VOLUME 7, ISSUE 2

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JUNE 2015

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National Labor Relations Board Continues Its Attack on Standard Handbook Provisions

The National Labor Relations Board is not content with its efforts to gut employers' social media policies. Now the NLRB has taken on other standard employee handbook provisions.

A report from the General Counsel released March 18, 2015 summarizes recent decisions of the NLRB and compares policies that the Board found lawful with those it found unlawful. Importantly, many of the cases discussed by the General Counsel involve charges against non-unionized employers. The report identifies several areas where the Board found that typical employee handbook policies violated employees' rights to discuss their wages, hours, and terms and conditions of employment.

Confidentiality Rules

The Board has invalidated several employer confidentiality rules. Rules that advise employees to maintain the confidentiality of "work matters" or "non-public information" are invalid because wages could be included in this information. Similarly, rules that require confidentiality of "employee information" are invalid, as such information could include contact information used for organizing, or wage and hour information.

Professionalism Rules

As with the its attacks on social media rules, the Board continues to take a hard look at rules requiring professionalism in the workplace. The Board found policies that prohibit "disrespectful," "negative," "inappropriate," or "rude" comments unlawful. Similarly, the Board invalidated policies that prohibited or limited employees' ability to criticize the employer, supervisors, managers, or the company on social media or in other forums. Finally, the Board has distinguished between policies that prohibit "defamatory" or "false" statements from those that prohibit "maliciously false" or "knowingly false" statements. Policies prohibiting the former are not valid; those prohibiting the more serious infractions are generally valid.

Use of Trademarks or Copyrighted Material

The Board has been cracking down on policies that prohibit the use of the employer's trademarks or that prohibit the use of trademarked or copyrighted material without permission. The Board reasons that, under the doctrine of Fair Use, employees have a right to use trademarks and copyrighted material in some circumstances, including in criticizing the employer regarding work conditions, without permission. The Board does allow

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National Labor Relations Board Continues Its Attack on Standard Handbook Provisions (continued)

(Continued from page 1)

employers to include a provision requiring employees to "abide by trademark and copyright law".

Photographs, Recordings, and Personal Devices

The Report also covers recent Board decisions regarding policies relating to personal photographs, recordings, and the use of personal devices (such as smartphones) at work. The Board invalidated blanket prohibitions on personal devices at work and blanket prohibitions on pictures or videos on company property or of company employees. Employers who do want to restrict the use of smartphone devices and the taking of audio or video recordings at work will have to work with counsel to craft a more limited policy to avoid running afoul of the NLRB.

Other Issues

The Report addresses other issues ranging from anti-harassment policies to prohibitions on activities that are "not in the best interest of the employer." It is available free of charge at: http://nlrb.gov/reports-guidance/general-counsel-memos (GC 15-04).

It is clear that the NLRB is going to continue its aggressive challenges to employee handbooks. Employers should take this opportunity to review their employee handbooks against the prohibited language in the Report, and should consult with competent counsel to address specific concerns.

Article written by Dawn J. Lanouette, Esq. For more information, contact Ms. Lanouette at (607) 231-6917 or via email at dlanouette@hhk.com.

Beneficiary Designations and Persons with Disabilities

If you have ever worked with a financial planner or have done any estate planning, you are probably familiar with "beneficiary designations." A beneficiary designation is the process of naming one or more people or entities to directly receive an asset upon death.

A common example of a beneficiary designation is naming someone on your life insurance policies to receive the death benefit when you pass away. The person you name is considered the beneficiary. You can usually name your first choice (primary beneficiary) and if the first choice is not alive at the time of your death, a second choice and then a third choice (contingent beneficiaries). At each level, you can name multiple beneficiaries, and specify how they are to divide the benefit. Other common investments that require or allow a beneficiary designation are 401(k) or other retirement plans, and investment and other bank accounts. Depending on the type of asset, the beneficiary designation is sometimes referred to as a "payable on death" or "transfer on death" designation.

Beneficiary designations are often described as an "easy" or "quick" way to transfer your assets to loved ones upon your death. If a beneficiary is named on an asset, the asset passes directly to him or her when you die, avoiding an estate proceeding in Surrogate's Court. The named beneficiary will receive the asset almost immediately and will supersede the terms of your Will or Trust. For example, if your Will names X as beneficiary, but the beneficiary designation on a particular asset names Y, the beneficiary designation will generally prevail and the asset will be paid to Y.

Why then wouldn't everyone just use beneficiary designations on all of their assets? For some people, it makes perfect sense. For others, this choice can ruin an estate plan or complicate what would otherwise be a rather simple estate proceeding. A knowledgeable financial planner or a Trusts and Estates attorney can advise you whether beneficiary designations work for you.

One common situation in which using a beneficiary designation causes complications is where the beneficiary is a person under disability. Parents, grandparents, and others often wish to provide for a disabled beneficiary. However, many disabled beneficiaries also receive public benefits, which may have restrictions on the income and assets that the person can own. Providing a direct benefit to a person under disability using a beneficiary designation may have the unintended consequence of making the beneficiary ineligible for his or her public benefits.

For example, if the beneficiary receives Supplemental Security Income (SSI), a benefit administered by Social Security Administration, the beneficiary receives a monthly cash benefit and medical insurance in the form of Medicaid. To continue to receive SSI, the person must meet very strict income and asset limitations.

If an SSI recipient receives assets directly as a beneficiary, then the assets received will often make the person ineligible to continue to receive SSI, eliminating their cash benefit and their medical insurance.

A person under disability can benefit from an estate if certain planning techniques are utilized. One common and effective technique is the creation of a Special or Supplemental Needs Trust (SNT), which is then designated as the beneficiary. If properly drafted, a SNT can both benefit a person under disability and allow them to continue to receive his/her government benefit. Too often, individuals are named as beneficiaries rather than the SNTs established to protect the benefit.

The use of beneficiary designations is an important tool in creating an effective estate plan. Great care must be exercised to make sure that the beneficiary named can receive the asset without risk of interrupting an important benefit. If a potential beneficiary is a person under disability, the use of a SNT and the naming of the SNT as the beneficiary may avoid an expensive process of attempting to renew the forfeited governmental benefit.

Article written by Jeremy P. Sedelmeyer, Esq. For more information, contact Mr. Sedelmeyer at (607) 231-6854 or via email at jsedelmeyer@hhk.com.

Congratulations!

Katherine A. Fitzgerald, Esq.

HH&K congratulates Partner Kate Fitzgerald on receiving the 2015 Woman of Distinction Award from the Girls Scouts of NYPENN Pathways, Inc.

Medical Marijuana Available in New York in January 2016

Despite a handful of bureaucratic delays, New York State still claims it will launch its medical marijuana program on January 5, 2016. The program is intended to permit New York residents who suffer from a narrow group of illnesses to obtain prescriptions for non-smokeable forms of marijuana. Here is a breakdown of the program's major provisions.

Who Can Use Medical Marijuana

New York's medical marijuana program significantly restricts eligibility for marijuana prescriptions. Only patients suffering from the following ten conditions will qualify to use medical marijuana: (1) Cancer; (2) HIV; (3) ALS; (4) Parkinson's Disease; (5) Huntington's Chorea; (6) Multiple Sclerosis; (7) Epilepsy; (8) Spinal Cord Damage with Intractable Spasticity; (9) Neuropathies; and (10) Inflammatory Bowel Disease. The law does permit New York's Commissioner of Health to add other diseases to this list; however, the medical marijuana program is intended to be narrowly applied and so it is expected that additions will be scarce.

No Smoking or Edibles

The law specifically prohibits medical marijuana users from smoking the drug, and regulations recently adopted ban edible marijuana products. Acceptable forms of use currently include pill form and liquid extract that may be ingested orally or vaporized.

Medical Marijuana Users are Considered "Disabled"

Perhaps the most significant facet of New York's medical marijuana program is that any person who obtains a medical marijuana prescription is considered legally disabled. This means that, for the most part, medical marijuana users in New York will be granted the same legal protections that the law grants to all other disabled persons. For example, New York expressly prohibits employers from disciplining or discriminating against an employee because the employee is a medical marijuana user.

Employers Retain Some Power Over Employee Medical Marijuana Use

Notwithstanding the law's proscription on discriminating against employees who use medical marijuana, the law does recognize that employers must retain certain controls over business operations. The law specifically allows employers to enforce policies that prohibit employees from performing their duties while under the influence of marijuana. The law also does not require an employer to "do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding." In addition, regulations prohibit employees from vaporizing medical marijuana while in the workplace or in any location where smoking tobacco is legally prohibited.

Stay Tuned

The broad discretion that New York's medical marijuana program affords to the Commissioner of Health and the clash between New York and Federal marijuana laws are going to create wrinkles in the program that will be ironed out only by incrementally adjusting how the program operates. Anyone interested in how New York's medical marijuana program may affect their business or their life should keep an eye on the news and speak to an attorney before taking any action.

Article written by Michael Keenan, Esq. For more information, contact Mr. Keenan at (607) 231-6927 or via email at mkeenan@hhk.com.

Dispelling Misconceptions about "Estate Planning."

- "If I die without a Will, then all of my assets will go to the State!" For most people, this statement is not true. If you die without a Will, your assets will pass to your next of kin as determined by the law of your State. One of the principal values of a Will is that a Will allows you, and not state law, to determine who receives your assets upon death. Most Wills are straightforward and very reasonably priced. A Will allows you to name the person to carry out your wishes (Executor). If your assets are large or complicated, a Will allows you to consider planning techniques that will reduce estate taxes and provide for a smooth transition of those assets to your intended beneficiaries.
- "I don't need an estate plan because I have no estate!" Believe it or not, almost everyone has an estate. All of your property is part of your "estate." For example: your car, personal property (TV, computer, furniture, clothing, etc.), real estate, bank accounts, and retirement accounts at work are all part of your estate. With an effective estate plan, you have the opportunity to get as specific as you want in distributing your estate when you pass away.
- "My power of attorney knows what I want when I die!" Unfortunately, a power of attorney terminates when you die. Even if you have a family member or trusted friend named as an agent under your power of attorney, he or she will be unable to act after your death. The person who is charged with the paying of bills and the distribution of assets after death is: Executor (if you have a Will); Trustee (if you have a Trust); or Administrator (if you have neither).
- "Why then do I need a Power of Attorney?" A Power of Attorney, along with a Health Care Proxy (sometimes referred to as a Living Will or Health Care Directive), are important parts of an effective estate plan. The Power of Attorney and Health Care Proxy allow you to appoint the person to handle financial matters and make health care decisions for you if you are unable to do so. If you become unable to handle these issues for yourself, the presence of these documents both allow you to name the persons you trust and to avoid a possible court proceeding that is both invasive and expensive.

Article written by Jeremy P. Sedelmeyer, Esq. For more information, contact Mr. Sedelmeyer at (607) 231-6854 or via email at jsedelmeyer@hhk.com.

Looking Back on Five Years of No-Fault Divorce

On October 13, 2010, New York became the last state in the United States to adopt "no-fault" divorce. Under Domestic Relations Law § 170(7), a divorce may be granted where the spouse seeking a divorce simply swears to the "irretrievable breakdown" of the relationship. Having now had the opportunity to examine the changes in action, certain conclusions can be drawn.

Prior to New York's adoption of no-fault divorce, a party seeking divorce had to sue the other spouse under fault-based grounds which include, among others, cruel and inhuman treatment, abandonment, and adultery. As Woody Allen once noted, "the ten commandments say 'Thou shalt not commit adultery,' but New York says you have to."

Critics of New York's pre-no-fault Domestic Relations Law argued that the refusal to recognize no-fault divorce legally required one spouse to assign blame to the other, which prolonged and aggravated the divorce process, added unnecessary litigation expense, invited false testimony, often led to domestic violence, and made the entire process unnecessarily painful.

Furthermore, the burden of proof for spouses seeking a divorce under fault-based grounds was, and still is, stringent. For example, for a spouse seeking a divorce based on adultery, CPLR 4502 provides that one spouse is incompetent to testify against the other to prove adultery, based upon the spousal privilege. Accordingly, corroboration is required to prove adultery, which can require hiring an investigator, taking photographs, finding hotel receipts, and reviewing cell phone records. Similarly, the standard for proving "cruel and inhuman treatment" as a ground for divorce is rigorous, as Domestic Relations Law § 170(1) specifically states that the conduct alleged for cruel and inhuman treatment must "so endanger … the physical or mental well-being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant."

However, under New York's "no-fault" provisions, a spouse seeking a divorce is required only to swear to the breakdown of the relationship for a period of at least six months. Moreover, the opposing spouse in a no-fault action is not entitled to litigate the other spouse's sworn statement that the relationship has broken down irretrievably. For example, in *Townes v. Coker*, the court refused to allow a husband to contest the wife's assertion of irretrievable breakdown, and held that:

> . . . a plaintiff's self-serving declaration about his or her state of mind is all that is required for the dissolution of a marriage on grounds that it is irretrievably broken. As stated in our statute, a no-fault divorce may be granted "provided that one party has so stated under oath" that the marriage is irretrievably broken. In adopting no-fault divorce, the Legislature implicitly recognized that the parties to a marriage should be able to make personal and unavoidably subjective decisions about the continuation of their marriage partnership.

No-fault divorce has not significantly impacted the overall divorce rate in New York State. According to the National Center for Health Statistics, the divorce rate in New York per 1,000 residents remained at 2.9 percent between 2010, when no-fault was enacted, and 2012. This is actually a decrease from New York's divorce rate in 2001, which was 3.5 percent.

However, since the adoption of no-fault divorce, "irretrievable breakdown" has become the predominant ground for divorce, with a drastic decline in fault-based grounds. The New York State Department of Health tracks the number of divorces by legal ground, including cruelty, abandonment, imprisonment, adultery, and divorces where no ground is stated (including irretrievable breakdown). In 2009, out of a total of 49,816 divorces, 9,990 were based on cruelty, 34,091 were based on abandonment, and 236 were based on adultery. However, in 2013, out of a total of 58,313 divorces, 1,052 were based on cruelty, 5,034 were based on abandonment, 62 were based on adultery, and in 50,935 divorces, no ground was stated.

The fact that New York has enacted no-fault divorce does not mean that finalizing a divorce is expedient, inexpensive, or painless. Domestic Relations Law §170(7), which allows for no-fault divorce, also provides that:

> No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court . . .

Practitioners of matrimonial law can attest to the fact that issues of property division, maintenance, alimony, and child support are often the most important and most contested issues in a divorce proceeding.

In sum, New York's adoption of no-fault divorce has made it easier for a spouse to obtain a divorce and has eliminated a substantial segment of (costly) litigation over fault-based issues, which are now largely irrelevant. However, the enactment of no-fault divorce has by no means eliminated all of the litigation that accompanies the dissolution of a marriage, as issues of property division, maintenance, alimony, and child support are still subjects of contentious dispute.

Article written by Jeffrey A. Jaketic, Esq. For more information, contact Mr. Jaketic at (607) 231-6742 or via email at jjaketic@hhk.com, Katherine A. Fitzgerald, Esq at (607) 231-6802 or via email at fitz@hhk.com or Michael S. Sinicki, Esq. at (607) 231-6857 or via email at msinicki@hhk.com

Announcement

Lauren E. Allu, Esq.

HH&K is pleased to announce that Lauren E. Allu has joined the firm as Special Counsel in the Saddle Brook, New Jersey office effective March 23, 2015.

Ms. Allu concentrates her practice in residential and commercial real estate, including acquisitions, dispositions, financing, leasing, and municipal land use. Ms. Allu is experienced in both residential and commercial New Jersey foreclosures, credit union law, and creditor's rights. Ms. Allu is also experienced in general corporate law, including the formation of business entities.

Ms. Allu received her J.D. from Fordham University School of Law and her B.A. from Lehigh University. Ms. Allu is a member of the New Jersey State Bar Association and CREW NJ (Commercial Real Estate Women). She is admitted to practice in New Jersey, New York, and the United States Virgin Islands.

U.S. Supreme Court Affirms Protection for Savings Plan Participants

The U.S. Supreme Court's recent decision in the case of *Tibble v. Edison*[1] confirmed that companies that offer their employees 401(k) Savings Plans have a "continuing duty" to act with prudence in selecting and monitoring the investments offered in their Savings Plan. The employer and administrators of Employer Savings Plans have a fiduciary duty under the applicable federal law governing the administration of pension and savings plans to act in a prudent manner to protect the investments for their employees. In this case, the U.S. Supreme Court ruled that these administrative obligations were not limited to the selection of the initial investment choices offered to the employees, but extended through the life of the plan.

The Edison employees who initiated this lawsuit alleged that the Plan administrator breached its duty to employees by adding six new mutual fund investment choices that charged unreasonably high expenses and administrative fees, as compared to equally rated, less expensive investment fund options. The administrator argued that the claims were barred by the applicable statute of limitations, as more than six years had passed since it initially recommended the investments at issue. The Supreme Court disagreed.

The Supreme Court ruled that the Plan administrator's duty to act prudently continues after the Plan is established and requires the administrators to monitor the performance of the Plan's investment choices for employees and remove investment choices if they are no longer prudent for the employees. Because this is an on-going obligation, the Supreme Court ruled that the Employer could not rely on the six year statute of limitations, and the employees had the right to assert a claim for its failure to monitor these investments in a reasonable, prudent way following the initial recommendation.

While the Supreme Court's decision provides a strong endorsement for the principle that all employers providing a 401(k) Savings Plan must exercise continuing diligence over the prudence of its investment options, the Court provided no specific guidance on how Plan administrators can meet that obligation. Instead, the Court sent this case back to the U.S. Court of Appeals for the Ninth Circuit, in California, to address this important issue for Plan administrators.

Employers have implemented a number of procedures to meet their legal obligations to exercise diligence with regard to their sponsored Savings Plans. Normally, the first step is the adoption of an Investment Policy Statement and structure for the new Savings Plan. This will guide the employer in meeting its fiduciary obligations to employees who participate in the Savings Plan. Many employers who initiate a Savings Plan will retain the services of an independent financial advisory firm to make the initial mutual fund investment choices from which the employer will select for submission to its employees. After considering these options, the employees will make their personal choices for their accounts. Larger corporations will delegate this procedure to a special Investment Committee, which will supervise the work of the corporation's independent financial advisory firm. The employer, through its Investment Committee and its advisor, usually conducts meetings with its employees where the employer's financial advisor will explain the Savings Plan's investment fund options and answer the employees' questions.

Once the Savings Plan is established, the employer's Investment Committee and its advisor will establish a schedule for actions to be followed each year to enable the employer to meets its ongoing due diligence responsibilities. These oversight actions normally include: (1) reviewing and monitoring the investment manager's performance for each of the Plan's investment options; (2) monitoring investment and administrative fees of each investment option; (3) ensuring all employee communications are made properly; (4) reviewing employee utilization of the Plan's options; (5) reviewing Plan effectiveness; and (6) evaluating and updating the investment options offered by the Plan to employees. The duty of employers to monitor the performance of the investment choices submitted to employees who participate in its Saving Plan is very important. If the current investment choices are no longer prudent for the employees, the employer should consider omitting some choices and submitting new investment choices. The more difficult questions to be resolved by courts concern the scope of oversight actions required of employers to meet their due diligence obligations.

Employers and their advisors must maintain documentation which demonstrates their efforts to comply with their fiduciary responsibilities throughout each year. Failure to take such actions can lead to lawsuits against employers, as in the *Edison* case.

Employers and investment advisors await the next legal opinion in the *Edison* case, which will be issued by the Ninth Circuit as directed by the Supreme Court. This opinion may provide further guidance to employers who must meet their continuing fiduciary obligation to monitor recommended investment options for participants in Savings Plan.

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[1] 135 S.Ct. 1823 (2015).

Article written by Ralph K. Kessler, Esq. For more information, contact Mr. Kessler at (914) 694-4102 or via email at rkessler@hhk.com.

Announcement

HH&K is proud to announce that our White Plains Office has moved to a new location.

Don't Miss HH&K Startup Workshop Series

There is still time to register for our upcoming startup workshop series:

Starting a business is hard. Keeping it running is even harder. Hinman, Howard & Kattell invites you to join us for a free workshop series where our attorneys will identify and untangle legal issues that startups and small businesses frequently encounter.

Interested attendees should RSVP to Miguel Aponte via email at maponte@hhk.com or call (607) 723-5341.

Future 2015 Summer workshops include

- Hiring Your First Employee
- Raising Capital for Your Business
- When to Incorporate / What Business Structure is Right for You.

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In order to select our first two winners we need to hit 300 total page likes by July 17. So remember like our page, share us with your friends and you could be watching the Saturday round in style and comfort!

Good luck!

Enjoie-the-Day-on-HHK Facebook Page

HH&K Informational Seminars

HH&K recently hosted a client seminar, on June 10, 2015. Michael Keenan presented the first in a series of startup and small businesses workshops being sponsored by HHK this summer. Michael spoke on cyber law, copyright and trademark issues that startups and small businesses must consider.

Michael Keenan presented at June's Launching Your Website & Branding Your Business Seminar

Presentation

Partner Dawn Lanouette took part in the Tioga County Human Resources Roundtable on Social Media on Wednesday, April 8. Panelists discussed recent developments in recruiting, hiring, policies, discipline and termination related to social media. HH&K Partner James Franz chaired the event which was held at Tioga Downs Casino.

Congratulations!

Jeffrey A. Jaketic, Esq.

HH&K congratulates Jeffrey Jaketic on being appointed to the Discovery Center of Southern Tier Board of Directors.

HH&K

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