Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management December 2003

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Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

Search of Employee's E-Mail Ok'd by Federal Court

A federal appeals court has ruled that an employer's examination of an employee's e-mails in computer storage on the employer's system does **not** violate the Electronic Communications Privacy Act (ECPA). *See Fraser v. Nationwide Mutual Insurance Co.* The Third U.S. Circuit Court of Appeal recently held that the law only bans "interception" of e-mails at the time of transmission and exempts the owner of an e-mail system from any claim alleging an illegal "seizure" of stored e-mails.

Fraser was an independent contractor (agent) working for Nationwide Mutual Insurance Co. In this role, Fraser leased computer hardware and software from Nationwide for business purposes. The lease agreement specifically stated the computer system was the property of Nationwide. Whenever someone logged onto the computer, a notice appeared on the screen informing the user that the system, including e-mail, could be monitored to protect against unauthorized use.

In 1998, Fraser sent a letter to one of Nationwide's competitors to solicit the competitor's interest in acquiring the policyholders serviced by Fraser and some of his fellow agents. Nationwide secured a copy of the letter, but did not know if it had been sent. In August 1998, the company's director of electronic communications searched Nationwide's electronic file server for e-mails which might indicate whether the letter had been sent. The director found an e-mail Fraser had sent to a co-worker indicating that it had. The e-mail was retrieved from the co-worker's file of already received and discarded messages stored on the server.

The bottom line is ...

This decision provides persuasive precedent that employers may have more freedom to search employee e-mails than previously thought.

In September, Nationwide canceled Fraser's agent agreement. Fraser sued, alleging Nationwide unlawfully intercepted his e-mail communication when it retrieved the message from its electronic storage sites, in violation of the ECPA.

Title I of the ECPA prohibits interceptions of any "electronic communication," including e-mail. The Third Circuit held that Nationwide did not violate the ECPA because, under that statute, an interception must occur contemporaneously with transmission. The court noted that every federal court which has examined this issue has reached the same conclusion. Thus, there was no violation of Title I of the ECPA because the e-mail was stored on the company's system, not intercepted at the time of transmission.

The court also held that the employer did not violate Title II of the ECPA, which prohibits unauthorized access of "stored" electronic communications. The court found that Nationwide was an "entity providing a wire or electronic communications service" and thus fell within an exception to the ECPA's prohibition on such unauthorized access.

While the Third Circuit court does not have jurisdiction over New York, this decision provides persuasive precedent that employers throughout the country may have more freedom to search employee e-mails than previously thought.

Costly FLSA Lesson: Preparatory Activities Considered "Time Worked" for Overtime Purposes

The U.S. Department of Labor announced in late November that it has reached an agreement with T-Mobile USA, Inc. to pay 20,546 workers more than $4.7 million in back wages as a result of alleged violations of the overtime provisions of the Fair Labor Standards Act (FLSA).

T-Mobile, a provider of wireless telecommunication services, is headquartered in Bellevue, Wash. An investigation by the Department's Wage and Hour Division at three of the firm's call centers found that customer care representatives were not recording preparatory activities performed prior to the start of their shift and thus were not paid. Such preparatory activities are considered "time worked" as defined in the FLSA and, therefore, must be compensated. After the company was made aware of the violations, it worked cooperatively with the Department to compute the back wages at all of its call centers for the three-year period from 2000 to 2003 and to come into compliance.

The FLSA requires employers to: (1) pay for all hours of work and (2) pay overtime at a rate of one and one-half times the non-exempt employees' regular rate of pay for hours worked after 40 in a workweek. The law also requires employers to maintain accurate payroll records. T-Mobile faced litigation on all three requirements.

A consent judgment agreeing to the payment of the back wages and future compliance with the overtime and record keeping requirements of the FLSA was filed November 25, 2003 in U.S. District Court, for the Western District of Washington in Seattle. The court must approve the consent decree before it is finalized.

New Law Eliminates Need for Employee's Consent When Employer Hires Outside Agent to Investigate Employee's Misconduct

Earlier this month, President Bush signed into law the Fair and Accurate Credit Transactions Act ("FACT Act") which was designed, in part, to provide employers with some relief from the requirements of the Fair Credit Reporting Act ("FCRA), when using outside agencies to conduct workplace investigations. Under the FACT Act, an employer who uses a third party (like a law firm, HR consultant or private investigator) to conduct a workplace investigation, no longer has to obtain the consent of the employee to be investigated, so long as the investigation involves suspected misconduct, a violation of law or regulations, or a violation of any pre-existing written policies of the employer. The Federal Trade Commission ("FTC") has stated that March 31, 2004 will be the effective date for these changes.

Since April 1999, the FTC, the federal agency charged with enforcing the FCRA, has taken the position that the FCRA consent and disclosure requirements were triggered when an employer contracts with an outside agency to conduct a workplace sexual harassment investigation on behalf of an employer. In other words, under the FTC's 1999 interpretation (referred to as the "Vail Letter" after the individual who asked for the FTC's interpretation on this issue), an employer was required to obtain the consent of an employee under investigation for alleged harassment ***prior to*** the conduct of the investigation. The employer also was required to disclose to the employee the nature and scope of the investigation. In addition, the Vail Letter required the employer to provide the employee being investigated with a copy of the resulting report at the "pre-adverse action" stage. In other words, if the employer's agent discovered that the employee engaged in unlawful workplace harassment, the employer was required to give the employee a copy of the report before the employer could take any disciplinary action against the employee.

Under the FACT Act, employers are no longer required to notify and obtain the consent of an employee prior to the misconduct investigation. However, there may still be a disclosure requirement at the pre-adverse action stage, unless the final investigative report is only shared with the employer and/or an agent of the employer.

In the event "adverse action" is taken against the employee based on the results of the investigation, the FACT Act still requires the employer to provide the employee a summary of the report. "Adverse action" has been broadly defined as ***any*** employment decision that adversely affects an employee. Employers using outside consultants to conduct internal investigations must therefore remember to provide this summary whenever an adverse action is taken, even if only a written warning results. However, the summary does ***not*** have to identify the individuals interviewed or other sources of information.

DOL Delays Effective Date for Proposed COBRA Notice Regulations

The Department of Labor's Employee Benefits Security Administration has announced it will delay the effective date for new regulations governing COBRA notices by at least six months. This announcement was welcome news for employers given that the proposed regulation initially included a January 1, 2004 effective date.

As described in the August 2003 edition of ***Employment Law Matters,*** the proposed regulations address the timing and content of COBRA notices for employees, employers, and plan administrators. They add two new notice requirements and revoke the "model" COBRA notice issued in 1986. It should be noted that the 1986 notice has been obsolete for some time, but the DOL has now stated explicitly that plan sponsors who are still using the old model notice must now stop.

In addition, the proposed rules require health plan sponsors to include in the COBRA section of their summary plan descriptions (SPD) information about a new tax credit available to trade-displaced workers.

If you have any questions about these proposed changes, or would like copies of the regulations or proposed model notices, contact Michael Dodd at 315-437-7600.

Immigration News: Special Registration Regulations Amended

On December 2, 2003, the federal Immigration and Customs Enforcement Agency published an **interim rule** in the Federal Register to suspend the 30-day and annual re-registration requirements for aliens who are subject to the National Security Entry-Exit Registration System ("NSEERS"). Instead of requiring all aliens subject to NSEERS to appear for 30-day and/or annual re-registration interviews, the Department of Homeland Security ("DHS") will utilize a more tailored system in which it will notify individual aliens of future registration requirements. This rule also eliminates the requirement for those nonimmigrant aliens subject to special registration who are also enrolled in the Student and Exchange Visitor Information System to separately notify DHS of changes in educational institutions and addresses. Additionally, this rule clarifies how nonimmigrant aliens may apply for relief from special registration requirements and clarifies that certain alien crewmen are not subject to the departure requirements. Finally, certain conforming amendments have been made to the existing regulations to reflect the fact that the former Immigration and Naturalization Service has been abolished and its functions transferred from the Department of Justice to DHS under the Homeland Security Act of 2002 (HSA), Public Law 107–296.

I-9 Mistakes: Fix Them — But Don't Cover It Up

The U.S. Citizenship and Immigration Services (USCIS), formerly the Immigration and Naturalization Service (INS), recognizes that employers will make mistakes on their Form I-9's (the Employment Eligibility Verification Forms). However, the USCIS looks favorably on employer efforts to rectify those errors. The USCIS encourages employers to conduct internal audits of their records and to make corrections where needed. However, if employers go back to make corrections as part of a "self-audit", efforts should be made to make sure that any updates or corrections are clearly identified.

Corrected I-9 Forms should never be backdated. Any and all corrections and additions should be initialed and dated by the person making the change. A memo can be also included with the I-9 files to summarize the steps that were taken to correct the Form.

No attempt should be made to fill in data that cannot be verified after the fact. For example, if the original I-9 did not indicate the date on which the form was completed, the employer should not guess or make up a date that cannot otherwise be independently verified. Those types of omissions simply cannot be corrected after the fact, and the employer is best served by demonstrating to the USCIS that corrective action was taken to avoid that type of mistake or omission in the future.

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New OSHA Forms for Recording Injuries and Illnesses Now Available

The revised OSHA Form 300, Log of Work-Related Injuries and Illnesses is now available on OSHA's website at http://www.osha.gov/recordkeeping/new-osha300form1-1-04.pdf. The forms, which are required for employers to use in recording injuries and illnesses, have changed in several important ways for 2004. Foremost among the changes is the addition of an occupational hearing loss column to OSHA's Form 300, Log of Work-Related Injuries and Illnesses. Other changes include:

- "days away from work" column now comes before the days "on job transfer or restriction";
- more clear formulas for calculating incidence rates;
- new recording criteria for occupational hearing loss in the "Overview" section;
- more prominent column heading "Classify the Case" to make it clear that employers should mark only one selection among the four columns offered.

These changes were made in response to public suggestions on making the forms easier to use.

Employers must begin to use the new OSHA Form 300 on January 1, 2004. The new form has the date of revision (rev. 1/2004) located on the form next to the form number.

Injuries and illnesses for years prior to 2004 should continue to be recorded on the appropriate form for that year (i.e., 2003 and 2002 injuries and illnesses should be recorded on the forms for those years). The forms for 2003 and 2002 will continue to be available on OSHA's website at www.osha.gov. Additionally, employers should use the old OSHA 300A Summary Form (without the hearing loss column) to post as required in February 2004. The new 300A form that includes the hearing loss column should be used to post in February 2005.

Hard copies of the new OSHA 300 form are also available and can be obtained using OSHA's on-line order form or by calling 1-800-321-OSHA.

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