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Employee Privacy And Computers: The Good News And Not-So-Bad News In New Jersey

The New Jersey Supreme Court just held that an employer violated an employee's privacy rights when it retrieved from a company laptop's hard drive and read e-mail messages between the employee and her attorney observing that the employee had a reasonable expectation of privacy in her personal yahoo password-protected e-mail account. *Stengart v. Loving Care Agency Inc.*, N.J., No. A-16-09, 3/30/10). The Court rejected the employer's argument that it had a right to search a company-owned computer for information about the employee after she left the company and sued it for unlawful discrimination. It also affirmed a lower court ruling that the company's lawyers violated state ethics rules by reviewing the employee's e-mail communication with her attorney.

The Court's ruling is interesting from two perspectives. First, it held that the employee had a reasonable expectation of privacy even though the employer had an employee handbook and electronic communication policy, which gave it the right to review and access "all matters on the company's media systems and services at any time." However, the Court found that "[t]he Policy does not address personal accounts at all. In other words, employees do not have express notice that messages sent or received on a personal, web-based e-mail account are subject to monitoring if company equipment is used to access the account." Justice Rabner, writing for a unanimous court, also noted that the policy did not alert employees that

even when they did not knowingly store e-mails or personal account information on company computers, the contents of previous messages remained in computer cache files where they could be retrieved and read by the company. Although company policy stated that e-mails were not to be considered private and might be read, it also stated that employees were allowed to make at least occasional use of company computers for personal communications. The Court cautioned that even a more clearly written company manual—that is, a policy that banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee's attorney client communications, if accessed on a personal, password protected e-mail account using the company's computer system— would not be enforceable.

Second, and perhaps most importantly, is what the Court acknowledged was permissible. The Court stated that it was not holding that employers cannot monitor or regulate the use of workplace computers. It noted that employers can adopt lawful policies relating to computer use to protect the assets, reputation, and productivity of a business and to ensure compliance with legitimate corporate policies. Employers can enforce such policies. They may discipline employees and, when appropriate, terminate them, for violating proper workplace

rules that are not inconsistent with a clear mandate of public policy. "For example, an employee who spends long stretches of the workday getting personal, confidential legal advice from a private lawyer may be disciplined for violating a policy permitting only occasional personal use of the Internet."

In truth, the *Stengart* decision, while causing quite a stir within the employment community, actually holds quite good news for employers. The Court acknowledged that New Jersey employers have the right to discipline employees who use corporate computers and e-mail systems in violation of company policy. Although employees have expectations of privacy in their personal, password-protected e-mail accounts, there is nothing in the *Stengart* opinion that prevents them from searching corporate e-mail accounts.

Employers should immediately review their handbooks and e-mail policies. Policy statements should specifically address the use of web-based e-mail accounts and advise employees that e-mails sent or received from these accounts will still be captured in internet cache files. In some cases, employers can avoid that problem by simply configuring their computer systems from allowing the use of web-based e-mail accounts. This is not hard to do and certainly improves security.

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DOL Deems Home Mortgage Loan Officers Non-Exempt

Reversing a 2006 Interpretation Letter, The Wage and Hour Division of the Department of Labor (DOL) issued Administrator's Interpretation No. 2010-01 stating that employees who perform the typical duties of a home mortgage loan officer are not exempt administrative employees when their primary duty is routine sales and not directly related to the management or general business operations of their employer or their employer's customers. Accordingly, they would be entitled to receive minimum wage and overtime under the Fair Labor Standards Act (FLSA). According to the DOL, the typical duties of a home mortgage loan officer are: (i) receive internal leads and contact potential customers or receive contacts from customers generated by direct mail or other marketing activity; (ii) collect required financial information from customers they contact or who contact them, including information about income, employment history, assets, investments, home ownership, debts, credit history, prior bankruptcies, judgments, and liens; (iii) run credit reports; (iv) enter the collected financial information into a computer program that identifies which loan products may be offered to customers based on the financial information provided; (v) assess the loan products identified and discuss with the customers the terms and conditions of particular loans, trying to match the customers' needs with one of the company's loan products; (vi) compile customer documents for forwarding to an underwriter or loan processor; and (vii) finalize documents for closings. These functions did not meet the requirements of

the Administrative Exemption which requires that the employee: (i) must be compensated on a salary or fee basis at a rate of not less than $455 per week; (ii) have primary duties which require the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; (iii) have primary duties that include the exercise of discretion and independent judgment with respect to matters of significance.

According to the DOL, mortgage loan officers' primary duty is making sales, and, therefore, the loan officers perform the production work of their employers, which cut against an important condition of exempt status, that the employee's primary duties involve the performance of office or non-manual work directly related to the management or general business operations of the employer. Other factors contributing to loan officers' non-exempt status were that the loan officers are typically paid entirely or primarily on commissions; the employer often trains the loan officers in sales techniques; and the employer often evaluates loan officers' performance on the basis of their sales volume.

Importantly, The DOL withdrew two Opinion Letters that are inconsistent with this Administrative Interpretation, including Opinion Letter FLSA2006-31 (Sept. 8, 2006), which dealt with the administrative exemption for employees who work in the financial services industry.

Under the 2008 law, employers must provide employees with 90 days' notice of businesss closings and layoffs.

New York Publishes Regulations To Implement State's Warn Act

The New York State Department of Labor recently published revised regulations in the New York State Register to implement the state's Worker Adjustment and Retraining Notification Act ("NY WARN"). Under the 2008 law, employers must provide employees with 90 days' notice of business closings and layoffs. The law generally applies to private employers with 50 or more workers. The regulations clarify which employers are covered by the law, the factors triggering notification, and several other provisions.

Under the regulations, the notice requirements apply to business closings affecting 25 or more employees; mass layoffs involving 25 or more employees, if the 25 or more employees comprise at least 33 percent of all the employees at the worksite; and mass layoffs involving 250 employees, regardless of what percentage of the workforce is involved. Part-time employees are not included for purposes of deciding whether notice is required under the regulations, but they are entitled to receive notification once the notice is provided to full-time workers. The revised regulations also add provisions explicitly exempting seasonal employees from the requirements.

Whistleblower Protections Contained In New Health Care Bill

We urge employers to take a careful look at certain provisions of the new health care overhaul law, the Patient Protection and Affordable Care Act ("PPACA"). It contains an amendment to the Fair Labor Standards Act ("FLSA") that provides new whistleblower protections for workers who report or help federal or state authorities investigate possible violations of the new law. Unlike the Sarbanes-Oxley Act ("SOX"), this new provision contains an explicit right to a jury trial. The provision is not limited to the health care or insurance industries, although it will be especially useful to employees in those industries, and applies to employers regardless of their size.

What Does the Law Prohibit? Section 1558 of the PPACA amends the FLSA to prohibit discrimination and retaliation by employers against workers who report possible violations of Title I of the new law to an employer, the federal government, or a state's attorney general if the employee "reasonably believes" that a violation has occurred. In addition, it covers employees who testify or assist authorities with investigations into possible violations of the new law or are about to do so. Employers also are prohibited from discriminating or retaliating against employees who object to activities or tasks they "reasonably believe" violate any other provision in Title I of the PPACA.

What is the Procedure? The new procedure for bringing claims is contained in the Consumer Product Safety Improvement Act, 15 U.S.C. § 2087(b). Employees who think they have been fired or discriminated against have 180 days after becoming aware of the adverse action to file a complaint with the Occupational Safety and Health Administration. If OSHA does not issue a final order within 210 days of the filing of the complaint, the employee can file a civil lawsuit in federal court.

What Does the Employee Have to Prove? The CPSIA contains a burden-shifting framework which provides that the employee need only show by the preponderance of the evidence that protected conduct was a contributing factor to the employer's decision. If the employee makes out this *prima facia* case, then the employer must show by clear and convincing evidence that it would have taken the action against the employee anyway.

What Are the Remedies? An aggrieved employee would be entitled to reinstatement, back pay, compensatory damages, and attorneys' fees, and in some cases, front pay. In addition, the law prevents the use of arbitration agreements regarding these claims.

There are other new protections provided for in the PPACA. They are as follows:

Nursing Mothers. Section 4207 of PPACA amends Section 7 of the FLSA to require that reasonable break time be provided for working mothers to express breast milk for one year after a child's birth each time such employee has need to express the milk. The provision states that an employer shall provide a private, shielded place other than a rest room in which the nursing mother may express the breast milk. The amendment does not apply to businesses with fewer than 50 employees if its

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requirements would impose an undue hardship by causing the employer significant difficulty or expense relative to the employer's resources. The Labor Department is expected to produce implementing regulations for this provision within the next six months.

The Elder Justice Act. Section 6703 of PPACA includes a requirement that employees and contractors of federally-funded long-term care facilities promptly report reasonable suspicions of crimes committed against facility residents. Failure to do so exposes the employee or contractor to civil fines of up to $300,000. Covered facilities are prohibited from retaliating against an employee for "lawful" conduct authorized by the new law. If the facility violates this anti-retaliation provision, it is subject to a fine of up to $200,000.

Black Lung Benefits. Section 1556 allows miners to receive total disability benefits if they worked at least 15 years in or around coal mines and prove they have a totally disabling respiratory impairment. The miner must also show that the employer or its insurer is unable to prove the disability was due to a cause other than black lung disease. Dependent survivors of miners will no longer need to prove that black lung disease was related to the miner's death, allowing for automatic continuation of benefits.

Upcoming Speaking Engagements:

May 3, 2010: Healthcare Reform And It's Impact On Employers And Employer Sponsored Health Plans. *The Westin Governor Morris, Morristown, NJ.*

May 20, 2010: Jed Marcus and Cynthia Borrelli will speak before The Diversity Committee of the New Jersey Bar Association on "Employer Diversity Programs at the Cross-Roads."

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