O'NEILL & BORGES
LABOR & EMPLOYMENT LEGAL ALERT
February 2008

GREATER FLEXIBILITY GRANTED FOR PAYMENT OF WAGES

With bipartisan support, the Governor signed Law No. 213 of December 26, 2007, which authorizes the payment of salaries through stored value cards (known by a variety of names, including payroll cards, payroll debits cards, ATM cards). The new law permits the employee to designate another person to receive an additional payroll debit card. While granting new levels of flexibility in the form of salary payments, the law also contains several new provisions related to wage payments through checks and electronic bank transfer mechanisms.

The most recent effort to modernize Puerto Rico's archaic wage payment laws occurred in the year 1995. Then, local law was updated to specifically authorize payment of salaries by check and to permit employees to agree to salary payments through direct deposits or electronic transfers to the employee's check or savings account, provided (1) the funds are available on the payday; (2) in a bank of the employee's selection; (3) the employer delivers a voucher to the employee indicating the amount of the payment and any deductions; (4) and no costs are imposed upon the employee in connection with the salary payment system. In addition, the 1995 Labor Reform legislation *exempted* "executive," "administrative," and "professional" employees from the wage payment rules and payroll deduction limitations.

Law No. 213 is another step in modernizing Puerto Rico's wage payment laws. First, the law adds to the list of permissible salary payment systems the use of *payroll debit cards*. Pay cards are either prepaid, reloadable ("stored value") or debit cards issued through a bank that takes the place of paper paychecks. In these systems, each payday the pay card is electronically credited with value in the full amount of the employee's net pay.

The payroll card provides electronic pay even if the employee does not have a conventional bank account. Using pay cards, the employee can access the pay in numerous ways, which vary according to the features offered by the program provider. Typically, pay cards will offer ATM withdrawals and PIN point of sale (POS) transactions. Pay cards may also provide for a "cash back" feature as part of the POS transaction, subject to the individual merchant's policy. Pay card programs may also offer one or more of a variety of other withdrawal features or mechanisms to transfer money from the payroll card to a standard bank account.

The requirement established in 1995, that no costs be imposed upon the employee in connection with the salary payment system, remains intact.

Law No. 213 also permits the employee to authorize a "designated beneficiary" to receive an additional payroll card, subject to the employee's account number. Although not clearly stated in the law, in our opinion, the employee should be able to limit the monetary amount the "designated beneficiary" will have access to. This mechanism can be used to facilitate transfer of funds to a spouse, dependent or to comply with alimony or child support obligations.

The new law continues to require providing the employee with a statement of gross earnings and itemization of deductions. However, the law liberalizes the manner in which said information can be provided. In addition to the traditional "paper voucher," the employee can authorize the employer to provide the information by phone, fax, or Web portal access.

Finally, Law No. 213 provides that in all cases the employer must provide employees with pertinent information on electronic fraud, as well as the responsibilities imposed on the employee, the employer, and the banking institution in connection with electronic fraud in non-cash salary payment systems.

© Copyright 2008
O'Neill & Borges

First Expansion of FMLA Rights

The Family & Medical Leave Act of 1993 ("FMLA") generally provides eligible employees up to twelve (12) weeks of unpaid leave for the birth and care of the newborn child of the employee, placement with the employee of a son or daughter for adoption or foster care, care for an immediate family member (spouse, child, or parent) with a serious health condition, or medical leave when the employee is unable to work because of a serious health condition.

On January 28, 2008, President Bush signed the National Defense Authorization Act for FY 2008 ("NDAA"), which includes a Section 585, expanding, for the first time, the FMLA coverage. This amendment, which became effective immediately, adds:

▪ twenty-six (26) workweeks of leave for a spouse, son, daughter, parent, or next of kin to care for a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; and

▪ twelve (12) weeks of leave because of "any qualifying exigency", arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation. The United States Department of Labor ("DOL") has announced that this provision is not effective until it issues a final regulation defining the circumstances in which this leave will apply.

Jilted Lover's Offensive Conduct Can Violate Title VII

The First Circuit has rejected an approach followed by other circuits, which holds that harassment by a former lover after a consensual sexual relationship goes sour does not constitute gender-based harassment, but rather simply personal "contempt" or "acrimony" due to the "failed relationship." *Forrest v. Brinker International Payroll Company, LP. D/B/A Chili's Grill & Bar*, 2007 U.S. App. LEXIS 29300 (1st Cir., December 19, 2007).

The Court opined that Title VII gender harassment analysis should not be based on whether the harasser picks his targets because of a prior intimate relationship, desire for a future intimate relationship, or any other factor that draws the harasser's attention. Instead, gender bias can be inferred from conduct. Title VII's requirement that the harassment be "based upon sex" is satisfied if the harassing conduct is gender-based.

Here, the plaintiff (a server/bartender at a Chili's restaurant) maintained an "off and on" intimate relationship with her coworker (a cook at the restaurant) for approximately one year. When the plaintiff initially ended the relationship, she was threatened by four women in the restaurant's parking lot whom she claimed acted at her former boyfriend's instigation. She reported this incident to the restaurant's manager and did not experience any similar incident. Thereafter, she briefly renewed intimate relations with her former boyfriend, until she began dating someone else. The former boyfriend began to frequently question the plaintiff at work about her new relationship; called her names such as "whore," "slut" and other profanities; and refused to complete her orders in the kitchen.

Plaintiff complained to management about the cook's behavior, but indicated she did not want him fired. Management proceeded to give the cook a verbal warning. The jilted boyfriend, nevertheless continued the same behavior for several weeks, and upon the plaintiff's complaint, management issued a final written warning. Several weeks later, the plaintiff reported the cook squirted her with hot water while she made a personal phone call, cornered her in a walk-in cooler, called her profane names, and told her she was fat and needed to go to the gym. Management investigated and terminated the cook.

After the plaintiff obtained a restraining order against her former boyfriend, management informed her the former boyfriend would not be allowed on the premises when she was working, but that Chili's could not prevent him from entering the premises when she was not in the building. Shortly thereafter, the plaintiff resigned from her position and sued the employer under Title VII, alleging sexual harassment.

© Copyright 2008
O'Neill & Borges

The District Court concluded the plaintiff had not demonstrated the former boyfriend's inappropriate behavior towards her was harassment *based on her sex*; rather the challenged conduct was due to personal animosity stemming from their failed relationship.

The First Circuit Court of Appeals *reversed* the lower court's conclusion stating that "nowhere does prior case law suggest that certain types of discriminatory behavior, held to constitute gender-based harassment in other cases, may not constitute gender-based harassment when the parties has previously engaged in a romantic relationship." Examining the specific conduct challenged in this case, the Court held that the use of sexually degrading, gender-specific epithets, such as "slut," "cunt," "whore," and "bitch," with which the former boyfriend barraged the plaintiff at work, was harassment "based upon sex," and therefore prohibited under Title VII.

The First Circuit, however, *confirmed* the dismissal of the case. First, the Court highlighted the following: 1) Chili's had adopted and implemented a policy prohibiting sexual harassment and had trained its managers to take disciplinary action against offenders, "which may include reprimand, suspension, or termination if warranted;" 2) The former boyfriend's harassment occurred over a period of four to six weeks; 3) the plaintiff initially told management that she did not want him to be fired; 4) management was aware of their on-again, off-again relationship; and 5) management investigated the complaints and took remedial action three times, issuing an initial oral warning, followed with a written warning upon receiving the second complaint, and ultimately terminating the former boyfriend upon the notification of a subsequent incident.

In light of the facts presented in this case, the Court found "no reasonable jury could conclude that Chili's response was not prompt and appropriate." Given the allegations of sexual harassment between ex-lovers known to have a volatile relationship, management's progressive discipline of plaintiff's co-worker, and ultimate termination when he failed to correct his behavior, fulfilled the employer's obligations under Title VII. Therefore, no liability could be imposed on the employer.

Comments: Management, understandably, is reluctant to intervene in co-worker personal relationships. However, when the effects of such failed relationship impact the workplace, the employer has an affirmative obligation to act and to make sure that one employee is not using the workplace to retaliate against the other based on the failed romance.

In Puerto Rico, management's duty to promptly respond and remedy the harassment by former lovers or spouses arises under the local anti-sexual harassment law *and* recent legislation that imposes upon employers the affirmative obligation to make work adjustments and "reasonable accommodations" in the workplace to protect *domestic violence* victims from current or potential aggressors, once the employer becomes aware of a potentially dangerous situation.

Educational Repayment Agreements may be invalid

Employers frequently pay or reimburse employees for their continued education, in return for the employee's promise to remain working for the employer for a specified period of time. Typically under these type of arrangements, the employee agrees to repay all or a percentage of the cost of education expense if the employee leaves before the end of the established retention term.

The Puerto Rico Supreme Court has recently examined these agreements and limited their enforceability. In *Oriental Financial Services v. José Juan Nieves*, 2007 T.S.P.R. 193, the Court held the repayment provisions in these agreements would be valid only if the contracts are for *specialized or extraordinary training or education, with the purpose of improving an employee's lack of knowledge or inexperience in its industry or business*.

The Court further held the training or courses should represent a considerable economic investment for the employer, and the amount of any repayment for the cost of training should be commensurate with its actual original cost to the employer. In addition, the duration of the obligation to remain with the employer should also be moderate and reasonably correlated to the cost of the training. Finally, in order to be valid, the agreement must be in writing.

© Copyright 2008
O'Neill & Borges

Email Policy Prohibiting Non-Job Related Solicitations Are Valid if Applied on a Nondiscriminatory Basis.

The National Labor Relations Board ("NLRB") addressed for the first time the question of how e-mail use by employees relates to employee rights under the National Labor Relations Act (the "NLRA"). In *Register Guard,* 351 NLRB No. 70, (December 16, 2007), a majority of the NLRB members ruled that employers have a property right to regulate and restrict their e-mail systems, and thus, can maintain a policy prohibiting employees from using its e-mail system for "non-job-related solicitations." The majority of the NLRB held that employees have no statutory rights to use the employer's e-mail system for union organizing reasons.

The NLRB majority also modified the previous standard for determining whether an employer has discriminatorily enforced an e-mail usage policy to adversely affect a protected employee's communication under the NLRA. As discussed in our June 2007, O&B Labor & Employment Alert, previously, if an employer permitted employees to use the email for *personal* purposes, the employer was barred from prohibiting the use for communications regarding union issues.

Now, the majority of the NLRB has held that an employer violates the NLRA *only* if it permits employees to use e-mail to solicit for one union but not another, or if it permits solicitation by antiunion employees but not by pro-union employees.

Here, the NLRB held that nothing in the Act prohibits an employer from drawing a line "between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business-related use. For example, a rule that permitted charitable solicitations but not non-charitable solicitations would permit solicitations for the Red Cross and the Salvation Army, but it would prohibit solicitations for Avon and the union."

IMPORTANT REMINDERS

New Hires. Use of the *revised* Form I-9 (Employment Eligibility Verification)(revision 06/05/07) for new hires is *mandatory* as of December 26, 2007. Employers are exposed to fines for not using the revised form. *O & B Labor & Employment Alert- November 2007*.

Employee Identity Protection. Employers must file a *certification* with the PRDOL by April 2, 2008, confirming implementation of the measures to protect employee social security numbers from unauthorized disclosure or theft. In the alternative, the employer must certify that all necessary measures and precautions will be in place by October 5, 2008, and provide a specific work plan. *O&B Labor & Employment Alert-October 2007*.

Domestic Violence Protocol. Employers should already have in place the *mandatory* protocol, policy and training programs to address domestic violence situations affecting employees or the workplace. *O&B Labor & Employment Alert-October 2006, February 2007*.

O'Neill & Borges' **Website**

Access our more recent Labor & Employment newsletters under the "News & Events" section of O&B's website at: http://www.oneillborges.com/

Note: *Because of the general nature of this Labor Newsletter, nothing herein should be considered as legal advice or a legal opinion. For further information, please contact our labor and employment lawyers.*

LABOR AND EMPLOYMENT LAW DEPARTMENT

Jorge L. Capó-Matos
Luis A. Núñez-Salgado
Pedro A. Delgado-Hernández
Yldefonso López-Morales
José Fco. Benítez-Mier
Carlos E. George
Debbie E. Rivera-Rivera

María E. Santori-Aymat
Ana M. Santiago-Ramírez
Dimitri González-Izquierdo
Enrique González-Quiñones

O'NEILL & BORGES
American International Plaza, Suite 800
#250 Muñoz Rivera Ave.
San Juan, P.R. 00918-1813
Tel. 787-764-8181 / Fax. 787-753-8944

© Copyright 2008
O'Neill & Borges