MANCHESTER AREA HUMAN RESOURCES ASSOCIATION

SEPTEMBER 12, 2017

LEGAL AND LEGISLATIVE UPDATE

by

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I. Introduction

Welcome back! It was a busy summer. Here are just a few developments while you were hopefully enjoying some time off this summer.

II. Take this off of your Fall "To Do" List: EEO-1 Delayed in Part and Suspended in Part

As you may have heard, recently we received some good news regarding the EEO-1 pay data collection that would have gone into effect in March 2018.

On August 29th the Acting Chair of the Equal Employment Opportunity Commission (EEOC), Victoria Lipnic, issued a statement indicating that the Office of Information and Regulatory Affairs (OIRA) plans to stay the effective date of the pay data collection provisions of the revised EEO-1 form in order to review the appropriateness of the revisions under the Paperwork Reduction Act (PRA). The original EEO-1 obligations have not changed, but employer will not need to report on wages or hours worked. In other words, EEOC postponed the rollout of its new reporting form, called "Component 2" which would have required the reporting of wages and hours worked. Both Component 1 (the original EEO-1 reporting form, which requires the disclosure of race, ethnicity, and gender) and Component 2 were originally scheduled for a filing date of March 2018. (EEO-1 used to be due in October each year for period ending 9/30). That March 2018 deadline has not changed for Component 1; it is still due on March 2018.

Component 2 however has been stayed, maybe indefinitely. So to be clear, for employers with 100 or more employees, the EEO-1 reporting deadline is still March 2018, but employers need only submit Component 1 (the original EEO-1 reporting form).

III. Buyer Beware: Federal Court in New Hampshire Applies Constructive Notice Standard to Question of Successor Liability in Employment Case

In a recent decision Kratz v. Richard J. Boudreau & Associates, LLC and Schlee & Stillman, LLC, the U.S. District Court for the District of New Hampshire provided useful guidance on the issue of whether a successor corporation must have actual knowledge of a claim against its predecessor in order to be held liable, or if it's sufficient to show that the successor *should have known* about the claim at the time of purchase. This decision should help underscore the importance of due diligence in corporate transactions.

Background

The plaintiff in this case, Patricia Kratz, began working for Richard J. Boudreau & Associates ("RJBA") as a debt collector in April 2014. Shortly after starting, she claims to have been sexually harassed by her training manager, Richard Fradette, and communicated as much to upper management in May 2014. In June 2014, just six weeks after starting work with RJBA, she was fired. RJBA claims that she was fired for failing to meet her assigned quota, but Ms. Kratz alleges that she was actually terminated in retaliation for complaining about sexual harassment.

Soon after her firing, Ms. Kratz filed a complaint with the New Hampshire Commission for Human Rights and the Equal Employment Opportunity Commission ("EEOC"). The process was slow-moving, and the parties were unable to reach a resolution through mediation, which culminated in Ms. Kratz filing suit against RJBA in June 2015. During the year that passed, however, RJBA was acquired by Schlee & Stillman, a fellow debt collection law firm. As a result, when Ms. Kratz filed suit against RJBA, she also named Schlee & Stillman as a defendant, claiming that Schlee & Stillman should be held liable under a "successor liability" theory.

Successor's Motion for Summary Judgment

Schlee & Stillman quickly moved for summary judgment, arguing that they cannot be held liable because they had no notice of Ms. Kratz's claim at the time of the acquisition of RJBA. Generally, under New Hampshire law, when one corporation sells all or a substantial portion of its assets to another, the purchaser does not assume the liabilities of the seller. However, there are exceptions to that rule, especially in the context of employment claims.

When courts are deciding whether to impute liability for unlawful employment practices to a successor corporation, they will attempt to balance the plaintiff's interests, defendant's interests, and public policy considerations. The factors courts will consider are innumerable, but in general, the court will impute liability in the event that (a) the successor corporation had notice of the claim at the time of purchase, (b) the predecessor corporation can no longer provide relief (e.g. due to insolvency), and (c) there has been substantial continuity of the predecessor's

business operations (e.g. the successor corporation did not simply dissolve the company). The courts consider the first factor to be the most important, as it would be inequitable to hold a successor corporation liable if they had no notice of the claim, since that means they would not have had an opportunity to protect themselves through either an indemnification agreement or lower purchase price.

In the instant case, Schlee & Stillman did not have actual notice of Ms. Kratz's claim at the time of purchase. However, Ms. Kratz claims that Schlee & Stillman had constructive notice of the claim – meaning that they *should have known* about it – and argues that such notice is sufficient for establishing successor liability. The District Court was thus tasked with determining the appropriate notice standard: Must Schlee & Stillman have known about the claim to now be held liable, or is it enough that they should have known?

The Decision

The Court spent a great deal of time analyzing the due diligence conducted by Schlee & Stillman during the sale process. Of note, Schlee & Stillman only conducted limited research into RJBA's potential liabilities, neglecting to even ask RJBA for a summary of such liabilities prior to signing the purchase agreement (a standard inquiry in such cases). Schlee & Stillman attempted to argue that they had no reason to believe that RJBA had not disclosed all liabilities prior to the sale, but the Court was not convinced by that line of argument, stating that the evidence may well support an inference that Schlee & Stillman and RJBA engaged in "an unspoken but mutually understood game of 'don't ask, don't tell.'"

The Court also focused on the fact that RJBA's business operations largely continued under the Schlee & Stillman banner, with Schlee & Stillman operating out of RJBA's former office, employing the majority of RJBA's former employees, and performing debt collection services for many of RJBA's former clients. The Court found Schlee & Stillman's minimal due diligence to be "especially perplexing" given the degree of business continuity.

The Court then considered these facts in light of the principal reason for the notice requirement: to ensure fairness by providing the successor the opportunity to protect against potential liability through the negotiation process, as noted previously. The Court made clear that fairness is not served if liability can be avoided by intentionally evading actual knowledge – which it appears Schlee & Stillman did. For this reason above all others, the Court decided that a constructive notice standard, not an actual notice standard, should apply. The Court then denied Schlee & Stillman's motion for summary judgment on the basis that a reasonable jury could conclude that Schlee & Stillman should have known about Ms. Kratz's claim based on the facts at hand.

Key Takeaways

- A successor corporation cannot avoid liability for its predecessor's unlawful employment actions by arguing that they were unaware of the potential claim, as a constructive notice standard applies.

- Constructive notice alone may not give rise to successor liability, as courts will consider a variety of other factors, but it will likely create a presumption of liability.

- A corporation considering acquiring another must conduct appropriate due diligence so that it can protect itself prior to signing the sale agreement, either through an indemnification agreement or a lower purchase price.

Acknowledgment

Thanks to Brian Bouchard and Paul Lopez for their research and writing on these matters.

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Disclaimer

Please note: This outline is intended as general guidance and not specific legal advice. Your legal counsel should be consulted with specific questions or for advice on how to proceed with these matters.