

Employment Law Digest

An Update from Thornton, Biechlin, Segrato, Reynolds & Guerra, L.C. Employment Law Department

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Technology: Not Always Good in the Workplace

When Internet access at employee workstations first became prevalent, most employers' only major concern was that employee productivity would drop because of personal Internet and email use at work. Although it is still debated whether this actually leads to decreased productivity, there are now even greater concerns about new technology being brought into the workplace, namely iPods and similar portable storage devices.

The average American worker wastes about 2 hours each workday, according to an online survey by Salary.com. This is one hour more per day than most HR departments believe. Most administrators don't have a problem with some wasted time – so long as it is “creative waste.” Creative waste includes such activities as reading the news on the Internet or socializing with co-workers. Reading news keeps employees up to date with the world and employee socializing is seen as a good team building exercise and a possible way to develop new business ideas. Further, certain Internet use is actually believed to make employees more productive because individuals can decrease their stress by taking care of some personal tasks quickly and efficiently on the Internet.

The Apple iPod, along with other mp3 players, pose new and unique problems in the workplace. Time spent downloading and sharing files gives employees yet another activity to distract them from their work, and this is not even a “creative” distraction. In fact, some claim that use of iPods at work actually serves to isolate employees, meaning less employee contact and less opportunity for brainstorming.

Some analysts are urging companies to stop their staff from using portable storage devices such as iPods because they can be used to introduce malicious software or to steal corporate data. These external devices can carry viruses and spyware in their mp3 files, and when hooked up to company computers, these portable storage devices can bypass perimeter defenses, like firewalls and antivirus programs, at the mailserver, and introduce malware, such as trojans or viruses, onto company networks. These infected files can crash computers, delete information, and wreak havoc on networks.

Portable storage devices can also be used to steal company data, since their small size makes them easy to conceal, misplace, or steal. However, the banning of iPods is probably not the right solution to prevent loss of company data, since many even smaller storage devices (such as jump drives) could be used for the same purpose. Employers concerned about data theft would be much better served by blocking the USB ports on employee computers.


Another concern regarding iPods and other mp3 players being brought into the workplace is that the owners of such devices will download and swap music files at work, using the company's network. Since a good portion of this downloading and file sharing is illegal, employers need to keep aware of what software is being introduced onto company computers, so that the company itself does not become



liable for the illegal downloading and sharing. Mp3 players and other gadgets, which encourage people to download music or video files onto a PC or corporate network, tend to eat up data storage space and either slow down the network or force the company to increase bandwidth capabilities and processors because music and video files are so huge.

Employers need to have a written policy regarding employees' use of the Internet and these portable storage devices, including iPods. The policy should inform employees whether or not the employer may, from time to time, monitor employees' use of the Internet at work. Companies have the right to review all activity on their computers, and employees should have no expectation of privacy because the company owns the computer and the system, and an employee's use of both is a privilege, not a right. A thorough policy should inform employees of the types of actions that may be taken against them for violations. Possible disciplinary actions should include anything from a verbal warning to immediate discharge, depending on the circumstances and severity of the policy violation. In drafting technology policies, employers should create teams that include both IT technicians and HR directors, because both insights are necessary to create and implement an effective plan.

This is not to say that iPods or other mp3 players should be banned in the workplace. If you don't mind your employees listening to music while they work, then mp3 players actually have the advantage over small portable radios because mp3 players are usually used with headphones rather than speakers, and therefore, one employee's music choice or volume will not disturb those around him.

The bottom line is that each employer needs to tailor a policy to fit his or her specific workplace. If you decide to allow iPods in the office, make it clear what is and is not permissible. You need to determine whether mp3 players may be hooked up to speakers or only used with headphones. Since the internal battery of the iPod can only be recharged by hooking the iPod up to a computer, let employees know whether or not this is allowed. Further, inform employees whether they may download music onto the company computer, whether they may share music files on the company network, or whether neither of these activities is permitted. By being clear and upfront about whatever policy you devise, you should be able to head off most potential conflicts. 

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Trends in the Law

Beware of discrimination claims arising from "lateral" transfers


A federal judge in Dallas recently expanded the reach of Title VII of the Civil Rights Act in his own courtroom – a decision that may become a trend in other courtrooms around

Texas and across the nation.

Claire Hill worked for SBC in its Business Sales Administration department, supervising customer service representatives. After Mrs. Hill informed her boss that she was pregnant, she was transferred to another management position, this one supervising service order writers. Mrs. Hill received the same salary and benefits and had the same job responsibilities in her new position as she had in her old one. However, Mrs. Hill did not want the transfer. She filed a charge of discrimination with the EEOC because she believed that she was transferred because of her pregnancy.

The EEOC brought suit against SBC for discrimination based on sex. SBC asked that the case be thrown out because the purely lateral transfer did not qualify as any kind of demotion, which SBC claimed should be required for Mrs. Hill to win her discrimination case. However, the law states that such a case should not be thrown out if the plaintiff can show that his or her new position is "objectively worse" than the old one. The judge accepted testimony from another SBC manager who said that she did not know of any other managers who wanted to supervise service order writers (plaintiff's new position), while at least 10 or 15 managers applied to supervise customer service representatives (plaintiff's old position).

Courts are permitted to consider the rate at which employees seek or contest transfers to particular positions as relevant in determining whether certain positions are objectively better or worse than others. Accordingly, the judge refused to throw out Mrs. Hill's case.

The word of warning to employers is that money is not the only consideration in determining whether someone has suffered adverse employment action and possible discrimination. If a new position is worse than a former one, the same salary will not defeat discrimination claims. 

Employment-at-will? Don't make any promises

In Texas, an employer or an employee may terminate employment at will for good cause, bad cause, or no cause at all. This is, of course, unless there is an agreement to the contrary.

Robert Zendejas was hired by El Expreso, a wholly owned subsidiary of Coach USA, as manager of scheduling and charters. Within his first week of work in 2001, several bus drivers complained to him that they were being coerced into violating safety regulations by driving their buses too long or too frequently. Zendejas took these concerns to higher ups within El Expreso, but was met with disinterest. He eventually contacted the regional safety director for Coach, who instructed Zendejas not to participate in any safety violations, and asked for his help in bringing El Expreso into compliance with all applicable safety regulations.




After expressing concern to the regional safety director that he may be fired for enforcing safety regulations, Mr. Zendejas was promised by the director that he would not be fired for ensuring compliance with safety regulations. This conversation of concern met with promises was repeated many times – always Mr. Zendejas was told that he would not be fired for enforcing compliance with safety regulations. Accordingly, Mr. Zendejas adamantly enforced the safety regulations, even when it meant canceling scheduled bus routes, reporting violations, and hiring drivers from sister companies to fill in.

Robert Zendejas was fired in September of 2001 after (during the course of his own investigation) he revealed the supposedly confidential name of a driver who had complained about safety violations committed by another driver. Zendejas sued for breach of contract, claiming that the promises made to him altered his at will employment and created a binding contract. A Houston jury agreed with Mr. Zendejas, and a court of appeals affirmed.

In order to modify the at will status of an employment relationship, the employer must unequivocally indicate a definite intent to be bound not to terminate the employee under certain circumstances. General, indefinite statements are not enough to alter the at will status of an employee. However, no magic words, or even a written promise are required to render a promise enforceable. An employer’s oral statement may alter the employee’s status if the statement includes a definite and stated intention to do so.

When Zendejas expressed concern that he may be fired, his superior responded specifically and definitely that Zendejas would not be terminated for enforcing safety regulations. The Harris County jury hearing Zendejas’s case determined that he was eventually fired for doing exactly that, and awarded Zendejas \$163,000.

This does not signal the end for the at-will-employment doctrine by any means. It is however, a good warning not to make definite promises, which will be relied on by an employee, unless you are absolutely certain that you want to be bound by them for all time. 

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For Your Information

EEOC cracking down on teen worker harassment and discrimination

Late last year, the EEOC announced that it was going to make great efforts towards stomping out discrimination and harassment of teen workers. This came in response to reports of increased sexual harassment and discrimination aimed at workers falling into that age group. Although discrimination and harassment happen to workers of all ages, young workers are especially vulnerable because offenders


think they won’t know enough about their rights to object or complain. Another problem for teen workers is the fact that their supervisors are often young and inexperienced themselves, and sometimes don’t know when their actions constitute harassment or discrimination.

To help achieve this goal, the EEOC developed the Youth@Work initiative. This program is twofold. First, it works to inform teens that they are entitled to the same legal protections as everyone else in the workplace. Second, it makes sure that the protections in place are actually useful by educating young workers on what to do if they are discriminated against or harassed in the workplace.

To get this helpful information to their target audience, the EEOC has created a website (www.youth.eeoc.gov) and is holding dozens of events especially for teenagers. The goal is to give teen workers the information and skills they need to identify, prevent, and respond to both discrimination and harassment. Part of this is simply informing teenagers of those characteristics which are protected.

In addition to this new initiative to educate teens on their rights, the EEOC is also diligently pursuing claims against employers who commit or tolerate discrimination or sexual harassment of teen workers. The EEOC has actually publicized the settlement agreements reached with numerous employers in lawsuits involving harassment or discrimination against teen workers, in the hope that other employers will learn from the mistakes of the companies involved. One Burger King franchise settled for \$400,000, while two restaurants in Tampa agreed to pay \$525,000.

To make sure that your company doesn’t end up incurring such liability, you should take steps to address and prevent harassment and discrimination of teen workers.

- Make sure that all employees are aware of what types of conduct constitute harassment or discrimination;
- Distribute copies of your company’s sexual harassment policies and procedures to all employees;
- Strictly enforce harassment and discrimination policies and respond promptly to complaints;
- If you have a multi-location establishment, make sure that an 800-number for reporting harassment is prominently displayed at each location. 

Why is this still so hard? Multi-million dollar wage and hour cases

In August of 2004, the Department of Labor made the first substantial changes to the Fair Labor Standards Act (FLSA) of 1939, since the last major changes of 1949. The Act requires both public and private employers to pay covered employees (who are not otherwise exempt) at least the federal minimum wage and overtime pay of one and a half times their regular rate of pay. The recent changes to the Act now guarantee overtime to more workers than it did prior to 2004,



and it also more clearly defines which workers must receive overtime pay than it did before, in an effort to help employers better comply with all of the regulations.

Nice Try! Although the changes attempt to make it easier for employers to determine which of their employees must be paid for overtime (those who are non-exempt) and which employees don't have to be paid for overtime (those who are exempt), these changes are not a cure all, nor do they guarantee that non-vigilant employers will correctly classify their employees and avoid liability. Over the past several years, there have been numerous multi-million dollar judgments against employers who failed to correctly implement the FLSA regulations.

An Oregon District Court Judge ordered Farmers Insurance to pay \$48.5 million for violating FLSA overtime regulations in six states. The claims arose from the misclassification of some claims representatives and claims adjusters. Although many claims adjusters were properly classified as exempt employees, many others, especially those handling claims for less than \$3,000, were not exempt, and should have been receiving overtime pay.

In a California case, Merrill Lynch agreed to pay \$37 million to 3,250 of its stock brokers who had been improperly classified as exempt employees. Merrill Lynch claimed that these brokers were exempt from the overtime wage requirement of the FLSA because they were administrative employees and they were paid on a "salary basis" because they received a "guaranteed draw" each month that was labeled as "salary" on their pay stubs. The stock brokers, however, claimed that the "guaranteed draw" was not a weekly salary of at least \$455 a week, as required by the FLSA, nor did they perform administrative duties.


T-Mobile accepted responsibility and agreed to pay \$4.7 million to employees who were not paid the wages and overtime they were entitled to. After conducting an investigation, the Department of Labor's Wage and Hour Division discovered that customer care representatives were not recording preparatory activities performed prior to the start of their shifts, and thus were not being paid for this time.

In another FLSA settlement, Computer Science Corporation (CSC) agreed to pay \$24 million to employees who had been misclassified as exempt, and thus not paid overtime. Food Lion similarly misclassified employees, and agreed to pay \$16.2 million.

Most recently, KTC Services, a North Carolina based company helping to clean up debris left by Hurricane Katrina in Gulfport, Mississippi, was ordered to pay \$141,887 for 106 employees who had not been paid for overtime.

Most of these problems arise because many employers are still mistaken in their beliefs as to how and why employees are classified as exempt or non-exempt. One of the most common misconceptions is that all employees who are paid a salary are

exempt from the overtime pay requirements. The truth is that this really depends on the type of work the employee is hired to perform and actually does perform, as well as how and what the employee is paid. Many employers also believe that they don't have to pay employees for overtime that they did not approve. This is not true, nor can employees waive their rights or claims under the FLSA. This means that if a non-exempt employee offers to work extra hours "off the clock," you, as an employer, will be violating the Act if you agree.

In case the prospect of a multi-million dollar judgment isn't enough, there is an additional problem which makes FLSA claims even worse than claims for employment discrimination, harassment or retaliation – these violations of the FLSA are usually expressly excluded from most employment practices liability insurance. This should all make the time it takes to conduct regular reviews of employee classification more than worth it. 

UPCOMING SEMINARS

02-23-06 SAMA Employment Law Update, sponsored by San Antonio Manufacturers Association

04-10-06 & 04-11-06 FMLA Update 2006, sponsored by Council on Education In Management

04-19-06 Employee Discharge and Documentation, sponsored by Lorman Educational Services



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for the most recent
significant changes
in the law
that affect you.

The contents of this newsletter are presented as general information only and are not intended as legal advice. The reader is invited and advised to consult with an attorney for more specific information regarding the matters and materials addressed herein, or for advice based on the individual circumstances of his or her specific situation.

The employment law section of the Thornton law firm represents management in a wide variety of employment law matters. Because we have offices located in Austin, Corpus Christi and McAllen, Texas, we can offer exclusive and timely insight into handling particular employment matters in diversified areas of the state. Of course, our focus is still on claim avoidance through timely advice and counsel before events occur which can lead to lawsuits; however, our firm has extensive jury trial experience in a wide variety of employment law matters. Our expertise includes the following areas:

- management counseling;
- review and preparation of personnel policy and procedures including employee handbooks;
- representation in administrative matters before the Equal Employment Opportunity Commission and the Texas Workforce Commission;
- representation of management in state and federal court for employment related claims involving Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Polygraph Protection Act, Consolidated Omnibus Budget Reconciliation Act, Worker's Compensation Retaliation, Family Medical Leave Act, Fair Labor Standards Act, Texas Commission on Human Rights Act and a variety of state court claims such as intentional infliction of emotional distress, invasion of privacy, defamation and negligence;
- preparation of arbitration agreements and non-subscriber programs;
- Training and preventative seminars to comply with recent U.S. Supreme Court decisions; and
- Wage/hour audits; FLSA claims.

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