale of abandoned property, but also that, if a circuit court issues such an order, it may require that such a sale take place within a reasonable time based on a totality of the circumstances of the case.

When abandoned properties are the subject of lien foreclosure actions, lenders should consider the benefits of appointing a receiver for such properties. A receivership not only prevents a finding of abandonment, but also is a way to liquidate property without going through the judicial foreclosure process.

For further information, please contact John Schreiber, Seth Dizard, or any of the attorneys in OCHD&L's Banking and Creditors' Rights Practice Group.

EMPLOYMENT LAWSCENE ALERT: THE FMLA, WFMLA, AND SAME-SEX SPOUSES

On February 25, 2015, the Department of Labor (DOL) issued a Final Rule revising the definition of "spouse" under the FMLA. Currently, a "spouse" is defined as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." The Final Rule amends the FMLA definition of "spouse" to include eligible employees in same-sex marriages, even in states that do not recognize same-sex marriages. Importantly, same-sex marriages will be deemed valid based on the place in which the marriage was entered into, instead of the state in which the employee lives or works. Marriages will be valid if they are performed in any state or country that deems the marriage legal. Wisconsin, through a series of recent federal court decisions, recognizes same-sex marriages. Therefore, if an employee in a same-sex marriage was married in a place that legally recognizes same-sex marriages, an employer in any state, even those that do not currently recognize same-sex marriages, must grant that employee FMLA leave for the care of a same-sex spouse if the employee is otherwise eligible for that leave.

The amendment to the meaning of "spouse" under the federal FMLA does not affect the Wisconsin Family Medical Leave Act (WFMLA). The WFMLA is broader in scope than the federal FMLA as it not only recognizes the right of an employee to take a leave of absence for the serious health condition of a "spouse," defined as "an employee's legal husband or wife" (including a same-sex spouse), but also provides leave rights to employees engaged in domestic partnerships. The WFMLA defines "domestic partner" in one of two ways. First, domestic partner can mean two individuals who: (i) are 18 years or older and competent to enter into a contract; (ii) are not married to or in a domestic partnership with anyone else; (iii) are not related by blood in a way that would prohibit marriage; (iv) consider themselves each other's immediate family; (v) agree to be responsible for each other's basic living expenses; and (vi) share a common residence. Second, domestic partners can be those who have signed and filed a declaration of domestic partnership in the office of the registrar of deeds of the county in which they reside. In Wisconsin, domestic partnerships can apply to same-sex couples who are not married as well as to opposite-sex couples who are not married. Therefore, even employees who are not legally married can be eligible for up to two weeks of WFMLA leave if they are part of a domestic partnership recognized under state law.

The new FMLA regulation goes into effect on March 27, 2015 and the WFMLA is already in effect for Wisconsin employers, so employers should review their policies and educate supervisors, managers, and human resources personnel on the Final Rule as well as Wisconsin law so that they can be applied properly.