

BEWARE: VERBAL PROMISE OF CONTINUED EMPLOYMENT RECOGNIZED

On August 1, 2007, the U.S. Court of Appeals for the First Circuit recognized the binding effect, under Puerto Rico law, of a *verbal* promise made by a high level officer of a parent corporation to the manager in charge of a *subsidiary's* operations in Puerto Rico, to the effect that he would continue employed within the organization even if Puerto Rico operations were terminated as part of a contemplated company-wide reorganization.

In doing so, the court upheld a jury verdict granting the manager contractual damages in excess of \$613,000 for back pay, front pay (approximately 7 years pay until the employee's contemplated retirement) and benefits, because the manager was not retained and relocated when the Puerto Rico operations were closed down 16 months later. *Muñiz-Olivari v. Stiefel Laboratories, Inc.* (1st Cir., August 1, 2007).

The jury had also awarded \$200,000 to the employee and his wife to compensate them for their mental anguish and sufferings resulting from the breach of the promise. Uncertain whether such emotional damages are recoverable under Puerto Rico law in breach of employment contract actions, the First Circuit ordered the trial court to request a ruling on the issue from the Puerto Rico Supreme Court.

Comments: Curiously, the court limited the certification request to the emotional damages issue. It would have appeared more appropriate to also request a ruling on whether Puerto Rico law recognizes such *verbal continued* employment contract claims when an employee is terminated rather than relocated to another subsidiary, as allegedly verbally promised.

The Puerto Rico Supreme Court has consistently held that absent independent tort or damage claims (such as discrimination, defamation, breach of privacy), Puerto Rico's Wrongful Discharge Act,

Law No. 80 of May 30, 1976 is the *exclusive* remedy for a wrongful discharge of an employee hired for an indefinite period of time. Further, when the Puerto Rico Supreme Court has deviated from this doctrine, it has been in the context of a breach of a *promise to hire* or when the employer has promised in writing that the employee would be retained for a stated minimum period. *Montalvo v. Ceramic Enterprises*, 107 D.P.R. 698 (1978); *Santiago Quiñones v. Atlantic Southern Ins. Co.*, 108 D.P.R. 47 (1978).

Permitting verbal contractual claims absent a statement as to the duration/term of the continued employment promise; with no clear evidence the employee notified acceptance of the offer when made; no evidence that the employee provided something in return in consideration for such an uncommon promise of continued employment for an indefinite period of time; or that the employee suffered a harm resulting from the reliance on the verbal representation, may fatally affect the Law No. 80 "exclusive remedy" doctrine and give rise to a multiplicity of new verbal promises of continued employment claims.

To reduce this risk, employers should, at a minimum, revise their application forms, offer letters, employment contracts, probationary period agreements and personnel manuals to state that (1) the employment is "at the will of both parties" and not for any specific period of time, and (2) absent a *written document*, signed by a designated company officer or executive, no supervisor or manager is authorized to alter the nature of this relationship.

Corporation President Personally Liable for Wage-Hour violations

The First Circuit also upheld a trial court's decision imposing *personal* liability on the president of a hotel for multiple minimum wage and overtime violations, including paying

employees less than minimum wage, not paying for training or meetings held during non-working hours, paying in cash "off the books," and not paying appropriately for overtime. *Chao v. Hotel Oasis* (1st Cir., June 28, 2007).

In this case, the district court had entered judgment against the corporate entity and its president, ordering them to pay \$ 141,270.64 in back wages and an equal additional amount in liquidated damages to 282 current and former employees

The First Circuit agreed that imposing an additional amount equal to the total amount due (as liquidated damages) was appropriate, since the hotel's failure to keep adequate payroll records and intentional manipulation of the records it kept, were sufficient to show it did not act in good faith or with a reasonable belief that it was in compliance with the FLSA.

The district court had found that the hotel failed to keep accurate records of the employees' time worked, disguised minimum wage and overtime pay violations, did not record the amounts of cash tips, and paid employees off the books. It maintained two sets of payroll records for the same employees, covering the same time periods, one showing fewer hours at a higher rate, and the other showing more hours at a sub-minimum wage rate.

While cautioning that not all supervisors or managers are liable for wage and hour violations, the court upheld the imposition of personal liability on the president under an "economic realities" test. Here, the president had ultimate control over day-to-day operations and was principally in charge of directing employment practices, such as hiring and firing employees, requiring employees to attend meetings unpaid, and setting employees' wages and schedules. Accordingly, he was instrumental in "causing" the hotel's violations.

LEGISLATIVE WATCH

The following highlights several employment related laws recently enacted in Puerto Rico and employment related bills presently pending before the Puerto Rico Legislature that have evidenced significant recent activity.

Should you wish to monitor these or other bills more closely, or to communicate your point of view on these matters, feel free to contact us. O'Neill & Borges maintains an experienced "Government Affairs" practice group that handles such requests.

NEW LAWS

Plant Closings. The lobbying efforts of several employer groups culminated in the approval of Puerto Rico's Law No. 95 of July 30, 2007. This law *overturns* an unpublished but frequently cited Puerto Rico Supreme Court judgment against Baxter Healthcare, which held that the closing of one plant of a multi-site employer was not "just cause" under Puerto Rico's Wrongful Discharge statute (Law No. 80 of May 30, 1976) for the discharge of the employees working in said plant, when the employer transferred production to other plants in and/or outside of Puerto Rico.

Although Law No. 80 has always provided that the employer's closing of the operations of an "establishment" is "just cause" for the discharge of the employees working at the establishment, in the Baxter Healthcare decision the Supreme Court had treated the term "establishment" to signify "employer." Accordingly, since the "employer" (Baxter Healthcare) continued operating in Puerto Rico, the majority of the judges had held defendant could not invoke this provision of Law No. 80 to avoid wrongful discharge liability.

The Legislature, in approving the bill, indicated it simply clarified the original text of Law No. 80, to eliminate any doubt that the term "establishment" refers to physical or geographical site. The term does not refer to the "employer." Thus, an employer operating several establishments or sites (e.g., plants, factories, branches, offices, stores), meets the initial "just cause" requirement if it discharges the employees working at the affected site when it shuts down the establishment.

Comment: Multi-site employers are cautioned that Law No. 95 did not amend another section of Law No. 80, which provides that when a multi-site employer (1) maintains a "practice" of "usually and regularly" transferring employees from one establishment to another, and (2) the establishments operate in a "substantially

integrated manner with regard to personnel aspects,” the “seniority rules” described in Law No. 80 must be applied in layoffs, by comparing the employees of the adversely affected establishment with those employees in the same “occupational classification” who work at the other integrated but unaffected site(s).

Given the absence of statutory definitions for the above quoted terms, multi-establishment employers should consider developing a policy addressing the potential closing of one or more sites or, at least give careful consideration to the significance of these terms when developing a single site shut down plan.

BILLS RECENTLY PASSED

Payroll Debit Cards Approved. House Bill 2920 (*Del Valle Colón, Méndez Núñez-PNP*) was approved by both legislative bodies on June 30, 2007 and, if signed by the Governor, will authorize the payment of salaries to private sector non-exempt employees thru stored value cards (known by a variety of names, including payroll cards, payroll debits cards, and debit cards), as well as establishing additional requirements when paying such employees’ salaries thru electronic bank transfer mechanisms.

The bill will amend Puerto Rico’s Law No. 17 of April 17, 1931, which regulates the payment and permissible deductions to the salaries of private sector non-exempt employees (those who are not “executive,” “administrative,” or “professional” employees).

In 1995, Law No. 17 was updated to specifically authorize payment of salaries by check and to permit employees to voluntarily agree to salary payments thru direct deposits or electronic transfers to the employee’s check or savings account, provided (1) the funds are available on the payday; (2) in a bank of the employee’s selection; (3) the employer delivers a voucher to the employee indicating the amount of the payment and any deductions; (4) and no costs are imposed upon the employee in connection with the salary payment system.

The bill adds to the list of permissible salary payment systems the use of *payroll debit cards*. The pay card is a prepaid, reloadable (“stored

value”) debit card issued through a national or regional bank that takes the place of paper paychecks. In these systems each payday, the pay card is electronically preloaded with value in the full amount of the employee’s net pay. The employer will still need to provide the employee with a statement of gross earnings and an itemization of all deductions. Further, the requirement that no costs be imposed upon the employee in connection with the salary payment system remains intact.

The payroll card provides electronic pay even if the employee does not have or cannot get a conventional bank account. Using pay cards, the employees can access their pay in numerous ways, which vary according to the features offered by the program provider. Typically, pay cards will offer ATM withdrawals and PIN point of sale (POS) transactions. Pay cards may also provide for a “cash back” feature as part of the POS transaction. The amount of cash an employee can obtain will depend on the individual merchant’s policy. Pay card programs also typically offer one or more of a variety of other withdrawal features or mechanisms to transfer money from the payroll card to a standard bank account. Pay cards can also be branded with the Visa, MasterCard or similar network marks or with the ATM and point of sale (POS) debit network marks.

The bill provides that in all cases the employer must provide employees with pertinent information on electronic fraud as well as the responsibilities imposed up the employee, the employer, and the banking institution in connection with electronic fraud in non-cash salary payment systems.

Finally, the bill liberalizes the manner in which the employer can provide the statement of earnings and deductions. In addition to the traditional “paper voucher,” the employee can authorize the employer to provide the information by phone, fax, or Web portal access.

Vetoed-Payment of Trucker’s Worker’s Comp.

The Governor *vetoed* Senate Bill 753 (*Parga Figueroa-PNP*), which would have required the *client* of independent truckers to include the trucker and his drivers in *the client’s* “worker’s accident compensation insurance” policy.

PENDING BILLS

The following highlights several employment related bills presently *pending* before the Puerto Rico Legislature:

Domestic Violence Victims May Be Eligible For Unemployment Benefits

House Bill 2134 (*Rivera Ramirez-PNP*) was passed and sent to the Governor, on June 18, 2007. The House subsequently requested the bill be returned for its reconsideration. On June 22, 2007 the House approved the bill with amendments, but the Senate failed to approve it during the final days of the recently concluded session. Upon enactment, the Employment Security Act would authorize granting unemployment benefits to persons who are unable to work due to domestic violence or who abandon employment in order to protect the employee's or her/his children's physical or emotional well-being.

Reinstatement Remedy under Law 80 for Older Employees

House Bill 1196 (*Torres Cruz-PPD, Méndez Núñez-PNP*) received a positive report on June 24, 2007 from the Senate's Government and Labor Affairs Committee. That same day, the bill was sent back to the Committee. The bill proposes to amend to the Wrongful Discharge Act, Law No. 80 of May 30, 1976, in order to grant employees over the age of 55 and with more than 5 years of service, a *job reinstatement* remedy, in addition to the monetary indemnification already provided for under the Act.

REGULATION-EMPLOYEE INFORMATION

On June 26, 2007, the Puerto Rico Secretary of Consumer Affairs issued "Regulation 7376", which requires all business entities that maintain "*personal information*" of its employees or clients, to notify its owners *and* the Department of Consumer Affairs, of any security breach, immediately following discovery of the breach, if personal information was or is reasonably believed to have been accessed by any unauthorized person. The Regulation also specifies the manner in which the notification is to be performed.

The protected "personal information" includes an individual's name or first initial and last name in combination with any of the following information that can be read without a special cryptographic authentication code: the person's security number; electoral identification card; driver's license number or other form of identification; user names, passwords or access codes; medical information protected by HIPAA; banking or financial account or debit or card number (with or without any security or access code that may be assigned); tax information; and employment evaluations.

Failure to comply with the notices may result in fines ranging from \$500 to \$ 5,000 per breach.

O'Neill & Borges New Website

In our June 2007 Legal Alert we notified the launching of O&B's redesigned website. The link to our website is: <http://www.oneillborges.com/>

We particularly invite you to access the News & Events section of the website, where you will find several of our more recent Labor & Employment newsletters.

Note: Because of the general nature of this Labor Newsletter, nothing herein should be considered as legal advice or a legal opinion. For further information, please contact our labor and employment lawyers.

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