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Dinita L. James, Editor
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TRADE SECRETS

Court's decision may render trade secret protection elusive

by Jodi R. Bohr

To have a chance at winning a court case against former employees who misappropriate trade secrets, employers must take extra care to maintain trade secret information. The Arizona Court of Appeals recently reversed an employer's victory because the company failed to present evidence that the misappropriated information was a protectable trade secret.

Background

Michael Calisi began working as a certified public accountant (CPA) for Unified Financial Services (UFS) in January 2006. Although he primarily focused on corporate accounting, he sometimes prepared individual tax returns and hoped to eventually develop a financial planning practice. In 2009, he also served as tax season coordinator, which required him to complete a list of tasks to receive a $15,000 stipend. After the employment relationship deteriorated, Calisi's employment ended on January 28, 2009. He was not paid his final commissions or any compensation for his work as tax season coordinator.

Calisi then elicited help from Daryle Messina, the owner of a mortgage company that had a mutual referral arrangement with UFS. Messina sent a mass e-mail to his clients—some of which were also clients of UFS—to announce Calisi as his new in-house CPA and to offer discounted services. In response, UFS communicated to Calisi that he was inappropriately soliciting UFS clients and demanded that he stop immediately.

Both sides sue

Calisi sued UFS for unpaid commissions and unpaid compensation for the work he performed as tax season coordinator. Because his claim was for unpaid wages, he wanted his damages tripled. An Arizona statute, A.R.S. § 23-355(A), entitles an employee to triple damages when he has to sue to get earned wages. UFS countersued for, among other things, misappropriation of trade secrets. Calisi won his wage claim (and triple damages) at trial, but UFS was awarded nearly offsetting damages for its trade secret claim. Both parties appealed. The Arizona Court of Appeals reversed UFS's trade secret victory but let Calisi keep his award for unpaid compensation.

To be a trade secret, information (in this case, a customer list) must not be public knowledge, and reasonable efforts must be taken to keep the information a secret. A customer list may be considered a trade secret if it (1) "represents a selective accumulation of detailed, valuable information about customers," such as needs or preferences, or (2) was compiled "by expending substantial efforts to identify and

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cultivate [a] customer base such that it would be difficult for a competitor to acquire or duplicate the same information." Whether the list derives economic value from its secrecy or provides a competitive advantage are also factors used to determine whether the information is a trade secret or merely confidential information.

The court of appeals distinguished between confidential information and trade secrets when it held that UFS's customer list was not entitled to trade secret protection. Had UFS been able to prove—or even present evidence—that its customer list contained "specialized, valuable information" (e.g., tax strategies or investment preferences) or that it took substantial efforts to obtain customer information that could not be duplicated by competitors, the result would have been different. The other nail in the coffin: Its customer list was not a secret because Messina knew the identity of several UFS customers.

Extra precautions needed

Employers that have information they want to protect as a trade secret must take extra precautions to

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MESSAGE FROM THE EDITOR

Meet your new Arizona ECN members

by Dinita L. James

I have the pleasure of introducing the new Employers Counsel Network (ECN) members for Arizona, Donald Peder Johnsen and Jodi R. Bohr of Gallagher & Kennedy, P.A. Don and Jodi will contribute articles to *Arizona Employment Law Letter* and participate with me in presenting educational programs for Business and Legal Resources (BLR), our publisher, as well as contribute to Arizona's sections of BLR's *50 Employment Laws in 50 States*. They also will help me keep up with developments that warrant e-mail alerts, as when Phoenix and Flagstaff amended their human rights ordinances to include protections for sexual orientation and gender identity in February.

First, I need to give you a little background on these changes. You may have noticed that the name of my law firm changed after the beginning of 2013. I moved to Gonzalez Saggio & Harlan LLP (GSH), a national minority-owned law firm certified as a minority business enterprise. I am partner in charge of GSH's Phoenix office. GSH handles cases throughout the nation for employers ranging from midsize companies to Fortune 500 corporations. The firm has a proven track record of representing public and private corporations, governmental entities, and individuals, with a keen insight and understanding of our clients' complex business environment.

Guffey

My new GSH partner in Phoenix, Doug Guffey, has been contributing the "Healthy Benefits" column since I made the move. Doug has more than three decades of legal experience as an attorney, counselor, and adviser for those in the healthcare and life sciences business. He graduated *summa cum laude* from Arizona State University and then earned graduate degrees in law and business in a joint program at Harvard University. Doug served as a senior contract law adviser in the U.S. Army's Judge Advocate General's Corps before practicing law at a large Phoenix firm, representing commercial banks and Fortune 500 corporations in a wide range of transactional matters. He also has been an in-house attorney and in solo practice.

Expanding the ECN in Phoenix will bring Gallagher & Kennedy into the national network. The firm, one of Arizona's largest, is a full-service business law firm that represents individuals, growing businesses, and Fortune 500 companies.

Johnsen

Don is a shareholder in Gallagher & Kennedy and practices in the employment and labor law arena exclusively. He graduated from the University of Arizona with highest distinction and earned his law degree from the College of William and Mary, where he was managing editor of the school's law review. Don counsels and represents employers in a wide range of labor and employment matters.

Bohr

Jodi is of counsel with Gallagher & Kennedy, where she practices employment and labor law, with an emphasis on litigation, class actions, and HR matters. She graduated *magna cum laude* from Arizona State University and earned her law degree with distinction from the McGeorge School of Law at the University of the Pacific. Jodi advises clients on all matters relating to employment and labor law. Her first article for the newsletter appears on page 1 of this issue.

I welcome my new ECN colleagues, and I look forward to working with them on BLR's excellent publications and educational programs.

Dinita L. James is the editor of Arizona Employment Law Letter. You can reach her at dinita_james@gshllp.com or 602-840-3301. ✤

WORDS ON WISE MANAGEMENT

Onboarding: Are you enacting the lemon law strategy?

by Brad Federman

I recently worked with a company on its talent management strategy, and I heard a number of things from focus groups, including:

- Employees accepted the position because it was a job, not for a higher purpose.
- Employees were never told why they were hired and what would make them successful.
- Orientation was short and administratively driven, not learner- or employee-centered.

The way an employer brings people on board makes a big difference in how employees perform, how they feel about their decision to take the job, and whether they will stay. Some employees may feel buyer's remorse—like after buying a used car. They may even want to take advantage of the lemon law and find a new job. Other employees may feel a sense of pride from day one.

What's the difference? It could be the job, the cultural fit, the employee's manager, or your onboarding process. Typically, the employer's onboarding practice (or lack of one) affects the job and cultural fit. Too many employers have poor selection processes and leave managers in the dark about their onboarding practice.

Every onboarding process should include:

- **A clear reason the candidate was hired and why she will be successful.** A new employee who understands why she stood out and which competencies and characteristics will help her be successful in your organization will perform better, have a reduced learning curve, and have a stronger desire to stay. However, this step is usually skipped by most hiring managers.
- **A three- to six-month plan.** Onboarding is more than paperwork and a half-day session with HR. It takes time to develop a broad knowledge base, which helps new employees perform better and establishes a collaborative culture.
- **A development plan based on information collected during the selection process.** The biggest challenge in creating development plans is that HR does not know the employee well enough. Using strong tools and techniques, including testing and appropriate behavioral interviews with trained interviewers, will help you collect a great deal of information about new employees. It should be fairly easy to create a productive development plan within a new employee's first two weeks of employment.
- **A buddy, mentoring, or coaching component.** People learn and gain cultural understanding through relationships. Tasking someone with helping a new employee become successful is a smart move for both the organization and the employee. The employee will be able to discuss concerns and vent safely.
- **A self-paced learning component.** New employees should be responsible and accountable for their success and learning. To create a self-sufficient employee, your onboarding process should have a component the employee must complete on his own.
- **Connections to people and departments in the organization.** Every onboarding plan should allot time to visit important departments and meet with key executives. Those activities help develop employees who think they are part of a team.
- **A quick win!** A quick win builds confidence, and confidence builds success. Early success means a new employee will have a good starting experience, will produce results sooner, and will want to stay. To ensure a quick win, managers must consider the first assignments delegated to new employees. For example, some companies give new sales reps a customer or two to get started.

A small investment in your onboarding process can reduce unwanted and unnecessary turnover. In addition, it will help eliminate the need to fire someone because he is not working out. Finally, successful onboarding will produce a sense of pride, stronger morale, and confidence in new employees.

Brad Federman is the chief operating officer of F&H Solutions Group and specializes in performance management and employee engagement. He can be contacted at bfederman@fhsolutionsgroup.com or 901-291-15470. ✤

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maintain the information's secrecy. Also, the information must have independent economic value to qualify as a trade secret.

Unfortunately for UFS, the damage did not end there. It had to pay Calisi three times the amount of wages it owed him. The company argued the wages were withheld in good faith because they were a setoff to its countersuit and there was a dispute over whether Calisi had performed the required tasks, but the court disagreed. UFS did not dispute that Calisi had earned the unpaid commissions or that his supervisor had assured him that he would be paid the stipend for the tax season coordinator work. Therefore, the court found that UFS unreasonably withheld compensation.

The court did not address UFS's setoff argument. Employers should be cautious when withholding earned wages from final paychecks if the setoff amount does not exist at the time of termination, especially when the countersuit is filed only after the employee begins working for another employer.

Bottom line

To ensure the protection of trade secrets, employers must take extra care to maintain the secrecy of the information and make sure the information fits within the definition of a trade secret. If the information is not entitled to trade secret protection, you may protect confidential information by requiring employees to sign a confidentiality agreement stating they will not disclose the information during or after their employment.

Also, when an employee is discharged in Arizona, he must be paid all compensation within seven workdays or at the end of the next regular pay period, whichever is sooner. That requirement applies unless the employer is permitted to withhold wages under federal or state law, has prior written authorization from the employee, or has a reasonable good-faith dispute regarding the amount of wages owed. If a portion of the employee's wages is not in dispute, you should pay the undisputed portion; you may withhold the disputed portion. Failure to pay wages could result in an employee receiving triple the amount he is owed.

Jodi R. Bohr is an attorney with Gallagher & Kennedy, P.A., and practices employment and labor law, with an emphasis on litigation, class actions, and HR matters. She is a frequent speaker on a wide range of employment law topics. She may be reached at jodi.bohr@gknet.com or 602-530-8035.

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BACKGROUND CHECKS

Faulty records are a particular hazard for Arizona employers

by Dinita L. James

Equal Employment Opportunity Commission (EEOC) guidance on the use of arrest and conviction records in employment decisions is causing concern for employers around the country. Arizona employers, in particular, face great difficulty in getting accurate background information, according to a recent report.

In March, the Arizona Criminal Justice Commission issued a report that spells out just how flawed the state's information in the National Instant Criminal Background Check System (NICS) is and how expensive it will be to fix it.

Garbage in, garbage out

Arizona criminal justice agencies are required to submit arrest and case deposition information for all felony, sexual, domestic violence, and DUI offenses to a central state repository called the Arizona Computerized Criminal History (ACCH). Arizona's information in the NICS comes from the ACCH's records.

Most background check vendors advertise that they provide NICS background checks. However, by law, NICS records are reserved for law enforcement and jobs requiring a fingerprint check; vendors use their own proprietary databases that they likely develop from public information contained in the ACCH and the NICS.

The state report identified considerable gaps in the ACCH's information. The system relies on employees at dozens of agencies in Arizona to enter and track information properly. One of the biggest problems identified by the study is a large number of arrests in the ACCH system without deposition information.

There are many reasons for the lack of deposition information, the most legitimate of which is that the case is still under investigation or being prosecuted. More problematic, however, are the charges that either are never prosecuted or are amended at various points in the criminal justice process. In each case, the ACCH relies on an employee going back and manually correcting the electronic record. In far too many cases, that correction does not happen.

Another common problem is that law enforcement may make an arrest on one charge but a prosecutor pursues a different charge after the investigation. That can result in duplicate records for the same arrest, no link between the records, and at least one of them left without deposition information.

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HR® HEALTHY BENEFITS

Is it time to consider a self-funded health plan?

by Doug Guffey

Long the exclusive province of large employers, self-funded employee health plans have advantages under the Affordable Care Act (ACA), which makes them worth a fresh look for medium and even small employers.

ACA brings new requirements

Under the common "fully insured" model of employee health plans, the employer contracts with a third-party insurer to provide healthcare coverage for employees and their dependents. The plan has a system of deductibles and copays (paid by employees) and premiums (either paid by the employer or shared between the employer and employees).

The ACA has brought to the fully insured model new requirements, including taxes, a specification of minimum essential benefits, and prohibitions on certain coverage limitations. As with many other factors responsible for increasing healthcare costs, the new requirements are expected to cause fully insured plan premiums to increase significantly in the near term.

Free of some requirements

Under the self-funded model, the employer assumes the financial obligation to pay for its employees' healthcare costs. The plans may have deductibles and copays, which are the employees' responsibility and frequently are met through cafeteria plan deductions from employees' pretax compensation, coupled with a "stop loss" insurance policy purchased by the employer to protect against large claims. The employer generally will contract with a third party to process and pay claims.

Under the ACA, self-funded plans are subject to some, but not all, of the requirements applicable to fully insured plans, including automatic enrollment of eligible employees, coverage of certain preventive services without cost to employees, and taxes to fund research. However, self-funded plans aren't required to provide coverage for minimum essential benefits and aren't subject to medical loss ratio requirements.

For employers with operations in more than one state, self-funded plans offer the advantage of being free from state regulation. All plans, whether self-funded or fully insured, are subject to the Employee Retirement Income Security Act of 1974 (ERISA). ERISA supplants state law on the subject of regulations. One provision of ERISA (the so-called deemer clause) effectively exempts self-funded plans from state regulation by preventing them from being considered in the "business of insurance" under state law. Accordingly, an employer with multistate operations can operate a single self-funded plan for all employees without referring to state insurance laws.

Culture of wellness is good for bottom line

Theoretically, freedom from various regulations may make it possible for employers (with cooperation from employees and the implementation of effective wellness and cost-saving measures) to reduce healthcare costs, which have been driving annual double-digit increases in premiums.

It is often said that 20 percent of employees are responsible for 80 percent of healthcare costs. It remains possible for even small employers to adopt policies and programs to support wellness and healthcare cost consciousness in their workforce without engaging in unlawful discrimination. For employers with self-funded plans, adopting a culture of wellness, just like adopting a culture of safety, can bring both near- and long-term positive effects to the bottom line.

Doug Guffey is a partner in the Phoenix office of Gonzalez Saggio & Harlan LLP. Doug has been practicing healthcare law for more than 30 years. You can reach him at doug_guffey@gshllp.com or 602-840-3301. ✤

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Those problems can result in a job candidate appearing to have multiple arrests when there was only one, but another type of issue can also come up: no information on a background check on a candidate who is wanted on a felony charge. The Arizona Criminal Justice Commission's report contains a shocking statistic: Of 44,075 outstanding Arizona felony warrants, only 13,344 appeared in the NICS database.

Bottom line

The report recommends full automation of the process in Arizona as well as technical support and training for law enforcement agencies, prosecutors, and court personnel. According to the study, a complete fix could cost as much as $24 million. With that kind of price tag, the fix will not be in place anytime soon.

In the meantime, however, Arizona employers need to heed the guidance from the EEOC and follow the dictates of the federal Fair Credit Reporting Act (FCRA). That means you need to give an applicant who appears to have a disqualifying criminal offense the chance to challenge the background check information before making a decision not to hire him on that basis.

Dinita L. James, the partner in charge of the Phoenix office of Gonzalez Saggio & Harlan LLP, is the editor of Arizona Employment Law Letter. You can reach her at dinita_james@gshllp.com or 602-840-3301. ✤

BACKGROUND CHECKS

Employers call for clarification on EEOC criminal-history guidance

It's been about a year since the Equal Employment Opportunity Commission (EEOC) issued guidance on considering arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964. That's given employers enough time to digest the guidance and see how it will affect their operations.

Some leery of background checks

Overall, employers have responded with some changes in their policies and many calls for clarification. Some governmental entities removed questions about conviction history from their job applications, and more businesses opted not to conduct criminal background checks. One congressman, U.S. Representative Doug Lamborn (R-Colorado), urged the EEOC to withdraw the guidance and stop all associated investigations, citing uncertainty over how the guidance and other laws interact.

So what are employers to make of the guidance?

Crime and punishment

To review briefly, Title VII applies to private employers with at least 15 employees as well as to federal, state, and local governments. It prohibits discrimination based on race, color, sex, religion, and national origin. Prohibited discrimination includes disparate treatment—treating someone in a protected group differently than one who is not in the protected group. It also includes disparate impact, meaning an employer can't use a seemingly neutral policy that affects protected group members disproportionately unless the policy is job-related and consistent with business necessity. The EEOC is concerned about using criminal histories to screen out job applicants because Hispanics and African Americans are convicted of crimes at a much greater rate than whites. Broad use of criminal histories could keep people in those racial groups unemployed indefinitely.

A well-written policy will distinguish between types of crimes and dates of conviction.

The guidance (found at www.eeoc.gov/laws/guidance/arrest_conviction.cfm) recognizes there are legitimate reasons for not hiring someone based on criminal history—safety, for example. It makes the major point, however, that employers shouldn't establish a blanket rule that they will never hire someone with a criminal record for any position and regardless of the crime.

According to the guidance, use of criminal histories should be targeted so that only a conviction for a specific crime within a limited time period can disqualify a person from a particular position. The potentially disqualifying crime must be related to the requirements of the position. The person must be allowed to offer additional information about the conviction and why it shouldn't disqualify him from the job, and the employer must consider the information.

Individual facts matter

The guidance is full of examples and hypothetical situations, but the bottom line is that employers will be taking a case-by-case approach to using criminal records in employment decisions. That's a lot of nuance and discretion to deal with and not a lot of hard-and-fast rules.

Amid the calls for clarification, the guidance does offer some pointers. It says that complying with federal rules or regulations that bar hiring those with specific criminal records is a defense to a charge of discrimination. Elsewhere, the guidance says that Title VII doesn't preempt conviction-based federal restrictions on hiring for such positions as law enforcement and bank

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BLIND CARBON COPY

Lessons from late-night and early morning television

by Kylie Crawford TenBrook

Contrary to what Mom says, TV is good for you (unless you're one of my children). In an effort to prove it, here are some recent lessons from late-night and early morning television.

Matt Lauer is a big meanie

If you don't know what I mean, you're among the millions no longer watching NBC and its crummy programming, so let me fill you in. In 2012, Ann Curry left *The Today Show*. Since then, it's been revealed that employees from the executive producer to the security guard mocked Curry, her attire, and her blunders. Additionally, it's been disclosed that Matt Lauer actively worked to have her fired from the show because he "didn't like her."

This kindergartner-like behavior falls under the ambit of workplace bullying. While workplace bullying is not illegal, legislation to prohibit it has been proposed in several states. Employers should be aware that in certain circumstances, bullying may be seen as involving a protected category (e.g., the Curry debacle has been viewed by some as sex-based). Moreover, bullying that extends beyond harsh words could lead to claims of assault, which could create liability for employers under negligent hiring and retention theories. As a result, it's in your best interest to nip any bullying in the bud.

Don't break a contract with Leno (and keep him around)

Earlier this year, NBC announced that Jay Leno will be leaving *The Tonight Show* before the end of his contract and Jimmy Fallon will be taking over the show in February 2014. Not only is NBC paying Leno $15 million for the early termination of his contract, but the network is also the butt of his jokes as he continues to host the show.

Arizona is an at-will state, meaning employees can be fired for any or no reason, just not for an illegal reason (e.g., retaliation for reporting harassment or filing a workers' compensation claim). However, before discharging an employee, employers must consider whether they have (or have unwittingly created) an employment contract with the employee. I think there's a larger lesson to be learned from Leno's situation: If you're going to fire an employee, really fire him; don't let him continue in a position in which he can cause you harm.

In the long run, this was a good choice by NBC—I'm way more likely to stare at Fallon for an hour.

If you need medical leave, work for ABC

Now here's a morning news show that did something right. In 2012, Robin Roberts, a host of *Good Morning America*, was diagnosed with MDS, a debilitating blood disorder most likely brought on by the treatment she received for breast cancer. Roberts went on leave in August 2012, and there was no telling how long she would be out. ABC had never dealt with the issue before; it had granted only maternity leaves to that point.

The network decided to keep Roberts' position open for her (although it was arguably not required to do so under the law) and continued to make her part of the show by mentioning her name and social media contributions during broadcasts. Unlike the Curry situation, you could see that the *Good Morning America* hosts and ABC were truly invested in Roberts' success and her eventual return.

This situation provides a good example of how employers can work with employees requiring medical leave. Instead of focusing on the short-term problems associated with Roberts' medical leave, ABC considered the long-term investment in a person who reportedly became, by a wide margin, the most-liked host on any morning news program. The tactic may have contributed to *Good Morning America* overtaking *The Today Show* in ratings. Employers should take this example into consideration when an employee requires medical leave. Remember the potential long-term payoff of going above and beyond what is required for employees needing medical leave.

Kylie Crawford TenBrook serves as corporate counsel for Best Western International, Inc., in Arizona. Previously, she practiced labor and employment law exclusively. In her spare time, she enjoys reading about the misdeeds of celebrities, politicians, and professional athletes and making the tenuous connection between those missteps and what she does for a living. ✤

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employees. It also states, "Having a criminal record is not listed as a protected basis in Title VII."

There's less clarity with the relationship between the guidance and state and local restrictions on hiring those with criminal records. Title VII will preempt state or local restrictions if they "'purport to require or permit the doing of any act that would be an unlawful employment practice' under Title VII." The guidance states that an employer can still be liable under Title VII for an exclusionary policy that complies with a state or local law but isn't job-related and consistent with business necessity.

Don't wing it

There has been no definitive word from the courts on how to achieve the right balance in analyzing specific job requirements and criminal histories, so it's essential to work with experienced counsel on your policies and practices regarding criminal background checks. Don't make up your hiring practices as you go along. Write a policy that explains your process for criminal background checks and the consequences for different types of convictions. A well-written policy will distinguish between types of crimes and dates of conviction.

You also should allow for some flexibility under the policy and be prepared to show how you arrived at the decision not to hire an applicant. If a candidate challenges his disqualification, be prepared to consider his argument, and then make sure your final decision is well documented and reflects legitimate business reasons. ✤

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