Summer 2014

Features

HR JOURNAL

WEST VIRGINIA CHAMBER

WEST VIRGINIA CHAMBER

MESSAGE FROM THE COMMITTEE CHAIR: Carolyn Wade

The West Virginia Chamber of Commerce, through its Human Resources Committee, endeavors to keep West Virginia's employers, Human Resources professionals, members and friends current with regard to employment-related issues, trends and legal obligations. On both the state and national levels, there have been more significant developments than usual in the past year. We are therefore proud to present the Summer 2014 edition of the Chamber's HR Journal, which will serve as a handy reference guide to many of these changes and issues.

We are also very excited about our upcoming HR Conference, to be held October 7-8 at the Charleston Town Center Marriott. We have a great line-up of speakers who will be providing much-needed information geared toward navigating the ever-changing and increasingly challenging business of effectively managing our state's human capital. From the expanding reach of the National Labor Relations Board to some fundamental changes in wage and hour law, from the new West Virginia Pregnant Workers' Discrimination Act to drug testing and substance abuse issues, the increasing vitality of retaliation claims, and numerous other subjects of interest to those charged with managing, developing and caring for the work force, the variety of topics on our agenda will certainly make this an extremely useful conference.

Fortunately, we have one of the country's top-rated and most in demand speakers to help us pull it all together. Our conference keynoter is Steve Gilliland, one of the nation's top-rated and most in demand speakers. Steve will share his renowned Making a Difference™ presentation. Billed as "an eye-opening and heartfelt keynote detailing how to positively influence people in every imaginable way, regardless of our position or status," Steve will explain how we all have "the potential to transform the culture of an organization through our actions and attitude."

It's a big job, but we're up to it! And thanks to the Chamber, we have the tools. Hope to see you in October.

Unmitigated or Flat Front Pay Awards

Policy Issues

Issue

West Virginia is the only state in our nation that permits both an unmitigated or flat front pay award *and* punitive damages in employment discharge cases, creating a windfall for plaintiffs and their lawyers, while putting our state and its businesses at a competitive disadvantage. It unfairly and needlessly punishes companies choosing to do business in West Virginia and employing our citizens.

Background

When an employee believes he or she has been wrongfully discharged, they can bring a tort action for damages. Such suits are supposed to make someone whole and damages include back pay, reinstatement or front pay, emotional distress and often attorney fees. If a jury concludes the employer's conduct was willful and wanton, punitive damages can also be awarded. But West Virginia has a unique type of additional damage referred to as unmitigated or flat front pay award. This is because West Virginia is the only state that does not require someone to make an effort to mitigate their damages by sincerely looking for a comparable job or accepting an offer of reinstatement or comparable work. Further, even if the plaintiff does find comparable employment, if the jury finds malice the plaintiff can be awarded unmitigated or flat front pay for life. This is the result of a West Virginia Supreme Court case. *Mason County Bd. of Ed. v. State Supt. of Schools.* This principle was re-affirmed in three multi-million dollar cases that recently were taken to the Supreme Court, including one where the plaintiff (Nagy) had immediately found a new job making comparable wages. *Peters v. Rivers Edge*; *Nagy v. WV American Water*; and *Burke-Parsons-Bowlby v. Rice.* As a result of these three recent decisions, plaintiffs, including those who have quit and are claiming constructive discharge, are routinely seeking unmitigated front pay, as well as punitive damages, claiming their employer acted with malice and in willful and wanton disregard in addition to wrongful intent in discharging them. Since unmitigated front pay can span a working lifetime of 40 or 50 years of annual earnings, jury verdicts in these cases are often in the millions; they have become a windfall for plaintiffs and their attorneys that is far beyond the original purpose of damages – to make the wronged employee whole. They are also causing companies to avoid locating or expanding in West Virginia as no other state allows this type of award.

Unmitigated front pay as a regular element of damages in employment law cases is making West Virginia uncompetitive; interferes with the ability to obtain reasonably-priced employment practices liability (EPLI) insurance; and is scaring both small and large employers. To change this situation requires a legislative solution much like what occurred with West Virginia's medical malpractice situation.

West Virginia is the sole outlier on this issue. Thirty-seven State Supreme Courts have issued decisions that say it is a plaintiff's duty to mitigate damages in employment discharge cases. (AL, AK, AZ, AR, CA, CO, CT, DE, FL, GA, ID, IL, IN, KS, KY, LA, MN, MA, MI, MN, MS, MT, NE, NV, NJ, NM, NC, OH, OK, PA, RI, SC, TN, TX, VT, WA & WI) Eight more states have imposed time-limited front pay awards based on the principle of mitigation. (HI, IA, MO, NH, NY, ND, VA and WY) For example, North Dakota limited front pay to two years. Finally, four states (DE, MD, SD & UT) have imposed statutory limits on front pay: one has refused it all together (SD); and one has capped front pay and punitive

Continued following page

damages (MD). Oregon is the only other state that has even discussed permitting unmitigated front pay, but in that case the Oregon Supreme Court said front pay still needed to be offset by the amount a plaintiff can still be expected to earn and in that case, punitive damages were awarded.

The Chamber's Position

The West Virginia Supreme Court's current unmitigated front pay policy is adverse to well-established basic legal principles of injury, damages and recovery that prevail across our nation. The Court's decision penalizes employers twice *(unmitigated front pay & punitive damages)* for the same action and permits a windfall to former employees and their attorneys. Further, this policy encourages unemployment, as former employees who decide to sue are unmotivated to find re-employment in the reasonable belief they can recover a career's worth of compensation from their former employer. The West Virginia Chamber of Commerce fully supports a legislative change that makes clear that an employee has a duty to mitigate economic damages; a statutory limitation that prohibits unmitigated or flat front pay; that prohibits or caps front pay; and that prohibits or caps punitive damages. Finally, there should be no such damages for an employee who quits absent physical assault by the employer.

Policy Issues

A Troubling Trend in West Virginia's WAGE PAYMENT & COLLECTION ACT

By: Constance H. Weber,
Kay Casto & Chaney PLLC

Most West Virginia employers are familiar with the West Virginia Wage Payment and Collection Act, W. Va. Code §21-5-1 et seq. It came to be known among the business community as the "72 hour rule". However, recently the West Virginia State Legislature made amendments to the Act in 2013 in an effort to give employers a little more time to pay discharged employees. The "72 hour rule" no longer exists. Now employers must pay employees no later than the next payday or within four business days, whichever comes first, W. Va. Code § 21-5-4 (2014). The old law required employers to pay discharged employees within 72 hours of termination without regard to whether the 72 hours consisted of weekends, holidays or business days. The amendments also allow employers to pay a terminated employee in the same manner the employee was previously paid or by mail, if so requested by the employee. There was no change to the time period in which an employee who resigns must be paid his final paycheck. It remains the next regular pay day.

Wages under the Act includes compensation as well as "accrued benefits capable of calculation" at the time of discharge. Thus, a best practice for all employers is to have the final paycheck, including all wages and benefits due, ready for an employee on his or her last day of work whether due to a discharge or resignation. This is the most efficient way for avoiding potential liability under the Act. One may consider this to be a strict liability type statute since violation of the Act requires an employer to pay three times the unpaid amount to the employee plus attorney's fees incurred in seeking recovery under the Act.

This particular statute has always been a hot-button issue for the Plaintiff's bar, because they can easily catch unaware employers in violation of its requirements by simply looking at a calendar. Additionally, damages under the Act can be easily calculated by simply multiplying the amount by three. The attorney need only to add his or her fees to the total recovery. Employers and defense attorneys must be more vigilant than ever as enterprising attorneys are trying to use the Act in conjunction with the class action mechanism allowing for more recovery for themselves and the employer's former workforce.

The class action mechanism allows a group of individuals who have been wronged in some small way to band together to seek recompense. This may allow Plaintiff's attorneys to initiate discovery to determine the number of employees similarly situated to the class representative (i.e.: terminated or resigned) for the last five (5) or more years and then move to certify the class with the individuals included therein. Individually, the claims would not be worth an attorney's time if pursued separately; but in a group the recovery and value of the claims can expand dramatically. Plaintiff's attorneys view class actions as an economical way of adjudicating numerous identical claims and deterring future wrongful conduct on the part of the Defendant.

In the context of the WV Wage Payment and Collection Act, employees who collectively failed to receive their final wages at the time of termination or in a timely manner following their resignation can sue as a group with far more impact than the individual employees might by themselves. Think about it…each employee could be entitled to three times the wages that were properly due and owing to them at the time of their separation from employment. Thus, seemingly small amounts can become substantial in light of the collective power wielded by a class and their entitlement to treble damages from the Act.

The bottom-line for employers is that they should have an employee's final pay check, which includes all wages and benefits due at the time of separation, ready to hand over on his or her last day of work. Employers, both large and small, need to educate their human resources departments as well as payroll and benefits departments of the need behind this practice so that calculations for purposes of computing final pay and benefits can be completed efficiently and accurately. Otherwise, an employer can open itself up to broad financial liability especially in light of the increasingly creative ways that the Act is being enforced by counsel for employees.

The Problem with Unmitigated or Flat Front PAY AWARDS in West Virginia Wrongful Discharge Cases

By: Brian J. Moore and Mychal S. Schulz, Dinsmore & Shohl LLP

You don't have to be a lawyer to recognize the principle that a plaintiff should be entitled to one, and only one, recovery for an alleged wrong. Our West Virginia Supreme Court ("W. Va. Supreme Court") has long recognized this rule. In wrongful discharge cases specifically, the W. Va. Supreme Court has cautioned that, because of the open-ended nature of emotional distress damages in such cases, which can serve a punitive purpose, an additional award of punitive damages may be impermissibly duplicative.

At the same time, however, the W. Va. Supreme Court has created a problem of duplicative punitive damages by allowing plaintiffs in wrongful discharge cases to recover "punitive" damage awards in the form of "flat" or unmitigated lost wage damages, in addition to an award of traditional punitive damages. This problem appears to be unique to West Virginia, as most other states either do not allow both types of damages, or place caps on them.

Plaintiffs in wrongful discharge cases have a duty to mitigate their losses by seeking replacement employment. In the 1984 decision of *Mason County Board of Education v. State Superintendent*, however, the W. Va. Supreme Court held that where an employee has been wrongfully discharged out of malice, he has no duty to mitigate and is entitled to a flat back pay award (lost wages from the time of termination to trial). In *Mason County*, punitive damages and front pay (wages from trial into the future) were not otherwise available to the plaintiff, a public employee. The W. Va. Supreme Court admitted that a flat back pay award was designed to have a "punitive element" under such circumstances. Standing alone, the *Mason County* decision may not be particularly controversial. Throughout the years, however, its holding has been applied to not only back pay awards, but front pay awards as well, ***and in cases where punitive damages are otherwise available.*** For example, in the 2009 case of *Peters v. River's Edge Mining*, the jury awarded the plaintiff $1.8 million in damages, including $1 million in punitive damages and $500,000 in flat front pay. And, courts have allowed flat wage loss damages even in cases where plaintiffs have almost completely mitigated their damages. In such situations, such damages cannot meaningfully be called

compensatory because they are not making the plaintiff whole. Such damages serve only to punish the employer. When punitive damages are then added to the equation, a duplicative recovery occurs. Unfortunately, the W. Va. Supreme Court has rejected this argument, and has classified unmitigated wage loss damages as compensatory in all circumstances. Thus, it may be up to the West Virginia Legislature to address the issue.

The problem of duplicative punitive damages is easily solved. First, a plaintiff should ***always*** have a duty to mitigate his lost wage damages, with the burden of raising mitigation remaining with the employer. Second, the maliciousness exception to the mitigation rule should be eliminated.

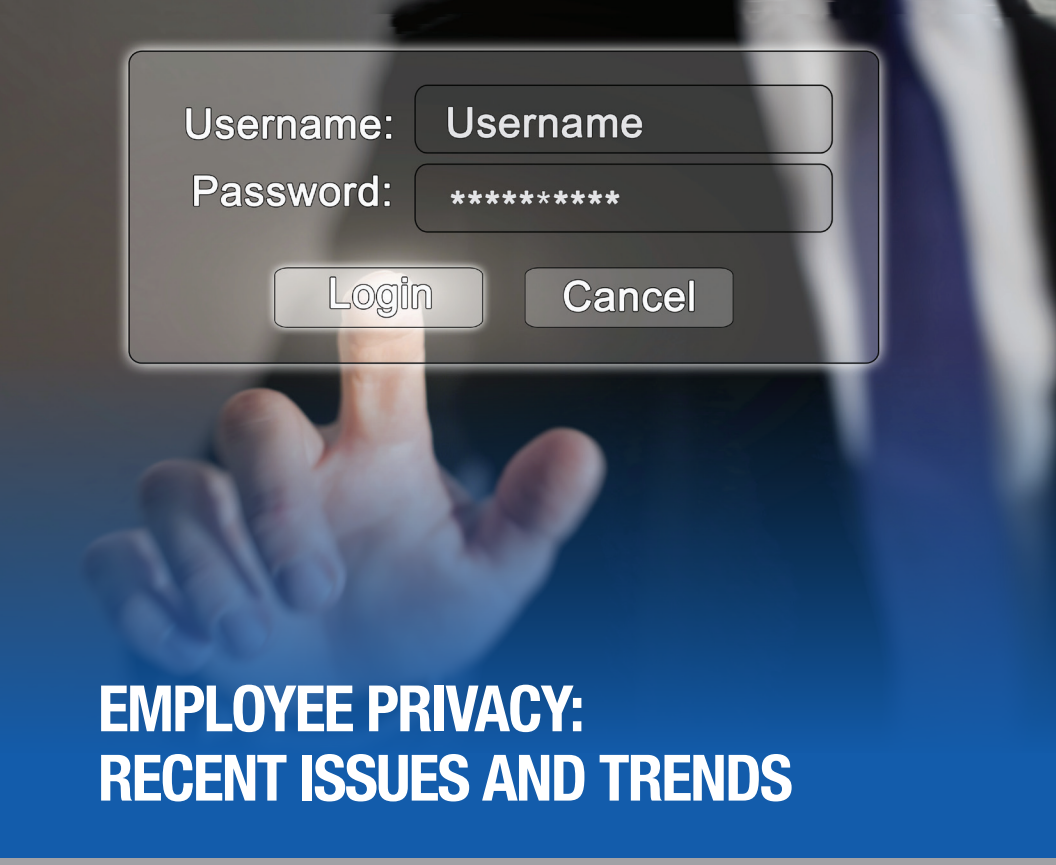
In light of the availability of punitive damages in wrongful discharge cases, flat back and front pay damages are not necessary to punish an employer. Certainly, the justification for this approach is consistent with West Virginia law. It encourages individuals to seek productive employment in the work force. If, for whatever reason, they cannot find work, they are not penalized because the burden of proving mitigation remains with the employer. Likewise, eliminating the maliciousness exception comports with the original intent of the *Mason County* rule, which was created to address situations where neither future lost wages nor punitive damages were available.

Instead of a mechanism to make wronged individuals whole, wrongful discharge cases have became a source of potential windfalls in West Virginia.

Certainly, this approach does not let an employer "off the hook" for its conduct because the jury could still be instructed on punitive damages. If a jury is compelled to punish an employer, it may due so, though subject to the constitutional scrutiny that is presently absent for a flat wage loss award. In this way, the *only* way an employer gets hit with both punitive damages and unmitigated wage loss is if it fails to prove that the employee mitigated or could have mitigated his lost wage damages. In that case, the employer has little upon which it can reasonably complain.

A solution is unquestionably needed. Instead of a mechanism to make wronged individuals whole, wrongful discharge cases have became a source of potential windfalls in West Virginia. Multi-million dollar awards have set dangerous expectations of entitlement to plaintiffs. Even in cases where plaintiffs have mitigated their losses, juries have been instructed to simply ignore mitigation if malice is found, resulting in clearly duplicative punitive damages. Changes need to be made soon if West Virginia ever hopes to escape its label as a judicial hellhole.

WEST VIRGINIA CHAMBER



EMPLOYEE PRIVACY: RECENT ISSUES AND TRENDS

By: Karina R. Kendrick, Jackson Kelly PLLC

Balancing an employer's business interests against employees' right to privacy is of significant concern to employers. Indeed, in recent years, courts and legislatures have put the issue front and center. Unsurprisingly, the trend continues to be a tempering of employer rights in favor of expanding employee privacy.

By way of example, a number of jurisdictions have enacted legislation that prohibits employers from requesting job applicants' criminal history information on employment applications. Most recently, Minnesota enacted a "Ban the Box Law" which prohibits employers from including criminal history checkmark boxes on employment applications. Although the law does allow employers to inquire or require disclosure of criminal record information after an applicant has been selected for an interview, if no interview is contemplated, an employer may not investigate an applicant's criminal history until after a making a conditional offer of employment. Clearly, these laws and ordinances are of great concern to employers, and is an issue to watch for in the West Virginia Legislature's next session.

Similarly, on January 1, 2014 Oregon became the twelfth state to implement a "social media password protection law." The law applies to all employers, regardless of size or trade, and makes it unlawful for an employer to (1) request employees' or job applicants' social media account passwords; (2) require employees or job applicants to add the employer as a "connection" or "friend" on their social media account; (3) require employees or job applicants to access their password-protected social media account in the presence of an employer representative; or (4) retaliate against employees

or job applicants for refusing to disclose their passwords, refusing to "connect," or refusing to access their password protected account in front of an employer's representative. Although West Virginia has not yet enacted such a law, a bill was introduced in the last legislative session but did not pass out of the committee.

Unsurprisingly, the National Labor Relations Board ("The Board") has also recently weighed in on employee privacy issues. Most significantly, the Board has issued a series of opinions addressing social media implications in the workplace. For example, in a recent opinion the Board found that an employer violated Section 8(a)(1) of the National Labor Relations Act when it fired five employees based on Facebook posts and comments about a coworker who threatened to complain to management about an employee's poor work performance. Further addressing its stance on social media, the Board majority held that the Facebook conversation was concerted activity for the purpose of mutual aid and protection and protected under Section 7 of the National Labor Relations Act.

The Board has also taken aim at employers' social media policies. Specifically, the Board has found that an employer's policy violated the National Labor Relations Act where it (1) broadly prohibited, without qualification, disclosure of confidential and proprietary information; (2) broadly prohibited use of an employer's name or trademark; and (3) broadly prohibited posting "offensive, demeaning, abusive, or inappropriate remarks." In most instances the Board's analysis is fact specific.

Along the same lines, the Board has found non-disparagement and confidentiality clauses in employment agreements invalid where they broadly prohibit employees from publicly criticizing, ridiculing, disparaging or defaming the employer or in any way disclosing, revealing, or exposing other employees' personnel information. According to the Board, these restrictions could hinder employees in the exercise of their Section 7 rights and/or violate Section 8(a)(1) of the National Labor Relations Act. Accordingly, carefully draft all employment agreements and policies dealing with employees' use of or posting on social media networks.

In sum, employers must remain cognizant of the ever changing landscape concerning employee privacy as it continues to be at the forefront of legal reform. Although West Virginia has yet to join the fray of states implementing the employee protections mentioned above, the trend continues to spread and it is likely not far behind.



AFFORDABLE CARE ACT:

Which Employees Must Be Offered Coverage in 2015?

By: Jill E. Hall, Bowles Rice LLP

We have seen a remarkable number of changes to the health care system in this country during the past few years, many of which directly impact employers sponsoring group health plans for employees. Undoubtedly, no change has caused employers more angst than the Affordable Care Act's (ACA) "Employer Mandate," which requires employers with more than 50 full-time employees (or full-time equivalents) to offer affordable health plan coverage to all full-time employees and their dependents by January 1, 2015, or pay a penalty.[1] The ACA final regulations provide guidance to employers in determining which employees should be considered full-time. Many employers will be surprised to discover that identifying full-time employees, to whom offers of coverage must be made, is not a simple task.

Full-Time Employees The ACA defines a full-time employee as one who regularly works at least 30 hours or more per week. This is a departure from the standard 37.5 or 40 hours most employers use to measure full-time status. Employers should review their health plan documents and employee handbooks to ensure that the definition of "full-time," for purposes of health plan coverage, reflects the definition of full-time found in the ACA.

Variable Hour Employees Employers may have employees for whom it is not known how many hours will be worked from week to week. These employees are referred to as variable hour employees. The ACA regulations provide a safe harbor method for determining whether or not these employees should receive offers of coverage in 2015. Generally, an employer may measure the hours worked by a variable hour employee during a certain amount of time, known as a measurement period, lasting between three and 12 months. Those employees who worked, on average 30 hours per week during the measurement period, will be treated as full-time during a subsequent stability period, which lasts at least six months, or as long as the measurement period. During the stability period, variable hour employees are entitled to coverage under the applicable health plan regardless of how many hours actually are worked.

Seasonal Employees The ACA defines a seasonal employee as one whose customary annual employment period lasts six months or less during approximately the same part of the year, such as summer or winter. The ACA regulations provide that a seasonal employee need not be treated as a full-time employee, even if the employee is expected to work more than 30 hours per week during the applicable work season. Rather, seasonal employees may be subjected to the same look-back measurement rules that apply to variable hour employees.

2015 is swiftly approaching, and all large employers should be taking steps now to comply with the Employer Mandate provisions of the ACA. Identifying full-time employees, to whom offers of coverage must be made, is just one piece of the Employer Mandate puzzle, but it is a crucial one, as failure to offer coverage to virtually all full-time employees can result in steep financial penalties.

[1] Under certain conditions, employers sponsoring non-calendar year plans have until the first day of their plan year in 2015 to comply. Employers with fewer than 100 employees have until 2016 to comply.

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THE LATEST ON ARBITRATION AGREEMENTS IN THE EMPLOYMENT CONTEXT:

The Growing Acceptance of Using Arbitration Provisions and Class Action Waivers to Control Litigation Costs

By: Eric W. Iskra and Gordon L. Mowen II, Spilman Thomas & Battle, PLLC

Without a doubt, at least on a national scale, the number of employment-related disputes resolved through arbitration has risen dramatically over the past decade. This trend should gain momentum in West Virginia as a result of several recent W. Va. Supreme Court opinions, which have expressed a favorable position regarding the enforceability of such provisions. As discussed below, given that arbitration can be an effective mechanism to resolve disputes without the expense of traditional litigation, and the fact that West Virginia state courts appear to have shifted towards a "pro-arbitration" stance, West Virginia employers can benefit by incorporating arbitration agreements into the employment relationship.

Arbitration is a form of alternative dispute resolution that is generally the result of a contractual agreement between parties. It offers many benefits absent in traditional litigation. First, arbitration is a private, consensual proceeding, opposed to the judicial process, which is a public forum. It is also a less formal setting than the courtroom and typically faster-paced. This results in a potentially more cost-effective proceeding than litigating a claim in front of a judge or jury. In addition, the parties generally have a say in selecting the arbitrator (or arbitration panel). At the federal level, Congress enacted the Federal Arbitration Act as a way to ensure that arbitration should be considered an equal path for resolution of potential litigation compared to resorting to

the judicial process. And even more recently, arbitration provisions with class action waivers have become an effective tool to prevent class-related claims.

The W. Va. Supreme Court has traditionally applied its relatively strict unconscionability analysis to mandatory arbitration agreements. That is, a court may find an arbitration agreement, to be unconscionable if it determines the agreement was "unfair" in both a procedural and substantive sense. Generally, this requires a showing that (1) the employee was unable — perhaps due to age, complex terms in the contract, or a lack of sophistication — to understand the arbitration provision and/or class action waiver (procedural unconscionability) and (2) the contract unfairly favored one party — almost always the employer — over the other (substantive unconscionability). This may occur where the employer drafted the provision in a way that maximizes the employer's ability to compel arbitration while at the same time minimizing the employee's rights under the agreement.

Within the past year, the W. Va. Supreme Court has, on three occasions, rendered decisions that cast arbitration in new, favorable light. In *State ex rel. Ocwen Loan Servicing, LLC v. Webster,* the Court found an arbitration agreement procedurally proper as the provision and class action waiver within the employee's contract was written in all caps and in simple language. 232 W. Va. 341 (2013). Critically, the Court appears to have stepped away from the strict application of substantive unconscionability by stating that "a one-sided contract provision may not be unconscionable under the facts of all cases." *Id.* The Court further found the class action waiver provision enforceable by relying on a 2013 United States Supreme Court decision rejecting a per se rule of unenforceability and instead announcing that such determinations should be made relative to the specific facts and circumstances of each case. *Id.* Similarly, in *New v. GameStop, Inc.*, the Court found a signed arbitration and handbook acknowledgement form sufficient to create an enforceable arbitration agreement between the employee and employer. 232 W. Va. 564 (2013). There, the handbook contained a provision that it could be modified at any time by the employer but, importantly, the arbitration agreement document existed separate and apart from the handbook. Because of this distinction, the Court found the agreement was not substantively unconscionable (that is, the Court approved the scenario where, while the employer could modify the employee handbook on its own accord, it could not unilaterally modify the arbitration agreement). Finally, in June 2014, the Court upheld the enforceability of an arbitration agreement in the employment context even where its implementation occurred after the plaintiff's employment began because the agreement provided that "both" parties (employer and employee) agreed to arbitrate their respective disputes should any arise. *Toney v. EQT Corporation et. al,* No. 13-1101 (2014).

These decisions fall in line with the majority of federal decisions generally upholding the enforceability of arbitration agreements and class action waivers. Whether employers choose to draft arbitration provisions into their employment agreements should be decided on a case by case basis, but should also be approached with the understanding that arbitration, when properly utilized, represents a cost-effective, streamlined manner to handle legal disputes. Due in part to this consideration and the trend at the national level to uphold and enforce arbitration agreements and class action waivers, West Virginia state courts have begun to shift its traditional position to embrace such provisions, and West Virginia employers should consider following suit.

Drug Use in West Virginia: a Contemporary Plague?

By: Carolyn Wade, Steptoe & Johnson PLLC

A March 26, 2014 article published by Al Jazeera America was titled "As Coal Fades in West Virginia, Drugs Fill Void." As you might expect, the article generated a number of tweets debating the article's conclusions and the reactions thereto. That notwithstanding, the content was sobering.

The focus of the article was on McDowell County, described as "once the top producer of coal in the nation, now lead[ing] the state and the nation in overdose deaths". The principal of War's Southside School (K-8) was quoted as saying that "the advent of prescription pill addiction has been a game changer . . . the addiction got so bad that, on average, about 43 percent of my students had lost a biological mother or father, either from overdose or removal from their homes."

According to the article, in 2012 War's then-mayor, Tom Hatcher, talked about the area's overwhelming problem with prescription drugs. He reportedly said that he kept his bedroom door locked to keep his pill-addicted son from stealing to buy drugs. "Less than six months later, he was found murdered. His daughter-in law and her brother were charged with smothering him with a plastic bag while robbing him of $1,100 to buy drugs."

The problem is not confined to McDowell County. West Virginia, across the board, has among the highest, and in some cases, the highest rates for various statistics associated with drug abuse. Between 2007 and 2012, hospital discharges with drug-related diagnoses nearly doubled, and the rate of acute hepatitis C cases tripled. On October 7, 2013, the Trust for America's Health reported that West Virginia ranks first nationally in fatal overdoses, the majority of which are from prescription painkillers. Rates have increased by 605% since 1999 when the rate was 4.1 per 100,000 – in 2012, it was 28.9 per 100,000. According to a 2013 article in the Pittsburgh Post-Gazette, federal prosecutors said that West Virginia has had more incidents related to bath salts use than any other state, and the epicenter of the problem was thought by some to be Harrison County. While the leading drug of abuse was oxycodone, other opiates accounted for the highest percentage of treatment admissions in West Virginia at ***four times*** the national percentage (34.9 % as compared to 8.7 %). See *West Virginia Behavioral Health Epidemiological Profile, 2013,* published by the West Virginia Bureau for Behavioral Health & Health Facilities.

The problem spills over into the workplace. The Canadian Centre for Occupational Health and Safety notes the following effects of substance abuse:

- serious accidents
- interference with accuracy and efficiency of work
- after-effects of substance use (hangover, withdrawal) affecting job performance
- absenteeism, illness, and/or reduced productivity
- preoccupation with obtaining and using substances while at work, interfering with attention and concentration
- illegal activities at work, including selling illicit drugs to other employees
- psychological or stress-related effects due to substance abuse by a family member, friend or co-worker that affects another person's job performance.

Add to that the following statistics reported in the 2011 National Survey on Drug Use and Health:

- 65.9 % of those reporting illicit drug use within the past 30 days are employed full-time;
- 64.8 % of those employed full-time currently use alcohol.

It is no wonder that at some point, most employers find themselves compelled to respond to these issues.

Our state leaders are tackling the problems. The Governor's Advisory Council on Substance Abuse states that over 152,000 West Virginians are in need of treatment. Six regional task forces have been established covering all 55 counties, who are charged with developing initiatives in prevention, early intervention, treatment, recovery and "overarching" issues. While the regional task forces report progress in many of the areas that have been targeted, there are certain needs that they report as unmet and "bigger than us." One of those areas is *Employment & Workforce*, where they say there is a need to:

> "work with and educate the business community and to involve it in drug education and employment for individuals post-treatment or after leaving the correctional system (re-entry), including felony forgiveness and alternative sentencing."

They also identified the need for funding to hire more drug counselors/clinicians.

This recommendation has wide-ranging implications, and will undoubtedly be viewed as controversial as the lead-off article. Add to that the challenges employers already face with regard to developing effective and legal drug testing programs, and implementing drug-free workplace policies, and it is safe to say that it will take a tremendous amount of thought and energy to effect meaningful change. Without such change, however, the employment-related and other societal costs associated with drug abuse will continue to decimate our state.

For more information, go to the web and visit the West Virginia Governor's Drug Free Work Force site. There is a portal for employers. In it, you will find valuable resources, such as the *Employer's Guide to Workplace Substance Abuse: Strategies and Treatment Recommendations and Money Saving Options for Your Business*. We hope this information helps you as you are called upon to respond to what is clearly one of the Mountain State's most serious health problems.

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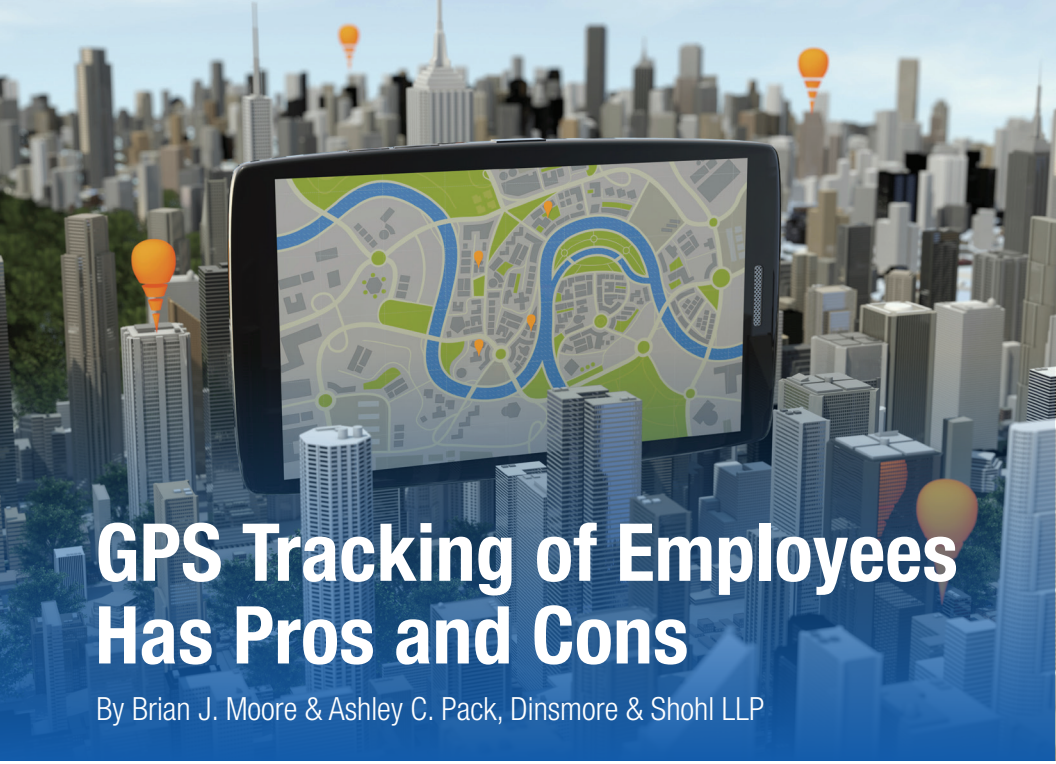

GPS Tracking of Employees Has Pros and Cons

By Brian J. Moore & Ashley C. Pack, Dinsmore & Shohl LLP

Like millions of Americans, Michael Cunningham took his family on vacation in the summer of 2008. Unlike other travelers, though, the twenty-year director of staff and organizational development for the State of New York was being watched. Unbeknownst to Cunningham, his employer had launched an investigation into the accuracy of his time sheets and placed a Global Positioning System ("GPS") tracker on his personal car. It recorded the location of his car 24 hours a day, including his daily commute, his evening and weekend social activities, and his vacation.

After he was fired, Cunningham sued the State of New York, challenging the use of the tracking device on his personal vehicle. Both the trial and state intermediate appellate judges condoned the use of the device, noting that he did not have a reasonable expectation of privacy in keeping the movements of his car secret. The Court of Appeals of New York, however, reversed. The Court held that, although the employer could place a GPS tracker on the employee's vehicle to monitor his movements during the workday, the employer had exceeded the scope of allowable search by tracking the employee during evenings, weekends, and his vacation.

GPS tracking of employees is a trend that is likely to continue as more devices become equipped with such technology and more employees work in non-traditional environments. GPS tracking provides a relatively easy and inexpensive tool for companies to increase efficiency, monitor employee behavior, and ensure the accuracy of recorded work time. For example, transportation companies such as UPS and FedEx use vehicle monitoring technology that allows them to track the movements of their drivers. Smaller companies have started using applications ("apps") such as AirWatch to allow them to monitor the daily travels of employees through smartphones.

While all of this modern technology may sound great to employers, it does have its drawbacks. Employers may go too far, and subject themselves to liability for invasion of privacy. As a more practical matter, employees may resent employers who "spy" on them. Nevertheless,

employers who want to implement GPS tracking of employees should stay up-to-date on the law and follow the best practices below.

The trend among courts is that the reasonable use of GPS tracking is permissible. Most courts, however, including West Virginia's Supreme Court, have not yet had the opportunity to rule on the issue. Moreover, several states have introduced laws that restrict the use of GPS tracking. Texas, Delaware, and California, for example, have enacted statutes requiring consent from the individual being tracked before tracking can be implemented. Connecticut requires employers to provide written notice to employees before they commence tracking.

Tracking employees with GPS tracking can be a helpful tool to any employer managing a workforce that travels or telecommutes. The pitfalls are serious enough, however, that employers should give careful thought to their plans and seek guidance from an employment lawyer prior to implementation.

In the private sector, employers who wish to utilize GPS tracking can help avoid legal liability by taking the following steps:

First, employers should make themselves aware of their state's laws governing the use of GPS tracking. In West Virginia, neither the courts nor the legislature have addressed the issue.

Second, employers should notify their employees before tracking them. This can be done either through an employment contract (for those employees who have them) or through a company policy. Employees who receive notice that they may be tracked do not have a reasonable expectation of privacy, a key point for courts.

Third, employees should sign waivers agreeing to tracking. Where employees consent to tracking, courts will likely find the employees enjoyed no reasonable expectation of privacy. Employers must exercise caution, however, both in drafting the waiver and ensuring that the scope of tracking does not exceed what the waiver specifies.

Finally, employers should make sure they have investigated and invested in an accurate tracking system. There have been cases of employers accusing employees of being in an improper place, only to eventually find out that the employee was next door at an appropriate location, but that the GPS system was slightly inaccurate. Thankfully, today's systems are extremely accurate.

THE NLRB AGENDA: AMBUSH ELECTIONS AND UNION E-MAIL

By: Mark A. Carter, Dinsmore & Shohl LLP

The National Labor Relations Board (NLRB) has an adventurous agenda. Newly constituted and feeling the pressure of an end to the Obama Administration, the agency is focused on two objectives that will redefine labor organizing in the twilight of its control of the bureaucracy.

The Ambush Election Regulation

Foremost among the NLRB's goals is the implementation of the highly controversial "ambush election" regulation. At its core, the proposed regulation is designed to dramatically shorten the period between the filing of a representation petition to unionize a workforce and the election and certification of the petitioning union. Currently, it takes at least 25 days from the date of a petition to hold an election to certify a union. In practice, the NLRB has reported that the majority of election periods are held within 42 days. The "ambush election" regulation removes the 25 day minimum period and would pave the way for election periods in as little as 14 days. Beyond that, the regulation eliminates the right of an employer to make pre-election appeals of critical rulings on the composition of the unit of employees eligible to vote; requires a hearing on pre-election issues within seven days of the filing of the petition; prohibits employers from raising issues on appeal concerning the petition of the union that it fails to identify in that hearing; requires the employer to file a comprehensive *"statement of position"* at the pre-election hearing; and requires the employer to provide the petitioning union with its employees' e-mail addresses and telephone numbers prior to the election, as well as their mailing addresses as is required now – among other new obligations.

The regulation[1] is not new. It was originally proposed in June of 2011, but was invalidated by the courts.[2] In January of 2014, the NLRB withdrew the proposed regulation and on February 6, 2014 filed a notice of proposed rulemaking seeking to finalize the regulation again.

1 (RIN 3142-AA08)
2 See, Chamber of Commerce v. NLRB, 879 F.Supp.2d 18 (DDC 2012)

The American business community is justifiably very concerned about the regulation, as well as the leadership of the U.S. House of Representatives. Chairman John Kline of the House Education and The Workforce Committee wrote that:

> "(t)he ambush election proposal gives employers only seven days to find legal counsel and appear before an NLRB regional officer at a representation hearing. During that brief period of time, employers will have to identify every possible legal concern or basically forfeit the ability to raise additional concerns during the course of the hearing. The rule also delays answers to important questions such as determining the appropriate bargaining unit and voter eligibility, until after workers have voted. Additionally, the proposed rule jeopardizes worker privacy by delivering to union organizers employees' names, home and email addresses, work schedules, and other personal information. It's been almost three years since this proposal was first introduced and it is just as bad now as it was back then …"

Employee Use of Employer's E-mail Systems

The NLRB is simultaneously seeking to grant employees a right to use their employer's e-mail systems for union organizing activity. Currently, employees have no right to utilize "work" e-mail to circulate correspondence designed to persuade fellow employees to support a union. The logic is simple: "work" e-mail is used for accomplishing work, not extracurricular activity apart from work. That principle was recognized by the NLRB in the landmark case of *Register-Guard.*[3] Register-Guard expressly permits employers to craft and enforce policies that prohibit non-work-related e-mail communications on the e-mail systems purchased by employers.

On April 30, 2014, the NLRB invited interested parties to file "friends of the court" briefs in *Purple Communications, Inc. and CWA.*[4] This invitation signals that the NLRB will use this litigation to overrule Register-Guard and create a new rule requiring employers to permit employees to use their work e-mail accounts for "protected and concerted activity" – a description that includes union organizing.

The management community has objected to any change to the rule established in *Register-Guard.* Beyond the simple fact that employers ***own*** the e-mail systems that they would be compelled to cede for the purpose of union organizing, employers have objected on the basis that once the rule took effect, it would jeopardize the legal expectation of employers that employees are working during scheduled work time. Providing employees with a right to use work e-mail accounts for union organizing invites the likelihood that employees will receive e-mail from non-work-related parties, such as unions, and have a right to respond, thereby diminishing the amount of work an employee produces. Beyond that, such a rule would call into question the current right of employers to review employee e-mails on work accounts to accomplish many legitimate and mandatory tasks,[5] because the NLRB prohibits an employer's illegal surveillance of an employee's expressions of protected and concerted activity.

Despite these very legitimate arguments, the NLRB is likely to create and enforce a right of employees to use their employer-provided e-mail accounts until such time as the courts overrule the decision or a new NLRB rescinds it. Employers will be advised to monitor this case and prepare for its implementation.

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3 351 NLRB 1110 (2007)
4 Cases 21-CA-095151, et al.

5 Such as to insure the employees are working in a hostile-free environment and to investigate workplace discrimination claims.

SOCIAL MEDIA

THE NEW FRONT IN THE WAR WITH EMPLOYEES (AND THE GOVERNMENT)

By: Thomas S. Kleeh, Steptoe & Johnson PLLC

Overview

Social media use has increased dramatically. Facebook grew from 1 million monthly users in 2004 to more than 1.2 billion monthly users by the end of March 2014.[1] YouTube now receives 1 billion unique monthly user visits.[2] Even Instagram sees 60 million photos uploaded daily.[3] Some of this participation occurs in the workplace. A 2012 survey found that 75% of employees access social media on the job at least once per day, while 60% access it multiple times per day.[4] Employers face several potential legal issues related to social media, including hiring implications, ownership of social media accounts, concerted activity/employee discipline, and video and photo sharing. The most problematic aspect of those issues is the ever-changing playing field. Employers would be wise to be able to spot the potential problems.

Hiring/Background Checks

Several states enacted legislation prohibiting employers from requesting or requiring that an employee or applicant provide their username and password or log into their account in the presence of the employer.[5] There still may be a wealth of publicly available information through Google and/or Facebook searches – however, using such tools to investigate prospective employees can provide information not otherwise available in the hiring process such as age, race, disability status or other protected class status. Having such information can lead to an increase in discrimination claims and charges. Thus, prospective employers must be careful if they use social media to check references, educational history, and licensure/certifications only.

1 *Statistics.* Facebook, http://newsroom.fb.com/company-info/ (last visited June 23, 2014).

2 *Statistics.* YouTube, https://www.youtube.com/yt/press/statistics.html (last visited June 23, 2014).

3 *Our Story.* Instagram, http://instagram.com/press/# (last visited June 23, 2014).

4 Silk Road, *Social Media & Workplace Collaboration* (2012), available at http://pages.silkroad.com/rs/silkroad/images/Social-Media-Workplace-Collaboration-SilkRoad-TalentTalk-Report.pdf.

5 These states include Illinois, Maryland, Michigan, Delaware, New Jersey, Utah, Nevada, New Mexico, Arkansas, Colorado, Washington, California and Oregon.

Ownership of Social Media Accounts

Some employees create and operate social media accounts on behalf of their employer. When the employee leaves, who owns the account? The United States District Court for the Northern District of California addressed this issue in *PhoneDog v. Kravitz*. Noah Kravitz worked for PhoneDog for four years as a Twitter blogger before leaving in 2010, after amassing 17,000 followers. Kravitz refused to surrender the account, so PhoneDog sued, seeking damages totaling $340,000. Although Kravitz and PhoneDog ultimately reached a confidential settlement, the Court found Kravitz's refusal to surrender the account and password could be a misappropriation of trade secrets.[6] Further, the Court found that upon development of the evidentiary record, PhoneDog could establish their right to possession of the Twitter account and password.[7] Thus, employers should contractually address social media account ownership prior to employee separation or termination.

Concerted Activity/Employee Discipline

If an employee posts disparaging remarks about a supervisor or employer, may that employee be terminated? Generally, under the National Labor Relations Act, employees may discuss their wages, hours, and terms and conditions of employment with each other for their possible mutual benefit without fear of interference or reprisal. This policy applies to both union and non-union employees, and protects such concerted activity in cyberspace and on social media.

The National Labor Relations Board ("NLRB") has taken a significant interest in social media policies and employer discharge or discipline decisions based on an employee's social media activity. The General Counsel's Office has issued three different memorandums on the issue and has shown no sign of slowing down. At this point, no clear guidance on what is permissible or impermissible in policies can be gleaned from the NLRB's written pronouncements. Employers should be cautious when drafting social media policies or considering discipline of employees based on social media posts or activity. The internet is fast becoming the new water cooler.

Video and Photo Sharing

As most phones, tablets and similar devices are equipped with cameras capable of taking photographs and/or videos, special mention of video or photo sharing policies is required. This is another area of interest to the NLRB. Giant Food, LLC instituted a social media policy banning employees' use of photographs or videos of company premises, processes, operations or products which include confidential information. In a 2012 advice memo, the NLRB found this prohibition unlawful because it could "reasonably be interpreted to prevent employees from using social media to communicate and share information" regarding their protected concerted activities through pictures or videos.[8] The NLRB clearly signaled that it considers an employee's right to engage in protected concerted activity supersedes an employer's privacy and confidentiality concerns.

Conclusion: How Should Employers Deal with Social Media?

Employers may consider developing a social media policy and training its employees accordingly. However, social media in the workplace is a developing body of law. Further, many employers already have rules governing conduct, such as sexual harassment, disclosure of proprietary information, and use of electronic equipment. A social media policy may be appropriate, however, to ensure better managerial control, maximize productivity, and protect confidential information. Generally, an employer's social media policy should be narrowly tailored and consistent with other company policies. A narrowly tailored social media policy that cannot be read to infringe on employees' right to engage in protected concerted activity is most likely to withstand review by the NLRB.

6 *PhoneDog v. Kravitz*, No. C 11-03474, U.S. Dist. LEXIS 129229, at *19-20 (N.D. Ca. Nov. 8, 2011).
7 *Id.* at *26-27.
8 *Giant Food LLC*, 05-CA-064793, 05-CA-065187 and 05-CA-064795, 2012 NLRB Lexis 896, at *26-27 (N.L.R.B. Mar. 21, 2012) (released July 18, 2013).

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