White and Williams LLP

Labor and Employment Newsletter *March 2011*

ELECTRONIC COMMUNICATIONS IN THE WORKPLACE

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CONTACT US

The attorneys at White and Williams LLP have experience in providing cost-effective legal services to organizations using a multi-disciplinary approach that ensures that our clients' unique needs are carefully and creatively addressed. If you have any questions regarding best practices or policies pertaining to social media in the workplace, please contact a member of the Labor and Employment practice group.

BEST PRACTICES – ELECTRONIC COMMUNICATIONS

by Nancy Conrad, Esq.

Recently, the United States Supreme Court issued its long-awaited decision in *City of Ontario v. Quon*, a case that raised what the Court deemed "issues of far-reaching significance" about an employee's expectation of privacy when using electronic communication devices provided by an employer. Although the case involved a public employer, it has significant implications for all employers.

The case centered on a police officer who was issued a pager with texting capability. The City, in a written policy, reserved the right to monitor employee e-mail and internet usage and warned that employees should have no expectation of privacy or confidentiality when using these resources. The City also informed officers that pager texts were considered e-mail and could be audited.

Quon, a police officer, sued the City after he was disciplined for sending personal text messages using his City issued pager. After Quon repeatedly exceeded the monthly text message quotas, the City obtained and reviewed transcripts of his messages for a two-month period. The City determined that most of his messages were personal, not work related, and that several messages contained sexually explicit information. The City disciplined Quon for violating the policy and Quon sued the City for violating his Fourth Amendment right to privacy.

In the decision, the United States Supreme Court recognized the "rapid changes in the dynamics of communication and information transmission" and declined to elaborate "too fully on the Fourth Amendment implications of emerging technology." Rather, the Court presumed that Quon has a reasonable expectation in the privacy of his text messages but then found that the search conducted by the City was legitimate and reasonable.

Although the Court stated that the decision was not meant to provide general guidance or apply to private employers, the Court noted:

> [E]mployer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.

The decision provides useful guidance to all employers about electronic communications, including:

- Employers should review and/or develop an electronic communication policy that expressly provides that employees have limited expectations of privacy in the workplace and that the employer retains the right to monitor electronic communications;
- The electronic communications policy should define acceptable use and state that employees will be disciplined for policy violations;
- The electronic communications policy should be clearly communicated to employees;
- Any search of electronic communications should have a legitimate business purpose, relate to work issues and be the least intrusive means.

DOCUMENT RETENTION POLICIES IN AN ELECTRONIC WORKPLACE

by George C. Morrison, Esq.

A lack of a competent and consistently enforced document retention and destruction policy can result in inefficiencies in daily operations and a lack of both physical and electronic storage space. In today's business world, information is created and stored electronically on a vast array of information management systems, including, but not limited to, internal email systems and mobile communication devices. Companies that become embroiled in litigation may be exposed to harsh results for failure to retain this electronic information. Litigants that fail to implement a document retention policy or destroy information in bad faith are subject to sanctions with increasing severity.

All companies should develop and implement a document retention policy that addresses the following general guidelines:

- **WHAT:** Define what information the organization maintains. A policy should address all types of business records (human resources, financial, legal, correspondence, business activities, etc.);
- **WHERE:** Define where hard copy and electronic information is stored. An effective policy is designed to work in conjunction with the organization's entire electronic information management system. Keep in mind that critical information could be stored on mobile devices such cell phones, Blackberries, and laptop computers;
- **WHEN:** Define when information can be destroyed. Federal and state government publications contain general guidelines on retention periods, and some regulations provide mandated retention periods. Companies have a duty to preserve information that may be relevant to pending or even potential litigation. Such information must be subject to a "litigation hold" and should not be destroyed until the threat of litigation passes;
- **WHO:** Define who is responsible for maintaining and destroying documents; and
- **HOW:** Define how information should be destroyed. Hard copy documents should be shredded and electronic information should be deleted from all systems.

HOW TO MAKE YOUR EMPLOYEE HANDBOOK AN ASSET RATHER THAN A LIABILITY

by Tanya A. Salgado, Esq.

Employee handbooks can serve as a useful personnel management tool for employers, but care should be taken to ensure that they are accurate and up-to-date, especially in a vast, quickly-changing social landscape. Ideally, an employee handbook will welcome new employees, introduce them to the company, and set forth the expectations of management as to standards of conduct in the workplace. A well drafted handbook will be referenced often by both management and personnel as a guide to company policies and procedures. Employee handbooks can serve other functions as well, such as providing valuable assistance in defending claims ranging from unemployment compensation to discrimination. A poorly drafted or out-of-date employee handbook, on the other hand, could be used as "Exhibit A" by an aggressive plaintiff's attorney in an employment lawsuit against the company. For example, in New Jersey, courts have found some employee handbooks to contain implied promises of termination only for just cause, in the absence of a clear and prominent disclaimer. In addition, a written policy that is not consistent with the company's actual practice could be used in an employment discrimination lawsuit as evidence against the company, depending on the nature of the claims.

With that in mind, employers should seek legal review of the company employee handbook or procedure manual, and also update the handbook periodically to ensure that it accurately reflects both the current law and the company's actual practices. While a thorough review of the entire handbook is recommended, certain policies are worth an extra focus, including one on social networking and technology.

More and more employers are developing policies addressing social networking by employees. The language of a company's policy will necessarily be dependent on the nature of the employer's workforce and the company's goals with regard to social networking. Care should be taken to ensure that the policy is kept up to date as to legal changes in this rapidly developing area, as well as changes in technology. In addition, employers should have policies addressing technology usage by employees, including monitoring of usage by the employer.

Conrad

Morrison

RECENT WIN

Nancy Conrad and George Morrison obtained the dismissal of a wrongful discharge claim brought by a union-represented employee against a manufacturing company. Conrad and Morrison asserted that Pennsylvania law does not allow union employees to maintain a tort action for wrongful discharge when the terms of a collective bargaining agreement would otherwise protect the employee from discharge without proper cause. The Philadelphia Court of Common Pleas agreed and dismissed the claim with prejudice.

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INDUSTRY SPOTLIGHT: CONSTRUCTION

DELAWARE WORKPLACE FRAUD ACT – INDEPENDENT CONTRACTOR OR NOT?

by Marc S. Casarino, Esq.

The Workplace Fraud Act, Title 19, chapter 35 of the Delaware Code, imposes significant monetary and other penalties on "construction services" employers who willfully misclassify employees as "independent contractors" to save on business costs and avoid paying appropriate taxes. "Construction services" is broadly defined as "all building or work on buildings, structures, and improvements of all types," including landscaping. The Act presumes that an employer-employee relationship exists whenever work is performed for remuneration. The burden is on the employer to demonstrate that a worker is an independent contractor or otherwise exempt from the Act.

At the time of hiring, an employer must provide certain written notices to an independent contractor. The employer must also maintain certain records pertaining to employees and independent contractors for up to three years. Failure to comply with the notice or record-keeping requirements of the Act subjects the employer to a penalty of $500 for each occurrence.

Employers may be penalized $1,000-$5,000 per misclassified employee. If an employer fails to provide the information requested by the DDOL in the course of an investigation within 30 days of the request, the DDOL may issue a stop work order and/or penalize the employer $500 per day until the information is provided. An employer found to have discriminated or retaliated against anyone making a complaint or participating in an investigation under the Act may be subject to a penalty of $5,000-$10,000 per occurrence. Anyone found to have assisted in the formation of a business entity intended to evade the requirements of the Act or to have otherwise aided and abetted an employer in a violation of the Act is subject to a penalty up to $20,000 per occurrence. Employers violating the Act twice in a two-year period are subject to debarment from public contracts for up to five years and may be penalized up to $20,000 per misclassified employee. Officers who knowingly permit their business entity to violate the Act may be held personally liable for the violation. Given the significant penalties for violation of the Act, employers should carefully consider its applicability to them before hiring an independent contractor.

PENNSYLVANIA CONSTRUCTION WORKPLACE MISCLASSIFICATION ACT

by George C. Morrison, Esq.

On February 11, 2011, the Pennsylvania Construction Workplace Misclassification Act went into effect. The Act substantially limits the circumstances under which a construction worker may be classified as an independent contractor for purposes of workers' compensation and unemployment insurance.

The Act narrowly defines the circumstances under which an individual may properly be characterized as an independent contractor. Several factors must be present in order to establish a contractor/independent contractor relationship. More specifically, the individual performing the services must:

- control and direct the performance of the services;
- engage in a business that is customarily performed by independent contractors;
- use his own tools to complete contracted work;
- perform his own work through a business in which he has a proprietary interest; and
- maintain a business with an address that is different from that of the person for whom services are being performed.

The Act further requires that a written contract exist between the independent contractor and the person for whom services are being performed. The contract should provide for payment to the independent contractor based upon work completed; thereby allowing the independent contractor to make a profit or suffer a loss. If the contract is based upon hours worked, with no potential for profit or loss, an employer/employee relationship likely exists. The Act further provides that the individual engaged as an independent contractor should have previously performed similar services for another person, and should hold himself out as being available for independent contracting. The Act recommends that independent contractors hold a minimum of $50,000 in liability insurance.

Violation of the Act could result in criminal and civil penalties. If a person intentionally misclassifies an individual as an independent contractor, the person may be charged with a misdemeanor. If the misclassification is negligent, the employer can be charged with a summary offense and may be ordered to pay a fine. The Secretary of Labor may also seek civil penalties and a "stop work order" on any project where an individual has been performing work in violation of the Act.

Businesses engaged in the construction industry should carefully review their arrangements with independent contractors to ensure they comply with the Act.

Please contact any member of our Labor and Employment Practice Group for assistance with the review, development, or revision of your independent contractor agreements and procedures.

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IN THE NEWS

U.S. SUPREME COURT RECALL: HUNDREDS OF NLRB DECISIONS VOIDED

by John K. Baker, Esq.

Under the Taft-Hartley Act of 1947, Congress established a five-member National Labor Relations Board to adjudicate disputes falling under the jurisdiction of the 1935 National Labor Relations Act. These disputes involve the rights of private sector workers to form unions and engage in collective bargaining. The Board investigates violations of federal labor law, adjudicates grievances and supervises elections for union representation.

Due to a vacancy in 2007, the Board found itself with only four members, and faced the prospect of having only two members when two more vacancies were set to occur by December 31, 2007. This would have left the Board with only two of its five members, too few to meet the Board's quorum requirement of three members in order to act. The Democrat-controlled Congress refused to approve President Bush's nominees to replace the two departing members, while the Bush White House refused to accept the Democrat-sponsored alternatives. The stalemate resulted in the two-member Board deciding to press on with deciding cases without having a quorum. During the 27-month period in which the Board had only two members, it decided almost 600 cases. However, New Process Steel, the Petitioner in the Supreme Court case, challenged the authority of the two-member Board.

On June 17, 2010, the Supreme Court ruled in a 5-4 decision that the Board acted without authority during this 27-month period when membership on the five-member board fell to only two people. As a result, nearly 600 cases have been voided. The Court decision could trigger the reopening of these cases decided by the Board at a time when it did not have a quorum and therefore had no authority to act, as well as scores of other cases that have been appealed to the various federal circuit courts based on the lack of authority argument.

Although the Board now has a quorum, it remains to be seen how it will handle this backlog of voided cases.

Employers who had any case adjudicated by the Board since 2007 should be prepared to litigate its case all over again.

SAVE THE DATE

LABOR AND EMPLOYMENT SEMINAR 2011

Thursday, April 28, 2011
Citizens Bank Park, Philadelphia, PA
8am – 12:30pm

Join the Labor and Employment Group of White and Williams as we look back on legal decisions and developments of 2010 and discuss key issues that may impact your business in the year ahead, including:

- FMLA and Intermittent Leave
- Restrictive Covenants and Trade Secrets
- Social Media and Employee Handbooks

Mark your calendars and make plans to join us for this informative and entertaining program. Be sure to stay after lunch for a tour of Citizens Bank Park!