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Social Media and Privacy In The Workplace

It is very common for employers to monitor the workplace communications of its employees. The 2007 Electronic Monitoring & Surveillance Survey by the American Management Association confirmed that most Employers engage in electronic surveillance of one form or another: 73% monitor email messages, 66% monitor web surfing, 48% monitor with video surveillance, 45% monitor keystrokes and keyboard time, and 43% monitor computer files.

Employers monitor for a host of reasons, many of which are pretty understandable. Employers monitor to prevent lost productivity of employees using workplace PCs for personal emails, playing computer games, or accessing web sites for personal use. Employers are also required to lessen the risk of harassment and discrimination claims based upon inappropriate and offensive emails and internet content. Finally, employers monitor to protect company property, including proprietary or confidential information, such as trade secrets.

An employee's social networking on many popular social networking sites poses unique risks and pitfalls in the modern workplace. To begin with, an employee could inadvertently disclose confidential plans about reductions in force, research and development, and/or mergers and acquisitions. For example, an employee posts the following status update on his facebook™ account: "Working late again! I hate this XYZ deal, I can't wait until it closes." Clearly, this status update would implicate a variety of confidentiality issues and breaches, which an employer has a legitimate interest in preventing.

Employees may also inadvertently disclose confidential customer lists when they "friend" the employer's customers and or add them as "buddies". Employers have a legitimate business interest in maintaining the confidentiality of their customer lists, especially in the cases where an employer has non-solicitation agreements with employees. Ultimately, customers listed as "friends" or "buddies" on social networking sites may open the door for argument that the company's customer lists are not confidential. Similarly, "friending" an employer's customers and co-workers increases the chance of customer poaching/soliciting by ex-employees.

Disparagement of the company is also a very real danger that employers face in this modern technological workplace. In fact, the majority of issues and questions in this arena posed by employers concern whether they can discipline an employee for disparaging the company on social networking sites or in blogs. Typical scenarios include employees who post pictures of themselves wearing a company logo and behaving badly, or involving excessive alcohol consumption. A more serious scenario involves an employee who posts inappropriate or negative status updates or tweets about the company.

Discrimination and/or harassment can occur between employees on social networking sites and companies can be liable for profanity; vulgar, demeaning jokes; defamation; disparagement; libel; and references to such conduct!

Recently, the American Bar Association Journal reported that a deputy attorney general in Indiana was fired after tweeting advice for local police dealing with pro-labor protesters in Wisconsin; he advised using live ammunition. The Indiana Attorney General's office released a statement explaining why it believed the inappropriate tweet was grounds for the DAG's termination, "[w]e respect individuals' First Amendment right to express their personal views on private online forums, but as public servants we are held by the public to a higher standard, and we should strive for civility." The DAG, of course, has fought back claiming that he has a first amendment right to post what he wishes about political events. He claims various factors support his claim, including that he often expressed controversial opinions on Twitter and through a personal blog, criticizing the President, and that the DAG's office knew about this blog since 2004 and took no action until now. This former-DAG has taken down his blog. He also admitted in an interview with a CNN affiliate that his comments regarding the labor disputes in Wisconsin were not wise. He conceded, "I think that in this day and age that tweet was not a good idea, and in terms of that language, I'm not going to use it anymore."

Regardless, it is clear that in this day and age, employers have a legitimate business interest in protecting the unlawful use of their trademarks or logos, and ensuring that comments made by employees are not imputed to the company.

There are, however, constraints on an employer's right to monitor and/or punish employees. For example, in November 2010, the National Labor Relations Board ("NLRB") issued a complaint alleging that an employee was unlawfully fired by her employer for posting negative comments about her supervisor on a personal facebook™ page in violation of the employer's blogging and internet policy. The complaint asserted that because the comments were "protected concerted activity" under the National Labor Relations Act (the "Act"), the discharge violated the law, and the employer's policy interfered with its employee's exercise of her right to engage in protected concerted activity. The matter was settled privately, but it will be interesting to see how the NLRB ultimately reconciles older rules when applied to a new workplace where social networking is the norm.

It is also well understood that employers have an obligation under state and federal laws to provide a workplace free from harassment and discrimination. This obligation extends to the electronic arena. Harassment awareness training should include discussion about use of the employer's network email systems, and social networking. Discrimination and/or harassment can occur between employees on social networking sites and companies can be liable for profanity; vulgar, demeaning jokes; defamation; disparagement; libel; and references to such conduct! Employers should have a well publicized anti-harassment policy which includes policies regarding social media.

What about Linked-In? Should employers have policies about the use of Linked-In? Well, this is an interesting topic. Most employers agree that Linked-In is tailored more to professional networking than "social" media and, as a result, encourage the use of Linked-In. We do, however, recommend that our clients have well publicized policies regarding the use of Linked-In "recommendations" of former company employees. Employers may want to protect their ability to control official recommendations of prior and future employees.

Under the applicable laws, employers need to take a few precautions. First, the Electronic Communications Privacy Act ("ECPA") prohibits the interception, recording and disclosure of "any wire, oral, or electronic communication" unless one of the parties to the communication consents. The ECPA has been interpreted by courts to prohibit only the unauthorized interception of live, in-transit electronic communications (e.g., contemporaneous or sent but not yet received by the intended recipient.) Moreover, the Stored Communications Act ("SCA") prohibits unauthorized access to "contents of a communication while [it is] in electronic storage." Electronic storage means any temporary, immediate storage of a wire or electronic communication incidental to the electronic transmission, and any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

Finally, in another typical question posed by employers, what is an employer to do about using social media to screen prospective applicants? It is good to keep in mind some best practices when it comes to social media and recruitment efforts. It is undeniable that social networking sites can help employers confirm resumes, job applications, observe activities during their work day, determine professionalism, identify communication skills, and evaluate potential unethical or inappropriate behavior.

There are, however, numerous risks involved when employers utilize social media in recruitment efforts. These risks involve violations of many employment laws, including the New Jersey Law Against Discrimination ("NJLAD"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the Americans with Disabilities Act ("ADA"). First, with regard to NJLAD and ADA compliance, remember that employers are prohibited from making inquiries into an employee's medical condition and/or disabilities. Employers have an obligation to refrain from using medical or disability data in their hiring process. Similarly, pursuant to the NJLAD and Title VII, employers are prohibited from discriminating against applicants on the basis of a protected class, such as age, race, religion, and sexual orientation. An employer can inadvertently violate these laws if it improperly uses information obtained from social networking sites. Also, employers must make sure that their recruiters obtain candidate information in a proper and lawful way; meaning, that they review only publicly accessible information.

The Bottom Line – Social media has created a host of new potential pitfalls for employers that could get them into hot water. We recommend companies adhere to the following best practices to avoid liability: (1) monitor an email only after it reaches the email server; (2) provide notice to employees that e-mails are monitored and the consequences for improper use; (3) provide the equipment the employees utilize to send emails; and (4) use social media as a job-candidate screening tool carefully.

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Wage Theft Prevention Act Takes Effect April 12, 2011

On December 13, 2010, Governor David Paterson signed the Wage Theft Prevention Act (S.08380/A.11760) ("the WTPA") into law. The WTPA goes into effect on Tuesday, April 12, 2011.

In the words of New York State's Majority Press Office, the WTPA is intended to "protect[] thousands of hard-working men and women from unscrupulous employers who steal their earnings by paying less than minimum wage, misclassifying them as independent contractors, forcing them to work off the clock and various other schemes." (Senate Majority Press, posted at **www.nysentate.gov** on November 30, 2010.)

Hyperbole and unscrupulous employers aside, the WTPA expands on employers' notice requirements under NYS Labor Law 195(1), which presently requires employers to provide written notice to new hires of their pay rate, classification, and overtime pay rate, if applicable. The WTPA will require an employer to provide regular written notice to all of its employees about what they are being paid and why. An employer will also have to maintain its pay records for six (6) years. Finally, the WTPA will carry stiff penalties for non-compliance (e.g., up to $20,000 and a year's imprisonment for certain violations), so it is imperative that an employer know what the law requires.

Here are the WTPA's requirements in a nutshell:

Initial and Annual Wage Notices to Employees. An employer must provide notice in each employee's primary language and English:

- at time of their hire and also annually by February 1 of each year;
- **with a breakdown of salary, which lists:**
  - the rate of pay;
  - the basis for the pay rate (e.g., time, commission or piece);
  - allowances claimed as part of the minimum wage, including tip, meal or lodging allowances;
  - the regular pay day;
  - for non-exempt employees, the employer must specify the hourly and overtime rates; and
- **identifying information about the employer, including the employer's:**
  - name and any d/b/a;
  - main or principal office address and the employer's mailing address, if different from the principal office; and
  - phone number.

Penalties for Noncompliance with Initial Wage Notice Requirement: An employer's failure to provide each employee the aforementioned written notice within ten (10) days of his hire can render the employer liable for damages in a civil action from $50 per week up to a maximum of $2,500 and reasonable attorneys' fees and costs.

A Week's Notice of Wage Changes. An employer must also provide seven (7) calendar days' notice to an employee of any changes to the information contained in the initial or annual wage notices. The employer can satisfy the 7-day notice requirement by providing the employee a "wage statement" as described immediately hereafter.

Wage Statements and Explanations. An employer must provide a statement "with every payment of wages" that sets forth the same salary breakdown provided to each employee at his hire and annually, as well as any deductions thereto. (An employer whose payrolls are generated by third-party payroll processing services, such as ADP or Paychex, may be able to configure its payrolls to meet this requirement easily.) An employer must also be prepared, however, to provide an "explanation in writing of how such wages were computed" upon an employee's request. **Penalties for Noncompliance with Wage Statement Requirements. An employer may be found liable for penalties of $100 per week up to a maximum of $2,500 with reasonable attorneys' fees and costs, unless the employer can show that it timely and fully paid the employee or reasonably and in good faith believed itself to be a temporary agency that is exempt from the WTPA.**

Document Retention Requirements. An employer must obtain and keep for six (6) years "contemporaneous, true and accurate payroll records." Those records must reflect:

- for each week: the hours worked, pay rates and bases, deductions and any allowances;
- a signed, written acknowledgment of receipt from the employee each time the employer provides initial or annual notice, and the employer's affirmation that the notice was sent to employee in his or her primary language.
- **Penalties for Failure to Maintain Payroll Records.** An employer may be subject to:
    - **200% underpayment amount:** penalties of up to double the total amount found to be due; and
    - **Burden of proof:** if the employer does not have the wage records required by the WTPA, the employer will bear the burden of proof that it paid the employee any wages at all.

Wage Payment Violations

- **100% underpayment amount:** An employer who underpays (or fails to pay) an employee will be liable for the underpaid amount and, in the absence of a showing of good faith, the employer may be assessed liquidated damages up to 100% of the underpaid amount.
- **Back pay and other remedies:** In proceedings brought under the WTPA, an employer may also be held liable for back pay; liquidated damages; reinstatement; front pay (in lieu of reinstatement); and/or reasonable attorneys' fees and costs. Penalties for noncompliance may go up to ten thousand dollars ($10,000) in monetary fines and up to one year imprisonment for civil violations of the WTPA. For criminal violations of the WTPA, monetary fines can go up to twenty thousand dollars ($20,000) and imprisonment of one year and one day.

Penalties for Gender Discrimination in Wage Payments. An employer will be penalized $500 per payment whenever it discriminates against an employee on the basis of gender.

Penalties for Retaliation. An employer who retaliates in response to a claim that

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it violated the WTPA may be found liable on behalf of "every employee aggrieved" for each employee's back pay, reinstatement or front pay, and/or assessed a civil penalty from $1,000 to $10,000.

Who May Initiate a Claim Under the Wage Theft Prevention Act? Employees; certified labor organizations; third parties in trust for such employees; various funds for such employees; or the NYS Labor Commissioner.

Statute of Limitations for Filing Complaint of Violation of Wage Theft Prevention Act?

- **Two years from the date of the violation**, "regardless of the dates of employment of the employee."
- **Statute of limitations tolled when complaint is filed or investigated:** "The statute of limitations shall be tolled from the date an employee files a complaint with the commissioner or the commissioner commences an investigation, whichever is earlier."

Under the Ledbetter Act, employment acts that predate current management's tenure or recollection can come back to haunt.

"Other Practice" Makes Perfect or What Lilly Ledbetter Taught Me

Imagine that you have just acquired a company that comes complete with equipment, employees and a profitable operation. Sweet. The inherited paperwork is spotty, but many of the employees are long-timers who have filled you in on the goings on. Things are running smoothly, a virtual turnkey operation. You have implemented written policies, treat your employees fairly, and direct managers to compensate employees on legitimate, non-discriminatory bases, such as prior salary, title, seniority, grade level, and performance evaluations. A few employees have grumbled about their jobs or their pay, but eventually the grumbling has stopped. Better still, the statutes of limitation have run on those who left the company. So you no longer bear the risk of being sued and having to mount defenses based on facts no one remembers and for which you no longer have witnesses or documents to aid in your defense. Right?

Not necessarily. Imagine being sued by a former employee who is complaining about actions that occurred 19 years ago.

Now imagine being held liable.

Employment acts that predate current management's tenure or recollection can come back to haunt. Take the case of Lilly Ledbetter. By now we're all somewhat familiar with her story. Nearing retirement after 19+ years at Goodyear Tires as a shift supervisor, Ms. Ledbetter sued the company for sex discrimination after receiving an anonymous tip that she had been paid 25% to 40% less than *all* of her 15 male counterparts. The jury in the district court found in her favor and awarded Ms. Ledbetter $223,776 in back pay and over $3 million in punitive damages. *Id.* at 644 (quoting from the record below). The award went up on appeal, and the Eleventh Circuit reversed it. (*See Goodyear v. Ledbetter,* 421 F.3d 1169 (11th Cir. 2005).) On May 27, 2007, the Supreme Court denied Ms. Ledbetter's claim as untimely because she had not filed suit within 180 days of *receiving her first discriminatory paycheck* almost 20 years before. *Ledbetter v. Goodyear Tire & Rubber, Co.*, 550 U.S. 618, 633-643 (2007); *see also* 42 U.S.C. § 2000e-5(e)(1) (an employee must file a discrimination charge within 180 days, or 300 days in deferral states, from the date the claim arises).

The *Ledbetter* Court reasoned that Goodyear's decision to pay Ms. Ledbetter less than her male counterparts was a "discrete" discriminatory act that occurred when she was hired. As with employees subjected to other acts typically held to be discrete – such as termination, failure to promote, denial of transfer, refusal to hire, and wrongful suspension, to name only a few – Ms. Ledbetter was presumed to know when the discriminatory act had occurred. *Ledbetter v. Goodyear*, 550 U.S. at 621. Citing the unfairness of penalizing employees for not readily detecting disparities that "are often hidden from sight," Justice Ruth Bader Ginsburg concluded her impassioned dissent by suggesting that Congress "act to correct this Court's parsimonious reading of Title VII." *Id.* at 645, 649 (Ginsburg, J., dissenting). Congress passed the Lilly Ledbetter Fair Pay Act ("Ledbetter Act"), which President Obama signed into law on January 29, 2009 and made retroactive to May 28, 2007.

What the Ledbetter Act Says

The Ledbetter Act amended Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act of 1967 ("ADEA"), the Rehabilitation Act of 1973 (which applies to federal employees), and the Americans with Disabilities Act of 1990 ("ADA"), by expanding the definition of "unlawful employment practices" under those statutes to include instances when:

- an employer *"adopts"*,
- an employee is "*subjected to,*" or
- an individual (an employee or, arguably, even another individual) is "*affected by*"
- "a discriminatory compensation decision or *other practice* . . . ."

42 U.S.C. § 2000e-5(e)(3)(A) (emphases added).

Pursuant to the Ledbetter Act a discriminatory compensation decision or other practice is perpetuated "each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." 42 U.S.C. § 2000e-5(e)(3)(A). Accordingly, an employer may be held liable for the present-day compensation effects of a long-past discriminatory act, even though the discrimination predates its management and the employer has since implemented a nondiscriminatory pay policy. Additionally, the Ledbetter Act provides for recovery of up to two years' back pay preceding the filing of the EEOC charge for similar discriminatory compensation, as long as some part of the employee's claim falls within the statutory filing period. 42 U.S.C. § 2000e-5(e)(3)(B). Every current employer assumes the ongoing risk that she will

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be called to answer for some alleged form of discrimination that has impacted an employee's compensation. How long does that risk last? For at least as long as the employer compensates the employee. Consider the financial consequences of a discriminatory compensation structure that affects an entire class of employees.

With the passage of the Ledbetter Act, the entire concept of a statute of limitations for alleged unlawful employment acts takes on a less reassuring tone. As one court noted, the Ledbetter Act "is a game-changer with regard to timing because it retroactively amended Title VII, *eliminating any statute of limitations bar* against an employee's claim that a paycheck received today is lower than it should be because of a past discriminatory action." *Randall v. Rolls-Royce Corporation*, 2010 U.S. Dist. LEXIS 23421 (S. D. Ill. Mar. 12, 2010) (emphasis added).

The Ledbetter Act in Action

Many learned of the relatively new law when the EEOC notified former charging parties that the Ledbetter Act might provide a basis to revive discrimination charges which the Agency had dismissed as untimely. While debating the bill in Congress, Senator Arlen Specter (D. Penn.) had proposed omitting the phrase "other practice" from the definition of "unlawful employment act" because the ambiguity of the phrase would result in litigation. 155 Cong. Rec. S755 (daily ed. Jan. 22, 2009) (statement of Sen. Specter). He was right. Much of the ensuing litigation has focused on whether certain employer conduct constitutes a discriminatory "other practice" within the meaning of the Ledbetter Act.

Case law is starting to add contour to the Ledbetter Act. Two cases in the Third Circuit illustrate the nuance involved in discerning when an employer's conduct is an "other practice" under the Act. In each case, the plaintiff brought a discrimination claim outside the statutory period after his or her employer denied the plaintiff's request for a title change and a pay increase. The outcomes were very different. In *Noel v. The Boeing Company*, 622 F.3d 266 (3d Cir. 2010), the plaintiff, an aircraft mechanic, filed a discrimination charge with the EEOC in March 2005, alleging that the company had discriminated against him based on his race and national origin by failing to promote him to lead mechanic in 2003. The district court granted judgment in favor of the company, finding the plaintiff's claims to be untimely because he had not brought them within 300 days. The plaintiff tried to revive his claims under the Ledbetter Act, by asserting that "Boeing's discrimination in refusing to give him a raise to Labor Grade 11 while giving this grade to similarly situated white workers was perpetuated each time the resulting lower compensation was thereafter paid to him." *Noel v. The Boeing Company*, 622 F.3d 266, 271 (3d Cir. 2010). The Third Circuit upheld the dismissal on timeliness grounds, finding that the plaintiff's original EEOC charge did not reference compensation discrimination and was, essentially, a discrete failure-to-promote claim. *Id* at 275.

By contrast, in *Mikula v. Allegheny County of Pennsylvania*, 583 F.3d 181 (3d Cir. 2009), the Third Circuit applied the Ledbetter Act to reverse the lower court's dismissal of the plaintiff's sex discrimination claim as untimely. The plaintiff, a grants coordinator for the Allegheny County police department since 2001, had asked her supervisor in 2004 and 2005 for a pay raise and change in her job title to "Grants and Project Manager." *Mikula v. Allegheny County of Pennsylvania*, 583 F.3d 181, 182 (3d Cir. 2009). Her supervisor never responded. In March 2006, she filed an internal complaint of sex and age discrimination and claimed, among other things, that she was paid less than a comparable male employee. On August 23, 2006, the County's Human Resources department sent the plaintiff a letter stating that it had investigated her charge and found her title and salary were fair. The plaintiff filed her EEOC charge on April 17, 2007, alleging that since her hire, the County had paid her substantially less than male employees for equal work.

The district court concluded that the plaintiff's 2007 charge was untimely because the alleged unlawful act had occurred at the time of plaintiff's hire in 2001 (precisely as the Supreme Court had found in Ledbetter). Rejecting that analysis, the Third Circuit held that the employer's silence in the face of the plaintiff's 2004 and 2005 requests for pay raises constituted "compensation decisions" within the meaning of the Ledbetter Act and rendered timely the plaintiff's discrimination claim as to all paychecks she received within 300 days before filing her EEOC charge. *Id*. at 186. As other courts have pointed out, the *Mikula* decision could have gone even worse for the employer. *See, e.g., Haase v. Government of the Virgin Islands*, 2009 U.S. Dist. LEXIS 107445, *13 (D.V.I., Nov. 17, 2009) (wherein the court deemed the *Mikula* court's failure to extend the back pay recovery period to two years "inexplicable"). The "failure to promote" claim fails as untimely, but the disparate pay claim survives under the Ledbetter Act.

There is a cautionary tale here. Listen closely to your employees' complaints. As the *Noel* and *Mikula* cases demonstrate, a court's revival of an untimely discrimination claim may turn upon how the employee characterizes his complaint. What may first sound like a request for a promotion to a higher title may actually be an employee's claim that he is being paid less for equal work. *Cf. Gertskis v. New York City Department of Health and Mental Hygiene*, 2009 U.S. Dist. LEXIS 25244, *11 (S.D.N.Y. Mar. 26, 2009) (court found that what plaintiff termed, in part, to be a failure-to-promote claim was essentially a pay disparity claim).

Other "Other Practices"

Now we know **not** responding to a raise request is an actionable compensation decision. What other "other practices" are implicated by the Ledbetter Act? These issues are fact-specific, but courts have either held or opined in passing that the Ledbetter Act applies to the following employer acts: (1) denial of raises; (2) denial of severance; (3) failure to pay overtime; (4) performance evaluations; (5) misclassification; (6) assignment of out-of-title duties; (7) work-related benefits (e.g., car lease subsidies, pension contributions); (8) demotion; (9) denial of long-range assignments (i.e., assignments which impact more than one paycheck); (10) failure to promote; and (11) acts or policies which impact benefits accrual.

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What's Next?

Here is a preview of other significant developments that may arise:

- Cases that tackle *whether non-employees can sue* under the Ledbetter Act if they are "affected by" the employer's discriminatory compensation. *See* U.S. Republican Policy Committee, Legislative Notice No. 1, S-181-- Lilly Ledbetter Fair Pay Act of 2009 (Jan. 14, 2009, Calendar No. 14) (wherein the Committee opined that "[a] plausible reading of this language means a spouse or heir who receives pension checks and was not a victim of discrimination would have standing to file a lawsuit").
- More "Mini-Ledbetter" statutes, such as those recently *enacted in Maryland* (S.B. 368, which amended Maryland Code §§20-607 and 20-1009(b)(5), effective October 1, 2009) and *under consideration in Texas* (Texas Senate Bill, S.B. 280, enrolled for consideration in the 82nd Legislative Session). These state statutes *may result in higher damage awards* to employees since Title VII's statutory caps don't apply.

Helpful Tips

What can employers do to mitigate the risks posed by the Ledbetter Act since employers are not quite sure which acts will subject them to liability, when, or for how long?

Here are some recommendations:

- Document, audit, and regularly review your compensation policies and any other policies in place since May 28, 2007 that affect compensation – such as performance evaluation policies, classification policies, benefits accrual policies, seniority policies, and vacation and bonus accrual policies.
- Render as transparent as possible the factors on which you base performance evaluation and compensation decisions. Although this is not always possible (or appropriate) to do in detail, greater transparency may help to manage employees' expectations and reduce related complaints.
- Ensure your employment policies are structured and administered in a manner that is clear, objective, non-discriminatory, and consistent.
- Routinely ask managers for the bases and documentation to explain differences in compensation among their subordinates.
- Document, investigate and follow-up on all compensation-related complaints.
- And as we learned from *Mikula,* **always** respond to employees' requests for raises.

Simply put, to manage the risks associated with the Ledbetter Act, employers must implement and adhere to best employment practices, such as those outlined above. In the event of a lawsuit 19+ years from now, clear policies and good recordkeeping will refresh memories, help establish credibility, consistency, and continuity and promote succession planning.

Upcoming Speaking Engagements:

April 11, 2011: Jed Marcus, Andrée Peart Laney, and Emily Wexler will present on Employment Issues in this Technological Age: The Generation Y Era, *The Westin Governor Morris, Morristown, NJ, 8:30 am to 10:30 am (registration starts at 8:00 am).*

For more information about any of the topics covered in this issue of the Labor and Employment Law Alert, please contact:

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