

SmithAmundsen Labor & Employment

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NEWS AND EVENTS OF INTEREST
to SmithAmundsen clients.

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U.S. Supreme Court Upholds Class Action Waiver: What *AT&T Mobility v. Concepcion* Means For Employers

By Molly A. Arranz and Sara S. Zorich

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Supreme Court considered whether the Federal Arbitration Act (FAA) preempts state laws conditioning the enforceability of certain arbitration agreements on the availability of class wide arbitration procedures. In a 5-4 decision, the court held that one such state rule in California, which labeled unconscionable class action waivers contained in certain consumer contracts, was, in fact, preempted by the FAA. This decision opens the door for employers to attempt to execute appropriate employment agreements that include class action and collective action waivers from their employees. The net result may allow the employer to escape costly and high stakes class action litigation.

Plaintiffs Vincent and Liza Concepcion entered into an agreement with AT&T Mobility (AT&T) regarding their cellular phone service. The agreement required arbitration of all disputes between the parties and that all such claims be brought in their individual capacity. The agreement provided that the arbitrator could not consolidate claims or preside over a representative or class proceeding. When the plaintiffs filed a lawsuit in the Southern District of California seeking reimbursement for sales tax on a phone that was advertised as “free,” AT&T moved to compel arbitration. The district court denied the motion, finding that AT&T’s arbitration provision was unconscionable because, in part, it disallowed class-wide proceedings. The district court looked to the California rule promulgated in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P.3d 1100 (Cal. 2005), where the California Supreme Court, looking to class action waivers in arbitration agreements, held that a class action waiver is unconscionable when found in contracts involving small amounts of damages and when one party has the superior bargaining power—a situation where, in practice, the waiver becomes an exemption for the one party from responsibility for its own fraud or willful injury. Applying the *Discover Bank* rule, the California District Court found that the AT&T agreement’s requirement for individualized arbitration was unconscionable: the bilateral arbitration was not an adequate substitute for the deterrent effects of class actions. The Ninth Circuit affirmed the district court’s decision.

The Supreme Court reversed. Initially, the court recognized that Section 2 of the FAA makes arbitration agreements “valid, irrevocable and enforceable” unless there exist such grounds “at law or in equity for the revocation of any contract.” The court reasoned that application of the *Discover Bank* rule utilized the generally applicable doctrine of “unconscionability” to disfavor arbitration agreements while supposedly preserving the FAA. Though there is a savings clause in the FAA for generally applicable contract provisions, the court explained there is nothing in the FAA to suggest an intent to preserve state law rules that stand as an obstacle to the accomplishment of the FAA objectives; to ensure enforcement of arbitration agreements according to their terms and to promote expeditious resolution of claims. The majority held that the

FAA preempted the *Discover Bank* rule—a rule that interferes with arbitration. It reversed the Ninth Circuit because the *Discover Bank* rule stood as an “obstacle to the accomplishment and executing of the full purpose and objectives of Congress” when Congress passed the FAA.

Given this ruling, employers can reasonably promulgate employment agreements that require mandatory arbitration and that preclude class arbitration. Under this ruling, the employee’s recourse will be agreed to and presumably enforceable as written. The accord should contain a waiver of the employee’s ability to participate in class and collective action proceedings, including class arbitration or collective

arbitration. However, it should be noted that the issue before the Supreme Court in *AT&T Mobility LLC* was not contract formation but solely preemption. The concurring opinion attempted to limit the majority’s opinion by finding that issues regarding contract formation may fall outside the provisions of the court’s *opinion*. Only time will tell, but this may leave the door open for an employee to argue that a mandatory arbitration agreement precluding class arbitration is invalid based on the notions of traditional contract formation.

Molly Arranz is a partner at SmithAmundsen focusing her practice on class action litigation. Sara Zorich is an attorney in SmithAmundsen’s Labor & Employment Practice Group. For questions regarding class action litigation, please contact Molly Arranz at 312.894.3307 or marranz@salawus.com. For questions regarding labor and employment matters, contact Sara Zorich at 312.894.3265 or szorich@salawus.com.

NLRB Issues Yet Another Complaint Against a Non Profit Employer For Allegedly Discharging Employees After Facebook Postings

By Jeffrey A. Risch

On May 9, 2011, the National Labor Relations Board issued another complaint against an employer for allegedly discharging a group of employees following posts on Facebook that criticized working conditions. The complaint comes on the heels of last year’s NLRB action against a Connecticut corporation for allegedly retaliating against an employee engaged in posting disparaging comments about a supervisor on Facebook. *See American Medical Response of Connecticut, Inc.*, Case No. 34-CA-12576 (NLRB Region 34, October 27, 2010).

According to the NLRB’s own press release, this most recent complaint alleges that Hispanics United of Buffalo, a nonprofit organization that provides social services to low-income clients, unlawfully discharged five employees after they took to Facebook to criticize working conditions, including work load and staffing issues. The complaint was issued by Rhonda Ley, NLRB Regional Director, in Buffalo, New York.

The case involves a Hispanics United of Buffalo employee’s facebook post about a coworker’s allegation that employees did not do enough to help the organization’s clients. The initial post generated responses from other employees who defended their job performance but criticized working conditions, including work load and staffing issues. After learning of the posts, Hispanics United allegedly discharged the

five employees who participated in the negative posts. According to the NLRB, the employer claimed that these five employees’ comments constituted inappropriate harassment of the employee mentioned in the original post.

The complaint alleges that the Facebook discussion was protected concerted activity within the meaning of Section 7 of the National Labor Relations Act because it involved a conversation among coworkers about the terms and conditions of their employment, including job performance and staffing levels. Unless the case is settled, the complaint will be the subject of a hearing before an administrative law judge currently scheduled for June 22, 2011 in the Buffalo office of the NLRB.

Obviously, the NLRB is making employers’ social media and internet policies a priority; one that will apply to companies regardless of whether their workforce is unionized. Employers must re-examine their computer, internet, email and social networking policies and practices or risk becoming an NLRB headline.

Jeffrey A. Risch serves as Chairperson of SmithAmundsen’s growing management-side Labor and Employment Practice Group. With over 20 labor and employment attorneys, SmithAmundsen serves the interests of employers throughout Illinois, the Midwest and Nationwide. Please feel free to contact Jeffrey at 630.569.0079 or jrisch@salawus.com.

“Union-Only” Construction Labor Agreements Will Soon Be Law

By Jeffrey A. Risch

The state of Illinois has accomplished the unthinkable; on May 25, 2011, the Illinois Legislature passed HB2987 (creating the Project Labor Agreements Act) which will codify into law Governor Quinn’s Executive Order on Union-Only Project Labor Agreements. This act, which will surely be signed into law, requires all Illinois State departments, agencies, authorities, boards, or instrumentalities to include a project labor agreement (PLA) on a public works project when that department, agency, authority, board, or instrumentality determines that the agreement advances the state’s interest. The problem with this pending new law is that a PLA is nothing more than

a pre-hire “union only” contract that requires construction projects to be awarded only to contractors who agree to recognize unions as the exclusive bargaining representatives of their employees for that job; obtain apprentices exclusively from union apprenticeship programs; pay into underfunded union benefit plans; obey costly, restrictive and inefficient work rules; and agree to a contract that is only as good as Big Labor deems fit. In short, if a state agency would like to require union-only agreements on Illinois construction projects, it basically can.

The problem is not with union signatory contractors—far from. The problem is that a PLA restricts participation in the market, lessens competitive bidding, and in no way guarantees labor harmony (in fact, PLAs can lead to labor unrest, disruption and work stoppages). Good luck taxpayers!

Jeffrey A. Risch is a management side labor attorney with SmithAmundsen in St. Charles, IL. Jeffrey represents both union and non-union employers and can be contacted at 630.569.0079 or jrisch@salawus.com.

An Employee's Vacation To Cancun While On Medical Leave Causes Her Job Loss

By Heather A. Bailey

The U.S. District for the Western District of Pennsylvania found in the employer's favor when it fired an employee for violating the employer's paid sick leave policy because she took the opportunity to travel to Cancun, Mexico without approval during her FMLA absence. In *Pellegrino v. CWA, W.D.Pa.*, No. 10-0098, 5/19/11, the court held that the employer, Communications Workers of America, did not interfere with the employee's FMLA rights when the company properly enforced its paid sick leave and absenteeism policy. This policy required employees on leave to remain in the immediate vicinity of their homes unless the employee needed medical treatment, needed to attend to ordinary and necessary family and personal needs, or received prior approval. The policy also specifically provided that unpaid FMLA rights ran concurrently with this paid leave.

Relying on the 3rd Circuit, the district court found that, "FMLA entitlements in no way prevent an employer from instituting policies to prevent the abuse of FMLA leave, so long as these policies do not conflict with or diminish the rights provided by the FMLA." In *Pellegrino*, the employer's policy did not interfere with employee's FMLA rights because the policy actually extended FMLA rights by

paying for leave. The policy also served the purpose to detour leave abuse. Thus, the employer appropriately terminated the employee for violating the legitimate policy, and not because she took FMLA leave, vitiating her FMLA interference claim.

The employee's argument that the employer's sick leave policy did not apply to her because a Collective Bargaining Agreement (CBA) governed also failed because the employer's sick leave policy and the CBA terms did not conflict. The CBA was silent on the issue of travel restrictions during leave and where the CBA was silent, the employer's policy ruled.

Employers spend countless efforts and resources in administering leave rights for employees. This case demonstrates a way to corral some of those expended resources by creating the ability to legitimately terminate leave offenders. Now is a good time to review your company's leave policies to determine whether you can provide such barriers to leave abuse.

For assistance in any area related to the Family Medical Leave Act and other types of leave, please contact Heather Bailey, partner in SmithAmundsen's Labor & Employment Practice Group, at 312.894.3266 or hbailey@salawus.com.

EEOC Subpoena On Employer Found to Be a "Fishing Expedition"

By Terry A. Fox

The EEOC has the power to issue subpoenas to employers in connection with investigation of charges within its jurisdiction. In the case of *EEOC v. UPMC*, 2:11-mc-121 (W.Dist. Penn. 5/24/11), a trial court quashed a subpoena the EEOC issued to an employer in an Americans with Disabilities Act case. In this case, the charging party had been fired after she failed to timely return from a non-FMLA qualified personal leave. The court found that the EEOC's subpoena to the employer was a "fishing expedition." That subpoena sought specific, corporate-wide information on employees who were granted personal leaves, including for a time period after the charging party was terminated. In reviewing the EEOC's actions, the court found that investigation by the EEOC was neither timely nor was it detailed as to the specific facts presented in the charge.

The take away from *EEOC v. UPMC* is that employers may successfully challenge the scope of the EEOC's subpoena if EEOC has done little investigation and the information sought is insufficiently related to the issues in the charge: "These types of narrowly-tailored, potentially-dispositive inquires should have been pursued prior to launching an inquiry into a tangential alleged systemic violation." *Slip opinion*, at p.7. The test of relevance is whether the information sought would reasonably "cast light" on the charge at issue.

Terry Fox is a partner in SmithAmundsen's Labor & Employment Practice Group. For assistance in any area related to the EEOC or a labor and employment issue, please contact Terry Fox at 312.894.3343 or tfox@salawus.com.

They're Back! SSA Resumes Issuing Employers Social Security "No Match" Letters

By Sara S. Zorich

In March 2011, the Social Security Administration (SSA) began issuing no match letters again. The letters inform employers that the social security number provided by an employee (which the employer ultimately reports to the government) does not match what SSA has in its records. The new SSA letters look different than previous versions. The prior versions listed multiple employees per form, however, the new versions contain only one employee per notice. Employers may receive many notices in the mail and need to address each one individually.

When an employer has received a no match letter, he or she should first check the documentation on file to ensure information matches what the employer has on file. If the information on file was reported by the employer correctly to the government, the employer must contact the employee in an effort to resolve the discrepancy. Employers should not take adverse action against the employee merely based on receipt of the letter. What the employer must do is give the employee a reasonable period of time to rectify the no match notice.

The SSA suspended sending the letters in 2007 due to litigation surrounding a proposed rule by the Department of Homeland Security. The proposed rule provided employers a safe harbor from civil and criminal liability for knowingly continuing to employ an unauthorized worker if that employer followed a certain set of actions. In 2009, the Department of Homeland Security rescinded the rule and ended the litigation.

Employers should set up a strategy plan on how to effectively manage these new notices so that no actions are conducted in a discriminatory or unlawful manner.

If you have questions regarding the SSA, no match letters, or immigration workplace enforcement, contact Sara Zorich at 312-894-3265 or szorich@salavus.com. Sara Zorich concentrates her practice exclusively on the representation of management in labor and employment law matters with the law firm SmithAmundsen.

The U.S. Citizenship and Immigration Services Launches 'I-9 Central' On USCIS.gov

By Jacqueline Lentini McCullough

Since 1986, U.S. employers have been required to verify the identity and employment authorization of every worker hired regardless of the employee's immigration status. To comply with the law, employers must complete form I-9, available at www.uscis.gov. In the past few years, there has been an increased focus on enforcement of immigration related documents in the workplace.

To assist employers, U.S. Citizenship and Immigration Services (USCIS) launched I-9 Central on May 13, 2011 to provide a streamlined format of information for employers and employees. The site provides access to resources, tips, and guidance to properly complete form I-9 and to assist in understanding the I-9 process. The site is free and will serve the

approximately 7.5 million employers current using form I-9 each time they hire a new employee.

Additional USCIS resources implemented this year include the "Handbook for Employers: Instructions for Completing Form I-9 (M-274)" and E-Verify Self Check, allowing workers and job seekers in the U.S. to check their own employment eligibility status online. E-Verify documents and links are available from USCIS' home page at www.uscis.gov.

If you have questions regarding I-9 Central or other immigration issues, please contact Jacqueline Lentini McCullough at 630-262-1435 or jlentini@salavus.com. Jacqueline Lentini McCullough concentrates her practice on business employment immigration issues.

CALENDAR OF EVENTS - June 2011

<p>Not-for-Profit Boards: Policies and Procedures that Every NFP Needs Webinar Presenters: Julie A. Proscia of SmithAmundsen and Jerry Orpen of Wine Sergi Insurance</p> <p>This one hour webinar will give not-for-profit organizations an overview of the policies and procedures that they are required to implement and update to ensure that they can continue to serve their communities. This webinar is essential for NFP executive directors, management, and Board of Director members.</p>	<ul style="list-style-type: none"> ■ Date: Thursday, June 9, 2011 ■ Time: 9:00 am - 11:00 am ■ For more information, contact Emily Lempa at 630.587.7939 or elempa@salawus.com.
<p>How Non Profit In-House Counsel Can Concentrate and Prioritize Efforts to Maximize Results For Clients/Employers Presenter: Julie A. Proscia</p> <p>Julie Proscia will present on this topic to the Chicago Bar Association Trade and Professional Law Committee.</p>	<ul style="list-style-type: none"> ■ Date: Tuesday, June 14, 2011 ■ Time: 12:15 pm - 1:30 pm ■ Location: CBA Headquarters, 321 South Plymouth Court, Chicago, IL 60604 ■ For more information and to register, please visit www.chicagobar.org.
<p>Labor & Employment Law Trends and Updates Presenter: Jeffrey A. Risch</p> <p>Jeffrey Risch will present during a Sikich LLP seminar on Wednesday, June 15, 2011. Topics discussed will include: game-changing U.S. Supreme Court decisions; legislative developments in employment; new strategies in preventing/correcting employee leave abuse; how the NLRB is controlling the union and non-union workforce; immigration/e-verify updates and ICE audit trends; and critical wage/hour developments.</p>	<ul style="list-style-type: none"> ■ Date: Wednesday, June 15, 2011 ■ Time: 8:30 am-11:00 am ■ Location: Sikich LLP, 998 Corporate Blvd., Aurora, IL 60502 ■ For more information and to register, visit www.dahuonline.com/events.html.
<p>A Deep Dive Into the World of Workers' Compensation (Assurance Agency) Presenter: Jeffrey A. Risch</p> <p>Jeffrey Risch will discuss pre-employment best practices, including topics such as: pre-hire/post offer physicals; drug testing; employee personality profiles; background checks; discrimination issues; WC vs. FMLA/ADA; illegal aliens/undocumented workers.</p>	<ul style="list-style-type: none"> ■ Date: Thursday, June 30, 2011 ■ Time: 8:00 am-3:00 pm ■ Location: JC Restoration, 3200 Squibb Avenue, Rolling Meadows, IL ■ For more information, please visit www.assuranceagency.com/university.
<p>Understanding the Impact of Health Care Reform on Employers Presenters: Jeffrey A. Risch, Rebecca L. Dobbs, and Jennifer Stuart</p> <p>In conjunction with Lorman Education Services, Jeffrey Risch, Jennifer Stuart, and Rebecca Dobbs will present this seminar as an opportunity for employers to assess best-practice programs and make the decisions necessary to develop plans that work with the new requirements. This seminar is designed to give you, the employer, the information you need to move forward in addressing the issues associated with health care and to give you some insight into the health care movement and what it means for employers.</p>	<ul style="list-style-type: none"> ■ Date: Friday, July 8, 2011 ■ Time: 8:00 am-4:30 pm ■ Naperville, IL ■ For more information and to register, please visit http://www.lorman.com/seminars/387246.