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The COMPASS

SERVING ALL POINTS OF NEBRASKA AND THE MIDWEST

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Thinking of Starting a Business -

Which Entity Will you Choose?

A critical step in the process of starting a business is selecting a business entity that will most effectively accomplish your goals. In Nebraska, there are several entities to choose from, and understanding which to choose can sometimes be confusing. The following is a brief summary of some of the benefits and limitations of each business entity available in Nebraska.

Sole Proprietorship

The simplest choice is a sole proprietorship. Advantages of a sole proprietorship include the ease of formation and the simplicity of governance. No statutory formalities are required when forming or governing a sole proprietorship. A significant disadvantage of a sole proprietorship is the owner's exposure to personal liability for any and all debts and liabilities of the business. Income and loss of a sole proprietorship passes directly to the owner for income tax purposes.

General Partnership

A general partnership is similar to a sole proprietorship, except that a general partnership involves two or more individuals or entities having an ownership interest. There are no statutory formalities required in the formation of a general partnership, and there is great flexibility in its management. Unless otherwise provided in a partnership agreement, general partners share management responsibilities, profits and losses equally. Another benefit of a general partnership is that its gains and losses are passed through to the partners for income tax purposes and taxed only at the partner level. There is no double taxation of income as occurs in a C Corporation where both corporate income and dividends to shareholders are subject to income tax.

Like a sole proprietorship, a significant disadvantage to a general partnership is the partners' exposure to personal liability for any and all debts and liabilities of the partnership. In fact, the personal liability in a general partnership may be greater than that of a sole proprietorship since each partner is jointly and severally liable for the partnership debts and obligations created by any of the partners.

Limited Partnership

A limited partnership is formed by filing a Certificate of Limited Partnership with the Secretary of State. A limited partnership is made up of at least one general partner and one limited partner. A general partner is responsible for the management functions of the partnership and has personal liability for all debts and liabilities of the partnership. A limited partner is shielded from the debts and liabilities of the limited partnership, so long as the limited partner does not participate in the control or management functions of the partnership. Like a general partnership, the gains and losses of the limited partnership pass through to the partners for income tax purposes.

Limited Liability Partnership

A limited liability partnership is a general partnership which files a Statement of Qualification with the Secretary of State. One advantage of this entity structure is the existence of some level of limited liability for partners. A partner in a limited liability partnership is personally liable only for liabilities which arise from the partner's own acts or omissions. The partners are not personally responsible to pay liabilities which result from the acts or omissions of other partners. Except for the liability protections, a limited liability partnership functions just like a general partnership, and partnership gains and losses pass directly to the partners for income tax purposes.

continued on page 2

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1201 LINCOLN MALL, SUITE 102
LINCOLN, NEBRASKA 68508
PHONE 402.475.5100
FAX 402.475.5087
AND
125 SOUTH 6TH STREET
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PHONE 402.643.4770
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continued on from page 1

C Corporation

A C Corporation is formed by filing Articles of Incorporation with the Secretary of State and by adopting written bylaws to govern the corporation. A C Corporation can be owned by any number of shareholders. The shareholders elect a board of directors to manage the internal operations of the corporation, and the board of directors then elects officers to manage the day-to-day activities of the corporation. A significant advantage to a C Corporation is that the shareholders are generally shielded from personal liability for any and all debts and obligations of the corporation, unless a court determines that the corporate veil may be pierced. "Piercing the corporate veil" generally occurs when a court determines that shareholders have disregarded the corporate structure, and the corporation is merely a sham.

Aside from the limited liability of shareholders, another advantage to a C Corporation is that it is relatively easy to transfer ownership of the corporation simply by transferring stock. A significant disadvantage of a C Corporation is that it is subject to double taxation. Not only is the corporation subject to corporate income tax, but shareholders are also individually taxed on dividend distributions.

S Corporation

An S Corporation is substantially the same as a C Corporation in all respects, except in the area of taxation. Like a C Corporation, an S Corporation is formed by filing Articles of Incorporation with the Secretary of State and by adopting written bylaws to govern the corporation. Shareholders are generally shielded from the debts and liabilities of the corporation. If an election to be taxed as an S Corporation is filed with the IRS, however, an S Corporation is not subject to double taxation. The IRS treats an S Corporation as a "flow through entity," which means that gains and losses of the corporation pass through to the individual shareholders of the corporation. To qualify for status as an S Corporation, the corporation cannot have more than 75 shareholders, all the shareholders must be individual, and the corporation may have only one class of stock.

Limited Liability Company

A limited liability company combines the limited liability of a corporation with the flexibility of a partnership. A limited liability company is formed by filing Articles of Organization with the Secretary of State. An owner of a limited liability company is a member, and the members can choose whether to manage the company themselves or elect a manager or managers to perform the management function. Members are shielded from personal liability for debts and obligations of the company, and a limited liability company is generally taxed like a partnership.

There are numerous other factors to consider in the entity selection process, such as employment taxes, employee benefit plans, farming and ranching restrictions, and the company's need for financing. Though there is often no one best choice, it is important to carefully consider which entity will serve your long term needs. Our attorneys work with all of these entities on a regular basis and would be happy to assist you in making the choice that best fits your circumstances.

– Troy S. Kirk, Esq.

The Check is Marked "Paid in Full" - But Is It?

Maybe you have been in this situation: you receive a check in the mail and in the memo line is written, "Paid in Full." Or maybe a member of your staff inadvertently deposits a "paid in full" check because he simply did not have the time to scan every check received. Or maybe you want to settle a debt owed on a deal that has gone sour through no fault of your own. In any of these scenarios, a number of questions may come to mind: What rights do you have if you cash the check? How can you know for certain the debt is settled? Should you even deposit the check? The answers to these questions are containing within Nebraska's Uniform Commercial Code (UCC). The UCC sheds light on what satisfies a claim regarding a "paid in full" check.

Under Nebraska's UCC, a "paid in full" check satisfies a debt owed only if the person that owes the debt can prove that:

1. The check was written with an honest intent, without malice and without attempt to defraud or seek an unfair advantage;
2. There is a sincere, open, honest, and non-fraudulent dispute over the amount of money submitted;
3. The check or an accompanying written document has a very noticeable statement indicating the check was given to fully satisfy the claim, *i.e.*, the words "paid in full" written on the actual check or an enclosed letter indicating the same intent; and
4. The person or entity owed payment receives payment from the person that owes the debt.

Many businesses deposit dozens if not hundreds of checks daily. Many of these same businesses lack the time and resources to carefully examine each and every check to determine if a debtor has written "paid in full" on the memo line. However, Nebraska's UCC provides means through which businesses and organizations can protect themselves from an inadvertently deposited "paid in full" check:

1. The depositor can repay the amount of the check to the debtor within 90 days after payment of the check and then request full payment on the amount owed.
2. The business can send an easily noticeable statement to the debtors (the statement can be incorporated into the billing statement) advising the debtors that payments on disputed debts must be sent to a particular person, office, or place. This statement must be sent to the debtor within a reasonable time before an attempt at full payment.

Lesson: "Payment in full" disputes come up quite frequently in Nebraska's judicial system. These controversies can be as simple as a consumer claiming he or she does not have to pay the entire price the consumer was billed because of a breach of warranty or defect in the goods or services. Or, in another example, an insurance company issues a "payment in full" check claiming it is not liable under the insurance policy for any greater sum. In these situations, Nebraska's judges and lawyers look to the UCC, a code widely adopted across the United States, to determine the rights of those involved.

If you happen to receive a "payment if full" check, would like to write a "payment in full" check to settle a disputed debt, or have any other questions regarding receipt or issuance of "payment in full" checks, you should consult with your legal counsel to discuss your rights regarding the UCC and its applicability.

– Brian S. Kruse, Esq.

Does Your "No-Rehire" Policy Violate the Americans with Disabilities Act?

For over 15 years Betty Jones worked for Acme Corp. and was an excellent employee. However, recent family problems led Betty to begin experimenting with illegal drugs. Last year, Betty was acting bizarrely at work, and appeared to be under the influence of drugs or alcohol. Acme officials asked Betty to submit to a drug test pursuant to Acme's policy, which she did. The test results confirmed that Betty had been taking illegal drugs, requiring Acme to terminate Betty's employment pursuant to its policy. Because Betty was terminated for misconduct, personnel records reflected that she was not eligible for rehire. One year later Betty was reading the local newspaper and discovered that her old job at Acme Corp. was open. Betty presented the company president with her application for rehire, and letters from her rehabilitation counselor and minister demonstrating that she had completely recovered from her addiction. Nevertheless, Acme Corp. declined to rehire Betty, citing its policy to not rehire employees fired for misconduct. "But I was addicted to drugs, which is a disability!" explained Betty. Acme's president responded, "Betty, you were fired for illegal drug use, which is misconduct and that makes you ineligible for re-hire."

Did Acme Corp. make the right call? Despite a recent U.S. Supreme Court case on facts mirroring Acme Corp.'s hypothetical situation, employers still don't have a firm answer.

In *Raytheon Co. v. Hernandez,* Case No. 02-749 (Dec. 2, 2003), the nation's high court was asked to decide whether the Americans with Disabilities Act (ADA) confers preferential rehire rights on "disabled" employees fired for violating workplace conduct rules. Unfortunately, the Court punted, jettisoning the case back to the lower court on a tangential issue. Nevertheless, the Court's unanimous opinion authored by former federal Equal Employment Opportunity Commission chairman Justice Clarence Thomas sheds some light on how the Court would likely decide the issue, and serves as a good reminder of the importance of ensuring that workplace rules and policies are consistently applied and job-related.

In *Raytheon Co.*, plaintiff Joel Hernandez worked for Raytheon for 25 years. In July 1991, Hernandez's appearance and behavior at work suggested that he might be under the influence of drugs or alcohol. Pursuant to Raytheon's drug testing policy, Hernandez submitted to a drug test, which came back positive for cocaine. When confronted with the results, Hernandez admitted that he had been up late the night before drinking beer and using cocaine. Because Hernandez's behavior violated Raytheon's policy, he was forced to resign. Raytheon's "Employee Separation Summary" indicated as the reason for separation: "discharge for personal conduct (quit in lieu of discharge)."

More than 2 years later Hernandez applied to be rehired by Raytheon. Hernandez stated on his employment application that he had previously worked for Raytheon, and attached reference letters from his pastor and Alcoholics Anonymous counselor. Nevertheless, Raytheon declined to rehire Hernandez, citing an unwritten company policy against rehiring employees who were terminated for workplace misconduct.

Hernandez subsequently filed a charge of discrimination and a lawsuit, alleging that he had a "record of" or was "regarded as" having a "disability" under the ADA, and claimed discrimination based on the company's "disparate treatment" of him, *i.e.*, Raytheon treated Hernandez less favorably because of his "disability." Raytheon moved to dismiss the case, causing Hernandez to allege a new theory of "disparate impact" discrimination, *i.e.*, even if Raytheon's "no rehire" policy was neutral and nondiscriminatory on its face, when it was applied it fell more harshly on former drug abusers who had been rehabilitated (and who are protected under the ADA) than it did on non-drug abusers. The trial court dismissed Hernandez's case, holding that Hernandez had failed to raise the "disparate impact" theory in a timely manner and that he had not been discriminated against under the "no rehire" policy. The federal appeals court reversed this decision, finding that Hernandez had stated a claim for "disparate treatment" discrimination, although the court used a "disparate impact" analysis to reach that conclusion.

On appeal, the U.S. Supreme Court held for the first time that a "disparate impact" claim of discrimination may be brought under the ADA, although the Court agreed with the trial court that Hernandez failed to raise this claim within the time allowed and was barred from pursuing it. Consequently, the Court analyzed Hernandez's claim only under a "disparate treatment" analysis. Under that analysis, the Court held that Raytheon's neutral "no rehire" policy plainly satisfied its obligation to provide a legitimate, nondiscriminatory reason for refusing to rehire Hernandez. The Court held that the only remaining relevant question was whether Raytheon's use of that policy against Hernandez was a "pretext" for disability discrimination, and sent the case back to the lower courts to decide that issue.

A small controversy has arisen with respect to a footnote in Justice Thomas' opinion, wherein he declared that "[t]o

continued on page 4

continued on from page 3

the extent that the [appeals court] suggests that, because [Hernandez's] workplace misconduct is related to his disability, [Raytheon's] refusal to rehire [Hernandez] on account of that workplace misconduct violated the ADA, we point out that we have rejected a similar argument in the context of the Age Discrimination in Employment Act" in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). In *Hazen Paper*, the Supreme Court held that an employer may make an employment decision based upon an employee's length of service, even if that factor often correlates to an employee's age. Supporters of the *Raytheon* decision contend that this footnote signals the Court's intention to reject the claim that a neutral "no rehire" policy can give rise to a claim of "disparate impact" discrimination. Opponents suggest that the footnote is meaningless, and that it is unclear whether the Court was referring to a "disparate impact" analysis.

Lessons: Although the Supreme Court didn't give employers the clear answer they deserve, the Court's decision in *Raytheon Co.* confirmed that "disparate impact" discrimination is actionable under the ADA. What this means is that individuals with disabilities may be entitled to preferential treatment under facially neutral workplace policies and rules, such as a "no rehire" policy. Employers should review their workplace policies and rules, especially drug/alcohol and blanket "no rehire" policies. Guidelines should be established in the use of these policies to ensure that decisions under those policies are actually "job related and consistent with business necessity," which is a potential defense to claims of "disparate impact" discrimination.

Two other lessons can be gleaned from the *Raytheon Co.* decision. First, in this case the company made its decision based upon an unwritten "no rehire" policy. Important workplace policies such as the one at issue in *Raytheon Co.* should always be in writing so as to avoid issues regarding their existence, employee knowledge of the policies, and their application. Second, *Raytheon Co.* demonstrates the importance of consistent application of workplace rules and policies in a manner that is job related and consistent with the needs of your company. Once the *Raytheon Co.* case gets back to the trial court, Hernandez will probably try to show that the company had made exceptions to its "no rehire" policy in the past for non-disabled individuals, but refused to do so for Hernandez. An employer's inconsistent application of workplace policies may give support to an individual's claim of unlawful discrimination.

– Mark A. Fahleson, Esq.

OSHA's Top Ten

According to the Occupational Safety and Health Administration, these are the most frequently cited violations of OSHA standards for fiscal year 2003.

	Standard Section 2 CFR	Standard	No. of Alleged Violations
1	1926.451	Scaffolds (Construction)	8,794
2	1910.1200	Hazard Communication	6,789
3	1926.501	Fall Protection Duty (Construction)	5,518
4	1910.147	Lockout/Tagout	4,499
5	1910.134	Personal Protective Equipment	3,954
6	1910.212	Machine Guarding	3,403
7	1910.305	Wiring Methods	3,114
8	1910.178	Powered Industrial Trucks	2,775
9	1910.1030	Bloodborne Pathogens	2,348
10	1910.303	Electrical	2,240

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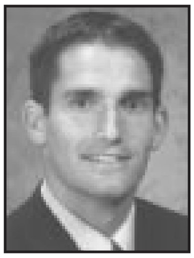

Troy S. Kirk

Mr. Kirk is a graduate of the University of Nebraska-Lincoln (B.S., with highest distinction, 1999) and the University of Nebraska College of Law (J.D., with distinction, 2002). He served as judicial clerk to the Honorable John F. Wright, Nebraska Supreme Court, from 2002 to 2003. Mr. Kirk's practice areas include entities formation and governance, employment law, and commercial transactions.

Glen Th. Parks

Mr. Parks is a graduate of the University of Nebraska-Lincoln (B.A., with high distinction, 1998) and the University of Nebraska College of Law (J.D., with distinction, 2001). He served as judicial clerk to the Honorable John M. Gerrard, Nebraska Supreme Court, from 2002 to 2003. Mr. Parks' practice areas include employment law, intellectual property and commercial litigation.

The American Bar Association Makes a Difference

The Young Lawyers Division of the American Bar Association is sometimes referred to as the public service arm of the ABA. This 125,000 member group is currently working on a public service initiative, "One Child, One Lawyer". One of the partners of our firm, Jane Langan, is a member of the nine-person team in charge of creating, planning and implementing this nation-wide project to get lawyers involved in helping children. The goal of the project is to serve children by:

1. Training lawyers on serving as a guardian ad litem,
2. Training lawyers on how to establish guardianships and facilitate adoptions, and
3. Creating legal clinics in junior and senior high schools so that young people can receive help with their legal issues without interfering with their education.

An important element in the project is encouraging the lawyers who participate to do the work pro bono - without cost to the client. With "One Child, One Lawyer", the Young Lawyers Division seeks to make a difference in the life of one child at a time by providing a voice for a child in need of a caring and skilled advocate.

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WILL v. TRUST: WHICH ESTATE PLANNING VEHICLE SHOULD YOU CHOOSE?

At Rembolt Ludtke & Berger LLP we constantly search for ways to help our clients meet their estate planning needs by carrying out their goals and wishes in the most accurate, cost-effective way possible. We strive to bring our clients bottom line results, while helping them understand the advantages or disadvantages of choosing one estate planning vehicle over another.

The living Trust and the Will are the two most widely used estate planning devices. A Will is a document in which a person directs how his or her estate is to be distributed upon death. A living Trust, on the other hand, is a property interest held by one person at the request of another for the benefit of a third party. A living Trust allows a person to distribute property before death according to his or her wishes, while a Will is a document commanding distribution of property after death. Typically, the Grantor (or creator) of the living Trust can change or terminate the Trust at anytime. At the death of the Grantor, however, the Trust becomes irrevocable and the assets in it are disposed of as provided by the Trust instrument. The Trust instrument thus becomes a substitute for a traditional Will. Trusts and Wills are very peculiar instruments, and with each comes advantages and disadvantages. Depending upon a person's ultimate goals and wishes, one estate planning vehicle may be more desirable than another.

For many people, Trusts are more advantageous than Wills. Trusts function by operation of law, to create a right for someone regardless of that person's intent. Trusts need not be proven in court. In addition, Trusts provide their creator relative privacy. State law requires Wills be proven in court in a process known as probate. Probate subjects all property distributions made in a Will to public record. Trusts, on the other hand, operate automatically, and are not subject to the public's scrutiny. This may be important if you do not want disappointed heirs, newspapers, and the like to have access to Trust terms. In making a decision on what estate planning vehicles to use, some specific areas to consider are:

1. Out of State Real Property
   A living Trust is an excellent option to consider if you own real property located in more than one state. Real property must be probated in the state in which it is located. In an estate governed by a traditional Will, probate documents must be filed with each local probate court. This can make probate necessary in more than one state, which can be expensive, cumbersome and time consuming. To avoid probate in more than one state, real property in other states can be transferred to a living Trust.

2. Disinheritance
   A disgruntled spouse might be able to create a funded living Trust in a state not recognizing a spouse's right to reach Trust assets and thereby defeat a spouse's elective share. The elective share is a statutory provision that ensures a surviving spouse will receive a minimum portion of his or her deceased spouse's estate.

3. Mental Capacity
   A living Trust, like a Will, can be contested for lack of mental capacity and undue influence. In practice, however, it is more difficult to set aside a funded living Trust than a Will on these grounds. Heirs are not entitled to see the Trust instrument because it is not a public document. If beneficiaries bring suit, they will be able to learn the Trust's terms, but they are thereby forced to commit themselves to legal fees in a law suit their chances of winning might be very small.

4. Planning for Mental Incapacity
   A living Trust can be used to plan for the contingency of incapacity. The possibility of physical or mental disability as you get older may require some form of fiduciary administration of your assets. A fiduciary is one who owes another duties of good faith, trust, confidence, and candor. The Trustee must exercise a high standard of care in managing the Trust's money and/or property. You can use a living Trust to plan for the possibility of your disability.

5. Closely Held Businesses/Continued Investment Management
   If you own a closely held business - where even a few days of delayed operation after death may be unacceptable - you may want to consider transferring that asset to a living Trust to ensure the enterprise operates with continuity. This step may not be necessary, however, if the business is in corporate or partnership form because its activities can be carried on by the other officers or partners after death. Permission of other partners or shareholders may be necessary before transfer of ownership to a living Trust can be made.

6. Taxes
   There are no federal tax advantages to creating a living Trust.

7. Timeliness
   It is typically easier and faster to administer the Trust estate than the probate estate, which must follow specific statutory requirements.

8. Creditors
   In probate, a short-term statute of limitations applies to creditors. A statute of limitations is a law establishing a time limit for bringing a claim against an estate and is based on the date when the claim comes into existence. If creditors do not file their claims within this shortened period, their claims are barred. No short-term statute of limitations applies to living Trusts. The Grantor's creditors can bring claims against the assets of the Trust as if there were no Trust.

9. Cost
   Trusts are not necessarily less expensive than Wills. Trusts, in fact, involve more documents and it often takes an attorney more time to prepare a Trust than a Will. The cost savings is realized, however, at the Grantor's death, in the simplified administration of the estate.

10. Certainty
    There is lack of certainty in the law of Trusts; rules pertaining to Wills have developed over the centuries, whereas Trust rules are relatively new. Thus, where a living Trust is

used as a substitute for a Will, the law may be more uncertain in solving a problem that arises than it would be in the case of a Will.

11. Additional Disadvantages of a Living Trust
There are administrative costs associated with transferring assets into a Trust and maintaining the Trust. Depending on the size and type of assets in your estate, it may be more efficient to utilize a Will than a Trust. Again, however, the lost savings can be significant when the Grantor dies and his or her estate must be probated.

12. A Will is Still Necessary
After a living Trust is made and funded, you will still need a Will to nominate guardians and conservators for minor children, exercise testamentary powers of appointment, and ensure that any property that may inadvertently not have been transferred to the living Trust during life is transferred to the Trust at death. If you have a child with special needs due to a physical or mental disability, your Will can also state your wishes with respect to that child.

In summary, there are no pat answers as to when you should include a living Trust in your estate plan. The professionals at Rembolt Ludtke & Berger LLP are available to help guide you through the decision making process - assuring you of the best possible outcome.

– Penny J. Berger, Esq.

WATCH OUT ON YOUR WATCHING OUT

You and your employees have a deal: if they work hard and abide by the company rules, you'll pay them their earned wage. Throughout the course of this mutual relationship, your end of the bargain is easy to verify; if you don't pay up, your employees are sure to notice! However, their end of the bargain is less open to verification. How hard are they working? Are they abiding by the company rules? Most employers resort to some form of monitoring, some more extensive than others, to determine employee compliance. Do you know the legal limits of employee monitoring?

There are several employee activities that employers sometimes monitor, including telephone, e-mail, voice mail, and internet use. The law allows some level of employer monitoring in these areas, but, as you might imagine, the law also protects employee privacy by limiting the scope of permissive monitoring. Note too that some union contracts further limit the ability of an employer to monitor its employees. This article will give some guidelines for any monitoring you, as an employer, do.

TELEPHONE

Employers may monitor telephone conversations its employees have with clients and customers to ensure quality control. However, employers typically may not monitor personal phone calls. Yet, when personal calls are made in spite of a policy that company phones are not to be used for personal use, the law is not as harsh with employers who monitor those calls.

Note that federal and Nebraska law forbid the recording of telephone conversations unless at least one of the people in the conversation knows and has consented to the recording. Also, at least eleven other states require that <u>all</u> persons in the conversation agree to be recorded. If someone in your company places a call to someone located in any of these states, it would be advisable either to refrain from recording these telephone conversations altogether or to inform each caller that the conversation may be recorded. Incidentally, this law applies to any conversation, not just those occurring over the telephone.

Pen registers list phone calls made from a given phone extension. They reveal the time and length of each phone conversation and the phone number of the other party to the conversation. The law allows employers to use these pen registers to monitor the phone calls its employees make from company phones. There is relatively no legal limits to employer use of this information. However, if the employer tells employees that this information will not be accessed, the employee might have a reasonable expectation of privacy that a court would recognize.

E-MAIL

In most circumstances, the law allows employers to read e-mail messages sent or received through its own e-mail service. However, if the employer leads the employees to believe that their e-mail messages are private, the law may limit employer monitoring. For example, if e-mail messages can be designated as "confidential" or if the e-mail account is accessible only through a password known only to the employee, a court might find that the employee had a reasonable expectation that his or her e-mail messages would not be read by the employer. In such a case, the employer could be in trouble for violating this expectation.

INTERNET USE

Likewise, employers may keep track of web surfing by its employees on company computers. Employers may ascertain which websites its employees visit and how long they are on the internet. Again however, the employer should be careful that it does not violate the employees' reasonable expectation that this information is private. An employer who plans to monitor internet activity should not ever imply that such information is private; better yet, the employer should explain to its employees that such information is not private.

WHAT SHOULD YOU DO?

One of the best things an employer can do to protect itself from liability over employee monitoring is to inform employees of a clear policy beforehand and then faithfully follow the policy. Courts often ask whether the employee had a "reasonable expectation of privacy." If so, the employer could be in trouble when the employee's expectations are not met. For example, if the boss tells employees that their e-mail messages are private, courts may find that the employer violates the employees' privacy rights by reading those e-mail messages. On the other hand, when an employer tells its employees that their e-mail messages may be monitored, courts will realize the employee should not have an expectation that the e-mail messages will not be read by management.

Therefore, a wise employer will spell out for its employees the ways in which it might monitor its employees and make clear that they should have no expectation of privacy. This policy should be written down and communicated to the employees - in the employment manual, for example. Have employees sign acknowledging that they have read and understand the policy.

The policy should be custom-designed to fit the particular situation – to balance the need to monitor employees against employee resentment that undue scrutiny might cause. However, if the employer wants maximum monitoring ability, it should include in the policy a statement that all computer and phone use is for business purposes only and that employees should not have an expectation of privacy in phone calls, e-mails, internet activity, and other computer uses. Include a warning that password-protection does not imply the company will not monitor such activity and that deletion of the information does not prevent the company from accessing it.

Even with the warning, the wise employer will not monitor employee communications unless there is a legitimate business reason to do so. Even with the perfect policy, courts look to see whether the monitoring was reasonable and frown on employer's gratuitous eavesdropping.

– Glen Th. Parks, Esq.

Union or No Union, You May Still Be Covered by the National Labor Relations Act

Adopted in 1935, the National Labor Relations Act (NLRA) is the primary law governing relations between labor organizations and employers in the private-sector. As one Jefferson City, Missouri employer recently learned, even nonunionized employers are required to comply with the NLRA, including its requirement that employers not interfere with the rights of employees to work together to protest working conditions.

In *JCR Hotel, Inc v. NLRB* (8^{th} Cir., Sept. 5, 2003), JCR Hotel—a nonunionized employer— hired Patsy Wilson in 1997 as its catering manager. However, after employees complained to management about Wilson's abrasive manner, JCR Hotel transferred Wilson, first to night desk manager and later to the position of housekeeping inspector. After both transfers, coworkers continued to complain about Wilson's behavior.

On October 26, 1999, JCR Hotel told the housekeepers that the free meal they customarily received would not be available that day. While on break, several employees, including Wilson, complained to each other about the situation and discussed whether they should all walk out or sit down on the job. Wilson added that a walkout should occur "on a full house day," such as when the Elks Club booked the entire hotel for a meeting. Two days later, hotel management overheard employees discussing Wilson's plan. On November 2, 1999, Wilson was fired by JCR Hotel. When Wilson asked why, she was initially told that she was being fired because she could not work with people. After being pressed by Wilson, JCR's general manager stated that "word is you are planning a walk out with the housekeeping department."

The National Labor Relations Board (NLRB), the federal agency charged with administering the NLRA, filed an unfair labor practice complaint against JCR Hotel. In its complaint, the NLRB alleged that JCR Hotel violated the NLRA by, among other things, discharging Wilson for engaging in "concerted protected activities" under the NLRA. An administrative law judge and NLRB found that JCR's termination was unlawful under the NLRA, and ordered JCR to reinstate Wilson to her former job and to pay her backpay with interest.

On appeal, the U.S. Court of Appeals for the Eighth Circuit (which covers Nebraska) upheld the NLRB's decision that Wilson was unlawfully terminated. Under Section 8(a)(1) of the NLRA, it is unlawful for any employer (unionized and nonunionized) to "interfere with, restrain, or coerce" employees in the exercise of their right to engage in protected activities. According to the Court, an employer violates Section 8(a)(1) of the NLRA by discharging a non-union employee like Wilson for organizing or implementing a collective walkout to protest working conditions. The appeals court distinguished Wilson's protected comments, which it characterized as "talk looking toward group action," from "mere griping," which is not protected.

Lesson: If you are a private-sector employer, you must be aware of your potential obligations under the NLRA regardless of whether or not your employees are unionized. One of the most important obligations under the NLRA is the requirement that employers not interfere with employees in the exercise of their right to engage in "protected, concerted activities." Generally three issues must be satisfied before the NLRA will protect an employee's actions: (1) the actions must be "concerted," *i.e.*, not by an individual employee solely on his or her own behalf; (2) the actions must be reasonably related to wages, hours and other terms and conditions of employment; and (3) the actions must be protected and lawful.

A classic example of an action that would not be protected under the NLRA is where employees plan to burn down their employer's factory to protest an overtime work requirement. Such action is clearly concerted and clearly work-related, but is unlawful (arson) and not protected. However, Wilson's talk and planning of a one-day strike is clearly lawful and protected.

Before taking any adverse action against an employee for their proposed or actual joint activities with or on behalf of their coworkers relating to the terms and conditions of their employment, unionized and nonunionized private-sector employers are strongly encouraged to consider their potential obligations under the NLRA. Here, JCR Hotel was ordered to rehire Wilson, and to pay her backpay (with interest) for the nearly four years that the case was in litigation. Had JCR Hotel simply considered its NLRA obligations, or consulted with experienced labor law counsel, they could have avoided this entire mess.

– Mark A. Fahleson, Esq.

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