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Employment Law Letter

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in this issue

Labor & Employment Law Department

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Technology Advances Create More Risk for All Employers

It's hard to keep up with the pace at which technological change occurs in today's world, but sometimes it's even harder to stay current with the number of ways in which technology can cause problems in the workplace. We all know how a careless email message can lead to legal liability, but that's just the beginning.

Social networking sites like Facebook can be helpful, for example, if you want to check on an applicant, but what if you find out things you shouldn't, like the applicant's race, religion, or health history? What if you go on Facebook and find an employee is badmouthing you or your company? A New Jersey company lost a federal jury trial after firing two employees for criticizing their supervisors on Facebook, because it violated privacy laws by accessing the site, even though one of the workers had revealed her password, thus making access possible.

Supervisor-employee communications on the internet can cause a host of other problems, for example when a boss asks a worker to be a "friend." What if the employee agrees, and later gets a promotion, or refuses and later gets disciplined? The first situation raises an inference of favoritism, the second could give rise to a charge of retaliation. Many employers have adopted policies on such internet issues, and some instruct supervisors not to communicate with subordinates on social networking sites.

Another reason to consider a policy is a new FTC guideline designed to protect consumers from deceptive endorsements. If your employees are commenting on your products or services on social media or blogs, your company could be liable if a consumer claims to have been misled, even though such communications were not authorized or even known to management. Many employers instruct employees not to talk about their products or services on the internet, and to make it clear, if they are identified as an employee of the company, that any opinions they express are their own.

One other technology-related court decision should be of particular interest to Connecticut employers. Most of us are familiar with the state law that requires notification to employees of all forms of electronic monitoring in the workplace, ranging from policing internet use to recording use of access cards. But what about the use of GPS tracking devices in company vehicles? The City of Bridgeport disciplined two fire inspectors found deviating from their assigned duties, and was sued by the employees because they hadn't been informed of the use of the devices.

Some time ago, we reported that the City dodged a bullet when a lower court ruled that the monitoring took place on public streets and therefore was not "in the workplace." The inspectors appealed that decision, and now our Supreme Court has also ruled in favor of the City, but for a different reason. The justices said the monitoring did violate the law, even though it didn't take place on City premises, but they found the law created no private right of action for affected employees. Therefore, the only party who could initiate such action was the Labor Commissioner.

Our advice to employers is to take a hard look at policies related to technology matters, and make sure that all pertinent issues are appropriately addressed. Obviously, this would include GPS tracking, social media, non-business use of the employer's computers, and any other technology issues that could touch on the employment relationship.

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$10M Penalty For Violating Connecticut's Free Speech Law

Seven-figure court judgments are unusual in any context, but are especially rare in employment cases. But that's what happened when a laboratory company fired a doctor after he complained that a urinalysis test used unproven technology that could produce false results and thus endanger patients' health. He sued, alleging a violation of Connecticut's free speech law, Conn. Gen. Stat. Section 31-51q.

A jury in Fairfield County awarded him $4,240,211, but that was just the beginning. The statute also allows successful plaintiffs to collect attorneys' fees, in this case one-third of his damage award. Further, the jury also awarded punitive damages, which in Connecticut are generally equivalent to attorneys' fees and costs. Finally, because the plaintiff had offered to settle his claim for $2,800,000, which was rejected by the defendant, the judge ordered interest from the date the lawsuit was filed at 12%, the rate in effect when the plaintiff was terminated. The total came to a whopping $10,136,015!

Our opinion is that this statute will be used more and more often when word of big judgments like this one gets around. As one example, when consumer watchdog George Gombossy was fired by the Hartford Courant, allegedly because he planned to do a column on bedbugs at retailer (and large Courant advertiser) Sleepy's, he brought suit claiming a violation of Section 31-51q.

Who's Exempt, Who's Not? Overtime Rules Still Confuse

You'd think by now the rules for determining which employees must be paid at overtime rates for hours over 40 would be reasonably clear and generally understood. Not so. A decision just a few days ago from the federal appeals court that covers Connecticut proves the point.

The case involved a regional sales director for a communications company, whose job consisted of selling advertising for Elite Traveler, a publication distributed

on a complimentary basis. The issue was whether an advertising salesperson qualified as an "administrative" employee and was therefore exempt from the overtime requirements of the Fair Labor Standards Act. Surprisingly, this was a question of first impression for the court, in part because the FLSA was designed primarily with manufacturers and retailers in mind.

The court concluded that because the plaintiff's job was focused largely on selling advertising space (the company's "product") to specific customers, rather than marketing activity aimed at promoting sales generally, she was a non-exempt salesperson rather than an exempt administrative employee for FLSA purposes.

Meanwhile, a national class action involving up to 5000 first level managers at AT&T is working its way through the courts. That case, which started with a Wethersfield resident who retired from AT&T's Connecticut subsidiary SNET, challenges the exempt status of first level managers, who claim they are nothing more than "ground troops," and allege they are denied overtime just to keep the company's costs down as they struggle to deal with the decline in land line telephone business.

Our opinion is that many employers don't take wage and hour issues seriously enough. There may not be much potential liability for treating the CEO's secretary as if she were exempt (a common mistake), but the AT&T lawsuit demonstrates there's a lot more to be concerned about when a group or class of employees is involved.

Legal Briefs
and footnotes...

Wiccans Protected? Everyone knows that laws against religious discrimination cover all the major faiths, but what about Wicca, a neo-pagan order whose major holiday involves a pilgrimage to the site of the Salem witch trials on Halloween? That question may be answered in a lawsuit filed by a Connecticut employee terminated shortly after her supervisor told her "I will be damned if I have a devil-worshipper on my team." The employer claims the termination was for other reasons, but if that defense is rejected, we may find out whether Wiccans are protected from employment discrimination.

Alcoholism Doesn't Excuse Attendance: Almost 20 years ago, a terminated Metro-North employee got his job back by convincing a court that his excessive absenteeism was caused by alcoholism. More recently, that approach didn't work for a power plant operator in Bridgeport who sued his employer under the Americans with Disabilities Act. A federal appeals court noted the Metro-North case was decided under the Rehabilitation Act, which lacks the ADA provision that alcoholic workers can be held to the same standards as other employees. The evidence also showed the Bridgeport employee not only had poor attendance but also multiple violations of the employer's "no call/no show" policy.

Executive Searches and FOIA: Searches by public employers for "executive level employment positions" are not subject to the usual requirements of public access and disclosure. But what is an executive level position? A Superior Court judge has ruled

S&G Notes

Our annual Spring Seminar for our public sector clients is scheduled for March 19 at the Rocky Hill Marriott.

We will also be hosting a series of seminars on Sexual Harassment Prevention Training. They will be held April 23 and 29 in our Hartford office and April 15, 2010 in our Stamford office. We will be sending out invitations in the near future. If you wish to sign up for our mailing list, contact mramsay@goodwin.com.

that even though the legislative history of this provision makes reference to high level positions like state commissioner and town manager, it also applies to positions like high school principal and municipal library director.

Loss of License: In one recent unemployment compensation decision, a truck driver who lost his commercial license because of a DUI conviction was not disqualified from eligibility for benefits, because his arrest was the result of an off-duty offense. The judge found this distinguishable from failing a drug or alcohol test administered by the employer as part of a program mandated by state or federal law. However, another judge found that an employee whose license was suspended could not take advantage of the provision that allows workers to collect benefits if they leave work "due to the discontinuance of transportation." If you are wondering how those two results can be reconciled, you are not alone.

Retiree's New Spouse: The City of Milford has long interpreted its policy of providing health insurance benefits to retirees and their spouses as being limited to spouses who were married to the retiree when he or she retired. However, one recent retiree didn't accept that interpretation, and sued to obtain coverage for his new spouse. A Superior Court judge agreed that the plain language of the applicable collective bargaining agreement did not limit coverage to a spouse to whom the employee was married at retirement.

Recent S&G Website Alerts

Required Wage Notification Form for New York Employers, 11/09

Law Extends and Expands COBRA Premium Assistance Program, 01/10

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