AKRIDGE & BALCH, P.C.

Attorneys at Law

Report From Counsel

Insights and Developments in the Law **Summer 2014**

Small Businesses and Job Discrimination

Number of Employees

The federal Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the most widely applicable federal laws that prohibit discrimination in employment. The smallest of businesses are not subject to most of these statutes. Title I of the Americans with Disabilities Act (ADA), which prohibits employment discrimination against qualified individuals with disabilities, applies only to employers with 15 or more employees.

In calculating the number of employees for purposes of coverage of these statutes, all employees are counted, including part-time and temporary workers.

The same is true for Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits job discrimination based on race, color, religion, sex, and national origin. The threshold for coverage under the Age Discrimination in Employment Act (ADEA) is 20 or more employees. The Equal Pay Act, which is intended to prevent wage discrimination between men and women in substantially equal jobs in the same establishment, applies to most employers with at least one employee.

In calculating the number of employees for purposes of coverage of these statutes, all employees are counted, including part-time and temporary workers. Independent contractors are not included, but the distinction between such workers and employees is often difficult to draw without the advice of legal counsel. Situated between the businesses so small as to be excluded from coverage and the Fortune 500 are thousands of small businesses to which the EEOC-enforced laws apply.

Procedures

Anyone believing that his or her employment rights have been violated because of the types of discrimination covered by the federal laws, or because of retaliation for opposing job discrimination, filing a charge, or participating in proceedings under those laws, may file a charge of discrimination with the EEOC. In most states, the charge must

Continued on page four.

Noncompetition Agreements and Arbitration

Although the Federal Arbitration Act is federal legislation, that is, the law of the land, the frequency with which it is part of standard employment contracts means that state courts, rather than federal courts, are more frequently called on to apply the Act to a contract dispute. Thirty years ago, the U.S. Supreme Court said that the Act declares "a national policy favoring arbitration." More recently, it has firmly come down against what it regarded as a state supreme court's "judicial hostility" towards arbitration.

The case arose out of litigation that ensued when two employees, whose contracts with their employer included noncompetition and arbitration clauses, left those jobs to work for one of the employer's competitors. The former employer demanded arbitration, and the former employees countered by suing in state court for an injunction against enforcement of the noncompetition clauses. By statute, the state has limited the enforceability of noncompetition agreements. When a lower state court ruled that it was for the arbitrator in the first instance, not the court, to decide on the validity of the noncompetition clause, the decision was overturned by the state's supreme court, which effectively ordered the state trial court not to defer to any arbitrator on the issue of the validity of the noncompetition clause.

The final arbiter—the U.S. Supreme Court—agreed with the lower

Continued on page four.

AKRIDGE & BALCH, P.C.

852 North Dean Road, Suite 100 • P.O. Drawer 3738 • Auburn, Alabama 36831-3738

Telephone (334) 887-0884 • Fax (334) 887-2380 • www.akridgebalch.com

Real Estate Deals Gone Wrong

The ageless advice to read, understand, and expect to be bound by language in a contract you sign is as sound now as ever. It is especially important with respect to contracts to buy real property, where the financial stakes are often high. Jerome contracted to buy property, delivering a $5,000 deposit to be credited toward the purchase price. An addendum to the contract agreed to by the parties stated that in the event the seller breached the agreement or defaulted, Jerome was entitled to the return of his earnest money and cancellation of the contract, as his "sole and exclusive remedy."

When the seller did not close on the deal within the time set by the contract, according to Jerome because there had been a defect in its title to the property that was later remedied, Jerome sued to enforce the contract. That is, he sued to force a sale of the property to him, as he was not content with the prospect of simply getting his $5,000 back, terminating the deal and returning to square one.

A court held Jerome to the terms of the contract addendum, ruling that he was entitled to no more than his money back from the seller. In some cases, an aggrieved party may be relieved of the limitations or burdens of a contract when the unequal bargaining positions of the parties are such as to deprive the aggrieved party of a meaningful choice and where the terms of the contract are unreasonably favorable to the other party. Jerome made this argument in an attempt to rid himself of the limitation on his contractual remedy, to no avail.

The problematic addendum, in bold language no less, warned the parties to read it carefully before signing and included an acknowledgment that Jerome was knowledgeable and experienced in financial and business matters and able to assess the transaction's merits and risks. The court also declined to find that limiting Jerome to the return of his earnest money deposit was unreasonably tilted in the seller's favor. It simply restored the parties to their positions prior to signing the contract. In a loose sense, Jerome may have been the "victim" of a broken contract, but he was not such a disadvantaged victim under the law as to be entitled to set aside any of the terms of his contract, including the one that boxed him in when he was seeking a remedy.

No less important than reading and understanding all parts of a real estate sales agreement is the need to be up front with the other party to the transaction about the condition of the property, especially as to a problem that is not obvious. In another case, this was an expensive lesson to learn for a seller of a home who was less than forthright with the buyer about defects in a basement wall.

In the litigation that ensued when the buyer sued the seller for fraud and negligent misrepresentation, the buyer testified that at first he was actually impressed with the finished basement

Continued on page three.

Estimated Taxes for Business Owners

Estimated tax is the method used to pay tax on income that isn't subject to withholding, most notably earnings from self-employment. Many owners of small businesses—whether operated as S corporations, partnerships, limited liability companies electing partnership taxation, or sole proprietorships—pay their estimated tax using the same IRS Form 1040-ES that individuals use.

Payments of estimated taxes are spread out over four payments, falling due in April, June, and September of the current year, and January of the following year. Generally a taxpayer must file estimated taxes if he or she owes $1,000 or more in taxes when an annual tax return is filed. An underpayment penalty can be avoided if tax payments for the year, including withholding and any tax credits, cover the ultimate tax bill, or at least are short by less than $1,000. There are special rules for farmers, fishermen, certain household employers, and some higher-income taxpayers.

A taxpayer who also receives salaries and wages may be able to avoid having to make estimated tax payments on other income by asking his or her employer to take out more tax from such earnings. In addition, in a given year a taxpayer does not have to make estimated tax payments until there is income on which income tax will be owed.

Given the difficulty in anticipating the year's total tax obligation in April, or even June, there are two "safe harbors" for avoiding a penalty for underpayment of estimated taxes: Pay either 90% of your current year's tax obligation or 100% of the previous year's tax.

Corporations are subject to similar, but slightly different, rules for paying estimated taxes. A corporation must make equal installment payments on the 15th day of the 4th, 6th, 9th, and 12th months of its tax year if the expected tax for the year is $500 or more. Corporations use IRS Form 1120-W. The safe harbors for corporate taxpayers are each set at 100%. Accordingly, to avoid a penalty, a company should make each payment at least 25% of the current year's income tax or 25% of the prior year's income tax, whichever is smaller.

Ensure Your Financial Privacy

There is a federal law that affords consumers significant say over the privacy of their financial information while still allowing financial institutions to share information for normal business purposes. This Act covers banks, savings and loan institutions, credit unions, insurance companies, securities firms, and even some retailers and automobile dealers that extend or make arrangements for consumer credit.

There may be more forms of personal information gathered by the institutions than you realize. They may have credit reports and records of how much you buy and borrow, where you shop, and how well or poorly you pay your bills on time.

The Act protects your financial privacy in three basic ways: First, in a privacy notice, the institution must tell you what kinds of information it collects and the types of businesses that may be provided with it. Institutions must send out a privacy notice once a year. Second, if the institution is going to share your information with anybody outside its corporate family, it must give you the opportunity to "opt out" of that kind of information sharing. The third layer of protection requires the institutions to describe how they will go about protecting the confidentiality and security of your information.

A privacy notice from your bank may not be the kind of mail you rip open with eager anticipation, but you should take the time to look it over carefully all the same. Somewhere in the formal verbiage you should look especially for these items:

What kinds of information may be shared, both with affiliated companies and with outsiders? Don't expect great specificity on this in the notice itself. The Act requires only a description of basic categories of information, with some examples.

What information can you not prevent your financial institution from sharing? Recognizing some circumstances in which the institutions should be allowed to share financial information with outsiders without the consumer's consent, the Act does not allow you to stop the sharing of information that is needed to help conduct normal business (such as for outside firms that process data or mail statements); to protect against fraud or unauthorized transactions; to comply with a court order; or to comply with a "joint marketing agreement" entered into with another institution.

How do you go about "opting out" of the sharing of information of outside entities? Sounds simple enough, but the institution may require you to exercise this option by calling a specific phone number or by completing a form and mailing it to a particular address. If you opt out by phone, to be safe you may want to follow up with a written version, keeping a copy for your records.

Real Estate Deals

Continued from page two.

in the house, with its drywall all around and a polished floor you could eat off of. But some months after he moved in, the buyer noticed a worsening problem with water leaking from one of those basement walls. When workers removed the drywall to explore further, they exposed a basement wall that was bowed, had cracks both small and large, and had mold and mildew. Layers of caulking in some of the cracks suggested that someone had tried in vain to fix the problem on the cheap. The new owner then did fix the problem, but at great expense.

Although the seller had answered no on a disclosure form to questions about any known water problems or cracks and settling issues in the basement, other evidence suggested that the real answer should have been yes. The seller claimed that he just happened to put up the drywall in the basement as the last item on a to-do list, at a time when he was not intending to sell the house. Records showed that there was no drywall when the house was first listed and did not sell, but that the drywall was in place less than a year later for the second listing that resulted in the sale.

For his lack of candor, the seller paid a high price. An appeals court upheld an award of tens of thousands of dollars in damages to the buyer. In addition to damages for mental anguish, there was compensation to the buyer for those costs of repair he incurred for such items as the installation of an exterior drainage system, the repair of the footer drains, and the installation of multiple straps to repair the bowed wall. Last but not least was a significant award of punitive damages, based on the trial court's conclusion that the seller had acted with "conscious disregard" for the rights and safety of the buyer, where there was a great probability of causing substantial harm. All in all, the case stands as an object lesson: In selling real estate, as in most undertakings, honesty is the best policy.

Real Estate Deals Gone Wrong

The ageless advice to read, understand, and expect to be bound by language in a contract you sign is as sound now as ever. It is especially important with respect to contracts to buy real property, where the financial stakes are often high. Jerome contracted to buy property, delivering a $5,000 deposit to be credited toward the purchase price. An addendum to the contract agreed to by the parties stated that in the event the seller breached the agreement or defaulted, Jerome was entitled to the return of his earnest money and cancellation of the contract, as his "sole and exclusive remedy."

When the seller did not close on the deal within the time set by the contract, according to Jerome because there had been a defect in its title to the property that was later remedied, Jerome sued to enforce the contract. That is, he sued to force a sale of the property to him, as he was not content with the prospect of simply getting his $5,000 back, terminating the deal and returning to square one.

A court held Jerome to the terms of the contract addendum, ruling that he was entitled to no more than his money back from the seller. In some cases, an aggrieved party may be relieved of the limitations or burdens of a contract when the unequal bargaining positions of the parties are such as to deprive the aggrieved party of a meaningful choice and where the terms of the contract are unreasonably favorable to the other party. Jerome made this argument in an attempt to rid himself of the limitation on his contractual remedy, to no avail.

The problematic addendum, in bold language no less, warned the parties to read it carefully before signing and included an acknowledgment that Jerome was knowledgeable and experienced in financial and business matters and able to assess the transaction's merits and risks. The court also declined to find that limiting Jerome to the return of his earnest money deposit was unreasonably tilted in the seller's favor. It simply restored the parties to their positions prior to signing the contract. In a loose sense, Jerome may have been the "victim" of a broken contract, but he was not such a disadvantaged victim under the law as to be entitled to set aside any of the terms of his contract, including the one that boxed him in when he was seeking a remedy.

No less important than reading and understanding all parts of a real estate sales agreement is the need to be up front with the other party to the transaction about the condition of the property, especially as to a problem that is not obvious. In another case, this was an expensive lesson to learn for a seller of a home who was less than forthright with the buyer about defects in a basement wall.

In the litigation that ensued when the buyer sued the seller for fraud and negligent misrepresentation, the buyer testified that at first he was actually impressed with the finished basement

Continued on page three.

Estimated Taxes for Business Owners

Estimated tax is the method used to pay tax on income that isn't subject to withholding, most notably earnings from self-employment. Many owners of small businesses—whether operated as S corporations, partnerships, limited liability companies electing partnership taxation, or sole proprietorships—pay their estimated tax using the same IRS Form 1040-ES that individuals use.

Payments of estimated taxes are spread out over four payments, falling due in April, June, and September of the current year, and January of the following year. Generally a taxpayer must file estimated taxes if he or she owes $1,000 or more in taxes when an annual tax return is filed. An underpayment penalty can be avoided if tax payments for the year, including withholding and any tax credits, cover the ultimate tax bill, or at least are short by less than $1,000. There are special rules for farmers, fishermen, certain household employers, and some higher-income taxpayers.

A taxpayer who also receives salaries and wages may be able to avoid having to make estimated tax payments on other income by asking his or her employer to take out more tax from such earnings. In addition, in a given year a taxpayer does not have to make estimated tax payments until there is income on which income tax will be owed.

Given the difficulty in anticipating the year's total tax obligation in April, or even June, there are two "safe harbors" for avoiding a penalty for underpayment of estimated taxes: Pay either 90% of your current year's tax obligation or 100% of the previous year's tax.

Corporations are subject to similar, but slightly different, rules for paying estimated taxes. A corporation must make equal installment payments on the 15th day of the 4th, 6th, 9th, and 12th months of its tax year if the expected tax for the year is $500 or more. Corporations use IRS Form 1120-W. The safe harbors for corporate taxpayers are each set at 100%. Accordingly, to avoid a penalty, a company should make each payment at least 25% of the current year's income tax or 25% of the prior year's income tax, whichever is smaller.