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An Employer's Suit against Its Former Employees Can Constitute Retaliation

In *Darveau v. Detecon, Inc.*, 515 F.3d 334 (4th Cir. 2008), the U.S. Court of Appeals for the Fourth Circuit held that an employer's filing of a lawsuit against a former employee can constitute a prohibited retaliatory action under the Fair Labor Standards Act ("FLSA").

Larry Darveau, vice president of sales for Detecon, Inc., filed suit against Detecon alleging that his former employer failed to pay him overtime compensation required under the FLSA. Fifteen days later, Detecon filed suit against Darveau alleging breach of contract and constructive fraud arising out of a sales contract whose termination Darveau allegedly hid to obtain a bonus. In response, Darveau amended his complaint to include a retaliation claim under the FLSA, alleging that Detecon filed suit against Darveau in retaliation for Darveau filing his FLSA suit. Detecon moved to dismiss Darveau's retaliation claim, which the trial court granted. The Fourth Circuit found this to be error and reversed the lower court's decision.

To establish a prima facie case of retaliation under the FLSA, a plaintiff must establish that he or she engaged in activity protected by the FLSA, he or she suffered an adverse action by the employer subsequent to or contemporaneous with such protected activity, and a causal connection between the two. The trial court dismissed the retaliation claim based primarily on the second prong, finding that there must be an adverse employment action and that since Darveau was a former employee, he could not have suffered any employment action by Detecon. The Fourth Circuit disagreed, relying on two recent precedents by the U.S. Supreme Court, *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (holding that former employees are protected under Title VII's retaliation provision); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (holding that an employee need not prove an adverse employment action for purposes of Title VII's retaliation provision).

In those two decisions, the Supreme Court held that former employees are covered under the retaliation provision of Title VII, and the scope of Title VII's retaliation provision covers not only actions relating to employment but extends to any action that could dissuade a worker from making or supporting a charge of discrimination. The Fourth Circuit found that it was appropriate to rely on Title VII precedent, as courts have uniformly done in interpreting the FLSA, where there are no significant differences in the language or intent of the two statutes. Title VII and the FLSA use the identical definition of employee and contain the same broad definition of a prohibited retaliatory act, making it appropriate to construe the coverage and scope of the FLSA's retaliation provision in accordance with the Supreme Court's interpretation of Title VII's retaliation provision.

The Fourth Circuit rejected Detecon's argument that reaching this result would create the "anomalous result" of extending protection from retaliation to former employees who no longer enjoy the substantive protections of the FLSA, stating that "[t]he more unfortunate anomaly would be if an employee's underlying FLSA claim could be brought after he quit, but the employee's protection from retaliation ended when the employee stepped beyond the employer's doorstep." After all, reasoned the Fourth Circuit, former employees often need references or other action by their former employers and thus require protection from retaliation even after the employment relationship ends. Because Darveau alleged that Detecon sued him with a retaliatory motive and no reasonable basis in law or fact (i.e., an action that could dissuade a worker from making or supporting a charge under the FLSA), his retaliation claim should not have been dismissed.

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While employers remain free to seek redress from the courts for actions taken by their current or former employees, employers should proceed with caution in filing suit against a current or former employee who has made either a formal or informal complaint about FLSA (or Title VII) violations, since such action can constitute retaliation in light of the Fourth Circuit's decision.■

Court Allows Association Claim to Proceed without Showing of Disability

The U.S. Court of Appeals for the Seventh Circuit recently issued a decision that should alert employers to the increasing potential for so-called association discrimination claims.

Plaintiff in *DeWitt v. Proctor Hospital*, No. 07-1957, 2008 WL 509194 (7th Cir. Feb. 27, 2008), alleged that her employer, Proctor Hospital, terminated her employment to avoid paying for her husband's rising medical costs. She claimed that her termination was unlawful under the Americans with Disabilities Act ("ADA"), which prohibits discrimination based on a person's association or relationship with a disabled person. The district court dismissed plaintiff's association claim on summary judgment. The Seventh Circuit Court of Appeals reversed.

Plaintiff worked as a nurse at the defendant's hospital facility. The defendant self-insured the healthcare costs of its employees and their dependents up to $250,000 per year, while a third-party insurance company covered any costs above this stop-loss amount. Plaintiff's husband suffered from cancer, and his medical expenses were rising. Because the husband's medical costs fell below the stop-loss amount, the defendant was financially responsible for them.

Hospital management kept detailed reports of all medical expenses that exceeded $25,000 per year including those related to plaintiff's husband. In 2004, management told plaintiff that her husband's medical expenses were unusually high and asked her whether she had considered less-expensive hospice care instead of chemotherapy and radiation. Management asked her about the treatments again in 2005.

In mid-2005, Proctor Hospital informed its employees that it had growing financial troubles. Hospital management told employees that it was looking for "creative" cost-cutting measures. In August 2005, management fired the plaintiff and designated her, without explanation, as "ineligible to be rehired in the future." The plaintiff then sued the hospital.

Under the ADA, an employer is prohibited from discriminating against an employee as a result of "the known disability of an individual with whom [the employee] is known to have a relationship or association." 42 U.S.C. § 12112(b)(4). The Seventh Circuit previously held in a seminal association discrimination case, *Larimer v. Int'l Bus. Mach. Corp.*, 370 F.3d 698, 700 (7th Cir. 2004), that to state an association claim the plaintiff must show that she was fired because her spouse has a disability that is costly to her employer. In other words, an employer who discriminates against an employee because of her association with a disabled person is liable under the ADA.

The Seventh Circuit found that the plaintiff in *DeWitt* presented direct evidence of association discrimination that a jury should hear: her employer's detailed reports, comments about "creative" cost-cutting, inquiries into her husband's treatment, and her designation as "ineligible for rehire." *DeWitt* is a remarkable case because the record did not show that the plaintiff's husband met the statutory definition of "disability," traditionally a highly-litigated issue. In a concurring opinion, Judge Posner noted that all the evidence in the case concerned costs "that a person who had a non-disabling medical condition could equally incur." The defendant, however, apparently never argued that there was a simple monetary cap in place that was applied uniformly, regardless of the nature of the condition.

DeWitt teaches that employers should be cautious when they make employment decisions based on medical costs. Association discrimination claims have not yet been widely litigated. But, as courts like the Seventh Circuit become more willing to allow these claims to proceed to a jury, employers may see association discrimination claims on the rise.■

Supreme Court Opines on "Me Too" Evidence

The U.S. Supreme Court recently decided a case that posed the question: Is "me too" evidence admissible at trial in a claim brought under the Age Discrimination in Employment Act ("ADEA")?

In *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), the Supreme Court considered whether the U.S. Court of Appeals for the Tenth Circuit erred when it reversed a district court ruling excluding

such evidence as irrelevant. The Tenth Circuit's opinion is at odds with many other courts of appeal that have held that where the plaintiff does not allege a "pattern and practice" of discrimination and the case is not a class action, "me too" evidence from other employees is not relevant to whether the plaintiff suffered discrimination by their employer and should, therefore, be excluded. *See Goff v. Continental Oil Co.*, 678 F.2d 593, 596-97 (5th Cir. 1982), *overruled on other grounds by Carter v. South Central Bell*, 912 F.2d 832 (5th Cir. 1990); *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152, 156 (6th Cir. 1988); *Kline v. City of Kansas City*, 175 F.3d 660, 668 (8th Cir. 1999).

Notwithstanding these decisions, there are also cases in several circuits that permit "me too" evidence if there is a sufficient nexus between the claims of the plaintiff and the other employees. For instance, courts have allowed testimony from witnesses who worked under the same supervisor or in the same position as the plaintiff. *See Goldsmith v. Bagby Elevator Co.*, Inc., 513 F.3d 1261, 1286 (11th Cir. 2008); *Spulak v. Kmart Corp.*, 894 F.2d 1150, 1156 n.2 (10th Cir. 1990); *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1315 (10th Cir. 2006). The Supreme Court's opinion in the *Sprint* case was supposed to clarify if and when such evidence is relevant and permissible.

In *Sprint*, plaintiff Ellen Mendelsohn sued her former employer alleging that in selecting her for termination as part of a company-wide reduction in force ("RIF"), she was discriminated against on the basis of age. Mendelsohn was 51 and the oldest manager in her unit at the time of her termination. After the jury returned a verdict for her employer, plaintiff appealed, arguing that the district court's refusal to admit testimony by other Sprint employees who alleged similar discrimination during the same RIF constituted reversible error. The district court allowed testimony only by other employees who were similarly situated, requiring proof that the employees shared the same supervisor as plaintiff and that their terminations occurred in close temporal proximity to plaintiff's termination. This requirement excluded the testimony of co-workers that plaintiff had intended to offer. The Tenth Circuit concluded that the district court abused its discretion in excluding the testimony and found that the same supervisor test is inapplicable in the RIF context where, as here, the plaintiff claims to be the victim of a company-wide discriminatory RIF.

The Supreme Court disagreed but declined to provide a bright line test for "me too" evidence, instead providing general guidelines on the admissibility of such evidence and then remanding to the district court for a full analysis. The Court noted that "[r]elevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad per se rules." *Sprint*, 128 S. Ct. at 1147. Writing for a unanimous court, Justice Thomas found that the court of appeals should not have ruled on the relevance of the testimony but instead should have remanded the case to the district court to clarify the basis of its evidentiary ruling under the applicable rules. In so doing, the Court cautioned that "me too" evidence is neither *per se* admissible nor *per se* inadmissible. "The question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." *Id.*

While the Court refused to articulate a blanket rule of exclusion or allowance for "me too" evidence, it made clear that a case-by-case analysis is inevitable. The Court counseled lower courts to assess the relevance of the evidence under Federal Rule of Evidence 402 based on the specific factual scenario presented and then perform a test balancing relevance and prejudice under Federal Rule of Evidence 403.

It is perhaps because of the fact-intensive nature of such questions that the courts of appeal have reached differing conclusions on the admissibility of "me too" evidence. Employers cannot assume that "me too" evidence is not admissible unless the same supervisor is involved. Rather, to avoid the potentially substantial prejudice of "me too" evidence, employers must be aware that they will need to carefully examine and distinguish any claims by a plaintiff from the proffered "me too" evidence.■

Supreme Court Makes It Easier to Exhaust Administrative Remedies

The U.S. Supreme Court recently decided *FedEx Corp. v. Holowecki*, 128 S.Ct. 1147 (2008), in which it adopted a broad interpretation of what constitutes a charge for purposes of federal employment discrimination suits. Under numerous federal employment laws, including the Age Discrimination in Employment Act ("ADEA"), Title VII, and the Americans with Disabilities Act ("ADA"), potential plaintiffs must first file a "charge" with the Equal Employment Opportunity Commission ("EEOC") within 180 or 300 days of when the alleged discrimination occurs and must then wait a

specified time period after the charge has been filed before they can bring suit in federal or state court.

However, these statutes do not define the term, "charge," and EEOC regulations, while providing a definition, do not present clear guidance on what must be included in a filing to constitute a charge. As a result, the various federal courts of appeal that have addressed this question have reached differing conclusions, with some requiring the filing to indicate an intent to trigger the EEOC's enforcement powers, some holding that an intake questionnaire alone is sufficient, and at least one circuit requiring a formal charge.

In *Holowecki*, the plaintiffs, Patricia Kennedy and 13 other FedEx employees, asserted that programs initiated by FedEx in 1994 and 1995 were designed to force older workers out of the company before they were entitled to retirement benefits. In December 2001, Kennedy submitted an Intake Questionnaire (Form 283) to the EEOC and attached to the questionnaire a signed affidavit describing in detail her claims regarding the company's alleged discriminatory practices. The EEOC regional office did not treat Kennedy's Form 283 as a charge and, as a result, neither notified FedEx nor attempted to pursue conciliation as required by statute. In April 2002, Kennedy filed suit in federal court alleging age discrimination under the ADEA, and FedEx learned of her concerns for the first time.

The Supreme Court addressed two questions in *Holowecki*: (1) What constitutes a charge under the ADEA? and (2) Were the documents that Kennedy filed in December 2001 a charge? In answering these questions, the Court focused on the EEOC's dual statutory functions: enforcing employment discrimination laws and educating the public about those laws. The agency, as a result of its dual functions, receives both enforcement requests and information requests and must distinguish between the two. Looking for a pragmatic solution, the Court essentially adopted the EEOC's position: to be a charge, the document filed with the EEOC must include some request for the agency to take action. The Court held that in addition to the information required by the regulations, including the allegation and the name of the charged party, the filing must also be "reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and employee." *Holowecki*, 128 S. Ct. at 1158. While the Court acknowledged that it had adopted a "permissive standard," it concluded that this was necessary because of the large number of *pro se* filings received by the EEOC and the need for the system to be accessible to individuals with no real knowledge of the statute or regulations at issue.

Finally, the Court concluded that Kennedy's filing was a charge. The intake questionnaire form contained all of the information required by the regulations. In addition, in her detailed six-page affidavit, Kennedy also asked the agency to "force Federal Express to end their age discrimination. . . ." The Court viewed this as a request for the agency to act sufficient to make the filing a charge.

The Court's ruling in *Holowecki* permits a wide range of documents to come within the definition of a "charge" and, thus, restricts employers' opportunities to dismiss employment cases on the grounds that the plaintiff failed to exhaust the available administrative remedies. Nonetheless, the clearer definition provided by the Court should make the EEOC's responses more consistent, providing employers with early notice of potential charges and allowing for the timely gathering of information for pre-suit conciliation that can make the system more efficient and cost-effective for all parties.■

OWBPA Does Not Create Independent Cause of Action Based on Invalid Release

Following the lead of numerous other federal courts, a judge in the U.S. District Court for the Middle District of Pennsylvania recently ruled that the Older Workers Benefit Protection Act (OWBPA)'s amendments to the ADEA do not create an independent cause of action for damages based solely upon an employer's failure to comply with the OWBPA's requirements with respect to waivers of claims. Rather, in *Baker v. Washington Group International LLC*, No. 1:06-CV-1874, 2008 WL 351396 (M.D. Pa. Feb. 7, 2008), the court held that the failure of a waiver to comport with the OWBPA's standards merely precludes an employer from invoking the waiver as an affirmative defense to a claim of age discrimination. While this ruling is significant in that it eliminates a potential source of liability to broad classes of former employees, the most significant consequence of an employer's failure to obtain valid waivers from terminated employees—that age discrimination claims by affected employees will not be barred by such waivers—still looms as large as ever.

The court's decision arose after a class of former employees sued Washington Group International following widespread layoffs by the company. In connection with the layoffs, Washington Group offered each of the affected employees a severance package in return for a

waiver of all claims. The waivers, however, only gave employees 21 days to consider whether to sign, instead of the 45 required by the OWBPA in the context of a "separation program" implemented by an employer.

A group of 80 plaintiffs filed suit under the ADEA based on the invalid waivers. However, their claim was premised "not upon an allegation that [Washington] discriminated again them on the basis of their age, but upon their belief that [Washington's] release violated the OWBPA by failing to comply with [its] requirements." Citing the "overwhelming weight of authority," the court rejected the plaintiffs' claim, holding that "[a]n analysis of the OWBPA's plain language reveals that, while the Act can be a shield for plaintiffs in an ADEA action when an employer invokes a waiver as an affirmative defense, the Act cannot be used as a sword that provides plaintiffs with an independent cause of action for affirmative relief." *Id.* Accordingly, while "a violation of the OWBPA renders a waiver ineffectual, meaning that it can not longer serve as an affirmative defense to an ADEA claim . . . [s]uch a violation does not serve as the basis of an age discrimination claim pursuant to the ADEA or determine in the first instance whether age discrimination has occurred."

While the court's decision in *Baker* is undoubtedly the correct one, it must be noted that the U.S. Court of Appeals for the Third Circuit, like most of the other federal appellate courts, has yet to decide the issue conclusively. Further, despite the court's decision, employers must still work closely with counsel to ensure that waivers obtained from departing employees comply with the OWBPA's strict requirements, as the failure to do so can result in costly litigation involving claims that ought to have been extinguished.■

Wandering Eyes May Land You in Court

In *Billings v. Town of Grafton et al.*, 515 F.3d 39 (1st Cir. 2008), the U.S. Court of Appeals for the First Circuit held that a secretary who alleged that her supervisor repeatedly stared at her breasts raised a triable issue of sexual harassment under Title VII of the Civil Rights Act.

Nancy Billings ("Billings") began working as a secretary for the Grafton Town Administrator, Russell J. Connor, Jr. ("Connor") in 1999. Billings noticed almost immediately that Connor repeatedly stared at her chest during their conversations. She alleged that she walked with a piece of paper in front of her chest to avoid Connor's leers. In one instance, Connor stared at Billings' chest so many times in the first half-hour of her workday that she felt compelled to drive home and change her sweater.

After that incident, Billings filed a sexual harassment complaint with the Town of Grafton. Other women who worked for the town also reported Connor's wandering eyes. After a limited investigation, the Town's labor lawyer concluded that Billings' allegations could not be sustained, finding that Connor does not "stare" at female employees' breasts, but simply does not maintain eye contact. Billings subsequently filed a charge of discrimination with the Equal Employment Opportunity Commission and the Massachusetts Commission Against Discrimination. After receiving a right to sue letter, Connor filed a complaint in federal court, asserting claims of sexual harassment and retaliation on account of her transfer to another secretarial position following her complaint against Connor.

In response to her claims, the Town of Grafton and Connor filed a motion for summary judgment, contending, among other things, that Connor's staring alone did not create a hostile work environment as a matter of law because the alleged harassing conduct was not severe and pervasive. The defendants also argued that the staring was not sexual in nature, as it resulted from a medical condition involving Connor's eyes known as alternating intermittent exotropia. The district court granted summary judgment in favor of the defendants, ruling that "'the alleged harassing conduct here is insufficient as a matter of law to create an objectively hostile work environment because it is not sufficiently severe or pervasive.'" *Billings*, 515 F.3d at 46 (quoting the district court opinion). The district court found it significant that Connor had not directed sexual advances or comments to Billings and never touched her inappropriately. Billings appealed.

Writing on behalf of the First Circuit, Judge Jeffrey R. Howard overturned the district court's ruling, opining that Billings stated a legal claim for sexual harassment. In so holding, the First Circuit noted that the district court properly articulated the standard for establishing a hostile work environment but "applied the standard in too rigid a manner." *Id.* at 48. According to the First Circuit, the district court placed undue emphasis on the fact that Connor's offensive conduct did not include touching, sexual advances, or sexual comments. "[T]he hostility vel non of a workplace does not depend on any particular kind of conduct; indeed, '[a] worker need not be propositioned, touched offensively, or harassed by sexual innuendo in order to have been sexually

harassed.'" *Id.* (quoting *Quick v. Donaldson Co.*, 90 F.3d 1372, 1379 (8th Cir. 1996). While the First Circuit explained that summary judgment remains "an appropriate vehicle for policing the baseline for hostile environment claims," it stated that "[t]aken in the light most favorable to Billings, the evidence depicts a supervisor who regularly stared at her breasts for much of the two and a half years they worked together. Thus, the alleged harassment did not consist merely of the sort of 'isolated incidents' that ordinarily 'will not amount to discriminatory changes in the terms and conditions of employment.'" *Id.* at 50.

In response to the defendants' contention that Connor's staring was not sexual in nature, the court stated, "[w]e cannot reasonably accept . . . that a man's repeated staring at a woman's breasts is to be ordinarily understood as anything other than sexual." *Id.* at 51. The court noted that Connor's eye condition might have some bearing on whether Connor's staring created an objectively hostile work environment but did not mean that such staring could not support a hostile work environment claim as a matter of law. According to the court, "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Id.* The court was also not persuaded by the defendants' argument that Billings was able to continue her duties notwithstanding the complained-of behavior. The court concluded that the fact that Billings managed to get her work done despite having to employ measures to avoid Connor's leers was "by no means fatal to her hostile environment claim."

The court's ruling in *Billings* appears to widen the door for hostile work environment claims. In addition to overturning the district court's judgment for the defendants on Billings' sexual harassment claim, the First Circuit also vacated the district court's grant of summary judgment on Billings' related retaliation claim. The case was remanded to the district court.■

British Court Refuses to Enforce U.S. Restrictive Covenants

In *Duarte v Black and Decker* [2007] EWHC 2720 (QB) the High Court of England and Wales confirmed that restrictive covenants will not be enforced by injunction through the English courts if those covenants are unenforceable under English law even when the parties have agreed that the law of another country shall govern.

Duarte, senior executive responsible for industrial power tools sales in Europe, the Middle East and Africa for Black and Decker ("B&D"), lived in England. During his employment with B&D, Duarte entered into a Long Term Incentive Plan agreement ("LTIP") with B&D. The LTIP contained restrictive covenants which purported to prevent Mr. Duarte for two years following the termination of his employment from joining certain competitors of B&D and from poaching certain B&D staff. The LTIP contained a choice of law provision stating that Maryland law would be applied in the event of a dispute. Mr. Duarte also entered into a service agreement governed by English law which did not contain any restrictive covenants.

In July 2007, Duarte resigned from B&D to take up a senior post with a competitor. B&D contended that Duarte could not work for the competitor for two years as a result of the restrictive covenants set out in the LTIP. Duarte applied to the High Court of England & Wales for a declaration that the LTIP covenants were unenforceable against him. In response, B&D sought an injunction against Mr. Duarte to enforce the covenants.

The first key issue for the Court in this case was whether Maryland or English law applied to the LTIP covenants. Duarte argued that English law was the governing law citing Article 6(1) of the Rome Convention on the Law Applicable to Contractual Obligations 1980 (the "Rome Convention"). B&D contended that Maryland law governed the covenants.

Article 6(1) of the Rome Convention provides that the governing law of a contract will be that chosen by the parties except in the context of a contract of employment where the parties' choice of law shall not operate to deprive the employee of the protection of mandatory rules of law which would otherwise apply. In other words, the Rome Convention operates to preserve any basic legal employment protection which normally applies to employees in the country most closely connected with the employment. Employees cannot contract out of these rights by agreeing to apply the laws of a country where such rights do not apply.

Duarte argued that English law relating to restraint of trade came within the framework of legal protections afforded to employees in England and therefore the effect of Article 6(1) of the Rome Convention was that English law should apply to the LTIP. However, the Court found that Article 6(1) of the Rome Convention did not apply to the covenants in the LTIP. Although the Court was satisfied that the LTIP constituted a contract of employment, it drew a distinction between specific statutory provisions designed to protect employ-

ees (such as the right not to be unfairly dismissed) and the general law of contract and restraint of trade which applies to restrictive covenants. Accordingly, the Court found that the governing law of the LTIP covenants was that of Maryland.

The second issue for the Court was whether the covenants were enforceable under Maryland law and, if so, whether it was open to the English Courts to enforce them. Duarte argued that even if the covenants were enforceable under the laws of the State of Maryland, Article 16 of the Rome Convention would prevent the English Courts from enforcing the restrictions in England on the basis that they were unenforceable under English law. Article 16 of the Rome Convention provides that the application of the laws of any country to which the Convention applies may be refused only where such application would be *"manifestly incompatible"* with the public policy of the forum.

The Court agreed with Duarte's Article 16 argument. It found that English law on restraint of trade is a clear and well established doctrine of public policy. Accordingly, even if the LTIP restrictions were enforceable under Maryland law, the English Court would not enforce them unless they were enforceable under English law.

The Court found that the LTIP covenants were not enforceable under Maryland law. Since the English courts take an even stricter approach to restrictions in restraint of trade than Maryland courts, the LTIP covenants were held not to be enforceable in England either. *Duarte* brings into sharp relief the difficulties faced by employers seeking to enforce restrictive covenants in different jurisdictions around the world. It is common practice for global businesses to include restrictive covenants against competition within contracts and plan documents. These agreements are invariably, and often necessarily, governed by the law of the corporation's headquarters. However, at least as far as the English Courts are concerned, the Rome Convention will prevent employees from enforcing covenants against competition which are valid under the law selected by the parties in the contract if the covenants are invalid in the country where the employee works. Employers with employees outside of the United States should be careful when drafting restrictive covenants to seek advice about and consider the laws of the country in which the relevant employee is based.■

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