

PHILADELPHIA SHRM NEWS

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May 2010

Legal Update: Workplace Issues Involving Electronic Social Networking & Computer Use

By CELIA M. JOSEPH, PRINCIPAL, CELIA M JOSEPH & ASSOCIATES PC

INTRODUCTION

The computer and electronic technology revolution that has been occurring over the last twenty years has caused major challenges for employers. The 1990s introduced the widespread use of computers, the Internet, and cell phones. The new millennium has seen the advent of text messaging, smarter cell phones, blogging, and social networking tools such as Facebook®, MySpace®, Twitter®, and LinkedIn®, all of which can be accessed by employees from their offices, production areas, homes and elsewhere. Facebook, which was created in 2004, as of February 2010 reports 400 million active users, with 50% of its active users logging on every day, and 35 million users updating their status daily. Similarly, Twitter reports, as of January 2010, 50 million tweets per day and 600 tweets per second. It is likely that some of this activity occurs while employees are working, using their employer-provided equipment, or both. Employers concerned about the effects of this new technology on workplace issues such as employee productivity, harassment, confidential information, and assaults on an employer's reputation are now better able to monitor their employees' activities and background through the use of many tools, including some of the same tools used by their employees. For example, with just a click of a button managers can use tools such as Google® to gain information on employees and applicants. Employees are starting to challenge this monitoring and to claim breach of privacy, discrimination, and other causes of action. As employers use

these tools more frequently, and discipline employees for both workplace and off-duty conduct, they must be mindful of the growing case law and statutes on this topic.

Two recent cases are of interest to employers faced with managing the use by both employees and employers of these technology tools. The purpose of this article is to provide information on these cases, the lessons learned from them, and advice for workplace policies and practices.

TWO CASES OF INTEREST

1. The Importance of Consistently-Applied Electronic Monitoring Policies. In *Quon v. Arch Wireless*, 529 F3d 892 (9th Cir. 2008) the U. S. District Court for the Ninth Circuit considered a case brought by California police officers alleging numerous causes of actions, including that the employer police department had violated their Fourth Amendment rights. The Department had a policy which stated that "users should have no expectation of privacy or confidentiality" when using employer-provid-

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MAY/JUN

UPCOMING EVENTS

Friday, 05/14/10
12:00pm-1:00pm

Webinar

[Addressing Work/Life Balance when your Workforce is Shrinking.](#)
GoToMeeting

Friday, 05/21/10

7:30am-11:30am

Professional Development

[Lost in MySpace: Legal Pitfalls in the Electronic Workplace.](#)

Sheraton Philadelphia City Center
17th & Race Streets
Philadelphia, PA 19103

Wednesday, 06/16/10

5:30pm-8:00pm

Social Event

[Inspire New Thinking to Build Opportunities.](#)

Children's Hospital of Philadelphia
34th Street and Civic Center Blvd
Abramson Research Building
Philadelphia, PA 19104

Friday, 06/18/10

12:00pm-1:00pm

Webinar

[Creative Training Techniques: Developing e-learning strategies and beyond.](#)

GoToMeeting

To register, log on to
<http://www.phillyshrm.org>

Reflections on 2009 – 2010 Programming Year!



We would like to thank all of the speakers, attendees and sponsors for making this programming year a success! At Philly SHRM we not only define success in our numbers of members, events held and attendees at events, we define success in knowledge transfer back to your institutions and workplace, the number of engaged members, and the ability for our leaders to successfully plan for the future of the HR profession.

The lessons learned as we reflect on this programming year as a leadership team and board of directors, we did find that many of the HR practitioners are seeking to and are consistently being called to be more strategic players in today's business world. To this end, as we strategize for next year, two things will be different about next year's calendar:

1) You will begin to see our programming evolve into a more cross-function training ground for the HR function – finance,

legal, supply chain knowledge, etc. – as we move into 2010 – 2011.

2) We will also prepare to hear from C-Suite leaders on how to best engage the HR world around business strategy to become better with planning and goal-setting relative to the talent needed to drive the goals of the organization.

With these two additions to our programming, our intentions are to deepen your skills and abilities as leaders in the HR world.

Again, we thank you for supporting the various programming activities this year. We still have a few events on the radar as we wrap up in May and June to include the networking event on June 16th at the Children's Hospital of Philadelphia from 5:30 pm – 8:00 p.m. to culminate the year, so please come out and support your colleagues!

Regards,

Kelley Cornish, MA, CCDP
President, Philly SHRM

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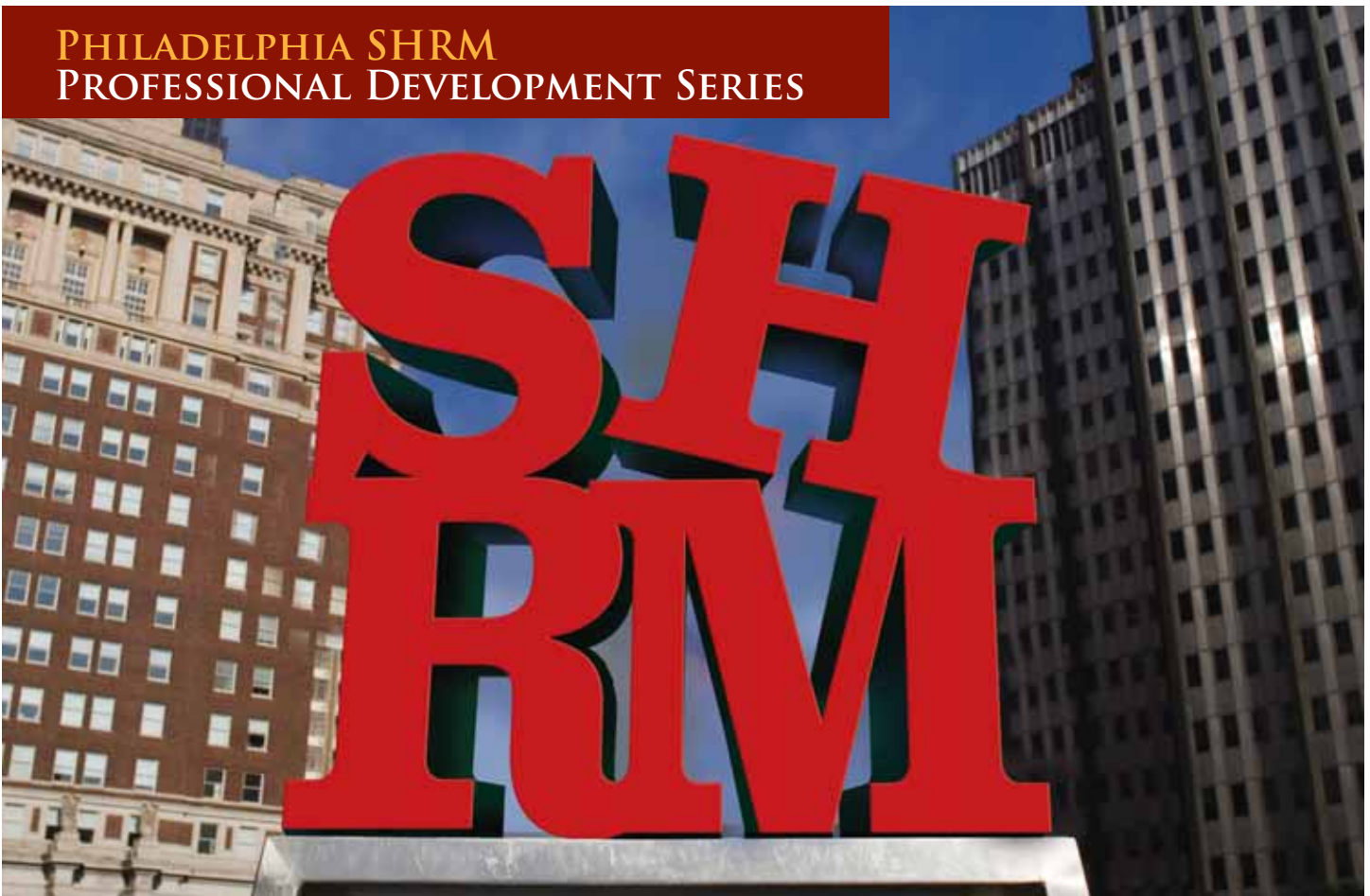
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LOST IN MYSPACE: LEGAL PITFALLS IN THE ELECTRONIC WORKPLACE

SOCIAL NETWORKING IMPACT ON RECRUITING,
FLSA, TITLE VII AND UNION ORGANIZING

FRIDAY, MAY 21, 2010 | 7:30AM-11:30AM

Venue:
Sheraton Philadelphia City Center
17th & Race Streets
Philadelphia, PA 19103

The pervasive and ever-expanding use of social networking sites, blogging, texting and other forms of electronic communication continues to create new legal issues in the workplace. Beyond simply questions of productivity, the use of these cutting-edge tools continues to create a host of additional legal issues that are evolving as rapidly as the technology itself. This interactive workshop will explore the many facets and pitfalls of social networking in the electronic workplace, utilizing real-world examples to assist HR professionals in learning how to identify and address these complex matters.

Presenters:

- Celia M. Joseph, Esquire, of Celia M. Joseph & Associates PC
- Janeen Olsen Dougherty, Esquire, member of Grey Street Legal, LLC, a law firm
- Jennifer Snyder, Esquire, Partner Dillworth Paxson

Cost:

\$75 PSHRM Members
\$95 Non-Members



Register for this event at: www.phillyshrm.org

Legal Update: Workplace Issues Involving Electronic Social Networking & Computer Use

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ed pagers. The City paid for the text message service and the officers paid for any "overages" over their text message limits. At least one supervisor, however, informed employees that their text messages would not be reviewed as long as the employees paid for any text messages overages. The Court held that the "operational reality" and oral representations by a supervisor that the text messages would not be reviewed as long as the overages were paid by the officers were sufficient to create an expectation of privacy despite the written policy. In December 2009, the United States Supreme Court granted certiorari review in *Quon*. Oral arguments were heard in April 2010, and the Supreme Court is expected to render its decision this year. Lesson learned. Even as we await the Supreme Court's opinion, there is a lesson learned by the facts in this case: employers should ensure that its electronic monitoring policies are strictly and uniformly enforced by supervisors, who should be educated about both the policies and about not providing conflicting information to employees. Such statements could alter the policies' enforceability, and possibly effect the outcome of legal challenges by employees.

2. **Manager's Access to Employees' Electronic Chat Group.** In *Pietrylo v. Hillstone Restaurant Group*, 2009 U.S. Dist. LEXIS 88702 (D.N.J. September 25, 2009), the U. S. District Court for the District of New Jersey, in an unpublished decision, upheld a jury verdict finding that an employer violated the federal Stored Communications Act and a parallel New Jersey State law where the employer's managers allegedly accessed an employee MySpace chat group that included criticisms of the employer without clear employee authorization. According to Court's opinion, an employee who provided the password to a manager testified that she: 1) would not have provided the password to the manager had he not been a manager; and, 2) felt she would have gotten in trouble had she not provided the password. The Court found that the jury could have reasonably inferred that the "purported" authorization was coerced or provided under pressure. Lesson Learned. Employers should understand that merely the act of a supervisor requesting an employee's or applicant's password to a private social networking site can have the effect of being considered coercion in violation of federal and state electronic communication statutes.

ADVICE ON EMPLOYER POLICIES AND PRACTICES

Employer Policies. Employers who desire to monitor their employees' emails/Internet use and otherwise manage computer use by their employees should consider creating and publicizing:

1. Electronic Monitoring policies informing employees that the employer reserves the right to monitor all electronic communication sent over its servers and networks, including emails and Internet use. These policies should also include: 1) the rules pertaining to the blogs and website that companies have created for use by their own employees; and, 2) a clear statement that employees do not have a reasonable expectation of privacy in electronic communications sent through employer-provided computers and/or networks or systems. It is recommended that these rules appear on the computer screen when employees access their computers, as well as in handbooks and electronically-available policies. Employers should be cautious about prohibiting all personal use of email unless the company is going to enforce that provision against all employees, even the CEO.

2. Acceptable Use policies setting standards for the acceptable use of company computer systems, including emails, Internet, Blogging, and Social Networking use. The policy should reference the company's nondiscrimination/nonharassment/non-retaliation policy, and should also set guidelines on the use of company email/Internet/blogs for personal use. Employers should also consider adopting and publishing a blogging and social networking policy that sets forth the employer's expectations regarding accessing such sites while at work and the content of such postings, as well as access outside of work, even on personal computers, that may be found to be: 1) disparaging; 2) defamatory; 3) discriminatory; 4) harassing; 5) vulgar; 6) obscene; 7) abusive or hateful regarding the company, its products and/or services, or any employees; 8) information regarding clients, vendors and/or business associates; 9) the use of trademarks, logos, or other copyright-protected company material; or, 10) confidential information regarding the company or its business. Employers may also require employees to clearly state that any postings regarding work-related matters represent their own views and opinions, and not that of the company.

Employer Practices. Employers should also:

1. Ensure that policies are uniformly enforced, and that supervisors do not provide conflicting information about such policies.
2. Publicize the discipline that can be taken against employees who violate these policies, and establish an appropriate structure for such discipline.
3. Educate all supervisors and employees, including new employees during orientation, as well as contractors, about these policies.
4. Ensure that supervisors do not ask or require an applicant's or employee's password to personal social networking sites.
5. Take appropriate steps, with the advice of legal counsel, if attorneys or company supervisors access an employee's or former employee's company computer system, to determine if there are communications that are arguably private attorney-client privileged correspondence that should be left unread and returned to the employee or former employee.
6. Be wary of reviewing candidates' or employees' Facebook or MySpace accounts or other private blogs at any time, including, but not limited to, in advance of employment decisions, to minimize potential discrimination claims.

Celia M. Joseph, Esquire, is a principal of Celia M. Joseph & Associates PC, a law firm representing employers on workplace matters. Ms. Joseph is a frequent guest lecturer and author of numerous employment-related publications for attorneys, human resources professionals and executives. She can be reached at (610) 660-7758, or cjoseph@celiajosephlaw.com.

Portions of this article were prepared using a publication co-authored by Ms. Joseph and Carrie B. Rosen, Esquire, Member, Cozen O'Connor, for the Pennsylvania Bar Institute entitled, "Just the Basics: Privacy in the Workplace".

This article is for informational purposes only and should not be construed or interpreted as legal advice or as creating an attorney-client relationship in any way.

Surveillance of Employee E-mail Activity: What Is Legal?

by Natalie Klyashtorny

Excessive personal e-mail use by employees, including on employer-issued laptops, is a source of concern for all companies. However, companies should be judicious as to the extent of e-mail monitoring. In a recent decision, the New Jersey Supreme Court held that an employee has a reasonable expectation of privacy in personal e-mails sent from an employer-issued laptop.

In *Stengart v. Loving Care Agency, Inc.*, the employee had been issued an employer-owned laptop which she utilized to send e-mails from her personal Yahoo account to her attorney in anticipation of a lawsuit she intended to file against the employer. The employee ultimately resigned and subsequently filed suit against the employer for violations of New Jersey's Law Against Discrimination (LAD).

As part of its discovery preparation, the employer extracted and created a forensic image of the hard drive from the employee's laptop, which she had returned upon her resignation. In reviewing the employee's Internet browsing history, the employer's attorney discovered numerous communications between her and her attorney from the time period prior to her resignation. The employer's attorney referenced some of the e-mails in discovery responses, prompting the employee's attorney to demand the return of all the e-mails and their copies as protected by the attorney-client privilege. The trial court rejected the employee's attorney's request, holding that the emails were not protected by the attorney-client privilege because the employer's electronic communications policy placed the employee on sufficient notice that her e-mails would be viewed as company property.

On appeal, the New Jersey Supreme Court reversed, holding that the employee could reasonably expect that e-mail communications with her attorney through her personal e-mail account would remain private, and that sending and receiving them via an employer-owned laptop did not eliminate the attorney-client privilege that protected them. The employer argued that its employees have no expectation of privacy in their use of employer-owned computers

based on the employer's Electronic Communications Policy, which stated, in relevant part, that e-mails, internet use and communication and computer files were considered part of the employer's business and client records. In deciding for the employee, however, the Supreme Court highlighted the fact that the Electronic Communications Policy was not clear whether the use of personal, password-protected, web-based e-mail accounts via employer-owned equipment was covered. The Electronic Communications Policy also did not warn employees that the contents of such e-mails are stored on a hard drive and can be forensically retrieved and read by the employer. The Supreme Court opined that the employee had demonstrated that she had a subjective expectation of privacy in e-mails sent to and from her attorney as she had utilized her personal, password-protected, webmail-based e-mail account, as opposed to the employer's e-mail account. She also did not save the password on the laptop or share it in some other way with the employer. In light of the ambiguous language of the Electronic Communications Policy and the attorney-client nature of the communications, the Supreme Court felt that her expectation of privacy was also objectively reasonable.

The New Jersey Supreme Court's decision does not mean that employers cannot monitor or regulate the use of workplace computers. Companies are free to adopt lawful policies relating to computer use to protect the assets, reputation, and productivity of a business and to ensure compliance with legitimate corporate policies. However, the Supreme Court's decision also demonstrates that such policies must be specific enough to put employees on notice of any potential surveillance of personal e-mail accounts.

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Quantifying leadership excellence: *Alexander Pentland, MIT*

The neuroscience of moral decisions: *Joshua Greene, Principle Investigator, Moral Cognition Lab, Harvard University*

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The mechanics of motivation: *Dean Mobbs, Research Neuroscientist, Cambridge University*

The neural challenges of the senior leader: *Jessica Payne, Director, Sleep, Stress & Memory Lab, University of Notre Dame*

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Employment Law Tips

By *Christa Rapoport*
Chief Compliance Officer
Corporate Synergies Group

Many Philadelphia HR managers have been under pressure to deal with layoffs, wage and hiring freezes over the past two years. With so many immediate fires to “put out,” this environment makes it easy for companies with lean HR staffs to push aside necessary steps where proper legal employment practices are concerned. But it’s important that companies take steps to stay on top of regulation changes, as the penalties for non-compliance can be severe.

For example, with the first piece of legislation of his Administration, the Lilly Ledbetter Fair Pay Act of 2009 (“Act”), President Barack Obama increased the compliance burden for all businesses. The Act overturned the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), which in turn changed the enforcement posture of the EEOC. That decision severely restricted the time period for filing complaints of employment discrimination based on discriminatory compensation. The EEOC’s enforcement position is now to vigorously enforce the Act and, as a consequence, it has re-opened over 1,000 closed cases.

The EEOC position says that each paycheck that contains discriminatory compensation is a separate violation regardless of when the discrimination began, including an explicit retroactivity provision which allows claims based on events that occurred many years back. To that end, every HR manager should be sure to review the EEOC’s revised Compliance Manual, which can be found here.

There are five often-overlooked areas that can create significant potential legal problems for companies: disability accommodation, discrimination, Fair Labor Standards Act status, whistleblowing and retaliation, and job descriptions.

DISABILITY ACCOMMODATION

For employees that have a disability – which can range from walking with a cane to Attention Deficit Disorder – employers have a duty of “reasonable accommodation.” One of the most commonly cited infractions occurs when employers routinely place employees with workplace disabilities into menial rehabilitation positions that deny them any chance of achievement.

DISCRIMINATION

While most HR managers can spot obvious discrimination threats a mile away, it’s important to remember that workplace discrimination does not have to result from an active action; it applies in certain passive cases too. For example, diversity is a positive force, but it can lead to discomfort when a person or persons differs substantially from their fellow employees. It is then possible for some employees to

subconsciously avoid the “odd” person, which can then lead to that person not receiving deserved pay increases and/or promotions. To avoid falling into that trap, take a look at merit increases and promotion requests from a “50,000 foot level.” Make sure you’re looking at the big picture.

FAIR LABOR STANDARDS ACT STATUS

If you are a company with 500 to 2,000 employees, you may be vulnerable to the growing class actions in the Fair Labor Standards Act (FLSA) arena. The FLSA sets out basic standards for minimum wage and overtime pay, and requires employers to pay non-exempt employees at least minimum wage and overtime pay of one-and-one-half-times the regular rate. Practical advice concerning record keeping and FLSA compliance may be found at here.

WHISTLEBLOWING & RETALIATION

If your company does not have a way to report allegations anonymously, whistleblowers could be shunned by other employees and management. Failure to protect disgruntled employees exposes your company to risks. And these risks are increased if/when management tries to discredit the whistleblower. If an employee makes an allegation, HR managers should take a deep breath, investigate fairly and watch (and stop) other employees and management who attempt to defame the employee.

JOB DESCRIPTIONS

Job descriptions can also present a problem if they don’t set proper expectations for employees of what the job will entail. This can especially be dangerous for smaller, entrepreneurial companies where employee duties often cross departments and change in real time. For example, if there are particular seasons where additional time is required (i.e. accountants in tax season, nurses in flu season), then that should be stated upfront in the job description to avoid any complications. Don’t assume it’s “understood.”

Christa S. Rapoport
Chief Compliance Officer

Christa S. Rapoport is the Chief Compliance Officer for Corporate Synergies Group, Inc (CSG), an independent benefits consulting and brokerage firm. As Chief compliance Officer (CCO), Ms. Rapoport provides executive oversight and leadership for CSG’s internal compliance efforts. In addition, she is the corporate office responsible for the oversight and leadership of compliance with corporate standards, and federal, state and local laws.

KEN MOORE ASSOCIATES PRESENTS

COMMENTARY OBESITY AND WORKERS COMPENSATION COSTS

In April, 2007, a team of medical researchers at the Duke University published a remarkable study relating obesity in the workplace to the number of Worker's Compensation (WC) claims submitted by employees. The results were startling. Over a period of 8 years involving more than 50,000 employees the researchers were able to correlate Body Mass Index to the number of Workers Compensation claims and the dollar costs to a company.¹

In the United States, all states plus its territories require by law that employers carry insurance under the general term Workers Compensation. This form of insurance covers the cost of medical care and rehabilitation for workers injured on the job. It also compensates them for lost wages and provides death benefits for their dependents if they are killed in work-related accidents, including terrorist attacks.

Let's look at some of the details of the study.

Body Mass Index (BMI) is a number calculated from a person's weight and height. It provides a reliable indicator of body fatness for most people and is used to screen for weight categories that may lead to health problems. It is a widely used diagnostic tool to determine weight problems within a population. It is calculated as weight in kilograms divided by height in meters squared. Most search engines will find sites that will calculate it for you. What the researchers discovered was that there was a linear correlation between BMI and the rate and cost of Workers Compensation claims. Employees whose BMI measured >40 had 11.65 claims per 100 full time employees (FTE), while recommended-weight employees had 5.80 claims. When calculating lost work days, they determined that the effect on lost workdays was 183.63 for obese employees versus 14.19 per healthy employees. Furthermore, when calculating medical claim costs, they discovered that medical claims costs \$51,091 per 100 obese FTEs versus \$7, 503 per 100 non-obese FTEs.

The claims most affected by BMI were strongly related to the following: lower extremity, wrist or hand, and back, contusions or bruises, falls or slips, lifting, and exertion. The study further observed that the combination of obesity and high-risk occupation was particularly detrimental.

Obesity in the United States is viewed as an epidemic with associated high health care costs. A recent edition of Forbes magazine printed a story about a University of North Carolina study that found that a population's greater access to a Wal-Mart Supercenter or other big box food retailer "was associated with lower body-mass indexes and a lower probability of being obese".² The conclusion is that consumers buy healthier foods when their purchasing power increases.

Worker's compensation is a significant cost element of the total employee benefit package. Indeed, it is one of only three benefit programs required by law in all 50 states

(Social Security and unemployment insurance are the other two). Over time and experience, Workers Compensation has evolved into a complex mosaic of rules and regulations that vex the best of HR, compensation and benefits managers, particularly in multi-state organizations.

It also vexes CEOs and CFOs who must budget for and pay additional premiums and expenses to WC insurance carriers that cover the employees. In 1982, Worker's Compensation cost the US \$22.8 billion. In 2002 the costs rose to \$72.9 billion³. In 2006, the costs increased to \$87.6 billion.⁴ Absent a national health care policy, health benefit costs in the US will continue to increase resulting in higher costs to the employees and employers and lower returns on investments for shareholders.

We acknowledge that obesity is a major concern in our American society. The media reports frequently on the subject and has termed it an epidemic. New York's governor is even proposing legislation requiring restaurants and other food vendors to put nutrition information on all of its menus. Some airlines are considering if and how they can charge extra for obese passengers.

As more and more empirical research on obesity becomes available, it presents an opportunity for company leaders to incent its employees to achieve and maintain an ideal body-mass index and weight. There are dozens of individual diet plans available and many long term weight loss programs. Some are excellent and effective programs. Others are not.

If a company wishes to address its increasingly unsustainable health care costs, studies like these will aid significantly in implementing and justifying corporate support for a healthy workforce.

1. *Obesity and Workers' Compensation, Archives of Internal Medicine, Vol. 167, No. 8, April 23, 2007, <http://archinte.ama-assn.org/cgi/content/full/167/8/766>*
2. *Forbes, June 8, 2009, p. 24*
3. *SHRM White Paper, John G. Kilgour, PhD., Revised, September, 2004 http://moss07.shrm.org/Research/Articles/Articles/Pages/CMS_000039.aspx*
4. *Workers Compensation – Benefits, Coverage & Costs, National Academy of Social Insurance, August, 2008, Table 1; http://www.nasi.org/usr_doc/NASI_Workers_Comp_Report_2006.pdf*



Fourteen Annual Wharton Leadership Conference
“Leading in a Recovering (and Even Rebounding) Economy”
June 16, 2010

As organizations begin to recover from the financial crisis of 2008-10, many of their leaders are guardedly but determinedly moving to restore their growth and re-embark on expansion. In doing so, it is helpful to reflect on what we have learned from leading through the crisis and about the organizational and individual acts of leadership that should have been taken to avert or manage the crisis. It is also essential to look ahead to the different kinds of leadership that will now be required for a world that wants to mend. The fourteenth annual Wharton Leadership Conference in Philadelphia on June 16, 2010, focuses on leading in this post-crisis era of recovery and rebuilding.

Complete information is available at <http://leadershipconference.wharton.upenn.edu> or call 215-898-5606. The conference will be held in Huntsman Hall on the Wharton School campus, Philadelphia PA.

On-line registration: <http://leadershipconference.wharton.upenn.edu/2010/registration.html>

SHRM members are eligible for a \$575 registration rate (full registration is \$995). To receive the discount, indicate “SHRM Member” in the Special Notes box of the registration form.

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- **Robert (Bob) Kelly**, chair and CEO of BNY Mellon
- **Steven Pearlstein**, Pulitzer-Prize winning columnist for the *Washington Post*
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Prizes:

A drawing will be held at the conference for multiple copies of the latest books by our conference speakers and hosts, and for a set of 10 of the newest titles published by Wharton School Publishing. A grand prize drawing will be held at the conclusion of the conference for free attendance at a multi-day learning program offered by Wharton Executive Education.

The Fair Labor Standards Act and the Digital Age: What Constitutes “Working?”

There is no question that the proliferation of personal technology devices, wireless access to the internet and social networking sites has radically transformed the face of the modern workplace. With WiFi® access creating portable offices in local coffee shops and companies relying on blogging and networking sites such as Facebook®, MySpace® and LinkedIn® as essential ways to increase corporate visibility, employees and employers alike now enjoy an unprecedented amount of flexibility in the way in which they work and communicate. In this digital age where the lines between personal and work activities have so tremendously blurred, however, employers have an increasingly-difficult time keeping track of when their employees are on the clock. Where nonexempt employees are concerned, the troubling wage and hour question remains, “Are your employees working when they blog, text or tweet?”

• **Industrial Age Rules for a 4G Workplace:** Under the federal Fair Labor Standards Act (FLSA), employers must pay at least the minimum wage and appropriate overtime for all hours worked by employees in a workweek. Although the law does not define “hours worked,” it broadly defines the term “employ” to include “to suffer or permit to work.” Under this definition, any activity required by the employer and performed for the employer’s benefit is considered compensable working time. This rule applies even if the employer has not requested that the work be done, if the employer knew or otherwise should have known that the work was being performed.

Hours worked in a workweek typically include all of the time the employee is required to be on the employer’s premises, on duty, or at a prescribed workplace. Although an employer can disregard insubstantial amounts of time beyond an employee’s scheduled work hours for “de minimis” activities, this rule applies only where there are only a few minutes or seconds of uncertain or indefinite periods of time involved.

In 1938 when the FLSA was passed, knowing when an employee was “working” was relatively easy. The difficulty that employers have today in applying these anachronistic rules to the electronic workplace, however, is epitomized in the *Agui v. T-Mobile* case, filed in 2009 in the federal district court in the Eastern District of New York. In this case, T-Mobile retail sales associates and supervisors claim that they were not paid for “off the clock” duties such as responding to email and text messages and logging into their computers after their normal working hours. The employees allege that they were issued T-Mobile smartphones and were required to review and respond to numerous company e-mails and text messages both day and night, whether or not they were logged into T-Mobile’s computer-based timekeeping system. While the T-Mobile case is still pending, a finding by the 2008 Pew Internet & American Life Project that fifty percent (50%) of all U.S. employees who use e-mail on the job also check their work email on the weekend highlights the scope of this potential liability for employers. These numbers further suggest that reliance on the de minimis rule is unlikely to provide any real safe harbor for employers targeted by such claims.

• **Must Employees be Paid for Friending?:** Aside from emails, another challenge posed by the digital age is ascertaining when general networking constitutes compensable working time under the FLSA. If an employer sponsors an industry-related blog or Facebook® page and encourages its employees to increase their own web visibility through use of sites such as LinkedIn® or Plaxo®, does that employer suffer or permit its employees to work when they check or post to those sites after-hours and off the employer’s premises? Under the rules of the FLSA and many other, more stringent state wage laws, employers have real reason to be concerned that such activities will be considered compensable working time.

• **Recording Working Hours: Is There an App for That?:**

Under the FLSA, it is employers (not employees) who must maintain an accurate record of all hours worked in each workweek and must pay at least the minimum wage and appropriate overtime for all hours worked. A frequent area targeted in the steep rise of FLSA collective (class) actions, is the failure by employers to capture all hours actually worked by nonexempt employees. With high-speed networks and smartphone technology elevating multi-tasking to new levels, however, how can an employer parse and record the time an employee spends reading and responding to work-related emails after hours if that employee is simultaneously downloading music, checking box scores and running a host of other applications? The FLSA regulations and Department of Labor have not offered any real guidance on the question and traditional timekeeping methods are currently wholly inadequate.

• **Staying Safe on the Cutting-Edge:** For so long as technology continues to outpace our courts and government, employers must adopt their own protective measures to avoid liability for wage and hour violations including the following:

- o Limit Remote-Access and Smartphone Use to Exempt Employees. Perhaps the clearest, safest way to avoid many of the problems highlighted in this article is for employers to permit only exempt employees to have access to social networking and remote communication devices. Nonexempt employees should not be afforded or permitted access to company email or other methods of workplace communications and such technology should be limited to employees who clearly meet the FLSA exempt employee definitions.

- **Implement a Clear “Off-The-Clock” Policy.** If employers encourage nonexempt employees to avail themselves of the benefits of digital technology, they must also have in place clear policies that prohibit “off-the-clock” working. Employees should be required to acknowledge often, and in writing, that they are required to report all hours worked, regardless of where or when this work occurs. Employers must also follow-through with appropriate discipline, but not wage withholding, for employees who violate this policy.

- **Train Managers About Working Expectations.** Companies must ensure that supervisors are communicating the proper message to nonexempt employees. Managers should never expect responses to after-hours emails or advise their employees to remain perpetually “on call.” Employees who are made to believe that they are constantly “out of the loop” or “delaying the process” if they are not connected are more likely to be successful in claiming that they were “suffered to work,” regardless of the employer’s written policy.

As companies continue to rely upon technology to accomplish more with fewer employees, the key to remaining both cutting-edge and litigation-free is constant vigilance to the rules of the FLSA and the activities of nonexempt employees. Proper training, dynamic policies and strong human resources leadership will enable companies to navigate the digital highway safely.

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Be On Alert! With the Newly-Constituted NLRB Firmly in Labor's Camp, Expect Unions to Come Knocking at Your Door.

In what may turn out to be a shrewd move that could shape labor law for years to come, President Obama recently made two pro-union recess appointments to the National Labor Relations Board (NLRB) – Craig Becker and Mark Pearce. Of the two, Mr. Becker is the more controversial appointment, having been extremely vocal regarding his views that the NLRB may be able to shape labor law through its rulemaking powers and does not have to wait for legislation like the embattled Employee Free Choice Act (EFCA) to be passed by Congress. With these two additions, the NLRB is now stacked 3-1 firmly in labor's camp. This time last year, the labor and employment community was bracing for a fight over EFCA, a.k.a. the "card check" bill, which proposed to effectively eliminate the longstanding secret ballot election process that unions claimed was a key reason why their ranks had diminished so significantly over the past decades. With health care as the Obama Administration's top legislative priority, EFCA was set aside, with the expectation that its passage was just a matter of time. However, with the election of Scott Brown to succeed Teddy Kennedy earlier this year, and with Arlen Specter and other Democrats in tough battles to retain their Senate seats later this year, EFCA will certainly not pass anytime soon.

So why should employers be concerned now? Even without EFCA, the newly-constituted NLRB is empowered to make changes to the pre-election process that will blindside employers if they are not prepared. Expect shorter election periods, drastic reductions to the scope of authorized employer speech, and substantial increases in labor's authorized access to employees on company property. The collective bargaining process and enforcement of unfair labor practices are also ripe for reform. Knowing what may be coming, what can savvy employers do to prepare? First and foremost, assess your organization's vulnerability to unionization by considering the following:

Workforce Awareness: Do employees understand the legal significance of union authorization cards and the secret ballot election process? Are supervisors prepared to respond quickly and effectively to unionization efforts within the boundaries of the law? Will employees be prepared to protect themselves against potential pressure from union organizers – or their co-workers – to sign cards?

Communication: Do managers listen to employees? Is there regular, constructive two-way communication between managers and employees? Do employees have good reason to believe that management is interested in them and concerned about them as individuals? Do employees feel valued and part of the team?

Management: Are managers and supervisors credible to the employees? Are progress reviews being held regularly and, where applicable, according to policy? Are they completed objectively and fairly? Do employees feel that they are involved in the process?

Policies: Are company policies and procedures documented in writing? Are employees aware of them? Are they followed in an evenhanded, non-discriminatory manner?

Hiring and Firing: Is care being taken with regard to discipline and terminations, making sure that each is fair, well-documented and thoroughly justified? Is care being taken with regard to new hires to see if their backgrounds are compatible with company expectations and their references support their employment?

Right now, news of an organizing petition serves as a warning call to employers, providing several weeks' advance notice of an election and time to address employees' concerns that prompted the unionization effort. If the new NLRB uses its rulemaking powers to effect changes to the pre-election process, there will be no warning call. There will not be sufficient time to answer these questions about your workplace. There will only be a quick election, with a union likely coming up victorious. It is often difficult to be truly objective about your organization's vulnerability to an organizing drive. Accordingly, training and outside assessment can be keys to success in maintaining your independence in employee relations. Educating managers, supervisors and employees today is the best way to keep your organization union-free tomorrow.

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