EMPLOYMENT LAWSCENE ALERT: IS YOUR BUSINESS EXPOSED TO LIABILITY FOR YOUR COMPANY'S LEASED EMPLOYEES/TEMPORARY WORKERS?

EMPLOYMENT LAWSCENE ALERT: WILL EMPLOYEES SOON BE PERMITTED TO USE COMPANY E-MAIL FOR UNION ORGANIZING ACTIVITIES?

Recent activity by the National Labor Relations Board ("NLRB") suggests that the Board may overturn a 2007 landmark decision in which it held that employees have no statutory right to use their employers' electronic communications systems for non-business purposes, including union organization and other concerted activities for the purpose of collective bargaining or other mutual aid or protection (also known as "Section 7 rights"). *See* 29 U.S.C. § 157. The Board's 2007 landmark decision is known as the "*Register Guard* decision".

On April 30, 2014, the NLRB issued a Notice and Invitation to File Briefs in the matter of *Purple Communications, Inc.*, inviting parties and other interested individuals and organizations to answer the question of whether the Board should reconsider or overrule its 2007 decision in *Register Guard*. The NLRB invites briefing and evidence to address the following questions:

- Should the Board reconsider its conclusion in *Register Guard* that employees do not have a statutory right to use their employer's email system or other electronic communications systems for Section 7 activity?
- If the Board overrules *Register Guard*, what standards, restrictions, and factors should be applied to employee access to employers' electronic communications systems?
- To what extent and how should the impact on the employer affect the issue?
- Do employees' personal electronic devices, social media accounts, and/or personal email accounts affect the proper balance to be struck between employers' rights and employees' rights under the NLRA to communicate about work-related matters?
- Are there any other technological issues regarding email or other electronic communications systems or any relevant technological changes that have occurred since the Board's 2007 *Register Guard* decision that should be taken into account?

If the NLRB overrules its *Register Guard* decision, employees may be permitted to use employers' email and communications systems for Section 7 activity, including union organizing activities.

Employers should pay close attention to the Board's decision in *Purple Communications, Inc.*, as it could have a significant impact on employers' policies and practices regarding employees' personal use of company communications systems. We will keep you informed when the Board issues its decision.

EMPLOYMENT LAWSCENE ALERT: MUST EMPLOYERS OFFER TELECOMMUTING AS A "REASONABLE ACCOMMODATION"?

A number of courts have traditionally held that attendance is an essential function of most jobs and, on that basis, have found that telecommuting, or working from home, as an accommodation is not reasonable. Recently, however, the United States Court of Appeals for the Sixth Circuit departed from this traditional notion and held that an employee's request for telecommuting as an accommodation was reasonable and that her physical presence at work was not an essential function of her job. This recent decision by the Sixth Circuit may present a problem for some employers and may be a signal that other federal courts, such as the Seventh Circuit, which oversees the federal district courts in Illinois, Indiana, and Wisconsin, may now be willing to recognize that allowing an employee to work from home may be a reasonable accommodation.

At issue in *EEOC v. Ford Motor Company* was whether a telecommuting arrangement could be a reasonable accommodation for an employee in a resale steel buyer position suffering from irritable bowel syndrome ("IBS"). The employee had formally requested that she be permitted to telecommute on an as-needed basis as an accommodation for her disability. Ford did maintain a telecommuting policy that authorized employees to telecommute up to four days per week, but specifically provided that telecommuting was not appropriate for all jobs, employees, work environments or managers. Ford ultimately determined that the employee's position was not suitable to telecommuting and denied her request.

In defending against the EEOC's claim, it was Ford's position that the employee was not "otherwise qualified" because physical presence at the workplace was an essential job function and that the employee's inability to demonstrate regular attendance made her unable to perform an essential function of her job and, therefore, she was not a "qualified"

individual under the ADA and did not fall within the statute's protections.

The Sixth Circuit rejected Ford's argument and, for the following reasons, found that Ford could not show that the employee's physical presence at work was essential to performing her job:

- The assumption that attendance at the workplace is essential for most jobs no longer applies due to technological advances that allow employees to perform a number of tasks remotely;
- Because of those technological advances, positions that require a great deal of teamwork are not inherently unsuitable to telecommuting arrangements;
- The EEOC offered evidence that cast doubt on the importance of face-to-face interactions in the employee's position;
- The employee could still conduct on-site visits to suppliers' places of business if she worked partially or even primarily from her home rather than the employer's facilities; and
- The employer permitted other resale buyers to telecommute, albeit on a more limited basis.

The Sixth Circuit emphasized that determining whether physical presence is essential to a particular job is a highly fact-specific question and that it considered several factors to guide its inquiry, including the following: written job descriptions, the business judgment of the employer, the amount of time spent performing the function, and the work experience of past and present employees in the same or similar positions.

What Does This Decision Mean for Employers?

Although this decision comes out of the Sixth Circuit, it has opened the door for the EEOC to take an aggressive approach on the issue of whether physical presence in the workplace is truly essential to performing a specific job. The Sixth Circuit's decision in *EEOC v. Ford Motor Co.*, represents a significant departure from the traditional majority viewpoint that regular attendance at the workplace is usually an essential function of the job. For example, in 1995 in *Vande Zande v. Wisconsin Department of Administration*, the Seventh Circuit stated:

"Most jobs in organizations public or private involve teamwork under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance. This will no doubt change as communications technology advances, but is the situation today. Generally, therefore, an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home. This is the majority view . . . . But we think the majority view is correct. An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced. No doubt to this as to any generalization about so complex and varied activity as employment there are exceptions, but it would take a very extraordinary case for the employee to be able

to create a triable issue of the employer's failure to allow the employee to work at home."

The Sixth Circuit's decision in *EEOC v. Ford Motor Co.*, may be a signal to other courts that technology has advanced such that the courts need to re-consider this traditional viewpoint.

With the federal courts and the EEOC beginning to embrace the concept that physical presence at the employer's place of business is not an essential job function, this may be the beginning of a slippery slope toward requiring employers to consider telecommuting as an accommodation. The question most employers will have is whether such an accommodation is reasonable, particularly because many employers, like Yahoo! CEO Marissa Mayer, are committed to the philosophy that in-person, face-to-face communication, and interaction fosters the type of collaboration, innovation, and production that is essential to a successful business.

Employers should keep a close eye on how other federal courts address the issue of telecommuting as a reasonable accommodation.

EMPLOYMENT LAWSCENE ALERT: HAVE YOU DONE YOUR HR SPRING CLEANING?

Spring is finally here! Like household cleaning, it is also important to do spring cleaning in the workplace. Spring is a great time for employers to audit their human resources policies and procedures to account for recent changes in state and/or federal law and to find and correct potential problems before they turn into costly claims or lawsuits.

Failing to regularly review your personnel policies and procedures could create litigation risks for your business. The key areas of focus for your workplace spring cleaning should include:

- Reviewing and revising employee handbooks and other individual policies as needed;
- Reviewing and revising your personnel practices and procedures regarding:
    - Avoiding discrimination, harassment, and retaliation in all aspects of employment;
    - Approving and managing leaves of absence;
    - Accommodating disabilities or religious needs;
    - Wage and hour issues; and
    - Disciplinary practices and investigations.
- Identifying any important changes in federal and state law, determining how any changes will affect your policies and procedures, and revising those policies and procedures accordingly.
- Conducting training and re-training for key personnel on important human resources policies such as harassment.

Reviewing your personnel policies and procedures annually and ensuring your employees have the proper training to implement and enforce your policies and procedures is a springtime best practice for employers.

If you would like additional resources to assist you in conducting your human resources audit or are looking for someone to conduct informational training for your employees or supervisors, please contact us.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN PASSES SOCIAL MEDIA PROTECTION ACT – HOW WILL IT AFFECT YOUR EMPLOYMENT PRACTICES?

On April 8, 2014, Governor Scott Walker signed into law the Wisconsin Social Media Protection Act (the "Act"). 2013 Wisconsin Act 208. The new law, which went into effect on April 10, 2014, Wis. Stat. § 995.55, prohibits employers from requesting an employee or an applicant to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's "Personal Internet account," defined as an "Internet-based account that is created and used by an individual exclusively for purposes of personal communications."

Specifically, under the new law, employers may not:

- Request or require an employee or applicant for employment to disclose access information for a Personal Internet account or otherwise grant access to or allow observation of that account as a condition of employment;
- Discharge or otherwise discriminate against an employee for:
    - Exercising his or her right to refuse to disclose access information, grant access to, or allow observation of his or her Personal Internet account;
    - Opposing a practice prohibited under the Act;
    - Filing a complaint or attempting to enforce any right under the Act; or
    - Testifying or assisting in any action or proceeding to enforce any right under the Act.
    - Refuse to hire an applicant for employment because the applicant refused to disclose access information for, grant access to, or allow observation of the applicant's Personal Internet account.

The Act does, however, permit an employer to do any of the following:

- Request or require an employee to disclose access information to allow the employer to gain access to an account, service, or electronic communications device that the employer supplied or paid for (in whole or in part) in connection with the employee's employment or used for the employer's business purposes;
- Discharge or discipline an employee for transferring the employer's proprietary or confidential or financial information to the employee's Personal Internet account without the employer's authorization;
- Conducting an investigation or requiring an employee to cooperate in an investigation if an employer has reasonable cause to believe that there has been:
    - Any alleged unauthorized transfer of confidential, proprietary, or financial information to the employee's Personal Internet account; or
    - Any other allege employment-related misconduct, violation of the law, or violation of the employer's work rules, as specified in an employee handbook, if the misconduct is related to activity on the employee's Personal Internet account.

(Although an employer can require an employee to grant access to or allow observation of the employee's Personal Internet accounts for this purpose, the employer may not require the employee to disclose access information for that account.)

- Restrict or prohibit an employee's access to certain internet sites while using an electronic communication device supplied or paid for in whole or in part by the employer or while using the employer's network or other resources;
- Comply with a duty to:
    - Screen applicants prior to hiring; or
    - Monitor or retain employee communications as required by state or federal laws, rules, and regulations or the rules of a self-regulatory organization.
    - View, access, or use information about an employee or applicant for employment that can be obtained without access information or is available in the public domain; and
    - Request or require an employee to disclose his or her personal e-mail address.

An employee or applicant who believes he or she was discharged or otherwise discriminated against in violation of the Act may file a complaint with the Department of Workforce Development in the same manner as other employment discrimination complaints are filed and processed with the Department.

Employers should review and revise their policies and practices to ensure that they are in compliance with the Act. For more information about the Wisconsin Social Media Protection Act or if you have questions about whether your practices comply with the new law, please contact us.

EMPLOYMENT LAWSCENE ALERT: SHOULD YOU CHANGE YOUR WORKPLACE POLICIES TO ADDRESS E-CIGARETTES?

As “e-cigarettes” grow in popularity, employers must decide how to address the use of e-cigarettes in the workplace. Electronic cigarettes or “e-cigarettes” are battery-operated devices that deliver nicotine or other substances to its user in the form of a vapor that is then inhaled. Many e-cigarettes are manufactured to look just like everyday objects that can be found in the workplace, such as pens or USB sticks.

E-cigarettes are currently unregulated by the U.S. Food and Drug Administration, which means the FDA has not evaluated any e-cigarettes for safety or effectiveness. A number of recent independent studies on the effects of e-cigarettes and the emissions from those devices have yielded mixed results, with some indicating that the vapor emitted by e-cigarettes contains some of the same carcinogens that you find in traditional cigarette smoke. So, as an employer, how can you know whether you should be regulating the use of these devices in the workplace?

Currently, there is no federal law regulating the use of e-cigarettes and no state has completely banned their use. Twenty-four (24) states, including Wisconsin, and the District of Columbia currently have “smoke-free” laws that prohibit smoking of traditional tobacco cigarettes in the workplace. Because e-cigarettes are still fairly new, most of these “smoke-free” laws do not address whether the use of e-cigarettes is also prohibited in the workplace. Recently, a number of municipalities and some states have enacted new laws or amended their “smoke-free” laws to ban the use of e-cigarettes in the same way use of traditional tobacco cigarettes is prohibited in the workplace.

Wisconsin’s legislature has taken an approach quite different from the trend toward banning the use of e-cigarettes in the workplace and other public places. The Wisconsin legislature has introduced a bill that, if passed, would exclude e-cigarettes from the types of smoking devices that are prohibited under Wisconsin’s “smoke-free” law, which would mean that using e-cigarettes would be permitted in those places where smoking traditional cigarettes is now prohibited. It is not likely, however, that this bill would require private employers to allow employees to use e-cigarettes in the workplace.

With more employees bringing e-cigarettes into the workplace, employers are faced with the decision whether to permit or ban employees’ use of e-cigarettes at work. Some employers find that permitting employees to use e-cigarettes cuts down on the number of smoking breaks employees take each day, thereby increasing some employees’ productivity, while other employers find that e-cigarettes create a distraction for users and non-users alike.

Absent legal restrictions regarding the use of e-cigarettes in most cities and states, employers in those jurisdictions are free to create their own reasonable policies addressing the use of e-cigarettes just as they would maintain policies addressing or restricting other activities and conduct that could interfere with employees' ability to do their jobs or otherwise disrupt the workplace.

Employers should stay up to date on state and municipal laws and ordinances that could affect how employers may be required to treat the use of e-cigarettes in the workplace.

EMPLOYMENT LAWSCENE ALERT: EEOC ISSUES NEW PUBLICATIONS ON RELIGIOUS DRESS AND GROOMING

On March 6, 2014, the Equal Employment Opportunity Commission announced that it released two new publications addressing religious dress and grooming rights and responsibilities in the workplace under Title VII of the Civil Rights Act of 1964 (Title VII), in response to an increased number of religious discrimination charges filed with the agency.

The EEOC has published a question-and-answer guide and a fact sheet in an effort to provide employers and employees practical guidance for complying with Title VII, which, under certain circumstances, requires employers to provide reasonable accommodations to employees and applicants who wear clothing or follow certain grooming practices for religious reasons, unless doing so poses an undue hardship on the employer's business operations.

The two publications address a number of topics, including examples of common religious dress and grooming practices and when an employer's duty to consider an accommodation request is triggered, potential claims against employers for failing to accommodate religious requests, tips for preventing and addressing workplace harassment and retaliation against employees who request religious accommodations, and examples of when these requests have posed undue hardship on employers.

If you have questions about religious accommodation under Title VII, please contact one of our Employment Law attorneys.

CHECKLIST FOR CREATING AN EFFECTIVE SOCIAL MEDIA POLICY

Employers' social media and internet policies are a top enforcement priority for the NLRB. Below is a checklist that employers can use to create an effective social media policy. Please continue to visit the Employment LawScene™ for more policy pointers and practical guidance.

- Evaluate your business' needs and goals.
- Take a stance on social media use—will you encourage, permit, or simply tolerate it?
- Understand and be familiar with the latest federal and state laws and NLRB rulings and guidance.
- Create a Social Media Policy that addresses your business needs and goals.
- Define "Social Media."
- Include key provisions:
    - Notify employees that they should have no expectation of privacy when using Company-issued equipment, systems, or networks.
    - Notify employees that the Company reserves the right to monitor data transmitted through Company-issued equipment, systems, or networks.
    - Remind employees that the Company's computer systems, networks, and equipment are Company property.
    - Remind employees to include a disclaimer when writing personal blogs or posts stating that he or she is a Company employee and that any views and opinions expressed are the employee's and do not represent official statements or views of the Company.
    - Remind employees of prohibitions against disclosing confidential or proprietary Company information.
    - Notify employees of prohibition against using social media to harass co-workers.
    - Encourage employees to report violations to the Company's social media policy to management.
- Provide specific examples of prohibited conduct.
- Avoid overly broad statements, especially concerning disparagement of the Company, respectful workplace, and confidentiality.
- Include a clause stating that the employer's policies are not intended to and should not be interpreted to interfere with or infringe upon employees' rights to engage in protected concerted activity.
- Notify employees of the Company's stance regarding social media use during working hours and while using Company resources.
- Clearly identify the consequences for violating the policy.
- Review other existing personnel policies to determine whether they apply to employees' use of social media.
- Implement your Social Media Policy by distributing the policy to all employees and obtaining acknowledgment of receipt.
- Enforce and apply your policy consistently (be aware that monitoring employee use of

social media sites and other off-duty conduct may be prohibited under federal or state law, terms and conditions of social media sites themselves, and collective bargaining agreements).
- Train employees on the appropriate uses of social media.
- Review your policy annually and update according to changes in the law.

EMPLOYMENT LAWSCENE ALERT: U.S. SUPREME COURT AFFIRMS TIME SPENT CHANGING CLOTHES NOT COMPENSABLE WORK TIME

On October 14, 2013, the Employment LawScene™ brought you an article explaining that the Supreme Court would hear oral arguments in *Sandifer v. U.S. Steel Corp.*, a case out of the Seventh Circuit, to resolve disagreement among other circuit courts as to what constitutes "changing clothes" within the meaning of the Fair Labor Standards Act ("FLSA") for purposes of determining whether time spent "changing clothes" at the beginning and end of each workday is compensable work time.

The *Sandifer* case specifically focused on Section 203(o) of the FLSA, which allows employers and unions to collectively bargain over whether employees must be paid for time spent "changing clothes" at the beginning and end of each workday. The Seventh Circuit held that time spent putting on certain articles of protective gear fell within the definition of "changing clothes" under the FLSA and, accordingly, was not work time that employees had to be paid for pursuant to the parties' collective bargaining agreement.

On January 27, 2014, the U.S. Supreme Court unanimously affirmed the Seventh Circuit's holding that the time employees spent "donning" and "doffing" protective gear was not compensable under the FLSA when, "on the whole", the vast majority of the time was spent "changing clothes" and the employer and employees agreed that time was non-compensable under a collective bargaining agreement.

The U.S. Supreme Court noted that employees in *Sandifer v. U.S. Steel Corp.* were required to don and doff twelve (12) items of protective gear, nine of which fell within the definition of "clothes" under the FLSA (flame-retardant jacket, pants, hood, hard hat, "snood," "wristlets," work gloves, leggings, and steel-toed boots) and, therefore, were not compensable. Although the Court did not consider the other three items—safety glasses, earplugs, and a respirator—to fall within its definition of "clothes," it found that, "on the whole", a vast majority of the time was spent donning and doffing the other items that did fall within the

definition and, accordingly, the time was not compensable. The Court instructed that in determining whether time spent donning and doffing certain protective gear is compensable under the Act, other courts should examine the time period at issue "on the whole" and determine whether the vast majority of donning and doffing time involves clothing items or non-clothing items as defined by the Court. If a vast majority of the time is spent on items that are "clothes," then the entire period should qualify as time spent "changing clothes" and should not constitute compensable work time under the FLSA pursuant to an applicable collective bargaining agreement.

The U.S. Supreme Court's decision in *Sandifer* makes clear that unionized employees are not entitled to compensation for time spent donning and doffing protective gear under the FLSA where a vast majority of time is spent "changing clothes" and where a collective bargaining agreement excludes such time from working time.

Click here to read the U.S. Supreme Court's complete decision in *Sandifer v. U.S. Steel Corp*.

NEW CHANGES TO WISCONSIN'S UNEMPLOYMENT INSURANCE LAWS TAKE EFFECT JANUARY 5, 2014

The Wisconsin Legislature recently enacted major changes to Wisconsin's unemployment insurance laws, a number of which will become effective on January 5, 2014. The most significant changes include an expansion of what conduct constitutes "misconduct" and establishes a new standard of "substantial fault," which if proven, can temporarily disqualify an employee for unemployment insurance benefits. Another significant change limits the circumstances under which an employee may be entitled to unemployment benefits following a voluntary resignation. These new changes can be found in Wisconsin's 2013-2015 Biennial Budget Bill, 2013 Wisconsin Act 20 ("Act 20"). The Wisconsin Legislature recently enacted major changes to Wisconsin's unemployment insurance laws, a number of which will become effective on January 5, 2014. The most significant changes include an expansion of what conduct constitutes "misconduct" and establishes a new standard of "substantial fault," which if proven, can temporarily disqualify an employee for unemployment insurance benefits. Another significant change limits the circumstances under which an employee may be entitled to unemployment benefits following a voluntary resignation. These new changes can be found in Wisconsin's 2013-2015 Biennial Budget Bill, 2013 Wisconsin Act 20 ("Act 20").

Definition of Misconduct Wis. Stat. § 108.04(5) currently provides that claimants who are terminated for "misconduct" are temporarily ineligible for unemployment compensation benefits. Act 20 amends Wis. Stat. § 108.04(5) to incorporate the longstanding definition of "misconduct" that was set forth by the Wisconsin Supreme Court in Boynton Cab Co. v. Neubeck and Industrial Comm'n, 237 Wis. 249, 296 (1941). Boynton set a high standard for misconduct that was difficult for employers to meet. Act 20 incorporates, but further expands that standard to include actions and conduct that may not have been considered "misconduct" under the Boynton standard.

Act 20 also eliminates the stringent requirements relating to termination for absenteeism and tardiness (formerly set forth in Wis. Stat. § 108.04(5g)) and incorporates absenteeism and tardiness within the new definition of "misconduct." Pursuant to Wis. Stat. § 108.04(5)(e), absenteeism or excessive tardiness by an employee in violation of the employer's policy, if the employee does not provide both notice and a valid reason for the absenteeism or tardiness, constitutes misconduct.

This new definition of misconduct applies to new unemployment compensation claims filed on or after January 5, 2014.

Substantial Fault Act 20 also creates a new standard – the "substantial fault" standard – intended to cover conduct by an employee that does not rise to the level of misconduct, but can still temporarily disqualify employees for unemployment compensation benefits. An employee who is terminated for "substantial fault" of the employee connected with the employee's work, will be temporarily ineligible for benefits. "Substantial fault" includes acts or omissions over which an employee exercised reasonable control and which violate reasonable requirements of the employer. Substantial fault does not include: minor rule violations, unless the violation is repeated after the employee is warned; inadvertent errors by the employee; and any failure of the employee to perform work due to insufficient skill, ability, or equipment.

Voluntary Resignation/Quit Exceptions Act 20 changes the law with respect to the current statutory exceptions that allow an employee to voluntarily resign from employment and still collect unemployment benefits if the resignation involved certain circumstances. Act 20 eliminates 8 of the previously recognized exceptions and modifies four of the remaining exceptions. These changes will first apply to claims for unemployment benefits filed on or after January 5, 2014.

The following exceptions are no longer recognized under Wisconsin law and will no longer be valid reasons for an employee to collect unemployment benefits after he or she has voluntarily resigned employment:

1. Employee terminated his or her employment to accept a recall to work for a former

employer within 52 weeks after having last worked for that employer.

2. Employee maintained temporary residence near the work terminated, maintained a permanent residence in another locality, and terminated the work and returned to his or her permanent residence because the work available was reduced to less than 20 hours per week in at least 2 consecutive weeks.

3. Employee left or lost his or her work because of reaching the employer's compulsory retirement age.

4. Employee terminated part-time work because of loss of other full-time employment makes it economically unfeasible for employee to continue part-time work.

5. Employee terminates work with a labor organization if termination cause employee to lose seniority rights granted under a collective bargaining agreement and if termination results in loss of employee's employment with the employer that is party to the collective bargaining agreement.

6. Employee terminated work in a position serving as a part-time elected or appointed member of a government body or representative of employees, employee was engaged in work for an employer other than the employer in which the employee served as the member or representative, and employee was paid wages in terminated work constituting not more than 5% of employee's base period wages for purpose of entitlement for benefits.

7. Employee owns or controls an ownership interest in a family corporation and employee's employment was terminated because of an involuntary cessation of the business of the corporation under certain conditions.

Employers should be sure to update their employee handbooks, policies, and procedures to reflect these new changes that will take effect January 5th. If you have questions about which policies you should update or would like assistance in reviewing your existing policies to ensure compliance with these updates, please contact us.