THOMPSON COE

LABOR & EMPLOYMENT NEWS

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CONTENTS

NLRA Employee Rights Notice – New Posting Requirement

Effective **April 30, 2012**, employers will be required to conspicuously post a notice of employee rights under the National Labor Relations Act ("NLRA"). Copies of the notice are available online at https://www.nlrb.gov/poster and can also be ordered free of charge. While employers are unlikely to be audited for compliance with the posting requirement, the statute of limitations for employees to file a claim under the NLRA may be extended if it is found the employer did not properly post the notice.[1]

The notice must be posted in a conspicuous place where other employee notices are hung. Reasonable steps should be taken to ensure the poster is not covered, altered, or otherwise unreadable. If the employer regularly provides employee notices online or on a company intranet, then it will also be required to post this NLRA notice in the same manner.

Additionally, if the employer has a work force of 20% who are not proficient in English, it must post the notice in the language spoken by the largest subgroup. It may then provide individual notices in all other languages. The National Labor Relations Board (NLRB) has provided the poster online in 23 languages other than English and Spanish. If there is no translation available in another language, the employer will not be liable for non-compliance.

The NLRB proposed the notice posting in December 2010. It received over 7,000 comments during the 60-day public comments period, and the final rule was posted to the Federal Register on August 30, 2011. The effective date was originally November 14, 2011, but was subsequently delayed. The date on which employers must now begin posting this notice is **April 30, 2012**.

Some employers are excluded from complying with this requirement. If a small employer is not subject to the NLRA (*i.e.*, less than $50,000 cash flow per year for non-retailers; gross annual volume of less than $500,000 for retailers; federal, state, and local government employers; *etc.*). Generally, however, the NLRB has very broad jurisdiction over private sector employers; and most employers will be required to comply. If you have questions as to whether you fall within the small group of excluded employers, one of our L&E attorneys can assist you.

Jodee McCallum

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[1]On March 2, 2012, the District Court for the District of Columbia held that the remedies dictated by the rule, *i.e.*, to extend the statute of limitations for violations, were beyond the scope of NLRB's authority. The opinion is being appealed. There are three other lawsuits challenging the validity of the rule's promulgated remedies.

Texas Supreme Court Expands Scope of Arbitration Review

For a number of years, arbitration agreements with employees have been touted as a favored and effective means for employers to effectively and expeditiously achieve resolution of employee claims confidentially and cost-effectively. True, arbitration usually takes less time to complete than litigation through the judicial system. True, arbitration affords the opportunity to resolve claims in a more confidential setting than in a very public lawsuit, informally and not subject to the rules of evidence. Sometimes true, arbitration can be more cost-effective than litigation because the arbitration agreement may limit the scope of discovery and arbitrators tend to limit or streamline the discovery process and resolve claims more quickly than the courts; but, arbitration also requires *paying* the arbitrator's fee, rather than having tax dollars pay for the judicial system.

A significant trade-off for these advantages, however, has been that the scope of review of arbitration awards is typically very limited. Arbitration statutes typically give arbitrators broad discretion regarding their resolution of claims. Under the Federal Arbitration Act ("FAA"), for example, a court *must* enforce an arbitration award unless the award was procured through *fraud* or *corruption*, the arbitrator was guilty of *misconduct*, or the arbitrator *clearly exceeded his/her authority*, such as deciding claims or issues which had not been submitted for determination. However, issues customarily raised in a judicial appeal, *e.g.*, whether evidence was or was not properly considered or admitted, whether the arbitrator correctly applied the law, or whether the evidence was sufficient to sustain the award, are *not* grounds for a court to overturn an arbitration award.

In an effort to ameliorate this perceived drawback, arbitration agreements sometimes purported to grant a reviewing court the authority to more broadly review arbitration awards. However, several years ago, the U.S. Supreme Court rejected this approach, holding that the scope of judicial review of arbitration awards under the FAA is limited to the grounds set forth in the FAA and could not be expanded by agreement of the parties.[1] A recent decision of the Texas Supreme Court, however, leaves open the possibility for broader review of arbitration awards under the Texas arbitration statute.

In *Nafta Traders, Inc. v. Quinn*[2], Nafta discharged Quinn as part of a reduction-in-force, allegedly as a result of declining business conditions. Quinn, a vice-president, sued in state court for sex discrimination. The employee handbook contained an arbitration provision; however, the provision did not specify whether the federal or state arbitration statute would apply. One portion of the arbitration provision stated:

> The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.

Nafta moved to compel arbitration under the FAA, Quinn did not oppose arbitration, and the trial court ordered arbitration.[3]

The parties proceeded to arbitration and the arbitrator found in favor of Quinn, awarding $30,000 in back pay, $30,000 in mental anguish, $29,031 in "special damages," $104,828 in attorney fees, and costs. Quinn then moved the court to

[1] *Hall Street Associates v. Mattel*, 552 U.S. 576, 128 S. Ct. 1396, 170 L.Ed.2d 254 (2008).

[2] 339 S.W.3d 84 (Tex. 2011).

[3] Because Quinn did not oppose arbitration, the case did not address the issue of whether an arbitration provision contained in an employee handbook—employee handbooks typically expressly state the handbook does not create a contract and can be modified at any time by the employer—was enforceable in the first instance. *See Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202 (5th Cir. 2012) (holding such arbitration provisions unenforceable, as "illusory" because the employer can change the handbook at any time).

Texas Supreme Court Expands Scope of Arbitration Review, cont'd

confirm the award *under the Texas Arbitration Act* ("TAA"). Nafta moved to vacate the award under both the FAA and TAA, arguing the arbitrator had erred by: (1) deciding Quinn's case under federal law, even though Quinn had only pleaded claims under the Texas discrimination statute; (2) awarding attorney fees and "special damages"; and (3) awarding mental anguish damages when the evidence did not support such an award. The trial court summarily confirmed the award.

While the case was on appeal to the Dallas Court of Appeals, the U.S. Supreme Court decided *Hall Street*. Not surprisingly, the Dallas Court of Appeals then affirmed confirmation of the award on grounds the parties could not—under either the FAA or TAA—expand the scope of judicial review of arbitration award beyond the scope of the applicable statute, without considering the substantive merits of Nafta's appellate grounds. However, the Texas Supreme Court reversed.

In addition to grounds for vacating an arbitration award similar to those stated in the FAA, the TAA also contains a provision which allows an arbitration award to be challenged if the arbitrator "exceeded his powers." Nafta argued that because the arbitration provision in the handbook specifically stated the arbitrator "does not have the authority . . . to render a decision which contains a reversible error of state or federal law," authority existed under the TAA to review the substantive grounds on which it had challenged the award. The Texas Supreme Court agreed. The Court considered two issues: (1) whether the TAA precludes parties from either limiting the scope of an arbitrator's authority or expanding the scope of judicial review; and (2) if not, whether the TAA was preempted by federal law under the FAA and *Hall Street*.

On the first question, the Court held parties could contractually limit the scope of an arbitrator's authority and could contractually expand the scope of judicial review of an arbitration award. Under Texas law, an arbitrator derives his powers from the agreement of the parties, which can be as broad or narrow as the parties agree. Further, Texas recognizes a broad right of parties to contract with each other and nothing in the TAA expressed a public policy against parties agreeing to define the scope of judicial review.

On the second question, the Court held the FAA only preempts the TAA when the TAA actually conflicts with the accomplishment and execution of the purposes of the FAA and those purposes were not impeded by state law enforcement of the parties' contractual agreement regarding the scope of review under state law. Thus, the Court remanded the case to the Dallas Court of Appeals to consider the substantive merits of Nafta's challenges to the arbitration award.[4]

An important factor in the Supreme Court's disposition of the appeal was the fact the parties did not dispute the application of the TAA to the issue of whether the award should be confirmed. To be clear, if a Texas employer wants to contractually limit the scope of an arbitrator's authority or contractually expand the scope of judicial review, the arbitration agreement should specify arbitration will be conducted under the TAA, not the FAA. If arbitration is had under the FAA, *Hall Street* will still control and the ability to overturn an adverse arbitration award will be severely constricted.

John L. Ross

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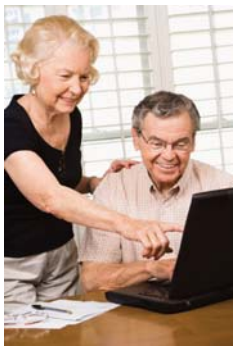
[4] On remand, the Dallas Court of Appeals rejected Nafta's substantive challenges to the award and once again affirmed confirmation of the award. The Court held the evidence was sufficient to support the arbitrator's findings. *Quinn v. Nafta Traders, Inc.*, 360 S.W.2d 713 (Tex. App.—Dallas 2012, n.p.h.).

EEOC Issues Its Interpretation of "Reasonable Factors other than Age" under the ADEA

With the aging of the baby boomer population and the downturn in economic conditions, there has been an increase in the number of age discrimination claims being filed. There were over 23,000 Age Discrimination In Employment Act (ADEA)-based charges filed with the EEOC in 2011—a substantial increase from the 16,500 charges filed in 2006. Frequently age discrimination charges arise from an employer's decision to cut costs or make a reduction in force affecting a group of employees, with the older workers in the group alleging the employer's decision more heavily impacted older workers. Such "disparate impact" cases differ from a "normal" claim of disparate treatment discrimination in that the claimant is not required to prove the employer intended to discriminate on the basis of age. To the contrary, to make out a claim of "disparate impact" discrimination, a claimant must show: (1) an *identifiable, facially neutral* personnel policy or practice; and a substantially *disproportionate* adverse impact of the policy on members of a protected class.

The ADEA, however, contains a special provision which affords an employer an affirmative defense if the employer can demonstrate the employer's decision was based on "a reasonable factor other than age" ("RFOA"), *even if the policy, in fact, more significantly impacted older workers*. Under the Supreme Court's interpretations of the RFOA defense, an employer is shielded from liability *even if there is an empirical correlation between age and the employer's reasons for its decision, such as pension status, high salaries, seniority, or high health care costs*.



Recently, in response to the Court's rulings, the Equal Employment Opportunity Commission ("EEOC") issued interpretive guidelines regarding when the EEOC will consider an employer's decisions to be "reasonable" under the RFOA defense. Unlike some federal agencies, Congress has not granted the EEOC broad rule-making authority. Rather, the EEOC only has authority to adopt *procedural* rules regarding, for example, the filing and investigation of discrimination charges, *etc.*, and guidance concerning the EEOC's *interpretation* of the statutes it enforces, including the ADEA. Accordingly, although courts may consider the EEOC's interpretations when deciding cases, the courts are not bound by them and need not even give the EEOC's interpretations any particular deference. In fact, there have been a number of cases in which the courts have rejected the EEOC's pro-employee interpretations.

Effective on April 30, 2012, the EEOC has issued its interpretation of the RFOA defense (see 29 C.F.R. § 1625)—an interpretation which will invite second-guessing of employers' business decisions.

According to the EEOC, whether the employer's decision was based on an RFOA should be based on an evaluation of the facts and circumstances *particular to each claim*. Further, the EEOC purports to define "reasonable" employment practices as those which are objectively reasonable when viewed from the position of a "reasonably prudent" employer under like circumstances, both in their design and in the way they are administered. In making that determination, according to the EEOC, factors to be considered in evaluating the "reasonableness" of the employer's decision include the following non-exhaustive list[1]:

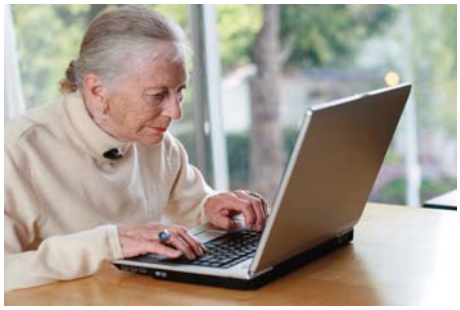
- The extent to which the factor is related to the employer's stated business purpose;
- The extent to which the employer defined the factor accurately and applied it fairly (*e.g.*, training, policy manuals, *etc.*), including the extent to which managers and supervisory personnel were given guidance or training about how to apply the factor and avoid discrimination;
- The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria which the

[1] 29 C.F.R. 1625(e)

EEOC Issues Its Interpretation of "Reasonable Factors other than Age" under the ADEA, cont'd

supervisors were asked to evaluate were known to be subject to negative age-based stereotypes;

- The extent to which the employer assessed the adverse impact of its employment practice on older workers; and
- The degree of harm to the individual employees within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.



A number of these factors appear to be inconsistent with previous Supreme Court decisions. For example, although the EEOC believes factors which should be considered in deciding whether an employer's decision was "reasonable" include the degree of harm to an older worker and the extent to which the employer took steps to reduce the harm in light of the burden on the employer in undertaking such steps, the Supreme Court has previously held the RFOA defense shields an employer from liability despite the disproportionate adverse impact of the decision on older workers, and an employer is not required to adopt an equally effective, less discriminatory alternative. The EEOC's interpretations also seem inconsistent with numerous cases holdings, and it is not the province of the EEOC or the courts to second-guess the wisdom or appropriateness of an employer's business decision, or act as a "super personnel department."

Thus, the EEOC's new interpretive guidance is sure to spark additional, more complicated age discrimination litigation and it remains to be seen whether, and to what extent, the courts will agree with the EEOC's interpretations.

Jodee McCallum

Quick Tip for Reductions in Force

Texas' unemployment rate fell slightly for the seventh straight month in March 2012 to 7.0%, with Texas employers having added 10,900 new jobs. Still, many employers continue to cut back and reduce their workforces. For those who are undergoing reductions-in-force and who are attempting to obtain valid releases of age discrimination claims, certain requirements must be met.

With any release signed by an employee over 40 years old, the terminated employee must have 21 days to decide whether to sign the release; they must be told they are afforded the right to consult with an attorney; they must be given seven days after signing the release to withdraw their consent; and the release cannot include a release of any claims arising after the date they sign the agreement. In addition, the release must make specific reference to rights or claims arising under the Age Discrimination in Employment Act; and the release cannot be made in exchange for anything of value to which the employee is already entitled.

What many employers do not realize is that if <u>two or more employees</u> are selected for a reduction-in-force or are offered an exit incentive, the required review period increases to 45 days. Employers in this situation also have a duty to make certain disclosures to the affected 40-and-older employees, including providing them with a list of the job titles and ages of all individuals who are and are not affected by the decision, any eligibility factors, and any applicable time limits.

Stephanie S. Rojo

EEOC Suggests High School Diploma Requirement May Violate the ADA

On November 17, 2011, the EEOC issued an informal opinion letter suggesting that employers may violate the Americans with Disabilities Act ("the ADA") by requiring job applicants to have high school diplomas. The letter—written to provide an informal discussion of the issue in response to an inquiry, and not constituting an official EEOC opinion—states that under the ADA, where a qualification standard, test, or other criterion screens out an individual or class of individuals on the basis of a disability, it must be job-related for the position in question and consistent with business necessity.

In its letter, the EEOC acknowledged that some students with learning disabilities cannot obtain a high school diploma and, therefore, cannot obtain jobs requiring a diploma, because their disabilities cause them to perform inadequately on end-of-course tests required in order to receive their diplomas. The EEOC then opined that an employer cannot meet the burden of showing the diploma requirement is job-related and consistent with business necessity if, for example, the functions of the job in question can easily be performed by someone who does not have a diploma.

Further, according to the EEOC, even if the diploma requirement is job-related and consistent with business necessity, the employer may still have to determine whether a particular applicant whose learning disability prevents him from obtaining a diploma can perform the essential functions of the job, with or without a reasonable accommodation. An employer can do so, for example, by considering the applicant's work history and/or by allowing him or her to demonstrate an ability to perform the essential functions during the application process. If the applicant can perform the essential functions of the job, then the employer may not exclude him based on his lack of a high school diploma. This being said, the EEOC did note that an employer is not required to prefer the applicant with a learning disability over other applicants who are better qualified.

Going forward, employers should be cautious about having a blanket policy requiring a high school diploma when advertising job openings. In order to be in compliance with the ADA, it is advisable to review each job opening on a case-by-case basis to first determine whether a high school diploma is actually job-related for the position and consistent with business necessity. If an applicant without a high school diploma then applies for the position, the employer should perform an assessment of whether the applicant can perform the job with or without a reasonable accommodation, including reviewing the applicant's work history and possibly having the employee demonstrate that he is able to perform the essential functions of the job during the interview.

Stephanie S. Rojo

Social Media: The New Water Cooler for Protected Concerted Activity

Can an employer restrict what its employees post on Facebook, or discipline employees based on their Facebook posts? The NLRB says "no," at least under certain circumstances.

On September 2, 2011, National Labor Relations Board ("NLRB") Administrative Law Judge Arthur Amchan held that an online Facebook discussion held by five employees of Hispanics United of Buffalo, Inc. ("HUB"), a New York-based not-for-profit corporation, was protected concerted activity within the meaning of Section 7 of the National Labor Relations Act ("the NLRA").

The issue arose when a domestic violence advocate for HUB, Lydia Cruz-Moore, sent a number of text messages to co-workers that were often critical of the job performance of other HUB employees. Cruz-Moore apparently sent several such texts to fellow employee Mariana Cole-Rivera. Cruz-Moore also told another HUB employee, Ludimar Rodriguez, that a client had been waiting on Rodriguez for 20 minutes and criticized Rodriguez's job performance. Early in the morning on October 9, 2010, Cruz-Moore told Cole-Rivera in a text message that she was going to raise her concerns with HUB's Executive Director, Lourdes Iglesias.

At 10:14 a.m. on October 9th, which was a Saturday, Cole-Rivera took her concerns about Cruz-Moore to Facebook, posting the following as her status:

> Lydia Cruz, a coworker feels that we don't help our clients enough at HUB [*sic*] I about had it! My fellow coworkers how do u [*sic*] feel?"

Four other HUB employees commented on the post, expressing outrage and sarcasm. Around noon, a member of HUB's Board of Directors posted a comment asking who Lydia Cruz was, and Cole-Rivera identified her as being part of the domestic violence program. Executive Director Iglesias' secretary next made a comment asking if it were "not overwhelming enough over there"; and, at 2:27 p.m., Cruz-Moore posted: "Marianna stop with ur [sic] lies about me. I'll b [sic] at HUB Tuesday.. [*sic*]."

Cole-Rivera and another of the original employees who commented made two additional posts; and, ultimately, Cruz-Moore complained to Iglesias by text message, suggesting that she wanted those who made posts on Facebook terminated or at least disciplined.

On October 12, 2012, Iglesias fired Cole-Rivera and the first four employees who made comments on the Facebook post, telling them the posts constituted bullying and harassment and violated HUB's harassment policy. During the termination meetings, Iglesias told the five terminated employees Cruz-Moore had suffered a heart attack as a result of their harassment and that HUB was going to have to pay her compensation.

Under the NLRA, it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act, including "the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." It is because of Section 7 of the NLRA that employers should not disallow their employees from discussing their wages with each other.

The NLRB judge who decided the case held that the group of Facebook posters engaged in "concerted activity" under the NLRA, because they were taking a first step towards taking group action by defending themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management.

Social Media: The New Water Cooler for Protected Concerted Activity, cont'd

The judge believed the fact that HUB grouped the five employees together in terminating them established that HUB viewed them as a group and that their activity was concerted.

In addition, the NLRB judge noted that the Facebook posts were not made at work using work computers, nor were they made during working hours. The posts were related to a coworker's criticisms of employee job performance, which matter they had a right to discuss; and there were no "outbursts," meaning the conduct did not bring such public disgrace as to lose concerted-activity protection under the NLRA.

HUB also, apparently, did not establish that the five employees violated any of its policies or rules. This was despite HUB's attempted reliance on its "zero tolerance" policy regarding harassment, which the judge found did not cover the situation at hand because it only addressed sexual harassment and other harassment based on an employee's status as a member of a protected class. The NLRB judge instead believed that HUB "was looking for an excuse to reduce its workforce and seized upon the Facebook posts as an excuse for doing so." HUB had not filled the five open positions. The judge further found that Iglesias had "no rational basis for concluding" that the Facebook posts had any relationship to Cruz-Moore's health.

The judge ordered, among a long list of other things, that HUB reinstate the five employees, make them whole for any loss of earnings and other benefits, and post a notice *and circulate it to all employees by e-mail*. The notice was written by the NLRA and stated that the company had violated federal law, outlined the employees' rights under the NLRA to engage in concerted activity and unionize, and detailed how HUB was making the situation right with the five terminated employees.

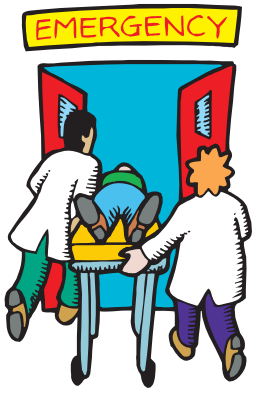
Due to this opinion and several others issued by the NLRB within the last year or so, employers should use extreme caution in disciplining or terminating employees for comments posted to social media. Where an employee is expressing more than an individual gripe and either attempts to or inadvertently initiates group action, the post could be considered protected concerted activity, even if the post is made during work time and possibly even when using a work-issued computer. However, where a post interferes with an employee's work or the employer's operations, an employer may impose discipline as a result of the interference.

Finally, there are appropriate social media policies that can be adopted in order to protect an employer's brand name and reputation, but it is advisable to include a carve-out specifically mentioning Section 7. For more information or for guidance on implementing a social media policy, please do not hesitate to contact a member of Thompson Coe's Labor & Employment Section.

Stephanie S. Rojo

"New" Medicare Reporting Requirements

Since the enactment of the Medicare Secondary Payer Act (MSPA) in December of 1980, a Medicare beneficiary has had a duty to repay Medicare for certain health care costs when Medicare made a "conditional payment" for medical services, despite being the secondary payer rather than the primary payer. Under the MSPA, Medicare is entitled to recover the "conditional payment" from the primary payer or the recipient. For example, if Medicare pays the emergency room bill for a Medicare beneficiary who was involved in an auto accident caused by another driver, then Medicare is entitled to have the responsible driver's insurance repay that cost. The MSPA was amended by the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA)[1], in part to increase the number of conditional payments that were repaid by primary payers and recipients. In other words, the MMSEA was intended to give some extra teeth to the MSPA. Although passed in 2007, the MMSEA provisions affecting insurers and self-insureds did not take effect until July 1, 2009; and very slowly people are taking notice. The MMSEA now requires certain entities—including insurers and self-insureds—known as Responsible Reporting Entities, to report any payments made to Medicare-eligible claimants to Medicare or face severe penalties (*e.g.*, a civil penalty of $1,000.00 a day). The payments which require reporting include settlements, judgments, awards and any other payment obligations made to the Medicare beneficiary or spouse in conjunction with any claim that *potentially* involves past or future medical expenses.



What does this really mean for insurers and self-insureds? There are now several extra steps which must occur during the litigation or claims-handling process, before finalizing a settlement, in order to ensure compliance with these "new" Medicare reporting requirements. First, all insurers and self-insureds must immediately determine if the claimant is Medicare-eligible or a Medicare beneficiary. This can be quite tricky, as both Plaintiffs' attorneys and claimants are often hesitant to provide the sensitive information needed to confirm eligibility. If the claimant is eligible or a current beneficiary, then an insurer or a self-insured must determine what, if any, Medicare liens exist pertaining to the claimant. It is important to obtain this information as early in the process as possible, as the Federal Government can take several months to provide the necessary information.

Ultimately an insured or self-insured should receive a demand-for-payment letter indicating the amount Medicare believes it is entitled to recover. Potentially, at least, Medicare may erroneously include medical expenses incurred by the claimant for injuries unrelated to the underlying claim or lawsuit when initially calculating the lien. When this occurs, an appeal must be made to Medicare to adjust the lien amount, a process which can take a great deal of time.

Once the parties understand and agree with the amount Medicare believes it is entitled to recover, a final settlement can be negotiated. Part of those negotiations should address the inclusion of certain release language which is intended to protect the insurer or self-insured from later suits by Medicare seeking additional funds. This is particularly important, as the Federal Government has recently made it clear that it intends to seek repayment from beneficiary recipients, attorneys (plaintiff as well as defense), insurers, self-insureds and defendants. The message being sent by the Federal Government is that Medicare *will* get paid.

Jessica L. Kirker

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[1]Codified by 42 U.S.C. Section 1395(b)(8).

Social Media War: Is Requiring Social Media Information Illegal?

Should employers require applicants or employees to provide their social media passwords or information? It's a question currently sweeping the nation from legislatures, advocacy groups, private entities, and law enforcement agencies. In a digital age where the vast majority of people publicly broadcast their feelings, beliefs, and personal information on Twitter and Facebook, the line between what is defined as "public" information versus "private" information has been distorted. On April 9, 2012, Maryland became the first state in the nation to ban employers from requesting access to employees' or job applicants' social media accounts. The bill was passed after the Maryland Department of Corrections instituted a mandatory policy for all employees and job applicants to provide their social media log-in and password information. The correctional facility claimed it required the information to investigate gang-related activity and illegal conduct. The requirement gained national attention after the American Civil Liberties Union ("ACLU") supported a former correctional officer, Robert Collins, who sued the Maryland Department of Corrections. The ACLU claimed the request was an intrusion upon Collins' private, off-duty communications, was unjustified, and was unacceptable.

Facebook has even threatened to take legal action against employers who require employees or applicants to provide user name login and password information, because the company believes it violates the privacy rights of its users' accounts. Likewise, lawmakers in the House and Senate are working on legislation which would ban the practice nationally. Senators Chuck Schumer of New York and Richard Blumenthal of Connecticut recently began a campaign asking the Attorney General, Eric Holder, to investigate whether employers asking for Facebook passwords violates the Stored Communications Act ("SCA") or the Computer Fraud and Abuse Act. The two acts, respectively, prohibit intentional access to electronic information without authorization and intentional access to a computer without authorization to obtain information.

In the *Collins* case, the ACLU claimed the SCA and similar laws were "enacted to ensure the confidentially of electronic communications, and make it illegal for an employer or anyone else to access stored electronic communications without valid authorization."

In *Pietrylo v. Hillstone Restaurant Group*, 2009 WL 3128420, No. 06-5754 (D. N.J. September 25, 2009), a New Jersey court found that a manager of the restaurant who obtained personal login information to a chat group site for employees violated the SCA. In order to prevail on the SCA claim, the plaintiffs were required to prove the manager "knowingly, intentionally, or purposefully" accessed the chat group without authorization. Although one of the employees provided the login information for the chat group to the manager, the court found that, because the employee testified she "probably would have gotten in trouble" if she had not provided the manager with the requested login information, the employee's "purported 'authorization' was coerced or provided under pressure." Significantly, this case provides precedent that, even if an employee provides an employer with social media login information, the use of that information may still be deemed to be "unauthorized" and expose the employer to liability under the SCA and other federal laws.

Accordingly, current trends indicate it is not a good idea for employers to require or request employees or job applicants to provide social media login and password information to the employer. Seeking such information may not only expose the employer to liability under the federal statutes discussed above, but may also expose the employer to potential liability under anti-discrimination statutes, because personal information, such as gender, race, religion, age, *etc.* are often displayed on social media profiles for applicants and employees.

Amanda A. Williams

Thompson Coe Labor & Employment Law Section

Austin • Dallas • Houston • Saint Paul

Partners

- John L. Ross (214) 871-8206 jross@thompsoncoe.com
  Board Certified in Labor & Employment Law and Civil Trial Law, Texas Board of Legal Specialization
- Barry A. Moscowitz (214) 871-8275 bmoscowitz@thompsoncoe.com
- Albert Betts, Jr. (512) 703-5039 abetts@thompsoncoe.com
- Stephanie S. Rojo (512) 703-5047 srojo@thompsoncoe.com
  Board Certified in Labor & Employment Law, Texas Board of Legal Specialization
- Rachael Chong Walters (214) 871-8291 rwalters@thompsoncoe.com
- Janis Detloff (713) 403-8281 jdetloff@thompsoncoe.com
- Kevin M. Mosher (651) 389-5007 kmosher@thompsoncoe.com
  Board Certified in Labor & Employment Law, Minnesota State Bar

Associates

- Jodee K. McCallum (651) 389-5005 jmccallum@thompsoncoe.com
- Amanda A. Williams (214) 871-8254 awilliams@thompsoncoe.com
- Rebecca J. Chartan (214) 871-8251 rchartan@thompsoncoe.com
- Camille V. Fazel (214) 871-8230 cfazel@thompsoncoe.com
- Jessica L. Kirker (512) 703-5079 jkirker@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.

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