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Inside this issue:

Employment Laws and Employee Thresholds

As a business owner in New Hampshire, knowing the various laws governing the employer/employee relationship is an important part of a preventive legal maintenance plan. Preventing problems is always better than trying to address them after they have occurred. The myriad of employment laws out there can be an intimidating obstacle for most small businesses. Not all of these laws, however, will apply to the small business owner. Many employment laws have minimum threshold levels of employees which must be met before the particular law applies.

This article will provide you with an overview of the most common employment laws and the relevant employee threshold levels.

Title VII of the Civil Rights Act (42 U.S.C. 2000) prohibits discrimination in the workplace. It applies to employers with 15 or more employees. New Hampshire has an equivalent statute that prohibits discrimination in the workplace, RSA 354-A. New Hampshire law against Discrimination. New Hampshire's law applies to employers with 6 or more employees.

The Americans with Disability Act (ADA) prohibits discrimination in the workplace based on a disability or a perceived disability. This statute applies to employers with 15 or more employees. At the state level, such discrimination is also prohibited under RSA 354-A (threshold of 6 or more employees).

The federal Family and Medical Leave Act (FMLA), which requires employers to provide unpaid leave to employees under certain circumstances, does not apply to all employers. A private sector employer must have 50 or more employees to be subject to the FMLA.

Both federal and state law require employers to provide an employee the ability to continue health insurance upon termination of employment. The federal law, COBRA, applies to employers with 20 or more employees. The state law, RSA 415:18, applies to employers with 5 or more employees.

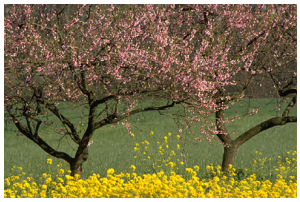
Some employment related statutes have no thresholds, but instead apply to all employers. This group of statutes include the Fair Labor Standards Act (FLSA); the Prompt Wage Payments Act (RSA 275:43); the Immigration and Reform Act; the Equal Pay Act (29 U.S.C. 206(d)) and RSA 275:37); OSHA; and the Uniform Services Employment and Re-employment Rights Act (USERRA).

Although recognition of the above thresholds is important, it should also be noted that employers are well advised to consult with legal counsel on individual issues as other laws may come into play which may otherwise prohibit certain employer conduct.

For further information, contact Attorney Douglas M. Mansfield.

Hospitality Law Update

Hospitality Law Update cont.



Non-Competition Agreements

In order to restrict former employees from engaging in activities adverse to the employer's commercial interests, employers frequently require employees to sign non-competition agreements, also known as covenants not to compete, in connection with employment contracts. A non-competition agreement generally provides that, for a certain period of time, a former employee will not solicit existing customers of the employer and will not participate in a competing business within a specified geographic area.

As a general matter, New Hampshire courts require such agreements to be narrowly tailored, but have found them to be valid and enforceable provided they meet the test of reasonableness. To determine the reasonableness of a particular non-competition agreement, courts employ a three-part test.

The first part of the test is whether the restriction is greater than necessary to protect the legitimate interests of the employer. In other words, the restriction generally must be limited to clients with whom the employee had contact, as opposed to all customers of the business, and to the geographic area in which the employee worked, as opposed to a widespread prohibition on any competition.

The second part of the test is whether the restriction imposes an undue hardship on the employee. For example, in one case a court struck down a non-competition agreement that prevented a former employee, a doctor, from practicing medicine altogether within a certain geographic area. A restriction that imposes an undue hardship on the employee's ability to make a living may be found to be unreasonable and unenforceable.

The third part of the test is whether the restriction is injurious to the public interest. If there is a public need for a certain service, such as a specialized professional service, a court may find a covenant not to compete invalid as injurious to the public interest.

In sum, non-competition agreements can be valid and enforceable in New Hampshire, provided they are carefully drawn to meet the legal requirements of the test of reasonableness and generally to protect the legitimate interests of the employer. Due to the complexities of the legal requirements, it is advisable to consult with counsel before attempting to implement a non-competition agreement.

For further information, contact Attorney Haden P. Gerrish.

Bankruptcy Preference Rules Altered to Benefit Businesses

The Bankruptcy Code has recently been amended in several ways that are business-friendly. This article briefly discusses some of the changes to the "preference" rules within the new Bankruptcy Code that are beneficial to businesses.

Previously, if the Bankruptcy Trustee finds that the debtor had preferred a creditor, to the detriment of the other creditors, he/she could take back (or "avoid") the "preferential payment" that the debtor gave to that preferred creditor. For example, Debtor owes Creditors A, B and C the sum of $1,000 each, and Debtor only has $1,000. Being friends with Creditor B, Debtor pays Creditor B his last $1,000 just prior to filing bankruptcy. If the Debtor had not paid Creditor B in that manner, Creditors A, B and C would have had to share that last $1,000 ($333.33 each) under the rules of bankruptcy. In this way, Debtor has "preferred" Creditor B, who has received $1,000 rather than $333.33. The Trustee could force Creditor B to return the $1,000 (via an "avoidance action") to be divided equally among all Creditors.

Under the previous Code, the Trustee could bring an avoidance action for preferential payments above $600. The Trustee could also bring avoidance actions in the jurisdiction of the debtor, making an objection to certain avoidance actions not cost-effective. For example, if the debtor is a Delaware corporation and the Trustee avoids a preferential payment to a New Hampshire creditor in Delaware Bankruptcy Court, the New Hampshire creditor might pay more in legal fees objecting to the avoidance action in Delaware than the preferential payment was worth.

Now, the Trustee generally cannot file avoidance actions for preferential payments under $5,000. Therefore, in the example above, Creditor B can now keep that $1,000 preferential payment without fear of the bankruptcy trustee bringing an avoidance action. Furthermore, if the preferred payment is made on a consumer debt and is less than $10,000, or on a non-consumer debt for under $15,000, the Trustee must file the avoidance action in the jurisdiction of the creditor. Thus, objecting to such avoidance actions is far more cost effective given that the objection can now be lodged in the objecting creditor's jurisdiction.

As an added incentive to object to an avoidance action, a creditor now has an easier burden of proof to carry in order to keep a preferred payment. Previously, the creditor had to demonstrate that the payment from the bankrupt debtor (1) was on a debt incurred in the normal course of business; (2) was made in the ordinary course of business; and (3) was a payment made under ordinary business terms. If the creditor satisfied these three "prongs", it could keep the preferential payment.

Now, a preferred creditor has an easier test to meet when objecting to an avoidance action. The creditor must demonstrate that the payment was (1) on a debt incurred in the ordinary course of business; *and either* (A) the payment was made in the ordinary course of business; *or* (B) was made according to ordinary business terms. The challenging creditor thus must now only establish two prongs, whereas previously it had the burden of demonstrating *three* prongs.

Notwithstanding the changes to the preference system and the other provisions of the new Bankruptcy Code which aid businesses, there are many pitfalls within the new Code which are potentially detrimental to businesses. In the event that these or any other bankruptcy issues arise in the course of business, please feel free to contact the author, Attorney Christopher T. Hilson, Esq.

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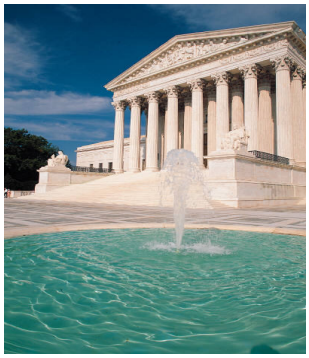

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Our attorneys provide affordable, quality legal services and personal attention to small and large businesses, agencies, boards, municipalities and individuals. Our focus on the client has enabled DTC to provide general counsel services, as well as special representation on specific matters to our clients. It allows us to be trusted counselors and advisors as well as advocates.

While situated on New Hampshire's seacoast, our clients come from throughout New England. We represent many firms and individuals relocating to New Hampshire from across the nation.

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