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: NLRB ISSUES NEW RULES FOR UNION ELECTIONS

On Monday, December 15, 2014, the National Labor Relations Board (NLRB) issued rules that will speed up the union election process. Although the rules do not take effect until April 14, 2015, employers should be aware of them and start preparing for the changes now.

Under the current rules, representation petitions are filed seeking to have the NLRB conduct an election to determine if employees wish to be represented by a union for the purposes of collective bargaining with their employer. The Board then investigates these petitions to determine if an election should be conducted and will direct the election, if appropriate. There is currently a 25-day minimum period of time between the filing of a petition and the date of an election. Parties must agree prior to the election on the voting unit and other issues. If the parties do not agree, the 25-day minimum can be extended in order to hold a pre-election hearing and, if necessary, a post-election hearing. Currently, that date as to when the pre- and post-election hearings are held can vary by Region. Also, under current rules, parties are not required to identify all specific issues in dispute, and litigation on voter eligibility and inclusion can occur prior to the determination of whether an election should be held.

Under the new NLRB rules, the road to a representation election will be substantially different and quicker. There will no longer be a minimum time frame between the date of the petition and the date of the election. This means that since representation elections will happen more quickly and with a shortened time frame to an election; and employers will be severely limited in their ability to properly and effectively communicate with their employees about the pros and cons of union representation. While the NLRB did not specify any date certain as to when an election must be conducted, under the new expedited election rules, it is anticipated that an election will now occur between 10 and 21 days after the filing of a petition as compared with the current 38 to 45 day time frame.

Now petitions can be filed and transmitted between the parties electronically. With the filing of a representation petition, the petitioning union must also file a letter of position and evidence that employees support the petition (the "showing of interest"). Upon receipt, an employer must post and distribute to employees an NLRB notice about the petition and the potential for an election to follow.

The regional director will now set a pre-election hearing eight (8) days after a petition is filed. The purpose of the pre-election hearing is limited in scope and is designed to determine whether there is a "question of representation." Employers will be required to file a letter of position prior to the pre-election hearing identifying all issues that the employer wishes to litigate before the election. In addition, employers must also provide a list of the names, shifts, work locations, and job classifications of the employees in the petitioned-for unit, and any other employees that it seeks to add to the unit based upon a community of interests. Based upon the evidence presented at the hearing, the regional director will decide whether an election should be held and which, if any, voter eligibility questions should be litigated prior to the election.

If an election is directed, the regional director will ordinarily transmit the notice of election at the same time as the direction of election and will specify in the direction of election the election details, such as the date, time, place and type of election and the payroll period for eligibility. An election date will be set for the earliest date practicable. Now there is a new *Excelsior* list requirement as an employer, within two (2) days after a direction of election is issued (as opposed to seven (7) days under the previous rules), must provide a list of employees eligible to vote that now must include employees' personal phone numbers and email addresses, if available.

The NLRB regional office will then conduct the election and, if necessary, hold a post-election hearing to resolve any challenges to voters' eligibility and objections to the conduct of the election or conduct affecting the results of the election. While objections to voter eligibility had been a pre-election issue, it will now be held off until after the election in the event that the objection becomes moot. However, any issues not raised in the employer's position statement will most likely be considered waived by the NLRB. The post-election hearing will be scheduled 14 days after the filings of objections.

Although there is already a pending legal challenge to the new NLRB rule, a suit filed by the U.S. Chamber of Commerce and several trade associations, and there are likely to be others, employers should prepare for these rules to be enforced as the NLRB's new rules are game changers for employers. Employers will have less time to effectively communicate with their employees and employees will have less time formulate their true desires as to whether union representation serves their best interests.

Importantly, employers should not wait until an election petition is filed to address workplace

issues that may lead to a representation petition being filed. Employers will need to be proactive in informing their employees about their stance on union-related issues and making sure that employees feel that their concerns are being heard and addressed by the employer. Employers should also train supervisors to be aware of issues that could lead to employees' desire to unionize. If an employer anticipates or suspects that any type of union organizing activities is occurring within its workplace, delaying a response is no longer a viable option. Now, employers will be required to immediately begin the process of drafting communications to employees upon any indication of organizing activities and devise a sound and lawful strategy as to how it will confront any attempt to organize well before a petition is filed. Waiting to act until a petition is filed may be too late!

SEVENTH CIRCUIT REVERSES COURSE ON EMPLOYER'S ADA REASONABLE ACCOMMODATION OBLIGATIONS

In *EEOC v. United Airlines*, the Court of Appeals for the Seventh Circuit held that an employer, as part of its reasonable accommodation obligations under the Americans with Disabilities Act ("ADA"), must reassign a disabled employee to an open and available position regardless of whether there might be a better or more qualified applicant for that job position. The Seventh Circuit's holding is a direct reversal of its previous decision on the same issue twelve years earlier when it held that an employer who has an open and available position is not required to provide a disabled employee seeking reassignment to that open and available position preferential consideration when there are better qualified applicants for the position provided the employer has a consistent policy to hire the best applicant for the particular job in question, rather than the first qualified applicant.

In a decision issued twelve years ago by then Chief Judge Richard Posner, the Seventh Circuit took the position that the ADA is not a mandatory preference act and that the ADA only requires an employer to consider the feasibility of reassignment. The Seventh Circuit also previously held that it was not Congress' intent when it passed the ADA that a reasonable accommodation should be used to provide a disabled employee an advantage or preference over non-disabled employees. Rather, it was Congress' intent to provide disabled employees a level playing field with non-disabled employees relative to job opportunities. In that case, the Seventh Circuit held that a "policy of giving the job to the best applicant is legitimate and nondiscriminatory."

In its United Airlines decision, the Seventh Circuit reversed its anti-preference interpretation

of the ADA based upon a re-examination of the U.S. Supreme Court's decision in *Barnett v. U.S. Air, Inc*. where the U.S. Supreme Court arguably rejected that interpretation of the ADA noting that such an argument "fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." The Seventh Circuit interpreted this language from the Barnett decision to mean that an employer is mandated under the ADA to reassign a disabled employee to a vacant position absent a showing of an undue hardship, regardless of whether there might be better qualified candidates for the position.

An argument can be made that the Seventh Circuit interpreted the U.S. Supreme Court's "preference" requirement in Barnett too broadly. That is, the ADA does in fact provide a preference to disabled employees – that preference is in the form of a reasonable accommodation as a means of leveling the "playing field" between disabled and non-disabled employees. However, the ADA does not expressly provide that employees with disabilities should be given "bonus points" relative to other qualified applicants or candidates when competing for the same position. As Judge Posner astutely questioned: Should the ADA provide preferential consideration to a 29-year-old white male with tennis elbow in providing that employee preferential treatment in reassignment to a vacant position over a 62-year-old black woman with no disability who also happens to be the more qualified and better applicant for the job? Under such a scenario, the ADA creates a hierarchy of protections against discrimination, placing an employee with a disability ahead of members of other groups also deserving protections, such as racial minorities. In our opinion, the U.S. Supreme Court in Barnett did not intend to signal such preferential treatment to employees with disabilities, but, rather, was addressing those preferences that may be necessary to level the "playing field" in the workplace for such employees. The question becomes how far does the duty of reasonable accommodation extend when it affects the legitimate expectations of other qualified applicants or employees. This was an important question that the Seventh Circuit did not address in its United Airlines decision and, perhaps, may be a question the U.S. Supreme may wish to address.

In *Huber v. Wal-Mart Stores, Inc.*, a case that followed the Barnett decision, the U.S. Supreme Court had the opportunity to address the issue of whether an employer who has an established policy to fill vacant job positions with the most qualified applicant is required to reassign a qualified disabled employee to a vacant position as a reasonable accommodation, although the disabled employee is not the most qualified applicant for the position. Unfortunately, this case was settled by the parties before the U.S. Supreme Court could rule on the case. A decision in the Wal-Mart case would have answered this important question regarding an employer's obligation to reassign a disabled employee who can no longer fulfill the responsibilities of his or her original job position when there are other better qualified applicants.

Despite the Seventh Circuit's reliance on the Barnett decision, it less than clear whether the

U.S. Supreme Court intended for the application of a best-qualified applicant policy to be a per se violation of the ADA when a disabled employee seeks reassignment as a form of a reasonable accommodation, especially when that reassignment is to the detriment of better qualified applicants or candidates. Neither the ADA nor the corresponding regulations express that reassignment to a vacant position is mandatory when it is to the exclusion of other qualified applicants or that an employer has to provide a disabled employee preferential treatment. In fact, the ADA stops short of requiring that any particular group be afforded a competitive advantage over all others when it comes to hiring or other job placements decisions. Although the U.S. Supreme Court recently rejected the opportunity to review the Seventh Circuit's decision in United Airlines, it will hopefully be an issue that the Court will address in the near future when given the opportunity.

RECORD RETENTION POLICY: A START TO BEING LITIGATION-READY

Almost 99% of today's information created by businesses is generated and stored electronically. The ability to easily and conveniently store large amounts of data has created a hidden liability that did not exist in the age of when companies maintained its information primarily in paper format. The effect of this hidden liability is twofold. First, companies create more information then they know what to do with. Second, companies sometimes delete or destroy data and information that they actually do need.

For the unwary, these hidden liabilities may become exposed when your company is faced with a lawsuit. In today's litigation, the age of electronic data has generated a paradigm shift away from traditional paper documents to digital information. This shift has changed the discovery process in litigation by changing what attorneys are looking for; how they are looking; and where they are looking for relevant information. Companies can expect in today's litigation that the way it stores and preserves electronic information will be a central topic during the discovery process that will involve not only your record custodians, but also your information technology department. How well a company manages and preserves its electronic information may be an outcome determinative factor for it in litigation.

Today, companies that find themselves involved in a lawsuit oftentimes are faced with attacks through the discovery process as to how they typically store and delete electronic information. The purpose of this inquiry is to set the expectation as to what electronic information, such as e-mails, the company should or should not reasonably have at its disposal for discovery purposes. Companies that do not have a well-drafted record retention plan that addresses electronic information and which incorporates a comprehensive litigation

hold policy may find themselves at a significant disadvantage in trying to defend what might otherwise be a winning case. That is why it is more important than ever for all companies, both large and small, to effectively manage their electronic information. This means that **companies must be litigation-ready** by taking affirmative actions that allow the company to effectively manage and retain electronic information. It is simply too late to start thinking about the manner and method of retention and destruction of electronic data after you have been served with a lawsuit.

The best tools to avoid these hidden liabilities is a **record retention policy** that addresses electronic information as well as a **litigation hold policy** that is designed to preserve electronic data once litigation is reasonably anticipated. A record retention policy should be designed so that your company does not destroy information that it is obligated to maintain and at the same time the policy should be designed to destroy or delete information that the company no longer needs and/or is no longer mandated to maintain. Most companies have some sort of document retention policy. These retention policies were originally implemented to manage the volume and space occupied by paper documents. Companies have been less diligent, however, in applying their retention policies to the electronic information that they store on their servers and individual computer hard drives. This lack of diligence in managing electronic data has created a treasure trove for plaintiffs' lawyers looking for the proverbial "smoking gun," such as that e-mail that explains exactly what motivated the company's decision to terminate that troublesome employee.

A litigation hold policy has long been an important concept in litigation. In simple terms, it means that once you are sued, you have to stop destroying documents. It is an easy concept to understand when applied to paper documents, but it becomes a much more complicated task when dealing with electronic information. Electronic evidence can easily disappear, be altered or destroyed if not properly preserved. For example, some companies' computer systems provide for automatic deletion of e-mails and documents, so stopping that process takes an affirmative effort on behalf of management. When implementing a legal hold, a company needs to approach the hold requirement with a coordinated team effort. Business units, IT, records management and custodial personnel, and either in-house or outside counsel need to be involved and work together in the process of implementing the hold.

The failure to have a properly drafted record retention policy as well as a litigation hold policy may result in serious and adverse consequences for your company and may compromise your company's ability to defend itself in a lawsuit. For example, failure to have these policies in place can result in court-imposed sanctions, adverse jury instructions and significant monetary awards.

For example, a federal district court in Illinois recently agreed to permit the jury to be instructed that it can assume computer data destroyed by an employer would be unfavorable to its defense in an employee's lawsuit under the Americans with Disabilities Act when the

employer permitted a software program to automatically overwrite computer data relevant to the claims in the case. It made no difference that the employer did not act intentionally in deleting the information, rather, the district court found that the employer's failure to prevent the automatic deletion made it "at fault" relative to its duty to preserve evidence that was discoverable pursuant to the Federal Rules of Civil Procedure. Consequently, thinking ahead and addressing the hidden liabilities created by your electronic information can save your company time and money, and, more importantly, potentially prevent your company from having to incur an unfavorable judgment as the result of electronic information being inadvertently deleted.

EEOC SEEKS DETERMINATION FROM SEVENTH CIRCUIT THAT ITS PRE-SUIT CONCILIATION EFFORTS CANNOT BE REVIEWED

The EEOC is statutorily obligated to enter into confidential conciliation efforts with an employer prior to commencing a lawsuit. Only if the EEOC is unable to secure a conciliation agreement acceptable to it may it bring a civil action, as conciliation is a condition precedent to the EEOC's power to sue. The purpose of this requirement is to encourage settlement of discrimination cases through voluntary compliance, rather than litigation. If the EEOC commences suit against an employer without first engaging in a good faith effort to conciliate the case, the employer may seek dismissal of the lawsuit because conciliation raises a quasi-jurisdictional issue.

Despite case law to the contrary, the EEOC has now attempted to argue that a federal district court is without authority to review the EEOC's pre-suit conciliation efforts. In *EEOC v. Mach Mining*, the EEOC has argued that an employer cannot challenge the EEOC's pre-suit conciliation efforts because Title VII prohibits disclosure of conciliation efforts in a subsequent proceeding. The federal district judge, however, was not persuaded by the EEOC's argument as he found that the prohibition was in conflict with Title VII's mandate that the EEOC must attempt to conciliate with the employer prior to bringing a civil action. Moreover, the federal district judge also held that Title VII's prohibition regarding disclosure of conciliation efforts goes to the introduction of such evidence relative to the merits of the case and not to introducing such evidence for the purpose of determining whether the EEOC first satisfied its prerequisite to bringing suit.

Nevertheless, the federal district judge granted the EEOC's motion to seek an interlocutory appeal before the Seventh Circuit because there exist a split between the federal circuits as

to the scope of a court's review of the EEOC's conciliation efforts – an issue that the Seventh Circuit has not yet addressed. Some circuits employ a "deferential standard" inquiring only whether the EEOC made an attempt to conciliate whereas other circuits apply a "heightened scrutiny standard" which requires the EEOC to make a sincere and reasonable effort to negotiate by providing the employer with an explanation as to the reasonable cause for its belief that Title VII has been violated and an adequate opportunity to respond to all charges and negotiate a possible settlement.

The federal district court certified the following two questions for the Seventh Circuit on appeal: (1) Is the EEOC's conciliation process subject to judicial review?, and (2) if so, is that level of review a deferential or heightened scrutiny level of review? It would be anticipated that the Seventh Circuit will hold that the EEOC's conciliation is subject to judicial review and will most likely find that a district court's scope of review will include a determination as to whether the EEOC in fact engaged in conciliation and whether that effort was made in good faith. We will update this blog article when the Seventh Circuit issues its decision.

OSHA NOW PERMITS UNION ORGANIZER TO ACCOMPANY OSHA COMPLIANCE OFFICER DURING WALK AROUND INSPECTION IN NON-UNION FACILITY

OSHA has literally opened the door for union organizers to enter an employer's non-union facility during an OSHA walkaround inspection. In a February 21, 2013 interpretation letter, Richard E. Fairfax, OSHA's Deputy Assistant Secretary, opined that employees without a collective bargaining agreement may designate a person affiliated with a union or community organization to act on their behalf as a walkaround representative. Mr. Fairfax opined that the OSH Act, specifically, 29 U.S.C. § 657(e), authorizes participation in the walkaround portion of an OSHA inspection by "a representative authorized by the employer's employees." Mr. Fairfax further attempts to support his opinion by citing to the underlying OSHA regulations, 29 C.F.R. § 1903.8, which explicitly allows walkaround participation by an employee representative who is not an employee of the employer when, in the judgment of the OSHA compliance officer, such a representative is "reasonably necessary to the conduct of an effective and thorough inspection."

Mr. Fairfax's interpretative letter conveniently fails to acknowledge that permitting a non-employee to participate in the walkaround inspection is an exception to the express part of the regulation that provides that "[t]he representative(s) authorized by employees shall be

an employee(s) of the employer." Further, Mr. Fairfax fails to acknowledge that the exception permits only those third parties with special expertise or knowledge to participate in a walkaround inspection, such as a hygienist or a safety engineer. OSHA's interpretative letter fails to clarify what special skill or knowledge a union or community organizer may bring to the inspection.

OSHA's interpretative letter also fails to clarify when an alleged "employee representative" is "authorized" by the employees. Can a minority faction of employees claim that an union organizer is their "authorized" representative when other employees may object to such individual as their authorized representative? It appears that OSHA's interpretative letter takes a very liberal interpretation of who is or can be an "authorized" employee representative. If an employer is confronted with this scenario, should it halt the inspection and provide the compliance officer the option of conducting the walkaround without the union organizer or should the employer require OSHA to seek a warrant if the compliance officer insists that he or she will only conduct the walkaround if the union organizer is permitted to accompany the compliance officer? Obviously, these significant issues, as well as others, should be discussed with experienced legal counsel prior to permitting an OSHA compliance officer to proceed with a walkaround inspection under such circumstances.

DOES YOUR "AT-WILL" EMPLOYMENT STATEMENT VIOLATE THE NATIONAL LABOR RELATIONS ACT?

To maintain its relevancy and expand the scope of its authority, the NLRB continues its attack upon non-union employers' policies. This time the NLRB has positioned its cross-hairs upon employers' "at-will" employment policies or statements. Most non-union employers include within their employee handbook a statement that employees' employment is "at-will," meaning either the employee or the employer may end the employment relationship at any time, for any reason, either with or without notice. Most "at-will" statements further provide that no agent or representative of the employer may enter into any agreement to the contrary unless done so in writing and signed by the president or CEO of the company. These types of statements reflect nothing more than the reality of the legal relationship between the employer and the employee.

The NLRB, however, has recently taken a different viewpoint, finding that such "at-will" statements have a chilling effect upon employees' Section 7 rights. In American Red Cross Arizona Blood Services Region, an administrative law judge found that the employer had

violated Section 8(a)(1) by maintaining the following language in a form that employees were required to sign acknowledging their at-will employment status: “I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.” The NLRB found this language to essentially constitute a waiver by the employee of his/her Section 7 rights to “advocate concertedly … to change his/her at-will status.”

The NLRB applies a two-step inquiry to determine if a work rule would “reasonably tend to chill employees in the exercise of their Section 7 rights.” First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restricted protected activities, it will nonetheless be found to violate the National Labor Relations Act upon a showing that: (1) employees would reasonable construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Due to a significant uproar from employers, the NLRB issued two sets of advice memoranda on October 31, 2012 and February 4, 2013, back-pedaling on its position with regard to “at-will” employment statements. In these advice memoranda, the NLRB now takes the position that an “at-will” statement will not be considered to interfere with employees’ Section 7 rights if the statement (1) does not explicitly restrict Section 7 rights, or (2) was promulgated in response to union or other protected activity, or (3) that the policy had been applied to restrict protected activity.

While most employers’ at-will statements will pass the NLRB’s scrutiny relative to employees’ Section 7 rights, this does not mean that all “at-will” statements, especially those that imply that there can never be any other employment relationship between the employee and employer, will be considered lawful under the National Labor Relations Act. To be prudent, employers should review their “at-will” employment statements in their employee handbooks to make sure that such statements do not foreclose to its employees the possibility of a potential modification of the at-will relationship.

NLRB ASSERTS THAT TELLING EMPLOYEES TO MAINTAIN CONFIDENTIALITY DURING INTERNAL INVESTIGATIONS VIOLATES SECTION 7 RIGHTS

The National Labor Relations Board (NLRB) has taken the position, in a recent Advice Memorandum dated January 29, 2013, that an employer’s confidentiality rule may unlawfully interfere with employees’ Section 7 rights. Section 7 of the National Labor Relations Act (29

USC § 157) guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Many employers incorrectly assume that if they do not have a unionized workforce, the NLRA does not apply to them. However, many of the protections afforded under the NLRA apply to both union and non-union employers alike.

Many employers have written policies providing that employees must maintain the confidentiality of internal investigations for such matters involving employee misconduct, employee theft or workplace harassment. During the investigation process, most employers warn employees involved with the investigation to keep matters discussed during the investigation strictly confidential and not to share such information with other employees. The obvious purpose of such admonition is to maintain the integrity of the investigation and to prevent employees from fabricating or colluding to get their respective stories straight.

The NLRB, however, takes a different view. The NLRB holds that an employer violates Section 8(a)(1) of the NLRA when it maintains a work rule that reasonably chills employees in the exercise of their Section 7 rights. According to the NLRB, employees have a Section 7 right to discuss discipline or disciplinary investigations involving their fellow employees.

An employer may prohibit employees' discussions during an investigation only if it demonstrates that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights. The NLRB's position is that the employer must show more than a generalized concern with protecting the integrity of its investigations. Rather, an employer must show that in any particular investigation that witness(es) needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or that there was a need to prevent a cover-up. Consequently, any blanket rule prohibiting employee discussions of ongoing investigations is invalid and will be held by the NLRB to violate employees' Section 7 rights.

Most, if not all, employers recognize the importance of employees maintaining the confidentiality of any pending internal investigation. Even the NLRB has not gone as far as to hold that employees have an unfettered right to communicate about internal investigations. Employers should review their employee handbook and other policies that address confidentiality of internal investigations and make sure such policies do not contain a blanket rule regarding confidentiality. In addition, where applicable, employers should add savings clauses to their policies providing that the employer's policy shall not be construed or interpreted to interfere with employees' Section 7 rights. Finally, to avoid NLRB interference, employers should address the issue of maintaining the confidentiality of any internal investigation on a case-by-case basis when it can be demonstrated that maintaining confidentiality is significant to preserving the integrity of the investigation. When such a need arises, employees should be instructed on an individual basis regarding the need to maintain confidentiality about the investigation.

AN EMPLOYER'S GUIDE TO WISCONSIN'S CONCEALED CARRY LAW

On July 8, 2011, Governor Walker signed 2011 Senate Bill 93 into law as 2011 Wisconsin Act 35. More commonly referred to as the "Concealed Carry Law," this new law will be codified as Wisconsin Statute § 175.60. While the Concealed Carry Law will not be effective until November 1, 2011, Wisconsin businesses should understand the full scope of the law now and be fully prepared for its final implementation in November.

Read full article here.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ELECT JOSEPH GUMINA AS SHAREHOLDER

O'Neil Cannon is pleased to announce that Attorney Joseph E. Gumina has recently been elected as a shareholder of the firm. Joe will continue his labor and employment practice representing management in the states of Illinois and Wisconsin, and will represent clients in litigation matters in both state and federal courts, including the federal district courts in Illinois, Indiana, and Wisconsin.

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service legal practice that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next. We also assist business owners with their personal legal needs including tax and estate planning, family law and litigation – including personal injury litigation.