

MESSAGE FROM THE CHAIR TO THE FRIENDS OF COZEN O'CONNOR:

Our Spring 2009 Labor and Employment Law Observer covers a multitude of topics of interest to in-house counsel, human resources professionals and corporate management. Many of these articles are particularly timely given the changing political climate and our increasingly technology driven society. These articles include:

- An overview of the first 100 days of the Obama Administration;
- A discussion of two recent decisions by the Third Circuit Court of Appeals that may affect settlement of discrimination and FMLA claims;
- A discussion of a recent New Jersey decision regarding striking workers' entitlement to unemployment compensation benefits; and
- Two articles on the impact of modern technology in the workplace.

You can read about these and other recent labor and employment developments in this issue of the Observer.

Additionally, our labor and employment attorneys have been busy speaking on various timely topics. Debbie Friedman spoke on recent developments with the FMLA at the Pennsylvania Bar's annual Employment Law Institute. At the same conference, Kimya Johnson spoke on generational differences and the modern workplace. Sarah Kelly spoke on discrimination claims in the succession planning and talent management context and Carrie Rosen spoke on the legal implications of employee blogging and email use. Jeff Braff spoke on new and upcoming developments in employment related legislation. Andrew Rolfes participated in a panel discussion during a Strafford Publications teleconference on Preparing for the Employee Free Choice Act.

We welcome your inquiries on the articles in this Observer, other matters of interest to you and suggestions for future topics.



Mark J. Foley
Chair, Labor & Employment

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AN OVERVIEW OF LABOR AND EMPLOYMENT LAW DEVELOPMENTS IN THE FIRST 100 DAYS OF THE OBAMA ADMINISTRATION

Andrew J. Rolfes

Many employers and management-side labor and employment practitioners expected dramatic changes in labor and employment law to be passed quickly by a Democratic Congress and become law under the Obama Administration. While some of those changes have come to pass, the Obama Administration's first 100 days saw only one significant new piece of legislation – the Lily Ledbetter Fair Pay Act – become law. Other major legislation, including the Employee Free Choice Act, remains stalled in the Senate. However, employers would be well-advised to remain vigilant. Significant legislative changes may still be in the offing. Moreover, President Obama's appointments to key posts, including Secretary of Labor, and nominations for the National Labor Relations Board, point to a more activist, employee-friendly approach to regulation and enforcement of existing laws. The following is a summary of developments in the Obama Administration's first 100 days, as well as highlights of things to come:

THE LILY LEDBETTER FAIR PAY ACT

On January 29, 2009, President Obama made good on a campaign pledge by signing into law the Lily Ledbetter Fair Pay Act. The Ledbetter Act was the first piece of legislation signed by President Obama, and overturned a controversial 2007 Supreme Court decision that limited the time for filing pay discrimination claims. The Act amended Title VII and the Age Discrimination in Employment Act to provide that an unlawful employment practice occurs "when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wage, benefits or other compensation is paid resulting in whole or in part from such a decision or practice." Because the Americans with Disabilities Act follows the remedial scheme provided by Title VII, the

Ledbetter Act also applies to ADA claims. Under the Ledbetter Act, a charge of employment discrimination will be deemed to be timely so long as it is filed within 300 days of the last paycheck paid pursuant to a discriminatory compensation decision or practice.

While many legal observers have commented that the Ledbetter Act did little more than restore a commonly-held understanding with respect to the limitations period for filing claims related to discriminatory pay practices, the law's impact may be somewhat broader than anticipated depending on how courts interpret the statutory language making the new provisions applicable to a "compensation decision or other practice." For example, in *Gentry v. Jackson State Univ.*, 106 FEP Cases 189 (S.D.Miss. April 17, 2009), the District Court ruled that a charge of discrimination filed in 2006 with respect to the university's 2004 decision to deny the plaintiff tenure was timely because the "denial of tenure also denied her a salary increase and hence was a compensation decision." *Id.* at 191. Therefore, the Court denied the university's motion for summary judgment which was based solely on the limitations period for filing a charge. Other courts have reached similar conclusions. See *Bush v. Orange County Corr. Dept.*, 597 F.Supp. 1293 (M.D. Fla. 2009).

THE PAYCHECK FAIRNESS ACT

At the same time it passed the Ledbetter Act, the House also passed the Paycheck Fairness Act (H.R. 12). However, the bill remains stalled in the Senate, and passage of the Act is far from certain. If enacted, the Paycheck Fairness Act would amend the Equal Pay Act to provide for compensatory and punitive damages, and opt-out class actions for pay discrimination claims. The Act also would significantly narrow the current affirmative defense, which allows an employer to avoid liability by establishing that a pay disparity is the result of "any factor other than sex," by requiring a showing that a pay disparity resulted from a "bona fide factor other than sex."

THE EMPLOYEE FREE CHOICE ACT

Speedy passage of the Employee Free Choice Act ("EFCA"), which would eliminate secret ballot elections in favor of a card check procedure in most union organizing campaigns, provide for mandatory interest arbitration for first contracts

after 120 days of negotiations, and increase penalties for unfair labor practices during union organizing drives or first contract negotiations, was high on President Obama's agenda. As in the previous Congress, EFCA easily passed the House, but stalled in the Senate in March after a number of key Senators, including Dianne Feinstein and Arlen Specter, announced they could not support EFCA in its present form. There currently are a number of compromises to EFCA being discussed, some of which would include retention of the secret ballot election process, but on an expedited time frame. While organized labor remains committed to passing EFCA in its current form, the Act remains extremely controversial, and passage of the bill appears unlikely in the current Congress.

WORKPLACE SAFETY

Both President Obama and his new Secretary of Labor, Hilda Solis, have repeatedly stated that the Obama Administration will place renewed emphasis on improving workplace safety, which they claim was given short shrift during the Bush Administration. During the Obama Administration's first 100 days, the only tangible result of this approach was the scuttling of an Advanced Notice of Proposed Rulemaking ("ANPR") for a new standard on exposure to diacetyl – a food flavoring associated with serious lung disease. Withdrawal of the ANPR is intended to allow OSHA to act more expeditiously in promulgating the new standard. Other new OSHA standards for construction cranes and derricks, and combustible dust may also be developed in the near future, and some lawmakers have expressed interest in a new push for an ergonomics standard.

In addition to these regulatory developments, on April 23, 2009, House Democrats introduced a bill entitled the Protecting America's Workers Act, which would amend the Occupational Safety and Health Act to, *inter alia*, expand OSHA coverage to include state, local and federal government employees and increase penalties against employers for repeat or willful violations. Although bills with the same title and similar provisions were introduced in prior sessions of Congress and never became law, prospects for some change in the OSH Act, particularly with respect to increased penalties, appear more likely with the current Democratic majority and a White House focused on improving workplace safety.

LABOR-FRIENDLY EXECUTIVE ORDERS

Between January 30 and February 6, 2009, President Obama issued four pro-labor Executive Orders aimed at employees of government contractors. The first of three Executive Orders signed on January 30, entitled "Economy In Government Contracting," prohibits federal agencies from reimbursing contractors for costs associated with efforts to persuade employees not to unionize, including such items as duplicating costs and legal fees. An Executive Order entitled "Notification of Employee Rights Under Federal Labor Laws," also issued on January 30, requires federal contractors to post a notice informing employees of their rights under various federal labor laws. That Executive Order also revoked an Executive Order by President Bush which required government contractors to advise employees of their rights under the Supreme Court's *Beck* decision not to join a union or pay fees for non-representational activities. The third Executive Order issued on January 30, entitled "Nondisplacement of Qualified Workers," requires federal service contracts to include a provision requiring a successor contractor providing the same or similar services at the same location to offer continued employment to non-management, non-supervisory employees of the predecessor contractor. Finally, the Executive Order entitled "Use of Project Labor Agreements for Federal Construction Projects," issued on February 6, encourages the use of project labor agreements on all "large scale construction projects," defined as those projects involving a total cost to the federal government of \$25 million or more.

CHANGES AT THE NLRB

On April 24, President Obama announced his intention to nominate two long-time union attorneys to fill two of the three vacancies on the NLRB. If confirmed, Craig Becker, an associate general counsel for the Service Employees International Union, and Mark G. Pearce, a union-side labor lawyer in private practice in Buffalo, N.Y., would join current Chair Wilma Liebman and Member Peter Schaumber on the Board. The immediate effect of having two new members join the Board would be to remove the cloud that currently hangs over the Board's authority to decide cases. Since January 2008, the Board has functioned with only two members. On May 1, 2009, the United States Court of Appeals for the District of Columbia Circuit held that the two-member

Board lacked legal authority to decide cases because the National Labor Relations Act requires a quorum of three members at all times. See *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, No. 08-1162, Slip Op., May 1, 2009. However, on the same day, the Seventh Circuit issued a decision upholding the authority of a two-member Board to decide cases. See *New Process Steel, L.P. v. NLRB*, Nos. 08-3517, 08-3518, 08-3709, 08-3859, Slip Op. May 1, 2009. The employer in that case recently filed a petition for certiorari seeking review by the Supreme Court. Until this conflict in the Courts of Appeals is resolved, the D.C. Circuit's decision calls into question approximately 400 decisions issued by the two-member Board in the past sixteen months. Two additional Board members would remove any question about the validity of Board decisions going forward.

As important, two additional Board members would allow the Board to decide more controversial cases in which Chair Liebman and Member Schaumber disagreed. In addition, with a solid Democratic majority, the Board may revisit some of the high-profile decisions of the Bush Board, from which current Chair Liebman dissented. In particular, employers should look for the newly-constituted Obama Board to revisit the decision in *Guard Publishing Co. d/b/a Register Guard*, 351 NLRB No. 70 (2007), in which the Board held that employees have no statutory right to utilize an employer's e-mail system, and modified the law governing discriminatory enforcement of employer communications policies, and possibly the so-called "Kentucky River" decisions from 2006

(*Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (2006); and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006)), in which the Board broadly interpreted the statutory definition of the term "supervisor" in a way which organized labor claimed would strip large numbers of minor supervisory employees and working foremen of their rights under the National Labor Relations Act. A narrower interpretation of which employees qualify as supervisors under the Act has been a high priority for organized labor since the *Kentucky River* cases were decided. Having failed to achieve such a definition through legislation (see Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act ("RESPECT Act"); H.R. 1644, S. 969), organized labor may now seek a regulatory solution before a more labor-friendly Board.

CONCLUDING THOUGHTS

The first 100 days of the Obama Administration did not bring many of the major legislative or regulatory changes workers had hoped for and employers had feared. Nonetheless, President Obama has clearly marked out a very different path from his predecessor, and employers should continue to expect increased regulation of the workplace, including new legislation, heightened scrutiny from regulatory agencies, and greater emphasis on inspection and enforcement activities.

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UPDATE: PROHIBITION ON MANDATORY OVERTIME FOR NURSES TAKES EFFECT JULY 1

Jonathan R. Cavalier

The Prohibition On Excessive Overtime in Health Care Act, signed by Governor Rendell last October, takes effect on July 1, 2009. The Act, which broadly covers all nonprofit and for-profit health care facilities operating in Pennsylvania, prohibits these employers from requiring employees involved in direct patient care to work in excess of an agreed to, predetermined, and regularly scheduled daily shift. In other words, health care facilities can no longer rely on mandatory overtime to fill staffing needs on a routine basis. While the Act does include exceptions for unforesee-

able emergencies, the circumstances under which an exception will apply are extremely narrow. The impact of the new law may be greatest for facilities which do not have 24-hour staffing. All health care facilities should review their staffing procedures, and may benefit from talking with their employees about the willingness to work overtime on a voluntary basis.

For more information about the Prohibition On Excessive Overtime in Health Care Act, please read our October 20, 2008 Alert, entitled "Pennsylvania's New Law Prohibits Mandatory Overtime for Nurses," available on our website at <http://www.cozen.com/admin/files/publications/Labor102008.pdf>.

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FEDERAL COURTS MAKE IT MORE EXPENSIVE FOR EMPLOYERS IN PA, NJ AND DE TO RESOLVE DISCRIMINATION AND FMLA CLAIMS

Sarah A. Kelly

In a pair of decisions earlier this year, the United States Court of Appeals for the Third Circuit, which has jurisdiction over federal claims arising within Pennsylvania, New Jersey and Delaware, and a district court within the Eastern District of Pennsylvania issued decisions which will make it more expensive for employers facing claims of employment discrimination or claims under the Family Medical Leave Act to resolve those claims.

In *Eshleman v. Agere Systems, Inc.*, 554 F.3d 426 (3d Cir. 2009), the Third Circuit considered whether a plaintiff, who had won at trial on her claim of disability discrimination, was entitled to an enhancement of her damages award to compensate her for the negative tax consequences of her receipt of that back pay award in a single year. Joan Eshleman had been discharged from Agere Systems in a reduction-in-force in 2001. She sued her former employer for disability discrimination, and at trial the jury awarded her back pay and compensatory damages in the total amount of \$200,000. Upon her motion made after the trial, the trial judge awarded her \$6,893.00 as an enhancement to offset the tax consequences of her receipt of the lump sum back pay award. Specifically, the district court determined that because Eshleman had to pay more in taxes based on her receipt of the lump sum award in a single year than she would have had to pay had she received the pay in the normal course of her employment over a several year period, she was entitled to an enhancement.

The Third Circuit agreed, and affirmed the enhancement, finding that awards of back pay are taxable, and that it is within the equitable power of the district court to fashion an award that makes a plaintiff whole as a result of the discrimination she experienced. Because an employee may be subject to a higher tax bracket based on receipt of a lump sum back pay award in a given year, and therefore would have a greater tax burden than if she received that pay in the normal course of business, a tax enhancement award is permissible. One other appellate court, the Tenth Circuit Court of Appeals, which has jurisdiction over federal claims arising in Colorado, Kansas, New Mexico, Oklahoma, Utah and

Wyoming, has reached a similar conclusion. However, the United States Court of Appeals for the District of Columbia has reached the opposite conclusion.

In a different decision, *Brown v. Nutrition Management Services Company*, 2009 WL 281118 (E.D.Pa. January 30, 2009), a court in the Eastern District of Pennsylvania held that a plaintiff who was successful in her claim under the federal Family Medical Leave Act ("FMLA") was entitled to an enhancement of her back pay award to include pre-judgment interest on the amount awarded, and liquidated damages equal to the sum of the back pay plus the interest awarded. In the *Brown* case, the additional interest award was \$6,655.82, and the liquidated damages awarded were \$80,655.82.

These two cases will make it more difficult and expensive for employers who are defending claims under the Family Medical Leave Act or claims of employment discrimination to settle such claims, because plaintiffs in states where these

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decisions apply now have a strong argument that they are entitled to an enhancement of their award. It is important when litigating these types of claims to be aware of the tax issues relating to these awards. When settling these cases, it is important to consider how to allocate the settlement amounts properly in order to survive scrutiny by the taxing authorities, and to articulate clearly how liability for taxes will be allocated in any settlement agreement. If litigating these claims through trial, it is important to consider the likelihood of tax enhancement award, and to be prepared to offer expert testimony as to why a tax enhancement is unnecessary, or why it need not be as high as a plaintiff argues it should be.

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NEW JERSEY SUPREME COURT HOLDS STRIKERS ENTITLED TO UNEMPLOYMENT BENEFITS WHERE EMPLOYER CONTINUES OPERATING

George A. Voegelé, Jr.

When an employer faces the prospect of a strike, one of its goals is to avoid taking actions which would permit striking employees to qualify for unemployment compensation. The reason for this is clear: if strikers can obtain unemployment benefits, they will have an alternate source of income which will significantly diminish the employer's leverage and potentially prolong the strike, since strikers will have less incentive to return to work or agree to an employer's proposals.

A new decision by the New Jersey Supreme Court makes it much more likely that strikers will qualify for unemployment in the Garden State where their employers try to continue operating through a strike. In *Lourdes Medical Center of Burlington County v. Board of Review*, 963 A.2d 289 (N.J. 2009), approximately 240 nurses went on strike over scheduling and economic issues. Despite the considerable financial difficulties resulting from the strike, the hospital continued functioning. It hired replacement nurses, maintained its patient and employee census, and continued performing medical procedures. During the strike, many of the nurses filed for unemployment benefits. A hearing examiner found they were eligible for benefits. The Unemployment Board of Review agreed. The Appellate Division, however, reversed and held the strikers were not eligible for benefits. The New Jersey Supreme Court then heard the appeal to resolve the issue.

The Court began by noting N.J.S.A. 43:21-5(d) provides that an individual is disqualified from receiving unemployment benefits if her "unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises" where she was employed. Administrative regulations further define a "stoppage of work" as a "substantial curtailment of work which is due to a labor dispute." N.J.A.C. 12:17-12.2(a)(2). That regulation also provides that "[a]n employer is considered to have a substantial curtailment of work if not more than 80 percent of the normal production of goods or services is met." The Court

noted that the term "stoppage or work" refers to whether the nurses caused work to stop at the hospital, and not whether the striking nurses stopped working themselves.

The Court held that, despite the "great cost" to the hospital caused by the strike, and the fact that any significant curtailment of operations at the hospital would have required regulatory approval, nevertheless there was not a "stoppage of work" as defined by N.J.A.C. 12:17-12.2(a)(2) or N.J.S.A. 43-21-5(d). According to the Court, while a work stoppage need not be complete, nevertheless there must be a substantial curtailment of operations. The Court found it was reasonable for the New Jersey Department of Labor to define a "substantial curtailment" of operations to mean a 20 percent or more reduction in the production of goods or services at the facility. Because the hospital had, in effect, maintained close to 100 percent of its normal production by hiring replacements, the strikers' unemployment was found not to result from a "stoppage of work," and so they were eligible for benefits.

The *Lourdes* decision raises the stakes for an employer who hopes to use supervisors or strike replacements to operate through a strike at close to its normal level of business. It also makes it much more difficult for facilities such as hospitals or utilities, which must seek regulatory approval before significantly curtailing operations (even during a labor dispute), to prevent strikers from becoming eligible for unemployment benefits. The New Jersey Supreme Court's decision means that should an employer maintain more than 80% of its pre-strike production of goods or services, its striking employees will likely be found eligible for unemployment benefits, thus potentially prolonging a strike and making it more difficult for the employer to achieve its strike goals.

In light of the *Lourdes* decision, a New Jersey employer which plans to continue operations through a strike needs to weigh the potential ramifications of doing so on its striking employees' eligibility for unemployment compensation benefits. Employers should consult with counsel, who will be able to assist in developing and evaluating strategies to minimize the risk of strikers becoming eligible for unemployment.

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WAGE AND HOUR ISSUES IN THE BLACKBERRY ERA

Carrie B. Rosen

Many employers routinely provide their employees with Blackberries, cell phones, laptops and other electronic devices with little thought to potential legal liability created by the use of such technology. Given the rise of class action lawsuits brought under the Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq.*, ("FLSA"), employers should be mindful of the pitfalls created by a digital workforce and take the appropriate precautions.

THE FAIR LABOR STANDARDS ACT

The FLSA requires covered employers to compensate employees for all hours worked. Nonexempt employees (often referred to as hourly employees) are entitled to overtime compensation at the rate of one and a half times the employee's regular rate of pay for hours worked over forty in a workweek. Employers must compensate nonexempt employees for all time spent performing work that is for the benefit of the employer. It does not matter that the employer did not specifically request that the employee work after hours; if the employee worked for the benefit of the employer, then the employer must compensate the employee. For example, if a nonexempt secretary comes in to work ten minutes early every morning to catch up on paperwork, she must be compensated for that time, even if she was not told to come in early to complete her paperwork. An employer may discipline an employee for working before or after hours without authorization, but an employer cannot refuse to compensate an employee for time worked for the benefit of the employer.

THE WAGE AND HOUR RISKS POSED BY ELECTRONIC DEVICES

While employers are usually well versed in accounting for hours worked by employees, employees' use of Blackberries and other electronic devices pose particular problems. If a nonexempt employee chooses to review and respond to work emails prior to arriving at work in the morning or at night, before bed, regardless of whether the employer required the employee to do so, then that time may well be considered time worked for the purposes of the FLSA. The ease of check-

ing emails on Blackberries or other similar electronic devices makes it convenient for employees to remotely check their email whenever they have a few minutes – even from the train while traveling home from work. However, unless the employee informs his employer that s/he spent that time checking email, then the employer may not record that time as part of the employee's hours. Therefore, the employer may not properly compensate the employee. Even an extra 10 minutes of checking emails two times a day, multiplied by ten or twenty employees, can add up quickly.

"While employers are usually well versed in accounting for hours worked by employees, employees' use of Blackberries and other electronic devices pose particular problems."

AVOIDING LIABILITY

In light of the above risks, employers should carefully review their policies and plan their response now, before being hit with a wage and hour lawsuit.

First, employers may want to review their policies and strictly prohibit nonexempt employees from checking or responding to email or performing other work-related tasks remotely outside of normal working hours or without express authorization. Note, however, that an employee's failure to secure proper authorization prior to working after hours does not excuse an employer from compensating an employee for that time. Instead, an employer's recourse is to discipline the employee – perhaps, by cutting off the employee's remote access. This may not be feasible for all companies or for all nonexempt employees but it is one method of reducing risk.

Second, employers should ensure that their policies clearly state that employees must report all working time spent on portable electronic devices. For example, employees would be informed that they must report all time spent reviewing and/or responding to emails outside of normal working hours, in order to ensure that they are properly compensated for all working time.

Finally, employers may want to consider limiting a nonexempt employee's access to company provided email and/or portable electronic devices before and after working hours. In such cases, only exempt employees would be issued Blackberries and other portable electronic devices. This approach, while drastic for some companies, virtually ensures that a company accurately is able to track all working hours by nonexempt employees.

KEEPING IT SHORT AND TWEET: IMPLICATIONS OF EMPLOYEE USE OF SOCIAL NETWORKING SITES

Michael C. Schmidt

Your employee is being paid millions of dollars each year to perform his job. Right in the middle of today's tasks, as he is about to receive instruction from his supervisor, your employee takes out his cell phone and posts a "tweet" on his feelings about his performance to all of his friends who have signed up to follow his twitter board. Would you have a problem with that?

At least one employer did. The employer: The Milwaukee Bucks of the National Basketball Association. The workplace: The locker room in the Bucks' NBA arena. As reported in several media outlets, star Milwaukee Bucks forward Charlie Villanueva apparently posted a message to his Twitter feed from his cell phone when he went into the locker room at halftime of a March basketball game against the Boston Celtics. According to the reports, the tweet that was posted from Villanueva's "CV31" screen name read: "In da locker room, snuck to post my twitt. We're playing the Celtics, tie ball game at da half. Coach wants more toughness. I gotta step up."

The good news is that Villanueva apparently stepped up, scoring a team-high 19 points to help the Bucks beat the Boston Celtics that afternoon. However, like many employment law issues, the concern is not for the period in which everyone is winning; rather, the key is to address a potential problem before the bad times attendant to a losing streak risk damage to the entire team.

Given the recent rise of wage and hours class action lawsuits, today's employers would be wise to review their employee policies and modify their policies where necessary to ensure compliance with the FLSA and other applicable federal, state and local laws.

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Twitter is the latest conversational web site to dominate the popular culture. The site allows users to post 140-character microblogs from a cell phone at the pace of an instant message, and has become a popular site for celebrities in the sports and entertainment world who have a following of gaggle that hang on to the twitter's every move and thought. According to cnn.com, Twitter use has grown more than 1,300 percent in the twelve months between February 2008 and February 2009, which can be attributable to the ease in posting and reading the messages, as well as the fact that such posting and reading can be done anywhere one may be standing with a cell phone.

And therein lies the problem. The implications of an NBA star's use of Twitter apply equally to your employees. Your company might not be an NBA franchise, and your office may not consist of a locker room. However, your company should consider the implications of social networking sites like Twitter on your workplace and your employees. This article briefly addresses four of those implications.

First, is the effect that increased social networking has on employee productivity. Even Milwaukee Bucks head coach Scott Skiles recognized the productivity dilemma, when he commented that "...anything that gives the impression that we're not serious and focused at all times is not the correct way we want to go about our business." While employers try to keep to the old adage that a "happy employee is a productive employee," there should be limits to acceptable forms of happiness when they come at the expense of productivity because your employee is spending countless hours posting tweets when he should be performing his job duties.

While it is clearly more difficult to monitor an employee's use of twitter on a personal cell phone that is not synchronized with the company's systems, you should at the very least create a policy that prohibits excessive use of personal, social networking sites while on company time. With regard to the use of social networking sites more generally, particularly those that are used from the company's computers, you should be mindful of the applicable laws that govern an employer's monitoring of employee activity. For example, the federal Electronic Communications Privacy Act governs the unauthorized interception and access to electronic communications in certain situations, and various state laws also exist that provide limitations on an employer's ability to monitor its employees. However, employers can limit exposure under these laws, and in fact eliminate any reasonable expectation of privacy on the part of the employee, if employees are required to sign appropriately-worded documents acknowledging and consenting to the company's monitoring policies.

Second, is the problem associated with the lack of control your company has over the use of sites such as Twitter. In the good old days, one only had to worry about the informal musings of an employee on the rapid-fire system we once knew as "e-mail". E-mail offered an opportunity for employees to easily click and send an offensive joke or comment to a large address group, who in turn could forward the inappropriate message to additional, and perhaps initially unintended, recipients. Now, there is an increased potential for workplace harassment that comes with the even great informality of Twitter.

There is a real concern over the fact that twitter posts from a personal cell phone may not be part of the company's systems, and thus the company may not have the same ability to control or capture and save messages in the same way it can with e-mail, or even with instant messages that are delivered through the company's computer system. Employers must nevertheless be sure that their harassment policies address the potential issues that arise in the context of inappropriate harassment and discrimination through the use of social networking sites, and be equally vigilant when responding to a complaint arising from communications made on those sites.

A third implication is the danger posed by employees intentionally or inadvertently disclosing confidential or proprietary information due to the informal nature of communications on sites such as Twitter. Again, it is critical for your company

to make sure it has policies in place regarding the use and disclosure of company information, and that those policies specifically address the concerns attendant to these new social networking sites.

Finally, the trend toward making it easier for employees to engage in communications quicker and from anywhere in the world, increases the possibility that such employees claim to

"...create a policy that prohibits excessive use of personal, social networking sites while on company time."

be "working" 24/7 while engaging in those communications. For example, even if your company does not authorize a non-exempt employee to work overtime, an employee must still be paid for hours worked (although a company certainly can discipline an employee for performing unauthorized overtime). Without the proper policies in place, and without the appropriate measures taken to ensure that the company can control and stay on top of the number of hours worked by all non-exempt employees, the potential for exposure exists under federal and state wage payment laws.

Upon hearing the news story about NBA star Charlie Villanueva twittering at halftime of a critical basketball game, one could chalk it up to simply another example of a young athlete being immature. Or, it can serve to demonstrate, by extension, the realities of today's technology and the expanding universe of modes of communication that, while increasing our ability to connect with others around the world, increase the risks right there in the four walls of your company's office.

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