

LABOR WATCH

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

LOVE IN THE AIR ... AND AT THE OFFICE

Whether it is due to long work hours, close working relationships, or the non-threatening environment, more and more romantic relationships are starting, developing, and ending in the workplace. In fact, a recent survey conducted by Vault, Inc. found that more than half of all employees have been involved in an intra-office romance. Unfortunately, these budding office relationships can present a variety of problems for the employer.

In the event that the relationship ends, possible harassment or hostile work environment claims may be alleged. However, at a minimum, communication between the one-time couple may become strained and jeopardize productivity and efficiency. This is not to say that only break-ups can lead to potential liability for an employer. Even in a consensual continuing relationship, the employer may be exposed to liability. Several jurisdictions have recognized "paramour favoritism" as a basis for sexual harassment suit.

Paramour favoritism occurs when a supervisor favors a subordinate employee who happens to be in a relationship with the supervisor. Both male and female employees may establish a hostile work environment claim under sexual harassment law as a result of this conduct. What can an employer do when faced with an intra-office romance? Better yet, what should an employer do when faced with an intra-office romance?

- Draft a policy that prohibits power-differentiated relationships to reduce paramour favoritism;
- If you restrict office romantic relationships, make certain that the

decision is supported by legitimate business decisions. It is inadvisable to flatly prohibit relationships among employees of equal stature;

- Obtain employee acknowledgements of their receipt of the office romance policy;
- Consistently enforce any office romance policy;
- At a minimum, adopt a policy prohibiting favoritism or behavior that can result in perceived favoritism based on off-duty sexual relationships;
- Consider requiring employees involved in consensual relationships to document the consensual nature of the relationship, their awareness of the company's harassment policies, and their agreement to behave appropriately in the workplace;
- If power-differentiated relationships are allowed, consider requiring one employee to transfer so that there is not a direct supervisory relationship;
- Do not allow a supervisor to evaluate or make employment decisions regarding his or her paramour; and,
- Investigate all allegations of harassment or favoritism.

As stated above, it is not advisable to restrict all intra-office relationships. However, even without a blanket restriction, informing employees of expectations, consistently enforcing policies, and investigating all allegations of harassment and perceived favoritism can eliminate much of the potential liability.

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EPLI: AVOIDING THE PITFALLS AND MAXIMIZING THE BENEFITS

Some kinds of insurance, including health and property insurance, are now widely considered a "must have," and many insurance companies are now touting employment practices liability insurance as the next indispensable insurance product. But is EPLI all that it's cracked up to be? The answer, as you might expect, is yes and no. If you can purchase a policy with maximum benefits and minimal pitfalls, EPLI can benefit your organization immensely. On the other hand, policies with limited coverage and greater costs can actually do more harm than good.

What is EPLI? EPLI is, as its name suggests, an insurance policy that employers can purchase to cover potential losses related to employment practices. Policies generally cover claims for things such as harassment, discrimination, and other wrongful termination issues and can help to entirely cover, or at least defray, related legal expenses.

What's new with EPLI? Many employers were gun shy about purchasing EPLI when it first became popular because policies covered very few claims and premiums were exorbitant. Now, however, many carriers have greatly reduced premiums, so that a policy costing \$10,000 ten years ago may now be available for \$2,500. Likewise, carriers have expanded what they consider "covered acts," making policies more practical and desirable.

What pitfalls should I avoid when purchasing a policy? Choosing an EPLI policy is similar in many ways to choosing any other type of insurance policy: you want to receive the maximum benefit with the least cost. Here are a few issues to watch specifically.

- **Analyze your risk.** If you're a small employer with few or no employment claims and no claims on the immediate horizon, consider whether you need a policy at all or, at least, look for a policy with a low premium and high deductible. That will allow you to keep your monthly or yearly costs low while still protecting yourself in the event of a claim. Even a single employment claim can be disastrously expensive for small employers. If you're a larger employer or an employer with a likelihood of seeing claims in the near future, look for a policy with greater liability limits.
- **Examine policy coverage.** Don't assume that an "employment practices" policy covers all employment practices. Understand what coverage is provided and what is not. Many policies do not cover claims for emotional distress or punitive damages, which are common in employment cases. Punitive damages are those a court would issue to "punish" an employer and can amount to hundreds of thousands of dollars. Often it is

the threat of punitive damages that is much more significant than the employment claim itself. Likewise, many policies do not cover wage and hour claims, which account for a large percentage of all claims filed and are the source of so many well-publicized and costly class action lawsuits.

- **Gauge the level of control the policy offers.** Most EPLI policies cover defense costs, meaning expenses incurred in defending the claim (litigation) including attorney's fees. However, many policies do not allow you to select which attorney defends you, meaning that you will be stuck with whichever attorney is on the insurance company's preferred-provider list.¹ Likewise, many policies do not allow the employer to have input on whether or not to settle a claim, considering that it is the insurance company's money on the line. However, you will want to have input as to settlement, especially if you feel strongly about settling or not settling a particular case. What if the case involves a highly sensitive subject, such as those involved in many harassment cases? You may not be able to have input on settling in order to avoid a highly publicized and damaging trial. The reverse is also true.

Thus, deciding on whether to purchase EPLI coverage involves many of the same considerations as with any purchase you make. Determine whether the benefits the policy offers are worth the cost involved in maintaining the coverage. And, if you decide to purchase an EPLI policy or if you already have one, be certain that you use the policy when circumstances permit. Many employers forget to put their insurance carrier on notice when they receive a claim, including Department of Labor or Equal Employment Opportunity Commission complaints and lawsuits, and those employers forsake their coverage as a result. Decide whether EPLI is right for your organization, select the best policy for your needs, and take advantages of the benefits provided.

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¹If you already have an EPLI policy that does not allow you to select your counsel and a claim is filed against you, be mindful that you can ask your insurance company to allow you to select your representation. The company does not have to allow you that option, but many carriers allow employers to select their own counsel if the firm is reputable and knowledgeable in the area. Also, be wary of how defense costs such as attorney's fees affect your liability limits. Many policies include defense costs against the limits, meaning that a policy with a \$100,000 limit could be eaten up with defense costs alone.

DON'T BE THE NEXT STATISTIC

The Wage and Hour Division of the Department of Labor collected approximately \$220.6 million in back wages in the fiscal year ending September 30, 2007. The back wages collected were the result of employer violations of the Fair Labor Standards Act, the Davis-Bacon Act, the Family and Medical Leave Act, and other laws enforced by the Wage and Hour Division. The amount collected was a record amount. The following are examples of errors that cost employers so much money:

- \$163 million for overtime violations (\$16 million of that as a result of misclassifying non-exempt employees as exempt employees);
- \$17 million for minimum wage violations;
- \$4.9 million for Davis-Bacon Act and Service Contract Act violations;¹
- \$4.4 million in civil penalties for child labor violations; and,
- \$1.57 million for FMLA violations (down 34% from 2003 -- another record year).

At this point, the following quotation seems quite apt: *"From the errors of others, a wise man corrects his own."* That being said, it would be prudent for all employers to audit their wage and hour practices in order to avoid being the next statistic. Here are some items to check in your HR audit:

Are you misclassifying nonexempt employees as exempt employees? In this category of mistakes, the most frequently cited violation was misclassifying administrative employees when their primary duty did not involve office or non-manual work directly related to management or general business operations. Administrative regulations provide the following examples of the type of work considered to be work directly related to management and general business operations: "work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance;

quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities." Keep in mind that inside sales and production work do not fall under the administrative exemption.

Of course, the positions of all exempt employees should be analyzed to ensure they meet the regulatory requirements for one of the following exemptions: professional, administrative, executive, or outside sales.

Are you monitoring the hours worked by employees under 16 years of age and the type of work performed by employees under 18 years of age? Under federal law,

employees under 16 years of age can only work outside of school hours and:

- no more than 3 hours on a school day, including Fridays;
- no more than 8 hours on a nonschool day;
- no more than 18 hours during a week when school is in session;
- no more than 40 hours during a week when school is not in session; and,
- between 7 a.m. and 7 p.m. – except between June 1 and Labor Day, when the evening hour is extended to 9 p.m.

Employees under 18 years of age cannot work in any of the 17 occupations designated as hazardous by the Wage and Hour Division. The most prevalent violations involve persons under 18 years of age driving or using paper balers. Specifically, Hazardous Occupation Order 2 bans persons under 18 years of age from operating motor vehicles on public roads and working as outside helpers on motor vehicles. The only exception is that 17-year-olds may drive cars or small trucks during daylight hours for limited times and under strictly limited circumstances.

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DON'T BE THE NEXT STATISTIC

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With regard to paper balers, Hazardous Occupation Order 12 bans persons under 18 years of age from operating power-driven paper products machines such as scrap paper balers, paper box compactors, and platen-type printing presses. Persons who are at least 16 years of age may load, but not operate or unload, certain scrap paper balers and paper box compactors under very specific guidelines.

Are you paying employees the minimum wage?

Before automatically answering "of course," please note that it isn't enough to simply check employees' pay rates. If those rates fall below the minimum wage rate after deductions are made for uniform costs, for example, you are not paying the minimum wage. Deductions for the following items are additional examples of deductions that will result in a minimum wage violation if they result in the employee being paid less than the minimum wage:

- Uniform cleaning;
- Tools;
- Damage to employer property; or,
- Theft of the employer's property.

Further, requiring cash reimbursement rather than making the deduction from the employee's paycheck does not make the deduction lawful.

Are you making improper deductions from exempt employees' salaries?

Employees who are correctly classified as exempt employees can lose the exemption if their employer makes improper deductions from their salary. Salaried employees are to be paid their regular established salary regardless of the quantity or quality of their work. Deductions from salaries for the following reasons cannot be made from an exempt employee's salary without jeopardizing his or her exemption:

- Absences caused by the employer or the business' operating requirements;
- Absences caused by jury duty, attendance as a witness, or temporary military duty;
- Penalties for infractions of safety rules which are not of major significance;
- Penalties for infractions of work rules that are not pursuant to a written policy applicable to all employees; or,
- Absences of less than one day unless due to FMLA leave.

Keep in mind that deductions can be made if the employee performs no work during an entire work week even if the reason, for example, is due to a mandatory plant shutdown.

Do you have a written complaint procedure for exempt employees to follow if they believe an improper deduction has been made from their salaries?

If an employer has a clearly communicated policy that (1) prohibits the improper pay deductions discussed above; (2) includes a complaint procedure; (3) reimburses employees for any improper deductions; and, (4) makes a good-faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. Also, if an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions.

Do you pay for breaks of less than 30 minutes?

Many employees are scheduled to take 30-minute meal breaks. However, in some cases, unexpected production requirements result in employees working a portion of their meal breaks, reducing the scheduled meal break to perhaps only 20 minutes. In those cases, employers often pay for the ten minutes the employee works. However, this is a violation of federal law. Employees must be paid for the entire thirty minutes. The reason is Department of Labor regulations provide that an employee need not be paid for a "bona fide meal period." However, it defines a "bona fide meal period" as being at least 30 minutes in length. Special conditions may allow an exception for a shorter period, but these are rare. Also, ensure that the employee is completely relieved of all duties during the meal period.

When conducting your internal audit, ensure that you consider state laws as well. When there is a state law that is more generous to the employee than the federal law, state law will govern.

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¹ The Davis-Bacon and Service Contract Acts cover certain federal contractors.

HOW TO CONDUCT LAWFUL EMPLOYEE SEARCHES

Workplace investigations are often the first step when confronting allegations of employee theft, inventory shortages, threats of violence, or a report that an employee may possess drugs, alcohol, or weapons. While the employer's initial reaction may be to search a worker's locker or desk, install a surveillance camera or recorder, or search an employee's purse, briefcase, or backpack, employees may have a reasonable expectation of privacy while at work, even in company-owned property. Such searches may violate an employee's privacy rights and subject an employer to a lawsuit for invasion of privacy, defamation, or intentional infliction of emotional distress. Here are some guidelines to follow in order to minimize an employee's expectation of privacy and allow an employer to conduct searches when necessary.

1. Have a policy. A personnel policy stating that the employer has the right to search certain areas, including employee work areas, lockers, desks, and filing cabinets, at any time and for any reason minimizes employee expectations of privacy. For example, if a company allows an employee to have a locker or other storage area, the company's policy should state that it will furnish the lock and keep a copy of the key or combination. If the employee is allowed to furnish a lock, the policy should require that the company be given a copy of the key or combination. The policy may also allow the company to take disciplinary action, including termination, against employees who fail to submit to searches. Employers may condition continued employment on signing the policy, and new employees should sign a consent form acknowledging receipt of the policy.

2. Know why you are searching. Before conducting a search, make sure you have a legitimate business reason. Legitimate reasons include theft, allegations of workplace violence, or possession of contraband. Prior to searching, verify as much information as possible in order to narrow the areas and/or employees to be searched. For example, if the allegation is that an unknown employee was using marijuana in the bathroom during the night shift, check employee timecards to verify which employees were working that shift before beginning the search.

3. No random or "pat-down" searches. Do not conduct random searches. Even with a policy, random searches without a legitimate basis may result in a lawsuit. Bodily searches should also be avoided. Courts have held that employees have strong privacy interests in their own bodies. If you want to conduct a body, or "pat-down," search, contact law

enforcement. Improperly conducted bodily searches may subject the employer to claims of assault and battery.

4. Electronic surveillance. Electronic surveillance laws vary from state to state. A general rule is that closed-circuit television monitoring is permissible in common areas in which the employee does not have an expectation of privacy. Some businesses post a notice in the area that is subject to the filming, but this is not required. Do not monitor areas such as restrooms and changing rooms. Employees possess a high expectation of privacy in those areas and electronic monitoring may result in allegations of privacy right violations.

5. Keep the search confidential. Whenever it is necessary to conduct a search in the workplace, keep the investigation discreet and confidential. Also, ask any employees involved in the search and investigation not to disclose the contents of the investigation or the areas of inquiry.

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NLRB ISSUES DECISION ON E-MAIL SOLICITATION

In a decision that warrants careful consideration by employers, the National Labor Relations Board recently held that an employer did not violate the National Labor Relations Act by maintaining an e-mail policy that prohibited employees from using its e-mail system to send "non-job-related solicitations."

In *Register-Guard*, the employer's policy prohibited employees from using its e-mail system "to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." As a practical matter, the employer allowed employees to send and receive personal e-mail messages, such as baby announcements, party invitations, requests for sports tickets, and so forth. The case arose, however, after the employer disciplined an employee for e-mailing other employees at work regarding a union rally and the union's request for a show of support.

The Board majority rejected arguments that employer e-mail systems should always be recognized as a protected forum for discussing union-related issues. Instead, the majority opinion ruled that management control of employer equipment such as bulletin boards, telephones, and e-mail prevails over an employee's Section 7 right to solicit for a union. The holding sends a clear signal that without a statutory basis for an asserted employee right to use employer e-mail systems for union organizational purposes, and in the absence of disparate treatment, no weighing of employer and employee (or union) interest is necessary or appropriate to reach such a result.

In reaching this decision, the Board majority also relaxed its prior standard for determining whether an employer has applied an e-mail usage policy or any other personal policy discriminately to adversely affect protected NLRA-related communications by employees. In the past, if an employer permitted employee

use of its e-mail system for any personal purpose, the employer generally lost all rights to prohibit any other type of personal system usage based on the Board's expansive view of disparate treatment. However, in the *Register-Guard* decision, the Board majority narrowed its disparate treatment analysis to "communications of a similar character." Thus, under this new standard, an employer may permit employee personal e-mail usage unrelated to Section 7 activity but prohibit any use of the e-mail system for union solicitation. For example, an employer may allow personal e-mails concerning a joke or baby announcement but ban an announcement about a union-organizing meeting.

Based on this decision, employers should review and potentially revise their existing e-mail and non-solicitation policies to make certain the policies take advantage of this favorable change in the law. For the first time, with some assurance, employers can promulgate a policy lawfully prohibiting use of e-mail systems.

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¹See *The Guard Publishing Company, d/b/a The Register-Guard*, 351 NLRB No. 79 (Dec 16, 2001).

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