

LEGAL UPDATE – June 2010

Highlighted emphasis added...order of the information has been shuffled for ease of reference

LinkedIn Messages As Evidence In Non-Compete Case

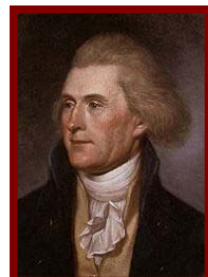
Staffing firm TEKsystems has filed suit against Brelyn Hammernik, a technical recruiter, alleging that she has violated her agreement not to contact former clients and employees following termination of her employment. The case has not yet been adjudicated. Much of the evidence of Hammernik's actions comes from LinkedIn messages such as "Tom – Hey! Let me know if you are still looking for opportunities! I would love to have you come visit my new office and hear about some of the stuff we are working on."

One lawyer has commented that "evidence doesn't get much better than that" LinkedIn message. Others have suggested that employees under properly worded non-compete agreements might have to "de-friend" their contacts on professional and social web sites, if those contacts are off limits by contract. While that is not at all clear, it is clear that, if you suspect a former employee of violating the employment agreement, it might be a good idea to look at professional and social web sites.

Federal Legislation Targets Worker Misclassification

Employers who wrongly classify employees as independent contractors, are coming under greater scrutiny from virtually any federal or state agency which has anything to do with the issue. Another recent example of this is Employee Misclassification Act, which was recently introduced in the U.S. House of Representatives. While the bill does not affect the way in which it is determined whether a worker is an employee or independent contractor, it does, among other things, increase the penalties for guessing wrong as follows:

1. It imposes a fine of \$1,100 for the first misclassification of any employee as an independent contractor, and gradually increases the fine up to \$5,000 per misclassification.
2. It requires employers to notify workers in writing as to whether they are being treated as employees or independent contractors.
3. It would create an "employee rights web site" to inform workers about their federal and state wage and hour rights.
4. It would permit the Internal Revenue Service and the Department of Labor to refer incidents of misclassification to each other.
5. It directs the Department of Labor to audit employers in industries that frequently misclassify workers, according to the Department. The Department has recently cited staffing firms as a frequent violator.



Staffing firms who assign workers as independent contractors should be sure that counsel has reviewed how they classify workers, and how they document that classification. None of this should impact how in-house placement consultants should be classified. They are employees.

Must You Investigate Your Client's Claim of a BFOQ?

Not usually, according to a recent decision by the federal Eighth Circuit Court of Appeals in *Equal Employment Opportunity Commission v. Kelly Services*.

Kelly interviewed Asthma Suliman, a Muslim, for a position with its client, Nahan Printing, Inc. Suliman wore a khimar, a traditional headdress worn by Muslim women.

Nahan required all of the temps it used through Kelly to work on assembly lines, which have machines with fast moving parts which can pose a safety risk to workers wearing loose-fitting clothing or headwear. Accordingly, Nahan adopted a policy which prohibited all employees, whether working through staffing firms or not, from wearing loose-fitting clothing or headwear on the job.

Kelly refused to refer Suliman to Nahan, but did refer her to seven other positions, which she refused. Kelly discussed the khimar requirement with Nahan, and pointed out that employees with long hair were allowed to work on the machinery as long as they tied the hair back, and discussed whether an employee with a khimar could do the same thing. Nahan refused, stated that a khimar, even if tied back, could still come loose and fall into a machine, causing injury to a worker who tried to retrieve it.

When the EEOC filed a religious discrimination suit against Kelly, it alleged that Kelly should have further investigated its client's claim that the khimar could not be safely tied back and that there were no positions on the line at which someone wearing a khimar could safely work. "Nothing in [the Civil Rights Act] suggests that an employment agency should be held liable if the agency has no reason to believe that the employer's claim of bona fide occupational qualification is without substance." The court then quoted to EEOC's own position regarding claims of bfoq's based upon gender.

"An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupational qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification." (Emphasis added.)

You must still, however, accommodate the candidate's religious beliefs in the referral process. That is why it was very helpful to Kelly that it had referred the candidate to seven other positions, all of which she declined.

Those with questions or comments can contact NAPS counsel Bob Style at rpstyle@sprynet.com.

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