DechertOnPoint

September 2007 / Issue 19

A legal update from Dechert's Labor and Employment Group

In this issue

DHS Issues Final Rule Containing "Safe Harbor" Provisions for Employers Receiving SSA No-Match Letters

Temporary Injunction Issued

The Department of Homeland Security ("DHS") has published a final rule detailing the legal obligations of an employer upon receipt of a "no-match" letter from the Social Security Administration ("SSA"), or a letter regarding employment verification forms from the DHS. Intended to help employers ensure that they are employing only legal workers, the new regulation identifies safe harbor procedures for an employer to follow to avoid liability, which includes fines and penalties, for knowingly hiring or employing an illegal worker in violation of current immigration law.

The law prohibits employers from hiring or continuing to employ an individual *knowing* that he or she is not authorized to work in the United States. Such knowledge can be actual or constructive. "Constructive knowledge" is defined as "knowledge which may be fairly inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain situation." The final rule specifically provides that an employer can be found to have constructive knowledge of an applicant or employee's illegal worker status by virtue of its receipt of a no-match letter from the SSA or a DHS discrepancy notice.

A so-called no-match letter is one from the SSA that informs an employer that the information submitted in a W-2 form, specifically the employee name and social security number ("SSN"), does not match the records of the SSA. While there may be legitimate reasons for such a mismatch, such as a clerical error, another cause could be an illegal worker's attempt to use a false SSN or one assigned to someone else. DHS similarly sends letters to an employer when it is unable to confirm in agency records that an employment authorization or immigration status document used by an employee in completing his or her Form I-9 was actually assigned to another person, or to no one at all. Again, the reasons for such a discrepancy notice can be benign or not.

An employer can avoid having the receipt of one of these letters serve as the basis for a finding of constructive knowledge by following certain steps outlined in the new rule for responding to SSA no-match letters and DHS discrepancy notices. Generally, upon receiving a no-match letter from the SSA, an employer must do the following in order to avail itself of the rule's safe harbor:

- Within 30 days of receipt of the letter, the employer must check its records to determine whether the discrepancy results from a clerical error. If there is such an error, the employer must correct the information, inform the SSA of the correction, verify with the SSA that the corrected information matches its records, and create and maintain a record of such verification, which should be stored with the employee's I-9 form.
- If the discrepancy is not due to a clerical error, the employer must promptly request its employee to confirm that the name and number in its records are correct. If the employee informs the employer that its information is incorrect, the employer must correct, inform, verify, and make a record as described above.
- If the employee informs the employer that its records are correct, the employer should ask the employee to resolve the matter with the SSA within 90 days of the employer's receipt of the notice. If the employer cannot within 90 days verify the information,

Dechert LLP

the employer must within an additional three days complete a new I-9 form as if the employee were newly hired. In completing the new I-9, the employer cannot accept any document containing the questionable social security number or any other questionable document. In this instance, the employee must also present a document with a photograph to establish identity and/or employment authorization. The employer should retain both the new and old I-9 forms.

Similarly, upon receiving a notice from the DHS, an employer should do the following:

- Within 30 days of receipt of the notice, contact the local DHS office and attempt to resolve the question regarding the immigration status document or employment authorization document.
- If within 90 days of receiving the notice, the employer cannot verify with DHS that the document in question is assigned to the employee, the employer must again, within an additional three days, complete a new I-9 form as described above.

An employer should be cognizant that the safe-harbor procedures promulgated in this final rule represent just one way of attempting to address mismatches upon receipt of a letter from the SSA or DHS. While following the rule's procedure can ensure that an employer will not be found to have constructive knowledge of an applicant's or employee's unauthorized worker status, failure to abide by these provisions will not automatically result in a finding of constructive knowledge on the part of the employer. The ultimate determination of whether an employer has constructive knowledge that it has hired or is employing an illegal worker will be made upon consideration of the totality of the circumstances.

The new rule was scheduled to go into effect on September 14, 2007. SSA was also poised to issue a first round of no-match letters to 140,000 employers around the country. On August 29, 2007, a lawsuit was filed by the AFL-CIO, the National Immigration Law Center, and the American Civil Liberties Union in federal court in California. The suit alleges that DHS and SSA lack the authority to use tax data to enforce the immigration laws.

In a stunning development, on August 31 a federal judge issued a temporary injunction halting the implementation of the new regulations and enjoining the SSA from sending out the first round of no-match letters containing DHS warnings. The next hearing on this suit is scheduled for October 1.

Until this matter is resolved, employers should remain mindful of the regulation's requirements. An employer's integration of and adherence to these safe harbor procedures will certainly help to avoid a finding of knowingly hiring or employing an individual not authorized to work in the United States in violation of current immigration law. Still, an employer must not be overzealous in its desire to abide by the provisions of the now-stalled regulations. That is, an employer should not terminate an employee, or take any other adverse action against him or her, simply because it has received a no-match letter relating to that individual.■

PA Courts Hand Employers a Mixed Bag in Noncompetition Litigation

The Philadelphia Court of Common Pleas recently ruled that an employer whose former employee went to work for a noncompeting client of the employer, and did not solicit the employer's customers, was not entitled to a preliminary injunction to enforce a restrictive covenant. *Allebach Creative Assocs., Inc. v. Schwartz*, May Term 2007, No. 0011 (Pa. Ct. Com. Pl. Aug. 6, 2007).

Approximately two weeks later, the U.S. Court of Appeals for the Third Circuit ruled that courts should be especially hesitant to dismiss early in the proceedings and before the development of an adequate factual record an employer's claim for breach of a restrictive covenant, despite assertions that the restrictive covenant is overly broad. *Victaulic Co. v. Tieman*, 2007 WL 2389795 (3d Cir. Aug. 23, 2007). Whereas the decision in *Schwartz* reaffirms a court's reluctance to preliminarily enjoin an alleged violation of a restrictive covenant, and casts doubt on whether restrictions preventing a former employee from working for a client will be enforceable, the Third Circuit's decision in *Tieman* offers employers hope that allegedly broad restrictions will not automatically doom from the outset an employer's claim to enforce a restrictive covenant.

In *Schwartz*, Michael Schwartz, a 76-year-old advertising agency owner, sold his business to Allebach Creative Associates, Inc., who hired Schwartz part time. When Schwartz went to work for Allebach, he executed a noncompetition agreement that prevented him from participating in any business that was a customer of

Allebach and with whom Schwartz had a business relationship in the Philadelphia area for three years after leaving Allebach. Schwartz resigned from Allebach and joined the in-house marketing department of a non-competing business to whom Allebach provided web-based marketing. In his new position, Schwartz did not provide web-based marketing services for his new employer and did not solicit Allebach's clients.

Allebach sued Schwartz for breach of his employment contract and also sought a preliminary injunction. The court denied the preliminary injunction on the grounds that: the harm to Schwartz in having to choose an alternative career or travel beyond the Philadelphia area in search of advertising work outweighed any harm to Allebach; Allebach was unlikely to prevail on the merits; and if Allebach could prevail on the merits, it could be fully compensated by monetary damages since the amount of business Allebach received from Schwartz's new employer could be easily calculated. Key to the court's decision was that Schwartz accepted employment with a single, noncompeting client of Allebach and was not soliciting Allebach's clients.

In *Tieman*, Tieman and his new employer sought to dismiss Victaulic's lawsuit against Tieman for breach of a restrictive covenant. Tieman worked for Victaulic as a salesman, primarily in Ohio, West Virginia, and western Pennsylvania. As part of his employment, Tieman signed a noncompetition agreement barring him, for one year after leaving Victaulic, from selling the types of items sold by Victaulic within a ten-state region or on behalf of specific competitors, including Tyco, in any area in which Victaulic's products were sold. Upon leaving Victaulic, Tieman immediately began working for Tyco. The parties did not dispute that Tieman was in violation of the restrictive covenant as written, but disputed whether it was overbroad in terms of its product restrictions, customer restrictions, and geographic restrictions.

In what it described as "a classic case of jumping the gun," the Third Circuit found that the trial court erred in finding the covenants unenforceable based only upon the pleadings and facts improperly gleaned from Victaulic's web site. The court emphasized that reasonableness of a restrictive covenant is a holistic, fact-intensive inquiry and recognized such facts, when developed, may show that the restrictions at issue were reasonable. In a statement extremely helpful to employers operating in multiple markets, the court rejected as "hopelessly antiquated" in the "Digital Age" a *per se* rule that broad geographic limitations in restrictive covenants are unenforceable.

Schwartz and *Tieman* reaffirm that the validity of a restrictive covenant and a court's willingness to preliminarily enjoin an asserted violation of a restrictive covenant remain fact-intensive inquiries that must be decided upon a developed factual record. As a result, employers with standard employment agreements containing restrictive covenants may well find that the same restricted covenant may be enforced as written in some instances and modified or not enforced in others, depending on the facts of the particular case.■

Age Discrimination Claims Continue to Pose Risks

The Third Circuit recently issued a decision which provides a cautionary tale for employers seeking to avoid claims under the Age Discrimination in Employment Act (ADEA). In *Steward v. Sears Roebuck & Co.*, slip op., No. 06-3360, 2007 WL 2310028 (3d Cir. 2007), the plaintiff had been employed by Sears for 22 years. At the time of his termination, he was 50 years old and a manager of repair technicians. A year before his termination, he began reporting to a new supervisor, age 33. Before the supervisory change, the plaintiff had never been disciplined or warned by Sears; after the change, however, his new supervisor reprimanded him twice and then fired him for alleged work performance deficiencies. In addition, two months before he was fired, when the plaintiff expressed concern about new additional responsibilities, his supervisor responded "Hell, you are old enough, you have been around long enough, you should handle this."

After trial, the jury returned a verdict for the plaintiff. However, the trial judge granted Sears' motion for judgment as a matter of law, or in the alternative for a new trial. The trial judge concluded that the plaintiff had not shown, as required as part of his *prima facie* case, that a "sufficiently younger" employee had replaced him or assumed his duties. The trial judge further concluded that the plaintiff had not shown pretext because, *inter alia*, his new supervisor's single remark could not reasonably be construed as exhibiting a bias against the plaintiff's age but rather was related to the plaintiff's years of experience.

On appeal, the Third Circuit reversed the trial judge's grant of judgment as a matter of law and its grant of a new trial, leaving the jury verdict for the plaintiff intact, for two primary reasons. First, the Third Circuit criticized the trial judge's method of calculating "sufficiently younger." The trial judge had found that there were four individuals (ages 33, 35, 45, 60) who as-

sumed the plaintiff's duties, had averaged those four persons' age differences with the plaintiff (resulting in an average 6.75 age difference), and had then concluded that 6.75 years was not "sufficiently younger" as a matter of law.

The Third Circuit found that the trial judge's exclusive use of a combined average age differential was improper, and ruled that a court must also consider the age difference of each individual as well as what portion of the plaintiff's duties each individual assumed. The court then found that a reasonable jury could have found that the two younger individuals assumed more of the plaintiff's duties and could have properly given more weight to their individual age differences (17 and 15 years, respectively).

Second, the Third Circuit criticized the trial judge's finding that the supervisor's comment could only be reasonably construed as relating to the plaintiff's years of experience. The court found the jury could reasonably infer from the comment that the supervisor knew the plaintiff's age and was more impatient with him because of it. The jury was also entitled to consider this comment in determining whether Sears' proffered reasons for terminating the plaintiff were a pretext for discrimination, even though the comment was not made in connection with the termination decision, because the comment had been made by the supervisor directly involved in the subsequent termination.

As a result of the *Steward* decision, employers should be more cautious when reassigning the duties of a terminated older employee. Not only should employers consider the average age difference, but they also should consider the individual age differences between the terminated employee and the individuals assuming his duties, as well as the portion of duties that each individual assumes. There is no "quick and easy" calculation to protect employers; rather, each factor (individual age and duties assumed) should be weighed and considered. In addition, employers must be aware that even a single comment by a supervisor referencing an individual's years of experience can support a finding that an employer's proffered reasons for terminating an employee are a pretext for age discrimination.

NLRB Allows Employers to Withdraw Union Recognition After Completion of Third Year of Collective Bargaining Agreement

A divided National Labor Relations Board, in an issue of first impression, ruled that an employer may rely on untainted evidence of a union's actual loss of majority support to withdraw recognition from the union after the third year of a collective bargaining agreement of longer duration. *Shaw's Supermarkets, Inc.*, 350 N.L.R.B. No. 55 (2007).

Shaw's Supermarkets and Local 1445 of the United Food and Commercial Workers International Union were parties to a five-year collective bargaining agreement covering approximately 1,600 employees. Three years into the agreement, an employee filed a decertification petition. Employee signatures supporting the petition were submitted to Shaw's, and an accounting firm hired by Shaw's confirmed that more than 900 signatures on the slips were from covered employees. Relying on this evidence, Shaw's withdrew its recognition of the union. The union filed an unfair labor practice charge, contending that Shaw's withdrawal of recognition was unlawful.

In reaching its decision that the employer lawfully withdrew recognition of the union, the two-member majority consisting of Chairman Battista and Member Schaumber reasoned that an employer faced with unchallenged evidence of a loss of majority support for an incumbent union should have wider freedom of choice than an employer lacking such knowledge, so as to satisfy and reconcile the oftentimes competing policy goals of stability in labor relations and employee freedom of choice.

The majority noted that preventing a challenge to a union's status for more than three years after the execution of a collective bargaining agreement would too heavily favor the goal of stability at the expense of the "compelling interest" of protecting an employee's freedom of choice, where, as in the present case, that choice could be made after the benefit of three years of continuous representation and experience with the union. The majority also noted that the evidence of actual loss of majority support "undercuts the theoretical assumption that a collective-bargaining agreement evidences stability in labor relations for the duration of the contract."

Key to the majority's decision was that there was unchallenged evidence of an actual loss of majority support untainted by any actions of the employer. Member Liebman filed a dissent criticizing the balance struck by the majority. She argued that a more sensible resolution would be to process the decertification petition and conduct an election, while holding the parties to their contract (i.e., maintaining the status quo) pending the outcome.

This decision affords employers a greater choice of action when faced with evidence establishing a lack of majority support for an incumbent union. This decision, however, does not affect an employer's obligation to continue to recognize a union without question for the entire duration of a three-year collective bargaining agreement or the first three years of an agreement of longer duration. Similarly, it does not affect the requirement that the employer have actual knowledge of a lack of majority support rather than simply a good faith belief that an incumbent union lacks such support. As a result, employers should be cautious to consider withdrawing recognition only in circumstances involving untainted evidence of a lack of majority support after the third year of a collective bargaining agreement of longer duration.■

Practice group contacts

If you have questions regarding the information in this update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/employment.

Alan D. Berkowitz
Philadelphia
+1 215 994 2170
alan.berkowitz@dechert.com

Matthew DelDuca
Princeton
+1 609 620 3202
matthew.delduca@dechert.com

Ian Downes
Philadelphia
+1 215 994 2346
ian.downes@dechert.com

Linda Dwoskin
Philadelphia
+1 215 994 2721
linda.dwoskin@dechert.com

Jerome A. Hoffman
Philadelphia
+1 215 994 2578
jerome.hoffman@dechert.com

Terry D. Johnson
Princeton
+1 609 620 3280
terry.johnson@dechert.com

Thomas K. Johnson
Philadelphia
+1 215 994 2756
thomas.johnson@dechert.com

Betina Miranda
Philadelphia
+1 215 994 2233
betina.miranda@dechert.com

Jane Patullo
Philadelphia
+1 215 994 2803
jane.patullo@dechert.com

Jeffrey Rubin
Philadelphia
+1 215 994 2807
jeffrey.rubin@dechert.com

M. Frances Ryan
Philadelphia
+1 215 994 2438
mfrances.ryan@dechert.com

Shane Siegel
Philadelphia
+1 215 994 2966
shane.siegel@dechert.com

Melissa Squire
Philadelphia
+1 215 994 2829
melissa.squire@dechert.com

Dechert LLP

www.dechert.com

U.S.

Austin
Boston
Charlotte
Hartford
New York
Newport Beach
Philadelphia
Princeton
San Francisco
Silicon Valley
Washington, D.C.

UK/Europe

Brussels
London
Luxembourg
Munich
Paris