# Management Update

January 2010

## Court OKs Verdict Against Restaurant for Managers' Access of MySpace Account

Social networking sites today abound. MySpace was created in 2003 and rapidly became a social must-have for high school and college students alike. As a result, these students began to live their lives in an open fashion, posting everything from the mundane to the shock-worthy events of their lives for everyone to view and comment. Accordingly, today's employees may find it hard to differentiate between online life and offline life, since to them it is all merged. This becomes problematic for employers when these employees take to their social networking site, be it MySpace, Facebook, Twitter or a blog, to air frustrations with their job or their company to a mass audience.

In a recent case, a federal district court in New Jersey provided some clarity as to an employee's privacy rights on social networking sites, but also highlighted other legal issues that may inadvertently cause problems for employers. In *Pietrylo v. Hillstone Rest. Group, d/b/a Houston's* (Sept. 25, 2009), the employer, Houston's, failed to convince the court to throw out a jury verdict finding it liable for compensatory and punitive damages to two waiters fired after managers accessed their private MySpace postings criticizing management.

In this case, the two waiters created a private group on MySpace.com called the "Spec-Tator," where employees could air their grievances about their employer. The group could only be joined by invitation. The icon for the group was Houston's trademarked logo, which would appear on the MySpace profiles of people invited into the group who had accepted the invitation. The waiters invited past and present employees of Houston's to join the group, but did not invite managers to join.

Subsequently, one of the invited employees showed the site to one of Houston's managers. This manager then told another and the two of them repeatedly requested that the employee provide them with her log-in ID and password to the site. The employee gave them the information and the managers logged onto the site a few times and printed its contents. The posts on the Spec-Tator included sexual remarks about Houston's management and customers, jokes about some of the specifications that Houston's had established for customer service and quality, references to violence and illegal drug use, and a copy of a new wine test that was to be given to employees. The managers subsequently fired the site's creators for damaging employee morale and violating Houston's "core values."

The waiters sued Houston's for, among other things, violations of the federal Stored Communications Act (SCA) and New Jersey's parallel state law, as well wrongful termination in violation of a clear mandate of public policy (invasion of privacy), and common-law invasion of privacy. The claims were tried to a jury, which ruled in favor of the employer on the waiters' common-law invasion of privacy claim and did not reach the wrongful termination in violation of public policy claim.

However, the jury ruled in favor of the waiters on the federal SCA claims and the parallel provisions of the New Jersey Act, finding that the employer, through its managers, knowingly, intentionally or purposefully accessed the Spec-Tator without authorization. The jury also found that the employer acted maliciously, which allowed the employees to recover punitive damages.

The central issue at trial was whether the employee who gave the managers her log-in and password information gave "consent" for the managers to use this information to view the Spec-Tator. This employee testified that she felt pressured to provide this information because she believed she would get in trouble if she did not do so. In light of this testimony the court upheld the jury verdict, finding that the jury reasonably concluded that the managers did not have authorized access to the password protected site. The court also upheld the award of punitive damages.

This case highlights the serious legal consequences an employer can face by accessing an employee's private social networking site, even when it appears that an employee has given the employer permission to do so. This case further illustrates the need for employers to develop social networking policies that provide clear guidelines on the use of the company's name, image, or logo. Sections can also be added to an employers' computer policy to cover expectations of privacy on social networking sites when accessed through the use of the company's computers and/or internet.

If you have any questions about this decision or the issues addressed in this article, please contact the Ford & Harrison attorney with whom you usually work or the author of this article, Michelle Tatum, an attorney in our Jacksonville office, 904-357-2018, mtatum@fordharrison.com.

**U.S. Supreme Court to Review Text Messaging Case**

For the first time, the U.S. Supreme Court will address the rights of employers to review text messages sent by and to employees on employer-provided equipment. *See Quon v. Arch Wireless Operating Co., Inc*. (9th Cir. 2008), *cert. granted,* 12/14/09. In *Quon,* the Ninth Circuit held that the City of Ontario violated a city employee's Fourth Amendment privacy rights when it read the employee's text messages.[1] The messages were sent by the employee (a police officer and member of the city's SWAT team) from a text-messaging pager purchased and provided by the city and were stored by an outside service provider.

In *Quon,* the city did not have an official policy directed to text-messaging by use of the pagers. However, the city's general "Computer Usage, Internet and E-mail Policy" notified employees that the city could monitor their e-mail and computer usage. Despite this general policy, the Ninth Circuit found that the city had an informal policy of not reviewing text messages if the employee reimbursed the city for any charges in excess of the contractually permitted amount. Based on this informal policy, the Ninth Circuit held that the employee had a reasonable expectation of privacy in his text messages and the city's search was unreasonable in scope.

The Supreme Court granted certiorari to determine the following questions:

1. Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers.
2. Whether the Ninth Circuit contravened the Supreme Court's Fourth Amendment precedents and created a circuit conflict by analyzing whether the police department could have used "less intrusive methods" of reviewing text messages transmitted by a SWAT team member on his SWAT pager.
3. Whether individuals who send text messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer.

Although this case involves a public-sector (governmental) employer, the Court's decision may provide guidance helpful to private-sector employers attempting to promulgate and enforce policies that adequately inform employees that their electronic communications, including text messages, are subject to review by the employer, which can help ensure that employees do not have a reasonable expectation of privacy in these communications. We will update you when the Court issues its decision in this case.

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[1] The Ninth Circuit also held that Arch Wireless (which later became USA Mobility Wireless Inc.) violated the federal Stored Communications Act (SCA) by releasing the messages to the city without either party's consent. The Supreme Court denied review of the decision against Arch Wireless. For a further discussion of the Ninth Circuit's decision against Arch Wireless, please see the November 2008 edition of *Management Update.*

**President Extends COBRA Subsidy Under New Department of Defense Appropriations Act**

On December 21, 2009, President Obama signed legislation extending the COBRA premium subsidy originally established under the American Recovery and Reinvestment Act of 2009 ("ARRA"). Under the ARRA, only individuals who were involuntarily terminated and who lost group health insurance coverage before December 31, 2009 were eligible to receive the subsidy. Moreover, the subsidy was only available for nine months of coverage.

The new legislation extends federal COBRA health coverage cost subsidies for 6 additional months for a total of 15 months of subsidized coverage. The extension applies to those COBRA beneficiaries whose nine-month premium subsidy under the ARRA had expired. The legislation also extends the qualifying event deadline to February 28, 2010. The legislation actually amends the ARRA provisions that required terminated employees to have been eligible for COBRA coverage by December 31, 2009, and now clearly says that the terminated employee only must have been terminated by December 31, 2009, even if COBRA eligibility isn't effective until some time in 2010. Although the December 31, 2009 deadline has been amended, the result is the same: come February 28, 2010, the employees need not actually be COBRA-eligible, they just have to have been involuntarily terminated by that date.

In addition, the legislation gives beneficiaries whose subsidy expired and who didn't continue to pay the full unsubsidized premium the opportunity to receive retroactive subsidized coverage. For example, a beneficiary whose nine months of subsidized coverage ran out November 30, 2009 and who didn't pay the unsubsidized premium for December 2009 now has the option to pay his or her 35 percent share of December's premium in January 2010 and, upon doing so, would receive COBRA coverage for December.

This legislation requires employers to notify current and future COBRA beneficiaries of the new 15-month premium subsidy. Additionally, it permits employers to offset future COBRA premiums or issue refund checks for beneficiaries who "overpaid" their COBRA premiums by paying unsubsidized premiums but who are now eligible for retroactive subsidized coverage.

The entire text of the legislation, including instructions for retroactive payment of premiums and notification requirements, is contained in Section 1010 of the Department of Defense Appropriations Act 2010, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills &docid=f:h3326enr.txt.pdf.

**The Bottom Line**

Employers and plan administrators should notify current and future COBRA beneficiaries of the new 15-month premium subsidy, and current COBRA beneficiaries of their right to extend receipt of the subsidy. Employers should also contact their payroll administrators to determine the easiest way to offset future COBRA premiums or issue refund checks to beneficiaries that overpaid their premiums.

If you have any questions regarding the issues addressed in this article, please contact the author, Lindsay O'Brien, lobrien@fordharrison.com, 904-357-2005 or any member of Ford & Harrison's Employee Benefits practice group.

## Supreme Court to Address Whether Two-Member Panel of National Labor Relations Board has Authority to Hear Cases and Issue Orders

The U.S. Supreme Court has agreed to review the Seventh Circuit's decision in *New Process Steel, L.P. v. NLRB* to determine whether the National Labor Relations Board (NLRB) has authority to decide cases with only two sitting members. The National Labor Relations Act (NLRA) provides that:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise . . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. § 153(b). In December 2007, the NLRB was comprised of four members: Liebman, Schaumber, Kirsanow and Walsh. The terms of Members Kirsanow and Walsh were to expire on

December 31, 2007. In anticipation of this, the four members delegated all of the Board's authority to Members Liebman, Schaumber, and Kirsanow pursuant to the first sentence of § 153(b). After the terms of Members Kirsanow and Walsh expired, the Board was left with only two members, Liebman and Schaumber, both of whom were part of the three-member group to which the Board delegated its authority. Since then, the Board has continued to act with only these two members.

In May 2009, the D.C. Circuit Court of Appeals held that the NLRB has been without the power to act since the terms of Members Kirsanow and Walsh expired on December 31, 2007. *See Laurel Baye Healthcare of Lake Lanier v. NLRB.* However, other federal appeals courts, including the First, Second, Fourth, Seventh and Tenth Circuits have held that the Board acted lawfully when it rendered decisions with only two members.

To resolve this split among the federal appeals courts, the U.S. Supreme Court granted certiorari in *New Process Steel.* Oral arguments are scheduled for March 23, 2010. The Court's decision regarding the authority of the two-member panel could impact numerous cases decided by the Board since December 31, 2007. We will update you when the Court issues a decision in this case.

**DOL Plans to Review Family Military Leave Amendments to FMLA Regulations**

The U.S. Department of Labor (DOL) has stated that it plans to review regulations implementing the new military family leave amendments to the Family and Medical Leave Act that were included in the National Defense Authorization Act for FY 2008 (NDAA). The agency will also review other provisions of the FMLA regulations that were revised and implemented in January 2009. This statement was included in the DOL's published Regulatory Plan, which, according to the Department, "highlights the most noteworthy and significant regulatory projects that will be undertaken by its regulatory agencies."

The FMLA requires covered employers to grant eligible employees up to 12 workweeks of unpaid, job-protected leave a year for specified family and medical reasons, to maintain group health benefits during the leave and restore the employee to the same or an equivalent job upon return from leave. The NDAA amendments permit an eligible employee who is the "spouse, son, daughter, parent, or next of kin of a covered servicemember" to take up to a total of 26 workweeks of leave during a single 12-month period to care for the covered servicemember. Covered servicemember is defined as "a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." The NDAA amendment to the FMLA also permits an eligible employee to take up to 12 workweeks of FMLA leave for any "qualifying exigency" (as determined by the Secretary of Labor) arising from the call or order to active duty of the employee's spouse, child or parent. Regulations implementing the NDAA amendments were published November 17, 2008 and took effect January 16, 2009.

According to the DOL, after the agency completes its review of the regulations implementing the military family leave amendments and other revisions of the regulations implemented in January 2009, "regulatory alternatives will be developed for notice-and-comment rulemaking."

Other proposed actions by the Wage and Hour Division that may be of interest to employers include:

- Plans to revise the child labor regulations under the Fair Labor Standards Act (FLSA). The DOL published a Notice of Proposed Rulemaking in 2007 and plans to take final action on the revision in April of 2010.
- Plans to revise the FLSA recordkeeping regulation. This regulation specifies the scope and manner of records covered employers must keep that demonstrate compliance with minimum wage, overtime, and child labor requirements under the FLSA, or the records to be kept that confirm particular exemptions from some of the Act's requirements may apply. The DOL proposes to update the recordkeeping requirements "to foster more openness and transparency in demonstrating employers' compliance with applicable requirements to their workers, to better ensure compliance by regulated entities and to assist in enforcement." The DOL plans to publish a Notice of Proposed Rulemaking in August 2010.

The Regulatory Plan was published in the December 7, 2009 Federal Register and is also available at http://www.reginfo.gov.

**DOL to Review Scope of "Advice" Exemption to LMRDA Reporting Requirements**

If a union tries to organize your work force, who do you call? Usually, your labor attorney – and you may also want to use a labor consultant. Under the current regulations you pay them a fee and whatever that amount is, it is between you and the firm. Guess what? That may all change depending on how the Department of Labor (DOL) changes its regulations interpreting the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).

The LMRDA requires unions, employers, labor-relations consultants, and others to file financial disclosure reports, which are publicly available. The DOL's Office of Labor-Management Standards (OLMS) administers and enforces most of the LMRDA's provisions. According to the DOL's published Regulatory Plan, available at http://www.reginfo.gov, the OLMS will propose a regulatory initiative "to better implement the public disclosure objectives of the LMRDA regarding employer-consultant agreements to persuade employees concerning their rights to organize and bargain collectively."

Under §203 of the LMRDA, an employer must report any agreement or arrangement with a third party consultant to persuade employees as to their collective bargaining rights or to obtain certain information concerning the activities of employees or a labor organization in connection with a labor dispute involving the employer. Similarly, the consultant must report any such agreements with an employer. Section 203(c) of the LMRDA provides for an exception to the reporting requirement where the agreement is for the consultant to provide "advice" to the employer.

According to the Regulatory Plan, the DOL believes that "current policy concerning the scope of the 'advice exemption' is over-broad and that a narrower construction would better allow for the employer and consultant reporting intended by the LMRDA." Accordingly, the DOL plans to publish notice and comment rulemaking seeking consideration of a revised interpretation of the "advice" exemption that would narrow the scope of the exemption. The DOL plans to issue the Notice of Proposed Rulemaking (NPRM) in November 2010.

This is not the first time the DOL has revised its position on the advice exemption. In 1989 the DOL took the position that reporting is not required with regard to "payments to consultants to devise for the employer's use personnel policies to discourage unionization" so long as the work product, whether written or oral, "is submitted . . . to the employer for his use, and the employer is free to accept or reject [the submission]." However, "where the attorney-consultant has direct contact with employees or he himself engages in the persuader activity alleged" the advice exemption would not apply. The D.C. Circuit Court of Appeals upheld this interpretation in *United Auto Workers v. Dole,* 869 F.2d 616 (D.C. Cir. 1989). Subsequently, the DOL revised its interpretation of the advice exemption to require that when a consultant or lawyer prepares or provides a persuasive script, letter, videotape, or other material for use by an employer in communicating with employees, no exemption applies and the duty to report is triggered. However, on April 11, 2001, the DOL rescinded this interpretation and reinstated the prior interpretation of the term "advice" under § 203(c).

We will keep you updated on this issue as more information becomes available.

**Ford & Harrison Atlanta Office Relocates**

On January 11, 2010, after 25 years at our Peachtree Street location, Ford & Harrison's Atlanta office moved to a new location. Our new address is: 271 17th Street, NW, Suite 1900 Atlanta, Georgia 30363. Our telephone and fax numbers will remain the same: P: 404-888-3800 F: 404-888-3863.