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Arbitration Update:

FINRA Proposes to Exclude Collective Action Arbitrations

By: Jed L. Marcus

Class action arbitrations remain as controversial as ever. Employers are well advised to follow developments very carefully. On one end of the spectrum is the Financial Industry Regulatory Authority ("FINRA"), taking steps to amend its Code of Arbitration Procedure for Industry Disputes to exclude from arbitration collective actions brought in court under the Fair Labor Standards Act ("FLSA") and the Age Discrimination in Employment Act ("ADEA"). Employers in the financial services industry agree to be bound by and arbitrate its disputes under this Code.

Specifically, FINRA will propose an amendment to Rule 13204 of the Code to include collective action claims among those that may not be arbitrated under the Code. While this had always been FINRA's interpretive position, the rule proposal responds to adverse court decisions, all of which held that FLSA collective actions are arbitrable pursuant to FINRA's rules. *See e.g,. Velez v. Perrin Holden & Davenport Capital Corp.*, 769 F. Supp. 2d 445, 447 (S.D.N.Y. 2011). The thrust of these cases is that, while FINRA Rule 13204 clearly states that "[c]lass action claims may not be arbitrated" under the Code, that rule says nothing about *collective action* claims.

Even if FINRA amends its rules, however, employers need not despair. FINRA notwithstanding, employees may, in a separate writing, agree to arbitrate claims otherwise excluded from FINRA's Code. Further, in light of *AT&T Mobility, LLC v. Concepcion*, 563 U.S. __, 131 S. Ct. 1740 (2011), which held that class action waivers in arbitration are enforceable, employees may even agree to waive class or collective actions in arbitration. In this regard, FINRA Rule 13204(d) states that "This paragraph does not otherwise affect the enforceability of any rights under the Code or any other agreement." One court has read this Rule to mean that employees can agree to arbitrate their claims and agree to forego their class and collective action remedies. *See Suschil v. Ameriprise Fin. Servs. Inc.*, No. 07-cv-2655, 2008 U.S. Dist. LEXIS 27903 at *15-16 (N.D. Ohio Apr. 7, 2008).

The Bottom Line. In light of FINRA's decision to amend Rule 13204 of the Code, financial services industry employers should consider developing and distributing arbitration agreements. These agreements, which would supplement the agreement to arbitrate under FINRA rules, would require employees to arbitrate all employment claims, foregoing class and collective action remedies. Employers should keep in mind, however, that the agreements should carefully identify all covered claims and unambiguously state that the employee has agreed to arbitrate his individual claims only, waiving any right to arbitrate class or collective claims. ■

Social Media Update:

"Sour Grapes" on Facebook Is Not Protected Activity Under the National Labor Relations Act ("NLRA")

By: Emily Wexler

The law surrounding employee comments on social media sites is in a state of flux. Over the last year, the National Labor Relations Board ("NLRB") has heard complaints against employers for discharging employees who made disparaging remarks about supervisors, customers or products. In each case, the NLRB found that the employees were engaged in protected activity, that is, they were in some form or fashion initiating, preparing, or engaging in group action involving terms and conditions of employment. In July, the NLRB issued three Advice Memoranda recommending dismissal of unfair labor practice charges arising out of employee use of social media. *JT's Porch Saloon & Eatery, Ltd.*, Case No. 13-CA-46689 (July 7, 2011); *Martin House*, Case No. 34-CA-12950 (July 7, 2011); and *Wal-Mart*, Case No. 17-CA-25030 (July 19, 2011). These Memoranda clarify the meaning of "protected activity" and distinguish it from mere personal gripes, which are outside the protection of the Act.

In analyzing these three cases, the Division reiterated the appropriate Board standards for finding certain conduct to be protected concerted activity, and explaining that concerted protected activity must involve the group action of co-workers. As the Board explained in the Wal-Mart Memorandum:

> An individual employee's conduct is concerted when he or she acts "with or on the authority of other employees," when the individual activity seeks to initiate, induce, or prepare for group action, or when the employee brings "truly group complaints to the attention of management." Such activity is concerted even if it involves only a speaker and a listener, "for such activity is an indispensable preliminary step to employee self-organization." On the other hand, comments made "solely by and on behalf of the employee himself" are not concerted. Comments must look toward group action; "mere griping" is not protected.

Applying these principles in *JT's Porch Saloon*, the employer lawfully fired the employee who had posted complaints as in a Facebook conversation with his stepsister that he had not received a raise in five years, and he was doing the waitresses' work without tips. He called the employer's customers "rednecks" and stated that "he hoped they would choke on glass as they drove home drunk." The NLRB concluded that the employee had not engaged in concerted protected activity because he did not discuss his Facebook postings with any employees either before or after he wrote them, and none of his co-workers responded to his Facebook conversation.

In *Martin House*, an employee at a resident facility for the homeless who had made derogatory remarks about residents suffering from mental illness and substance abuse, was lawfully fired because no participant in the Facebook conversation was a co-worker, and none of her co-workers were even Facebook friends with the employee. The Board concluded that the employee had used the residents' illnesses for her personal amusement.

Finally, in *Wal-Mart*, the NLRB determined that the employer lawfully disciplined an employee who had fired off obscene comments about Wal-Mart and his supervisor on Facebook since the posting contained no language suggesting that the employee sought to initiate or induce co-workers to engage in group action.

The Bottom Line. Employers should continue to exercise great care before disciplining employees for posting objectionable comments on a social media site; postings which are made either on behalf of other employees or with the objective of inducing *or preparing for* group action will continue to be protected concerted activity. On the other hand, individual gripes made solely for the employee's own benefit will not be protected under the NLRA. ■

In-House Counsel Update:

In-House Counsel in NY Must Have Limited License or Bar Admission

By: Andrée Peart Laney, Esq.

On April 20, 2011, New York implemented a limited license rule, at 522 NYCRR Part 522, which allows attorneys in good standing in other U.S. jurisdictions (except Hawaii, Mississippi, Montana and West Virginia, which are barred because they do not offer reciprocity for New York attorneys) to serve as in-house counsel in New York without admission to the New York bar. The rule provided current in-house counsel 90 days to register. After July 19, 2011, the rule bars unregistered in-house counsel from practicing law until they apply for a limited license from the Department of New York Appellate Division in which they live or work. New hires have 30 days to apply for the limited license.

The limited license is good news to attorneys contemplating in-house employment in New York. It should also be a caution to those in-house counsel who have moved to New York but have not yet gotten licensed. Attorneys who fail to register are subject to discipline by the Appellate Division.

Aside from the obvious problems which flow from practicing without a license, unlicensed in-house counsel also risk adverse criminal, ethical, and evidentiary consequences. New York law and rules of ethical conduct prohibit the unauthorized practice of law. Additionally, the attorney-client and work product privileges do not attach to legal advice or analyses provided by unlicensed attorneys.

New York's limited license is not equivalent to admission to the New York bar. In-house counsel may render legal services under the limited license if they work full-time for, and provide legal advice only to, their employer in New York. Such counsel must work for the employer full-time. Additionally, in-house counsel cannot provide personal or individual legal services or otherwise hold themselves out as being admitted to practice law in New York. Unlike their counterparts in New Jersey, holders of New York's limited license cannot represent their employer in court, arbitration, administrative proceeding, or any other forum in which *pro hac vice* admission would be required of an out-of-state attorney. This last restriction can significantly hamper in-house counsel who traditionally have handled extra-judicial proceedings themselves. Significantly, the Financial Industry Regulatory Authority ("FINRA"), which arbitrates securities-related disputes nationwide, recently issued a notice advising attorneys that their appearance at FINRA proceedings in states where they are unlicensed could constitute the unauthorized practice of law.

The limited license is good for the duration of counsel's in-house employment with the same New York employer. In-house counsel must apply for a new limited license if there is a break of more than thirty days in qualifying employment. There are no fees or CLE requirements associated with the limited license. ■

Upcoming Speaking Engagements:

October 17, 2011: Jed Marcus, Dan Korb, Jr., Mark Knoll, Andrée Laney, and David Campbell, General Counsel of Silvercrest Asset Management Group, LLC will be speaking on employment law issues in financial services - managing risks. Topics will include "Current Issues in U-4 and U-5 Filings, the Whistleblower and Executive Compensation Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the U.S. Department of Labor, Wage and Hour Division's assault on the Financial Services Industry", *The Yale Club, New York, NY, 12:30 pm to 2:30 pm (registration starts at 12:00 noon)*.

November 2-4, 2011: Jed Marcus will be speaking on current trends in labor and employment law at the Tennessee Employment Relations Research Association Annual Conference. Topics will include "Trends in Collective Bargaining" and "Social Media and Employment: Sour Grapes or Protected Activity?", *Arnold Engineering Development Center, Tullahoma, TN*.

December 20, 2011: Jed Marcus will be participating in a panel discussion on Litigating and Trying Employment Cases, *The Sheraton Meadowlands Hotel in Secaucus, NJ*, 9:30 am to 12:30 pm. Sponsored by the New Jersey State Bar Association.

For more information about any of the topics covered in this issue of the Labor and Employment Law Alert, please contact:

Jed L. Marcus
jmarcus@bressler.com
973.966.9678

Michael T. Hensley
mhensley@bressler.com
973.660.4473

Andrée Peart Laney
alaney@bressler.com
973.245.0686

Dennis Kadian
dkadian@bressler.com
973.660.4456

Emily Wexler
ewexler@bressler.com
973.660.4470

BRESSLER, AMERY & ROSS

A PROFESSIONAL CORPORATION

17 State Street
New York, NY 10004
212.425.9300

325 Columbia Turnpike
Florham Park, NJ 07932
973.514.1200

2801 SW 149th Avenue
Miramar, FL 33027
954.499.7979

www.bressler.com