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## Law @ Work Employer Newsletter - The Savvy Employers Guide to Legal Developments & Quirks that Affect the Workplace

Newsletter

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Welcome to the third edition of the Law @ Work Employer Newsletter. For those of you who read the Law @ Work blog, you know that the blog offers an in-depth analysis of important legal developments. This Newsletter fills in the blanks, focusing on the overlooked stories that are entertaining and good fodder for learning. Think of it as an ever-evolving employment manual for employers because it is always better to learn from someone else's mistakes.

### **The DOL Goes To Church**

The U.S. Court of Appeals for the Sixth Circuit sided with a church operating the Lords Buffet and against the Department of Labor (DOL) in a case testing the reach of the Fair Labor Standards Act (FLSA). In *Acosta v. Cathedral Buffet, Inc.*, the appellate court reversed a trial court ruling and held that volunteers who staffed a church-operated buffet are not employees and the Grace Cathedral Church did not run afoul of the FLSA by failing to pay the volunteers minimum wage. The DOL claimed the church and its televangelist pastor illegally used unpaid labor by staffing its buffet with volunteers from the congregation. In this case, the church operated the buffet restaurant for a religious purpose: to allow church members to proselytize to patrons. Its operations relied heavily on church volunteers who worked alongside paid employees performing the same work. While the work performed was comparable to that of an employee, the Sixth Circuit held the DOL overstepped the bounds of the FLSA by applying it to the volunteer workforce. In part, the Court's decision relied on a determination that the volunteers had no expectation of payment and were not economically reliant on the work of the church.

***Savvy employer takeaway: Employers with charitable missions and those who support charities must be careful to delineate work from volunteer activities to avoid claims that the volunteers should have been paid for their activities.***

### **Not-So Silent Partner May Have Individual Liability Under the FLSA**

In *Malee v. Anthony & Frank Ditomaso, Inc.*, the Court served a surprise to a shareholder of a corporation that owned a restaurant, who sought to be dismissed from a FLSA case brought by employees of the restaurant. The shareholder alleged he did not participate in the business on a day-to-day basis and, therefore, was not an employer within the meaning of the FLSA. The Court refused to dismiss the claims, finding that the shareholder's attendance at staff meetings, and advice on operating the business created a triable issue of fact as to whether the shareholder was, in fact, an employer within the meaning of the FLSA.

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***Savvy employer takeaways: The FLSA and overlapping state wage and hour laws often impose individual liability on officers, owners, and others involved in decisions to deprive employees of wages owed.***

#### **Fast Food Chain Turns \$626 Loss Into Nearly \$8 Million**

When Chipotle Mexican Grill Inc. fired store manager Jeanette Ortiz, accusing her of stealing \$626 in cash from the safe, it could never have expected its minimal theft loss to balloon into a nearly \$8 million jury verdict against it for wrongful termination of Ortiz. Even worse, an assessment of potential punitive damages against Chipotle in that case is still pending. Nevertheless, according to an article in the *Fresno Bee*, jurors awarded Ortiz nearly \$8 million after finding that Chipotle had wrongfully terminated her. According to Ortiz, she was innocent of theft and was set up in retaliation for filing a claim for workers compensation benefits due to a work-related wrist injury. The article reported Chipotle had video of the theft but refused to show it to Ortiz and eventually taped over the evidence. Apparently, Chipotle failed to preserve text messages and other written notes about the firing as well. Although the article does not elaborate, it is quite likely the jury reached an adverse inference that the missing evidence would have been helpful to Ortiz in proving her case.

***Savvy employer takeaways: While it is impossible to know for sure how much weight the missing evidence had on the jury's decision, employers are wise to preserve all evidence relating to employee misconduct to avoid even an appearance of wrongdoing. As in politics, although the original offense is bad enough, the ensuing cover-up is always worse.***

#### **Employment Law Myth Busters The Unenforceable Non-Compete**

Non-compete and other restrictive covenants are commonly used by employers in many industries to protect their trade secrets and legitimate business interests. While employees may be willing to sign them when they take a new position, they are often frustrated by them when it comes time to look for a new job. Some employees take to Google to see if their agreement is enforceable. What they find on Google often provides them with false confidence that their non-compete or other restrictive covenant is unenforceable, but relying on Google research in the complicated, fact-sensitive legal morass of non-compete agreements is risky business. True, a Google search can turn up numerous court opinions that express the view that non-competes are viewed unfavorably by courts as anti-competitive restraints on trade and, as such, are narrowly construed and enforced only to the extent that they protect a legitimate business interest of an employer. However, those cases may or may not be useful in deciding whether *your* restrictive covenant is likely to be enforced. First, the law governing non-competition agreements varies from state to state. Thus, an opinion by a court in California applying California law (which bars enforcement of restrictive covenants except under specific, narrow circumstances), for example, is of little help in assessing whether a court in New Jersey or Pennsylvania, where non-competes are routinely enforced, is likely to enforce a restrictive covenant under that states laws. Making the analysis even more complicated, courts decide whether to enforce restrictive covenants based upon a thorough review of the specific language used in the agreement; even slight variations in the language of the agreement can lead to vastly different results. In addition, because they are viewed as anti-competitive, a court will generally enforce one only if it is well drafted so that its restrictions narrowly target the business interests at issue and nothing more. The finer points of

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enforcing restrictive covenants, such as non-competes, are too detailed to address here, but employees with employment agreements that contain restrictive covenants and businesses that are hiring employees subject to them should not rely on Google to assess their enforceability or their liability for a breach.

***Savvy employer takeaways: Employers should have an experienced employment lawyer evaluate the enforceability of their employees post-employment restrictions and the enforceability of post-employment restrictions by which prospective employees may be bound. Employers should also require candidates to disclose whether they are subject to any restrictive covenants before offering them employment.***

For more information, including news, updates and links to important information pertaining to legal developments that affect businesses ranging from cyber security liability arising from electronically-stored information to evolving issues with employees, subscribe to my blog, or follow me on Twitter @AdamGersh.