FRANKLIN, GRINGER & COHEN, P.C.

ATTORNEYS AT LAW

LEGAL BRIEFING

ATTORNEY ADVERTISING

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DECERTIFYING A UNION

Recently, the National Labor Relations Board had to evaluate what happens when employees—with no improper influence or assistance from management—provide their employer with evidence that at least 50 percent of the bargaining unit no longer wishes to be represented by their union, the employer tells the union that it will withdraw recognition when the parties' labor contract expires, and the union subsequently claims that it has reacquired majority status before the employer actually withdraws recognition.

In *Johnson Controls, Inc.*, after receiving a union-disaffection petition signed by 83 of the 160 employees just a few weeks before the expiration of the parties' collective bargaining agreement ("CBA"), the Company notified the United Automobile Workers labor union (hereinafter the "Union") that it would be withdrawing recognition once the CBA expired. The Company also cancelled planned negotiation sessions for a new CBA. The Union responded by informing the Company that it had not received a petition or any other verifiable evidence that it no longer enjoyed majority support and demanded that the Company return to the bargaining table. The Company refused and the Union began soliciting authorization cards from bargaining-unit employees. The Union collected 69 authorization cards, including 6

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IS AN UNSIGNED EMPLOYMENT AGREEMENT ENFORCEABLE?

In *Lord v. Marilyn Model Management*, a model scout filed a lawsuit against his former employer, alleging breach of an employment contract. The Appellate Division for New York's First Department would have to decide whether the employee's breach of contract claim should be dismissed because the employer never signed the agreement.

The employee was an experienced modeling scout and was induced to leave his previous job and join the employer with a salary of $190,000 and other benefits. The parties negotiated an employment agreement that contained a provision for six months' severance if the employee were termi-

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RECENT SURGE IN ADA LAWSUITS

The Americans with Disabilities Act ("ADA") was enacted to eliminate discrimination against individuals with disabilities. In the past, lawsuits and claims based on the ADA involved physical barriers that made businesses inaccessible to those with disabilities, such as a lack of wheelchair ramps. However, as technology has expanded to lengths that Congress never anticipated when it enacted the ADA, the focus of ADA lawsuits has shifted from physical barriers, such as wheelchair ramps, to technological barriers, such as the inaccessibility of websites for those with disabilities. Nearly all businesses, regardless of size and sector, are being targeted in these lawsuits. Restaurants such as Domino's Pizza Inc., Hooters, and even prestigious universities such as Harvard and MIT, have all been named as defendants in lawsuits claiming their websites to be in violation of ADA. Statistics show that the amount of ADA website compliance lawsuits is increasing. In the first six months of 2018, for example, nearly 5,000 ADA lawsuits were filed in federal court for alleged website violations.

The primary legal issue in ADA website compliance lawsuits revolves around whether a website is a place of public accommodation. The ADA states, in pertinent part, that "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." Courts throughout the country are divided on this issue. For example, the Courts of Appeals for the Third, Sixth, Ninth, and Eleventh Circuits hold that the statute is unambiguous: "places of public accommodation" are physical structures, and the only goods and services that a disabled person has a "full and equal" right to enjoy are those offered at a physical location. Discrimination only exists if the discriminatory conduct has a "nexus" to the goods and services of a physical location. The Courts of Appeals for the First and Seventh Circuits, while also holding that the ADA is unam-

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from employees who had also signed the disaffection petition. Just before the contract expired, the parties agreed to meet to compare evidence, but the Company stated that it was not willing to share the names of the employees who signed the disaffection petition. On May 8, the Company withdrew recognition from the Union.

At an unfair labor practice hearing, four of the six employees who signed both the disaffection petition and authorization cards testified that on May 8, when the Company withdrew recognition, they did not want the Union to represent them. Based on the disaffection petition and the testimony of the four employees who signed both, the judge determined that at the time the Company withdrew recognition, the Union had actually lost majority support because adding these four employees to the 77 who just signed the disaffection petition established that 81 employees out of the 160-employee unit no longer wished to be represented by the Union. The Union appealed and the case was heard by the Board.

In this case, the Board reevaluated its precedent regarding the union decertification process and set a new process. The previous process relied on a fundamentally controversial "last in time" rule. After a company received evidence, in the months before the expiration of a CBA, proving that less than 50% of its employees wished to be represented by the union, the company released an anticipatory withdrawal notice to the union. The union could then present evidence that it reacquired majority status in the period of time between the anticipatory withdrawal and actual withdrawal of

recognition. If the company withdrew recognition, it could unexpectedly find itself on the losing end of an unfair labor practice charge. The remedy for this violation typically included an affirmative bargaining order, preventing any challenge to the union's majority status, generally for six months to one year. Thus, the standard had been a "last in time" rule, as the union's evidence controlled the outcome even if the employer was correct that the union lacked majority status when the employer made the anticipatory withdrawal of recognition.

The new union decertification process allows an employer to announce an anticipatory withdrawal if it receives evidence up to 90 days before the expiration of a CBA that the union no longer possesses a majority. After the union receives an anticipatory withdrawal, it has 45 days from the date listed on the anticipatory withdrawal to file a petition with the NLRB for a new union election to re-establish itself as the workers' representative. If the union does not timely file an election petition, at contract expiration the employer may safely rely on its evidence of the union's loss of majority support. The Board applied this ruling retroactively to all pending cases.

If you have any questions regarding this or any other labor and employment law matter, please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131.

REMARKABLE RESULTS

FRANKLIN, GRINGER & COHEN, P.C. COLLECTS MORE THAN $38,000 ON AN 8-YEAR-OLD DEBT

Through aggressively pursuing litigation and judgment enforcement proceedings, we recently collected more than $38,000 for a business client of ours.

The defendant debtor failed to appear in the lawsuit we commenced, which then led to a default judgment being entered. Judgments are sometimes not worth the paper they are written on, unless you know how to properly file that judgment and use the numerous judgment enforcement proceedings New York law provides.

After filing the judgment in all counties in which the debtor owned property, the judgment then became a lien on those properties. What this means is that if this debtor ever tried to sell any of his properties, he would not be able to unless the judgment, plus interest, were paid off at the time of closing.

Four years after obtaining and filing this judgment, the debtor's real estate attorney called me and requested that we send to him a payoff amount for the judgment, since his client, the debtor, was trying to sell one of his properties and could not do so until our client's judgment was satisfied in full.

The debt in 2007 when the client came to us was only $20,000. With the interest that had accrued over time, we collected more than $38,000 once the debtor's property sold. Our client was more than pleased.

If you are in need of assistance with any of your outstanding collections, please contact our firm.

If you have any questions regarding this or any other labor and employment law matter, please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131.

CLIENT CONCERN CORNER

I want to hire a domestic worker to care for my children. What do I need to do?

Families often hire domestic employees to care for their children or an elderly family member. They meet the person, obtain referrals and background information, and agree on a weekly salary. The entire process is usually done very informally. However, under New York law, individuals who hire domestic workers are considered "employers" and are subject to various requirements under the law.

First and foremost, if the domestic employee works at least 40 hours per week, employers MUST have a workers' compensation policy. Failure to provide workers' compensation coverage could result in a penalty of up to $2,000.00 for every 10 days without coverage. People who employ domestic workers also need to provide unemployment insurance, disability benefits and New York Paid Family Leave coverage.

When it comes to paying domestic employees, people often set a weekly salary because it is the easiest thing to do. However, domestic workers need to be paid on an hourly basis, and all of their hours need to be recorded accurately. Domestic workers need to be paid at least the applicable minimum wage and must be paid overtime at 1.5 times their regular hourly rate for all hours worked after 40 in a week. If the domestic worker lives in the home of the employer, he or she is entitled to overtime pay for all hours worked after 44 hours in a week. If an employer gives a domestic worker meals and/or lodging, the employer may be granted a specific credit toward the minimum wage paid to the worker, but it has to be calculated accurately. Failure to accurately record a domestic employee's hours and pay overtime could lead to substantial liability for unpaid wages. The law places the burden of keeping accurate time and payroll records exclusively on the employer. Therefore, a domestic worker can falsely claim that he or she worked 90 hours per week without having to provide any proof while the employer must have accurate time and payroll records to dispute the employee's claim.

In addition to accurately recording a domestic employee's hours and paying at least the applicable minimum wage and overtime, employers must also provide domestic employees with a pay stub, indicating the hours they worked, their overtime hours, rate of pay, payroll deductions, taxes, etc. Failure to provide a domestic worker with a pay stub can result in a fine of up to $5,000.00.

Further, upon hiring, there are certain documents that need to be filled out. For example, federal law requires employers to fill out an I-9 form to verify the domestic worker's status to work legally in the United States. Under New York law, all newly hired employees also need to be given a wage notice that informs them of their hourly rate, overtime rate, payday and other pertinent information regarding their wages. Failure to provide a domestic worker with this wage notice can result in a fine of up to an additional $5,000.00, totaling $10,000.00.

There are several other factors to consider when hiring a domestic worker. If you are considering hiring a domestic employee, please contact an attorney at Franklin, Gringer & Cohen, P.C. at 516-228-3131 to discuss how to do it correctly and reduce your exposure to liability.

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RECENT SURGE IN ADA LAWSUITS

biguous, reach the conclusion that "places of public accommodation" need not be physical structures, and discrimination may occur when the goods or services of a "place of public accommodation" are enjoyed by customers who never visit a physical location. The Second Circuit Court of Appeals, which covers New York, has emphasized that it is the sale of goods and services to the public, rather than how and where that sale is executed, that is crucial when determining if the protections of the ADA are applicable. Therefore, in New York, websites are considered a place of public accommodation with or without a nexus to a physical location.

For a website to be accessible to disabled people, the content must be coded so that a screen-reading software can transcribe the words into audio. Additionally, any video on the website must include descriptions for those with hearing disabilities. While no formal government standards exist, the accepted industry standard, followed by both private and government websites, are the "Web Content Accessibility Guidelines" (WCAG). The relative simplicity of government websites has allowed them to already be compliant with these guidelines. Since most websites for private businesses are typically loaded with images and video, such websites tend to be more difficult and costly to overhaul to meet the guidelines. The cost of such overhaul ranges from several thousand dollars to a few million dollars, depending on the complexity of the website.

With the ever-growing rise of lawsuits citing the ADA and accessibility of websites for those with disabilities, it remains in the best interest of all businesses to review their current website and the "Web Content Accessibility Guidelines" (WCAG) to ensure that their website is fully compliant with these guidelines.

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nated without cause. The agreement also stated that the agreement could be signed in counterparts, meaning it could be signed separately by the parties. The employee signed the agreement and emailed it to the employer. The employer replied to the email by stating, "Welcome aboard. We'll countersign over the next few days." However, the employer never signed the agreement. Nonetheless, the employee began working and performed his duties as required under the agreement, and the employer paid the employee the stated salary and benefits. Approximately six months later, the employer terminated the employee without cause and refused to pay the six months' severance provided in the agreement. The employee filed a lawsuit alleging breach of contract against the employer for failing to pay the six months' severance. The trial court dismissed the employee's claim because the agreement was not signed by the employer. The employee appealed.

The Appellate Division reversed the trial court's decision. The court held that the fact that the employer never signed the agreement did not necessarily mean that the parties did not intend to be bound by the agreement. As for the counterpart provision, it stated that each party could indicate its assent by signing a separate counterpart, but there was nothing in the agreement that stated that the parties could only assent by signing the agreement. The court found it especially significant that the employer assented in its response email to the employee and that both parties performed their duties as required by the contract.

Employers should be mindful of the language included in employment agreements given to employees and be aware that they may still be bound by the terms even if the agreement is not signed by both parties.

If you have any questions regarding this or any other labor and employment law matter, please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131.

IMPORTANT LAW UPDATE FOR ALL EMPLOYERS IN NEW YORK CITY

- Governor Cuomo recently signed a new law making it easier for employees to win and recover monies in harassment and/or discrimination cases.
- The law goes into effect in October 2019:
  - The new law lowers the current "severe or pervasive" standard employees must meet to show that they have been harassed or discriminated against in the workplace.
    - The new bill allows an employer to escape liability only if it can show that the alleged harassment comprises "petty slights or trivial inconveniences."
    - Under this new legislation, it will be easier for employees in New York to prove harassment or discrimination based on age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status, and other protected categories.
  - The new law also provides that an employer may still be held liable for harassment in the workplace even if the employer has a complaint procedure and the employee failed to report the harassment.
- Employers should ensure that all their supervisors, managers and employees receive sexual harassment and discrimination prevention training.
- Call our firm at 516-228-3131 to schedule a training session, which is required annually.

- Governor Cuomo has signed a law prohibiting employers from asking applicants or current employees for their wage or salary history.
- New York City, Suffolk County, Westchester County and Albany County already have similar bans in place.
- Starting on January 6, 2020, employers in New York will be prohibited from:
  - Requesting or requiring that a job applicant or current employee provide salary history as a condition of being interviewed or considered for an offer of employment, or as a condition of employment or promotion;
  - Using a job applicant's compensation history when considering whether to offer employment or in determining the salary to be offered;
  - Seeking an applicant's or employee's compensation history from a current or former employer; or
  - Declining to interview, hire, promote, or otherwise retaliating against a job applicant or current employee based on his or her compensation history or because the applicant or employee refused to provide the requested compensation history.
- This new law does not prohibit an applicant or employee from voluntarily disclosing their compensation history for purposes of negotiating a compensation package from an employer.
- An employer is allowed to verify salary history with an individual's previous employer, but only if that individual has rejected an offer of employment based on previous compensation.
- Employers should review their current hiring and interviewing policies.

If you have any questions regarding this or any other labor and employment law matter, please contact an attorney at Franklin, Gringer & Cohen, P.C. at (516) 228-3131.

FRANKLIN, GRINGER & COHEN, P.C.

ATTORNEYS AT LAW


Glenn J. Franklin


Martin Gringer


Steven E. Cohen


Joshua Marcus


Michael S. Mosscrop


Ken Sutak


Jasmine Y. Patel


Daniel F. Carrascal

We have over ninety years of combined experience representing employers in labor relations and employment law matters. We believe that there are numerous advantages for a company to look to a firm that has practiced labor and employment law for many years in both preventing and defending employment discrimination litigation. Our foremost concern is to avoid litigation whenever possible through preventive planning. Our clients consult with us on a regular basis before taking action to avoid labor disputes and costly lawsuits. The best result for a client is the lawsuit that does not happen in the first place.

We have been giving seminars and writing articles for many years on how to avoid litigation through the use of progressive discipline, documentation, consistent treatment, adoption of anti-harassment policies, employee handbooks, and proper training of supervisory staff. We give this advice because we have seen that it has worked for our clients. Our long-term clients who regularly consult with us before taking adverse disciplinary action rarely face litigation over those decisions.

OUR FIRM ALSO PRACTICES IN THE FOLLOWING AREAS

LABOR RELATIONS AND EMPLOYMENT LAW ON BEHALF OF MANAGEMENT
COMMERCIAL TRANSACTIONS AND LITIGATION
COMMERCIAL AND RESIDENTIAL REAL ESTATE
MATRIMONIAL AND FAMILY LAW
PERSONAL INJURY AND MEDICAL MALPRACTICE LITIGATION
BUSINESS PLANNING AND FORMATION

GARDEN CITY OFFICE
666 Old Country Road, Suite 202
Garden City, New York 11530-2013
Phone: (516) 228-3131 • Fax: (516) 228-3136

NEW YORK CITY OFFICE
150 East 58th Street, 27th Floor
New York, New York 10155
Phone: (212) 725-3131 • Fax: (212) 725-3268

www.franklingringer.com