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LABOR & EMPLOYMENT LAW ALERT

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Law Against Discrimination Prohibits Sexual Advances By Supplier Against Female Business Owner

The New Jersey Law Against Discrimination ("NJLAD") is much broader than most businesses and people think. Certainly, it prohibits employment discrimination and it also prohibits businesses who are public accommodations from discriminating against people because of their protected category status. What most people do not know is that the NJLAD also prohibits people and businesses from refusing to enter into or terminating contracts because of one's protected category. Thus, for example, a general contractor who refuses to subcontract to a certain electrical contractor because that contractor is African-American violates the law. Similarly, if that same general contractor terminates or refuses to renew the subcontract of a plumber because of her gender, or because of her sexual orientation, that too would be unlawful discrimination. It does not matter that the electrical and plumbing contractors were independent contractors and not employees. In fact, protection extends to companies whose owners are members of a protected classification.

The question before the Appellate Division in *JT's Tire Service v. United Rentals* was whether NJLAD protects a female business owner where her supplier allegedly terminated their business relationship because she refused his sexual advances. The issue was important because while the relevant section of the NJLAD makes it unlawful to discriminatorily refuse to do business with another on the basis of sex (among other things), it does not expressly prohibit sexual harassment. Not surprisingly, the Appellate Division answered in the affirmative.

In *JT's Tire Service*, the small tire company was owned by a female and sold industrial tires to the United Rentals. The female owner alleged that the United Rental Branch Manager pressured her for sex and when she refused, United stopped buying tires from JT's. JT's sued but the trial court dismissed the complaint on the theory that United's refusal to do business with JT's was not "on a basis of sex." The Appellate Division reversed and reinstated the complaint. The Court noted that sexual harassment is a form of sex discrimination and rejected the defendant's argument that the female owner, as the owner of a busines separate from United Rentals, did not need protection from sexual harassment. The Court found that *quid prop quo* sexual harassment violates the LAD even when the victim is not an employee but someone who is doing business with the harasser.

The Bottom Line

We need to understand that the NJLAD protects independent contractors in many cases and governs our ability to enter into, terminate, or refuse to renew contracts with contractors and independent businesses. Therefore, it is imperative that our actions regarding these relationships are guided by the same principles of fairness as our relationships with employees. Make sure that this message is communicated to everyone, including those in your organization that are responsible for contracting.

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FTC Guidelines May Create Company Liability For Employees' Online Endorsements

The Federal Trade Commission (FTC) has issued final guidelines regarding the use of "endorsements and testimonials" in advertising. "Guides Concerning the Use of Endorsements and Testimonials in Advertising," 16 CFR Part 255. Under those guidelines, employees who use social media like blogs, Twitter or Facebook to make statements about their employers' products may create unintended legal liability for their employers if a consumer later claims to have been misled into purchasing an allegedly dangerous or defective product by such a posting.

Under the guidelines, an "endorsement" is an advertising message that consumers are likely to believe reflects the opinions beliefs, findings, or experiences of a party other than a sponsoring advertiser. An endorsement must not include any representation that would be deceptive if made directly by the sponsoring advertiser. Further, companies are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers. Importantly, the guidelines impose liability on endorsers and companies who fail to disclose "material connections" between an endorser and the company about whose products that endorser comments.

Accordingly, if an employee uses electronic media, including e-mail, blogs, or social networking sites, to make comments about a product made by his or her employer, there can be liability to the employer if he fails to disclose his relationship with the manufacturer. Should a consumer rely on a particular comment in that posting to her detriment, any ensuing damage could be attributed to the manufacturer/company.

The Bottom Line

Immediate steps should be taken to draft a written social media policy, one that is distributed and uniformly enforced. Such a policy can help you avoid liability for violation of these FTC guidelines. Because the guidelines are designed to protect consumers against misleading advertising and endorsements, a company's written directive to its employees to avoid publishing "endorsements" that are misleading or in which the employee's relationship to the company is not revealed can help to avoid legal liability.

The New Jersey Supreme Court Lifts The Bar Placed On Public-Interest Attorneys And Defendants From Simultaneously Negotiating Merits And Attorneys' Fees Claims

A new development in New Jersey law, *Pinto et al. v. Spectrum Chemicals, et al.*, ___ N.J. ___, Docket No. A-94-08 (Jan. 21, 2010), lifts the ban placed on public-interest attorneys and defendants from simultaneously negotiating merits and attorneys' fees claims in Conscientious Employee Protection Act ("CEPA") and New Jersey Law Against Discrimination ("LAD") cases. Defendants however, are barred from insisting on a waiver of fees or dictating how settlement proceeds should be divided between a public-interest attorney and his/her client in a fee-shifting case.

Prior to this landmark decision, *Coleman v. Fiore Bros.*, 133 N.J. 594 (1989) barred such simultaneous negotiations of merits and fees. In *Coleman*, to encourage public-interest lawyers to continue their mission of serving the needs of low-income citizens and to remove the ethical dilemma of having such lawyers sacrifice their statutory fees for the purpose of effectuating the best settlement for their clients, the Court carved out a special exception to the general policy of allowing the parties to freely negotiate the terms of a settlement. *Coleman* involved a Consumer Fraud Act (CFA) case where the Court concluded that in all future CFA cases, public-interest attorneys could not engage in such simultaneous negotiation of merits and fees until the merits had been settled and defense counsel were barred from insisting on a waiver of attorneys fees as a condition of settlement. *Coleman* was a landmark departure from the position taken by the United States Supreme Court in *Evans v. Jeff D.*, 475 U.S. 717 (1986), in which the Court held that simultaneous negotiations served the public interest. In *Coleman* however, the Court held that this federal policy would disserve New Jersey's interests. However, as the Court notes in Pinto, twenty years after *Coleman*, no other jurisdiction bars such simultaneous negotiation in fee-shifting cases.

Immediate steps should be taken to draft a written social media policy, one that is distributed and uniformly enforced.

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In *Pinto*, several discharged employees, all of whom were represented by Legal services, filed a discrimination lawsuit against their former employer, alleging violations of LAD and CEPA. In August 2008, the parties entered into court-ordered mediation. The mediator met separately with both parties and apparently believed that the case was settled because he submitted to the trial court a completion of mediation form indicating, "Case Resolved." The parties however left the mediation with entirely different understandings of the terms of the settlement, which was never reduced to writing. Legal Services believed that the parties had reached a settlement on the dollar amount of the underlying claim **only**, because as dictated by *Coleman* the parties were barred from entering into negotiations regarding attorneys' fees. Defendants, on the other hand, believed that the monetary offer settled all financial claims against it, including attorneys' fees. Legal Services filed a motion to enforce settlement believing that attorneys' fees were excluded from it and Defendants sought to enforce the settlement agreement, believing that attorneys' fees were included in it. The trial court judge denied both motions, stating that there was no meeting of the minds, declining to extend *Coleman* beyond its express terms outside the consumer fraud context. The Appellate Division denied Legal Services' motion for leave to appeal. The Supreme Court granted leave to appeal. *Pinto v. Spectrum Chemicals*, 199 N.J. 124 (2009).

Ultimately, the Supreme Court upheld the trial court's decision who found that the parties did not reach a settlement through the mediator. Additionally, as stated above, the Court lifted the bar imposed by *Coleman* finding that *Coleman* runs counter to the policy promoting settlement negotiations on terms that will be acceptable to the parties. The Court reasoned that such bifurcation has practical application in the "real world" or advance the interests of employees who are to be protected by LAD or CEPA. The *Coleman* criteria was intended to protect public-interest firms and their clients, but in reality, the Court found that its application may do more harm than good. For example, defendants will be less likely to settle cases where there is no closure as to attorneys' fees.

However, the Court held that *Coleman's* prohibition on a defendant conditioning settlement on a waiver of attorneys' **has** continuing validity in fee-shifting cases involving public-interest law firms. Where a plaintiff is seeking monetary damages in fee-shifting cases, a defendant has no legitimate interest in how the plaintiff and attorney "divvy" up the settlement. If this were permitted, it would make it difficult to attract competent counsel to take plaintiff's cases in the LAD and CEPA context, because they may be less inclined to take cases where compelled to forfeit their fees.

The Bottom Line

For employers, this case should be seen as a victory, because it enables employers involved in litigation with plaintiffs represented by public-interest counsel to effectuate a full and complete settlement at mediation without concern over later battles involving attorneys' fees. If you have any questions, please contact us.

New York Wage Notification: An Update

In October 26, 2009, New York promulgated a new law that required New York employers to notify all new hires in writing of their hourly rate, overtime rate and payday and receive a written acknowledgment of such notification. A model for hourly employees was then issued by the New York State Department of Labor with instructions that the form should be used by all employers.

We have received questions from many employers who wanted to know whether a form was required for salaried workers insofar as the form issued by the DOL applied only to hourly employees. The answer is that the Department of Labor later advised that the form was not required and that compliance could be achieved without using the form so long as the information required by the statute was provided and the employee acknowledged receipt, although the Department did state that it would issue further model notices for employees paid other than on an hourly basis. The Department of Labor has now posted a series of model forms on its website for employers to use. These model forms include a revised form for hourly employees, and new forms for exempt employees as well as non-exempt employees paid on a salary basis or using a piece rate method. You can obtain these forms by going onto the web-site (http://www.labor.state.ny.us/formsdocs/) or by calling and asking us for them. We would be pleased to help.

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