

THOMPSON COE

LABOR & EMPLOYMENT NEWS

Volume 2010 No. 1

CONTENTS

1. U.S. Supreme Court Set to Take on Employee Privacy; Issues in *Quon v. Arch Wireless*
John G. Browning
3. HIPAA Goes "HITECH"—Are You in Compliance?
Edward Vishnevetsky
4. Does TITLE VII Prohibit Retaliation Based on Associations?
John L. Ross
6. Texas Supreme Court Modifies Limitations Period for Discrimination Claims
John L. Ross
7. Business Discrimination Claims
Jody McCallum
8. In Brief. . .

U.S. SUPREME COURT SET TO TAKE ON EMPLOYEE PRIVACY ISSUES IN *QUON V. ARCH WIRELESS*

The U.S. Supreme Court recently agreed to review a case with potentially significant implications for private employers concerned about workplace privacy issues in a world in which communication via computers, e-mails, and text messages play an ever-increasing role. On April 19, 2010, the Court will hear oral argument in the case of *Quon v. Arch Wireless*, a 2008 decision from the Ninth Circuit in California. That court held that the City of Ontario Police Department violated a SWAT officer's reasonable expectation of privacy by reviewing the content of his personal text messages, even though: 1) the messages had been sent using a Department-issued pager through a service provider under contract with the Department, and 2) the Department's official policy informed all SWAT officers that the Department might review their text messages. In reaching its decision, the Ninth Circuit relied heavily on statements by the officer in charge of the text messaging program to the SWAT officer that, if he voluntarily paid the overage charges resulting from excessive personal use, the Department would not examine his text messages.



Although *Quon* concerns the scope of privacy rights offered to public employees under the Fourth Amendment, the case is a reminder for private employers to focus on ensuring consistent enforcement of employee monitoring policies. Unlike the public sector, private employers are not subject to the Fourth Amendment prohibition against unreasonable searches and seizures, although they must comply with federal wiretap statutes and applicable state law. Practically speaking, however, the "reasonable expectation of privacy" tests that courts apply to state common law privacy claims governing private employers is virtually identical to the Fourth Amendment test. As a result, the Supreme Court's review is likely to affect how courts view privacy claims brought against private employers.

The Facts

The facts of the case are a good deal juicier than your average Supreme Court case. The City of Ontario, like most employers, routinely told its employees that they had no expectation of privacy when it came to e-mail and other communications involving city-owned equipment. Its policy said the City "reserves the right to monitor and log all network activity, including e-mail and internet use, with or without notice." But the officer who handed out pagers to SWAT team members sent a different message: the devices were limited to 25,000 characters each month, but officers could use them for personal use as long as they paid the overage charges. At some point, the Department decided to audit the messages in order to determine whether its SWAT officers needed a higher text-messaging quota.

U.S. SUPREME COURT SET TO TAKE ON EMPLOYEE PRIVACY ISSUES IN *QUON V. ARCH WIRELESS*, CONT'D

The audit revealed that a lot of SWAT officer Jeff Quon's messages were personal; in fact, a review of one typical month revealed that only 57 of Quon's 450 messages were business-related. Not only was an overwhelming percentage of Quon's use personal, but many of the messages were sexually explicit. The plot thickens: not only were many of the texts sent and received sexually graphic communications between Quon and his wife, but many were also sexually explicit messages between Quon and his girlfriend. Quon sued, claiming that the Department had no right to read the messages without a suspicion of wrongdoing on his part. Quon's wife and others who had electronically communicated with him also sued, contending their privacy rights had been violated as well. The City of Ontario, of course, maintained that there was no reasonable expectation of privacy, primarily because of its computer usage policy that cautioned all employees that they had no expectation of privacy when using city-owned devices. The trial court and the Ninth Circuit agreed that this policy alone likely would have trumped the employee's right to privacy; however they found that the written policy had been abrogated by the conduct and statements by



Quon's supervisor regarding text messaging. The Ninth Circuit acknowledged that they were venturing into uncharted waters, saying that the "recently minted standard of electronic communications via e-mails, text messages and other means opens a new frontier in Fourth Amendment jurisprudence that has been little explored."

The Implications

In reviewing the Ninth Circuit's decision in *Quon*, the Supreme Court will likely address and provide guidance for employers on several key issues. First, while the law is well settled that employers can monitor and review communications stored on their own corporate servers (like e-mails), does the same rule apply when the employee's communication is transmitted through a third-party service provider under contract with the employer? As an ever-increasing number of employees use text messaging during the work day, this issue has gained importance. In fact, a case that is currently under con-

sideration by the New Jersey Supreme Court, *Stengart v. Loving Care*, addresses an employee's privacy expectations in e-mails stored on a company-issued laptop that were sent through the employee's personal e-mail account to her attorney. The Supreme Court elected not to hear the appeal by the city's co-defendant, Arch Wireless. The Ninth Circuit had ruled that Arch violated the federal Stored Communications Act by disclosing the text messages, even though Arch contended that disclosure to the subscriber (the city) was permitted because Arch was a "remote computing service" and not simply a provider. As the concept of "cloud computing" becomes more prevalent, the Supreme Court's decision not to look at this issue may prove significant.

Next, the Supreme Court's decision will likely address the circumstances under which a formal employment policy that would otherwise defeat an employee's privacy expectation can be undermined by informal representations to an employee. Hopefully, the Court will provide some guidance on the types of statements that might be sufficient to countermand an employer's formal policy, the degree of authority of the person making such representations needed to override a formal computer use policy, *etc.* Finally, the Supreme Court is also expected to consider the question of whether the senders of text messages to Officer Quon had a reasonable expectation that his employer would not read them. The privacy interests of the third-party sender, and what implications might exist for employers is an issue that is often overlooked in cases concerning the employer's review and monitoring of its employees' elective communications.

In conclusion, the *Quon* case reflects the dynamic nature of the law governing technology in the workplace as society's reliance upon everything from text messaging to e-mail to social media increases and expectations change. However, it also underscores the importance of not only developing an effective and comprehensive workplace policy on employees' electronic communications (one which makes it clear that no expectation of privacy is warranted) but *enforcing* and *following* it. Enforcing a well-drafted policy in the workplace is the first and most critical step to enforcing it in court.

John G. Browning

HIPAA GOES “HITECH”—ARE YOU IN COMPLIANCE?

In February 2009, President Obama signed the AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009. TITLE XIII of the Act, called the HEALTH INFORMATION TECHNOLOGY FOR ECONOMIC AND CLINICAL HEALTH ACT (the “HITECH”), expands many of the requirements promulgated under the HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (“HIPAA”) to protect the privacy and security of protected health information (“PHI”) and directed the Secretary of the Department of Health & Human Services (“HHS”) to issue regulations implementing HITECH’s breach notification requirements. HITECH’s enhanced privacy and security standards are applicable to both covered entities and “business associates.” The new changes went into effect February 17, 2010.

Who’s Affected?

The privacy and security requirements of HITECH apply not only to covered entities but also to “business associates”—entities which use or have access to PHI when providing services on behalf of health plans, health care providers, and health care clearinghouses (defined as “covered entities” under HIPAA). Under HITECH, business associates are directly regulated and are subject to HIPAA’s obligations and also are required to implement security policies and procedures in the same manner as covered entities.

What’s Required?

HITECH:

- Requires business associates to comply directly with HIPAA Security Rule provisions directing implementation of administrative, physical, and technical safeguards for electronic-PHI, and development and enforcement of related policies, procedures, and documentation standards. Business associates and covered entities must appoint someone as a privacy and security officer who will coordinate HIPAA compliance. *Administrative safeguards* include functions such as assigning security responsibilities to employees, maintaining security policies and procedures, and training staff. *Physical safeguards* are intended to protect electronic systems and data



from physical threats, environmental hazards, and unauthorized access. *Technical safeguards* are primarily IT functions used to protect and control access to data, such as the use of passwords and having computers automatically log off users after a certain length of inactivity.

- Makes civil and criminal penalties for violating those standards now directly apply to business associates. Civil penalties for HIPAA violations have increased to a range of \$100 to \$50,000 per violation, with maximum penalties for additional violations in any one year ranging from \$25,000 to \$1,500,000.
- Imposes on business associates an obligation to directly comply with HIPAA’s business associate safeguards, including limiting use and disclosure of PHI as specified in a business associate agreement or as required by law; facilitating access, amendment and accounting of disclosures; opening books and records to HHS; and returning or destroying PHI, if feasible, upon contract termination.
- Deems a business associate to violate HIPAA if the business associate knows of a “pattern of activity or practice” by a covered entity that breaches their business associate agreement but fails to cure the breach, terminate the business associate agreement, or report the non-compliance to HHS; and
- Requires HHS to conduct compliance audits.

Breach Notification Procedures

HITECH also creates new breach notification procedures. Upon discovery of a **breach of unsecured PHI** under its control, a business associate is required to notify the covered entity, which then must notify the impacted individual. With certain exceptions, “breach” means the unauthorized acquisition, access, use, or disclosure of PHI that “compromises the security or privacy” of such information, except where an unauthorized person to whom such information is disclosed would not reasonably have been able to retain such information. “Compromises the security and privacy” of PHI means “poses a significant risk of financial, reputational, or other harm to the individual.” Covered entities and business associates must perform a risk assessment to determine whether there is significant risk of harm to the individual as a result of the impermissible use or disclosure.

HIPAA GOES “HITECH”—ARE YOU IN COMPLIANCE? CONT’D

“Unsecured” PHI means PHI in any form that is “not rendered unusable, unreadable, or indecipherable to unauthorized individuals through the use of a technology or methodology specified by the Secretary” in guidance issued by the Secretary of HHS. This means that PHI may be “secured” only by using one of the methods described in such guidance: *encryption* and *destruction*.

Notice of the breach must be provided to HHS and prominent media outlets serving a particular area if more than 500 individuals in that area are impacted. If the breach impacts fewer than 500 individuals, the covered entity involved would have to maintain a log of such breaches and submit it to HHS annually. The Act establishes specific requirements for both the *method* of notification and the *content* of the notification. Covered entities are required to report to individuals any breaches of unsecured PHI, without unreasonable delay, after discovery of the breach (no later than 60 calendar days after discovery of the breach).

Covered entities must also develop breach notification policies and procedures and train their workforce members regarding such policies and procedures. They must also adopt and apply sanctions against workforce members who violate the entities’ policies and procedures, including the breach notification policies and procedures.

We Can Help

HITECH’s requirements can be confusing and complicated. Should you have questions about the obligations of a covered entity or business associate, need to update your business associate agreements, or need help establishing a HIPAA compliance manual (with breach notification provisions), please contact Edward Vishnevetsky or John Browning.

Edward Vishnevetsky



DOES TITLE VII PROHIBIT RETALIATION BASED ON ASSOCIATIONS?

Does TITLE VII Prohibit Retaliation Based on Associations?

Over the past several years, the Supreme Court has expanded the scope of an employer’s potential exposure for retaliation claims under several federal statutes. The Supreme Court is currently considering whether to review a lower court decision which could expand that exposure even further—to claims of retaliation brought not by employees who have, themselves, filed a discrimination claim or have otherwise opposed unlawful employment practices, but also to persons “associated” with them, such as spouses.

Past Recent Expansion of Retaliation Claims

In a series of decisions, beginning in 2006, the Supreme Court has increased employers’ exposure for retaliation claims.

In *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the Supreme Court rejected the proposition then held by a number of the circuit courts—including the Fifth Circuit—a retaliation claim

could only be predicated on “ultimate adverse actions,” *e.g.*, discharge, promotion, demotion, *etc.*, not on lesser actions such as, *e.g.*, a “bad” performance evaluation. Instead, the Court held TITLE VII’s anti-retaliation provision covers “materially adverse” actions, *i.e.*, “actions [which are] harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” Whether allegedly retaliatory conduct about which a former employee complains might “dissuade a reasonable worker from making or supporting a charge of discrimination” is, of course, largely in the eye of the beholder, a subjective determination which will be up to a jury to decide, making summary judgments in retaliation cases less likely.

In 2008, in *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008), by a 7-2 decision (Thomas and Scalia, dissenting), the Court affirmed the right of an individual to sue his employer for retaliation without having to file a charge with the EEOC and exhaust administrative remedies under TITLE VII. The Court’s majority held another federal statute, 42 U.S.C. §1981 also prohibits retaliation for complaining about employment discrimination. Un-

DOES TITLE VII PROHIBIT RETALIATION BASED ON ASSOCIATIONS? CONT'D

like TITLE VII, which broadly prohibits employment discrimination on the basis of race, sex, color, national origin, religion, *etc.*, and also contains an express provision prohibiting retaliation, §1981—adopted after the Civil War and intended to afford blacks equal rights with whites—on its face is limited to prohibiting disparate treatment based on *race* and does not say *anything* about *retaliation*. Nevertheless, the Court's majority held race retaliation claims are cognizable under 42 U.S.C. §1981. The decision significantly expanded employers' potential liability for retaliation claims because: (1) unlike TITLE VII, under §1981 there is no requirement for a plaintiff to file a charge of discrimination with the EEOC or exhaust any administrative remedies before filing suit; (2) by not having to file an administrative charge of discrimination, a plaintiff can wait up to four years in which to bring suit; and (3) most significantly, unlike TITLE VII claims, §1981 claims are not subject to a statutory damage cap on compensatory or punitive damages.



Finally, last year, in *Crawford v. Metro. Gov't of Nashville and Davidson County, Tennessee*, 555 U.S. ___, 129 S.Ct. 846 (2009), the Supreme Court held an employee need not have themselves initiated a complaint about discrimination in order to be protected from retaliation. It was enough, in *Crawford*, that, during an employer's investigation of *another* employee's sexual harassment complaint, Crawford was interviewed and told the company investigator the accused employee had engaged in sexually-inappropriate conduct towards her and coworkers. Although Crawford's claims had been dismissed by the lower federal courts, the Supreme Court reversed, holding Crawford's statements during the investigation were protected by TITLE VII's opposition clause.

What May Be Next?

The Court is currently considering whether to review a decision of the U.S. Sixth Circuit Court of Appeals which rejected the plaintiff's contention he had been discharged because his wife, who worked for the same employer as her husband, had filed a sex discrimination charge against the employer with the EEOC. In *Thompson v. North American Stainless, L.P.*, Eric Thompson became engaged to, and subsequently married, another employee. In 2002, Thompson's then-fiancé filed

a sex discrimination charge against the employer. Three weeks after the EEOC notified the company of the charge, Thompson—who had been employed by the company for six years—was fired.

Thompson filed a charge of retaliation with the EEOC. The EEOC found "reasonable cause to believe" the company had fired Thompson because his wife had filed a charge of discrimination with the EEOC. Thompson then filed suit in federal court. The district court granted summary judgment to the employer on grounds the anti-retaliation provision of TITLE VII only protects persons who have, *themselves*, engaged in protected activity and does not extend to persons *associated* with such persons; and Thompson did not claim he had personally engaged in any protected activity. Initially, by a 2-1 decision, a three-judge panel of the Sixth Circuit reversed the summary judgment. However, the entire Sixth Circuit decided to rehear the case and, on rehearing, by a 9-6 decision affirmed the summary judgment.

Although protecting persons such as Thompson from retaliation might further the goals of TITLE VII, the majority of the Court held the "plain language" of the statute—prohibiting discrimination against an employee or applicant "because he has opposed" an unlawful employment practice or "because he has made a charge, testified, assisted or participated" in a discrimination claim—limited the scope of the statute to persons who have, themselves, engaged in protected activity. Several other federal appeals courts had previously reached the same conclusion. In contrast to TITLE VII's anti-retaliation provision, when passing the AMERICANS WITH DISABILITIES ACT, Congress expressly prohibited discrimination against an employee or applicant "because of the known disability of an individual *with whom the [employee or applicant] is known to have a relationship or association.*" Thus, Congress knows how to prohibit associational or relational discrimination when it chooses to do so. The majority declined the invitation of Thompson and the EEOC "to rewrite the law."

As of this writing, the Supreme Court has not yet decided whether to grant review of the case but has invited the Solicitor General to submit briefing to express the views of the United States on the issue.

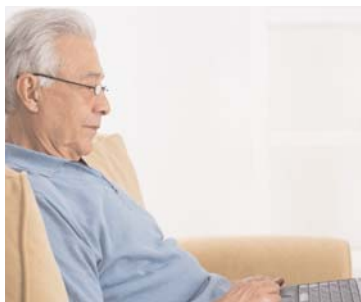
We will keep you posted.

John L. Ross

TEXAS SUPREME COURT MODIFIES LIMITATIONS PERIOD FOR DISCRIMINATION CLAIMS

Nearly twenty years ago, in what seemed definitive language, the Texas Supreme Court held the statutory two-year limitations period for filing a discrimination lawsuit under the TEX. LABOR CODE (after having first filed a timely administrative charge of discrimination) was “mandatory and jurisdictional.” See *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 488 (Tex. 1991). Recently, however, in a somewhat procedurally-bizarre case, the Court overruled *Schroeder* and now holds the statutory limitations period is not jurisdictional and is subject to tolling.

In *In re United Services Automobile Association*, decided March 26, 2010, James Brite sued his former employer, USAA, for age discrimination. He originally filed suit in County Court at Law No. 7 in Bexar County (i.e., San Antonio). By statute, that court’s jurisdiction is limited to cases in which the amount in controversy exceeds \$5,000 but does not exceed \$100,000. Because Brite was making \$74,000 annually at the time of his discharge, USAA moved to dismiss on grounds Brite’s claims for back pay, front pay, and other relief exceeded the court’s statutory jurisdiction. The trial court denied the motion. Thereafter, Brite amended his pleadings to expressly seek \$1.6 million in damages and back pay and front pay of \$1,000,000. A jury found in Brite’s favor and awarded a verdict of \$188,406 in back pay, \$350,000 in front pay, \$300,000 in punitive damages and \$129,387 in attorney fees. On appeal, a divided San Antonio Court of Appeals affirmed the judgment, but the Texas Supreme Court reversed on jurisdictional grounds.



Within sixty days of the Supreme Court’s decision—but more than two years after his discharge—Brite filed a second suit in Bexar County District Court, a Texas court of general jurisdiction. Because of the sometimes complicated and confusing structure and jurisdictional limits of the Texas court system, a provision in the TEX. CIV. PRAC. & REM. CODE tolls limitations for cases dismissed for lack of jurisdiction, if the case is refiled in a proper court within sixty days of the dismissal and if the

original suit was not filed with “intentional disregard of proper jurisdiction.” USAA moved for summary judgment in the second suit for lack of jurisdiction, this time citing the two-year limitations period for discrimination claims under the TEX. LABOR CODE and relying on the “mandatory and jurisdictional” language of *Schroeder*. The district court denied the motion; and the San Antonio Court of Appeals declined to consider USAA’s mandamus petition, believing USAA had an adequate remedy through a normal appeal.

The Texas Supreme Court, however, considered USAA’s mandamus petition on the merits. Noting that “jurisdictional” is “a word of too many meanings,” the Court reviewed federal cases which have declined to treat statutory filing periods as “jurisdictional” but rather as akin to statutes of limitations which are subject to equitable tolling. If a filing period is considered “jurisdictional,” then the court has no power to decide the case; and a court’s decision in such a case is subject to a later jurisdictional challenge, even for the first time on appeal. Whereas, if a filing period is treated like a limitations period which may be tolled or waived by a defendant’s failure to raise the defense, the claim may be barred; but the court’s power to decide the claim is not affected and not subject to a jurisdictional challenge on appeal. The Court also observed that, in the two decades since *Schroeder*, its own decisions reflected a reluctance “to conclude that a provision is jurisdictional absent clear legislative intent to that effect.” Accordingly, the Court overruled the “mandatory and jurisdictional” language of *Schroeder* and held a discrimination claim under the TEX. LABOR CODE can be brought more than two years after the alleged discrimination, if there is an equitable or statutory basis for tolling the two-year period. Thus, the Court went on to consider whether the two-year period was tolled in Brite’s case. The Court held the limitations period was not tolled because the Court was satisfied Brite had not been confused about the limits of the original trial court’s jurisdiction but had intentionally disregarded the limits on the court’s jurisdiction for tactical reasons. Accordingly, the Court granted USAA’s mandamus petition and directed the district court to grant USAA’s motion for summary judgment.

John L. Ross

BUSINESS DISCRIMINATION CLAIMS

In a recent 4-3 decision, the Minnesota Supreme Court held that only parties to a contract have standing to bring a claim of business discrimination under the Minnesota Human Rights Act¹ ("MHRA").² Pamela Krueger is the sole owner, member, and operator of Diamond Dust, LLC, a Minnesota company engaged in the sheetrock and drywall business. Diamond Dust entered into a subcontract agreement with Zeman Construction Company in December 2005 to supply labor and materials for a residential construction project in Wabasha, Minnesota.

It is undisputed that, during performance of the contract, Krueger was subjected to extreme hostility and sexual harassment by the male supervisors and workers employed by Zeman. The list of alleged offenses includes, for example: (1) referring to Krueger and her family in profanities and with vulgar gestures; (2) following Krueger to the bathroom and leaning on the stall while she was inside; (3) tracking the number of times she used the bathroom; (4) subjecting her to physical intimidation; (5) male workers exposing their genitals to Krueger; and (6) ordering Krueger onto her hands and knees to pick up materials that had fallen onto protected floors.³ Krueger reported these incidents to Zeman, but Zeman took no corrective or remedial action.⁴

As a result of Zeman's inaction, Diamond Dust stopped performing on the contract and, together with Krueger individually, filed this lawsuit seeking damages for unlawful business discrimination. In the district court, Zeman successfully moved to dismiss Krueger's individual action as a lack of standing. A divided Court of Appeals affirmed the dismissal, holding that Diamond Dust had a contractual relationship with Zeman but Krueger did not and, therefore, Krueger cannot directly sue Zeman for business discrimination.⁵

In affirming the lower courts' rulings, the Minnesota Supreme Court held the language of the MHRA is unambiguous and does not provide a cause of action to individual employees of a contracting party (or to other persons not a party to a contract):

It is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service:...(3) to intentionally refuse to do business with, refuse to contract with, or to discriminate in the basic

terms, conditions, or performance of the contract because of a person's race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose.

Minn. Stat. §363A.17 (2009). As a basis for the conclusion, the Court held the use of the term "performance" in the statute presupposes a contractual obligation exists. In turn, only a party to a contract may perform; and, "while a corporate party to a contract may use employees to fulfill a contract, those employees have no rights or obligations under the contract."⁶

The three dissenting justices took issue with the majority's opinion that a contractual relationship must exist between the discriminator and the person suffering from discrimination. In his dissent, Justice Alan Page states the MHRA describes only what constitutes unlawful conduct and not who may pursue a cause of action:

A person is aggrieved by such discrimination when she is injured by it. The plain language of the MHRA places no further limits; and we should not artificially impose them, especially given the legislature's mandate to construe the MHRA liberally.⁷

The Court did, however, note that Diamond Dust continues to have a statutory right to perform under the contract without discrimination; and, therefore, discriminatory treatment of Diamond Dust's employees is a violation of the statute. So, while it affirmed the dismissal of Krueger's individual claims, the ruling does not affect Diamond Dust's claims of discrimination and harassment by Zeman.

In addition, an employer may still be held liable under MHRA to its employees for discrimination by third parties. In other words, the employee subjected to harassment and discrimination by third parties is generally not without remedies.

Side Note: One interesting aspect of this ruling is the Court's lack of attention to the nature of a limited liability company. Krueger, as the sole member, owner, and operator of Diamond Dust, is, essentially, both the employer and the employee. The ruling leaves her, personally, without redress as an employee; because one cannot sue herself.

Jodee McCallum

¹ Minn. Stat. § 363A.17(3) (2009).

² Krueger v. Zeman Construction Company, No. A08-206 (Minn. 4/29/10) (Minn. 2010).

³ Id. at pages 3, 7-8.

⁴ Id. At 3.

⁵ Krueger v. Zeman Construction Company, 758 N.W.2d 881, 890 (Minn. App. 2008).

⁶ Krueger, A08-209 at 10.

⁷ Id. at 20.

IN BRIEF . . .



- **Houston Court of Appeals holds there is no individual supervisory liability for Sabine Pilot wrongful termination claims.** Under *Sabine Pilot*, former employees have a common-law cause of action, if they are terminated for the sole reason they refused an employer's order to engage in criminal activity; but, "as a matter of first impression," the Houston Court holds only the company, not individual supervisors, can be held liable. *Physio GP, Inc. v. Naifeh*, 2010 WL 374515 (Tex. App.—Houston [14th Dist.] Feb. 4, 2010).
- **Former employee's evidence he "experienced sleeplessness, stress, and anxiety due to hauling illegal loads, being fired, and being forced to search for another job" held insufficient to support damage award for mental anguish.** *Safeshred, Inc. v. Martinez*, 2010 WL 1633025 (Tex. App.—Austin April 23, 2010).
- **New guidelines for the H-2A program for immigrant visas became effective on March 15, 2010.** See <http://www.dol.gov/opa/media/press/eta/eta20100198.htm> and <http://www.twc.state.tx.us/svcs/alc/h2a.html>
- **Regular on-site attendance was an essential function of the job; summary judgment for employer affirmed on pregnancy and disability discrimination claims where plaintiff had not been medically released for return to work and could not supervise employees from home.** *Ferguson v. C/Base, Inc.*, 2009 WL 2927961 (Minn. App. Sept. 15, 2009).

THOMPSON COE LABOR & EMPLOYMENT LAW SECTION

Austin Dallas Houston Saint Paul

PARTNERS

- | | | |
|---|----------------|----------------------------|
| • John L. Ross | (214) 871-8206 | jross@thompsoncoe.com |
| <i>Board Certified in Labor & Employment Law and Civil Trial Law, Texas Board of Legal Specialization</i> | | |
| • Barry A. Moscovitz | (214) 871-8275 | bmoscovitz@thompsoncoe.com |
| • Albert Betts, Jr. | (512) 703-5039 | abetts@thompsoncoe.com |
| • Catherine Krahl Faubion | (214) 871-8208 | cfaubion@thompsoncoe.com |
| • John G. Browning | (214) 871-8215 | jbrowning@thompsoncoe.com |

ASSOCIATES

- | | | |
|---|----------------|-------------------------------|
| • Stephanie S. Rojo | (512) 703-5047 | srojo@thompsoncoe.com |
| <i>Board Certified in Labor & Employment Law, Texas Board of Legal Specialization</i> | | |
| • Rachael Chong Walters | (214) 871-8291 | rwalters@thompsoncoe.com |
| • Jodee K. McCallum | (651) 389-5005 | jmccallum@thompsoncoe.com |
| • Ryan G. Cole | (214) 871-8277 | rcole@thompsoncoe.com |
| • Edward L. Vishnevetsky | (214) 871-8260 | evishnevetsky@thompsoncoe.com |

The Attorneys in the Labor & Employment Section of Thompson Coe counsel public and private sector management in connection with all federal, state and local laws regulating employment. Our experienced attorneys can help clients by simplifying the employment law maze, resolving sensitive employment-related issues and reducing the risk of costly lawsuits.

How to Reach Us

If you would like more information about the issues discussed in this newsletter or you have a suggestion for a future article, please contact Newsletters@thompsoncoe.com.

Labor & Employment News may also be found online at www.thompsoncoe.com.

Thompson Coe Labor & Employment News is published to inform clients and friends of developments in labor and employment laws and is not intended to provide legal opinion or to substitute for the advice of counsel. Readers should confer with appropriate legal counsel on the application of the law to their own situations. Entire contents copyright © 2010 by Thompson, Coe, Cousins & Irons, LLP. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means without the prior express written permission of Thompson Coe. Inquiries regarding usage rights should be directed to Natalie Trevino, Marketing Coordinator, at ntrevino@thompsoncoe.com.