



The Labouring Oar

From the Chair



Initially, I want to thank the board for its vote of confidence in allowing me to serve you as the Labor & Employment Law Section chair. This is my second time to serve in this position, and it is an honor. With that said, we are always looking for future leaders and have positions available on our board this year. If you are interested in serving on our board, or on one of our committees,

please contact me or any other officer or member of the board. It is our goal to foster new leaders so that everyone has an opportunity at some point to hold a leadership position in the section. We can only grow and improve with fresh ideas and we strive to maintain a governing board that reflects all of our members.

The section has very exciting events planned this upcoming year, particularly, the 5th Bi-Annual Labor & Employment Law Conference, which is co-sponsored this year by the Corporate and Association Counsels Division with support from the New Orleans Chapter. This will be our first year to bring this outstanding conference stateside as in the past it has been held in San Juan, Puerto Rico. It will be on May 2-3, 2013, at the Westin New Orleans and we hope many of you attend. We are also committed this year to continuing to provide quality continuing legal education through webinars, and through our sponsorships of programs presented by other sections and divisions, as well as local chapters. For example, we will be providing a speaker on April 11, 2013, at the North Alabama Chapter's Labor & Employment Law Symposium in Huntsville, Ala.

We also hope everyone will attend the Annual Meeting and Convention in San Juan, Puerto Rico, in September 4-6 2013. Sometime during the convention, the L&E section will hold a board meeting that will be open to all section members. We have also created an award committee, which will recognize outstanding contributions to our section, and hope to be able to present these awards in San Juan.

Again, I thank you for allowing me to serve as your section chair. If anyone would like information about our section, upcoming events, or if you would like to serve or have any ideas on how we can better improve, please do not hesitate to contact me. ■

Danielle Brewer
Chair



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August 2012 Legislative and Congressional Update

By Craig A. Cowart

PAYCHECK FAIRNESS ACT

The Paycheck Fairness Act would have amended the Equal Pay Act to revise remedies for enforcement of, and exceptions to prohibitions against sex discrimination in the payment of wages. Sixty votes were needed in the Senate to advance the Paycheck Fairness Act. However, on June 5, 2012, the Senate vote was 52-47, and the act did not move forward. On the same day, Sen. Dean Heller (R-Nev.) introduced the End Pay Discrimination Through Information Act as an alternative to the Paycheck Fairness Act. The End Pay Discrimination Through Information Act has not advanced beyond referral to committee.

LABOR AND EMPLOYMENT LEGISLATION INTRODUCED IN 2012

Many bills related to labor and employment law have been introduced in Congress this year. While none of the below bills have advanced beyond referral to committee, and most may not, the subject matter of the proposed legislation provides insight into hot topics in the labor and employment law area.

WORKING FAMILIES FLEXIBILITY ACT

On Feb. 29, 2012, the Working Families Flexibility Act was reintroduced by Rep. Carolyn Maloney (D-N.Y.) and Sen. Bob Casey (D-Penn.). The bill would provide employees with a statutory right to request flexible work terms and conditions. Modified versions of the Working Families Flexibility Act were previously introduced in both the 110th and 111th Congresses, with no significant action taken by Congress in either session.

FAIR PLAYING FIELD ACT

The Fair Playing Field Act of 2012 was reintroduced by Sen. John Kerry (D-Mass.) on Feb. 29, 2012. If passed, the act would limit the use of the federal “safe harbor” that allows businesses to treat workers as independent contractors for federal employ-

ment tax purposes, regardless of the employee’s status under the common law test. Although a similar version of this bill failed to advance in either the House or Senate during the last congressional session, independent contractor classification continues to be a major topic of interest.

NATIONAL RIGHT-TO-WORK ACT

On March 7, 2012, Sen. Jim DeMint (R-S.C.) reintroduced the National Right-to-Work Act. The bill would repeal provisions of the NLRA and Railway Labor Act that permit employers and unions to draft agreements requiring union membership and payment of union dues or fees as a condition of employment. Sen. DeMint introduced identical legislation in 2007 and 2011, but the bill failed to advance in either of those terms. The current version represents the 40th time such a measure has been introduced in Congress during the past 40 years.

RE-EMPOWERMENT OF SKILLED AND PROFESSIONAL EMPLOYEES AND CONSTRUCTION TRADEWORKERS

The RESPECT Act would amend the NLRA’s definition of “supervisor” to enable more employees to be covered by the NLRA. Specifically, the terms “assign” and “responsibility to direct” would be eliminated from the list of supervisory duties in the NLRA. Additionally, the RESPECT Act would require that employees perform supervisory duties during a majority of his or her work time in order to be considered a supervisor under the NLRA. The RESPECT Act was reintroduced by Sens. Richard Blumenthal (D-Ct.), Dick Durbin (D-Ill.), and Tom Harkin (D-Iowa) on March 7, 2012.

BILL TO BAN PREDISPUTE ARBITRATION AGREEMENTS

A bill that would effectively ban most employment-related pre-dispute arbitration agreements was introduced by Rep. Robert Andrews (D-N.J.) on March 8, 2012. The bill is not expected to advance during this legislative term.

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Danielle Brewer
Baker & Brewer, PLLC
Biloxi, MS
dbrewer@bakerbrewerlaw.com

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Phelps Dunbar LLP
Baton Rouge, LA
karleen.green@phelps.com

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Ogletree Deakins
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ccowart@laborlawyers.com

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Gordon, Arata, McCollam,
Duplantis & Eagan, LLC
New Orleans, LA
dcurrault@gordonarata.com

Immediate Past Chair

José Gonzalez-Nogueras
Jimenez Graffam & Lausell
San Juan, Puerto Rico
jgonzalez@jgl.com

Editor, *The Labouring Oar*

James D. Noel III
McConnell Valdés LLC Hato
Rey, Puerto Rico
jdn@mcvpr.com

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PROTECTING OLDER WORKERS AGAINST DISCRIMINATION ACT

A bipartisan bill that would overturn the 2009 Supreme Court decision in *Gross v. FBL Financial Services Inc.* was introduced in the Senate on March 13, 2012. The *Gross* decision held that a plaintiff bringing a claim under the ADEA must show by a preponderance of the evidence that age was the “but for” cause of the employer’s adverse employment decision. In reversing *Gross*, the act would establish that when an employee shows discrimination was a “motivating factor” behind a decision, the burden shifts back to the employer to show it complied with the law. The bill was introduced on March 13, 2012 by Sens. Tom Harkin (D-Iowa), Chuck Grassley (R-Iowa), and Patrick Leahy (D-Vt.). While similar measures failed to advance in 2009 and 2010, the current version of the bill deletes language stating that the proposed framework would apply to all federal anti-discrimination and anti-retaliation laws.

REBUILD AMERICA ACT

On March 29, 2012, Sen. Tom Harkin (D-Iowa) introduced a bill that incorporates numerous employment-related provisions into a single piece of legislation. Some key provisions of the bill include: substantial increases in the federal minimum wage and minimum wage for tipped employees; a requirement that employers provide employees with paid sick leave; and an amendment of the FLSA to make it more difficult for employees to qualify for the administrative, executive, and professional exemption. The bill is quite expansive and is not expected to advance as a whole.

REWARDING ACHIEVEMENT AND INCENTIVIZING SUCCESSFUL EMPLOYEES ACT

The RAISE Act would amend provisions of the NLRA to permit employers whose workplaces are governed by collective bargaining agreements to award employees with additional wages or other compensation for their job performance without such actions being deemed illegal “direct dealing.” The measure was introduced in the House on April 18, 2012, by Rep. Todd Rokita (R-Ind.) and in the Senate on April 26, 2012, by Sen. Marco Rubio (R-Fla.).

PASSWORD PROTECTION ACT OF 2012

On May 9, 2012, several members of both the House and Senate introduced the Password Protection Act of 2012. The bill would ban employers from requesting individuals’ usernames, passwords, or any other means of accessing their social networking sites and from taking adverse action against job applicants and employees who refuse to provide such information.

SERVICEMEMBERS ACCESS TO JUSTICE ACT

Sen. Robert Casey (D-Penn.) introduced the Servicemembers Access to Justice Act on May 22, 2012. The bill would make several amendments to USERRA and make it easier for covered individuals to bring an action in civil court.

SERVICEMEMBER EMPLOYMENT PROTECTION ACT

The Servicemember Employment Protection Act was introduced by Sen. Mark Pryor (D-Ark.). The proposal would permit veterans to take unpaid leave under the FMLA in order to

receive medical or dental treatment for service-related injuries or illnesses.

CATCHING UP TO 1968 ACT OF 2012

On June 6, 2012, Rep. Jesse L. Jackson Jr. (D-Ill.) introduced a measure that would increase the federal minimum wage to \$10.00 per hour and index future increases to the consumer price index. The bill would also require the minimum wages of tipped employees to be at least 70% of the federal minimum.

COMPANIONSHIP EXEMPTION PROTECTION ACT

Sens. Mike Johanns (R-Neb.) and Lamar Alexander (R-Tenn.) introduced a bill on June 7, 2012 that would preserve the FLSA’s in-home companion services exemption despite a DOL proposed rule that would extend minimum wage and overtime requirements to many home care workers.

RESEARCH FAIRNESS ACT OF 2012

On June 7, 2012, Rep. Mike Kelly (R-Penn.) introduced the Research Fairness Act of 2012. The bill would exempt marketing research participants and mystery shoppers from certain FLSA provisions.

FOREWARN ACT

Sen. Sherrod Brown (D-Ohio) reintroduced the Forewarn Act on June 14, 2012. The bill would amend the WARN Act by requiring more and smaller employers to notify workers of mass firings or plant closings and increasing penalties and enforcement mechanisms for violations.

EQUAL EMPLOYMENT OPPORTUNITY RESTORATION ACT

On June 20, 2012, the Equal Employment Opportunity Restoration Act was introduced by Rep. Rosa DeLauro (D-Conn.) in the House and Sens. Al Franken (D-Minn.) and Richard Blumenthal (D-Conn.) in the Senate. The bill would lower the bar for class action certification in employment discrimination cases and effectively overrule the *Wal-Mart Stores, Inc. v. Dukes* Supreme Court decision.

ROBERT C. BYRD MINE AND WORKPLACE SAFETY AND HEALTH ACT OF 2012

Sen. Jay Rockefeller (D-W.V.) reintroduced a bill that would make sweeping changes to OSHA. Among the proposed amendments to OSHA are new recordkeeping and training requirements, increased whistleblower protections, and increased maximum criminal and civil penalties for violations.

BAN THE BOX ACT

On July 26, 2012, Rep. Hansen Clarke (D-Mich.) introduced legislation that would make it unlawful for an employer to ask job applicants whether they have ever been convicted of a crime until after a conditional offer of employment is made, absent limited circumstances. The bill is not expected to advance during this Congressional session.

CRIMINAL ANTITRUST ANTI-RETALIATION ACT

Sens. Patrick Leahy (D-Vt.) and Chuck Grassley (R-Iowa)

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Equality in Employment Opportunities

By Jorge C. Pizarro and Tatiana Leal

“Fourscore and seven years ago our fathers brought forth on this continent a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.”
—Abraham Lincoln, Gettysburg Address 1863.

Throughout a large part of America’s history it can be seen how the United States was founded under the principle that “all men are created equal.” Such idealistic phrase was called forth in the Declaration of Independence, proclaimed later on by the U.S. president Abraham Lincoln at the dedication of the Soldiers’ National Cemetery in Gettysburg, Pa., and the U.S. Supreme Court in multiple cases has repeatedly held so.¹

In an attempt to prevail equality among citizens, the U.S. Congress passed several laws, amidst these the Civil Rights Act of 1964. This legislation consists of eleven titles that prohibit discrimination based on race, color, national origin, religion, or sex. Specifically, Title VII clearly forbids employers from discriminating against prospective employees because of their race, color, national origin, religion, or sex.² The U.S. Supreme Court has stated that the primary purpose of Title VII is “to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”³ This way, it was believed that individuals pertaining to minority groups would have reassurance that employers could not carry out discriminatory actions towards them.

Nonetheless, even though Congress ratified the act to serve as a remedy to employees belonging to the different protected classes specified in the law, there are still individuals who suffer unfair employment practices. To this end, the U.S. Supreme Court has stated that there is, currently, no federal statute which “prohibits discrimination per se, rather, what is prohibited is discrimination that is [...] motivated [by race, color, national origin, religion, or sex].”⁴ What Congress intended to do with the passing of Title VII was “the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”⁵ However, in view of this interpretation of Title VII, the U.S. Supreme Court clearly pronounced that with such legislation Congress did not intend to command “that the less qualified be preferred over the better qualified simply because of minority origins”, but “that any test used [by employers] must measure the person for the job and not the person in the abstract.”⁶

A clear example of individuals who are not directly protected by Title VII of the Civil Rights Act of 1964 are convicted criminals. Why? Criminals are not a protected class under Title VII. To this effect, it is commonly known that a person with a criminal background who is seeking a job is significantly less employable.

As Kay Kohler once manifested, “prisoners are told that rehabilitation is a major goal of the correctional system, and that upon release they should seek employment and become contributing members of society. However, when ex-prisoners attempt to find jobs, they find out they are met with almost insurmountable barriers from both public and private sectors.”⁷

In accordance with this, the U.S. Court of Appeals for the Eight Circuit has rationalized that “to deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.”⁸

According to the Equal Employment Opportunity Commission (EEOC) Enforcement Guidance of 2012 a survey demonstrated that 92 percent of employers subjected some, if not all, of its prospective employees to a criminal background check.⁹ All the same, in another research it was found that less than 50 percent of such candidates who had a criminal record received a callback.¹⁰

In 2011, the Bureau of Justice Statistics Probation and Parole in the United States (BJS) reported that in 2010 federal and state corrections facilities held over 1.6 million inmates, this being one of every 200 U.S. residents.¹¹ An estimate of the sentenced African Americans and Hispanics prison population was 933,900.¹² Nationwide a total of 708,677 prisoners were released at year’s end.¹³ In addition, at the end of 2010 approximately 4 million ex-offenders were on probation or parole in the United States.¹⁴

Looking at the cited statistics in proper perspective, the EEOC concluded that a large segment of the American population suffers from unfair employment practices related to criminal background checks since less than half of former convicts who re-enter the community are being considered by employers for a job opening. Further, because ex-felons are not among the protected classes of Title VII they cannot turn to the Act when seeking recourse.

As a result of this situation, the EEOC recently issued the EEOC Enforcement Guidance. The purpose of this enforcement guidance is to refurbish the EEOC’s guidances concerning the use of arrest or conviction records in employment decisions.¹⁵ With this enforcement guidance, the EEOC attempts to diminish discrimination in employment decisions based on race and national origin linked to an individual’s criminal background. Nonetheless, it must be noted that the EEOC Enforcement Guidance under no circumstances prohibits an employer from obtaining criminal background records of job applicants or current employees.

The EEOC states that an arrest does not necessary establish that criminal conduct has occurred.¹⁶ On the other hand, a conviction record serves as sufficient evidence to indicate that an individual perpetrated an illegal conduct.¹⁷ An employer may not rely solely on such record when making an employment decision.¹⁸ Therefore, exclusions in employment based solely on an arrest, if such is not related with a business necessity or is job-related, is not permissible.¹⁹

To this effect, the EEOC lists two circumstances in which an employer may take in consideration an arrest or conviction record of a prospective employee:

- The employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible); or

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5th Bi-Annual Federal Bar Association Labor and Employment Law Conference

Presented by the
FBA Labor and Employment Section
Co-sponsored by the Corporate and Association Counsel Division and the
New Orleans Chapter of the FBA



May 2-3, 2013

The Westin New Orleans New Orleans, Louisiana

A limited number of rooms at the Westin New Orleans have been set aside for conference participants at a special rate of \$209/night. To secure this special rate, call (800) 627-8180 by Monday, April 8, 2013. Please be sure to mention the Federal Bar Association conference.



More details are available at www.fedbar.org.

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introduced legislation on July 30, 2012, that would extend whistleblower protections to employees who provide information to the Department of Justice regarding criminal antitrust violations.

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- The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three *Green* factors), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.²⁰

The guidance demonstrates the EEOC's intention to promote equality and justice in the American workplace by preventing employment decisions based on prejudice and stereotypes. Hence, its primary purpose is to alleviate antidiscrimination practices against qualified job applicants with criminal background records.

It is undisputable that Title VII and the updated EEOC Enforcement Guidance do not intend to secure a job to every citizen regardless of his/hers qualifications,²¹ but to safeguard a labor commitment of true merit selection. Also, the EEOC encourages employers to adopt the hiring practices clearly stated in the Enforcement Guidance when considering a prospective employee's criminal record, as to avoid violations to Title VII of the Civil Rights Act of 1964.

Nonetheless, while the preventive measures contained in the updated Guidance traces a new path to overcome employment discrimination against criminal offenders, justice and equality among citizens must not depend exclusively on statutes and rights conceived by Congress. A nation is not constructed solely by its lawful regulations. It requires " a reciprocity between the state and its citizens and among citizen themselves. A man whose rights are not protected by the state has no rights. A man who has no rights cannot be expected to observe the rights of others."²² ■

Jorge C. Pizarro is a partner and member of the Executive Committee of law office Jiménez, Graffam & Lausell located in San Juan, Puerto Rico, representing employers in all areas of Labor and Employment Law, including training, collective bargaining, counseling, as well as litigation in Puerto Rico, state and federal courts and government agencies.

Tatiana Leal is a law clerk with Jiménez, Graffam & Lausell. She is a third year law student at the Inter American University of Puerto Rico, School of Law.

ENDNOTES

¹Slaughter-H. Cases, 83 U.S. 36 (1872); *Butchers; Union Slaughter-H. & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-H. Co.*, 111 U.S. 746 (1884); *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150 (1897); *Regents of U. Of California v. Bakke*, 438 U.S. 265 (1978); *Wygant v. Jackson*

CONCLUSION

The 112th U.S. Congress has seen a number of bills introduced that relate to labor and employment law. While it is likely that many, or most, of these proposals will not advance during the current Congressional session, they provide insight into potential trends in the area of labor and employment law. ■

Bd. of Educ., 476 U.S. 267 (1986); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

²42 U.S.C. § 2000e-2

³*McDonnell Douglas Corp. V. Green*, 411 U.S. 792, 800 (1973); *see also, Intl. Broth. of Teamsters v. U.S.*, 431 U.S. 324, 348 (1977).

⁴*Richardson v. Hotel Corp. Of America*, 332 F. Supp. 519 (1971)

⁵*Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (E.D. La. 1971)

⁶*Id.* at 436.

⁷Kay Kohler, *The Revolving Door. The Effect of Employment Discrimination Against Ex Prisoners*, 26 *Hast.LJ* 1403, 1420.

⁸*Green v. Missouri Pac. R. Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975).

⁹Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., 915.002 (2012).

¹⁰Pager, Devah, *The Mark of a Criminal Record* 955 (2003).

¹¹Guerino, P.M., P.M. Harrison, and W. Sabol. *Prisoners in 2010*. NCJ 236096. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, 2011. www.bjs.gov/content/pub/pdf/p10.pdf.

¹²*Id.*

¹³*Id.*

¹⁴Glaze, L.E. & T.P. Bonczar. *Probation and Parole in the United States, 2010*. NCJ 231674. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, 2011. www.bjs.gov/content/pub/pdf/ppus10.pdf.

¹⁵Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.

¹⁶*Id.* at 12.

¹⁷*Id.* at 13.

¹⁸*Id.*

¹⁹*Id.* at 12.

²⁰*Id.* at 14.

²¹*See, Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

²²Jessie L. Krienert, Mark S. Fleisher, *Crime and Employment: Critical Issues in Crime Reduction for Corrections*, p. VII, 2004.

Your Benefit Plan—Entering The Electronic Age: Requirements For Electronic Employee Communications

By Jason Rothman and Tia L. Martarella

One of the central tenants of the rules governing employee benefit plans is that employees have a right to know everything about their employee benefit plans. Further, plan administrators have the affirmative obligation to ensure that employees have sufficient information available to them so that the employees have the complete picture regarding their plans. Accordingly, the Internal Revenue Service (IRS) and the Department of Labor (DOL) (the government agencies primarily responsible for the rules and regulations governing employee benefit plans) have established an entire body of law surrounding the documents, notices, and information that must provide to employees concerning their employee benefit plans. For example, employees must automatically receive summary plan descriptions, financial summaries, fee summaries, and notices and summaries of changes to the plan's terms and fee structure. Traditionally, the IRS and DOL rules and regulations mandated that the required documents be provided to employees in paper form.

Beginning in the mid-90s, as Internet-based communications became more prevalent and more cost-effective, plan administrators started becoming increasingly frustrated by the administrative burden and expense of providing paper notices and documents to their many employees. In response, the IRS and the DOL each issued rules and regulations governing the electronic dissemination of employee communications. Although the agencies generally follow similar rules, there are some differences. As a plan administrator, it is important to understand the rules and to know which items of communication with an employee are covered by which rules.

DOL RULES

Scope of the DOL Rules. The DOL was the first of the employee benefits-governing agencies to finalize its electronic communication rules. The DOL's rules were finalized in April 2002, and generally apply to the transmittal of all documents required to be furnished or made available under Title I of the Employee Retirement Income Security Act (ERISA). Plans covered by Title I of ERISA include welfare plans and pension plans (defined benefit and defined contribution plans). Documents covered under the DOL rules include summary plan descriptions, summary of material modifications, and summary annual reports. The DOL regulations are "safe harbors" and are not intended to be the only way plans can meet the disclosure requirements of ERISA. Plans that meet the safe harbor rules, however, are deemed to meet the disclosure requirements of ERISA. The overall theme of the DOL safe harbor rules is that plan administrators must take careful and measured steps to ensure that any individual who will receive an ERISA-required communication electronically realizes that they will be receiving the document electronically, can easily access the document electronically, and has access to a paper document, if preferred.

Two Approved Groups of Individuals. The DOL rules provide that ERISA-required employee communications can be disseminated electronically to two groups of individuals:

- Any individual who is able to effectively access electronic documents at his or her worksite as long as access to the electronic information system is an "integral part" of his or her duties (integral employees). This group includes an individual who works from home and accesses the employer's electronic information system as part of his or her duties but does not include an individual whose only access is to a shared workstation or kiosk.
- Other individuals to whom the plan administrator may deliver plan related information electronically include those individuals who affirmatively consent to receiving documents electronically (consent employees). Obtaining consent is a rather onerous and burdensome process, especially for those employers who have a large population of non-integral employees, whose job duties do not require regular access to electronic information systems (such a retailers, large farms, or factories). Before providing consent, each consent employee must be given a "clear and conspicuous" notice describing exactly what he or she is consenting to, including specifying the documents that will be delivered electronically; the procedures for withdrawing consent, and the procedures for both receiving the documents electronically and requesting a receiving paper documents. If the documents are to be provided through email, the consent employee must provide an address to receive documents electronically, and must consent or affirm consent electronically in a manner that reasonably demonstrates his or her ability to access the documents in the electronic (for example, by e-mailing consent). This requirement does not apply for information on CD, DVD or similar media.

Any individual who is not an integral employee or a consent employee must receive a paper communication.

General DOL Requirements. Once an employer has established that an individual is either an integral employee or a consent employee, in order to obtain safe harbor protection under the DOL regulations, the plan administrator must take "appropriate and necessary measures" aimed at ensuring that the electronic delivery results in actual receipt of the transmitted information (*e.g.*, using return-receipt or notice of undelivered electronic mail features, conducting periodic review or surveys to confirm receipt) and protects the confidentiality of personal information. At the time that the electronic document is provided, an electronic or paper notice must be provided to the individual that describes the significance of the electronic document, and upon request, the individual must be furnished a paper version of the electronically furnished documents.

IRS RULES

Scope of the IRS Rules. The IRS rules were finalized in October, 2006, well after the DOL rules. The IRS rules apply to certain communications made through not only electronic means, but also other technological means, such as digital, magnetic, and voice-recording systems. The IRS-covered communications include most notices and elections made under tax-qualified 401(a) plans, 403(b) plans, and cafeteria plans, to name

a few. The IRS rules do not apply to certain notice or disclosure requirements governed by the DOL, such as COBRA notices, SPDs, or notices regarding a suspension of benefits.

With respect to any IRS-required communications or elections that are otherwise required to be in writing, the IRS's electronic disclosure rules are not safe harbor rules—instead, the IRS rules generally provide the “exclusive means” of delivering those documents or making IRS-governed elections electronically. However, where a communication or election is not required to be in writing, the IRS rules function as a “safe harbor” for the electronic communication.

Two Approved Methods. Much like the DOL rules, generally, the IRS rules provide that notices can be provided electronically to two groups of individuals—those who can be reached using the Consumer Consent Method and those who can be reached using the Alternative Method.

Under the Consumer Consent Method, the recipient must affirmatively consent in advance to the electronic delivery of the notice. As with the DOL rules, the consent requirements can be burdensome to those employers with large populations of employees who do not have access to the electronic medium at work. This consent must be made or confirmed in a manner that demonstrates that the recipient can access the notice in the applicable electronic medium or in a written paper document if the recipient confirms the consent electronically in a manner that proves the recipient can use the planned electronic medium. Before consenting, the recipient must be provided a disclosure that describes the scope of the consent; the procedures for withdrawing consent; the right to receive the notice on paper; and other specifics related to the technological requirements for receiving the communications electronically.

Under the Alternative Method, the recipient must be “effectively able” to access the electronic medium used to provide the notice. In addition, at the time any notice is provided, the recipient must be advised that the notice is available in writing on paper at no charge.

In addition to the above, the IRS rules set forth further requirements that must be met if an electronic system is to be used by participants for making elections, which include the requirement that if the participant election must be witnessed by a plan representative or notary public, the electronic signature of the person making the election must be made in the physical presence of a plan representative or notary public.

General IRS Requirements. The IRS rules require that the method for providing an electronic notice or obtaining electronic elections must meet all of the requirements applicable to the notice other than as to the medium of transmission (*i.e.*, applicable timing and content requirements); it must be in a manner “no less understandable” than information on paper; the transmission must identify the subject matter of the notice and, as applicable, otherwise alert the recipient to the significance of the notice; and it must instruct electronic notice recipients on how to access the electronic notice.

Going Forward—Electronic Communications for the Electronic Age

With the growing use of electronic communications, more than ever employees appreciate—and even expect—to receive communications from employers in electronic form. Americans

receive information from schools, churches, and extra-curricular activities via the internet, and generally want to receive important work-related information in the same manner. This is especially true when the communications are large and full of information that the employee will likely want to be able to access quickly and easily at a later date (such as summary plan descriptions and other plan-related information). In addition, plan administrators are, more and more frequently, finding it easier, more effective, and more cost-efficient to deliver plan documents electronically.

While employees and plan administrators recognize the need for a more efficient, more streamlined manner in which to disseminate benefit plan-related communications electronically, the IRS and DOL seem to be struggling to catch-up. The agencies are having some difficulties reconciling the practicality and need for internet-based communications with a core function of ERISA and the Code—ensuring that participants and beneficiaries are fully informed of all aspects of their benefit plans. Accordingly, in 2011, the Employee Benefits Security Administration (EBSA), a DOL agency, issued a Request for Information Regarding Electronic Disclosure by Employee Benefit Plans (RFI). The RFI asked for feedback regarding the DOL's current electronic disclosure rules.

The RFI received approximately 80 formal responses—most of them urging for a more streamlined process for disseminating plan communications electronically. The responses indicated that participants and plan administrators would benefit greatly from electronic communications, but that the burdensome requirements of the DOL rules prohibited plan sponsors from disseminating communications electronically. The responses indicated that the ability to easily and effectively provide electronic communications would save plan administrators incredible amounts of time and money. In addition, employees would benefit from electronic communications because they would have constant access to important plan information.

Technical Release No. 2011-03R. After receiving comments on the RFI, the DOL issued a Technical Release No. 2011-03R, Revised Interim Policy on Electronic Disclosure. The release provides a safe harbor for the electronic dissemination of a specified type of notices that provide fee-related information to plan participants and beneficiaries. Those notices, which are a new requirement for 2012, are commonly referred to as “Participant-Level Fee Disclosures.” In the final regulations for the Participant-Level Fee Disclosures, the DOL did not describe the manner in which the Participant-Level Fee Disclosures may be disseminated electronically. Consequently, the DOL issued to release, to provide rules relating to the electronic provision of the Participant-Level Fee Disclosures.

While the mechanics of electronic dissemination are specific to the Participant-Level Fee Disclosures, in the release, the DOL addresses the broader issue of the potential need to update the current DOL rules with respect to electronic communications. The DOL acknowledges that electronic communications may be the more efficient means of communicating to participants and beneficiaries, but notes that some individuals do not have access to electronic means of communications. The DOL also

BENEFIT continued on page 15

Pharmaceutical Sales Representatives Are Not Entitled to Overtime Payment

By Jorge A. Antongiorgi-Betancourt

In a landmark decision, on June 18, 2012, the Supreme Court of the United States in *Christopher et al. v. SmithKline Beecham Corporation* ruled that pharmaceutical sales representatives qualify as outside salesmen under the provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.* As a result, they are exempt from the FLSA's minimum wage and maximum hour requirements. The court rejected the United States Department of Labor's interpretation of its regulations, particularly on whether these pharmaceutical sales representatives were making "sales" within the meaning of the outside salesman's exemption. The opinion, authored by Justice Alito, was joined by Justices Roberts, Scalia, Kennedy, and Thomas. Justice Breyer filed a dissenting opinion joined by Justices Ginsburg, Sotomayor, and Kagan.

Before this decision several district courts had addressed the issue on whether pharmaceutical sales representatives, known as "detailers" should be classified as exempt employees from overtime requirements under the "outside salesman" and/or "administrative employee" exemptions of the FLSA. The pharmaceutical industry has commonly classified detailers as exempt employees pursuant to one or both of these exemptions.

CASE'S FACTUAL BACKGROUND

The pharmaceutical industry is an industry heavily and extensively regulated by the federal government. Since 1951, prescription drugs may be dispensed only upon a licensed physician's prescription. As a result of such limitation, the industry promotes its products to licensed physicians through a process commonly known as "detailing." Pharmaceutical sales representatives, or detailers, do not actually sell prescription drugs. These employees engage in providing information to physicians about the pharmaceutical products with the objective of obtaining from them non-binding commitments to prescribe different products in appropriate cases. That is, their aim is to persuade physicians to write prescriptions for the company products they represent.

In 2003, Smith Beecham Corporation, doing business as GlaxoSmithKline (Glaxo), hired Michael Christopher and Frank Buchanan as pharmaceutical sales representatives. Their compensation formula included a base salary and an incentive pay. The latter was based on the sales volume of their assigned drugs in their sales territories. They were not paid for overtime work in excess of 40 hours per week, nor did Glaxo keep records of their working hours. They were hired for their sales experience and trained to close each sales call by obtaining a non-binding commitment from physicians. As detailers, they worked away from the office and had minimal supervision.

The pharmaceutical industry has always considered the detailers as outside salesmen and, as such, exempt from the minimum wage and maximum hour provisions of the FLSA. Throughout the years the Department of Labor (DOL) had never contested, nor initiated any action against the pharmaceutical industry based upon misclassification of the detailers.

Christopher and Buchanan sued Glaxo in the United States

District Court for the district of Arizona alleging that their employer violated the FLSA for its failure to pay them for overtime. They also alleged that for that reason, they were entitled to back pay and liquidated damages.

Glaxo moved for summary judgment alleging that detailers fit the FLSA's outside salesman's exemption and the court granted same. The 9th Circuit affirmed, and Christopher and Buchanan filed a petition for *certiorari* before the Supreme Court.

THE LEGAL LANDSCAPE

Congress has expressly exempted certain categories of employees from the FLSA's overtime requirements. See 29 U.S.C. § 213. Among these is the category of the "outside salesman." See 29 U.S.C. § 213(a)(1). The FLSA does not define the term "outside salesman," being Congress' intention to delegate the authority to define and delimit it on the U.S. Secretary of Labor. See 29 U.S.C. § 213(a)(1).

According to the DOL's regulations, in order to comply with the outside salesman's exemption the employer must show that the individual (1) has as his primary duty "making sales ... or ... obtaining orders ... for which a consideration will be paid by the client or customer," and (2) is "customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." See 29 C.F.R. § 541.500.

Section 3(k) of the FLSA specifies that the terms "sale" or "sell" include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." See 29 U.S.C. § 203(k). The regulations issued by the DOL further explain that "[s]ales within the meaning of Section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." See 29 C.F.R. § 541.501(b).

For purposes of outside salesman's exemption, the DOL's regulations distinguish sales work from promotional work. "Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations work is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work." See 29 C.F.R. § 541.503(a).

Therefore, in *Christopher*, the Supreme Court was faced with the task of untying a gordian-knot. That is, should the court determine whether detailers were regularly engaged in making sales under the FLSA, and therefore, exempt as outside salesmen, or defer to the interpretation given by the DOL, that they were just engaged in non-exempt promotional work. To overcome the challenge, the court first had to adopt a position as to what deference was owed to the DOL in its interpretation of its regulations, in particular, as to the outside salesman's exemption and the "sales" requirement.

The Question of Deference to the DOL's Interpretation: Controlling Deference v. Persuasiveness

In *Christopher*, the Supreme Court's opinion noted that after about 70 years of silence in which the DOL did not enforce any action against the pharmaceutical industry for its practice of classifying detailers as exempt employees, finally, in 2009, it adopted the position that detailers were not exempt outside salesmen; albeit in an *amicus curiae* brief filed in a case before the 2nd Circuit.

The petitioners in *Christopher* had argued before the district court and the 9th Circuit that such interpretation was controlling based upon the case of *Auer v. Robbins*, 519 US 452 (1997). In *Auer*, the Supreme Court had held that the Secretary of Labor's interpretation of the DOL's regulations was *controlling*, unless plainly erroneous or inconsistent with the regulation. *Auer, Id.*, at page 461. Such deference is equally extended to the Secretary's positions "in the form of a legal brief." *Auer, Id.*, at page 462.

In *Christopher*, the Supreme Court summarized the exceptions to the controlling deference doctrine. According to the opinion, deference is inappropriate not only when the interpretation is plainly erroneous or inconsistent with the regulation, but also when there is reason to suspect that it does not reflect the agency's fair and considered judgment on the matter in question. *Christopher, Id.*, at page 10. The latter might occur when the interpretation (i) conflicts with a prior interpretation; (ii) is nothing more than a convenient litigating position; (iii) or is a *post hoc* rationalization advanced by the agency seeking to defend past agency action against attack. *Christopher, Id.*, at page 10.

In *Christopher*, the Supreme Court rejected the application of the controlling deference doctrine, mostly based upon fair play concepts. *Christopher, Id.*, at pages 10-12. In what seems to be the application of the ancient maxim of "silence shows consent," the Court noted the effect of the DOL's decades-long inaction against the industry for what was a known and common practice of considering detailers as exempt employees. It reasoned that under the circumstances, the application of its interpretation the "potential for unfair surprise is acute." *Christopher, Id.* at page 13. Probably equally important was the effect of such interpretation over the industry. The court noted that such interpretation "would pose potentially massive liability. . . for conduct that occurred well before the interpretation was announced." *Christopher, Id.*, at page 10.

The Court also rejected considering such regulations as persuasive, while noting the DOL's convenient, but inconsistent, interpretations about what a "sale" is. The DOL had argued in another case before the Second Circuit and, in this case before the 9th Circuit, that a sale required a *consummated transaction* in order to advance the position that the non-binding commitment between detailers and physicians was not equivalent to a sale. The DOL's reasoning was that since detailers were prohibited by federal regulations to sell their products to physicians, the non-binding commitment failed to satisfy the statutory and regulatory sales requirement. At the Supreme Court level, the argument was totally different according to the DOL's adopted position. According to the DOL's convenient and newly adopted position, in order to make a sale, a *transfer of title* to the property at issue was required. This new interpretation was inconsistent with the FLSA, which defines the term "sale" to include, among other things, a *consignment for sale*, which does not involve any transfer of title. *Christopher, Id.*, at page 15.

The Court's Interpretation of the Exemption

Having rejected the DOL's interpretation, the Court resorted to statutory and regulatory canons of construction in order to determine how the exemption should be enforced with respect to detailers.

With respect to the statutory exclusion, the Court referred to the definition provided; it exempts anyone employed " . . . *in the capacity of outside salesman*" as the term is defined in the DOL's regulations. See 29 U.S.C. § 213(a)(1) (emphasis supplied). Such emphasis on the "capacity" engaged in by the employee, according to the Court, favors an inquiry on the " . . . employees' responsibilities *in the context of the particular industry in which the employee works.*" *Christopher, Id.* at page 17 (emphasis supplied). On the other hand, the regulations, in the definition of the term, refer as their primary duty that of . . . "making sales within section 3(k) of the [FLSA]." See 29 C.F.R. § 541.500(a)(1). According to the Court a perusal of the statute's definition of the term "sales" reflects a *broad* definition, which includes " . . . *any sale, exchange, contract to sell, consignment for sale, shipment for sales; or other disposition.*" See 29 U.S.C. 203 (k) (emphasis supplied). Such broad definition, which includes as "sales," transactions which are not ordinarily considered as such in a technical sense, is evidence, according to the Court, of the Congress' intention to "accommodate industry by industry variations of selling commodities." *Christopher, Id.*, at page 19. In contrast, the DOL's *narrow* interpretation would defeat Congress' intention. *Christopher, Id.*, at page 19.

In consequence, in view of the Court's rationale on the term "sales," in the pharmaceutical industry, obtaining non-binding commitments from a physician to prescribe drugs *is* a sale within the meaning of the FLSA. As a result, the FLSA's exemption for the category of outside salesman applies to detailers; more so considering that their " . . . end goal was not merely to make physicians aware of the medically appropriate uses of a particular drug [; but] to convince physicians actually to prescribe the drug in appropriate cases." *Christopher, Id.*, at page 24. ■

To Friend or Not to Friend—That is the Question: Social Media Regulation in the Workplace

By Corie J. Tarara and Tara R. Craft

On March 20, 2012, the Associated Press reported three instances of employers asking employees or applicants for access to their Facebook accounts, either directly by requesting a password, or indirectly by asking them to ‘friend’ company personnel or by asking them to log in on a company computer. One of those instances involved Robert Collins, who was returning to his job with the Maryland Department of Public Safety and Correctional Services. He was asked for his login and password to his Facebook account, a request with which he complied—and then subsequently notified the ACLU about the practice. The ACLU protested, and Collins’ case spurred the Maryland Legislature to pass a law in 2012 prohibiting employers from demanding or requiring employees or applicants to disclose usernames and passwords to personal social media accounts. The Maryland law took effect on Oct. 1, 2012.¹

The AP article created a flurry of legislative activity and statements from elected officials decrying the practice. Shortly after the AP published its article, Facebook’s chief privacy officer Erin Egan warned on Facebook that employers who demand passwords of job applicants are invading the personal privacy of the Facebook account holder. Other states quickly followed Maryland’s example. On Aug. 1, 2012, Illinois became the second state to pass legislation making it illegal for employers to seek passwords from employees and applicants.² The Illinois law, which takes effect January 1, 2013, still permits employers to request user names so that public online information may be viewed, but prohibits them from requesting passwords to access private portions of an employee or job applicant’s online profile.

Similar bills are pending in eleven other states: California,³ Delaware,⁴ Michigan,⁵ Minnesota,⁶ Missouri,⁷ New Jersey,⁸ New York,⁹ Ohio,¹⁰ Pennsylvania,¹¹ South Carolina,¹² and Washington.¹³ The proposed legislation in these states shares the common denominators of prohibiting employers from requiring employees or applicants to provide access to their social media accounts. Delaware additionally seeks to prohibit an employer from requiring someone to log in to a social media account in their presence (known as “shoulder surfing”), and from using another person (i.e. an individual who is already a Facebook friend) from reporting content of someone’s social media account.

Several states have included exceptions in their legislation. For example, the Maryland law makes exceptions for investigations regarding securities fraud or trade secrets misappropriations; Delaware makes an exception for investigations by financial regulators, and employers may conduct internal investigations into employee wrongdoing associated with financial regulations.

Some states have included provisions granting employers limited leeway. New York permits employers to seek logins or passwords for accounts that provide access to the employer’s internal computer or information systems. As noted above, the Illinois law permits employers to ask for usernames so they could view publicly available information. California has the

only pending legislation providing employers with a built-in shield from potential claims of negligence for failure to “exercise reasonable care to discover whether a potential employee is unfit or incompetent.”

Michigan, New Jersey, and California additionally seek to prohibit educational institutions from gaining access to students’ or potential students’ social media accounts, and Delaware recently passed legislation to that effect.¹⁴

The enforcement mechanisms associated with these bills vary. The language in the proposed legislation of six states—California, Maryland, Minnesota, Missouri, two of the bills in New York and South Carolina—contains no remedy. The other bills generally contain a mix of civil and administrative remedies, and Michigan’s version makes its violation punishable up to 93 days in jail as a misdemeanor offense.

In addition to the state legislation, two bills have been introduced in Congress, the Social Networking Online Protection Act,¹⁵ or SNOA, and the Password Protection Act of 2012.¹⁶ At the heart of the bills is the prohibition on current and potential employers from requiring an employee to provide a username or password to access a social networking website or private email account. According to the authors of the bill, Reps. Eliot Engel (D-N.Y.), Jan Schakowsky (D-Ill.) and Michael Grimm (R-N.Y.), SNOA “was created to prevent employers, schools and universities from demanding usernames and passwords from current employees and students, or prospective ones. This applies to websites such as Facebook, MySpace and Twitter, and also protects email and any other personal user generated content.” SNOA would also apply to schools and universities, offering students the same privacy protections. In addition to prohibiting employers from requiring employees or applicants to provide access to private online content, the legislation makes it unlawful for employers to discharge, discipline, discriminate against, deny employment or promotion, or threaten any such action against employees or prospective employees for refusing to provide access or for filing a complaint. The act likewise prohibits schools from demanding account information, and from discharging, disciplining, discriminating against, denying admission to, suspending, expelling, or threatening to take action against students or potential students who refuse to provide such access. On June 30, 2012, the bill passed the senate unanimously.

The Password Protection Act of 2012 was introduced on May 9, 2012, and prohibits an employer from compelling or coercing an employee or applicant to authorize access to a computer that does not belong to the employer, or from discharging, discriminating against or disciplining an employee for declining to do so. The Password Protection Act is proposed as an addition to the existing Computer Fraud and Abuse Act.¹⁷

Despite the swift reactions by the states who have implemented the legislative process to prevent employers from seeking access to private social media accounts, and the federal congressional equivalent, there is little in the way of evidence supporting the need for such legislation. Apart from the three incidents listed by the AP in its article, there is very little available data confirming that employers are commonly requesting access to employees’ accounts. In fact, the incident most often cited by subsequent articles—that of Collins—took place in

2010. Apart from those mentioned by the AP, there appear to be no more recently reported cases of employers requesting Facebook passwords from employees, or cases of schools requesting them from students. This begs the obvious question as to whether the practice is as widespread as the media coverage and fast legislative response would indicate.

The necessity of the legislation is further complicated by the fact that employers' requests for passwords may already be deemed illegal under the Stored Communications Act (SCA), 18 U.S.C. § 2701, which prohibits unauthorized access to electronic communication services. On March 25, 2012, several days after the AP article, Sen. Richard Blumenthal, D-Conn. and Charles Schumer, D-N.Y., requested an investigation by the Equal Opportunity Employment Commission and the Department of Justice into whether the SCA prohibits employers from requesting login information.¹⁸

However, several courts have already had the opportunity to address the issue. In *Pietrylo v. Hillstone Restaurant Group*,¹⁹ the court upheld a jury verdict that found an employer had violated the SCA by asking an employee to provide her MySpace account login information in order to access a chat group on the site created by employees. The jury found that the access was unauthorized because the employee felt she had to provide her password because her manager had asked for it, and that she was therefore coerced into providing it. Similarly, in *Konop v. Hawaiian Airlines, Inc.*,²⁰ the Ninth Circuit found that Hawaiian Airlines violated the SCA by accessing a private website created by one of its pilots that was used to criticize the airline. The airline asked two other employees, who had password access to the site, to provide their passwords. Despite the fact that the employees gave the airline their usernames and passwords and permission to use the site, the court found that they were not authorized to grant access to the site, and the employers actions did not fall within the liability exception set out in § 2701(c)(2). In *Snyder v. Fantasy Interactive, Inc.*,²¹ two plaintiffs were terminated after their employer accessed their Skype accounts and read instant message conversations. They brought a claim under the SCA, which was pled sufficiently to survive the defendant's motion to dismiss because it alleged the defendant accessed communications occurring outside of the workplace on plaintiffs' personal computers. An employer was again found to violate the SCA when it obtained an employee's username and password to a private Hotmail account, which it then used to read the employee's emails. *Pure Power Boot Camp v. Warrior Fitness Boot Camp*.²² Similarly, in *Shefts v. Petrakis*,²³ the employer's unauthorized installation of spyware to recover text and email messages from work and personal accounts violated the SCA.

In addition to possible statutory violations, employees may have a simple right of privacy claim to their social media accounts and communications. It is difficult to make the argument that information exposed to hundreds of friends on Facebook could be considered private in the context of that term as it is most often used in the law. A reduced expectation of privacy in information that is distributed to sometimes a great number of people on an internet website could be presumed. Recently, however, a plaintiff's claim based on common law invasion of privacy in such an instance survived a Rule 12(b)(6) motion to dismiss. In *Ehling v. Monmouth-Ocean Hosp. Service*

Corp.,²⁴ the plaintiff's supervisor viewed a negative post on the plaintiff's Facebook page coercing a coworker, and 'friend' on the plaintiff's Facebook page, into accessing the page in the presence of the supervisor. The plaintiff was subsequently terminated, and brought suit against her employer. In ruling on the defendant's motion to dismiss, the court allowed the plaintiff's claim for common law invasion of privacy to stand, acknowledging that "privacy in social networking is an emerging, but underdeveloped, area of case law," and that the plaintiff may have had a reasonable expectation of privacy in her Facebook postings because she took active steps to protect her page from public viewing.

Much more common than demanding access to employee's Facebook accounts is the implementation by employers of broad social media policies that, often improperly, set forth what employees may and may not post on Facebook. In the past year, the NLRB's Office of the General Counsel has issued three memoranda regarding social media cases, and discussed in-depth the lawfulness of employer social media, and specifically blogging and internet posting, policies.²⁵ In essence, any language in such a policy that would reasonably tend to chill employees in the exercise of their Section 7 rights has been found unlawful by the NLRB. In explaining its approach, the NLRB stated:

Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful. See *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001), enf. Denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003). In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful. See *Tradesmen International*, 338 NLRB 460, 460-462 (2002).

NLRB Memorandum 12-59, p. 3. Concerted activities under Section 7 are activities for the purpose of collective bargaining or other mutual aid or protection.

The following are various examples of employer social media policies that have been determined by the NLRB to be unlawful:

- Prohibiting employees from posting pictures of themselves in any media depicting the company in any way, including a uniform or corporate logo;
- Prohibiting employees from making disparaging comments when discussing the company or the employee's superiors, coworkers or competitors;
- Subjecting employees to discipline for engaging in "inappropriate discussions" about the employer, management or coworkers;
- Prohibiting employees from using any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity;
- Prohibition of "any communication or post that constitutes embarrassment, harassment or defamation of

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- the hospital or of any hospital employee, officer, board member, representative, or staff member”;
 - Prohibiting “statements that lack truthfulness or that might damage the reputation or goodwill of the hospital, its staff, or employees”;
 - Prohibiting employees on their own time from “talking about company business on their personal accounts; from posting anything they would not want their manager or supervisor to see or that would put their job in jeopardy; from disclosing inappropriate or sensitive information about the employer; and from posting any pictures or comments involving the company or its employees that could be construed as inappropriate”
 - Instructing employees “not to release confidential guest, team member or company information”;
 - Instructing employees not to share confidential information with co-workers unless they need the information to do their job, and not to have discussions regarding confidential information in the breakroom, at home, or in open areas and public places;
 - Cautioning employees to check with the employer prior to posting information that may fall into a prohibited category;
 - Instructing employees to report inappropriate internal social media activity;
 - Instructing employees not to comment on legal matters, including pending legislation or disputes;
 - Warning employees to avoid harming the image and integrity of the company;
 - Prohibiting employees from expressing personal opinions to the public regarding the workplace, work satisfaction or dissatisfaction, wages, hours or work conditions;
 - Prohibiting employees from making disparaging or defamatory comments;
 - Prohibiting employees from using social media to engage in unprofessional communication that could negatively impact the employer’s reputation or interfere with the employer’s mission or unprofessional or inappropriate communication regarding members of the employer’s community;

The NLRB overturned these policies on the grounds that the prohibitions could be reasonably construed to prohibit protected discussion about an employer’s labor policies or treatment of employees or terms and conditions of employment, or specifically encompass topics related to Section 7 activities. On the other hand, the NLRB upheld the following policies:

- Provision stating that harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if done after hours, from home and on home computers;
- Rule stating that employees may not post anything on the internet in the name of the employer or in a manner that could be reasonably be attributed to the employer without prior written authorization;
- Rule requiring employees to maintain the confiden-

tiality of the employer’s trade secrets and private and confidential information;

- Prohibiting employees from using or disclosing confidential or proprietary information, including personal health information about customers or patients;
- Prohibiting employees from discussing launch and release dates and pending reorganizations.

In addition, the NLRB has upheld one social media policy in its entirety as lawful (reprinted here in its entirety):

Social Media Policy
Updated: May 4, 2012

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, social media can mean many things. Social media includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else’s web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer’s] legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolved work related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trades secrets may include information regarding the development of Systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related

confidential communications.

- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Media contacts

Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information

If you have questions or need further guid-

ance, please contact your HR representative. ■

Corie Tarara is a senior associate at the labor and employment boutique firm Seaton, Peters & Revnew, P.A. in Minneapolis, Minn. She represents and counsels employers in all aspects of employment law, focusing on prevailing wage issues and wage and hour litigation.

Tara Craft is an associate at Seaton, Peters & Revnew, P.A. and also counsels employers; she was recently involved in the successful repeal of the Minnesota Child Care Act. Craft previously served as a law clerk in U.S. District Court for the District of Minnesota.

ENDNOTES

¹Maryland H.B. 964 / S.B. 433, Chapter 232/234.

²Illinois H.B. 3782, Public Act 97-0875.

³California A.B. 1844.

⁴Delaware H.B. 308.

⁵Michigan H.B. 5523, 5623.

⁶Minnesota H.F. 2963, H.F. 2982; S.F. 2565.

⁷Missouri H.B. 2060.

⁸New Jersey A.B. 2878, S.B. 1898, S.B. 1915.

⁹New York S.B. 6938, A.B. 9654, S.B. 6831, S.B. 7077, A.B. 10396.

¹⁰Ohio S.B. 351.

¹¹Pennsylvania H.B. 2322.

¹²South Carolina H.B. 5105.

¹³Washington S.B. 6637.

¹⁴Delaware H.B. 309, Chapter 354.

¹⁵Social Networking Online Protection Act, H.R. 5050, 112th Cong. (2d Sess. 2012).

¹⁶Password Protection Act of 2012, H.R. 5684, 112th Cong. (2d Sess. 2012).

¹⁷18 U.S.C. § 1030(a).

¹⁸www.blumenthal.senate.gov

¹⁹2009 WL 3128420 (D.N.J. Sept. 25, 2009).

²⁰302 F.3d 868 (9th Cir. 2002).

²¹2012 WL 569185 (S.D.N.Y. Feb. 9, 2012).

²²587 F.Supp.2d 548 (S.D.N.Y. 2008).

²³758 F.Supp.2d 620 (C.D.Ill. 2010).

²⁴2012 WL 1949668 (D.N.J. May 30, 2012).

²⁵NLRB Office of the General Counsel, Division of Operations-Management Memorandum OM 11-74, issued August 18, 2011; Memorandum OM 12-31, issued January 24, 2012; and Memorandum OM 12-53, issued May 30, 2012. <http://www.nlr.gov/publications/operations-management-memos>

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acknowledged that the affirmative consent requirements necessary in order to provide electronic communications to Consent Employees may be inadequate. The release provides more relaxed standards for the provision of Participant-Level Fee Disclosure, as described below. Pursuant to the release, plan administrators may provide Participant-Level Fee Disclosures electronically under the general safe-harbor rules, or plan administrators may follow the more relaxed rules described in the release. The release is a “temporary enforcement policy” until the DOL issues further guidance, which is expected in 2012.

Consent Under the Release. The consent provisions of the release contain the most modifications as compared to the general safe-harbor rules. Under the release, the plan administrator must provide each individual with an initial notice and an annual notice, generally setting forth how the individual can access the information electronically, a brief statement of the information in the Participant-Level Fee Disclosure, information on receiving a paper Participant-Level Fee Disclosure and opting out of electronic communications, and the initial notice must request that the individual voluntarily provide his or her email address.

General Release Requirements. In delivering the Participant-Level Fee Disclosures, the plan administrator must take measures reasonably calculated to ensure that the electronic delivery results in actual receipt (*i.e.*, return receipt notice); the confidentiality of the communications should be protected; and the Participant-Level Fee Disclosures should be written in a manner that is understandable by the average plan participant.

Is The release a Harbinger of the Future? While the release is merely a temporary band-aid, applicable to a small sub-set

of DOL-required participant notices, it is an important document, in that the DOL has recognized the need to revise the current electronic communication rules to better suit the overall needs of plan administrators and employees. It may be that the release is a harbinger of future changes to the general DOL and IRS rules regarding electronic communications, and, if so, plan administrators should keep a close eye on any future developments. ■