Law Office of Edward E. Sharkey LLC

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BUSINESS LAW DEVELOPMENTS

Legal updates for entrepreneurs and business owners from the Law Office of Edward E. Sharkey LLC.

Dear Friends of the Firm,

This is the March 2015 issue of our firm's newsletter, featuring coverage of legal developments important to business owners and entrepreneurs. You are receiving it because you are a client or have previously solicited legal resources from the firm.

Please let us know what you think.

Very truly yours,

Ed

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Is Being Disagreeable an ADA Disability?

We often write about employers' struggles with issues related to the Americans with Disabilities Act ("ADA"), the federal law that prohibits discrimination against qualified individuals with disabilities. One common challenge for employers is determining whether a particular employee has a disability. It is a significant issue because, if an employee does not have a disability, the ADA does not apply.

A disability is any impairment that substantially limits a "major life activity." Eating, sleeping, walking, standing, lifting, bending, reading, concentrating, thinking, communicating, and working are all major life activities. The definition appears broad enough to encompass many circumstances which a lay person would not normally consider to be a disability. Here is one illustration: courts are now routinely

finding that morbid obesity is a disability.

Fortunately for employers, some courts are taking care to avoid an overly broad interpretation of the definition. We previously wrote about a decision by the Texas Supreme Court which distinguished between the lack of a special ability and a disability. A recent decision by the U.S. Court of Appeals for the Ninth Circuit is further cause for hope that courts will impose some limit on what constitutes a disability under the ADA.

In the Ninth Circuit case, a police officer sued his former employer for discrimination, alleging that his termination violated the ADA. On several occasions during his employment, the officer's coworkers complained that his communication style was arrogant, intimidating, and demeaning. Before he was fired, the officer was diagnosed with attention deficit hyperactivity disorder ("ADHD"). His doctor opined that treatment could eliminate the officer's communication issues. Nonetheless, the police department terminated the officer because of his recurring interpersonal problems with coworkers.

The officer attributed the interpersonal problems to his ADHD and claimed that the disorder substantially limited his ability to work and interact with others. A jury agreed with the officer, and the employer appealed. The appellate court reversed, holding that the officer's ADHD did not substantially limit his ability to work or interact with others.

With regard to working, the court found no evidence from which it could reasonably conclude that the officer was unable to work as compared to most people in the general population. The evidence presented in the case actually showed that, in many respects, the claimant was a skilled cop. Regarding the officer's ability to interact with others, the court distinguished getting along with coworkers from interacting with others. The court explained that a "cantankerous person" who "has mere trouble getting along with coworkers" does not have a disability under the ADA.

Because every case is factually distinct, the relevance of the opinion to other employers and other circumstances remains uncertain. Still, the case serves as an important reminder for any employer assessing an employee's ADA claim. Coverage by the Act requires the employee to have an impairment that substantially limits at least one major life activity. Being disagreeable is not enough.

Independent Contractors: Courts Deliver Costly Decisions to FedEx

Most businesses would prefer to have independent contractors rather than employees because it is a means of avoiding, among other things, tax, workers' compensation, and overtime pay requirements. For these reasons, courts and a multitude of federal and state agencies take an interest in the manner in which workers are classified and may impose penalties for misclassification. Even so, recent verdicts holding that FedEx misclassified its drivers as independent contractors have surprised many.

In suits filed across the country, drivers claim that, because FedEx improperly treated them as independent contractors rather than employees, the corporation failed to meet mandated wage and leave requirements. FedEx defended on the ground that its classification of the drivers as independent contractors was legally correct. In recent decisions, both the U.S. Court of Appeals for the Ninth Circuit and the Kansas Supreme Court held that, as a matter of law, the drivers are employees, not independent contractors.

Both courts applied the "right to control" test to assess the drivers' relationship with FedEx. Pursuant

to the standard, where a principal retains the right to control, the relationship is employer-employee rather than principal-independent contractor. To assess the degree of control, courts weigh multiple factors. Although there is some variance among jurisdictions, the factors typically include which of the parties provide necessary equipment, how the worker is paid, when and where the work is performed, and whether there are requirements for the worker to report to the principal.

So, what is surprising about the FedEx decisions? The drivers that sued FedEx for misclassifying them had previously agreed that they were independent contractors rather than employees. When they were retained by FedEx, the drivers signed contracts that purported to give them control over the manner in which they performed their work and expressly identified them as “contractors.” The lesson is that, in every case, it is the applicable regulatory criteria, not the parties’ agreement or characterization, that determines whether a worker is an independent contractor. Even if an employee agrees he is a contractor, he can still sue you later as an employee.

The expense of this lesson to FedEx is huge. It is now exposed to multiple millions of dollars of liability for all sorts of costs associated with having employees.

Any business that treats its workers as independent contractors faces the risk of a future misclassification claim, even one instituted by a previously agreeable worker. In Maryland, the classification of workers should begin here. For purposes of federal law, the process begins with this website.

If you need assistance applying the criteria to your circumstance, please feel free to contact us.

Website Terms of Use: Will the Court Enforce Yours?

Although it is old hat for consumers to make purchases through websites, businesses continue to wrestle with how to make online contracts enforceable. The law requires only that both parties manifest assent to the terms. Before internet commerce, a signed piece of paper was the customary way of showing assent, but that is not practical in the context of online transactions.

Accordingly, businesses and lawyers have started to employ other means to obtain consumers’ assent. One way is by requiring some form of affirmative action by a website user, such as clicking a button. When assent to terms is obtained in this fashion, the agreement is referred to as “clickwrap.” Another way that users are said to show their assent to terms is by continuing to use a website after being given notice of the terms to which the use is subject. When assent is obtained in this fashion, the agreement is referred to as “browsewrap.”

In light of a recent ruling by the U.S. Court of Appeals for the Ninth Circuit, businesses should review the manner in which they give notice of browsewrap terms.

The case arose out of a retailer’s failure to complete a consumer’s online purchase. The retailer moved to compel arbitration of the consumer’s claim pursuant to the terms of use posted on the website through which the consumer made the purchase. The terms of use were available to the consumer in a hyperlink at the bottom of each page of the website. The hyperlink was underlined and in a color that contrasted with the background of the pages. According to the retailer, the consumer’s continued use of the website manifested his assent to the terms.

The court rejected the retailer’s argument, holding that a user’s continued use of a website containing

a hyperlink to the terms, even if the hyperlink is conspicuously located on every page, is not sufficient to manifest the user's assent. Unfortunately for website owners, the court did not establish a bright line standard for what would be sufficient.

The opinion does contain some insight into steps website owners can take to increase the likelihood that browsewrap terms of use will be enforced. Among them are:

- Including an express warning that continued use acts as a manifestation of users' intent to be bound by the terms; and
- Where a user must take some affirmative step to complete an online transaction, such as a purchase, including an instruction in the process to "review the terms."

Even if these steps are taken, there is no guarantee that a court will enforce browsewrap terms of use. A website owner may instead wish to use clickwrap terms of use, which courts tend to favor, to avoid the risk all together.

ABOUT US

The Law Office of Edward E. Sharkey LLC is a firm of dedicated business and trial lawyers in Bethesda, Maryland, concentrating on business law and commercial litigation. Other areas of practice include pension, securities, negligence/professional liability, and construction law.

In This Issue

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