March 2011

Worldview

Employment

Welcome to the first issue of Squire Sanders' Worldview. Every month we will be giving you details of employment stories from around the world, some educational, some perplexing and some just terrifying, but we hope all of interest to you.

ANTI-SOCIAL MEDIA CITES UNION ARGUMENT

The increasing use of social media sites has made it ever more likely that your employees' personal lives will at some point bleed over into your business. In addition to providing an unwelcome distraction for your employees, social networking sites and other "traditional" technology such as e-mail, texting and instant messaging are quickly becoming a serious headache for employers around the world. Without even trying that hard, employees can leak trade secrets and other confidential information, harass other employees or do potentially irretrievable damage to a company's property and image. Little wonder that nearly 10% of U.S. employers have dismissed an employee for inappropriate use of Facebook or other social media sites.

But what about the simple griping about one's employer, colleagues or management in which everyone engages from time to time? Does that justify termination or other sanction? Perhaps bizarrely, U.S. Federal law appears to allow employees in unionized environments to air their criticisms on social networking sites without recourse from their employers where they constitute a "protected concerted activity", i.e. union rather than personal complaints.

The U.S. National Labor Relations Board recently filed a complaint on behalf of a union member who posted criticisms of her supervisor on Facebook. These drew much supportive comment from her unionized colleagues, which led in turn to further postings about the supervisor from the employee. Her employment was then terminated for violating the employer's internet policies. The NLRB contended that the Facebook postings were protected concerted activity because they related to the workplace and were supported by a number of other union members, and therefore that the dismissal was unlawful. Sadly the parties recently settled, grievously disappointing pundits and analysts who were looking to this case to shed some light on where the line lies between legitimate union activity on the one hand and concerted character assassination on the other.

Although this one settled, it is unlikely to be the last case regarding employee use of social media. Employees cannot be disciplined for engaging in protected activity, but there must surely be limits to the scope of that protection to maintain order in the workplace and keep some parity between behaviours acceptable in unionized and non-unionized environments. Employers may want to review their Internet and social media policies to determine whether they are susceptible to an allegation that they would dissuade employees from exercising their rights to discuss wages, working conditions and other union-related matters. Is the policy over-broad in the license it provides or unduly restrictive? Because this area of law is still developing in line with the spread of access to social media sites at work, employers are best advised to take advice prior to taking disciplinary action because of an employee's comments on social media.

Julie Smith, Associate, Columbus

"U.S. Federal law appears to allow employees in unionized environments to air their criticisms on social networking sites without recourse from their employers where they constitute a 'protected concerted activity' "

FRENCH COURT PENALIZES EMPLOYER FOR UNLAWFUL NON-COMPETITION CLAUSE

In France, as in a number of other European countries, a non-competition clause will only be valid if the employee receives a payment from the employer for abiding by it. The amount of the payment is determined in each national collective bargaining agreement and may vary from 30% to 100% of an employee's average gross monthly salary, payable for the duration of the restriction. If the agreement is silent on this issue, the Courts have determined that the payment has to be set out in the contract of employment itself and cannot be less than 33% of the employee's average gross monthly salary.

The French Supreme Court (the highest Court in the French legal system) has recently held that a non-competition clause was unenforceable for want of payment to the employee for entering into it. No surprises there. Of much greater concern is that it went on to say that the employee was also entitled to damages to compensate him for the fact the covenant had effectively stopped him from applying for (or accepting) jobs with any competitor companies during the term of his employment. In other words the employee did not have to wait until the termination of his employment to challenge the validity of the non-competition clause or to make a claim for damages for the "detriment" suffered as a result of entering into the clause.

The Court paid no heed to arguments that if the clause was invalid the employee could ignore it with impunity anyway, or that if he thought it was valid when agreeing to it, he had not suffered any detriment by respecting it in the meantime.

In light of this seemingly quite surreal decision employers in France should review their contracts to ensure that any non-competition clauses (and by extension, non-solicitation provisions) are lawful.

Jean-Marc Sainsard, Partner, Paris

"Employers in France should review their contracts to ensure that any non-competition clauses are lawful."

CZECH REPUBLIC: NEW IMMIGRATION RULES

On 1 January 2011 controversial new immigration laws relating to foreigners from third countries (other than EU) came into force in the Czech Republic.

A new type of permit – the Blue Card - has been introduced for highly skilled workers from outside the EU. Applicants will have to demonstrate that they have a University background, are intending to work in the Czech Republic for at least a year and will be earning at least 150% of the CZH 283, 176 Czech annual average salary. Blue Cards will be valid for up to two years, but can be further extended. Foreign workers already in the Czech Republic can also apply, provided that they satisfy the same criteria. These new permits do not replace the Green Cards introduced in 2009 which simplify the hiring of workers without professional qualifications from certain specified countries.

Employers need to be aware that long-term residency visas are now only being issued for six months, as opposed to twelve previously. Furthermore, applicants must apply for such visas in person at the Czech Embassy or Consulate in their home country or a country of their long-term stay and will be required to demonstrate that they have already obtained accommodation in the Czech Republic, for example by providing a written declaration from the intended landlord, with its notarized signature attached to such document.

One of the most controversial changes is the new requirement for Czech employers to provide health insurance for any employees from third countries. The cover must extend to injuries suffered whilst under the influence of alcohol or illegal substances and should cover claims up to €60,000, double the previous minimum. There is, however, one fairly major sticking point - no Czech insurance companies currently offer insurance on this basis. The authorities there are apparently aware of this issue, as one might hope in the circumstances, and are "in discussion" with the relevant insurance providers.

Czech Republic employers should ensure that any foreign workers have the correct permits in place as the penalties for breaching the new immigration rules have also been stiffened. Any employer found to be employing an illegal worker will, for example, have to bear any deportation costs.

These new immigration rules have been criticised as too burdensome for employers, especially the duty to provide unavailable insurance cover! Discussions are ongoing as to how they should apply to foreign managers and other highly skilled workers.

Zdenek Rosicky, Senior Associate, Prague

Hana Cekalova, Associate, Prague

REFUSAL TO SIGN CONFIDENTIALITY AGREEMENT DOES NOT JUSTIFY DISMISSAL, ACCORDING TO SPANISH COURT

Whilst Spanish employers are entitled to ask employees to enter into confidentiality agreements to protect the business' confidential information, it seems they are not entitled to dismiss any employees who refuse to do so. A Spanish Court recently ruled that this was not serious enough to justify dismissal and held that the employer should have imposed a lesser disciplinary sanction.

In the same matter, the Court held that the employee's refusal to undergo a medical examination at its request was also not sufficient to justify his dismissal. This aspect of the decision is less surprising because under Spanish law employees can only be required to have a medical examination where they have been absent from work due to ill-health or the nature of their job could pose a risk to their health. Neither circumstance applied here and so the dismissal was understandably held to be unfair.

Whilst the confidentiality agreement aspect of the ruling may be appealed to the Superior Court of Justice, it highlights the importance of imposing the correct disciplinary sanction when dealing with misconduct issues - going in too strong could result in any dismissal being ruled unfair.

Antonio Elcarte, Associate, Madrid

FURTHER INFOMATION

We would welcome any feedback you have on this new publication. Please email david.whincup@ssd.com or contact one of the following or your usual Squire Sanders' contact:

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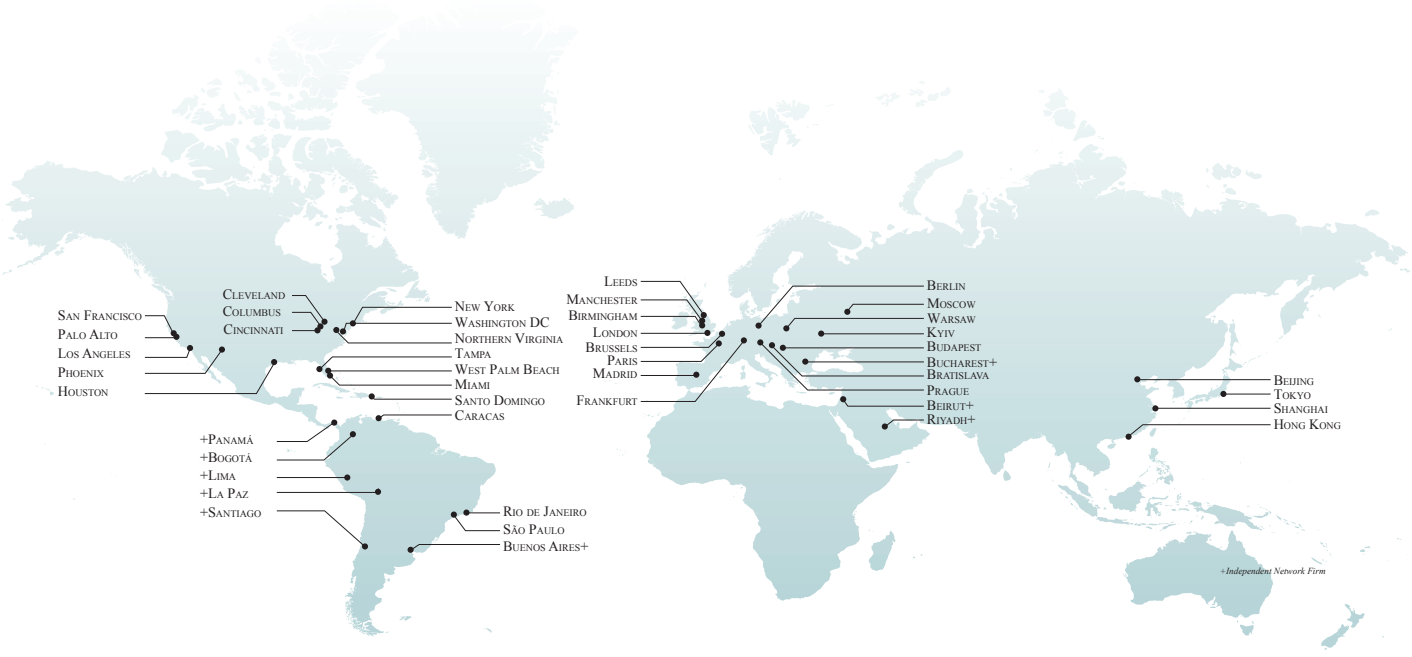

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