In recognition of its growing employment practice, the firm has created an Employment Services Group. The firm has offered employment-related services to its clients for years under the umbrella of the firm’s Litigation Services Group. The number of lawyers who provide employment-related services has grown steadily, as has the variety of those services. The firm therefore decided to create a separate Employment Services Group, which boasts nine lawyers.

“When the employment practice was under the Litigation Group, we were concerned that we were sending the message that our employment law practice was focused upon litigation. In reality, although we have experienced litigators who have an impressive number of wins for our employment law clients, we are as focused upon counselling and human resource strategies that help clients avoid litigation,” said Suzanne L. DeWalt, the Chair of the Employment Services Group. Eric C. Springer, a Managing Shareholder of the firm noted, “The formation of a separate Employment Services Group is an acknowledgment of how important this specialty area has become to our corporate and executive clients.”

The firm’s Employment Services Group provides a variety of employment-related services:

- Counseling businesses, individuals and labor organizations on employment matters
- Drafting and negotiating employment agreements, collective bargaining agreements, non-competition and non-solicitation agreements
- Negotiating employment contracts on behalf of physicians and health professionals
- Creating employee handbooks and personnel policies
- Representing businesses and executives in non-compete and other post-employment restriction matters
- Defending businesses against discrimination, wrongful discharge and other claims brought by employees
- Representing executives and businesses in severance matters
- Counseling and representation of businesses and labor organizations on union and collective bargaining issues

Several members of the Employment Services Group have significant experience in representing physicians and health professionals in employment matters. The formation of the group has greatly facilitated collaboration on physician representation among the firm’s lawyers, with significant benefit to its physician clients. “Representing physicians and physician practices brings its own unique set of employment law concerns. Having an Employment Services Group is another way we continue to refine and coordinate our rich employment law resources to deploy on behalf of our clients,” observed W. Chad Pociernicki, Shareholder and Director.

For more information about the SGK Employment Services Group, please visit the Employment Services Group webpage at www.sgkpc.com.

Suzanne L. DeWalt
Shareholder and Director
Chair – Employment Services Group
EMPLOYMENT LAW UPDATE:
Pennsylvania Supreme Court Decides That “Magic” Language Cannot Fix an Unenforceable Non-Compete Agreement

It happens a lot – an employer wants an existing employee to sign a non-compete agreement. Either the employer is worried the employee intends to start working for a nearby competitor or the employer is starting to get her employment documents in order for a growing business and realizes she never had her employees sign a non-compete agreement. Whatever the employer’s motivation, Pennsylvania courts have long required the employer to offer the existing employee a “significant benefit” if she wants the non-compete to be enforceable in the future. This proposition was recently confirmed in a landmark ruling by the Pennsylvania Supreme Court in Socko v. Mid-Atlantic Systems of CPA, Inc.

When an employee signs a non-compete at the beginning of employment, the employer doesn’t have to offer significant benefit to the employee; the job itself is enough. But if a Pennsylvania employer misses that window at the start of employment, she must give the employee a significant additional benefit, what is often called “adequate additional consideration” in legal terms, for the non-compete to be enforceable. For an employer who has failed to sign an employee to a non-compete at the beginning of employment, there is no bright-line test for what passes as adequate additional consideration under Pennsylvania law. For an employee who signed a non-compete only after the start of his employment, this lack of a bright-line test often creates an equal uncertainty about whether he can later accept a new job with a competitor.

Few like uncertainty, particularly when business interests and careers are at stake. When the Supreme Court of Pennsylvania accepted the Socko appeal, it appeared poised to reverse precedent by eliminating the requirement that the employer provide adequate additional consideration to an existing employee in exchange for a viable non-compete agreement. If it had done so, Pennsylvania would have joined the majority of jurisdictions, who do not require an additional significant benefit to obtain an enforceable non-compete with an existing employee. Instead, in Socko, the Pennsylvania Supreme Court re-affirmed prior precedent. In so doing, it has perpetuated the uncertainty for employers and employees alike, forcing both employers and employees to engage in a very careful review of the facts to determine whether an enforceable non-compete exists if the agreement wasn’t signed at the start of employment.

Socko resigned in January 2012 and went to work for a competitor. Mid-Atlantic sent Socko’s new employer a copy of his third non-compete covenant, and Socko was discharged. Socko then sued Mid-Atlantic and sought, among other relief, a declaratory judgment that the covenant was unenforceable. In support of his contention that the non-compete was unenforceable, Socko argued that he did not receive a significant benefit for signing the non-compete, as is required under Pennsylvania law.

Interestingly, the Socko case also interpreted Pennsylvania’s Uniform Written Obligations Act (“UWOA”). Pennsylvania’s UWOA provides that an agreement in writing “shall not be invalid or unenforceable for lack of consideration if the writing also contains an additional express statement [] that the signer intends to be legally bound.” In conformity with the UWOA, Socko’s third non-compete contained the parties’ express commitment to be “legally bound.” Mid-Atlantic argued that it didn’t have to give Socko a significant benefit or adequate additional consideration because the UWOA’s language was sufficient.

The trial court held that Socko’s covenant was invalid, finding that a restrictive covenant executed by an existing employee who received no benefit other than continuing employment is unenforceable. Mid-Atlantic appealed to the Pennsylvania Superior Court, who affirmed the trial court decision. In so doing, the Superior Court ruled that a contract without benefit to one of the parties, even a contract containing the “to be legally bound” language recognized under the UWOA, will be deemed invalid for lack of adequate consideration. The court reasoned that even though Socko’s 2010 employment agreement included an intent “to be legally bound” in conformity with the UWOA, the employment agreement conferred no benefit to

The Socko case involved a salesman for Mid-Atlantic, a basement waterproofing company. In both 2007 and 2009 the employee, David Socko, signed two-year employment agreements. Each agreement restricted him from working for a competitor for two years after he stopped working for Mid-Atlantic. Later, in 2010, Mid-Atlantic required Socko to sign a third non-compete. It was more restrictive, expressly superseded the other two, and prohibited competition for two years anywhere that Mid-Atlantic did business.
Socko. Mid-Atlantic then appealed to the Supreme Court of Pennsylvania.

In its appeal to the Pennsylvania Supreme Court, Mid-Atlantic stressed that, as a matter of law, the UWOA barred Socko from challenging the validity of the covenant for inadequate consideration. In support of this position, Mid-Atlantic argued that the UWOA is unambiguous and contains no exceptions. Therefore, courts do not have the power to legislate under the guise of statutory interpretation to avoid the UWOA. Socko countered that Mid-Atlantic’s argument ignored the public policy inherent in a long line of decisions invalidating restrictive covenants that are executed after the commencement of employment without substantial benefit to the employee. With these opposing positions staked out, many practitioners and commentators predicted that Pennsylvania’s Supreme Court was poised to reverse long-standing precedent and embrace Mid-Atlantic’s argument.

Instead, precedent held firm. The Supreme Court agreed with Socko and reaffirmed existing case law that the exchange of consideration is critical to the enforcement of all contracts. The Supreme Court observed that the analysis of non-compete covenants in the employer-employee context is unique and requires rigorous scrutiny. Thus, because the UWOA does not expressly provide that it applies to employment-related covenants, it cannot reasonably be interpreted as eliminating the necessity of the provision of a benefit to the continuing employee in exchange for the execution of a non-compete.

There are several important takeaways from the Socko decision:

First, employers should sign the employee to a non-compete at the very beginning of the employment relationship if the employee will receive confidential information or will be entrusted with customer, supplier and other important business relationships. Don’t wait until it is more difficult to protect business interests. For employees considering a job offer that contains a non-compete, carefully consider the restrictions and seek counsel before signing it. An employee’s ability to negotiate the non-compete is strongest before the employee accepts the employment.

Second, if the employer wants to have an existing employee sign a non-competition provision, the employer must provide the employee with a significant additional benefit that the employee is not otherwise entitled to receive. New and valuable consideration can take the form of a salary increase (if it is larger than a normal raise), bonus payment, new or enhanced stock options or a true promotion. However, because there is no bright-line test for determining whether adequate additional consideration is present, employers are best served by consulting with a lawyer who is experienced in the drafting and enforcement of non-competes for guidance to maximize the likelihood that the non-compete is enforceable.

Third, the courts disfavor non-competition agreements. Employers therefore need to be careful about the terms of the non-compete. The non-compete must be reasonably necessary for the protection of an employer’s legitimate business interests and reasonably limited in scope, duration, and geographic coverage. Because the non-compete must be carefully tailored to the individual business, a “one size fits all” drafting approach usually will not work. Employers should be wary of canned non-compete agreements or any agreement copied from the internet as they may not fit the business needs and may not be compliant with applicable law, which varies from state to state. For employees who have a non-compete with their current employer and wish to change jobs, don’t assume that a court will enforce the non-compete as written. Seek guidance on the likely scope and enforceability of the non-compete and plan the exit from the current employment to reduce the chances that the new employment will result in a successful threat or lawsuit from the former employer.

If you have any questions or would like more information on the issues discussed above, please contact Beverly A. Block, Esquire at 412-355-0200 or email to bab@sgkpc.com, or any member of the Employment Services Group.

INSIDE SGK

A NEW ATTORNEY HAS JOINED THE FIRM:

William T. Fahey III is a member of the firm’s Energy and Natural Resources and Real Estate Services Groups. He focuses his practice on oil and gas, title, real estate and land use law. Mr. Fahey has broad experience in the preparation of certified oil and gas title opinions and advises clients in both the acquisition and divestiture of mineral assets in Pennsylvania and West Virginia. He also has experience in commercial real estate, including the drafting of purchase and sale agreements, commercial leases, as well as securing zoning, land use and other approvals necessary for land development. In addition to these, Mr. Fahey has experience in negotiating and drafting documentation for routine and complex commercial transactions, such as mergers, acquisitions, divestitures, and entity formations.

OTHER ANNOUNCEMENTS:

On February 25, 2016, Holly S. McCann, Senior Counsel, acted as the moderator for a PBI presentation held in Pittsburgh, Pennsylvania entitled “How to Start and Run a Nonprofit.” Ms. McCann is an attorney in the firm’s Corporate Services Group, focusing on federal, state, local and nonprofit tax matters.

Curtis M. Schaffner, Associate, was elected Vice President of the Board of Directors of the Mary & Alexander Laughlin Children’s Center, a non-profit that provides multi-disciplinary educational support services to children from preschool through high school.
John has a white collar job, his job description requires a college degree, and he earns a guaranteed salary. John is exempt from being paid overtime if he works 50 hours in one week, right? Not so fast! The test for whether an employee is exempt from overtime payments under the Fair Labor Standards Act (the “FLSA”) is not that quick or easy. The impending new FLSA overtime regulations set to be released this summer offer a great opportunity for employers to review their employee classifications, to confirm exempt statuses, and to avoid costly back-pay awards and fines for FLSA violations.

As reported in our last newsletter, the U.S. Department of Labor is set to issue new regulations on July 1st that will more than double the minimum salary employers must pay certain employees to preserve their exemption from overtime payments under the FLSA. The new regulations may take effect as early as the fall of 2016, leaving employers with little to no time to audit or review the wage and hour practices of their workforce after their passage. So, the time for employers to review their wage and hour practices is now. While performing the review process, however, employers should avoid focusing solely on salaries and the number of hours worked in a rush to prepare for the new regulations. Simply increasing salaries to meet the new regulations may be unnecessary if such employees are not exempt under the FLSA in the first place.

In order to qualify for most exemptions under the FLSA, an employee must not only meet the minimum salary requirements, but the employee’s primary job duties must also involve work that corresponds directly to the particular exemption at issue. This second requirement under the FLSA, sometimes referred to as the “job-duties” test, is the most frequent cause for misclassification by employers. Indeed, many employers fail to recognize that an employee’s actual job duties must involve a particular kind of work in order to be exempt from overtime pay and that job titles and job descriptions are not controlling. More troublesome is that some employers wrongly assume that their employees, like John in the above example, are exempt from overtime simply because they receive an annual salary or are required to have a college degree.

Further complicating matters, the exemptions are not always what they seem – or how they are labelled. Many employers are familiar with the common FLSA exemptions under the executive, administration and professional categories. However, these exemptions all have specific requirements under the FLSA that are much narrower than the general public’s use of those terms. The outside salesperson exemption can be another issue for employers, particularly as more sales employees work from a home office.

When employers audit and review their workforce to prepare for the new regulations, they should also be reviewing whether the primary job duties that their employees are performing on a day-to-day basis qualify them as exempt, regardless of whether the employees are receiving salaries above the new thresholds. Methods for compiling such information can include honest and complete assessments of each job; questionnaires (to be completed by managers and supervisors); shadowing studies (typically by outside consultants); interviews (conducted by trained HR professionals, consultants or counsel); and the gathering and review of documents such as internal policies, job descriptions, and employee handbooks.

As the enactment of the new regulations is bound to increase the number of wage and hour lawsuits over the next year, now is the time for employers to look hard at their classifications of employees as “exempt” or “non-exempt” and carefully consider whether each exempt position truly meets the FLSA standard -- or still meets that standard. Properly re-classifying a position as non-exempt where its fails the duties test will reduce an employer’s exposure under the FLSA. Where the position does not meet the duties test and currently pays below the anticipated new salary threshold of $50,440/year ($970/week), raising the salary to meet the new threshold for exempt employees is unnecessary. In fact, it could harm the employer as overtime pay will be calculated based upon the increased salary.

It is equally important for employers to ensure that all policies and employee handbooks are up to date. In this time of increased scrutiny under the FLSA, employers should protect themselves with policies that require non-exempt employees to accurately and fully record their time and policies that prevent employees from working overtime without prior written approval. A well-documented open-door policy that encourages employees to file *internal* complaints, with no fear of retaliation, is also important. Encouraging employees that believe they have not been paid in full, that their position has been misclassified, or that there has been any other violation of any wage and hour laws can insulate an employer from some of the worst penalties under the FLSA. Better yet, it enables employers to address issues before they become serious FLSA compliance problems.

*If you have any questions or would like more information on the issues discussed above, please contact Curtis M. Schaffner, Esquire at 412-355-0200 or email to cms@sgkpc.com, or any member of the Employment Services Group.*
Not Your Father's Harassment

Too often, when employers think of prohibited harassment, they think of the lecherous male boss chasing the pretty female secretary around the desk or the slick executive in the immaculately tailored suit who suggests to his young assistant that she’ll get a promotion if she sleeps with him. While those examples of illegal harassment still exist, a failure to appreciate the current, far wider sweep of the anti-harassment laws can result in embarrassing publicity and large liability for the unwary employer.

For example, prohibited sexual harassment goes far beyond these old stereotypes. Prohibited harassment now includes the female boss chasing the male secretary around the desk. It can even extend to same-sex harassment where gender is the motivating factor behind the harassment. Illegal harassment also reaches beyond sexual harassment and includes harassing behavior that is based upon any characteristic of the victim that the anti-discrimination laws protect. These protected characteristics under Federal law include race, age, religion, national origin, disability, color, sex, and veteran status.

Prohibited harassment also isn’t just about improper touching or demands for sexual favors in exchange for raises and promotions, which is often called quid pro quo harassment. It also includes statements and actions that create a hostile work environment. Basically, a hostile work environment exists wherever conduct that ties to a protected class is severe enough and occurs often enough that it permeates the workplace and would cause a reasonable person to find the environment hostile or abusive. If the employee in this hostile environment feels abused and the employee’s ability to work is adversely impacted by the environment, the employee has a potential harassment claim.

If an older worker is subjected to derogatory comments about his age from his supervisor, prohibited harassment on the basis of age might exist. Similarly, a worker who repeatedly experiences teasing and joking from her co-workers based upon her ancestry may have a claim for national origin harassment.

In the wake of this expanding view of prohibited harassment, here are some suggestions for the savvy employer to consider:

- Adopt and publish anti-harassment policies that conform to current law. These policies should include all actionable harassment, not just sexual harassment. Such policies should also allow the employee to by-pass any harasser in making a complaint, assure the employee that s/he will not be retaliated against for making a complaint, and provide for a prompt, discrete investigation of the complaint, the results of which will be communicated to the employee.
- Create a policy that addresses dating in the workplace. Many sexual harassment claims start from romantic relationships gone awry. A policy that alerts the employer early-on to the dating relationship and describes how the employer will ensure that the relationship doesn’t impact the workplace can be very helpful.
- Be sensitive to the expansion of the anti-harassment law and react carefully to complaints of harassment that do not appear to implicate any protected class. No employer wants to end up as a test case in the next EEOC attempt to expand the boundaries of prohibited harassment.
- Provide training for supervisors so that they understand the reach of the anti-harassment laws and can better avoid, correct, and address such behavior before it becomes a problem.
- Stop using the term “harassment” – or permitting its use -- when the supervisor is simply tough or insisting that the employee perform at expected levels. The law does not prohibit a supervisor from speaking harshly to employees and it does not require that all employees have a good boss. It does, however, prohibit a boss from singling out an employee for negative treatment and offensive comments on the basis of any characteristic of the employee that is protected at law.

Employers should also be aware of case law and state and local laws and ordinances that expand the definition of a protected class beyond the categories recognized in Federal law. Some states prohibit discrimination on the basis of marital status. Some states and localities, including the City of Pittsburgh, prohibit discrimination on the basis of sexual orientation. Even where there is no statute or regulation recognizing a protected class, anti-discrimination agencies are using lawsuits to expand the scope of the anti-discrimination laws and with that expansion, the reach of harassment claims. That activity is particularly strong in the context of LGBTQ rights.

Very recently, and in a ground-breaking action that made national news, the Equal Employment Opportunity Commission filed an harassment suit in Federal Court in the Western District of Pennsylvania on behalf of a gay employee who alleged that he endured repeated anti-gay slurs from his supervisor. The case, entitled U.S. Equal Employment Opportunity Commission v. Scott Medical Center, P.C., alleges that the employee complained to his employer about his supervisor’s repeated highly offensive anti-gay statements and vulgar comments based upon gender stereotypes. According to the complaint, the employer did nothing and backed the supervisor. A few weeks later, the employee allegedly quit his employment with Scott Medical to avoid any further workplace harassment. Scott Medical now faces claims for back and front pay and a possible injunction that would force it to address and prohibit anti-gay statements in the future. The Federal anti-discrimination laws do not include sexual orientation as a protected class. Therefore, the Commission has framed the case as a gender discrimination claim. Nonetheless, the Commission has made it clear that it is seeking to expand the Federal law to include sexual orientation and will aggressively use hostile work environment claims to meet its agenda.

If you have any questions or would like more information on the issues discussed above, please contact Suzanne L. DeWalt, Esquire at 412-355-0200, or email to sld@sgkpc.com, or any member of the Employment Services Group.
After almost two decades of discussion, Pennsylvania’s capital stock and foreign franchise taxes have been eliminated as of January 1, 2016. Prior to 2016, all domestic corporations and limited liability companies (LLCs) were required to pay capital stock tax. The capital stock tax was based on such entity’s capital stock value (net worth plus average book income), consequently requiring payment of capital stock tax even if the entity suffered a loss during the applicable tax year. Historically, the existence of this capital stock tax has driven certain investments (real estate, in particular) to be made through limited partnerships (LPs) in lieu of LLCs. Now that LLCs can offer relative equal tax treatment on top of relative equal liability limitation and a simpler corporate structure than LPs, we expect to see these investment vehicles formed as LLCs going forward. Although Pennsylvania’s budget has yet to be set and new taxes can always be established in the future, for now the owners of corporations and LLCs in Pennsylvania can enjoy the elimination of this tax that Governor Wolf deemed an “unfair tax on business.”

If you have any questions or would like more information on the issue discussed above, please contact Jonathan P. Altman, Esquire at 412-355-0200 or email to jpa@sgkpc.com, or any member of the Corporate Services Group.