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### MESSAGE FROM THE CHAIR

To the friends of Cozen O'Connor:

Our Fall 2010 Labor and Employment Law Observer covers topics of interest to in-house counsel, human resources professionals and corporate management. These articles include:

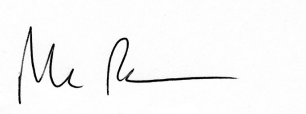
- A discussion of Pennsylvania's new law regarding classification of independent contractors in the construction industry;
- An update of the NLRB's recent decisions;
- A discussion of electronic monitoring and social networking in the workplace;
- Recently imposed requirements regarding nursing mothers in the workplace; and
- Current immigration issues.

You can read about these and other recent labor and employment developments in this issue of the Observer.

We welcome your inquiries on the articles in this Observer, other matters of interest to you and suggestions for future topics.

Have a wonderful Fall.

Verv trulv vours.



**Mark J. Foley**

Chair, Labor & Employment



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### PENNSYLVANIA ADOPTS NEW STANDARDS FOR INDEPENDENT CONTRACTORS IN THE CONSTRUCTION INDUSTRY

On October 13, 2010, Pennsylvania Governor Ed Rendell signed "The Construction Workplace Misclassification Act." This law establishes a test to determine if a construction industry worker is an independent contractor or an employee for purposes of the workers' compensation and unemployment compensation laws. It is aimed at eliminating misclassification in Pennsylvania's construction industry by establishing three factors that must be met for a worker to be properly deemed an independent contractor. An individual who performs services in the construction industry for remuneration is an independent contract only if:

1. "The individual has a written contract to perform such services;"
2. "The individual is free from control or direction over performance of such services both under the contract and in fact;" and
3. "As to such services, the individual is customarily engaged in an independently established trade, occupation, profession, or business."

To be classified as independent contractors, individuals must not only possess their own tools, but they must also maintain liability insurance of at least \$50,000. In addition, they must expect to realize a profit or loss, must perform the services through a business in which they have a proprietary interest, and must maintain a business location separate from the location of the person for whom the services are being provided. They must also either hold themselves out to the public to perform similar services or have a history of doing so while free from direction or control by others.

*"... Intentional violations of the law are treated as criminal misdemeanors, while unintentional violations are treated as summary offenses and subject to a fine of up to \$1,000."*

Under the law, each person misclassified as an independent contractor may be the basis for a separate offense. Intentional violations of the law are treated as criminal misdemeanors, while unintentional violations are treated as summary offenses and subject to a fine of up to \$1,000. Prior convictions may be used as evidence of intent. The secretary of labor and industry may also assess civil penalties of up to \$1,000 for a first violation and up to \$2,500 for each subsequent violation. For intentional violations, the secretary may also petition the court to issue a stop-work order on the construction project requiring the cessation of work by individuals who are improperly classified as independent contractors. The new law goes into effect on February 10, 2011.

The secretary of labor and industry is required to create a poster for job sites which outlines the requirements and penalties under the law.

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*For more information on the new standards, please contact Jeffrey I. Pasek in the firm's Philadelphia office at 215.665.2072 or [jpasek@cozen.com](mailto:jpasek@cozen.com).*

### NLRB UPDATE - BIG LABOR STARTS TO GET ITS MONEY'S WORTH

After seeing its number one legislative priority — the artfully named Employee Free Choice Act (EFCA) — languish in the Senate, organized labor may have wondered where the return on investment was from the millions spent in the 2008 election cycle to elect a pro-labor president and solid Democratic majorities in Congress. The answer, as many observers predicted once passage of EFCA began to seem unlikely, appears to be at the National Labor Relations Board (NLRB). The NLRB now has a three-member Democratic majority of former union advocates who have begun to issue decisions on controversial topics that substantially favor union interests, and have telegraphed their intent to do more of the same. At the same time, the NLRB's acting general counsel recently announced new procedures and timelines for seeking injunctive relief under Section 10(j) of the National Labor Relations Act in cases involving unlawful discharges during union organizing drives, citing the "ineffective" nature of a reinstatement order following

ordinary Labor Board processes. All of this activity points toward even more union-friendly decisions by the Labor Board in the months to come.

### **BEWARE THE BANNER**

On August 27, 2010, the Labor Board issued a decision expanding the weapons labor can use to pressure neutral employers: permitting the display of large banners immediately outside neutral employers' places of business, so long as the union representatives holding them remain stationary and do not patrol back and forth like traditional pickets. *United Brotherhood of Carpenters, Local Union No. 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (August 27, 2010). In the *Carpenters* case, the union displayed banners outside the workplaces of three neutral employers (two hospitals and a restaurant) to protest the use of nonunion contractors either at the neutral site or at another facility owned by the neutral company's parent. The banners were three or four feet high and ranged from 15 to 20 feet in length, and contained the typical "SHAME ON" condemnation of the neutrals, or in the case of the restaurant, "DON'T EAT RA SUSHI." The banners were held by union representatives who remained stationary, and were placed as close as 15 feet to the entrance of the neutral facility. Union representatives also distributed handbills to passersby explaining the nature of the dispute with the nonunion contractors and the union's belief that by utilizing those contractors, the neutral employers were destroying area standards.

*"... unions may be emboldened to push even closer, to man the banner with more union representatives, or to try other more confrontational tactics."*

The Labor Board majority held that such displays of stationary banners, unaccompanied by any picketing or other confrontational behavior did not "threaten, coerce or restrain" the neutral employers within the meaning of Section 8(b)(4)(ii)(B) of the Act. In doing so, the majority explained that nonpicketing conduct should be found to be coercive "only when the conduct directly caused, or could

reasonably be expected to directly cause, disruption of the secondary's operations." This decision drew a stinging dissent from members Schaumber and Hayes, who criticized the majority for adopting a newly created standard focused on "disruption" of the neutral's business. According to the dissent, such a standard is contrary to the statutory text, which does not require any "proof of actual or potential loss or damage" to establish a violation of the Act. Moreover, the dissent asserted that the majority's "new narrow definition of picketing and their new requirement for a showing of actual or threatened disruption before other secondary activity will be found unlawful unquestionably augments union power," and contravenes both the purpose of the Taft-Hartley amendments and longstanding board precedent, by putting neutral employers "right back into the fray" of labor disputes between unions and their primary targets.

Employers should expect unions to push the envelope under the board's new standard. The banner activity the Labor Board blessed in this case clearly has the potential to be disruptive. If a banner placed only 15 feet from a restaurant's entrance is not coercive, then unions may be emboldened to push even closer, to man the banner with more union representatives, or to try other more confrontational tactics. However, even under the board's new approach, blocking of entrances or massing of union representatives or patrolling back and forth will remain unlawful, and employers should carefully document other activities that accompany a stationary banner erected outside their places of business.

### **ON SECOND THOUGHT — REVIEW OF BUSH BOARD DECISIONS**

NLRB Chairman Wilma Liebman has made no secret of her distaste for any number of the Bush board's decisions, not just in dissenting opinions she wrote at the time, but in speeches and other statements she has given more recently. On August 27, 2010, the Labor Board issued two notices and invitations to file briefs in cases where the board granted review to address two of those decisions — the 2007 decision in *Dana Corp.* 351 NLRB 434 (2007), in which the board modified its recognition bar principles to allow employees a 45 day period following an employer's voluntary recognition of a union in which to file a decertification petition or to support a rival representation

petition filed by another union; and the 2002 decision in *MV Transportation*, 337 NLRB 770 (2002), in which the Labor Board reversed the “successor bar” doctrine adopted in *St. Elizabeth Manor, Inc.* 329 NLRB 341 (1999), which had provided an incumbent union with a “reasonable period of time for bargaining” once a successor employer’s obligation to recognize and bargain with the union attached before a decertification or rival representation petition could be filed. See *Rite Aid Store #6473 and Lamons Gasket Co.*, 355 NLRB No. 157 (August 27, 2010) (recognition bar) and *UGL-UNICCO Service Co.* 355 NLRB No. 155 (August 27, 2010) (successor bar).

In each case, Chairman Liebman and departing member Schaumber wrote separate opinions trading barbs as to the wisdom and propriety of granting review. With respect to the decision to grant review in *Rite Aid* to revisit the recognition bar doctrine, as modified in *Dana Corp.*, Schaumber (along with Hayes) argued that the actual experience under *Dana Corp.*, which involved 1111 requests for voluntary recognition, 85 election petitions, 54 actual elections, and only 15 elections in which employees voted against the recognized union, demonstrates that the “*Dana* principles are working well,” and that the Labor Board should not reverse that decision in response to the “mostly subjective and partisan claims” the dissenters anticipate the board will receive. Not to be outdone, Liebman shot back that she is “interested in what members of the labor-management community (and not just my fellow Board members) have to say about this data and its lessons.”

*“Employers should expect some resurrection of the successor bar doctrine and the elimination of the Dana Corp. procedures in voluntary recognition cases.”*

The sparring continued in *UGL-UNICCO*, in which Schaumber expressed his concern that the majority’s decision in that case, and other recent decisions, “augur movement toward an activist agenda that includes the likely reversal of several of the prior board’s most important decisions.” According to Schaumber, the law of successorship under the NLRA, including the absence of any “successor bar” doctrine, “is well-travelled and well-settled territory that needs no

reconsideration.” Liebman countered that she had dissented in *MV Transportation*, but she is “open to being persuaded either that my prior position was wrong or that even if *MV Transportation* was mistaken it should nevertheless be left in place.”

Historically speaking, *stare decisis*, the principle of generally deferring to a past decision, even if one does not necessarily agree with that decision, has been given lip service by board members, but is often ignored or “imaginatively” skirted. Notwithstanding the present board’s asserted desire to evaluate the “real-world” data and experience involving these decisions, the handwriting is on the wall. Employers should expect some resurrection of the successor bar doctrine and the elimination of the *Dana Corp.* procedures in voluntary recognition cases. Moreover, Schaumber is clearly correct that the Labor Board’s decisions “augur movement toward an activist agenda,” which will likely include the reversal of other Bush board decisions (many of which were, in turn, a reversal of Clinton or even Carter board decisions).

### **INJUNCTIVE RELIEF IN THE CONTEXT OF ORGANIZING CAMPAIGNS**

On September 30, 2010, acting general counsel Lafe Solomon issued a memorandum (GC 10-07) to the NLRB’s regional offices emphasizing that the general counsel’s office will be focused on ensuring, “that effective remedies are achieved as quickly as possible when employees are unlawfully discharged or victims of other serious unfair labor practices because of union organizing at their workplace.” According to the memo, such unfair labor practices are particularly troublesome because an employer “nips in the bud” its employees’ efforts “to engage in the core Section 7 right to self organization.” Moreover, an employer’s discharge of a union organizer sends a chilling message to other employees that “they too risk retaliation by exercising their Section 7 rights,” and deprives those employees “of the leadership of active and vocal union supporters.” Because reinstatement following a hearing conducted pursuant to normal Labor Board procedures may not be ordered until substantial time has passed, and discharged employees may no longer desire reinstatement, the general counsel views those procedures as “ineffective to protect rights guaranteed by the Act.”

To address this potential problem, the general counsel's memo outlines a timeline and procedures to be used in such "nip-in-the-bud cases" to ensure Section 10(j) injunctive relief is considered and pursued in a timely fashion. First, organizing campaign discharge cases should be identified "as soon as possible" after a charge is filed. A lead affidavit should be taken within seven calendar days of filing the charge, and all of the charging party's evidence should be obtained within 14 calendar days of filing the charge. If the evidence gathered supports a prima facie case on the merits and suggests the need for injunctive relief, the regions are instructed to notify the charged party that Section 10(j) relief is being considered and request a position statement on that issue within seven calendar days. A regional director should normally make a determination on the merits of the case within 49 days and make a decision on the need for Section 10(j) relief within the same time. Complaints should be issued quickly in these cases, and the general counsel's memo instructs the regions to schedule sufficient trial time to avoid the possibility of continuances. Moreover, the memo emphasizes that, "[n]either the discriminatees' lack of desire for interim reinstatement nor a union's abandonment of its organizing campaign are, in themselves, grounds to decline to seek Section 10(j) relief."

Concurrently with the issuance of this memo from the acting general counsel, Chairman Liebman issued a statement that the board members have also reviewed the Labor Board's procedures for Section 10(j) cases to expedite the process for authorizing the regions to seek injunctive relief.

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*For more information on any of the issues discussed in the above article, please contact Jeffrey L. Braff in the firm's Philadelphia office at 215.665.2048 or [jbraff@cozen.com](mailto:jbraff@cozen.com), or Andrew J. Rolfes in the firm's Philadelphia office at 215.665.2082 or [arolfes@cozen.com](mailto:arolfes@cozen.com)*

## EMPLOYER REVIEW OF EMPLOYEES' E-MAILS AND TEXT MESSAGES: TWO RECENT CASES PROVIDE CONFUSINGLY LITTLE GUIDANCE

Two recent decisions, one from the U.S. Supreme Court and another from the New Jersey Supreme Court, have addressed the extent and limits of an employer's right to review an employee's electronic messaging.

In June, the U.S. Supreme Court decided that a public employer (the City of Ontario, Calif., police department) did not violate the Fourth Amendment privacy rights of an employee, police sergeant Jeff Quon, when it audited text messages he sent and received on a department-issued paging device. *City of Ontario, California, et al. v. Quon, et al.* The Court's decision was narrowly tailored and applies only in the government employment context, in which employees may have constitutionally-based privacy rights. The Court specifically declined to issue a "broad holding concerning employees' privacy expectations vis-à-vis employer provided technological equipment." Nonetheless, employers and employees in both public and private employment settings may try to apply some of the Court's commentary to other contexts.

In *Quon*, the police department had a written policy notifying employees they should have no privacy expectation in their e-mails sent on employer devices, and had told employees both in writing and orally that this policy applied to text messaging on employer devices as well. When employees' texting went over monthly usage limits, the department had an informal practice of not reviewing messages to determine if they were work-related if the employee paid for the overage charges. Because two employees' usage often was above the monthly limit, the department conducted an audit of a two-month period to determine if it needed to expand its usage limits or if the overages related to nonwork use. During this audit, it discovered that Quon's usage was overwhelmingly for personal reasons and included sexually explicit messages. Quon was disciplined and he sued, claiming that his constitutional right to privacy under the Fourth Amendment was violated by the "search" of his text messages.

Noting that "many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency," the Court stated that, "it is uncertain how workplace norms, and the law's treatment of them, will evolve." The Court assumed for purposes of argument that Quon had a reasonable expectation of privacy in text messages sent on his employer-provided pager device, and that the review of those text messages constituted a search within the meaning of the Fourth Amendment. It assumed further that the principles applicable to a public employer's search of an employee's

office also apply to employer searches within the electronic communications sphere. The Court held that when a search is conducted for a non-investigatory, work-related purpose or for the investigation of work-related misconduct, a public employer's search is reasonable if it is "justified at its inception" and if the measures used in the search are "reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search."

The "search" at issue in *Quon* was found to be reasonable because its purposes were (a) to determine whether the messaging limit was sufficient, (b) to determine whether employees were being forced to pay out of their own pockets for work-related messaging, and (c) to ensure the police department was not paying for excessive personal messaging. The search also was limited enough not to be excessively intrusive because the employer did not look at the content of after-work-hours messages (apparently assuming those to be personal without review), and only looked at two months of messages. The fact that the review revealed details of Quon's personal life did not make the review unreasonable. The Court relied in part on Quon's status as a law enforcement officer to find that he should have expected scrutiny of his on-the-job communications, and also held that the method the employer chose to use to review the messages did not need to be the "least intrusive" method. Although they would not state it explicitly, it seems clear that all nine justices would have found the search in *Quon* reasonable in a private employment context as well.

Two months prior, the Supreme Court of New Jersey had issued its decision in *Stengart v. Loving Care Agency, Inc.* In *Stengart*, the employee sent e-mail messages to her attorney over a work-issued laptop computer, although she used her own personal web-based and password-protected e-mail account. The court found that the employee did not waive the attorney-client privilege under those circumstances, in part because of the wording of the employer's policy:

[T]he policy does not address the use of personal, web-based e-mail accounts accessed through company equipment. It does not address personal

accounts at all. Nor does it warn employees that the contents of e-mails sent via personal accounts can be forensically retrieved and read by the company. Indeed, in acknowledging that occasional personal use of e-mail is permitted, the policy created doubt about whether those e-mails are company or private property.

In *Stengart*, the New Jersey Supreme Court made it clear that even if the employee had been using her employer's e-mail account, once it was understood that the message was a communication between a client and an attorney, a privacy expectation arose because of the privileged nature of the communication.

What do these cases tell us? Despite careful drafting of electronic media policies, employers are still likely to face lawsuits over electronic monitoring or employer review of employees' electronic messaging. Some of the take-away messages are:

- Draft your policies using broad language regarding the types of messages, systems, and hardware that may be subject to review.
- Ensure that policies clearly provide that they cannot be modified by oral statements or company practice, but only in writing by the right persons with authority to do so.
- Apply your policies judiciously, and be respectful of employees' privacy in doing so. The court in *Stengart* obviously was concerned because the communication at issue was one the employee would have assumed was privileged and private, even though she happened to open it and review it on her work computer. The Supreme Court in *Quon* was impressed by the very tailored nature and purpose of the employer's review of employee messaging.

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*For more information on electronic privacy and the current issues presented above, please contact Sarah A. Kelly, in the firm's Philadelphia office at 215.665.5536 or [skelly@cozen.com](mailto:skelly@cozen.com).*

## RECENT GUIDANCE PROVIDED ON REASONABLE BREAKS AND PRIVACY REQUIREMENTS FOR NURSING MOTHERS

The highly publicized and much-debated health care reform act includes a provision that has not received significant media attention, but which may require employers to take immediate action. Section 4207 of the 2010 Patient Protection and Affordable Care Act (PPACA), signed into law by President Obama on March 23, 2010, amends the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207, by requiring employers to provide nursing or breastfeeding employees with reasonable break time to express their breast milk. (See P.L. 111-148, § 4207.) This PPACA provision took immediate effect.

Although the Department of Labor's Wage and Hour Division (WHD) has not yet issued regulations on the PPACA's nursing employee break requirements, on July 15, 2010, the WHD published "Fact Sheet #73: Break Time for Nursing Mothers under the FLSA" (fact sheet)<sup>1</sup> to provide general information regarding this new requirement.

*"The PPACA does not preempt state laws that offer greater protection for nursing mothers who work. Thus, employers should be aware of state or local laws ..."*

### BREAK TIME FOR NURSING MOTHERS

According to this recently enacted FLSA amendment, employers must provide: "Reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express milk." P.L. 111-148, § 4207 (emphasis supplied). Reasonable break time is not defined in the amendment and there is no specified limit on the number of breaks or amount of break time that a nursing mother may take per day. Seeking to shed light on this provision, the recently released fact sheet states that employers are "required to provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother." The fact sheet further states that the "frequency of breaks

needed to express milk as well as the duration of each break will likely vary."

Since the breast-feeding mother determines the amount and duration of her lactation breaks, employers should not hinder an employee's lactation break based on a supervisor's perception that the employee is abusing her break time. Rather, to the extent there is a concern about nursing mothers abusing their break time, supervisors should be encouraged to document their concerns and observations by keeping track of the time and length of each break.

### LOCATION FOR NURSING MOTHERS

The new FLSA amendment also requires employers to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by an employee to express breast milk." P.L. 111-148, § 4207. Thus, employers are required to provide not only the time, but also a private location for nursing employees to express their breast milk. The fact sheet states:

The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing mother's use, it must be available when needed in order to meet the statutory requirement. A space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient provided that the space is shielded from view, and free from any intrusion from co-workers and the public.

The federal law does not require employers to provide a lactation room per se, but the law is clear that some private space, outside of a bathroom, must be made available.

With that said, a variety of unanswered questions concerning the location for nursing mother breaks remain. Some industries may have physical space challenges that do not allow for a private space outside of bathroom facilities. And questions surface concerning whether locked doors are required or even advisable, whether an organization is required to build a space, and how to accommodate mobile employees, among others. Troubleshooting such employer-specific concerns will be essential.

1. See <http://www.dol.gov/whd/regs/compliance/whdfs73.pdf>.

### EMPLOYEE AND EMPLOYER COVERAGE

The PPACA's nursing mother break time requirement only applies to employees who are not exempt from the FLSA's overtime pay requirements. While employers are *not* required to provide breaks to nursing mothers who are exempt from the FLSA's overtime requirements, such employers might still be required to provide such breaks under existing state laws.

The recent nursing mother break time requirements are a mandate to all employers. But those employers with less than 50 employees need not provide such breaks if doing so would impose an undue hardship. Undue hardship is determined by analyzing "the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer's business." P.L. 111-148, § 4207. Notably, all employees who work for the employer, regardless of work site, will be counted to determine whether this exemption applies.

### COMPENSATING NURSING MOTHERS

Employers are not required under the FLSA to compensate nursing mothers for breaks taken for the purpose of expressing milk. This is an exception to the FLSA's rule that breaks of less than 20 minutes be paid as compensable time. Where employers already provide compensated breaks, however, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for their break time. Further, the FLSA's general requirement that the employee must be completely relieved from work duty or else the time must be compensated as work time equally applies to break time to express breast milk.

### INTERACTION WITH STATE LAWS

Currently 24 states, including California, Georgia, Illinois, and New York, as well as the District of Columbia, already have laws related to breast-feeding mothers in the workplace. The PPACA does not preempt state laws that offer greater protection for nursing mothers who work. Thus, employers should be aware of state or local laws that are more expansive or "employee friendly" than the federal counterpart. Currently 17 states have laws that require employers to provide lactation breaks. And, while many of these states have provisions that are similar to the PPACA, no state exactly mirrors the federal law.

Further, state law provisions that expand nursing mother protections vary. New York, for example, provides that nursing employees receive break time and accommodation for up to three years after the child's birth. Some states may require employers to make reasonable efforts to provide lactation rooms that are close to an employee's work area. Other states may require employers to provide refrigeration for breast milk and/or equip nursing break areas with electrical outlets so that breast pumps may be used. Understanding the governing state nursing mother break time requirements is a necessity because the more protective provisions will govern.

### WHAT EMPLOYERS SHOULD DO NOW

Since the PPACA went into immediate effect, employers should take prompt action to understand the PPACA and the applicable state nursing mother break time requirements as well as to bring policies and practices into compliance. Employers should consider the following action steps:

- **Change work policies and practices to allow for nursing mother breaks.** If the state has no law governing nursing mother breaks or if state law provides fewer employee protections than the PPACA, employers must amend policies to include reasonable breaks for nursing mothers in an out-of-sight location that is free from intrusion. If, however, an employer is operating in a state that provides greater protections than what the PPACA offers, the employer should review existing policies to confirm compliance with state statutes. Employers who operate a multistate business should review the laws of each applicable state and update the policies accordingly.
- **Revise employee handbooks, training materials and policy manuals.** After gleaning the applicable PPACA and state requirements for nursing mother breaks, employers should revise employee handbooks and other printed materials to reflect the new break policies. In addition, employers should revise manager and supervisor training materials to include the updated policies.
- **Train managers about new break time policies.** Employers should conduct training sessions for managers and supervisors to educate them about changes in the company's break time policies. Management should be informed that when qualifying



nursing mothers request breaks to express milk, managers must allow them to take a reasonable break in an appropriate location.

- **Identify spaces in each place of business that could be an appropriate nursing mother break location.** Employers should conduct a physical survey of each business site where employees report to work to identify places that can be used by mothers who wish to take breaks to express their milk. The PPACA does not require a separate lactation room be made available for this purpose; but it does require that employees be “shielded from view” and “free from intrusion” during their break. Remember, bathrooms cannot qualify as appropriate lactation locations under the PPACA.

The nursing mother break time requirement is a new federal law that requires immediate action. While we wait for the federal regulations and case law to develop, employers are well served to apply their best judgment and consult with legal counsel. Implementing a new national policy with potentially differing requirements across specific states may be a daunting task, but effective legal counsel can help employers navigate the myriad of differing state nursing mother break time laws and help employers troubleshoot company-specific issues where current lactation law may not yet be developed. Advance consideration of this law and a thoughtful and well-planned approach to implementation will ensure a smooth compliance process.

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*For more information on this or other similar issues, please contact Kimya S.P. Johnson in the firm's Philadelphia office at 215.665.2735 or [kjohnson@cozen.com](mailto:kjohnson@cozen.com).*

## THIRD CIRCUIT FINDS HAZLETON ORDINANCE UNCONSTITUTIONAL: PATCHWORK EMPLOYER-SANCTION IMMIGRATION LAWS ACROSS THE U.S. MAY BE NO MORE

Many employers are breathing a sigh of relief in Hazleton and perhaps in localities all across the country. On September 9, 2010, the U.S. Court of Appeals for the 3rd Circuit affirmed the lower court's decision that Hazleton's “Illegal Immigration Relief Act Ordinance”

was unconstitutional. Hazleton, a small town in Luzerne County, Pa., saw an influx of Latino residents in recent years. Triggered by a murder of a Hazleton native, allegedly by Latino illegal immigrants, the town sought to legislate immigration law within its borders. According to the ordinance, employers and landlords would face severe penalties for engaging, hiring, or renting to an illegal immigrant. Many residents, including the *Lozano* plaintiffs, saw the ordinance as an overly zealous attempt to weed “illegals” out. The city of Hazleton and others defended the ordinance, in light of the federal government's alleged failure to deal with the millions of unlawful aliens in the country. In 2007, Judge Munley of the Middle District of Pennsylvania found for the plaintiffs; the judge held that the ordinance's reach, scope, and effects were unlawful themselves. The 3rd Circuit affirmed this decision, and the ordinance now remains permanently enjoined.

### HAZLETON'S ATTEMPTS TO CURB UNLAWFUL EMPLOYMENT

The employment section of the ordinance placed burdens on Hazleton employers over and above current federal laws. For example, the ordinance imposed sanctions for employers who requested work from, let alone hired, an unauthorized worker; federal law has no similar prohibition against merely requesting work from someone who turns out to be unauthorized. Moreover, the ordinance provided only a circular definition of unauthorized worker as “any person who does not have the legal right or authorization to work due to an impediment in any provision of federal, state or local law ...” Without the benefit of the I-9 safe harbor under federal law, employers who failed to exclude unauthorized workers would be subject to public monitoring, revocation of licenses, and other penalties. On the flipside, if the employer terminated an employee who was in fact lawful, the ordinance created a private right of action against that employer by the terminated employee. The 3rd Circuit held that such requirements imposed by the city of Hazleton were preempted by existing federal law.

### CURRENT LAW GOVERNING AUTHORIZED EMPLOYMENT FOUND IN FEDERAL STATUTE

Currently, the Immigration and National Act (INA) is the federal law that governs employers' hiring responsibilities in all states. The law holds that employers must hire and retain

only those who are legally allowed to work in the United States. The method by which employers determine legal work status is through the I-9 form. Within three days of the first day of work, employers and the new employee must fill out the I-9 form, available at [www.uscis.gov](http://www.uscis.gov) under "Forms." The new hire must present documents to the employer to prove identity and work authorization; any documents listed on the I-9 form that appear legitimate on its face are to be accepted by the employer. Completed, signed, and properly stored I-9 forms can protect employers from liability for employees ultimately found by the government to be unauthorized.

### **FUTURE OF PATCHWORK IMMIGRATION LAWS?**

As local and state anti-illegal immigration proliferated across the country, a patchwork of immigration laws began to mark the nation. But as decisions like *Lozano v. Hazleton* in the 3rd Circuit come down, localities may now be thwarted from legislating their own variations of immigration law. Nevertheless, as Congress continues to delay in providing us with comprehensive immigration reform, localities like Hazleton may continue its push to control immigration within its own borders.

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*\* Elena Park was co-counsel in the Lozano lawsuit against the city of Hazleton.*

### **SOCIAL NETWORKING AND BLOGGING: WHAT EMPLOYERS NEED TO KNOW**

During the last several years, we've seen the explosion of social networking sites. According to Facebook's website, as of October 2010, there are more than 500 million active users of Facebook. Moreover, Facebook reports that users spend over 700 billion minutes per month on their site. See <http://www.facebook.com/press/info.php?statistics>. Twitter reported similarly astounding figures in October 2010: there

are about 165 million registered users and about 90 million tweets are created each day. See <http://blog.twitter.com>.

What does this mean for employers? Clearly, not all of these users Facebook and tweet after working hours. With these types of figures, employers need to be prepared for the infiltration of Facebook, Twitter, and other social media outlets into the workplace. Social networking can affect the workplace in a number of ways. The growing use of social networking sites can cause a loss of productivity during workdays. The ease with which individuals can post, and in turn publish to a larger audience, comments about themselves and co-workers can lead to strife and conflict in the workplace. Additionally, the ability to research job applicants online, and learn information relevant to an applicant's protected status, can lead to problems for employers in the hiring process. There are a number of steps that employers can take to minimize the negative effects of social media in the workplace.

*"First, and most importantly, employers should develop and publish a social networking and blogging policy."*

First, and most importantly, employers should develop and publish a social networking and blogging policy. The policy should set forth the employer's expectations on accessing social networking sites while at work, as well as the content of such postings whenever employees may post them. The policy should emphasize that employees are expected to focus on their work and minimize personal distractions during their working hours and that company computers and computer systems are to be used primarily for business purposes.

The substance of the policy can take many forms, depending on company needs. Employers drafting a policy should consider prohibiting employees from: (a) posting disparaging, defamatory, discriminatory, harassing, vulgar, obscene, abusive, or hateful comments regarding the company, its products and/or services, or any employees; (b) posting information regarding clients, vendors, and/or business associates; (c) using trademarks, logos, or other copyright-protected material of the company; or

(d) divulging other confidential information regarding the company or its business. Employers may also require employees to make clear that any postings regarding work-related matters represent their own views and opinions, and not those of the company.

Second, employers should enforce the policy evenhandedly, and be clear that discipline will result from conduct in violation of the policy. Employers should ensure that managers and supervisors do not make statements to employees that exceptions can or will be made to the policy.

Finally, employers should keep in mind that the rise in popularity of social networking sites, and the ease of researching individuals on the Internet through search engines such as Google, has led to another potential landmine for employers. It is all too easy for recruiters and human resource professionals to Google applicants or view applicants' social networking pages/profiles and, in the process, learn information relevant to an applicant's protected status. For example, a human resource professional may discover that an applicant belongs to a protected category, aligns him or herself with particular political viewpoints, or engages in unprofessional conduct. In such cases, even if the employer chooses not to employ that applicant for legitimate reasons, the mere fact that the employer performed the searches and viewed the results may be enough to cast doubt on the employer's legitimate reason for not hiring that applicant. Thus, employers need to use care in screening applicants and ensure that if recruiters use social networking or other related sites for screening, uniform standards are set for doing so.

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*Employers who would like to discuss social networking issues or who require assistance in developing and implementing a social networking and blogging policy should contact Carrie B. Rosen in the firm's Philadelphia office at 215.665.6919 or [crosen@cozen.com](mailto:crosen@cozen.com).*

## BIG BROTHER IN THE BIG APPLE: SUBTLE EROSION OF EMPLOYMENT AT WILL?

If you are an employer doing business in New York, you have taken great comfort over the years in citing the "at will" nature of an employee's job status when taking virtually any action ranging from discipline, to a diminution of salary or job responsibilities, to outright termination. New York has generally been considered a pro-employer jurisdiction, with employees often having to clear high hurdles before circumventing the cornucopia of legal precedent granting employers free and unfettered rights when it comes to beginning and ending one's employment.

However, over the past few years – and, perhaps, most pronounced this year – there has been a noticeable trend whereby the legislative and judicial branches in New York appear ready to impose their will on at will employment, and increase potential protections and remedies available to employees. This article discusses the subtle erosion of employment at will in New York, and the extent to which "big brother" might be directing a more watchful eye at employers who do business in this state.

### LONGSTANDING MURPHY RULE

It is axiomatic in New York that, in the absence of a constitutional or statutory violation, or an express contractual limitation, employment in New York is "at will" and an employer may discharge an employee for any reason at any time, with or without cause. The leading pronouncement on the at will rule in New York continues to be the New York Court of Appeals' 1983 decision in *Murphy v. American Home Prod. Corp.* In *Murphy*, the plaintiff asserted a common law cause of action for abusive discharge after he was fired from his job, he alleged, because of his age and his disclosure to management of certain accounting improprieties.

The lower court denied the employer's motion to dismiss the abusive discharge claim, but the appellate division reversed and dismissed plaintiff's complaint in its entirety. In affirming that decision on appeal, the New York Court of Appeals refused to recognize a common law cause of action for abusive discharge in light of the strong at will

presumption, specifically noting that “such a significant change in our law is best left to the Legislature.”

On the surface, not much has been done over the years to significantly erode the at will rule. While the unique facts of a particular case have given rise to a successful employee claim, particularly where the alleged harm is unrelated to the act of termination itself, courts remain loathe to erode the *Murphy* doctrine. Thus, courts have refused to create any public policy exception to the at will doctrine, and have refused to recognize fraudulent inducement claims where an employee alleges that he or she was fired shortly after accepting the job in reliance on a misrepresentation of material fact.

*“The New York Legislature has increasingly appeared intent on affording greater rights to employees.”*

Indeed, a corollary to the at will presumption is the well-established “business judgment rule” applied in employment discrimination cases to preclude a court from substituting its judgment for the business or financial judgment of an employer in the operation of its business.<sup>1</sup> And, for more than 20 years, the New York Legislature has joined the judiciary in refusing to accept the *Murphy* invitation to create a “significant change in our law.”

Until now.

Upon closer review, one could argue that certain legislative and judicial developments over the past couple of years, up to and including 2010, represent a shift in the desire to instill a big brother role in the workplace. The result has been the creation of additional obligations for employers and potential new causes of action and remedies for employees.

### THE LEGISLATURE’S ROLE

The New York Legislature has increasingly appeared intent on affording greater rights to employees. For example, in 2007, §§ 202-j and 206-c of the New York Labor Law were enacted to require employers to provide a leave of absence and break time respectively for employees to donate blood

and express breast milk. Section 191 of the labor law was amended that same year to compel employers to put in writing the terms of employment for all commissioned salespersons, including a description of how commissions and other monies earned are to be calculated, the frequency of reconciliation between any recoverable draw and an earned commission, and the manner in which any earned monies will be paid in the event employment is terminated.

The pro-employee trend continued in 2009 with two significant amendments to the New York Labor Law. First, § 195 was amended to require that employers notify all employees, in writing, of the rate of pay and regular payday designated by the employer, as well as the regular hourly rate and overtime rate of pay for all nonexempt employees. To tie a bow around the newly enacted labor law obligations, § 198 was amended to increase the monetary penalties for employers who violate the New York wage and hour laws, and also to expand potential liability for unlawful retaliation to officers or agents of any partnership or limited liability company.

We have only completed the first half of 2010, and already it seems that the New York Legislature (with the blessing of Governor David Paterson) is primed to continue regulating the working environment for employers operating in this state. First, the Legislature has proposed adding Article 20-D to the labor law to create a new private cause of action for an alleged abusive work environment (A5414/S1823).

*“... the New York Legislature is primed to continue regulating the working environment for employers operating in this state.”*

Under the proposed law, an employer would be liable for the existence of an “abusive work environment” within its control in which “an employee is subjected to abusive conduct that is so severe that it causes physical or psychological harm to such employee.” In turn, “abusive conduct” is defined as “conduct, with malice, taken against an employee by an employer or another employee in the

1. See, e.g., *Alvarado v. Hotel Salisbury Inc.*, 38 A.D.3d 398, 833 N.Y.S.2d 25 (1st Dep’t 2007); *Citibank, N.A. v. New York State Div. of Human Rights*, 227 A.D.2d 322, 643 N.Y.S.2d 68 (1st Dep’t), lv. to app. denied, 88 N.Y.2d 815, 651 N.Y.S.2d 17 (1996).

workplace, that a reasonable person would find to be hostile, offensive and unrelated to the employer's legitimate business interests." Obviously, within these defined terms are additional terms of art that are either further defined, or will require interpretation through inevitable lawsuits.

Critically, however, the proposed "abusive work environment" legislation marks a dramatic shift in the legislative desire to closely monitor and regulate the day-to-day operations of an employer's business and workforce. Indeed, one could argue that existing federal and state law provides sufficient redress to an employee who has been subjected to discriminatory or abusive conduct on the basis of a wide spectrum of protected classes.

Similarly, state law currently affords protection to employees in areas such as engaging in legal, off duty activities, certain leaves of absences, and anti-retaliatory proscriptions. This new law could threaten the well-established at-will and business judgment rules by creating a general civility code that empowers employees to litigate general workplace annoyances and frustrations, and reduce the ability of an employer (both large and small) to manage its operations. This bill passed the Senate and is currently held in committee in the assembly for consideration.

*"This new law could threaten the well-established at-will and business judgment rules by creating a general civility code that empowers employees ..."*

Second, the Legislature has proposed a new "Wage Theft Protection Act" to provide a host of new employer obligations and broaden the available remedies for aggrieved employees (A10163/S7050). For example, the proposal imposes certain meal and rest period obligations, requires that wage-related notifications be provided to employees every year for each employee (even if the employee received the notification in the prior year), and, for the first time, creates new rights to inspect or copy an employee's own personnel file. This bill passed the assembly

and is currently held in committee in the Senate.

Third, this past July, both houses of the Legislature passed this country's first Domestic Worker Protection Law. The law requires employers to give nannies, housekeepers, and other domestic workers one day of rest per week (or premium overtime compensation in lieu of the rest day), as well as three paid days off per year after the domestic worker has worked for the employer for a full year. In addition, the new law provides anti-discrimination and anti-retaliation rights to domestic workers, and establishes the number of hours constituting minimum daily and weekly working hours, above which the employer is required to pay overtime to the domestic worker. Governor Paterson has signed this new law.

### THE JUDICIARY'S ROLE

Efforts by the Legislature to increase the level of outside regulation of the workplace have seemingly been matched in recent years by the New York judiciary. Beginning in 2008, for example, New York's highest court determined a then-open-ended question of whether company executives were covered generally under the wage and hour provisions in Article 6 of the New York Labor Law.<sup>2</sup> The court held in *Pachter v. Bernard Hodes Group Inc.* that executives are included within the definition of "employee" for purposes of labor law coverage, and are only considered exempt from a requirement in Article 6 if the requirement expressly exempts executives.

More recently, courts in New York have interpreted New York City's local human rights law (NYCHRL) far more broadly than parallel state, and even federal, anti-discrimination laws. The genesis of this trend began in 2005 when the New York City Council amended the NYCHRL with the "Restoration Act," which unequivocally stated its purpose:

The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed.

2. *Pachter v. Bernard Hodes Group Inc.*, 10 N.Y.3d 609, 861 N.Y.S.2d 246 (2008).

Courts interpreted this “construction provision” to require a separate and distinct analysis for claims under the NYCHRL.<sup>3</sup> Analyzing such city-based claims more liberally, courts have refused to grant summary judgment for an NYCHRL claim even when identical claims under state or federal law might otherwise warrant dismissal.<sup>4</sup>

Then, on May 6, 2010, the New York Court of Appeals answered the following question certified by the U.S. Court of Appeals for the 2nd Circuit: whether the federal and state *Faragher/Burlington* affirmative defense to employer vicarious liability in harassment cases applies to claims under the NYCHRL.<sup>5</sup> Under that defense created in 1998, an employer can avoid liability in a case that does not involve a tangible employment action if (i) the employer exercised reasonable care to prevent and remedy harassment, and (ii) the aggrieved employee unreasonably failed to utilize the employer’s established preventative methods. While noting that it generally interprets state and local anti-discrimination statutes “consistently with federal precedent,” the Court of Appeals answered the question in the negative, ruling that “the plain language of the NYCHRL precludes the *Faragher- Ellerth* defense.”

*“.. the Zakrzewska decision signals a continuing landscape change, where the Court of Appeals seem ready to afford greater protections to employees in areas that traditionally have been open for New York employers to make their own decisions ...”*

In doing so, the court rejected the argument that the broader, more pro-employee language in the NYCHRL should be struck as inconsistent with state law, noting that, “[b]oth [state and city law] prohibit discrimination; NYCHRL § 8-107 merely creates a greater penalty for unlawful discrimination.”<sup>6</sup> The import of *Zakrzewska* is that employers operating in New York City — and their counsel — must reevaluate the value of certain claims brought by employees under the NYCHRL in light of the liberal standards required under that law and the inability to raise at least this one affirmative defense.

More generally, however, the *Zakrzewska* decision signals a continuing landscape change, where the Court of Appeals (and lower courts as well) seem ready to afford greater protections to employees in areas that traditionally have been open for New York employers to make their own decisions without significant second guessing.

### CONCLUSION

It remains to be seen whether recent legislative and judicial developments in 2010 are nothing more than a short-lived wave of pro-employee efforts and case-by-case holdings, or mark a definitive crossroads in the fundamental nature of employment in New York. While recent legislative and judicial pronouncements retain certain defenses and strategies for employers to defeat workplace claims – even creating new ones – it is clear that employers doing business in New York should be cognizant of the apparent trend and mindful of its effect on employee relations issues.

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*For more information on any of the issues discussed in the above article, please contact Michael C. Schmidt in the firm’s New York office at 212.453.3937 or mschmidt@cozen.com.*

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3. See *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 872 N.Y.S.2d 27 (1st Dep’t), lv. to app. denied, 13 N.Y.3d 702, 885 N.Y.S.2d 716 (2009)

4. See, e.g., *Dixon v. City of New York*, 2009 WL 1117478 (E.D.N.Y.); *Weiss v. JPMorgan Chase & Co.*, 2010 WL 114248 (S.D.N.Y.)

5. *Zakrzewska v. The New School*, 14 N.Y.3d 469, —N.Y.S.2d— (2010).

6. *Id.* at 481.

# e-DISCOVERY LAW REVIEW

SUMMARIES, EVENTS, NEWS AND ANALYSIS ON ELECTRONIC DISCOVERY ISSUES

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While many social media commentaries focus on the information obtained through social media, employers need to understand the ramifications of giving employees means to access that information in the first place.
- **Personal E-mail, Personal E-mail Account, Company-Owned System**  
Recent cases offer guidance to employers who seek to monitor or use an employee's personal e-mails that are sent through a personal (non-company) e-mail account, yet accessed or sent using the employer's computer system.
- **What Shirley Sherrod Can Teach Employers**  
Ms. Sherrod was forced to resign from the U.S. Department of Agriculture after a blogger posted limited excerpts of a speech she gave to the NAACP. Her departure is a call for caution to any employer that bases employment-related decisions on information obtained from the Web.

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