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USE CAUTION

When Managing Social Media in the Workplace

Twitter, Facebook, MySpace, LinkedIn. Welcome to the wonderful world of social networking. Or maybe not, if that networking happens to intrude at work.

With the rise in social media, employers face many challenges—and more than a few risks—in properly monitoring workplace access to popular sites, weighing concerns of privacy, and ensuring no unlawful activity transpires on company time.

Be aware of these issues as you separate fact from fiction and shape your business's Internet policies.

1. Using an employee's social media activity to support an adverse employment decision can lead to a wide variety of potential causes of action in any post-termination suit.
2. Special caution must be taken if employees are part of a union. In an adverse employment decision, if the employee's use of a social networking site amounts to concerted activity under the NLRA, an employer's conduct may constitute restraint of a protected activity under labor laws.
3. Employees subject to unfavorable employment actions as a result of using social networking sites may be able to argue they received unequal treatment due to their protected class and charge the employer with discrimination.
4. Employers can also face discrimination claims if they make use of social media sites in hiring and other employment decisions. While it's not illegal to learn about protected characteristics when making hiring decisions, it's important that those individuals making the decisions are trained to be neutral.



5. If an employee uses a site to report that an employer is involved in potentially unlawful activities, and that employee is subsequently disciplined or fired, he or she may have a retaliation claim under Title VII.
6. While there are no published cases that challenge an employer's right to monitor an employee's public Facebook or MySpace page, employers should be aware of privacy laws. Any intrusion into a matter in which an employee has a legitimate expectation of privacy could lead to a claim of invasion of that privacy.
7. And finally, employers should be wary of state laws that require notification prior to monitoring employee e-mail or Internet use.

The most important lesson is this: A good workplace policy that addresses the use of social media is absolutely necessary in today's technology-teeming world. At a minimum, that policy should:

- Inform employees that there is no expectation of privacy in their use of a workplace computer.
- Prohibit publishing confidential or proprietary information about the company or employer, and specify the consequences of doing so.
- Reinforce the need to be professional, prudent, and respectful of the company and its customers when privately using a social networking site.

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Are You a Commercial Tenant?

Better Exercise Caution in Today's Real Estate Market

Current economic conditions have lower occupancy rates—and that means cash flow is down for many commercial landlords. As a result, some landlords are having difficulty meeting their lease obligations with respect to repairs and upkeep.

State laws usually provide that a tenant's obligation to pay rent is independent of a landlord's maintenance obligations. Absent a specific lease provision, a tenant would be legally required to continue to pay rent even after a landlord default.

If you're a commercial tenant about to renew or enter into a new lease, what should you do?

SAFEGUARD AGAINST LANDLORD DEFAULTS

One solution is to negotiate lease provisions that allow you to correct the landlord default and offset those expenses incurred against your rent. Landlords and their lenders are usually reluctant to agree to cure-and-offset rights. However, they may compromise with you by allowing setoffs following some form of independent verification—judicial or other—that you properly exercised your cure right. But be careful. Though a right to cure is fine if the fix is a relatively minor matter, it's not much of a solution for major repairs where costs exceed your remaining rent obligations.

A struggling landlord may also delay performing repair and maintenance obligations by invoking the lease's "force majeure" clause, which allows for delays resulting from an event that is outside of its control. Because this provision can leave a tenant with little recourse, tenants often request a limited force majeure clause that doesn't allow a landlord to delay repairs due to financial difficulties.

SAFEGUARD AGAINST FORECLOSURE

In these tough times, a lender's increased vigilance over landlords can affect tenants. Most leases require tenants to execute two legal forms—estoppel letters and subordination, non-disturbance agreements (SNDAs)—which govern their rights as to the lender. Prior to signing a lease, a tenant should carefully review the terms of these documents to determine the impact of any foreclosure.

REVIEW GROSS-UP AND OTHER PROVISIONS

Any tenant whose lease will require the payment of additional rents for variable common area charges above the base year will want to make certain the base year's costs are grossed up to reflect any current vacancies. Otherwise, when vacancies are filled and the landlord's variable costs increase, a tenant may be obligated to pay a greater share of those operating expenses.



Unfortunately, the shared costs for common areas, insurance, or tax liabilities can be overstated. Be sure your lease requires your landlord to provide an annual reconciliation statement, documentation of costs, and the right to audit the landlord's records.

Because commercial property values—especially those with high vacancy rates—have fallen significantly, tenants should ensure that the taxable value of their premises has been appropriately adjusted. If you are the building's sole tenant, include a right to contest the local assessor's tax valuation. If you lease less than 100% of the property, you may need to employ more creative means to reach a fair arrangement.

It's the wise tenant who enters a lease with eyes wide open and all the fine points nailed down. If you would like some assistance reviewing your commercial real estate agreements, please give us a call.

Real Estate
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FOUL?

High Court Sacks NFL

A recent Supreme Court decision, *American Needle, Inc. v National Football League*, received plenty of press due to its sports hook. But the case's broader impact on joint ventures between competitors received scant attention.

Too bad. Because the decision is a good reminder that joint ventures and other cooperative conduct between competitors should be carefully reviewed by antitrust counsel.

In *American Needle*, the Court reinstated a lawsuit that challenged the NFL's right to license all 32 of its team logos to a single apparel vendor, Reebok International. The NFL is an unincorporated association of its teams. But the teams had organized their own company, National Football League Properties (NFLP), which had long licensed team logos to a variety of clothing vendors—among them, American Needle.

Then, in December 2000, NFLP granted Reebok an exclusive 10-year license for all 32 teams. That's when American Needle sued under Section 1 of the Sherman Act, which prohibits conspiracies that restrain trade.

Both the district court and Court of Appeals threw out the lawsuit, ruling that the NFL should be viewed as a single entity. Traditionally, the law has held that officers, employees, and wholly-owned subsidiaries of a single entity aren't capable of conspiring.

Wrong, ruled the Supreme Court. The mere fact that the teams cooperate to produce NFL football doesn't mean they're immune from the antitrust laws. After all, the teams compete with one another for fans, on the playing field, for gate receipts, and in matters related to managerial contracts. Team interests in licensing their trademarks are not necessarily aligned and they could have made their decisions separately. Therefore, said the Court, NFLP's licensing decisions were "concerted action" subject to scrutiny under the Sherman Act.

In essence, the Supreme Court looked upon the NFL as a joint venture between its member teams. Now, it's up to the lower courts to decide whether antitrust laws were

broken, applying the antitrust "Rule of Reason," which takes into account a variety of factors to decide whether conduct unreasonably restrains competition in the market.

The lesson learned? Partners in a legitimate joint venture can violate antitrust laws if they cooperate on matters that are too far from their venture's core purpose. When a joint venture is necessary to create a product, the joint venture itself is usually lawful. But conduct that pushes the boundaries of a joint venture, such as the NFLP's licensing decisions, deserves a closer look.



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CLOCK CONTINUES TO TICK ON FEDERAL ESTATE TAX STATUS

As we flip the calendar to this year's final quarter, Congress still hasn't taken action to reinstate the Federal Estate Tax for deaths occurring in 2010 or to change the exemption amount or rate for persons dying in 2011. Effective January 1, 2010, the tax was repealed for individuals dying during the year. Under current law, the estate tax is scheduled to return in 2011, reverting to a \$1 million exemption and a maximum estate and gift tax rate of 55%.

Be sure to visit our website, millercafield.com, and click on "Alerts" for any late-breaking developments.

HIGH-STAKES SLEUTHING

What You Should Know About Protecting Your Trade Secrets

Our global economy has entered the Information Age. Now, technological innovation and information is the “currency of the new millennium.” But with the stroke of a computer key, technology that took years and millions of dollars to develop can be stolen and sent to commercial and political competitors around the globe.

Recognizing the national economic benefits of the technology trade secrets of U.S.-based companies, and the ease with which these secrets can be stolen, the U.S. Congress enacted the Economic Espionage Act of 1996.

Though some argue the government has not used the Act often enough, the U.S. government’s recent prosecutions of two Chinese automotive engineers have highlighted the subject’s renewed importance. The charges take on extra weight as the engineers were accused of stealing GM and Ford’s trade secrets to send to Chinese competitors at a time when the U.S. government has a vested interest in domestic auto companies, and business commentators are likening theft of U.S. trade secrets to a “kind of warfare.”

In each case, the defendants were preparing to leave GM and Ford for jobs with companies in China. The government alleges the engineers attempted to convert confidential trade secrets to the economic benefit of their new employers, knowing that it could economically injure GM and Ford.

These cases underscore the complexity of laws surrounding intellectual property theft—particularly as companies cooperate, trade, and compete on an ever-expanding international field. At stake, too, are hot-button social and political issues like pre-trial detention and immigration.

These issues were recently exacerbated by news that the Chinese government may compel foreign auto makers that want to produce electric vehicles in China to share cutting-edge electric-vehicle technology in joint ventures with Chinese companies where the foreign auto maker has only a minority stake. Couple this with the currency valuation issues roiling between the U.S. and China, and Sino-American economic relations stand at a volatile crossroad.

If your company does business internationally, it’s time to take a closer look at how trade secret litigation affects you.

WHAT’S A TRADE SECRET?

The law defining trade secrets is broad. Unlike other forms of U.S. intellectual property protection—patent, copyright, and trademark—trade secret jurisprudence is a creature of state law. Most states have some variation of the Uniform Trade Secrets Act. Included in the definition of trade secrets are various forms of financial, scientific, technical, economic, or engineering information—whether tangible or intangible. Plans, patterns, program devices, formulas, designs, prototypes, codes, processes, methods, and techniques can be classified as trade secrets. “Negative know-how”—time and money spent learning what does not work—can be a trade secret.

It doesn’t matter whether or how this information is compiled, recorded, or stored if it meets these conditions:

1. The information derives actual or potential economic value from not being known nor readily ascertainable by the public.
2. The owner uses reasonable efforts to maintain the information’s secrecy.

WHAT’S NOT A TRADE SECRET

Though not exhaustive, and subject to the facts of a particular dispute, the following are generally not recognized by courts as trade secrets:

- General information or knowledge an employee obtains over his career
- General information or knowledge in a certain industry
- Independent development of an idea
- “Reverse engineering” a publicly available product to discover a design or method
- Publicly available information or information that the owner does not exercise reasonable efforts to keep secret

WHAT DOES THE LAW SAY?

While trade secret laws are addressed by individual state law, the Economic Espionage Act is a federal statute that criminalizes misappropriation of a trade secret if the government proves the following four elements beyond a reasonable doubt:



1. The defendant obtains, conveys, or receives a trade secret (or attempts or conspires to do so)
2. The trade secret relates to a product that is produced for or placed in interstate or foreign commerce
3. The defendant intends for the trade secret to economically benefit anyone other than the owner
4. The defendant intended or knew that his conduct would injure the owner

Individuals found guilty can be fined and imprisoned for up to 10 years; companies may receive fines up to \$5 million.

HOW SHOULD YOU PROTECT YOUR VALUABLE COMPANY TRADE SECRETS?

If your company relies on research and development of protected information; purchases, licenses, enters joint ventures that do; or uses vendors to help create protected information, there are several proactive steps you can take to lessen the risk of becoming the victim of trade secret theft or espionage.

- Develop non-compete agreements compliant with state laws to prevent an employee from working with a competitor for a period of time.
- Implement non-disclosure agreements to prevent employees, vendors, and partners from disclosing protected information.
- Require non-solicitation agreements to prevent employees, vendors, and partners from hiring your employees.
- Utilize assignment-of-inventions agreements that state any inventions or trade secrets developed by an employee, vendor, or partner while working for or with your company remain the property of the company.
- Restrict access to R&D networks, work spaces, and environments for your valuable trade secrets to help maintain their security; develop systems that guard access to development or computer source code repositories; monitor details of changes to product, source code, formulas, and equations; and keep clearly defined versions of a developing product, source code, formula, equation, or algorithm in a secure place.
- Understand the pros and cons of patent versus trade secret protection for your proprietary information, including applicable court decisions and any proposed legislation.
- Create policies clearly addressing the use of and rights to company-issued computers and networks.
- Conduct extensive exit interviews of departing employees, especially those in sensitive positions vis-à-vis trade secret development.

INTERNATIONAL PROTECTION OF TRADE SECRETS AND INTELLECTUAL PROPERTY

Protecting your trade secret and other intellectual property in the U.S. does not mean that it's protected in other countries. Indeed, most nations—including China—have their own trade secret and IP laws and filing requirements before those assets can be protected. Many nations (including the U.S. and China) are members of various treaties or world organizations that provide forums to resolve IP and trade secret issues. In the U.S., there's been an increase in U.S. companies filing complaints with the U.S. International Trade Commission seeking to exclude importation of foreign products that infringe IP rights in violation of Section 337 of the Tariff Act of 1930.

One thing is certain: in today's global market, invention, innovation, and information are your most valuable assets. Our firm can guide you through the intricacies of international law and make sure your intellectual property is safe. Call us if you'd like assistance.

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Shusheng Wang Joins Firm

Miller Canfield's International Business practice has gained a seasoned lawyer with the addition of Shusheng Wang. Wang, who serves as co-director of the international practice in our Troy, Michigan, office, brings 13 years of experience helping Chinese companies expand to North America.

Over the years, he has helped global clients establish automotive, engineering, and R&D centers here, as well as those U.S. companies looking to invest in emerging foreign enterprises or outsource products and services abroad.

At Miller Canfield, Wang's focus is on global corporate transactions, mergers and acquisitions, dispute resolution, China business counseling, and U.S. taxation of international operations.

A former member of General Motors' legal staff who is fluent in Mandarin Chinese, Wang received his J.D. from Washington University School of Law in S. Louis, Missouri. He also holds degrees from the People's University of China in Beijing, and Shandong University in Jinan, China.

Shhhh... Can You Keep a Secret?

How to Protect Confidential Business Information

How safe is your company's proprietary data? If you're like most businesses, you utilize systems that guard restricted information from competitors, hackers, and other outside snoops. But the bigger threat may come from where it's least expected—your own employees, contractors, or vendors.

Fortunately, several laws are designed to help companies guard against unauthorized access by authorized people—namely, the Computer Fraud and Abuse Act, the Federal Economic Espionage Act, the Michigan Uniform Trade Secrets Act, and the Michigan Identity Theft Protection Act.

But taking a few proactive steps now can thwart would-be spies and save you from becoming a victim of business espionage.

MAKE USE OF NON-COMPETE CONTRACTS

You may require certain employees to sign a non-compete agreement to prevent them from improperly using confidential business data. Enforcement of non-competes varies by state. Michigan law allows employers to utilize non-compete agreements that are deemed "reasonable" in duration, geographical area, and line of business.

IMPLEMENT NON-DISCLOSURE AGREEMENTS

A non-disclosure agreement can protect you against the unauthorized use of confidential business data by employees, contractors, vendors, or any other third party with access to sensitive data.

EDUCATE YOUR EMPLOYEES

Make employees aware of policies and procedures that protect sensitive information, as well as the reasons for such policies and the consequences for failure to comply.

CLASSIFY DATA

Develop a system that separates confidential information from non-confidential. When in doubt, treat data as restricted.

LIMIT ACCESS

Decide who really needs to see what, and restrict access by all others.

MONITOR YOUR COMPUTER SYSTEMS

Consistently check e-mail utilization and install software that detects excessive downloading or copying of files by individual employees.

PROTECT PASSWORDS

Say goodbye to those password sticky notes affixed to computer screens!

INSTILL CONFIDENTIALITY AS PART OF YOUR COMPANY'S CULTURE

Your policies are of little use if they're filed away and ignored. Make compliance a priority throughout the organization.

Follow these tips to become a good secret-keeper.

If you'd like some help drafting agreements and policies that will protect your data, give us a call.



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INHERITED IRAs

SURPRISE! *That “Stretch IRA” you’re leaving your children may not be protected from their creditors*

Americans have more wealth tied up in tax-favored retirement plans than ever before—an estimated \$8.4 trillion, in fact. That’s more than 15% of the total net worth of all U.S. households.

If the favorable tax treatment afforded retirement plans has fueled their popularity and generated wealth previously unheard of for the nation’s workers, it’s also created a challenge for estate planners. Because so many taxpayers won’t consume their entire nest egg in a lifetime, their retirement assets will likely pass to the next generation as an inheritance.

You might think that the benefits available to one generation would be inherited by the next. After all, the tax consequences are certainly the same. But what happens if a beneficiary has creditors? Could those creditors reach an inherited IRA?

The answer is: it depends. Federal law protects your ERISA-qualified, employer-provided plans, including 401(k), pension, and profit-sharing plans. But protection for Individual Retirement Accounts is a matter of state law. While most states exempt initial owner and spousal IRAs from creditor claims, there’s a growing body of case law that questions the exemption of inherited IRAs once in the hands of the next generation.

Yet, with proper planning, it may be possible for a parent to leave their IRA to children or grandchildren and continue creditor protection.

One proposed strategy calls for establishing a separate IRA “irrevocable inheritance trust” that is designated as the beneficiary of the parents’ retirement accounts. The thinking goes that, while the trust is irrevocable, the designation isn’t. So if circumstances change, a new irrevocable trust can be designated the beneficiary as long as the trust contains a “spendthrift” provision that prevents creditors from reaching it.

Another option involves customizing an often overlooked section of the standard IRA form, Article VIII. The IRS provides a place in this section to incorporate “see attached” language. So long as it doesn’t violate the less-restrictive IRS rules for IRAs, the custodian should recognize the inserted attachment. Language could be as simple as: *A designated beneficiary’s interest in this IRA shall not be subject to liabilities or creditor claims, assignment, or anticipation.*

Coupled with this attachment would be a provision designating a trust as the beneficiary of the IRA. Michigan law prevents establishing a spendthrift trust to protect one’s own assets from creditors. But a spendthrift trust can be established that protects the trust assets from claims of the next generation’s creditors.

With a spendthrift trust as beneficiary of an IRA, the IRA’s assets are shielded from your beneficiary’s creditors. Federal bankruptcy law specifically excludes assets held by these spendthrift trusts from being subject to a bankruptcy proceeding.



What to do? If asset protection for IRA beneficiaries is an important consideration, use either a trustee IRA or name a spendthrift trust as beneficiary. And if your circumstances

should change? The new Michigan Trust Code recognizes the appointment of a “trust protector” who could modify the terms of the otherwise irrevocable trust, thus making it more flexible.

Clearly, federal and state laws governing tax-deferred retirement plans make this a complex issue. Call us if you’d like some help.

Estate Planning
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If you would like your name added to our mailing list, please call Heather Willis at 313.496.7902.

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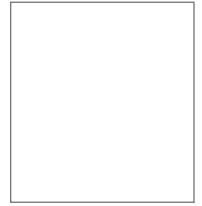
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RETURN SERVICE REQUESTED



OK? Or NOT? \$\$\$\$\$\$\$\$\$\$

No Clear Decision on Legality of Bundled Pricing

Bundled discounts—offering a lower price with the purchase of two, three, or more separate products together—are common practice. But federal courts disagree whether the pricing custom can be regarded as a violation of the Sherman Antitrust Act.

Package discounts are widespread, and usually not subject to scrutiny. But problems can arise when the party offering the deal has some degree of market power over one or more elements of the bundle—allowing them to raise prices without losing significant sales. The question of antitrust comes into play if a bundled price makes it impossible for other sellers of one or more of the components to compete.

In its watershed decision, *LePage's v 3M*, the Third Circuit Court ruled that the bundling discount in question did, indeed, violate the Sherman Act.

LePage's is a manufacturer of store-brand transparent tape. Its primary competitor, 3M, also manufactures store-brand tape, along with numerous other office products. When 3M offered stores discounts on Scotch Tape and some of its other products in exchange for an agreement to purchase its store-brand tape exclusively, LePage's sued.

The Third Circuit agreed that 3M's bundling of discounts on Scotch Tape (a product over which the manufacturer had significant market power) with store-brand tape created an unfair competition. In its finding, the Court held that 3M's pricing

as a monopolist may foreclose portions of the market to a potential competitor who does not produce an equally diverse group of products. Further, the Court rejected 3M's argument that its bundled discounts couldn't violate the Sherman Act, so long as final prices remained above cost.

Case closed? Not really. Several other courts and commentators have expressed concern that this approach could condemn too many instances of bundled pricing as anticompetitive. Most notably, the Ninth Circuit rejected LePage's analysis in a recent case, *Cascade Health Solutions v PeaceHealth*, instead adopting a "discount attribution" test.

Under this method, the entire amount of the bundled discount on all products is attributed to the competitive product in the bundle—i.e. the product also made by the plaintiff. The bundled discount is found to be anti-competitive only if applying the entire discount to the competitive product results in a price that's below the defendant's cost to manufacture the product. In other words, if the price of the competitive product is above cost even after the entire bundled discount is attributed to that product, there can be no antitrust liability.

And so, we are left with no ready answer on the question of bundling. The Supreme Court has yet to address the issue, and there's no clear consensus among the other federal courts.

The best advice: Before your company offers a packaged discount, consider carefully whether you might have market power over one or more of the bundled products. If an analysis suggests you do, don't risk an antitrust charge.

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