

LABOR WATCH

A MONTHLY REPORT ON THE DEVELOPMENTS IN LABOR RELATIONS, EMPLOYMENT LITIGATION, IMMIGRATION, AND HUMAN RESOURCE MANAGEMENT

THEFT BY IPOD: A NEW THREAT TO CONFIDENTIAL CORPORATE DATA

An employee who has just been given a poor performance evaluation goes back to his desk and plugs his iPod into his computer. He seems fine, just listening to music and getting back to work. In minutes, he locates confidential customer information and downloads it to his iPod. The next day he leaks the information, such as social security numbers and addresses, to millions of people, including some who use the data to steal the identities of those individuals.

Data theft using an iPod is a real, ever-increasing threat to business. Businesses routinely spend thousands of dollars to protect confidential electronic information from external threats. These protections include implementing firewalls, antivirus, and intrusion prevention systems. However, these barriers do not protect against the internal threat of a dishonest employee

with easy access to such information. The employee can locate, download, and steal huge amounts of confidential information in minutes using an iPod or other portable data storage device. Using an iPod to copy and transport confidential data has even been given its own name: "Pod Slurping."

WHAT IS "POD SLURPING?"

More than 42 million iPods have been sold in the U.S. An iPod is a portable media player onto which individuals can download information, including music, video, and other data, using a USB port on any computer. An iPod operates by simply plugging into a USB port with no drivers or configuration required. "Slurping" occurs when an iPod user "slurps," or copies, data from that computer to the iPod. To make it easier to isolate and obtain sensitive information, programs exist that instruct the iPod to automatically search, identify, and download relevant directories on a computer system. These directories include Word, Excel, .PDF files, and anything which might contain sensitive business data. An iPod with just 60 gigabytes of storage space can store all of the data found on a typical computer.

THE "SLURP" EFFECT ON BUSINESS

The ability to download thousands of documents in minutes while appearing to be listening to music poses a serious

threat to business. First, downloadable information may include trade secrets, confidential and proprietary information, and other valuable intellectual property. This information can be used by employees to compete with the business, or be sold by employees to competitors looking to gain a competitive advantage. In fact, the 2006 FBI Computer Crime and Security Survey identifies the theft of intellectual property as having the fourth highest economical effect on businesses.

Second, employee data that the company may not want exposed may be located, downloaded and published. For example, an employee who is unhappy because he or she has been recently denied a raise or bonus may decide to search for employee salary information. Once a list of salaries is located, the employee may download the spreadsheet to an iPod or other portable storage device, take it home and email the information to each employee. There is at least one report that this has been done with devastating consequences.

Finally, confidential consumer data and client records, including medical and financial records, may be downloaded with ease. Once downloaded, the information could be sold or divulged to the public. Client information could

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VIGILANCE AND PREVENTION HELP STOP WORKPLACE VIOLENCE

News reports of disgruntled employees who kill coworkers and supervisors are prominent in the headlines these days. Unfortunately, while these headlines may have helped create a greater awareness of workplace violence, by focusing on multiple homicides perpetrated by former or current employees the media headlines may have obscured the true impact of this costly and widespread problem.

Statistics show that homicides are the exception, not the rule, in workplace violence. Homicides committed at work are committed by non-employees much more often than by coworkers, and other forms of workplace violence are far more common than homicide.

Acts of intimidation, sexual assaults, and domestic violence are more prevalent forms of violence in the workplace. And while these events do not make the headlines, they are the crux of a problem that crosses industry lines and affects large and small employers alike.

A few examples are:

- A federal appeals court ruled that Delta Air Lines may be liable under sexual harassment law in a suit where one of its flight attendants claims she was attacked by another flight attendant. The events occurred when the two flight attendants were off duty in a hotel room.
- A former shipping clerk was awarded \$909,000 by a California superior court in a suit wherein he alleged he was subjected to verbal insults and physical threats by his co-workers. The employee claimed he was harassed, physically threatened, and eventually fired because of his

sexual orientation and that the company did nothing in response to his complaints.

- A female employee of Wal-Mart sued the national chain for failure to ensure her safety in the workplace. The employee, who was shot and severely wounded by her husband while she was at work, claimed the store had prior knowledge of her physical abuse at the hands of her husband and did nothing to prevent the attack.

Prevention is clearly the key to stopping workplace violence. Important steps an employer can take to prevent workplace violence include:

- Adopting a clearly stated workplace violence policy and prevention program that are effectively communicated to all employees;
- Providing regular prevention training for all new and current employees, supervisors, and managers; and,
- Establishing a climate of trust and respect among workers and between employees and management.

As an employer, you may face liability if you fail to promote a work environment free from threats and violence. Employers also face economic loss as the result of workplace violence in the form of lost work time, reduction in morale and productivity, increased workers compensation payments, medical expenses, and possible lawsuits.

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EMPLOYERS OBLIGATED TO RE-HIRE EMPLOYEES AFTER MILITARY SERVICE

With the war in Iraq showing no signs of slowing down, the Uniformed Services Employment and Reemployment Act has become increasingly important in the American workplace. USERRA was enacted in October 1994 and provides reemployment protection and other benefits for veterans and employees who serve in the military.

Under USERRA, if a military member leaves his or her civilian job for service in the uniformed services, he or she is entitled to return to the job, with accrued seniority, provided they meet the law's eligibility criteria. USERRA applies to both voluntary and involuntary service, in peacetime as well as times of war, and the law applies to virtually all civilian

employers, including the federal government, state and local governments, and private employers, regardless of size.

USERRA Eligibility

Persons who have been absent from a position of employment because of service in the uniformed services are entitled to the reemployment protections of USERRA. Service in the uniformed services includes active duty, including Reserve and Guard members who have been called up; active duty for training; full-time National Guard duty; absence from work for an examination to determine a person's fitness for duty; and funeral honors duty performed by National Guard or Reserve members.

PSYCHIATRIC DISABILITY: WHEN AND WHAT YOU CAN ASK

The term 'psychiatric disability' is used when a mental illness significantly interferes with the performance of one's major life activities, such as learning, thinking, communicating, and sleeping, among others. The most common forms of mental illness are anxiety disorders, depressive disorders, and schizophrenia. Anxiety disorders, the most common group of mental illnesses, are characterized by severe fear or anxiety associated with particular objects and situations. Depressive disorders share disturbances or changes in mood, usually involving either depression or mania (elation). Finally, symptoms of schizophrenia are categorized as either "negative" or "positive." Negative symptoms include social isolation or withdrawal, loss of motivation, and a flat or inappropriate affect (mood or disposition). Positive symptoms include hallucinations, delusions, and thought disorder.

As a general rule, the Americans with Disabilities Act precludes employers from asking questions that will elicit information about a disability. However, there are limited circumstances in which employers may seek additional information during the job application stage, after a job offer has been extended and/or during the course of employment:

Application Stage. Employers are prohibited from asking disability-related questions before making an offer of employment. However, an exception exists when an applicant asks for a reasonable accommodation during the hiring process. If the need for this accommodation is not obvious, an employer may ask an applicant for documentation about the specific disability. The employer may require that applicant to provide documentation from an appropriate professional concerning the applicant's disability and functional limitations. A variety of health professionals may provide such documentation regarding psychiatric disabilities, including primary health care professionals, psychiatrists, psychologists, psychiatric nurses, and licensed mental health professionals such as clinical social workers and professional counselors. An employer should make clear to the applicant why the information is being requested, that is to verify the existence of a disability and the need for an accommodation.

Example A: An applicant asks to take a typing test in a quiet location rather than in a busy reception area "because of a medical condition." The employer may make disability-related inquiries at this point because the applicant's need for reasonable accommodation under the ADA is not obvious. The employer may specifically ask the applicant to provide documentation showing that the applicant has an impairment that substantially limits a major life activity. The employer may further require documentation showing that the applicant must take the typing test in a quiet location because of a disability-related functional limitation.

Although an employer may not ask an applicant if a reasonable accommodation is necessary to perform the essential functions of a job, there is an exception if the employer could reasonably believe, before making a job offer, that the applicant will need an accommodation to perform the functions. For an individual with a non-visible disability, this may occur if the individual voluntarily discloses a disability or if the applicant voluntarily tells the employer that a reasonable accommodation is necessary to perform the job. The employer may then ask certain limited questions, specifically: whether the applicant needs reasonable accommodation; and what type of reasonable accommodation would be needed to perform the functions of the job.

After an offer of Employment. After an employer extends an offer of employment, the employer may require a medical examination (including a psychiatric examination) and/or ask questions related to a disability (including questions about psychiatric disability) if the employer subjects all entering employees in the same job category to the same inquiries or examinations. The employer may not differentiate between employees on the basis of disability or type of disability. In other words, to meet the exception, all entering employees in the same job category must be required to take the medical examination and/or respond to the disability-related questions.

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be used a number of ways, including identity theft, the fastest growing crime in the United States. Having client information stolen would damage the company's reputation and, perhaps just as costly, expose it to prosecution for a violation of consumer privacy rights. For example, in January 2006, the Federal Trade Commission and commercial data broker ChoicePoint Inc. reached a settlement for ChoicePoint's unintentional leak of consumer data. The leak was found to violate consumer privacy rights, and ChoicePoint had to pay \$15 million.

STOPPING THE "SLURP"

In addition to efforts to prevent outside threats, companies must now take steps to prevent internal security breaches. There are a number of solutions to the "slurping" problem, some more drastic than others. First, ensure that your company has a policy regarding the type of corporate information that can and cannot be copied onto iPods and other portable storage devices. Second, software is available which monitors the USB port on computers and can lock out USB drives, such as iPods, or simply require an encryption and password protection.

Third, USB ports can be physically blocked in order to prevent anything from being plugged into the computer. Fourth, it may be beneficial to tell employees that they cannot download or place iTunes software (played on an iPod) on company computers for downloading purposes. This option is doubly beneficial because of an iPod virus that independently travels between iTunes and the computer. Finally, and most extreme, iPods and other portable data storage devices, may be banned altogether. If data portability is a necessity for your business, a corporate-standard data storage device could be issued and used for approved data portability.

Despite these prevention tactics, should an employee still decide to slurp confidential information, the company may be able to pursue criminal charges and/or a civil lawsuit against that individual. When considering whether to allow iPods or the use of other portable storage devices at the office, it is important to consider the risks and ensure your company has policies or practices in place to protect itself from this internal threat.

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PSYCHIATRIC DISABILITY: WHEN AND WHAT YOU CAN ASK *(Continued from page 3)*

During Employment. During employment, an employer may make disability-related inquiries or require an employee to submit to a medical examination if it is "job-related and consistent with business necessity." This requirement may be met when an employer has a reasonable belief, based on objective evidence, that (1) an employee's ability to perform the essential job functions will be impaired by a medical condition, or (2) an employee will pose a direct threat due to a medical condition. Thus, for example, inquiries or medical examinations are permitted if they follow up on a request for a reasonable accommodation when the need for an accommodation is not obvious, or if they address reasonable concerns about whether an individual is fit to perform essential functions of a job position. In these situations, the inquiries or examinations must not exceed the scope of the specific medical condition and its effect on the employee's ability, with or without reasonable accommodation, to perform the essential job functions or to work without posing a direct threat.

the employee's hospitalization and medication adjustment, that her ability to perform essential job functions may continue to be impaired by a medical condition. This examination, however, must be limited to the effect of her depression on her ability, with or without reasonable accommodation, to perform the essential job functions. Inquiries about her entire psychiatric history or about the details of her therapy sessions would exceed the limited scope.

Because the determination of whether to make disability-related inquiries is not always clear, we recommend that you closely evaluate any uncertainties and seek legal advice prior to taking action. As a final practical note, remember that all information concerning an applicant's or employee's medical condition and medical history must be kept strictly confidential. Therefore, if and when you collect information, be sure that you utilize separate forms and maintain such information in separate medical files apart from the usual personnel files.

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Example B: An employee with depression seeks to return to work after a leave of absence during which she was hospitalized and her medication was adjusted. Her employer may request a fitness-for-duty examination because it has a reasonable belief, based on

MINIMIZE EMPLOYEE THEFT

Not all employer loss comes from poor sales, shoplifting, economic slowdown, or bad management. Unfortunately, a staggering amount of lost revenue is directly attributable to employee theft and dishonesty. Employee theft includes outright stealing from the till, unauthorized discounts, and removal of employer property. The expense and logistical problems associated with ending all employee theft makes it an unreasonable goal. However, the following suggestions, if thoughtfully implemented, can help reduce employee theft and its associated problems, i.e. poor morale and turnover.

Hiring - Nothing an employer can control is more important than hiring the right personnel. Employers must consciously verify employment history, education, references, and conduct criminal background checks. Additionally, drug testing can help remove potential theft problems prior to employment.

Proactive Policies - Establish internal controls. Employee video surveillance allows for the detection of theft as it happens, but more importantly it dissuades employees from attempting to steal in the first place. Periodically rotate employees in positions with potential for theft or fraud. Encourage management to periodically work side-by-side with employees or lower-level managers. Audits, while ideally at least conducted annually, should be done with as little advance warning as possible.

Education - All management and employees should be trained yearly on how to spot and avoid fraud and theft.

Reporting Fraud or Theft – Rewards may be an option for some employers. It may be helpful to establish an anonymous way for employees to report inappropriate behaviors. At a minimum, inform employees of the company's expectations and non-retaliation policy regarding the reporting of theft and fraud.

Insurance - While not an option for all employers, some companies have found it cost-effective to insure against loss caused by employee theft or fraud.

Investigate - Thoroughly investigate all allegations or suspicions of theft or fraud. Failing to investigate leads to lower morale of uninvolved employees and consequently increases turnover. and,

Discipline - The only thing worse than failing to investigate claims of fraud or theft is failing to act upon them once established. Consistency is paramount.

Again, no amount of money or employer effort will stop all employee theft. However, educating employees on your expectations, encouraging employee participation in reporting suspect activities, and consistent application of policies and discipline will go a long way in reducing this loss. Above all, employers must treat the hiring process as what it is, the most critical element to a solid loss-prevention program.

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EMPLOYERS OBLIGATED TO RE-HIRE EMPLOYEES AFTER MILITARY SERVICE *(Continued from page 2)*

In order to be entitled to reemployment rights following a period of service in the uniformed services, military members must meet five eligibility criteria:

1. They must have held a civilian job;
2. They must have informed their employer that they were leaving the job for service in the uniformed services;
3. The period of service must not have exceeded five years;
4. They must have been released from service under honorable conditions; and,
5. They must have reported back to their civilian employer in a timely manner or have submitted a timely application for reemployment.

Upon meeting these criteria, an employee returning from military service is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. The escalator principle requires that the employee be reemployed in a

position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites that he or she would have attained if not for the period of service.

In addition to receiving the compensation, benefits, and seniority rights associated with the escalator principle, uniformed service members returning to the workforce are protected by a mandatory just-cause firing provision for a minimum of 180 days after their reemployment. This just-cause firing provision is designed to protect uniformed service members from adverse employment actions that could result from their military service.

Accordingly, employers need to exercise caution when reemploying employees after a period of military service. At a minimum, the provisions of USERRA should be examined in order to ensure compliance.

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STARTING THE CLOCK ON FILING DISCRIMINATORY PAY CLAIMS

As many of you are aware, either from experience or otherwise, employees have a limited amount of time under most federal employment laws during which to file a discrimination charge or lawsuit. For example, under Title VII, which governs race, sex, and religious discrimination issues, employees have 180 days (or 300 days in some states) to file such a claim. But, when does that clock start ticking exactly?

The U.S. Supreme Court has shed some light on the matter, determining recently that in wage-related cases, such as for a discriminatory raise (or lack thereof), the clock starts running when the wage decision is set. In *Ledbetter v. Goodyear Tire and Rubber Co.*,¹ the employee, Ledbetter, argued that the clock on her discriminatory pay claim began each time she was issued a paycheck after her discriminatory performance evaluation that resulted in a lesser raise. That is, she argued that she was discriminated against each time Goodyear gave her a paycheck because those paychecks would each have been larger had it not discriminated against her during her a negative evaluation.

The Court disagreed and determined that in a Title VII discrimination case relating to an act that results in lower pay, it is the pay decision that starts the time clock and not the issuance of each check. The Court tempered that this is the result in situations where the checks are issued pursuant to a facially neutral payment policy, not one that is obviously discriminatory, and can be pinpointed to a discrete act such as a performance evaluation. In other words, it would not be the case if your overall pay structure was rigged to pay all employees a certain race or gender discriminatorily. Thus, in *Ledbetter*, employers won a small battle in that employees cannot now claim, at least under Title VII, that a performance evaluation that occurred in 2004, for example, has resulted in discriminatory paychecks for the past three years. Instead, employees have 180 or 300 days from the discriminatory pay decision itself.

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