

EMPLOYMENT

Applications

**KUTAK ROCK EMPLOYMENT
PRACTICE GROUP CONTACTS****Atlanta**

Gregory R. Crochet
Joyce Mocek
(404) 222-4600

Denver

Craig N. Johnson
Heather M. Davis
(303) 297-2400

Des Moines

Norene D. Jacobs
(515) 224-1266

Fayetteville

Robert W. George
Debby Nye
Michael R. Bond
(479) 973-4200

Irvine/Los Angeles

Grace Y. Horoupian
(949) 417-0999

Little Rock

James M. Gary
(501) 975-3000

Los Angeles

Paul F. Donsbach
(213) 312-4000

Omaha/Chicago

Thomas J. Kenny
John Schembari
Marcia Washkuhn
(402) 346-6000

Scottsdale/Chicago

Michael W. Sillyman
Marc R. Lieberman
Paul S. Gerding
Paul S. Gerding, Jr.
Paige A. Martin
(480) 429-5000

Washington, D.C./Richmond

Nancy E. Nunan
(202) 828-2400

**Wichita/Kansas City/
Oklahoma City**

Alan L. Rupe
S. Douglas Mackay
(316) 609-7900

To our readers:

Just like parachute pants and mullet haircuts, the world of human resources is susceptible to ill-advised fads. But unlike fashion fads of years past that result only in embarrassing high school yearbook photos, employment fads can result in huge embarrassment and liability for employers.

For those of us with teenagers at home, social networking sites such as Facebook and MySpace are as everyday as breakfast: announcements of the latest breakups; postings of the weekend's parties and events; and the self-defining "profile." And there's the problem. Surveys indicate that a substantial number of users of social networking sites routinely divulge critical information about themselves they would not normally reveal. As the chief security officer for a Silicon Valley-based maker of encryption software recently stated, "I am continually shocked and appalled at the details people voluntarily post online about themselves." [NewScientist.com, June 9, 2006](#). Take a look at some of the profiles on your teen's Facebook. Self-disclosures such as "getting out of rehab and getting on with my life" and "my Ritalin level must be down" are common, and political and sexual commentary are replete.

Getting this kind of information before hiring an applicant is tempting for the employer who wants to know a little more about the job applicant but is afraid to ask. Employers are specifically prohibited from asking job applicants questions which might disclose discriminatory intent. Interview questions causing the most problems are those questions that give an indication of how old the applicant is; or the applicant's national origin, religious beliefs or affiliation, marital status, and health and physical condition. Yet the answers to these forbidden questions are almost always posted on the social network "profile." Consider the applicant whose online profile reveals his recent release from rehab or her proud affirmation of the physical difficulties overcome following her nearly fatal car accident. An employer who refuses to hire such an individual might be accused of violating the Americans with Disabilities Act.

Savvy employers know not to make discriminatory hiring decisions based on information revealed in the interview process. Employers who rely on information learned from any other source and relied upon in the hiring process may be faced with an inference of discrimination.

Employment fads, like those parachute pants, are hasty reactions to pop culture or social issues and are not necessarily in line with the law. It is important to recognize the difference between the two.

Recent Hires Strengthen the Diversity Initiative at Kutak Rock LLP

A year ago, Kutak Rock LLP reaffirmed its long-standing commitment to workplace diversity and implemented a series of diversity initiatives. During the past year, an impressive roster of minority attorneys joined the firm. As we begin the second year of our strategic diversity initiative, these attorneys will join others at the firm in taking our diversity efforts to the next level. We are proud to introduce them with brief profiles.

Trinidad P. Galdean, of counsel in our Wichita office, has over fifteen years of experience advising employers and human resources managers on workplace matters, including employment law compliance. A certified mediator, Mr. Galdean is also Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization and by the Human Resource Certification Institute as a Professional in Human Resources. He has long been an active member of the Hispanic National Bar Association and recently received appointment as the Deputy Regional President for Kansas. Since relocating to Kansas in mid-2006, he has been active in the Wichita Chamber's Government Relations Committee and has been named the 2007 Legislative Director for the Wichita Chapter of the Society for Human Resources Management.

Eric Kendall Banks joined our Labor & Employment Group in January in an of counsel role. Mr. Banks is a certified mediator with over twenty-five years of experience advising and representing private, corporate and governmental clients. He has assisted clients with complex

cases in state and federal trial and appellate courts and before administrative agencies throughout the United States. Between 1996 and 2006, he has been featured in multiple editions of *Who's Who in America*, *Who's Who in American Law* and *Who's Who in Black St. Louis*. In 2005, he was among five percent of the attorneys selected as a Missouri/Kansas Super Lawyer based on attorney ballots. In recognition of his dedicated community service, he received the 2003 Equal Justice Award from the Legal Services of Eastern Missouri and the 2002 Cochran Community Service Award from the Young Lawyers' Section of the Missouri Bar.

Outside the Labor & Employment Group, **Jo Ana Saint-George** and **Randy Delgado II** joined our Real Estate Group in Scottsdale. Ms. Saint-George, an of counsel attorney, has over ten years of experience in representing corporate clients in commercial and finance litigation and transactions. Ms. Saint-George serves on boards of directors for several community organizations and is the founder and chair of the National Bar Association Diversity Pipeline Program, which was launched in Arizona in 2006. Prior to joining Kutak Rock LLP, Mr. Delgado was an Assistant Attorney General to the Arizona Department of Real Estate directing investigations, facilitating settlement negotiations and providing legal advice.

Karen Marie Perez, an associate in the Denver office, is a member of our Structured Finance practice group. Ms. Perez is Treasurer of the Hispanic National Bar Association, and has been a key member of

the Colorado Pledge to Diversity Program in which the firm has been participating since its inception over 10 years ago.

Mary Daniel, a 2005 law graduate, is an associate in our Healthcare Group in Kansas City. Ms. Daniel is a member of the Cheyenne-Arapaho Tribes of Oklahoma and has been involved in extensive community service since 1998. She was a keynote presenter at the third annual American Indian Symposium held in Kansas City in November 2006. **Angela Maria Bergmann Kassube** also joined the Kansas City office as a litigation associate. A 2006 law graduate, Ms. Kassube was a Thurgood Marshall Diversity Scholar and Secretary of the Latino Law Student Association.

Angela Probasco and **Janice Holmes** joined as litigation associates in Omaha. Admitted in Arizona and Nebraska, Ms. Probasco focuses her practice on insurance coverage issues. Ms. Holmes, a 2006 law graduate, previously interned at Union Pacific Railroad Company in the Labor Relations Department, working on collective bargaining agreements. In Los Angeles, **Robert Oliver** and **Julie Beaton** joined the Litigation Department, in an of counsel role and as an associate, respectively. In Richmond, **Celia Smoot** joined the Tax Credit group as an associate in January. Ms. Smoot has experience in various aspects of real estate and commercial and finance transactions, including as an Attorney Advisor at the U.S. Department of Housing and Urban Development.

By Daphne H. Aronson

ERISA Preempts Maryland's Fair Share Act: What's in Store for 2007 and State Health Care Legislation

One of the primary goals of ERISA is to provide uniformity with respect to the regulatory regime over employee benefit plans. To accomplish this objective, Congress included broad preemption provisions when it drafted ERISA, providing that ERISA preempts any and all state laws that relate to any employee benefit plan.

Maryland's Fair Share Act

On January 17, 2007, the United States Court of Appeals for the Fourth Circuit, in *Retail Industry Leaders Association v. Fielder*, Nos. 06-1840, 06-1901, 2007 WL 102157 (4th Cir. Jan. 17, 2007) upheld a district court's decision that ERISA preempts Maryland's Fair Share Health Care Fund Act (the "Act"). The Act required nongovernmental employers with more than 10,000 employees to spend at least 8% of their payroll on employee health care or contribute to the state's Fair Share Health Care Fund, established for the sole purpose of supporting Maryland's Medicaid and children's health programs.

The Fourth Circuit determined that because the Act essentially required large employers to structure their employee health benefits in such a fashion as to meet the Act's minimum spending threshold, it ran afoul of ERISA's preemption provisions. The court concluded that the Act directly related to employee benefit plans because in order for employers subject to the Act to avoid paying additional amounts to the state, they would need to increase their health care spending. The court

rejected the state's argument that employers could reach this objective through non-ERISA programs such as contributing to health savings accounts or offering on-site medical clinics. At the end of the day, an employer would either have to increase its health care spending via ERISA employee benefit plans or pay the difference between 8% of its total payroll and the amount it spends on health benefits. The Fourth Circuit concluded the Act offers employers no reasonable choices except to change the manner in which they design their employee benefit plans. As such, the court determined ERISA preempts the Act because the Act directly relates to the manner in which employers provide health benefits to employees.

State Health Care Legislation

Health care remains a primary focus for state legislatures and Congress and a hot topic for individuals campaigning for the 2008 presidential election. Last year, 28 states introduced legislation requiring large employers to spend a certain amount of their payrolls on health care. Of those, 15 states' proposals contained provisions similar to Maryland's Act. By the end of the year, each of the 28 proposals either died in committee or was voted down.

With legislative sessions beginning, health care remains a priority for many state legislatures. To avoid an outcome like that in Maryland, drafters of legislation must contemplate ERISA's broad preemption provisions. Many states are looking to the Massachusetts

Health Care Access and Affordability Act (the "Health Care Reform Act") as a model. Unlike Maryland's Act, the Massachusetts Health Care Reform Act is directed primarily at requiring residents to obtain health care coverage and imposing certain requirements on employers to offer affordable health care to their employees or risk paying an assessment to the state. Please refer to our April 2006 *Employment Applications* for details on the Massachusetts Health Care Reform Act. We note that the Health Care Reform Act has not yet been challenged with respect to ERISA preemption and could still face judicial scrutiny. Whether state health care laws survive ERISA preemption will depend largely on the manner in which the bills are drafted and whether such proposed laws interfere with ERISA's goal of providing uniform laws relating to employee benefit plans.

By Kathryn M. Magli

Management-Labor Updates

Organizing Efforts

- What is a “Corporate Campaign”?

“A corporate campaign is an organized assault by a union or some other group, literally a form of warfare designed to undermine a company’s relationships with key stakeholders and to define that company as an outlaw that must be stopped before it does further damage to our society.”

- Jarol B. Manheim, Professor of Media and Public Affairs and of Political Science, The George Washington University.

- UNITE HERE, one of seven unions affiliated with Change to Win, has publicly announced that over 50% of its 2007 national budget will go toward organizing employees. The union’s General President recently stated that “*there is no reason to subject workers to NLRB elections*” and that “*our union – now organizes exclusively through card checks and neutrality agreements.*” Moreover, Change to Win is making the Employee Free Choice Act (“EFCA”) a 2007 congressional priority. According to UNITE HERE, under EFCA, card checks may become an accepted form of union recognition even *without* management’s preapproval and “would strengthen penalties for the kind of union busting activities that are common today.”

The continued message this sends to employers is threefold. First, like the AFL-CIO unions, the unions affiliated with Change to Win have large financial reserves earmarked to spend on organizing employees. Second, the top-down organizing programs of the Change to Win unions are not the traditional

NLRB-supervised elections most employers are familiar with. Rather, these campaigns are designed to exert multiple economic and political pressures on companies to succumb to card check or neutrality agreements. Finally, if legislation such as EFCA is passed into law, a company may be required to recognize the union without management’s preapproval.

Recent NLRB Court or Administrative Cases

- The National Labor Relations Board will hear oral arguments on March 27, 2007 in *The Guard Publishing Company*, Cases 36-CA-8743-1, et al. Guard Publishing has a policy prohibiting use of its e-mail “to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.” The issues presented include whether employees have the right to use their employer’s e-mail (or other computer-based communications system) to communicate with other employees about union or other concerted protected activity. This decision merits watching and may have a significant impact on unionized and nonunionized employee workforces.

Politics, Labor Legislation and General Information

- Two pieces of legislation that employers should watch for in the 110th Congress are the Employee Free Choice Act, sponsored by organized labor, and the Secret Ballot Protection Act, largely sponsored by business interests.

The Employee Free Choice Act would, in effect, gut the current

employer protections under the National Labor Relations Act by eliminating a secret ballot election process and replacing that process with a “card check” method of union organizing. Numerous federal courts have recognized that card checks provide a less accurate reflection of employee desires than secret ballot elections. Card check campaigns are often accompanied by accounts of union threats and intimidation against employees and their families. Moreover, in corporate campaigns, card checks are used by organized labor to pressure employers to accept card checks or neutrality agreements when it is not clear that a majority of employees even support the union.

Under current law, a secret ballot election is permitted, but not required. The Secret Ballot Protection Act (H.R. 874/S 1173) would require government-supervised elections for union recognition. The bill’s sponsors believe it would eliminate some of the abuses by organized labor in card checks and neutrality agreements.

By James M. Gary

Fifth Circuit Breathes New Life Into 'Engaged in Interstate Commerce' Defense to FLSA Claims

On January 4, 2007, the Fifth Circuit Court of Appeals, in *Sobrinio v. Medical Center Visitor's Lodge, Inc.*, No. 06-20671, 2007 WL 14587 (5th Cir. Jan. 4, 2007), dismissed a motel employee's minimum and overtime wage claims, finding that he was not "engaged in interstate commerce" when performing his job duties.

Gregorio Chavez Sobrinio brought suit against his employer, Medical Center Visitor's Lodge ("MCVL"), complaining that he was paid below the minimum wage and was not properly compensated for overtime, in violation of the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. §§ 201-19. While disputing Sobrinio's claims, MCVL moved for summary judgment in the district court on the threshold issue of whether or not Sobrinio was covered by the FLSA through his employment with MCVL.

The FLSA provides minimum wage and overtime protection to an employee who is (1) engaged in commerce; (2) engaged in the production of goods for commerce; (3) employed in an enterprise engaged in commerce; or (4) employed in the production of goods for commerce. 29 U.S.C. §§ 206(a), 207(a). Sobrinio argued that he was entitled to the FLSA's protection because he was "engaged in commerce" when performing his job duties. The district court sided with MCVL and granted its motion for summary judgment, finding that Sobrinio was not covered by the FLSA. On appeal, the Fifth Circuit Court of Appeals affirmed.

The Fifth Circuit examined Sobrinio's job activities and applied a "practical test" in determining whether or not Sobrinio personally engaged in interstate commerce. The test, the court noted, "is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it rather than isolated local activity. There is no *de minimis* requirement. Any regular contact with commerce, no matter how small, will result in coverage." (citations omitted).

Sobrinio alleged that he provided a variety of services at the 18-room motel that houses patients (and their families) seeking treatment at a nearby medical center. He worked as a janitor, security guard and driver for the motel's guests, who were often from out of town. Sobrinio argued that by transporting out-of-state patrons, he engaged in interstate commerce and therefore was entitled to the FLSA's protections. In support of his claim, Sobrinio relied on Circuit Court of Appeals cases finding coverage for drivers transporting guests to and from airports.

The Fifth Circuit distinguished these cases, holding that Sobrinio's activities, unlike the employees who transported travelers to and from interstate and international transportation points, were "purely local in nature" and fell outside the FLSA's protections. Even though many of the guests may have been out-of-state, the court noted that

it did not alter the local quality of Sobrinio's work. The court pointed out that Sobrinio's "activities took place outside the stream of travel, after MCVL guests arrived from out-of-state and before they began their departure journeys. His job description amounts to nothing more than providing local transportation for motel patrons."

The Fifth Circuit's ruling provides additional support for employers seeking dismissal of an employee's claim under the FLSA. However, the court's opinion also reminds employers that Sobrinio's claim that he was "engaged in commerce" was "more exacting than the test of whether his occupation is necessary to production for commerce." Employees can be covered under either test, and the latter test more often results in a finding of coverage by the FLSA.

By Stacia G. Boden

This Issue's Authors

Daphne H. Aronson is Kutak Rock LLP's National Director of Diversity. She focuses on the recruitment, retention and advancement of attorneys from diverse backgrounds. Ms. Aronson also practices in the area of public finance.

Stacia G. Boden focuses on disputes involving allegations of discrimination, harassment and retaliation and often counsels employers on day-to-day employment issues. Most recently, she has defended employers in wage-and-hour and Fair Labor Standards Act violations.

James M. Gary concentrates his practice on the representation of companies on a nationwide basis in traditional labor and employment law. He represents companies in Railway Labor Act and National Labor Relations Act matters and has represented employers in employment discrimination and wage/hour litigation. Mr. Gary also counsels corporations with respect to labor and employment issues arising out of corporate transactions, including mergers and

acquisitions, corporate downsizing and financial restructuring.

Kathryn M. Magli concentrates her practice primarily in the area of employee benefits and ERISA, including health and welfare plans, qualified and nonqualified retirement plans, employee stock ownership plans and executive compensation arrangements. Her 15 years of HR and benefits management experience encompasses three business sectors, including manufacturing, construction and nonprofit trade organizations.

Alan L. Rupe is a trial lawyer certified by the National Board of Trial Advocacy and member of the American Board of Trial Advocates. He chairs Kutak Rock's National Employment Practice Group. Recognized for his distinctive courtroom style, skilled advocacy and personal involvement in his clients' cases, Alan brings to the table over 30 years experience advising clients and in litigation. He has served as lead counsel in more than 120 civil jury trials.

Kutak Rock LLP's law practice embraces a wide array of legal disciplines, including general corporate practice, litigation, tax, government relations, corporate finance, banking, real estate, telecommunications, health care, bankruptcy, insurance, public finance and environmental law. Founded in Omaha in 1965, the firm has expanded to 15 offices nationwide. The firm's more than 370 attorneys direct their individual professional skills toward the common goal of providing the firm's clients with excellent, comprehensive legal services.

For more employment law news and information, check our Web site: www.KutakRock.com.

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