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THE EAGLE'S VIEW

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ABUSE OF CORPORATE E-MAIL SYSTEMS BY SPAM

Recent federal legislation as well as a recent ruling of the California Supreme Court calls attention to the effect of "spam" on corporate productivity. A study released on July 2 by Nucleus Research entitled "Spam, the Silent ROI Killer" reveals that the average employee spends 6.5 minutes managing an average of 13.3 spam e-mails daily resulting in a 1.4% yearly loss of productivity per employee. IT administrators spend an average of 4.5 hours per week dealing with spam-related issues. The study concluded that spam annually costs employers $874.00 per employee.

On June 30, 2003, the California Supreme Court issued a decision holding that the sending of hundreds of thousands of unsolicited bulk e-mails by a former disgruntled employee does not constitute an actionable trespass to personal property, i.e., the computer system, because it does not interfere with the possessor's use or possession of, or any other legally protected interest in, the personal property itself. Intel Corp. v. Hamidi, 71 P. 3d 296 (Cal. 2003). This decision represents the first state supreme court ruling to address the trespass tort theory upon which many courts have relied to impose liability on spammers, and in essence held that Intel was left without a remedy to combat the sending of spam. The former employee's e-mails reached as many as 35,000 current Intel employees, criticizing Intel's employment practices and management. Though Intel requested that Hamidi stop sending the messages and attempted to block any future messages from him, Hamidi continued nonetheless, doing so from different computers in order to

prevent Intel's blocking efforts. Apparently critical to the court's ruling was that the messages neither slowed Intel's servers nor caused them to crash, although substantial company time was spent attempting to block the messages.

Although the effect of this decision directly applies only to California, it is a decision that may be recognized in other states, arguably limiting a corporation's remedy against spam to situations where it can be shown that the spikes in e-mail traffic resulted in a system crash or some other similar demonstrated injury. In addition, there is a federal statute designed to address technological abuse, the Computer Fraud and Abuse Act of 1986. This law criminalizes any "impairment to the integrity or availability of data, programs, or system or information that... causes loss aggregating at least $5,000 in value during any one year period to one or more individuals...." 18 U.S.C. §1030(e)(8)(A).

In 2003, the federal government took the first steps in penalizing certain types of spam. This anti-spam legislation, spearheaded by Louisiana Representative Billy Tauzin, supplants state law, such as the one passed in California, and encourages the Federal Trade Commission to establish a national "do not spam" registry. Criminal penalties are possible for intentional violations of the law.

However, there are some indications that the new anti-spam law will not go far enough in preventing spam in the workplace. For one thing, not all spam is outlawed; emails that contain fraudulent information are prohibited, as are emails that contain false return addresses or misleading subject lines.

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For these violations, the spammers can be fined up to $6 million. But the emails that make truthful claims – estimated to be approximately 33% of the spam sent – will not be restricted. Additionally, while the FTC and other federal agencies are authorized to sue spammers on behalf of recipients, no individual user can bring suit because of unsolicited spam.

Still, there is hope that a do-not-spam registry will prevent even the truthful spam from making its way to a company's inbox. The FTC is expected to draft proposals for such a registry within the next six months; in all likelihood, the registry will mimic the "do-not-call" telephone registry already in place. In theory, placing an email address on this new registry should prevent all spam; unfortunately, in reality, this is probably not the case. Already, many fraudulent emails are sent from other countries, and it is nearly impossible for the U.S. government to find and prosecute those who violate the anti-spam law. With anti-spam legislation going into effect, other spammers may choose to move their operations overseas, as well. Furthermore, many critics have suggested that the FTC lacks the resources necessary to establish the do-not-spam registry. As a result, the ultimate effectiveness of the anti-spam legislation is still difficult to predict.

In a related development, in November another California appeals court upheld a jury's $750,000 compensatory and punitive damages verdict for defamation and libel against two former employees who posted over 13,000 messages on Internet bulletin boards and vowed to "continue posting until they die." Varian Medical Systems, Inc. v. Delfino, Cal. Ct. App. No. H024214, 11/13/03. A jury found that the two former disgruntled employees acted with malice, fraud and oppression when they posted notes and 13,000 messages on 100 Internet message boards accusing Varian managers of being homophobic, discriminating against pregnant women, having sexual affairs, and secretly videotaping employees while they were in restrooms. The court rejected the defendants' argument that no one views comments on an Internet message board as true and therefore they should not be held liable for their comments.

HAZARDOUS CHEMICAL UPDATE

The Tennessee Hazardous Chemical Right to Know Law enacted May 23, 1985 originally required that all manufacturing employers and certain non-manufacturing employers in Tennessee compile and maintain a workplace chemical list for each hazardous chemical present in the workplace. The law also required that employers file the list with the Commissioner of Labor and Workplace Development and update the list on a regular basis. The Tennessee Legislature amended this portion of the law. The law now provides that "The workplace chemical list shall be filed with the commissioner within ninety-six hours *of a request by an authorized representative of the commissioner*." Employers are still required to compile and maintain the list, but are only responsible for filing a copy with the commissioner when requested to do so by an authorized representative of the commissioner.

FORMER EMPLOYEES' CLAIM OF DEFAMATION AND BLACK-LISTING REJECTED

Many employers are fearful of giving job references on former employees, for fear of being sued. Some of these concerns were recently addressed by the Indiana Court of Appeals in Eitler v. St. Joseph Regional Medical Center, 789 N.E.2d 497 (Ind. Ct. App. 2003).

The application at the new employer required the plaintiff to send a "confidential reference check report" to a former employer. That form required the reference to rate the plaintiff by checking the appropriate box under various categories, such as performance, adaptability, judgment, dependability, cooperation, initiative, personality and attendance. The form also required the reference to indicate whether it would re-hire the plaintiff. The form had an authorization and release that stated: "I hereby authorize the addressed individual ... to furnish an employment reference to [new employer] and do hereby release both parties from any and all liability for

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damages in the furnishing and receiving of this information." The plaintiff signed the form and sent it to her supervisor at her former employer, who rated the employee either "average" or "below average" in the various categories, and indicated she would not re-hire the plaintiff.

The new employer received the form from the former employer after it had made an offer of employment to the plaintiff. The plaintiff was told by the new employer that it had received negative references, and so she filed suit against the former employer and her former supervisor, alleging defamation, black-listing and intentional infliction of emotional distress. The defendants filed a motion for summary judgment, arguing that by signing the release and authorization form, the plaintiff had consented to any defamation that might arise in the completion of the evaluation form.

The former employer and former supervisor won their motion for summary judgment, and the case was dismissed. The court held that an employee's consent to the publication of defamatory material creates an absolute privilege, and that even an allegation of malice does not defeat such a privilege. The authorization and release form that authorized the former employer to furnish a reference by completing the form, and releasing all parties from "any and all liability" for damages in the furnishing and releasing of the information, was enforceable. The court also found that the form releasing the former employer from "any and all liability" for damages, also operated to bar the plaintiff's black-listing claim.

Editor's Note - *This court followed the rule that is likely to be followed in a majority of states. An employee cannot release a prior employer from any claims in furnishing reference information, and then sue the former employer for defamation. Further, many states have now passed state laws encouraging the providing of reference information by providing immunity for employers who disclose information about former employees unless it can be proven that the information disclosed was known to be false at the time of disclosure. At least one limitation exists, however, even when an appropriate release form is used. That is, an employer may not give negative references because of race, sex, age, etc., or because an employee has opposed alleged unlawful employment practices.*

ONE-FIFTH OF WOMEN REPORT BEING SEXUALLY HARASSED

A national survey released earlier this year by the Employment Law Alliance, reports that over 20% of women and 7% of men polled reported being sexually harassed at work. The survey also found that 20% of respondents reported having known about a romantic relationship between a supervisor and a subordinate at work. 66% believe such relationships at work cause favoritism and poor morale. Although 54% of respondents said employees were likely to face retaliation if they reject romantic relationships with their supervisors, 66% said that romantic relationships at work are personal and private and should not be regulated by employers.

In another survey, by psychologist Louise Fitzgerald, a third of the surveyed women who have filed a sex harassment complaint thought it made things worse. Only one fifth believed that such complaints were treated fairly.

ISSUES REGARDING WITHHOLDING FROM FINAL PAYCHECKS

Many if not most employers have a policy or practice of withholding certain deductions from an employee's final paycheck, upon termination of employment, probably because they know it will be difficult to collect the monies otherwise. A number of important legal issues are raised by these procedures.

Many states have statutory provisions as to when the final paycheck must be received by the terminating employee. Although a majority of states allow the final paycheck to be received in the normal time sequence, a few states require the final pay to be ready at or around the time of termination. In addition, a majority of states have rules prohibiting most deductions from paychecks, including the final paycheck, without some type of prior authorization from the employee.

Important issues also arise under the federal laws, particularly the wage-

hour laws. As to hourly employees, any deductions below the statutory minimum wage generally violate the federal minimum wage laws, even if they are authorized by a withholding form unless the employer can establish that the authorization was voluntary and uncoerced. One exception is the deduction of an "advance" previously given the employee, as opposed to the payment of a loan, which generally may not be deducted below the minimum wage. When an "advance" becomes a loan is unclear but at some point in time an advance will become a loan. Federal law permits deductions above the minimum wage in the case of hourly employees for non-overtime hours.

Withholding deductions in the final paycheck from salaried employees raises some difficult legal questions. The deductions can raise questions as to the validity of the salaried status. An advance of salary may be properly deducted from the last paycheck without serious consequences since the employee had simply received that money earlier. However, deductions from the paychecks for loans, losses, failure to return equipment, negative leave balances, etc., may destroy the "salary" concept resulting in the loss of the exemption or the salaried non-exempt status.

Some employers attempt to avoid the wage-hour problems in the case of both hourly and salaried employees, by using some type of withholding form. The withholding form may be sufficient to comply with the state pay withholding requirements, but different considerations

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arise under the federal wage-hour laws. It is of critical importance that the withholding form be voluntary and uncoerced and specific to the debt. Thus, having an employee sign an authorization form upon employment is ineffective. Furthermore, conditioning a loan upon the execution of an authorization form that is not revocable renders the authorization ineffective. One concern is that by using a previously signed payroll deduction form, allowing the deduction for an inappropriate reason, the employer may actually lose its ability to "repair" the damage under the wage-hour laws legally, by utilizing the "window of corrections" to correct the matter from the wage-hour standpoint. That is, an inadvertent deduction for an inappropriate reason of the salaried-exempt employee, may often be corrected by the employer; however, deductions made as a matter of the employer's regular policies or an otherwise established pattern or practice of the improper deductions from salary may not be corrected. The fact that the employer has been using the pay withholding form authorizing inappropriate deductions, would likely be viewed by Wage-Hour as a policy or practice of inappropriate deductions, thus, destroying the salary concept and the salaried-exempt status.

There are a couple of strategies an employer can adopt that may avoid many of these wage-hour problems. First, the employer could write into its policies something like: "all advances that may be deducted by law will be deducted from the final paycheck," or something to that effect. In the case of either hourly or salaried employees who have incurred a debt, those persons could be requested to execute an authorization for a payroll deduction for the specific debt. In order to avoid any claim by Wage-Hour that the withholding was coerced, and thus an inappropriate deduction, a provision could be added to the payroll withholding form that the employee may cancel the payroll deduction authorization upon two weeks prior notice to the employer. Using such a form at or near the time of termination would thus allow the employer to make a deduction below the minimum wage in the case of hourly employees, or against the salary in the case of salaried employees, even where such deductions would otherwise be inappropriate. The reason for this approach being allowed is that it would be deemed to be a "voluntary and uncoerced" payroll deduction authorization. In contrast, if the form is signed in advance, or stated as a policy such as in the employee handbook, the payroll withholding would not meet the wage-hour requirements allowing the employer to deduct matters below the minimum wage or against salary since no debt is owed at that time and in any event it would likely be deemed involuntary and coerced.