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Spring 2007

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[The answer seems to be YES]

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PSSSST!

Want to know a secret?

Privacy laws apply to your company too.

Privacy laws are only for financial institutions or hospitals, right? Think again. New federal and state regulations affect a variety of businesses—and there's a chance yours is among them. Here's a guide to the alphabet soup of current privacy laws.

A MATTER OF FACTA

The Health Insurance Portability and Accountability Act (HIPAA), Gramm-Leach Bliley (GLB), and the Fair and Accurate Credit Transactions Act (FACTA) are probably the best-known privacy regulations. HIPAA deals with health information, while GLB and FACTA regulate financial information. But FACTA recently enacted two new rules, broadening its scope.

The Disposal Rule applies to any company that uses information found on a consumer report for any business purpose. The rule requires proper disposal of such information that's reasonable and appropriate for the circumstances.

The Pre-Screen Opt-Out Notice Rule requires companies that send prescreened offers of credit or insurance to notify consumers of their right to opt out of future offers.

MICHIGAN MATTERS

In January 2007, Governor Granholm signed legislation requiring businesses to notify individuals whose confidential information has been compromised, and tell them how it was compromised.

Michigan's Identity Theft Protection Act holds liable companies that fail to exercise reasonable procedures to verify the identity of a consumer applying for credit. Michigan courts have also held employers liable for failing to adequately protect employee information when that information has been compromised and later used to commit identity theft.

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~LITIGATION
Larry J. Saylor
313/496-7986

Is it appealing?

Weigh the Issues Carefully Before You Pursue a Case on Appeal

You've been to court, pled your case, and lost. Should you appeal the decision? Before deciding whether to pursue an appeal, you'll want to think about more than just the size of a judgment or the importance of victory. An appeal can involve significant cost, and the likelihood of success is directly impacted by the standard of review applied by the appellate court.

Except in the most unusual circumstances, only appeals of right are worth pursuing. All jurisdictions allow an appeal of right from a trial court's judgment—one that dispenses with all of the issues and all of the parties in litigation.

Federal and some state rules allow appeals of right from non-final judgments, such as orders granting or denying injunctions. The federal Class Action Fairness Act now makes orders remanding class actions to state courts appealable of right.

Appeals from non-final (interlocutory) orders are rarely worth pursuing. Only in unusual circumstances, such as appealing a state order certifying a class, should such a strategy be employed. Courts hardly ever stay proceedings while an interlocutory application is pending—and it's an atypical case where the stakes are high enough to justify the risk and expense of proceeding with such an appeal.

Consider the cost vs benefit

Costs continue to grow during an appeal. Your opponent can enforce judgment during the appeal, or—if the court approves—you may instead be required to post a bond or other security, plus interest. Stay bonds and judgment interest can be expensive.

On the other hand, an appeal creates uncertainty and presents another opportunity for settlement negotiation, and many appellate courts now require parties to participate in a settlement conference.

To expedite the appeal process, control costs, and heighten your chance of success, you should fight the urge to press every possible trial error and focus only on those issues most likely to result in a reversal. Raising and briefing too many grounds can undercut the weight of your most important ones. Ditto with your oral argument. It's more effective to expound fully on only two or three errors.

Finally, decide who should handle your appeal. Trial counsel has the advantage of familiarity—a possible time saver—but may lack experience with appellate rules. If your appeal involves a large sum or critical issues, consider teaming your trial counsel with an appellate specialist.

Understand the standards of review

Winning an appeal often turns on the standard of review. A finding of fact (whether made by judge or jury) is subject to the "clearly erroneous" standard—sometimes referred to as "manifest weight." This standard is difficult to satisfy and, from a cost perspective, should not be the only ground for appeal.

Court decisions made during the course of discovery or trial (such as whether to admit evidence) are subject to the "abuse of discretion" standard. Although decisions on admission of evidence are critical to the outcome of a jury trial, the abuse of discretion standard makes it very difficult to overturn an order. Further complicating matters, a "harmless error" will not be reversed.

Taken together, these two standards make appeals based solely on alleged errors in the administration of trial very difficult. But courts of appeal are willing to reverse such a decision if convinced there has been a miscarriage of justice. Keep in mind, however, that success on appeal may result in the need for a new trial, with all of the attendant costs and uncertainties.

Choose the right strategy

Keeping these standards of review in mind—along with a candid assessment of the issues involved and the probable costs—can help you and your attorney make a sound decision on whether to pursue an appeal.

If you're faced with deciding whether to pursue a case on appeal and would like the benefit of our perspective, please call for an analysis.

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New leadership at Miller Canfield

Michael W. Hartmann has been named Chief Executive Officer of our firm. His appointment was recently announced by Thomas Linn, who steps down after serving as CEO since 1999. Linn will now be Chairman Emeritus, resume his professional practice, and head up other strategic initiatives.

Michael W. Hartmann

Michael Hartmann, a principal and commercial litigator in the Detroit office, joined the firm in 1975 and has been Chair of the Managing Directors for the past three years. He received his law degree, *magna cum laude*, from the University of Michigan Law School, and his A.B. from the U of M as well. Listed in the Business Litigation Section of *The Best Lawyers in America*, Hartmann is a member of the American Bar Association and the State Bar of Michigan.

Issues in Labor & Employment Law

Miller Canfield's 22nd Annual Seminar

More important information on current labor issues! Don't miss our must-do seminar.

April 24, 2007
8:30 am ~ 3:30 pm

Western Michigan University
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For human resource professionals, managers, in-house counsel, CEOs, and business owners

$85 Includes all seminar materials, breakfast and lunch

To register:
Online: www.millercanfield.com/newsroom/seminars.asp
Phone: 269/ 383-5879

Hot off the Press: 2007 Employment Law Handbook

Each year, our firm updates the Employment Law Handbook, published and distributed through the Michigan Chamber of Commerce—and the newest edition is now ready.

Written in plain, easy-to-read language, the handbook covers a number of day-to-day issues that have the potential to trip up even the savviest employer. Among its topics ~

- ~ New FACTA requirements regarding the shredding and disposal of documents
- ~ Information about the latest Supreme Court opinions on discrimination and retaliation
- ~ A discussion about a rare interpretive ruling from the Michigan Department of Civil Rights related to contraceptive equality in health benefits
- ~ New Michigan minimum wage info
- ~ A revised affirmative action chapter with guidance on the recently adopted constitutional amendment
- ~ Expansion of MIOSHA laws regarding lock-out/tag-out

This is the most inclusive handbook available, and could save you considerable costs in damages or legal fees. Part of a comprehensive kit that includes a customized CD with forms and letters needed to run a bullet-proof HR department, access to a Labor Law Helpline, and electronic newsletter to provide updates on critical issues, the package is available through the Chamber by calling 888/ 763-0514, ext. 204, or on the Chamber's Web site: www.michamber.com/chamstor/ELH07.asp.

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If you would like your name added to our mailing list, please call Joanne Theisen at 734/ 668-7755.

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Sally A. Hamby
248/267-3229

INDIA CALLS...
How to do business in this bustling nation

It's the world's largest democracy. Highly skilled technical and professional people abound. The primary language for transacting business is English. A newly liberalized economy now promotes foreign investment, and many bureaucratic roadblocks have been lifted.

There's much to like about today's India—as many U.S. companies are discovering.

Of course, as with any business venture, due diligence is advised—particularly if affiliating with an Indian entity. And any potential investor should become familiar with the culture, customs, and business etiquette in India, as well as the Indian state and federal laws that may apply. But there's plenty of help available, the country welcomes new business, and the options for expansion are numerous.

Depending on your type of business, and whether you intend to sell a product or service in India's market or establish a physical presence in the country, you will want to consider the structure of your investment.

U.S. companies that wish to establish operations in India may do so as "Foreign Direct Investment" or FDI. Many sectors of Indian business are now open to 100% FDI, and do not require government licenses or approvals. In such cases, the investor simply notifies the Reserve Bank of India of its investment. Even in those sectors where government approval is required, decisions are generally made quickly—usually within 30 days.

Options for investment include new business start-up, the acquisition of an existing business, a joint venture or affiliation with an established Indian business, establishing a "special purpose" office, or creating an outsourcing or supply arrangement.

Many of our clients have entered India through acquisition of an existing Indian business in an industry for which FDI is permitted, or by partnering with an established Indian company through a joint venture. Others have created facilities to provide technology, engineering, or design services for their own company or others.

Regardless of the chosen business structure, the applicable Indian laws vary from state to state, as do fees and taxes related to both employees and real property. Businesses that depend on intellectual property or are engaged in the development of intellectual property should make certain the proper agreements and protections are in place. Other concerns include product import and export; customs and duties; immigration matters; and repatriation of Indian profits.

All can be handled with the assistance of able legal counsel. Call our International Business Group if you'd like to explore opportunities in this growing, vibrant part of the world.

Timothy L. Andersson
313/496-7528

BUSINESS FOR SALE

Successful succession planning may begin with an ESOP

If you're preparing to sell your closely held business, you have several options. You could transfer ownership to the next family generation, or execute a traditional asset or stock purchase transaction. Fair enough. But have you considered the benefits of selling through an ESOP?

An ESOP (Employee Stock Ownership Plan) is a type of tax-qualified, defined-contribution benefit plan that has grown in popularity for several good reasons. Among them: smooth ownership transition.

An excellent method of rewarding employees for their service, an ESOP buys and holds your company's stock in trust for your employees. It can help your corporation preserve its legacy and maintain its value going forward by reducing risks commonly associated with the transfer of control. And, at the same time, it may allow you to exit the business with a reduced tax burden.

Sound good? Here's how it works…

Prior to the ownership transfer, selling shareholders (and, in some cases, a lending institution) loan funds to the ESOP, which the ESOP then uses to purchase the stock of those selling shareholders at an appraised value.

The ESOP holds that stock, releasing it annually in proportion to repayment of the loan, until participating employees assume ownership.

The method works best for companies with a stable cash flow and at least 20 employees. Naturally, management of the corporation must be in favor of the formation and operation of an ESOP as well.

An ESOP can work for the sale of either a C corporation or S corporation—although certain differences apply.

If the corporation is organized as a C corporation, the selling shareholders in an ESOP stock-purchase transaction are eligible to defer gain on the sale. But to take advantage of this provision, they must reinvest the proceeds of the sale in qualified replacement property (such as publicly traded securities) and hold that property for at least three years. At the same time, the ESOP must purchase at least 30% of the outstanding stock of the C corporation in order for the selling shareholders to qualify for a Section 1042 deferral.

In the case of an S corporation, selling shareholders aren't eligible to defer gain under Section 1042. However, any income earned by the ESOP in an S corporation is tax exempt—creating a powerful economic incentive.

Of course, there are a number of strategies to consider when planning to transfer ownership of your closely held business. If you'd like to discuss options and learn more about the use of an ESOP, call our office for some help.

John M. Jedlinski
519/ 561-7411

Traveling to Canada?

Don't let an old criminal record come back to bite you

Your plans are made. Your passport is in hand. Think you're ready to visit Canada? Not so fast. Unless your past is without legal blemish, you may find yourself waiting at the border, or—worse yet—heading back home.

It doesn't matter if you're going on a fishing trip or to your cousin's wedding; off to college in Toronto, or on temporary work assignment. Business, pleasure, or study—long visit or short—if you've been convicted of a crime outside or inside Canada, you are deemed to be inadmissible. And, while you might not realize it, criminal charges and convictions are equated to Canadian law.

Most people fail to realize that driving while impaired or under the influence is a criminal offense in Canada and the United States. What's more, a past conviction going back 30 years or more can affect entry.

Does any of this apply to you? If there's something sketchy in your past, it's important to take steps ahead of your Canadian venture to prevent embarrassment and delay. Here's what to do.

Obtain a Rehabilitation Certificate

In most cases, if at least five years have passed since you completed a criminal sentence, you can apply for this certificate through a Canadian Consulate or Embassy. You will need to obtain certified court records or—if they're not available—a certified letter from the court, along with information relative to the sentences you received, or any pardons or discharges. A fingerprint record check is also required. Expect your application to take from approximately six months to one year to process. Most delays occur prior to the submission of an application because clients await fingerprint results, or fail to provide all the documentation necessary to have an application considered. If it has been at least 10 years since completion of your sentence, and if yours was a singular offense punishable by less than 10 years, you are deemed to have been rehabilitated.

Obtain a Temporary Resident Permit

Generally, a Temporary Resident Permit requires that you apply through a consulate or embassy and present much of the same documentation. In some cases, an application for temporary resident permit is approved at the port of entry—but such approvals are limited and usually apply only to short visits. Both the temporary resident permit and rehabilitation certification become more difficult to obtain if you have more than two convictions on your record.

In all cases, issuance of either a Temporary Resident Permit or a Rehabilitation Certificate is discretionary, and consultation with a knowledgeable professional can be of great assistance.

Obtain a Foreign Pardon

You may also overcome criminal inadmissibility by obtaining a foreign pardon that is recognized in Canada, or—if your offense was committed in Canada—a pardon from the National Parole Board of Canada.

While border or port-of-entry screening isn't conducted on every individual upon every crossing, it's smart to be prepared. Your ability to enjoy a family trip, complete your studies, or take on a work assignment may depend on it. Call our office if you'd like some help.

Kurt P. McCamman
269/ 383-5818

Can Employers be held liable for WORKPLACE INTERNET PORN?

[The answer seems to be YES]

A recent New Jersey Court of Appeals ruling has raised the possibility that an employer may be held liable for failing to properly investigate and prevent an employee from viewing or transmitting child pornography from a workplace computer network.

In *Jane Doe, Individually, and as G/A/L for Jill Doe, a minor, Plaintiff-Appellant v XYC Corporation, Defendant-Respondent,* the court held that:

> *"An employer who is on notice that one of its employees is using a work place computer to access pornography, possibly child pornography, has a duty to investigate the employee's activities and to take prompt and effective action to stop the unauthorized activity, lest it result in harm to innocent third parties."*

The employee in question was arrested on child pornography after law enforcement obtained a warrant to search his workspace. The employee had been secretly taking inappropriate photographs of his stepdaughter and transmitting them on his workplace computer, as well as sending emails to pornographic Web sites, and storing pornographic images—including those of children.

Several times over the years preceding the arrest, the employee's supervisor learned or had reason to suspect that the employee was accessing adult pornographic Web sites at work and told him to stop. But nothing further was done to investigate or monitor the employee's actions. There was no evidence that the employer knew about the child porn.

In its ruling, the Court assigned knowledge to the employer about the child porn and ruled the

employer bore a duty to report the employee's activities to the proper authorities and terminate the employee or take other remedial action. The duty was imposed because the employer had imputed knowledge about the employee's engaging in activities that imposed the threat of harm to others.

What's more, the Court may have been further swayed by the employer's failure to investigate, despite the fact that it had access to software that could track computer usage, as well as a policy in place that permitted monitoring an employee's computer activities.

Although no Michigan court has yet tackled the issue, recent decisions in the state signal a willingness to hold employers to a higher standard when it comes to protecting third parties from an employee's criminal acts.

If you believe one of your employees is involved in similar computer activity and would like to discuss how the situation should be handled, please call our office.

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MICHIGAN

Ann Arbor
734/663-2445

Detroit
313/963-6420

Grand Rapids
616/454-8656

Howell
517/546-7600

Kalamazoo
269/381-7030

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Warsaw
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Wroclaw
011-4871/337-6700

Michigan's Social Security Protection Act restricts certain uses of Social Security numbers (for example, no more than four sequential digits may be publicly displayed), and requires companies that obtain Social Security numbers in the ordinary course of business to create a privacy policy safeguarding that information.

PRACTICAL MATTERS

Carelessness, hackings, and inside jobs account for many data breaches. In addition to encryption, firewalls, and other network protections, companies should consider limiting employee access to sensitive data; as well as adopting, posting, and enforcing privacy policies. If a data breach occurs, don't cover it up. Notify the authorities and affected customers, and conduct an internal investigation to help prevent future breaches.

If you would like some assistance to ensure your company's compliance with these and other privacy issues, please contact the Miller Canfield Information Technology team.

150 West Jefferson, Suite 2500
Detroit, Michigan 48226-4415

RETURN SERVICE REQUESTED

www.millercanfield.com

QUESTIONS AND COMMENTS ABOUT *HOT POINTS* MAY BE ADDRESSED TO:
silkworth@millercanfield.com