YOUR BOSS IS MONITORING YOUR WORK EMAILS – AND MAY BE REQUIRED TO ACT ON THEM

by Ann Longmore, August 12, 2013

Courts have generally treated a firm’s computers and information, or communication stored on them, as the employer’s property. It was therefore somewhat perplexing to see the apparent surprise and consternation at the news that a major American university had accessed and read the e-mails of some of its professors as part of an internal investigation.

WHY EMPLOYERS MONITOR EMAIL

Employers that provide work email and Internet access for business purposes have an interest in ensuring this use remains professional. Organizations tend to monitor employees’ email and computer usage for a number of reasons:

1. To make sure that employees are not divulging confidential information or trade secrets.
2. To protect itself against potential liability arising from an employee’s misuse of the organization’s email system (by introducing viruses, sending harassing emails, or visiting inappropriate websites, for example).
3. To foster productivity by limiting the personal emails sent during work hours.
4. To safeguard the organization’s reputation.

BUT HAVE THEY TOLD THEIR EMPLOYEES?

Today, courts are increasingly weighing whether employers have explicitly established this property right and informed employees that their email is or may be monitored. That was what happened in a case in New Jersey, where an appeals court ruled that an employee had a reasonable expectation that email sent on a personal account wouldn’t be read—even on the company’s computer. To clarify this intent, most organizations spell this out in an Internet and Computer Use Policy.

WITH MONITORING COMES OBLIGATION TO ACT

The very ability of an organization to monitor the emails and internet access gained through its systems, and to filter this information, can itself, in certain circumstances, result in potential liability for employers that don’t take appropriate follow-on action. A seminal decision from the New Jersey Superior Court held that a company that knows its employee is accessing pornography at work has a duty to investigate that activity and stop any potential harm to third parties.

We hold that an employer who is on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee’s activities and to take prompt and effective action to stop the unauthorized activity, lest it result in harm to innocent third-parties. No privacy interest of the employee stands in the way of this duty on the part of the employer.

AS FOR LIMITING PERSONAL EMAIL USE…

Employees’ use of personal e-mail during business hours is common in the 21st-century workplace. With personal smartphones in every employee’s pocket, the genie may be out of the bottle.

Unless it’s a bring-your-own-device firm—but that’s an issue for another post.

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WHEN ARE CORPORATE INDEMNIFICATION CLAIMS RIPE (FOR DELAWARE CORPORATIONS)?

by Ann Longmore, September 4, 2013

In a decision that is likely to unpleasantly surprise many directors and officers of Delaware companies, the Delaware Court of Chancery recently found that corporate indemnification is typically not timely (not “a ripe claim”) until the underlying litigation on which it is based is final and all appeals completed.

There were some unusual facts but, sadly, the rarity of the circumstances would not appear to have dictated the outcome. In the case in point:

- A Texas court entered a judgment against two board members
- This resulted from a finding of breach of fiduciary duty by the two in connection with an alleged theft (or usurpation) of a corporate opportunity.
- The remedy included a damage award of $95 million against the two directors.
- While appealing the Texas decision, the directors sought indemnification of their expenses from the Delaware corporation.
- The pair sought indemnification on the ground that they were “successful” within the meaning of 8 Del. C. § 145(c) because, based on the argument that, while there were originally eight counts asserted against them, ultimately at trial only a single breach of fiduciary claim was presented to the jury.
- The Delaware court was asked to consider the Delaware corporation’s motion to dismiss or stay the indemnification action. It granted the motion to dismiss the directors’ claim for indemnification, without prejudice, “on the ground that is most sensitive to the important interests at stake.”
- According to the court, under of Delaware law, “indemnification claims do not typically ripen until after the merits of an action have been decided, and all appeals have been resolved.”

Smackdown

- Claims for indemnification, the court explained, require a careful analysis of the record in the underlying action and a careful consideration of exactly how partial the defendants’ success was — something which cannot be properly done until the underlying action is finally completed. Doing so in advance of a final determination of the underlying action would risk the potential need to reopen and revise the holding in the indemnification action if there was a change in appeal of the underlying action.
- “Corporate fiduciaries (or directors) who, unless they overturn a jury verdict, owe the corporation nearly $100 million and must yield to the company’s substantial property rights, because they have been adjudicated to have breached their fiduciary duties, are not in an equitable position to ask this court to allow them to prematurely seek a money damages claim from the corporation to which they owed a duty of loyalty.”

What Does This Mean from the Perspective of D&O Insurance?

- Firstly, in most instances, after deliberation, companies advance defense costs. But—and this can be a big “but” – where the company itself is suing its directors, as in this case, no one should expect the firm to advance defense costs to the director defendants.
- Most Directors and Officers Liability (D&O) insurance have removed the provision requiring companies to first indemnify their directors and officers to the fullest extent allowable by law. Instead, most policies cover where the company has not indemnified its directors and officers.
- In the U.S., there is typically either an “entity versus insured” or an “insured versus insured” exclusion that would likely preclude coverage for situations where the firm sues its own directors.

CITATION

Chapter 8 Delaware Code § 145
(c) To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys’ fees) actually and reasonably incurred by such person in connection therewith.

IMPACT

“Due to the fact that there are similar cases being tried in multiple courts, this case is likely to get some attention. Its broad reading of when an individual may be personally liable under the FLSA is bound to raise some eyebrows – and concern.”
CAN INDIVIDUALS BE PERSONALLY LIABLE UNDER THE FAIR LABOR STANDARDS ACT (FLSA)?

by Ann Longmore, August 29, 2013

A recent decision by the Massachusetts appeals court may open the door to personal liability in FLSA claims—at least in the kinds of systematic under-compensation cases sweeping through American hospitals.

In this case, current and former employees alleged that they were deprived of their wages due to timekeeping policies and workplace practices that required them to work through their meal and rest periods, put in extra work before and after their regularly scheduled shifts, and attend mandatory training sessions. They asserted causes of action under the Fair Labor Standards Act (FLSA) and Massachusetts common law for recovery of their unpaid wages. Their charges were dismissed before they were reexamined by an appeals court.

“Numerous lawsuits like this have been filed against hospitals across the country, all alleging similar types of systematic under-compensation cases.” In fact, as the judge observed, a number of these cases were being litigated by counsel for plaintiffs in this case.”

On appeal, the court overturned the lower court’s dismissal of the FLSA claims against the employer and one of the individual defendants, while allowing the charges to be dropped against the remaining individual defendant.

Importantly, claims were allowed to stand against the employer’s former president and chief executive officer, while they were dropped as to the former senior human resources director.

WHAT THE EMPLOYEES SAID

The plaintiffs alleged that:

- Their employer and supervisors were aware that they performed work without being paid.
- Their unpaid work was performed on premises during operational hours, in clear view of managers and supervisors.
- Due to staffing shortages and other industry demands, management knew that the tasks they assigned required employees to work through their meal breaks and before and after their regularly scheduled shifts.
- They also suggested that their employer consciously took advantage of the employees’ dedication and commitment, knowing that they would not abandon their responsibilities simply because their work hours are over or because they are due to take a meal or rest break.

WHAT THE LAW SAYS

Liability under the FLSA attaches to any “employer,” broadly defined to include “any person acting directly or indirectly in the interest of an employer in relation to an employee.” Courts have generally agreed that “a corporate officer with operational control of a corporation’s covered enterprise is an employer along with the corporation, jointly and severally liable... for unpaid wages.”

The three basic elements of a FLSA claim are:

1. The individual plaintiffs were employed by the defendant.
2. The work involved interstate activity.
3. The employee plaintiffs performed work for which they were under-compensated.

Claims for unpaid overtime wages must establish that the workers were employed and that any hours worked in excess of 40 per week were not compensated at a rate of at least one and one-half times the regular rate.

PERSONAL LIABILITY WHEN WE SEE IT

In the seminal case on FLSA individual liability, the courts balanced “the shield from personal liability (that) is one of the major purposes of doing business in a corporate form” against Congress’s clear refusal “to incorporate the common law parameters of the employer-employee relationship” into the FLSA.

Clear as mud? Looking to the U.S. Supreme Court’s precedents interpreting employment statutes, this court applied an “economic reality” test that looked to the totality of the individual’s level of involvement with the corporation’s day-to-day operations, as well as their direct participation in creating or adopting the unlawful pay practices.

This court identified some of the key indicia of personal liability under the FLSA:

1. They typically involve a corporate officer with operational control rather than a mere employee, and/or
2. The individual possesses an ownership stake (seen as highly probative of an individual’s employer status).
APPLYING THE LAW TO THE FACTS

In the Massachusetts case, the court considered that, while the former president and CEO did not have an ownership interest in the organization, she was alleged to make decisions concerned the timekeeping policies complained of, oversaw the budget, and made a number of major employment-related decisions, including reducing jobs and implementing budget cuts. Concluding that while one's high position within an organization wasn’t alone sufficient to hold the individually personally liable under the FLSA, the court noted that the complaint contains allegations indicating that she had control over corporate policy about compensation practices.

The court believed that the former president and CEO had control over the budget and critical resource allocation including the reduction of jobs and services – this was sufficient for the appeals court to allow the claims against her to stand.2

1 Noting that when an individual has the ability to have the employer undercompensate employees, thereby increasing profits of the organization, which then inure to the individual – they have a strong personal motive to cause violation the FLSA minimum wage standards.

2 There was a dissenting opinion disagreed: stating that while it was possible that mere broad assertions that the former president and CEO had authority that might include the necessary degree of control over the plaintiffs’ employment, these don’t amount to a reasonable expectation that further discovery and trial will reveal evidence of liability.

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