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Employer Liability For Employee Wrongs

By Jeffrey Pittman

The late Joe Paterno and the recent Penn State football scandal illustrate a growing area for employer liability. Penn State's knowledge of an employee's misdeeds — Jerry Sandusky — has opened the university to enormous liability. While outside observers may agree that Penn State deserves liability for ignored child abuse, other companies may find they too are liable for situations where they are not so clearly culpable.

In the Workplace

Employers today are collecting more information on their employees than imagined possible even a decade ago. Employee e-mail messages are monitored; text messages also are monitored if company telephones are used. Workplace cameras are common. Using GPS technology, tracking devices are inserted into company cars. Employers know exactly where employees are in real time. Internet use is recorded at work, tracking websites visited and pages opened.

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Recent Notable Employment Law Developments

By J. Ian Downes, Linda Dwoskin, Kate Ericsson, Melissa B. Squire and Jane E. Patullo

Developments in the labor and employment area continue at a rapid pace. Among the significant developments in recent months are decisions concerning novel issues arising under the Fair Labor Standards Act (FLSA) and the Pregnancy Discrimination Act (PDA), continued disagreement between courts and the National Labor Relations Board (NLRB) with respect to the validity of mandatory arbitration agreements containing class action waivers, and the efforts of Congress and state legislatures to curtail employer control over employees' social media accounts. Herein is a review.

1. Fourth Circuit: Pregnancy Discrimination Act Does Not Require Preferential Treatment

In a much debated case, the Court of Appeals for the Fourth Circuit recently concluded that the PDA does not require employers to provide special accommodations to pregnant employees. *See Young v. United Parcel Service, Inc.*, --- F.3d ---, 2013 WL 93132 (4th Cir. Jan. 9, 2013). The case arose after Peggy Young, a UPS delivery driver, took leave in July 2006 to try a third round of in-vitro fertilization, which was ultimately successful. Young subsequently gave UPS notes from both her physician and her midwife stating that she should not lift more than 20 pounds during her pregnancy.

Noting that the company identified the ability to lift up to 70 pounds as an essential function for all drivers, a UPS manager informed Young that she could not return to work with the lifting restriction in place, and was not eligible for light duty. Pursuant to UPS policy, light duty was only available to employees with work-related injuries, those with an Americans with Disabilities Act (ADA)-covered disability, and those who had lost their Department of Transportation (DOT)

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certifications. Young remained on an extended leave throughout her pregnancy, receiving no pay and ultimately losing her medical coverage. Following the birth of her child in April 2007, Young returned to work for UPS. She subsequently sued the company, alleging, among other things, claims of disability and pregnancy discrimination. The district court granted summary judgment to UPS .

On appeal, the Court of Appeals for the Fourth Circuit quickly disposed of Young's disability discrimination claim, finding that she offered no evidence suggesting that UPS believed her pregnancy substantially limited any of her major life activities. Turning to the "heart of Young's appeal," the court held that UPS did not violate the PDA through its policy limiting light-duty work and not making it available to pregnant workers. Citing statutory language, both Young and the American Civil Liberties Union (ACLU), which joined as an amicus, contended that the PDA requires an employer to provide pregnant workers with light duty if it does so for any other workers "similar in their ability or inability to work," even if the company does not do so for all non-pregnant employees.

The court rejected this argument, holding that interpreting the PDA in this manner would require employers to afford preferential treatment to pregnant workers in the form of accommodations and light-duty work "regardless of whether such status was available to the universe — male and female — of non-pregnant employees." The court explained that while "an explicit policy excluding pregnant workers" would violate the PDA, "no such policy exists here."

Instead, the court concluded that by limiting light duty to certain categories of employees, UPS crafted a "pregnancy-blind policy" which did not evidence discriminatory animus toward pregnant workers and did not run afoul of the PDA. Summary judgment was, therefore, affirmed in favor of UPS on Young's pregnancy discrimination claim.

While the *Young* decision is a victory for employers, requests for accommodation by pregnant employees must be evaluated on a case-by-case basis. Although pregnancy itself is not considered a disability under the ADA, certain pregnancy-related impairments — even though temporary — may constitute disabilities for which reasonable accommodations must be made. Furthermore, late last year, the Equal Employment Opportunity Commission (EEOC) declared in its draft strategic plan that the accommodation of pregnant employees will be one of its enforcement initiatives going forward. Congress is also considering a bill, known as the Pregnant Workers Fairness Act, which, if passed, would require employers to provide reasonable accommodations to pregnant employees and those with limitations following childbirth.

2. First Appellate Court Decision on FLSA's Nursing Mother Provision

In recent years, over 20 states have enacted lactation break laws, spurred by the steep influx into the workplace of women with infants and toddlers. In March, 2010, the federal Patient Protection and Affordable Care Act passed, adding to the Fair Labor Standards Act (FLSA) § 207(r)(1), a requirement that an employer provide a non-exempt employee with a reasonable break time to express breast milk for her nursing child for one year after the child's birth each time the employee has a need to do so, and a private place other than a bathroom within which to do so. Section 215(a)(3) of the FLSA prohibits an employer

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Disaster Planning May Reduce Workplace Violence Liability

By Terri Howard

The concept of workplace violence is not new, but it has experienced a recent increase in awareness due, in part, to the string of incidents that have occurred since the Aurora, CO, movie theater shooting last July. Shortly after that tragedy, the Sikh Temple shooting occurred in Oak Creek, WI, followed by a grocery store shooting in New Jersey, then a shooting outside a workplace near the Empire State Building in New York City and the Minneapolis sign shop shooting. After a short lull, another shooting occurred in the workplace as a result of domestic violence, this time at a salon and day spa in Brookfield, WI.

More Than Just a Concept

Unfortunately, the list of workplace shootings continues to grow. Social networking and the media helped turn these events into national headlines. But on a day-to-day basis, many incidents of workplace violence occur, and while they don't make the national news, their impact is still devastating for all those involved.

In the aftermath of these horrific events, questions and concerns naturally arise among managers, employees and even families about the possibility and potential prevention within our own communities and workplaces.

Terri Howard, Sr. Director at FEI Behavioral Health, is responsible for working with corporate clients to ensure companies are prepared for, can respond to and recover from, a crisis incident. She also coordinates the people support and psychological first-aid services for those impacted by the incident, and helps develop drills and exercises aimed at testing current plans and procedures.

"Those are natural concerns," said Dr. Vivian Marinelli, Senior Director of Crisis Management for FEI Behavioral Health. "After such horrific events, we all feel compelled to consider the safety of our own homes and workplaces."

The real question, though, especially for in-house lawyers and other corporate policymakers, is "What could have been done to prevent it?" Is there a way to develop policies and plans that might mitigate violence? Or, at least provide a warning?

Warning Signs

Past experience has shown that highly tragic incidences are not spur-of-the-moment occurrences. Often, the shooter has calculated his actions and developed a plan. In hindsight, there are patterns that become much easier to identify after the tragedy has occurred. Many of the recent workplace violence issues involved a disgruntled employee. Some triggers to look for in such a person are:

- Recent firing from the job;
- Unexcused and frequent absences;
- Depression or anger;
- Resistance to changes or procedures; and
- Noticeable change in demeanor or behavior.

Steps for Prevention

Employers have a duty to exercise reasonable care to protect employees against violent acts. The Occupational Safety and Health Act of 1970 (OSH Act) was passed to prevent workers from being killed or seriously harmed at work. Often, we think of the Occupational Safety and Health Administration (OSHA) as an agency to protect workers in factories, manufacturing and construction industries. While true, workplace violence also falls under the OSH Act. Under the General Duty Clause of the OSH Act, every employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

Legal counsel can advise employers how to comply with the Act and also assist with the steps to reduce the risk of liability of a violent employee. Here are some suggested steps:

- Conduct pre-employment background checks on every new hire.
- Ask for references and follow through with them.
- If the background check has you feeling suspicious, take the next step and conduct a criminal record check.
- If you know the person has a history of violence, don't hire him or her.
- Document all disciplinary actions.
- Have a written plan in place with discipline and action to be taken for disruptive behavior and follow through each and every time.
- Use annual reviews as a method of discussing performance and expectations. Often, these are the only times that managers get a feel for what's happening with an employee.
- Make other opportunities to observe and speak with employees, such as weekly/monthly staff meetings, all-employee functions, etc.
- Provide assistance through a company-sponsored Employee Assistance Program (EAP). A comprehensive EAP should provide counseling referrals for drug and alcohol abuse, marriage or family counseling, financial counseling, gambling addiction, and stress management. Also, an EAP can provide management consultations to walk managers through a difficult employee situation.
- Adopt a zero-tolerance policy for violent behavior.

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- Document all concerns raised by coworkers, and take action.
- Create a termination process. When an employee is fired or quits, immediately disable his computer, security pass and anything that would give him open access to the company.
- Take all concerns seriously. Establish a Threat Assessment Team whose responsibility is to review each and every threat made to an employee or supervisor. Under the OSH Act, if an employer has reason to know of possible workplace violence (*e.g.*, threats, intimidation) but does nothing to protect its employees, OSHA may impose civil fines and penalties of $5,000-20,000 per violation, depending upon the seriousness.
- Document all threats.
- Analyze the workplace and identify particular areas of risk. Is your reception area safe? Is there adequate lighting in your parking lot? If you don't already have one in place, install a security system in your office to ensure that the workplace is safe from outsiders.
- Employee break rooms should be accessed via a keypad or PIN number if possible.
- Based on your state laws, it would be wise to post or include in your employee handbook your company policy on handguns and weapons on company property.

Employers should consult with their legal counsel to determine if the above steps are adequate to protect their company from liability.

Training

Training and counseling programs are some of the best ways to prevent workplace violence. Employers can work with in-house counsel to write policies designed to assist troubled employees. Consider policies that:

- Allow time off for the employee to make doctor and counselor appointments.
- Transfer an employee away from a potential threat from another employee.
- Make training programs competency-based so that employees understand policies and behavioral expectations, as well as consequences of behavior.

Create a Crisis Plan

Perhaps the best policy lawyers can suggest is the development of a crisis or disaster plan.

"A crisis plan supports a company's liability position … "

"A crisis plan supports a company's liability position," says attorney Christine Liu McLaughlin from the Milwaukee, WI-based office of Godfrey & Kahn, S.C. "Keeping your employees safe and secure is of critical importance. There are legal and practical options that should be vetted ahead of time so you are prepared to act. Failure to act swiftly and effectively can lead to legal consequences, as well as negative aftereffects on the workplace."

It is important to note that preparation for crisis events, while no guarantee of prevention, can help limit the scope of the crisis as well as speed recovery, and it can reduce the cost of recovery, or potential lawsuits. For the business environment, this is crucial to the return of productivity.

"These events may appear to be random and chaotic," says FEI's Marinelli, "But for those involved, particularly when violent acts occur in the workplace, there is always a 'before, during and after.' We have to approach crisis at work in this context, as something we prepare for, manage as it occurs and address after the event."

When creating a crisis plan, it is important for in-house lawyers to consider the full impact of policies, not just before a crisis, but during and after as well. A good disaster plan will have a counseling component to it. The after-effects of a violent event at work can last for years, and if not addressed, have an enormously negative impact on the individuals, organization or community and leave the company open for potential legal ramifications.

Begin your crisis plan by conducting a proactive assessment of your company's risk areas to map the most appropriate prevention and response measures. This exercise should take into account multiple types of crises, including workplace violence, crime, natural disasters, infrastructure failure, and mass events such as terrorism.

During your assessment, you should:

- Establish detailed audits of your company's physical locations and their inherent risks — an office building in California, for example, is more prone to earthquakes than one in the Midwest. Or evaluate how many egress points are available for individuals to evacuate a building if necessary.
- Categorize employee roles and responsibilities with regard to risks they face — a cashier, receptionist or other front-line employee will face different risks than an employee working in the stockroom or back office.
- Consider the impact of social media — sites like Twitter and Facebook not only offer a platform for organizing crowd actions, they also provide insights on how a situation might morph and develop. It's important to take this into account when analyzing your company's risk.

Address the Risks

Once you have a better understanding of the risks, draft a formal

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crisis plan that details your specific response, as well as appropriate resources and roles for each staff position. The plan should incorporate step-by-step violence response protocols. This becomes your blueprint for action during a crisis and, as simple as it sounds, it's always comforting to have a written plan amid chaos.

Practice the Plan

Your preparation efforts shouldn't end with plan development. One of the most important steps in crisis management is regular training. In our experience, the best preparation must occur at the enterprise level. You can't just graft on a security approach and expect it to work. All your employees and on-site vendors must be familiar with your plan. This does not mean simply reviewing a piece of paper, but practicing through load testing, exercises and drills.

Employees need to be made aware of what they are expected to do when an individual become physical or when weapons are involved, for example. These procedures need to be simple and specific:

- Disengage from the violent individual.
- Keep yourself safe — leave the area.
- Call police and seek help immediately.

We've found that most violent incidents follow typical patterns of escalation. Being aware of these patterns can help reduce natural panic when a facing a real-life situation. We often compare this to fire drills — you become familiar with what to do when there is no fire, so you can respond via muscle memory if a fire occurs.

What if a Crisis DOES Occur?

After enacting your crisis plan, it's important to implement post-incident assistance programs that provide support and counseling for those affected. Remember, crisis events occur within communities and the long-term effects, like ripples in a pond, may continue to emerge for weeks or months. Ongoing stress counseling for employees or customers can be one of most essential aspects of a comprehensive crisis management plan.

Legal counsel should advise business clients to do whatever they can to recognize workplace violence and do what's necessary to prevent it. Through thoughtful, diligent preparation in developing safety measures and a crisis plan, your clients can offer their employees and customers a safer environment in light of potential crises. These steps will help minimize liability and provide a safe work environment for all employees.

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Most employers will soon routinely check employee personal, off-duty use of social media such as Facebook. Employee background checks are commissioned. All of this information provides actual or constructive employer knowledge of employees' deeds and misdeeds.

At what price does all the employee information come? One cost often ignored by employers is potential employer liability for employee wrongs (torts) committed outside the scope of employment. That is, employer knowledge of employee activities opens employers to responsibility for employee misdeeds. Consider Jerry Sandusky as an example.

The Sandusky Scandal

On Nov. 5, 2011, Jerry Sandusky was arrested, charged with sexually abusing eight boys over a 15-year period. On June 22, 2012, Sandusky was found guilty on 45 counts of sexual abuse. Beyond Mr. Sandusky, his former employer, Penn State University, is facing many civil lawsuits for his crimes.

Jerry Sandusky was hired by the Penn State University football team as a defensive line coach in 1969. Sandusky worked for the football program until he retired as defensive coordinator after the 1999 football season. After retirement, Jerry kept campus privileges, including a Penn State athletic office and keys to the team locker rooms.

Sandusky was convicted for assaulting young boys in various locations, including the Penn State locker rooms and shower facilities. His assaults occurred before and after he left employment with the football program. According to a 267-page report commissioned by Penn State, the Freeh Report, Penn State leaders, including former President Graham Spanier and the late football coach Joe Paterno, knew about Jerry Sandusky's sexual abuse of young boys. That employer knowledge and absence of immediate corrective action opened the university to liability. As a result, legal experts estimate Penn State could eventually agree to lawsuit settlements and pay judgments exceeding $100 million. In a similar setting, sexual abuse cases by U.S. Catholic clergy have cost the church over $3 billion in settlements and attorneys' fees. Knowledge and inaction is a dangerous combination.

Bases for Liability

Negligent Hiring, Retention and Supervision

Lawsuits often are brought by injured parties against employers for the actions of tortfeasor employees. Using the doctrine of *respondeat superior*, employers are liable for an employee's wrongs committed within the scope of employment. When

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the employees commit intentional torts, as opposed to wrongs like negligence, *respondeat superior* usually provides no relief for victims. It is difficult for plaintiffs to prove intentional torts, like Sandusky's alleged child abuse, are within the scope of the employment relationship, the required test for r*espondeat superior*.

Moving beyond the vicarious liability concepts of *respondeat superior*, employers also have potential liability for their own negligence. In all 50 states in the U.S., an employer has some form of a duty of reasonable care in selecting, retaining, or supervising its employees. The employer's liability rests on proof the employer knew — or through the exercise of ordinary care should have known — an employee's conduct would subject third parties to an unreasonable risk of harm. This is the exact point where employer actual or constructive knowledge of an employee's behavior is critically dangerous. It is not necessary under the law for an employer to foresee the particular injury that occurred to a third party, but only that the employer should reasonably foresee an appreciable risk of harm to others.

Application of Law to Penn State

In the case *Brezenski v. World Truck Transfer*, the Superior Court of Pennsylvania pronounced the legal test for the Sandusky torts: "It has long been the law in this Commonwealth that an employer may be liable in negligence if it knew or should have known that an employee was dangerous, careless or incompetent and such employment might create a situation where the employee's conduct would harm a third person."

As an artificial entity, Penn State can only know facts through the knowledge of university agents. Based on the Freeh Report, various key Penn State agents such as Spanier and Paterno knew of the danger posed to third parties by Jerry Sandusky. This knowledge came while Sandusky was still a Penn State employee.

Employers and Information

We are coming to the end of the "ostrich era" for employers. In the past, employers often lacked extensive employee personal information or lacked extensive information about employee misbehavior. Employers would be able to claim ignorance about risks posed by employees committing torts outside the scope of employment. This is not true today, as data collected by employers on employees is great.

It is not necessary under the law for an employer to foresee the particular injury that occurred to a third party ...

Actual employer knowledge of employee activities is not necessary for liability to attach. That is, it may not be a sufficient legal defense for an employer to claim ignorance of information captured electronically but not viewed by the employer. The court may hold the employer had constructive knowledge of information collected.

Today, with workplace monitoring of employees commonplace, employers are on notice of dangerous employee tendencies. For example, employers know which employees view Internet pornography at work. Most employers record employee Internet traffic. One court held that, based on knowledge of an employee's pornography viewing at work, the employer was liable to the victim when the employee later sent child pornography over the Internet. The victim was the 12-year-old stepdaughter of the employee. He sent nude pictures of his stepdaughter to Internet child pornography sites while he was at work. The court held the employer, knowing the employee visited pornography sites, should have stopped the behavior and was liable for the harm caused to the stepdaughter. In a similar fashion, employers know which employees are gambling over the Internet at work. Liability could be present to families harmed by gambling lost income. The possibilities for liability are many and varied.

The Solution

Knowledge of employer liability potential is the first step toward reducing a company's legal exposure. When the liability threat is recognized, an action plan may be developed to reduce liability risks. An action plan could involve the following steps:

1. Review all employee data collected by the employer to ensure the data collection does not violate federal and state privacy laws.
2. Next, ask if the data collected is necessary and relevant to the employer's business. Any data collection that is not strategically relevant to employer operations should stop. Some data is collected simply because the collection is technically possible, or because other firms are collecting similar data.
3. Establish a review process for collected employee data. Red flags should be set up for employee behaviors that pose risks to other employees or third parties.
4. Last, senior managers for the employer must ensure that timely and effective review of all red flags leads to necessary employment actions protecting others from unreasonable risk of harm.

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from retaliating against an employee because she has filed a complaint involving the Act, including § 207(r)(1). An employer who violates the FLSA is subject to penalties that may include payment of unpaid minimum wages and/or overtime or lost wages and liquidated damages; in the case of § 215, employment, reinstatement, or promotion may be ordered. A willful violation can trigger fines and/or imprisonment. Attorneys' fees and costs are awardable.

Recently, the Court of Appeals for the Eleventh Circuit in *Miller v. Roche Surety & Casualty Co.*, No. 12–10259, 2012 WL 6698786 (11th Cir. Dec. 26, 2012), became the first federal appellate court to interpret the nursing mother provision of the FLSA. Plaintiff Danielle Miller worked for Roche, a bail bond surety company, in Florida. After her pregnancy, Miller was free to take the nursing breaks she needed, as well as a one-hour lunch break. Her break time was not counted or timed, and she was never criticized for taking a break. Miller chose to express breast milk in her own office rather than in any of several empty offices available for her use, and she taped folders to her office window for privacy. She neither informed Roche that she was using her office, nor asked for a different location for the breaks.

On one occasion, contemplating having to spend a day working at a remote location, Miller sent Roche's president an e-mail inquiring as to a location where she could use her breast pump while working there. Sometime after sending the e-mail, Miller was terminated. She then sued, claiming Roche had not given her a time and place to express breast milk in violation of § 207(r)(1), and had violated § 215(a)(3) when it terminated her employment after she asked for a time and place to do so.

The Eleventh Circuit ultimately rejected these claims, holding that Miller's own testimony established that she had been given necessary breaks for expressing breast milk in a private location, at her leisure and without criticism, and that based on the evidence, a reasonable jury could not find that Roche denied Miller breaks in violation of § 207(r)(1). The court also held that because Miller's e-mail to the president, who was her supervisor, did not constitute the filing of a complaint, she had not suffered retaliation under § 215(a)(3).

Relying on the U.S. Supreme Court's decision in *Kasten v. Saint-Gobain Performance Plastics Corp.,* 131 S. Ct. 1325 (2011), the court noted that although the filing of a complaint under § 215(a)(3) need not be in the form of an official complaint, or even in writing, it must put the employer on notice that an employee is lodging a grievance. The complaint must be sufficiently clear for a reasonable employer to understand that the employee is asserting his/her FLSA rights and calling for protection of them. Miller's e-mail to her supervisor simply asking about a location for expressing breast milk in the future, and alleging or intimating that Roche had violated § 207(r)(1) did not meet these notice standards.

Despite the ruling in the *Miller* case, issues of compliance with lactation break rules under federal and analogous state laws will continue to be significant for employers and employees alike. In nearly all states, lactation break laws apply to all employees, regardless of classification, and several states mandate breaks for a period well beyond the one-year under the FLSA. A few states even require that breastfeeding at work be allowed. Where both federal and state laws apply, an employer must comply with the provisions of either law most favorable to employees.

3. Courts Continue Trend in Favor of Class Waivers in Arbitration Agreements

In January 2012, the National Labor Relations Board (NLRB) issued its controversial decision in *D.R. Horton*, 357 N.L.R.B. No. 184 (Jan. 3, 2012), holding that the National Labor Relations Act (NLRA) prohibits mandatory arbitration policies that require an employee to waive his or her right to participate in a class action in any forum. The judicial response to *D.R. Horton* has not been kind, with the vast majority of courts rejecting its reasoning and applicability. Two recent decisions — *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) and *Miguel v. J.P. Morgan Chase Bank, N.A.*, No. CV 12–3308 PSG, 2013 WL 452418 (C.D. Cal Feb. 5 2003) — are the latest to limit the impact of *D.R. Horton* and uphold the validity of arbitration provisions containing class action waivers.

In *Owen*, the Eighth Circuit reversed a district court decision, and held that a former nursing home employee must arbitrate her FLSA claims — even though the arbitration provision included a waiver that foreclosed her FLSA collective action. First, the Eighth Circuit determined that, even though the FLSA identifies the "right" to become a party plaintiff, because it also gives the employee the power to waive participation, the statute did not evince a "contrary congressional command" precluding collective action waivers. Second, the court rejected the plaintiff's argument that the legislative history of the FLSA created a command to override the Federal Arbitration Act (FAA) in the context of labor relations.

Congress, the court noted, reenacted the FAA nine years after the FLSA, which indicates that it intended for its arbitration protections to remain intact. Finally, the court ruled that *D.R. Horton* "carries little persuasive authority" in the circumstances presented because the NLRB's holding was limited to arbitration agreements which bar all protected concerted action. The court noted that the Mandatory Arbitration Agreement in the case at hand did not bar complaints to administrative agencies like the EEOC. In addition, nothing prevented any agencies from investigating and potentially filing suit on behalf of a

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class of employees if it was necessary. The appeals court also determined that — even if *D.R. Horton* addressed an arbitration agreement like the one in the case at hand — the court "would owe no deference to its reasoning" because "the Board has no special competence … interpreting the Federal Arbitration Act."

The court in *Miguel* followed *Owen* and reached a similar conclusion. In *Miguel*, the court discussed the opinion in *Owen*, stating that "because the Eighth Circuit is the first appellate court to address the impact of *D.R. Horton*, the Court finds the decision of the Eighth Circuit instructive." Just as in *Owen*, the *Miguel* court also found it important that the arbitration agreement in that case explicitly stated that the employee is not precluded from filing a charge with the EEOC. The court also cited the Eighth Circuit's determination that courts do not owe deference to the reasoning in *D.R. Horton*, while pointing out that "every district court in [the Ninth] [C]ircuit to consider the decision has declined to follow it."

4. Host of New Laws Prohibit Employers from Demanding Social Media Passwords

In their efforts to screen job applicants, many employers have "googled" applicant names and reviewed various public social media profiles to help determine whether an applicant is actually a good fit with the organization and to ensure a company's safety and integrity. More recently, some companies have begun to request user names and passwords to be able to log in and view a social media account that is otherwise designated as "private" or restricted. Civil liberties groups, the users of social media like Facebook and Twitter, and numerous politicians have criticized this practice, likening the requests to asking for an applicant's house keys or a diary.

In response to this growing opposition, there has been significant legislative activity. In May 2012, Maryland was the first state to pass legislation making it unlawful for employers to compel employees or applicants to disclose social networking user names and passwords. Maryland's law prevents employers from taking disciplinary action against employees or from not hiring applicants who refuse to disclose personal online information. Employers, however, are allowed to investigate employees who use a personal account for business purposes to ensure they comply with legal and regulatory requirements.

Michigan, Illinois and California have also enacted similar legislation. Michigan's law took effect in December, 2012, while the Illinois and California statutes became effective Jan. 1, 2013. All three states ban employers from requesting passwords and account information, but they permit employers to use publicly available social networking information.

Illinois also allows employers to monitor employees' e-mail or electronic equipment owned by the employer, and to create workplace policies on the use of social networking sites. A number of other states have gotten on the proverbial bandwagon. Most recently, Nebraska introduced legislation (Legislative Bill 58) on Jan. 10, 2013, and Texas referred legislation to committee (S.B. 118) on Jan. 29, 2013, making it unlawful to request user names and passwords, or to request access to, private social media accounts. Massachusetts, Minnesota, Missouri, New York, Ohio, Pennsylvania, South Carolina and Washington also introduced such laws, all at various stages of the legislative process.

At the federal level, no law expressly restricts an employer's right to require an applicant or employee to disclose user name and password information like the state laws noted above. However, in May, 2012, Sens. Charles Schumer (D-NY) and Richard Blumenthal (D-CT) issued public letters to the EEOC and DOJ asking these agencies to investigate whether the practice violates any federal law. The senators argued that the practices were "unacceptable invasions of privacy" and allowed an employer access to information that would otherwise be impermissible to consider, such as religion, age, marital status, or pregnancy status.

In May, 2012, the federal Social Networking Online Protection Act (SNOPA) was introduced in the U.S. House of Representatives. This bill states that it is "[a] bill to prohibit employers and certain other entities from requiring or requesting that employees and certain other individuals provide a user name, password, or other means for accessing a personal account on any social networking website." The bill, which would have been the first national legislation on the matter, died when Congress adjourned at the end of 2012. Representatives Eliot Engel (D-NY) and Jan Schakowsky (D-IL) and Michael Grimm (R-NY) have now reintroduced this legislation.

Given the rapid rise of laws restricting employer access to social media log-in information, as well as the wealth of information on these sites that is otherwise impermissible to consider, employers would be well advised to proceed with caution when doing any on-line screening.

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