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LABOR AND EMPLOYMENT NOTES
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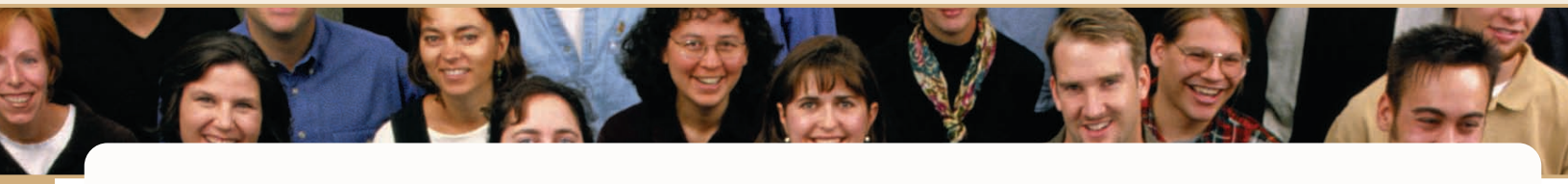

E-MAIL ARBITRATION NOTICE INSUFFICIENT TO BAR ADA SUIT

Employers which rely on e-mail correspondence to notify employees of benefit changes or other alterations in the terms and conditions of employment should take note of a decision in the Federal First Circuit Court of Appeal, decided May 23, 2005. In *Campbell v. General Dynamics Govt. Systems Corp.*, 407 F.3d 546 (1st Cir. 2005), the Court held that an e-mail announcement regarding a new dispute resolution policy was insufficient to put employees on notice that the policy was a contract that extinguished their right to litigate federal employment discrimination claims.

Plaintiff was a full-time, salaried, at-will employee of General Dynamics, who was terminated for persistent absenteeism and tardiness. Plaintiff alleged that his infractions were due to sleep apnea, which should have been reasonably accommodated under the Americans with Disabilities Act (ADA). General Dynamics claimed the dispute required arbitration pursuant to the Federal Arbitration Act and the company's new dispute resolution policy. The Court disagreed, focusing on whether the e-mail announcement provided sufficient notice that continuing to work amounted to a waiver of plaintiff's right to have a judge resolve his ADA claim.

The e-mail announcement included two embedded links which directed employees to documents explaining the policy in detail. The new policy was also posted on the firm's intranet. Plaintiff claimed he received 10 to 100 e-mails per day, claimed he did not review the embedded link documents, and never received actual notice that the company might alter the terms of his employment.

The Court noted that although the company's preferred means of past communication was via e-mail, there was no showing of other instances where the company relied on e-mail or intranet posting to introduce a contractual term that would be a condition of continued employment. The text of the e-mail itself also failed to give employees fair warning that continuing to come to work would result in the waiver of important rights. There was no direct statement of waiver, its tone and choice of phrase downplayed the obligations outlined in the policy, and contained no language that arbitration was mandatory. No part of the e-mail communication required a response acknowledging receipt of the new policy or signifying that the recipient had read and understood its terms.

Significant alterations in benefits or terms of employment should be communicated in writing to employees and require a written acknowledgment signed by the employee that he has received, reviewed, and understood the change, which should be placed in the employee's personnel file. If conducted electronically, employers should take care to insure that a mechanism is in place to verify that the employee has seen, reviewed, and accepted the change.

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DOES THE REQUIREMENT APPLY?

Employers covered by the National Labor Relations Act ("the Act") sometimes forget about requirements of the Act which apply even when the employer does not have employees represented by a union. One example relates to Section 8(a)(2) of the Act and the issue of employee committees. Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation of any labor organization or contribute financial or other support to it."

The decision of the National Labor Relations Board ("the Board") in Electromation dealt with issues of what constitutes a "labor organization" and "domination."

The Board in Electromation indicated that employee committees can sometimes fall within the meaning of a "labor organization" for purposes of the Act stating in part that:

. . . the organization at issue is a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of "dealing with" employers, and (3) these dealings concern "conditions of work" or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment.

The Board in Electromation also indicated that finding illegal "domination" is sometimes not very difficult stating in part that "[a]lthough section 8(a)(2) does not define the specific acts that may constitute domination, a labor organization that is the creation of management, whose structure and function are essentially determined by management . . . and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2)."

Covered employers should consider the applicable decisions interpreting Section 8(a) (2) of the Act before establishing employee committees.

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