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Information Technology Usage Policies:

An Increasingly Important Risk Management Tool

ALLEGATIONS OF PERSONAL "PRIVACY" violations are increasing as Information Technology ("IT") continues to expand in the workplace such that IT usage policies are essential as illustrated by the recent decision in *U.S. v. Ziegler*, 474 F.3d 1174 (9th Cir. 2007).

After receiving a tip from a concerned third-party Internet Service Provider ("ISP"), the FBI opened an investigation into allegations that an employee of a private company violated interstate child pornography laws. The defendant employee in *Ziegler* used his company-owned computer to search and view child pornography. He unsuccessfully sought to suppress the evidence of his crimes, which his employer had provided to the FBI, arguing that the government lacked any warrant to search or seize that evidence.

The employer cooperated fully with the FBI investigation. The FBI learned the employer had a computer usage policy which, among other things, placed employees on notice that the employer prohibited personal use of company-owned computers. The FBI also learned the employer warned its employees that it routinely monitored Internet usage and that the employer had an Internet firewall constantly monitoring employees' Internet access. Utilizing software associated

with the firewall, the employer learned that a company-owned computer had accessed child pornographic Web sites. Based on the IP address and logon information, the employer further learned that prohibited Web sites had been accessed from the employee's desktop computer. The employer's IT department was in the

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During the FBI's investigation and at the direction of one of the employer's corporate officers, the employer's IT staff entered the employee's locked office after regular business hours and made a mirror-image of the computer's hard drive and provided it to the FBI. Based on the pornographic pictures found on the hard drive, the FBI

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Four Year Statute of Limitations Applicable to USERRA Claims may be Reduced by Contract

AN ISSUE OF FIRST IMPRESSION INTERPRETING THE UNIFORMED Services Employment and Reemployment Rights Act of 1994 (“USERRA”) was recently considered by a New Jersey Federal District Court. In *Aull v. McKeon-Grano*, No. 06-2752, 2007 WL 655484 (D.N.J. Feb. 26, 2007) (not for publication), the court determined that the provision in an employment agreement providing that the employee bring any claim against the employer within six months of termination was binding and enforceable, and trumped the general four-year statute of limitations applicable to claims brought under USERRA.

Tyrone Aull was employed by McKeon-Grano Associates as an architectural designer. Aull’s employment was governed by an employment agreement, which contained, among other things, a provision that states that Aull agreed to bring any claim against McKeon-Grano within six months from the date of his termination. While employed at McKeon-Grano, Aull was called to and performed active duty with the United States Army for one year. Upon Aull’s return to work, he signed another employment agreement that contained substantially the same terms as the earlier employment agreement. Additionally, Aull was informed verbally by McKeon-Grano that his new job assignment would be for 37.5 hours instead of the 40 hours he had been working prior to going on active duty and that his previous assignment with the University of Medicine & Dentistry of New Jersey (“UMDNJ”) had been eliminated because UMDNJ gave that job to another vendor, not to McKeon-Grano.

Subsequent to his return to work on May 2, 2005, Aull alleges that he began performing the same work he had done prior to active duty, with the same duties and working for the same supervisors. Aull alleges that he complained to McKeon-Grano that he was doing the same job as before active duty and therefore he should have the same hours because his job had not in fact been given to another vendor. Aull alleges that he warned McKeon-Grano that its conduct violated his rights

under USERRA. On August 2, 2005, McKeon-Grano terminated Aull’s employment for poor work performance. On June 16, 2006, approximately 10 months after his termination, Aull filed a lawsuit against McKeon-Grano alleging discrimination and retaliation against him due to his active military service in violation of USERRA. McKeon-Grano moved to dismiss Aull’s complaint based on Aull’s failure to comply with the contractual statute of limitation stated in

his employment agreement. Aull argued that USERRA superseded the employment agreement and therefore his claim was not time-barred.

The court, after considering the provisions of USERRA and the employment agreement, dismissed Aull’s complaint. At the outset, the court recognized that while USERRA does not provide an express

statute of limitations for bringing a claim under the Act, USERRA claims, nonetheless, were subject to a general *four-year* statute of limitations for federal claims stemming from laws enacted after December 1, 1990. On the question of preemption, the court noted that USERRA supersedes only “State law, contract, agreement, policy, plan, practice or other matter” that “reduces, limits or eliminates” any “right or benefit” provided for under USERRA. As such, the court determined that USERRA meant to preempt only *substantive rights* and that statutes of limitations were not substantive rights under USERRA. Consequently, the court concluded that USERRA did not supersede the statute of limitations provision stated in Aull’s employment agreement. Finally, the court rejected Aull’s argument that his employment agreement was unconscionable, noting that Aull failed to provide any factual basis to support his assertions of unconscionability. Moreover, the court stated that six months was not *per se* insufficient time to bring a lawsuit. Considering the facts of the case, the court concluded that Aull’s employment agreement does not rise to the level of unconscionability. In sum, the court decided that USERRA does not prohibit an employee from agreeing to reduce the time to bring a claim under the Act. ■

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California Supreme Court Agrees

Employees are Entitled to More Time to Bring Wage Claims

EMPLOYEES ENJOYED A SIGNIFICANT WIN WITH THE RECENT ruling rendered by the California Supreme Court in a wage claim case brought by a former employee seeking compensation for unpaid breaks and rest periods. At issue was the interpretation of California Labor Code section 226.7, which provides, among other things, that if an employer fails to provide an employee a meal period or rest period, the employer shall pay the employee one additional hour of pay. In a unanimous ruling, the court was convinced that, collectively, the language, purpose and legislative history of Labor Code section 226.7 intended the provision to *compensate* employees for their injuries rather than to *penalize* employers for wage violations. This distinction was crucial to the plaintiff's case because a claim to recover wages is subject to a three-year statute of limitations whereas a claim for penalties is subject to a one-year statute of limitations. The court's ruling in favor of the three-year statute of limitations meant the plaintiff's wage claim for unpaid breaks and rest periods was not barred by limitations.

In *Murphy v. Kenneth Cole Productions, Inc.*, Cal., No. S140308, April 16, 2007, John Paul Murphy worked as a store manager in a Kenneth Cole Productions ("KCP") retail clothing store. Following his employment, Murphy filed a wage claim with the Labor Commissioner seeking unpaid overtime and waiting time penalties. Murphy claims that he was unaware he could also make a claim for rest and meal period and itemized pay statement violations. The Labor Commissioner issued a decision in Murphy's favor. KCP filed a notice for *de novo* review with the San Francisco Superior Court. On appeal, Murphy, having retained counsel, also

asserted claims for meal and rest period and itemized pay statement violations. KCP objected to the introduction of new claims, but the trial court overruled the objections. The trial court awarded judgment in favor of Murphy on all of his claims. In doing so, the trial court exercised jurisdiction over Murphy's new claims and applied a three-year statute of limitations on Murphy's claim for meal and rest period violations.

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KCP appealed from the judgment arguing that the court erred in addressing claims for meal and rest period and itemized pay statement violations that had not been previously raised before the Labor Commission and that the payments ordered for the meal and rest period violations were penalties, and thus subject to a one-year statute of limitations. The court of appeals reversed the trial court, ruling that the payments assessed for

meal and rest period violations were penalties subject to a one-year statute of limitations and that claims may not be raised for the first time on *de novo* appeal from a Labor Commission hearing.

The Supreme Court, however, reversed these portions of the appellate court's decision. With respect to providing a three-year limitation period, the high court's decision was based largely on its determination that the legislature intended section 226.7 first and foremost to compensate employees for their injuries, not to penalize employers. Further, the Supreme Court concluded that permitting trial courts to exercise jurisdiction over the entire wage dispute, including related wage claims not raised before the Labor Commissioner, is consistent with the trial courts' broad discretion in adjudicating claims at trial. ■

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arrested the defendant employee for possession of child pornography.

Attacking the basis of the government's charges against him, the employee sought to exclude the evidence obtained from his company-owned computer. The employee argued that his employer's IT employees acted as government agents when they imaged his company-owned computer's hard drive. He argued that since the FBI had not obtained a search warrant when the hard drive imaging occurred, the evidence was inadmissible.

The *Ziegler* court found that under the circumstances, the employee retained a legitimate expectation of privacy in his company-owned computer. The court observed an access password was required to log on to the employee's company-owned computer, that the employee locked his office when he was not there, and that the employee did not share his office with any other person. Based on the evidence presented, the court also found that the employer had acted as a government agent when it prepared and provided the mirror image of the computer's hard drive to the FBI.

However, as the court also observed, a search of private property may be conducted without a search warrant when valid consent to the search has been given either by the employee or a third party who possesses common authority over the item to be searched. Given the facts that (1) the company had computer use policies prohibiting the employee's conduct; (2) the computer was company-owned; (3) the employee

provided his log-on information to the company; and (4) the company trained its employees regarding company Internet usage, the court found the employer held the ability to consent to access to the employee's office and computer. Because the employer gave valid consent, the *Ziegler* court affirmed the trial court's order denying the employee's motion to suppress

the evidence of child pornography on his company-owned computer. ■

In light of the *Ziegler* decision, prudent employers should consider the following:

- Provide employees written notice that they should not expect privacy in use of company-owned computers, communication systems and other property;
- Review IT usage policies and procedures to ensure that they provide notice that the company regularly monitors usage of company-owned computers that may access the Internet. Have a written policy informing employees that their desks, lockers, computers (including e-mail), voicemail and personal effects are subject to search, along with a signed acknowledgement from each employee giving notice that electronic communications and Internet traffic from company-owned computers are regularly monitored and are accessible by the employer;
- Seek counsel when contacted by government authorities regarding an employee's alleged unlawful conduct; and
- Upon direction of counsel, cooperate with government authorities throughout an investigation into an employee's alleged unlawful conduct.

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Andrews Kurth's national employment team prepares this quarterly newsletter highlighting a few of the many developments in federal and state employment laws. To learn more about labor and employment matters, or if you would like to receive the Employer Alert, please contact Bennee B. Jones, a Partner in our Dallas office, at 214.659.4624.

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