
CLIENT EMPLOYMENT LAW ADVISORY

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FEDERAL COURT IN NEW YORK DENIES TRADE SECRET PROTECTION FOR INFORMATION AVAILABLE ON THE INTERNET

When a senior corporate employee leaves to work for a competitor, the former employer often fears that he or she will misuse its confidential information to benefit the employee's new firm. In this circumstance, the former employer sometimes brings a lawsuit seeking to block the employee from taking the new job. To succeed in such a suit, the former employer must demonstrate, among other things, that the ex-employee was privy to trade secrets or confidential information.

In one recent case, the defendant, a managing director of a financial services industry executive search firm, left that company to start a competing firm. Her employment agreement did not contain any restrictions on her post-employment competition or her use of confidential information restrictions. However, her prior employer, claiming that the employee had misappropriated its trade secrets, sought to enjoin her from using, disclosing, or providing access to any of its allegedly confidential information and from communicating with its client contacts.

The defendant employee argued that the information in her prior employer's database was stale (and, she said, was itself stolen from the employer's previous employer), and, in any event, was not worthy of trade secret protection as the information was readily available from public sources, including the Internet. She testified that "if she had amnesia tomorrow" she could obtain the same information through routine Internet searches starting with a search engine like Google and using LinkedIn, Facebook, Bloomberg, and other widely available resources to supplement the information.

A federal district court sitting in New York denied the prior employer's request for an injunction, holding that the employer had failed to demonstrate that its database was a protectable trade secret. The court agreed with defendant that the database was outdated; that the prior employer had failed to take adequate steps to safeguard it; and that the information was not confidential or protectable as it could be replicated through public sources on the Internet. **Sasqua Group, Inc. v. Courtney**, 2010 WL 3613855 (E.D.N.Y. Aug. 2, 2010), **report and recommendation adopted**, 2010 WL 3702468 (E.D.N.Y. Sept. 7, 2010).

CLASS OF ADULT DANCERS CERTIFIED IN MISCLASSIFICATION CASE

In one of the growing number of "employee misclassification" disputes around the country, a federal court in Manhattan has certified a class action brought on behalf of a class of adult dancers who claim that they were misclassified as independent contractors, and therefore were denied overtime pay and other benefits, rather than employees. **In re Penthouse Executive Club Compensation Litigation**, 2010 WL 4340255 (S.D.N.Y. Oct. 27, 2010).

The dancers allege that the defendant, an adult entertainment club, violated the federal Fair Labor Standards Act ("FLSA") by failing to pay them minimum wages; by failing to pay time-and-a-half for overtime for hours worked in excess of 40 per week; by requiring them to pay a "house fee" for each shift worked that sometimes exceeded \$100 per night; by deducting a 20% service charge for tips paid in scrip issued by the Club; by requiring them to share their tips with other Club personnel; and by requiring them to purchase and wear gowns, high heels, and clothing that conformed to precise club specifications, thereby depressing their earnings below the minimum wage. The club responded that the adult dancers were independent contractors, to whom the FLSA requirements did not apply.

The court has held that plaintiffs satisfy the requirements for a class action, meaning that the court's decision on the merits of the case will apply not just to the individual plaintiffs but to all other class members. We will follow this case and report on any key developments in future editions of this *Client Advisory*.

NEW DISABILITY STANDARD UNDER THE ADA: CANCER IN REMISSION IS STILL A DISABILITY

Plaintiff was diagnosed with renal carcinoma. After taking time off for surgery and recovery, he returned to work with no restrictions on his ability to work or his work schedule. A year later, while plaintiff's cancer was in remission, his supervisor informed him that everyone in his classification would be required to work mandatory overtime up to 70 hours per week because of a big new account. Plaintiff submitted a doctor's note indicating that he could not work more than 40 hours per week. The company agreed to limit his workweek to 40 hours, but said he would be required to work out of an office that would require two to three extra hours of travel time per day. Plaintiff would not agree to this condition and was terminated.

Plaintiff sued, alleging that the company had violated the Americans with Disabilities Act (ADA) by terminating him without offering a reasonable accommodation. The employer moved for summary judgment on the ground that because plaintiff's cancer was in remission, he was not "disabled" under the ADA. A federal court sitting in Indiana denied the employer's motion, based on the Americans with Disabilities Act Amendments Act (ADAA) of 2009, which provides that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." The court held that plaintiff's condition constituted a disability and the employer was required to have provided a reasonable accommodation to plaintiff. **Hoffman v. Carefirst of Fort Wayne, Inc. d/b/a Advanced Healthcare, 2010 WL 3522573 (N.D. Ind. 2010).**

The ADAA significantly lessens a plaintiff's burden of establishing that he or she is disabled under the ADA. While the ADAA retains the ADA's definition of "disability" as a substantial limitation of a major life activity, the ADAA requires that its meaning "shall be construed in favor of broad coverage of individuals ... to the maximum extent permitted by ... [the ADA]," including treating impairments that are episodic or in remission as disabilities. This case suggests that now that ADAA cases are appearing on judicial dockets, the focus of some ADA litigation may turn not on whether an employee (even one whose condition is in remission) is considered "disabled" under the ADA, but on whether an employer has met its obligation to provide a "reasonable accommodation" to the qualified individual with a disability.

Please note that the cases presented in this Advisory are drawn from courts located throughout the United States. They may or may not apply to a given employer based upon regional interpretations of federal law as well as any applicable state or local laws. If you have any questions concerning labor or employment law, please contact Robert I. Gosseen, Esq., who heads this practice area at Ganfer & Shore, LLP, at (212) 922-9250, ext. 288, or your contact at the firm.