Immigration Reform Debate
Page 3

Human Resource Documents
Page 5

Internet Investigations
Page 7

PRIORITY Read

A New Defense to FLSA Off-the-Clock Work Claims

By: Marcus W. Campbell; campbellm@millerjohnson.com; 616.831.1791
and Aliyya A. Clement; clementa@millerjohnson.com; 616.831.1712

"The Court's decision underscores the importance of having an off-the-clock work policy that outlines the procedure for reporting it to the employer."

Wage and hour class action lawsuits have increased exponentially over the last several years. Many are the result of employee complaints that they were required to perform off-the-clock work, particularly during unpaid meal periods or immediately before or after shifts. Indeed, a number of recent lawsuits have directly challenged the common practice of automatically deducting 30 minutes from an employee's pay each workday for an unpaid meal break. The Sixth Circuit Court of Appeals recently addressed this issue in *White v. Baptist Memorial Health Care Corp.* It held that an employer may not be liable for off-the-clock work if the employer has a reasonable procedure an employee can use to report unpaid work time and the employee fails to follow it.

Margaret White was employed as a nurse in Baptist's Emergency Department. Because of the nature of her job, she did not have a regularly scheduled meal break. Instead, meal breaks were to occur during her shift as work demands allowed. Baptist's employee handbook stated that employees working shifts of six hours or more were to receive an unpaid meal break that would be automatically deducted from their paychecks. It also provided that an employee who had to miss or interrupt a meal break because of a work-related reason would be compensated for the time he or she worked during that break. An important rule was that, employees were to record all the time they spent performing work during meal breaks in an "exception log," regardless of whether the meal break was partly or entirely interrupted.

Ms. White initially logged the time that she worked during her meal breaks in the exception log and she admitted that when she reported to Baptist that she had worked through a meal break, she had been compensated for her time. However,

Continued on next page.

MILLER JOHNSON
Attorneys and Counselors

FLSA Off-the-Clock Work Claims, *continued*

she eventually stopped recording the time she worked during her meal breaks. On several occasions after that, she did inform her supervisors and Baptist's human resources department that she had missed meal breaks, but not that she hadn't been compensated for them. She also failed to use Baptist's procedure for reporting and correcting payroll errors to address the errors in her pay linked to work performed during unpaid meal breaks.

Ms. White filed a lawsuit against Baptist, alleging that the hospital had violated the Fair Labor Standards Act (FLSA) by failing to pay her for working during her meal breaks. She also alleged that Baptist's established procedure for compensating employees for missed meal breaks violated the FLSA.

The Sixth Circuit Court of Appeals rejected Ms. White's claims and held that an employer who establishes a reasonable procedure for employees to report unpaid work time will normally not be liable for failing to pay an employee who does not follow the process. The court's analysis focused on whether Baptist knew or should have known that Ms. White was working during her meal breaks, not whether it merely could have known about it. Because there was no evidence that Baptist had discouraged employees from reporting time worked during meal breaks or that the hospital had been notified that employees were failing to report time worked during meal breaks, the court held that Ms. White's allegations were insufficient to show that Baptist knew or should have known that she was not paid for that time.

The Sixth Circuit's decision underscores the importance of having a policy that outlines the procedure for reporting off-the-clock work. If you have such a policy in place, then you may very well have a built-in defense that could help you avoid FLSA liability for off-the-clock work when it goes unreported. Moreover, you may be able to assert this defense early in the litigation process, so in addition to potentially eliminating FLSA liability should you be faced with these claims, it could also help keep your litigation costs low.

If you have an off-the-clock work policy or are considering adopting one, please contact the authors or your Miller Johnson employment attorney to make sure your policy puts you in a position to take advantage of the beneficial defense outlined here.

Save the Date

Employment Law Seminar 2013

Miller Johnson's annual half-day Employment Law seminars are scheduled for October 15 at the Fetzer Center in Kalamazoo and October 30 at DeVos Place in Grand Rapids.

The Immigration Reform Debate: Why Employers Need to Speak Up

By: John F. Koryto; korytoj@millerjohnson.com; 269.226.2979

The current immigration laws controlling how foreign nationals are allowed to work in the United States are ineffective, with burdensome procedures and nonsensical quota limits on employers' access to much-needed international talent. Proposed immigration reform measures could bring broader access to both professionals and less skilled workers. Because employers have much at stake in this debate, they should speak up to protect their interests.

In January 2013, a group of eight Republicans and Democrats released their Bipartisan Framework for Comprehensive Immigration Reform. There is no comprehensive legislation circulating in the Congress right now but there has been a lot of discussion of this proposal. Even considering only the number of people affected, it's no wonder that debate has been intense. There are approximately 11 million undocumented immigrants in the United States with no legal means to secure employment authorization or a legal stay. Only recently have an estimated 2 million to 3 million people gained eligibility for work authorization through the Deferred Action for Childhood Arrivals (DACA). The vast majority of the 11 million are already working, without proper documentation.

Among other things, the proposed reforms seek to both (1) minimize the difficulties employers encounter when they try to obtain permanent resident status for professional-level employees (including processing delays and additional waits and more after the status is approved) and (2) address the issue of lower-skilled undocumented workers where very limited immigration options exist, which cause these workers to enter illegally or fail to maintain legal status.

The framework contains the following key provisions that are:

- **Improving the immigration system** to attract the world's best and the brightest. Immigration reform could be structured to favor immigrants who have received a Ph.D. or Master's degree in science, technology, engineering, or mathematics (STEM) from an American university. This change would expand a critical part of the workforce that is most able to contribute to our economy. Right now, U.S. companies have significant difficulties filling job openings in STEM fields.

- **Implementing an effective employment verification system** that would help employers avoid hiring undocumented workers. An efficient system would also make it more difficult for unauthorized immigrants to falsify documents to obtain employment. The current verification system has been plagued by inconsistent enforcement and has left employers with no effective and efficient means to easily confirm valid work authorization. Further, different states have imposed different rules for employment verification. The result of this is that employers who operate in more than one state often face multiple and different verification programs.

Beyond these ideas for directly addressing employers' staffing and administrative problems, the framework also includes measures related to agriculture, changes in the economy, and quotas.

- **Creating a new program to meet the needs of America's agricultural industry**. There is a longstanding shortage of agricultural workers with insufficient numbers of U.S. workers available to fill employers' needs.

- **Allowing increased numbers of lower-skilled immigrants** to come to the United States when the economy is creating jobs, and fewer when it's not.

- **Eliminating the backlog with employer sponsored green cards or permanent resident status** by eliminating annual quotas based on

Continued on next page.

Immigration Reform Debate, *continued*

country of birth and adding additional employment-based visas to the system based on market demands. Current immigration laws impose annual quotas based on country of birth and the offered job's educational requirements. The system often imposes a five-year or longer wait to obtain a green card for nationals of countries with high rates of immigration e.g. India and China—despite a clear shortage of U.S. workers in many professions, including medicine, research science, and information technology.

Employers must speak up on immigration reform. The debate affects their hiring options and will likely increase the burdens of employment verification procedures.

If you have any questions about this article, please contact the author.

Upcoming Workshops

May

Health Care Reform – Now What?

ADA Update

June

Managing Leaves of Absence & Attendance Issues

Employee Handbooks

July

Are You Prepared for New HIPAA Enforcement Activity?

August

New Challenges Under Wage & Hour Laws

For the complete schedule and more details, visit our web site at www.millerjohnson.com or contact Lisa Geske at 616.831.1886 or geskel@millerjohnson.com.

Discharging an Employee Should Often Trigger Preparing for a Retaliation Claim

By: Sara G. Lachman; lachmans@millerjohnson.com; 616.831.1789
and Andrew A. Cascini; cascinia@millerjohnson.com; 616.831.1705

Performance, discipline, and investigation records are often your best weapon in defending an employment lawsuit. But creating the records is not enough; you have to be ready to use them.

This point may be best illustrated by comparing two retaliation cases that are similar—except for their outcome. The two cases are *Galeski v. City of Dearborn* and *EEOC v. Fry's Electronics, Inc.* Both cases feature a one-way love story between a manager and an uninterested employee. In both cases, the companies had documented performance problems and investigated claims of harassment. And in both cases, the allegedly harassed and whistle-blowing employees were eventually terminated for performance problems. However, in *Dearborn* the claims were dismissed early on summary judgment, while in *Fry's* the employer was forced to settle the case for $2.3 million. The key difference: Dearborn was ready for litigation; Fry's wasn't.

When the lawsuit was filed against Dearborn, the city stood ready with scores of documented instances of poor conduct and discipline stretching back to the plaintiff's first days of employment. Even better, Dearborn marshaled evidence showing that no witness could possibly corroborate the plaintiff's claims—the city had carefully drafted internal investigation notes and kept them available and accessible.

Similar to Dearborn, Fry's created comprehensive personnel and performance evaluations and also conducted sales reviews, comparing sales results against historic data and other Fry's stores. It had and followed discipline and harassment policies, and stored complaints and investigation notes electronically. This is not a cautionary tale about record generation—Fry's had it covered. But unlike Dearborn, Fry's lapse was with record retention. More than one year after the discharges, Fry's replaced the hard drives in all the computers at the store where the harassment allegedly occurred. In doing so, it erased all the documentation it had created on the initial harassment charges and sales performance. Making matters worse, over time, no one could remember which co-workers could have served as witnesses on either the alleged harassment or the plaintiffs' poor performance. Essentially, the employer had failed to preserve its defense. As a result the judge imposed sanctions and instructed the jury that the employer's defense to the lawsuit was pretextual. Fry's was forced to settle the case for $2.3 million.

Every human resource practitioner knows: document, document, document. However, documentation means nothing without preservation. So don't wait until you have been sued. The moment an employee is discharged, consider whether there is *any* potential threat for a retaliation-related or other employment claim. If so, gather and preserve evidence. Don't let computer upgrades and typical workforce turnover sabotage your defense to a lawsuit. In the end, the preparation you do for a case that hasn't been filed yet could save you millions if it is.

If you have any questions about workplace harassment, record-keeping, or effective investigations, please contact the authors or your Miller Johnson employment attorney.

In the News

Mary Bauman recently gave presentations on Health Care Reform to the following groups: The American Subcontractors Association of Michigan and the Michigan Community Bank HR Association in February, the Lakeshore HRMA in March and the Michigan West Coast Chamber of Commerce and the National Association of Wholesale-Distributors in April.

David Buday, **Nate Plantinga** and **Sarah Willey** are speakers at the Michigan Healthcare Human Resources Association conference in Lansing. On April 25, they will cover "Critical Issues That Impact Health Care Human Resources Professionals." In the afternoon, their presentation is "The Employment of Physicians and the Challenges that Presents for Health Care Human Resource Professionals."

Jim Bruinsma spoke on Health Care Reform to the following groups: the American Foundry Society at their Human Resources Conference in Clearwater, FL on February 6, to Jandernoa Entrepreneurial Mentoring group on February 19, to the Michigan Negotiators Association on March 14 and the Michigan School Business Officials on April 25.

David Buday did Breakfast Briefings on Right To Work in Kalamazoo on February 18 and 19. He spoke at the NALS of Michigan 52nd Annual Meeting and Education Conference in Kalamazoo on April 19 on the topic "Drugs, Sex and Politics." He will present "Changes in Employment Law That Matter to Health Care Executives" at the Hospital Network Educational Retreat on May 17.

Marcus Campbell, **Andrew Cascini**, **Aliyya Clement**, **Patrick Edsenga**, **Sara Lachman**, **Kelley Stoppels**, **Rebecca Strauss**, **Mike Stroster**, and **Tripp Vander Wal** will be presenting on a variety of topics at the "Fundamentals of Employment Law" seminar that Sterling Education Services is offering on September 13 in Kalamazoo.

Gary Chamberlin will be presenting "Personnel Files and Recordkeeping: A Lawyer's Perspective" on June 12 to the Grand Rapids Association for Human Resources Management.

Bill Fallon presented "Today's FLSA: Overtime Exemptions, Unpaid Time, & the Blissfully Defenseless Employer" on February 21 at the Human Resources Group (HRG) of West Michigan.

Jeff Fraser is now the firm's Diversity Officer and chair of Miller Johnson's Diversity Council. He will be co-presenting "The Nexus of FMLA & ADAAA" with Gail Scott of MorningStar Health Inc. This is part of HelpNet's Leadership Oasis series and is hosted by St. Mary's Health Care on April 17. Jeff will also speak to the Employers Association of West Michigan on June 25 on Drug Testing along with Vern Jones of ASTS.

Peter Kok was interviewed in March by Charlsie Dewey with *Grand Rapids Business Journal* for the article "Policies reduce risk of workplace violence."

Peter Kok, **Jim Bruinsma** and **Nate Plantinga** presented a HR Labor Law Legal Update at the HRG (Human Resource Group, a chapter of SHRM) meeting on March 14.

John Koryto gave a presentation on February 15 at Western Michigan University's Annual Career Fair on International Student Immigration Options for Employment.

Greg Ripple did a Safety Round Table at the MIOSHA Update on January 10 for The Employer's Association.

Chris Schlegel gave a presentation on January 26 for Western Michigan University's MBA/MSA international students at The Career Center at the Haworth College of Business.

Cathy Tracey is the new chair of Miller Johnson's Education practice group.

Sarah Willey, **John Koryto** and **Gary Chamberlin** spoke to the South Central Human Resources Management Association on March 21.

Internet Investigations and Facebook Firings


New Michigan Law Places Important Restrictions on Employer Investigations of Employee Internet Activity

By: Gregory P. Ripple; rippleg@millerjohnson.com; 616.831.1797
and Rebecca L. Strauss; straussr@millerjohnson.com; 269.226.2986

Employee use of social media like Facebook and Twitter as a primary method of communication has exploded in recent years. So, it's not surprising that Internet communications and social media posts have become increasingly relevant to investigations into workplace misconduct. Until recently, no federal or state law specifically placed limits on employers' demands for access to employees' personal email accounts or social networking sites. But that has changed.

At the end of 2012, the Michigan legislature passed the Internet Privacy Protection Act (IPPA), which places limits on an employer's ability to access or view an employee's "personal internet account." Although the IPPA does not prohibit you from disciplining employees for their internet communications or social media posts, it does restrict how you gain access to them.

What Is a Personal Internet Account?

The IPPA defines "personal internet account" very broadly. It is an "internet-based service that requires a user to input or store access information via an electronic device to view, create, utilize, or edit the user's account information, profile, display, communications or stored data." The law defines "access information" as "user name, password, login information, or other security information that protects access to a personal internet account." Social networking sites like Facebook and Twitter, as well as personal email accounts, fall under the Act's definition of "personal internet account."

An Employer May Not Request Access to an Employee's Personal Internet Account

The IPPA prohibits you from asking or requiring employees or applicants to:

- grant access to their personal internet accounts
- disclose information that would allow access to their personal internet accounts
- allow you to observe their personal internet accounts

You may not punish an employee or applicant for refusing any of these requests.

Under the IPPA, therefore, you could not require an employee to provide password information to his or her personal internet account or to access the account so that you can view it.

Investigations Under the IPPA

Although the IPPA restricts your ability to access an employee's electronic communications or social media posts it does provide several important exceptions that allow you to access and consider such information.

First, it does not prohibit you from observing a personal internet account if you don't request access information or permission, or from viewing or using information about an employee if you obtain it without acquiring access information or if it is available in the public domain. For example, an employee maintains a Facebook or Twitter account that's accessible to the general public, the IPPA does not prohibit you from accessing the employee's communications or posts.

Continued on next page.

MILLER JOHNSON
Attorneys and Counselors

Internet Investigations, *continued*

The IPPA also allows you to require an employee to cooperate with an investigation by providing access to his or her personal internet account if it contains specific information concerning compliance with applicable laws, regulatory requirements, or work-related employee misconduct. This exception appears to be fairly narrow: it permits you to require an employee to cooperate only if there is specific information about such activity on the employee's personal internet account. Future court decisions will certainly clarify the breadth of the exception.

In addition, the IPPA protects your right to require an employee to cooperate in an investigation if you have specific information about an unauthorized transfer of confidential information to his or her personal internet account. If you find out that an employee who has access to confidential, proprietary information is emailing it to his or her personal internet accounts, you may require the employee to provide access to that account. Again, however, the exception is a narrow one. The IPPA requires you to have specific information about the unauthorized transfer. Of course, the IPPA does not forbid you to discipline or discharge an employee for the unauthorized transfer or disclosure of confidential information.

Finally, several exceptions allow you to maintain control over your company devices and accounts. First, you may request that an employee disclose access information to any electronic communications device that you've paid for in whole or part, or an account or service that you've provided, that was obtained by virtue of the employee's employment relationship with you, or that was used for your business. Second, the IPPA protects your right to restrict or prohibit an employee's access to certain websites while he or she is using a device paid for by you or your network or resources. Third, you may monitor, review, or access electronic data that's stored on devices you've paid for or that travels through your network.

Step-By-Step Guide to Investigations of Employee Personal Internet Accounts Under the IPPA

If you're faced with a situation in which looking at an employee's personal internet account is relevant, the first question is whether a request to view or access the account is necessary. If not, then the IPPA doesn't prohibit you from doing so. If a request is necessary, you should determine whether you have specific information indicating that the employee's personal internet account may contain information about prohibited misconduct, compliance with laws, or transfer of confidential employer information. If you do, you may request access to or observation of the employee's personal internet account. If you don't, you should consider whether the employee has transferred data to or from his or her personal internet account over your network or on a device paid for by you. If the answer to that question is yes, then you may request access to or observation of the employee's personal internet account. If the answer is no, you should not.

Penalties for Violations

If you violate the IPPA, the applicant or employee may recover up to $1,000 in damages. More important though, is the Act's prohibition against discharging, disciplining, failing to hire, or otherwise penalizing an employee for failure to grant access or allow observation of his or her personal internet account, so that violation may provide the basis for a wrongful discharge lawsuit. This potential liability creates a strong incentive for you to comply with the Act.

If your organization is faced with an issue concerning an investigation or employee internet privacy, please contact a Miller Johnson employment attorney.

MILLER JOHNSON
Attorneys and Counselors

GRAND RAPIDS
p 616.831.1700
f 616.831.1701

KALAMAZOO
p 269.226.2950
f 269.226.2951

www.millerjohnson.com

MANAGING MEMBER

Craig A. Mutch
616.831.1735
mutchc@millerjohnson.com

EMPLOYMENT LAW AND LITIGATION

David M. Buday
269.226.2952
budayd@millerjohnson.com

Marcus W. Campbell
616.831.1791
campbellm@millerjohnson.com

Andrew A. Cascini
616.831.1705
cascinia@millerjohnson.com

Gary A. Chamberlin
616.831.1709
chamberling@millerjohnson.com

Aliyya A. Clement
616.831.1712
clementa@millerjohnson.com

Tony Comden
616.831.1757
comdent@millerjohnson.com

Keith E. Eastland
616.831.1749
eastlandk@millerjohnson.com

Patrick Edsenga
616.831.1713
edsengap@millerjohnson.com

William H. Fallon
616.831.1715
fallonw@millerjohnson.com

Jeffrey J. Fraser
616.831.1756
fraserj@millerjohnson.com

David J. Gass
616.831.1717
gassd@millerjohnson.com

Peter J. Kok
616.831.1724
kokp@millerjohnson.com

John F. Koryto
269.226.2979
korytoj@millerjohnson.com

Sara G. Lachman
616.831.1789
lachmans@millerjohnson.com

Craig H. Lubben
269.226.2958
lubbenc@millerjohnson.com

Jon G. March
616.831.1729
marchj@millerjohnson.com

Craig A. Mutch
616.831.1735
mutchc@millerjohnson.com

Peter H. Peterson
616.831.1741
petersonp@millerjohnson.com

Nathan D. Plantinga
616.831.1773
plantingan@millerjohnson.com

Gregory P. Ripple
616.831.1797
rippleg@millerjohnson.com

Kelley E. Stoppels
616.831.1776
stoppelsk@millerjohnson.com

Rebecca L. Strauss
269.226.2986
straussr@millerjohnson.com

Michael E. Stroster
616.831.1780
strosterm@millerjohnson.com

Catherine A. Tracey
616.831.1792
traceyc@millerjohnson.com

Sarah K. Willey
269.226.2957
willeys@millerjohnson.com

Thomas R. Wurst
616.831.1775
wurstt@millerjohnson.com

EMPLOYEE BENEFITS

Mary V. Bauman
616.831.1704
baumanm@millerjohnson.com

Frank E. Berrodin
616.831.1769
berrodinf@millerjohnson.com

James C. Bruinsma
616.831.1708
bruinsmaj@millerjohnson.com

Tripp Vander Wal
616.831.1796
vanderwalt@millerjohnson.com

WORKERS COMPENSATION

Bert J. Fortuna, Jr.
616.831.1716
fortunab@millerjohnson.com

MERITAS®
LAW FIRMS WORLDWIDE

Miller Johnson is a member of Meritas, a global alliance of over 7,000 lawyers serving in more than 170 full-service law firms across more than 70 countries. For direct access to locally-based legal expertise worldwide, please visit the Meritas website at www.meritas.org.

2013 BEST LAW FIRMS U.S.News & World Report Best Lawyers®

U.S. News Media Group and Best Lawyers awarded Miller Johnson with high rankings for 34 practice areas in Grand Rapids and 11 in Kalamazoo as part of their 2013 "Best Law Firms" report. Achieving a high ranking is a special distinction that signals a unique combination of excellence and breadth of expertise according to the report. Services ranked as Tier 1 include employee benefits, bankruptcy and creditor/debtor rights, corporate law, labor and employment, mergers and acquisitions, banking and finance, commercial litigation, mediation, real estate, tax law, trusts and estates, and family law.