Accidental Contracts

Often when reading an email, it is interesting to note how casual the language may be, lacking specificity and facts relevant to the issue at hand. From a business perspective the lack of clarity may give rise to questions pertinent to compliance with the antitrust laws or other legal aspects of doing business in today's technology world. But even outside the scope of the antitrust laws, email is giving rise to a new issue…"The Accidental Contract".

But, how can a contract be formed "accidentally". A contract is supposed to require a meeting of the minds and represent the mutual intent of the parties to be bound and there can't be an "accidental" meeting of the minds. Logic and the law said there's no way the parties can accidentally form a contract. The contract had to be written and parties were always careful about what they wrote. But, then came technology.

Email has changed things. I can talk with my fingers any time I want. I don't go anywhere without some device that facilitates communication in written form albeit an "electronic writing". But, yes, contracts can be formed through email.

The fact that email contracts exist is not surprising. Rather the problem is that people are not careful enough about what they say when preparing and sending email and too often find themselves party to a contract they never contemplated. Consider the following:

In 1999, the owner of a public relations firm sold his business. Two contracts were executed, one being a stock purchase agreement and the other being an employment agreement where the seller agreed to continue as chairman and CEO for three years. His duties were to be the customary duties of a CEO. The employment contract called for a series of payments contingent upon certain enumerated goals being achieved. Within six months of the sale, financial problems arose and the seller was removed as CEO. After some negotiations, the seller was presented with three options…leaving the firm, staying and working on new business, or come up with another alternative. Thereafter, the seller and the former CEO of the company exchanged a series of emails which culminated with a fourth option proposed to the seller. In response, the seller wrote in an email:

> "Bob, to begin with, I want to thank you again for helping me restore the dignity and respect that I'm entitled to as a senior professional. Things

were really getting out of hand until you intervened. What's happened since the lunch you and I had has been almost cathartic...That being said I accept your proposal with total enthusiasm and excitement...I'm psyched again and will do everything in my power to generate business..."

In response, the Company said that it was thrilled with his decision and assured him that it would work together to achieve their mutual goals.

Each of the emails included the typed name of the sender at the foot of the message.

Sometime later, the seller filed a lawsuit against the company alleging a breach of the employment agreement. He argued that the email exchanged did not constitute a signed writing as required under Section 13 of the employment agreement. However, the court found that the emails did constitute "signed writings" within the meeting of the statute of frauds since the name of a party at the end of an email signified the intent of the party to authenticate the contents.

Enter the Uniform Electronic Transactions Act (UETA)

In 1999, the Uniform Law Commissioners promulgated the UETA. This was the first comprehensive effort to prepare state law for electronic commerce. While it has been adopted in some form by all 50 states don't let the word "uniform" mislead you. Like the Uniform Commercial Code, the states may modify or not pass sections of the recommended statute.

The UETA applies only to transactions in which each party has agreed by some means to conduct them electronically. Parties to electronic transactions may opt out and they may vary, waive or disclaim provisions of the UETA by agreement even if it is agreed that business will be conducted by electronic means. There are four basic rules in Section 7 of the UETA.

1. A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

2. A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

3. Any law that requires a writing will be satisfied by an electronic record.

4. Any signature requirement in the law will be met if there is an electronic signature.

Recommended Action to Avoid Accidental Email Contracts

Businesses should take certain actions to avoid falling into the trap of Accidental Contracts. While there may be a myriad of ways to avoid doing so the following are some for businesses to consider:

1. State in emails "The company intends to be bound only by a physical executed formal written agreement that includes all the customary provisions and will not be bound by electronic contracts."

2. Be explicit about hurdles that must be cleared before closing a deal. If upper management approval is required, be sure to say so.

3. Consider the automatic disclaimer to all business emails. "Sender of this email is not authorized and has no intent to make offers or contracts by email or any other electronic means."

4. Train employees to the pitfalls of accidental contracts including the significance of the terms "offer", "accept or acceptance", "promise" or even "doable".

5. Consider random audits to nip problems in the bud.

Something to Remember

Lightning fast informal deal making is not necessarily a bad thing and it's not going away. It's all about discipline—sloppiness was never good—but, now, the consequences are worse. Above all remember, "I know that's what the contract says but that's not what I really meant" is not a viable defense.

Antitheft Security Screening Not Compensable Time Under Federal Law

In a unanimous ruling, the U.S. Supreme Court has ruled that time spent by warehouse workers in line for and undergoing antitheft security checks is not compensable time (i.e., time for which wages are owing) under the Fair Labor Standards Act (Act). (*Integrity Staffing Solutions, Inc. v. Busk,* No. 13-433).

In this case Integrity Staffing Solutions, Inc. required its hourly warehouse workers, who retrieved products from warehouse shelves and packaged them for delivery to Amazon customers, to undergo a security screening before leaving the warehouse each day. Several former employees sued the company alleging that they were entitled to pay under the Act for the roughly 25 minutes each day that they spent

waiting to undergo and undergoing those screenings. They also alleged that the company could have reduced that time significantly by adding screeners or staggering shift terminations and that the screenings were conducted to prevent employee theft and, thus, for the sole benefit of the employer and its customers.

The Supreme Court reversed the Ninth Circuit appeals court and held that time spent by employees waiting to undergo and undergoing security screenings is not compensable under the Act. What remains unclear is whether similar claims brought under *state* wage and hour laws will be resolved by state courts in the same manner.

Source: National Association of Wholesaler Distributors, January, 2015

NLRB Creates New Right for Employee Use of Company Email for Union Activity

The National Labor Relations Board has declared that employees with access to an employer's email system in the course of their work must, in practically all cases, be allowed to use the employer's email system during non-work time to engage in union organizing and otherwise communicate about wages, hours and other workplace issues. (*Purple Communications Inc.*, decided Dec. 11, 2014). This decision applies to employers – whether or not the company has a unionized workforce. Any company with a "business use only" policy for its email system now is exposed to possible NLRB adversarial action for having such a restriction.

At issue was the Purple Communications email use policy that provided in part:

> INTERNET, INTRANET, VOICEMAIL AND ELECTRONIC COMMUNICATION POLICY
>
> Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by [Company] to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.

In this case, the union attempting to organize Purple Communication's workers charged that this policy was unlawful on its face because it prohibited employees from using the company's email for union organizing communications to co-workers (e.g., sending union authorization cards, flyers, video clips, etc.) and discussing other workplace issues.

NLRB Ruling

On a 3-2 vote, the NLRB overruled its 2007 decision in the *Register Guard* case (which approved a company's email policy with a business use only restriction), and declared:

> "[W]e decide today that employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems."

Describing its decision as "carefully limited," the Board stated: (1) the decision only applies to employees who have already been granted access to the employer's email system and, importantly, does not require employers to provide such access; (2) an employer may only justify a total ban on non-work use of email by proving in "the rare case" that "special circumstances" make the ban necessary to maintain production or discipline; (3) absent justification for a total ban, an employer may apply uniform and consistently enforced controls if they are proven necessary to maintain production and discipline; and (4) the decision does not address access to a company's email system by non-employees nor address other types of electronic communications. Proving the existence of "special circumstances" will likely be a heavy burden for the employer.

Also discussed in the decision (although not an issue) is the employer's monitoring of the electronic communications on its email system, which will be lawful according to the NLRB, so long as the employer "does nothing out of the ordinary," such as increasing its monitoring during a union organizing drive or focusing its monitoring efforts on union or other protected employee activity. Finally, an employer may still notify employees that it monitors (or reserves the right to monitor) computer and email use for legitimate management reasons and that employees have no expectation of privacy in their use of the employer's email system.

Conclusion

The NLRB's *Purple Communications* ruling will likely be challenged in the federal appellate courts and perhaps the U.S. Supreme Court. Until modified or reversed by a court, the NLRB will enforce this rule in pending and future cases. Every employer with a policy on the use of its email system by authorized employees is well advised to have its professional advisors review the policy and consider changes as needed to conform to the NLRB's latest fiat.

Source: National Association of Wholesaler Distributors, January, 2015

NLRB Charges McDonald's as a "Joint Employer" of its Franchisees' Workers

The National Labor Relations Board's general counsel has filed 13 consolidated complaints naming McDonald's Corp. as a "joint employer" of the employees at 78 McDonald's franchisees across the U.S. Issued on December 19, 2014, each complaint seeks to hold McDonald's responsible for unfair labor practices allegedly committed by independently owned and operated franchisees.

The complaints ignore existing NLRB precedent and are supposedly justified by the questionable argument that the existing joint employer test inhibits effective collective bargaining by franchisee employees. The NLRB general counsel has also claimed that, in some cases, avoiding unionization is the "driving force" behind the franchising business model.

The new complaints relate to allegations of unlawful terminations, threats and retaliation by certain McDonald's franchisees in response to their employees participation in a campaign for higher hourly wages organized by a union. McDonald's has denied that it "directs or co-determines the hiring, termination, wages, hours or any other essential terms and conditions of employment of our franchisees' employees." McDonald's and the franchisee owners have vowed to vigorously contest the NLRB allegations of joint employer status as well as the unfair labor practice charges lodged in the complaints.

Holding a franchisor jointly responsible for the employment practices of its franchisees would abruptly reverse years of NLRB precedent in which a franchisor has generally been viewed as a separate employer from its franchisees.

Existing Joint Employer Test

For 30 years joint employer status has existed only if the franchisor exerts a direct and immediate control over the franchisee's employees and the employees' essential terms and conditions of employment – e.g., hiring, firing, discipline, supervision and direction of employment. Thus the NLRB has long recognized that a franchisor who only sets general guidelines and standards for its franchisees (trademark use, product and service standards, etc.) is not a joint employer, where the franchisee is the one in charge of hiring, termination, setting wages and benefits, and otherwise managing the operation of the workplace.

...The New Test

The NLRB general counsel now advocates adoption of a more "flexible" test that would consider the "totality of circumstances" in determining joint employer status –

taking into account whether an entity wields sufficient influence over the working conditions of another entity's employees such that meaningful bargaining could not occur in its absence. This approach is not limited to franchise operations - other target areas identified by the general counsel are temporary service workers, outsourced operations and subcontracted services.

Conclusion

The potential liability impact on franchisors and other businesses is significant. Franchisors would face substantial liability and legal defense costs for the conduct of independent franchisees, unknown to the franchisor, and over which they have no control.

It remains to be seen whether this maneuver will be approved by the NLRB and upheld by the federal appellate courts. This process could take several years. It is another example of a potential pro-labor reversal of long-standing precedents under the National Labor Relations Act to facilitate union organizing attempts.

Source: National Association of Wholesaler Distributors, January, 2015