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Reminder - Public Employers Required To Electronically File Collective Bargaining Agreements

Christine P. O'Hearn, Esquire

The New Jersey Public Relations Commission ("NJPRC") is the agency which governs public employers and handles disputes between public employers and employees. N.J.S.A. 34:12A-8.2 provides "The commission shall collect and maintain a current file of filed contracts in public employment. Public employers shall file with the commission a copy of any contracts it has negotiated with public employee representatives following the consummation of negotiations." Recently, the NJPRC issued a Notification to public employers reminding of the employer's statutory obligation to file copies of collective bargaining agreements. The Notification further instructed public employers to email copies of the current and future collective bargaining agreements to NJPRC. NJPRC intends to make the collective bargaining agreements available online at its website www.state.nj.us/perc. In addition, each collective bargaining agreement must have a Certification from an appropriate government official which states "I declare to the best of my knowledge and belief that the attached document(s) are true electronic copies of the executed collective negotiations agreement(s)." Any public employer who has not complied with N.J.S.A. 34:12A-8.2 should do so.

Happy New Year in May? Employers Can Be Liable for End-of-Year Bonuses Even Where Termination Does Not Happen in December

William F. Cook, Esquire

Who celebrates New Year's Day in May? The Mummers aren't on Broad Street, and the only things that people are counting down are the days until Shore vacations. But unwary employers might be put into an end-of-year state of mind if their employment contracts are not specific about how to dole out December bonuses when an employee is terminated at some other time of the year.

This was the issue before the United States District Court for the District of New Jersey this past August. In Sluka v. Landau Uniforms, Inc., the Court held an employer remains obligated to compensate a terminated employee for incentive bonuses even though the employee's termination did not coincide with the time of the employer's bonus distribution period.

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William F. Cook, Esquire

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Carl Sluka worked for Landau Uniforms, a company in the business of making uniforms for retail sale. Mr. Sluka worked in the business marketing department and served as the Territory Manager for Pennsylvania, New Jersey, Maryland, and Delaware. Under his employment agreement, Mr. Sluka was an at-will employee and receive a base salary of $60,000 per year. He was to receive a commission of 1% on all net sales to accounts assigned to him. In addition, Mr. Sluka was to receive a 2% commission on net sales from new customers that he generated. Finally, Mr. Sluka was to receive a 2% commission on the marginal increase in net sales from year- to-year.

The contract, provided a specific timing when bonuses were to be paid. First, Mr. Sluka's salary was to be paid weekly or bi-weekly. The "commission-based" portion of his compensation was to be paid on a monthly basis, and the "bonus-based" portion of his compensation was to be paid at the end of the year. Although there were three different types of incentives in play, the contract did not specify which incentives were commission-based and which were bonus-based. The Court, relying on the ordering of the language in the contract, concluded that the commission-based incentive was the 1% commission on all net sales, and the bonus-based incentives were the 2% commission on net sales from new customers and the 2% commission on the marginal increase in net sales from year-to-year.

Mr. Sluka began work in September 2001. Although he had only worked for part of 2001, he received a 2% net sales commission for 2001. However, the company had to counsel Mr. Sluka for performance problems in 2002 and into 2003. At one point, Mr. Sluka's supervisor received a request from a customer that Mr. Sluka stop contacting the customer.

Mr. Sluka's record also had some positives, though. For example, he assumed additional responsibilities in serving in another territory while the company was trying to find a Territory Manager for that area. Mr. Sluka was also able to obtain new accounts outside of the normal chain of distribution. This latter accomplishment was even highlighted at a group headquarters meeting.

On October 21, 2003, the company terminated Mr. Sluka for failure to follow procedures and communicate with others. He was fifty-seven at the time of his termination. Four months later, the company replaced Mr. Sluka with a forty-one year old man.

Upon his termination, the company paid Mr. Sluka's remaining initial base salary and his monthly 1% commission. However, Mr. Sluka received no payment for 2% of net sales on new accounts. In addition, Mr. Sluka did not receive any payment for 2% marginal increase in sales from 2002 to 2003. Even though Mr. Sluka was in a group health plan with the company at the time of his termination, the company failed to provide a COBRA notice until December 2004.

Mr. Sluka filed a lawsuit in May 2004 alleging Landau breached the employment contract and implied covenants of good faith and fair dealing with respect to the non-payment of his bonuses.

The Court held the company's failure to pay the bonuses was a breach of contract. The Court rejected the employer's argument that an employee must be employed with the company at the time of the bonus distribution. The Court observed there was no provision containing such a requirement. In addition, all commissions and bonuses were included in a contract section entitled "Compensation". Accordingly, all earned commissions and bonuses were due to Mr. Sluka upon his termination, just like any other kind of compensation. Because the Court concluded that there was a clear breach of contract, there was no need for the Court to address the duplicative claim for breach of the covenant of good faith and fair dealing.

The Court declined to grant relief under the New Jersey Wage Payment Law (NJWPA), since the NJWPA does not apply to "supplementary incentives". Thus, the NJWPA did not provide Mr. Sluka with an additional entitlement to his bonuses.

The Court also held the company violated COBRA when it failed to give notice of benefits until December 2004. The Court fined the company twenty dollars per day for each day it failed to give notice. Since the company was over a year late, this added up to a considerable penalty.

What can employers take from Sluka? Be clear in your incentive packages and contracts regarding entitlement and liability to receive incentive monies. Sluka shows that an employer can be liable for earned portions of end-of-year bonus distributions even if the employee is not employed at the end of the year.

In addition, employers must be attentive to post-termination practices. There is simply no excuse for the failure of the employer in Sluka to provide COBRA notice. The Court held even though the employer recognized its mistake and offered to compensate the employee retroactively for health benefits, the employer's offer was not enough to remedy the COBRA violations and imposed COBRA penalties.

Court Expands Employers' Liability to Third Parties for Employee's Illegal Internet Activity

Stephen Higgins, Esquire

Doe v. XYC Corporation, _____ N.J.Super. _____,
2005 WL 3527015 (App. Div. 2005)

In a recent decision involving an employee's use of the Internet while at work, the Appellate Division expanded an employer's liability related to an employee's illegal internet computer use. In *Doe v. XYC Corporation*, ____ N.J.Super. ____, 2005 WL 3527105 (App. Div. 2005), the Court held an employer who has notice an employee is using a workplace computer for illegal purposes, i.e. accessing child pornography, has an affirmative obligation to investigate the employee's activities and take prompt and effective action to stop the unauthorized activity. An employer who fails to do so will be subject to liability to third parties.

In *Doe*, a mother sued her husband's employer after she learned her husband had transmitted clandestinely-taken photos of her minor daughter ('Jill') over the Internet from his workplace computer. Prior to transmitting the photos of Jill, the employer was aware the Employee had been visiting pornographic sites using his workplace computer. The employer was undoubtedly aware because it had a practice of reviewing internet log reports which identified websites accessed by employees on workplace computers. In this case, as early as 1999, the employer's Internet Services manager, became aware the Employee had visited several pornographic sites. The employer was also on notice of the Employee's internet activity because in December 2000, another employee observed and complained to her supervisor about Employee's strange behavior insofar as he was shielding his computer screen from other employees who were passing by and quickly minimizing his computer screen. Finally, in or about March 2001, the employer became aware that other employees in nearby cubicles observed inappropriate images displayed on Employee's computer screen. Although Employee was instructed to cease these activities, the employer took no other affirmative action in the form of a reprimand or discipline.

On June 15, 2001, the Employee transmitted photos of his minor stepdaughter over the Internet to gain access to a pornographic website. The Employee was subsequently arrested following a June 19, 2001 search of his workspace and computer. The search disclosed a folder of approximately seventy downloaded pornographic photos, including photos of Jill and other young females.

The plaintiff mother sued the employer alleging the employer was negligent and alleged "XYC Corporation knew or should have known that Employee was using its computer and internet at its workstation to view and download child pornography and to interact with child pornography web sites." *Doe*, ___ A.2d ___ at *4. The trial court granted summary judgment to the employer and dismissed the case holding the employer had no duty to control the conduct of Employee while he was not under the employer's control, referring to the molestation and photography of Jill outside the presence of the employer. The trial court also held the employer had no direct, or indirect, knowledge of misconduct until a report was made by the co-employees and upon receipt of the complaints, Employer acted as a reasonably prudent employer and directed Employee to cease. Finally, the trial court held there was an absence of proximate cause because the termination of Employee by the employer would not have resulted in protecting the minor plaintiff. Quite simply, the trial court explained "the duty of monitoring employee's internet activities does not exist… There is no way this Court can conclude that this corporate defendant in any way could have controlled and/or in any way protected the plaintiff from that injury. [Therefore] This court finds that employer has not breached a duty, was not negligent, did not act in an unforeseeable fashion and did not actually or proximately in any way, cause the injuries to which plaintiffs complain." *Id.* at *5.

The plaintiff mother appealed and the Appellate Division reversed. In doing so, the Appellate Division held an employers' right to monitor the employee's internet activities trumps the privacy interests of the employee. Based on the employer's knowledge of the employee's activity, the employer had an affirmative duty to monitor, prevent and stop Employee's pornographic activity. The Appellate Division based its decision on four main points. First, referencing the email policy which employee signed, the Appellate Division held Employee retained no legitimate expectation in privacy that prevented the employer from accessing his computer. Second, the Appellate Division held the employer had notice of the Employee's pornographic activities through information provided from the supervisory personnel and had a continuing duty to investigate the same. Third, noting that child pornography is a federal and state crime, the Appellate Division discussed the employer's affirmative duty to control the acts of its Employee. The court recognized the existence of a special relationship between the Employee and employer, thereby imposing a duty on the defendant to control Employee's conduct: "In this case there is a special relation between defendant (the actor) and the third person (the Employee), that being the master-servant relation." *Id.* at 10. Thus, under the circumstances, the Court held the risk of harm to plaintiff and her minor daughter was "reasonably within the employer's range of apprehension" and "defendant had a duty to report employee's activities to the proper authorities and to take effective internal action to stop those activities, whether by termination or some less drastic remedy." *Id.* at *10, 11. Fourth, with respect to proximate cause, the court held proximate cause issues are generally decided by a jury and not decided upon a motion for summary judgment. Therefore, a question of fact existed as to whether the employer could have prevented the harm to plaintiff by discontinuing his ability to visit pornographic websites as soon as the employer learned of his activities, thus preventing him from transmitting the photos of plaintiff's minor daughter.

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E-Mails of Public Officials Stored on Computer Are Public Records Subject to Disclosure

Christine P. O'Hearn, Esquire

In a recent decision, Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127, the Government Records Council ("GRC") held the location of records does not inhibit the "Custodian" from obtaining the records and providing them pursuant to a request under the Open Public Records Act ("OPRA"). Here, the Complainant sought records stored on the Mayor's personal home computer and/or under his personal e-mail account. Specifically, the request sought "all documents, in electronic format . . . sent from or received by [the Mayor] to or from his personal e-mail account that relate in any manner to his position as a [public] official and/or the conduct of government by or for the Borough . . . , from January 1, 2004 to May 31, 2005." The Complainant attached prior e-mail correspondence from the Mayor's personal e-mail account wherein he responded to questions regarding a council meeting. The request was denied by the Custodian on grounds the e-mails were not public records required to be maintained and they were located on the Mayor's personal computer and e-mail account. The Custodian further stated she did not have access to the Mayor's personal computer and the Township had not purchachased the computer for the Mayor.

The GRC unanimously held the Custodian unlawfully denied access to government records. The GRC noted "the definition of a government record is not restricted by the location of the records." The GRC emphasized "Requiring material to be made, maintained, kept or received in the course of official business by an officer or official does not mean that a record must be generated or received during regular office hours or official meetings. Nor does a document become a government record only if the sender intends it to be." Further, in this case, the Mayor "has utilized his home computer/personal e-mail to communicate with various individuals regarding Borough business." The GRC entered an order directing the Custodian to obtain the records and release them to the Complainant.

This case should cause all public officials and employees to consider how they are communicating regarding public business. Communication on personal, home computers, personal e-mail accounts, etc. may lead to such information being disclosed if requested pursuant to OPRA. To avoid this scenario, public officials and employees should, to the greatest extent possible, utilize computers and e-mail accounts owned and/or operated by the public entity with which they are employed and/or represent.

Court Expands Employers' Liability . . .

Stephen Higgins, Esquire

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Based on the court's holding in *Doe*, it is absolutely clear that an employer's right and duty to monitor internet activities of its employees trumps the employee's right to privacy. Further, there is now an affirmative duty placed upon the employer to take appropriate action against an employee when the company learns the employee is using his work computer for illegal activity. Implicitly, the court's expansion of liability related to monitoring an employee's computer use imposes an obligation on the employer which may likely extend beyond computer monitoring and into the employee's workplace station. Indeed, in light of the decision in *Doe* and to avoid liability, employers should seriously consider implementing monitoring of an employee's computer activities that are within the employer's "range of apprehension" to the extent that an employer who is aware of illegal activity should take prompt, effective and remedial action. It is unclear whether the Courts will extend the Doe holding and find an employer's failure to monitor such computer related activity and discover such improprieties is negligence in and of itself because in Doe the employer had a policy of monitoring such activity and its knowledge of the improper activity was undeniable. Nevertheless, employers who do not monitor computer activity of employees should seriously considering doing so. Employer's who already have implemented such monitoring must actually review the monitoring results and take action when appropriate in order to avoid liability based on the failure to do so.

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