



### What's Inside

- Employer May Not Violate Employee's Privacy Rights by Accessing Employee's Personal E-mails or Text Messages
- Court Finds Lack of Exigent Reason for Submitting "Low Risk" Govt. Contract Employees to In-Depth Background Checks
- High Court Rules Administering and Insuring ERISA Plan Creates Conflict of Interest
- Ninth Circuit Affirms Back Pay and Reinstatement to Workers Terminated For Failing to Correct "No Match" Letters
- Inspectors' Commute Time Held Not Compensable
- Court Holds Employer Not A Guarantor of Meal Breaks
- Employee Entitled to Recover for Work Lost due to FMLA Retaliation
- Video of Injured Employee Working on House Insufficient to Defeat FMLA Claim
- Ninth Circuit Allows Driver Without Air Conditioning to Proceed with ADA Claim
- Court Rejects "Association" Claims of Caucasian Employee
- "Same Actor" Defense Denied
- Last-Minute Claim of Physical Disability Under FEHA Rejected
- Federal Contractors Required to Use E-Verify
- Congress Passes Genetic Discrimination Ban

violation of the employees' privacy rights.

The Ontario police department had a written policy notifying employees that the computer and e-mail system of the department was for official business and that users of the system had no expectation of privacy or confidentiality in messages or information sent or stored on the system. However, a lieutenant in the department told staff that he would not audit the text messages on their department-furnished pagers if the employees paid for text messages above 25,000 characters per month. Because of this "unofficial" policy, the court concluded that the employees had a reasonable expectation of privacy in the content of the text messages, and that a search of these messages was unlawful.

The court distinguished cases where employers had clear policies announcing that they would inspect messages and information on employer-provided computers and equipment, which destroyed any reasonable expectation of privacy.

The court also held that the service provider for the text messaging service violated the Electronic Communications Privacy Act by providing transcripts of the text messages to the police department, which was the account holder but not the sender or receiver of the messages.

### Employer May Not Violate Employee's Privacy Rights by Accessing Employee's E-Mails or Text Messages

Where an employer led employees to believe their text messages sent on the employer's equipment were private and would not be monitored by the employer, the employer

violated the California constitutional right of privacy and the Fourth Amendment of the U.S. Constitution by accessing such messages. The Ninth Circuit in *Quon v. Arch Wireless Operating Co., Inc.* held that the Ontario police department created an expectation of privacy in employees' text messages sent from department equipment, and therefore an audit of the messages was an unreasonable search and a

This occasional newsletter is published by Hill, Farrer & Burrill LLP as a service to clients, friends and colleagues.

Each publication summarizes recent developments in state and federal law affecting employers, but should not be relied upon as an opinion or advise of the Firm regarding any specific matter.

In light of this decision, employers should review their e-mail, voicemail, computer, and electronic communications policies to be certain that they clearly place employees on notice that they have no reasonable expectation of privacy in the information stored or sent through these systems. Where the policy clearly informs employees that they have no reasonable expectation of privacy in the information stored or sent from the employer's electronic communications systems, employers should have the right to monitor and search such communications without violating the employee's privacy rights. This is a developing area of the law and employers should seek legal counsel before undertaking a search of an employee's personal electronic messages.

### **Court Finds Lack of Exigent Reason for Submitting "Low Risk" Govt. Contract Employees to In-Depth Background Checks**

The Ninth Circuit Court of Appeals held last month in *Nelson v. National Aeronautics and Space Administration* that scientists and other employees who do not work with classified materials at the Jet Propulsion Laboratory may obtain a temporary injunction against in-depth background checks they deem overly intrusive. The petitioning employees claimed that though they worked in "non-sensitive" positions that did not require security clearances, it was their employer's policy to summarily terminate employees who refused to submit to extensive background investigations by the contracting agency.

Under the program developed by the Department of Commerce, contract employees were required to provide disclosures of mental health history, past use of controlled substances, and past arrests (regardless of whether charges were ever filed). They were also to provide the names of three references, each of whom would be asked to complete a questionnaire regarding the employee. Finally, they were required to sign "Standard Form 85," which contains an express privacy waiver. The petitioning employees argued that the privacy waiver could disclose information unrelated to a legitimate security interest.

The court held that the employees were likely to succeed on their informational privacy claims related to disclosures of medical treatment and psychological counseling for which the government did not demonstrate a legitimate state interest. Moreover, forcing the employees to sign a waiver that allowed the government to obtain information from any source or face termination tipped the balance of hardships in the employees' favor. As such, the court held that the preliminary injunction should have been granted, and should have applied to both the government agency and the private employer.

### **High Court Rules Administering and Insuring ERISA Plan Creates Conflict of Interest**

Under the newly-issued Supreme Court opinion in *Metropolitan Life Insurance Co. v. Glenn*, using the same outfit to administer an ERISA plan and fund the plan's benefits may create a conflict of interest. The underlying case revolved

around MetLife's administration and insurance of Sears, Roebuck & Company's long-term disability insurance plan. As administrator of the plan, MetLife had discretionary authority to determine whether an employee's benefits claim was valid. MetLife was then responsible, as the insurer of the plan, for paying valid claims.

In the case at issue, Wanda Glenn, a Sears employee, was granted 24 months of benefits under the plan following a diagnosis of a heart disorder. She was encouraged by MetLife to apply for Social Security disability benefits based on an agency determination that she could not work, but when MetLife had to determine whether she could work to establish eligibility for extended plan benefits it found her capable of doing sedentary work and, thus, denied her application for benefits.

Glenn sought review of the decision in federal court. The Court held that where an administrator operates under a conflict of interest, "that conflict must be weighed as a fact[o] in determining whether there is an abuse of discretion in deciding benefits claims." The *Glenn* case confirms that such a conflict created when the same company both administers and funds a benefit plan. If you would like to review your company's ERISA plan management options, please contact Tom Reed at [treed@hillfarrer.com](mailto:treed@hillfarrer.com).

## Ninth Circuit Affirms Back Pay and Reinstatement to Workers Terminated For Failing to Correct “No Match” Letters

True or False: If you receive a “no-match” letter from the Social Security Administration as to one of your employees, you may require that the employee correct the discrepancy within three days or produce documentation that he has applied for a new social security card, and terminate him if he does not. According to the Ninth Circuit in *Aramark Facility Services v. Service Employees International Union, Local 1877*, the answer is “False.”

In early 2003, Aramark fired 33 of its employees who, subsequent to Aramark’s receipt of “no-match” letters, failed to correct discrepancies with the SSA or obtain new social security cards. Their union, the SEIU, filed a grievance on behalf of the employees, claiming Aramark had violated the collective bargaining agreement. Aramark countered that it was complying with federal law and could not knowingly employ undocumented workers.

At arbitration, the employees were awarded back pay and reinstatement, the arbitrator having concluded that there was no “convincing information” demonstrating that the employees were undocumented workers. Aramark appealed to the United States District Court, which reversed the award on the ground that it required Aramark to violate federal immigration laws. Rejecting the district court’s contentions and affirming the award of back pay and reinstatement, the Ninth Circuit held that while the Immigration

Reform and Control Act (IRCA) sets forth a well-defined public policy against the employment of undocumented workers, merely receiving a “no-match” letter did not amount to “constructive knowledge” of the employees’ ineligibility for employment sufficient to set aside the arbitrator’s award.

The court also disapproved of the short window of opportunity provided by Aramark to address a “no-match” letter, stating that numerous factors could result in a failure to respond within three days’ time, including work or family obligations. The court noted that even the proposed regulations drafted by the Department of Homeland Security for responding to no-match letters allow for a 90-day window.

Because the underlying ruling was in arbitration, it is questionable what impact it will have on employers. In any event, should your company receive a no-match letter, prior to taking any disciplinary action against the non-compliant employee it is essential that you discuss your options with legal counsel.

## Inspectors’ Commute Time Held Not Compensable

Is the commuting time of fire alarm inspectors compensable under the Fair Labor Standards Act, merely because they carry inspection documents during their commute from home to work? No, said the U.S. Second Circuit of Appeals in the case of *Singh v. City of New York*, because the mere carrying of a briefcase without any other active employment-related responsibilities does not transform the employees’ entire commute into work.

The court reasoned that carrying a briefcase during a commute presented only a minimal burden on the inspectors, permitting them to freely use their commuting time as they otherwise would have without having their briefcase with them. Whatever else the employees choose to do during their commute, the use of commuting time was not “materially altered” by their carrying the briefcases. It further noted that although the City certainly benefited from the inspectors carrying the materials, it cannot be said that the City was the predominate beneficiary of the commute time, sufficient to transform the employees’ otherwise non-compensable commute into compensable time. The court also noted that if the materials carried by the employee to work resulted in more than a “minimal restriction” of their commute, the commuting time would have been compensable.

This case raises important issues for employers who require their employees to carry or transport work-related materials from home to their worksites. If you have any questions regarding this ruling or the impact of it on your operations, please call Ronald W. Novotny at (213) 620-0460.

## Court Holds Employer Not A Guarantor of Meal Breaks

California Labor Code §226.7(b) imposes liability for missed meal periods on employers only if the employer “fails to provide” an employee with a meal period in accordance with an applicable I.W.C. Wage Order. In *Brown v. Federal Express Corp.*, a federal court concluded that an employer only violates that provision if it “requires” an employee to work during a meal or rest period, and not if the employee decides not to take

the break by his own choice. The court relied on the dictionary definition of “provide,” which means to “supply or make available,” and on the fact that it “does not suggest any obligation to ensure that employees take advantage of what is made available to them.”

In reaching its decision, the court cited the state Supreme Court's 2007 decision in *Murphy v. Kenneth Cole Productions, Inc.*, which held that an employee is only forced to forego his meal or rest period when he has been “deprived of the right to be free of the employer's control” during the break. The court also concluded that “requiring and enforcing meal breaks would place an undue burden on employers whose employees are numerous or who, as with plaintiffs, do not appear to remain in contact with the employer during the day.” Because the employer was only required to make meal and rest breaks available to its employees, and the plaintiffs failed to demonstrate that the employer's policy deprived them of those breaks, the court also concluded that any such showing would require substantial individualized fact finding, that the case could not proceed as a class action.

This is an important ruling for California employers, which some authorities have suggested are required to ensure that meal breaks are actually taken as opposed to merely making them available. If the practical, common sense ruling of the *Brown* court is ultimately adopted by the state courts in California, employers will be able to avoid the one hour per day penalty that arises from missed meal periods when employees simply decide not to take the meal periods afforded them by law.

## Employee Entitled to Recover for Work Lost due to FMLA Retaliation

In a case recently decided by the U.S. Ninth Circuit Court of Appeals, a verdict was upheld for an employee who was awarded damages for absences from work that were caused by an emotional condition resulting from his employer's wrongful denial of FMLA leave.

The employee had diabetes at the time he was hired by his employer, the Tri-County Metropolitan Transportation District of Oregon, and later developed additional maladies which included eczema, chronic obstructive pulmonary disease, asthma, emphysema, and chronic bronchitis. He repeatedly requested permission to be absent from work as a result of his medical conditions, but his requests were denied. Shortly thereafter, the employee was diagnosed with an adjustment disorder, anxiety, and depression.

A jury later awarded the employee damages in the amount of \$1,110 for lost wages “for days of work he missed because of stress or other mental problems resulting from the wrongful denial of FMLA leave.” The appellate court in *Farrell v. Tri-County MTD* upheld the damage award on the ground that it constituted “compensatory damages” which are permitted by the statute, and not consequential or emotional distress damages which are not. Because the damages were measured by actual monetary loss equal to the wages the employee would have earned on days he would have worked but did not due to his employer's violation, the court upheld the verdict as one which was “limited to wages actually lost” and not as “a back-door means of recovery for psychic injuries.”

## Video of Injured Employee Working on House Insufficient to Defeat FMLA Claim

In a decision under the federal Family Medical Leave Act decided in June 2008, a federal district court in Ohio allowed an injured auto worker's retaliation claim to proceed even though his employer had obtained a video of him building a porch while on an approved medical leave. In *Weiner v. Honda of America Manufacturing, Inc.*, an auto worker went to an emergency room after a work-related injury, and was placed off work by Honda's doctors until March 15, 2006. On that date, Honda obtained video of the employee (Weiner) carrying wood around his yard and building a front porch, and after he returned to work the next day he admitted working on his house and doing yard work while on leave. He was then fired for dishonesty and misusing FMLA leave.

However, the court refused to dismiss the claim because they found that there was an issue of fact as to whether Weiner was simply obeying Honda's doctor's orders to stay off work through March 15, or if he was or was an “opportunistic schemer taking advantage of the system in order to have time to enhance the curb appeal of his home.” There was also a separate issue of whether Weiner's injuries precluded him from performing his work tasks even though they did not prevent him from working around his yard. The court did note, however, that an employee on FMLA can lose the protections of the law when he or she does not use the leave for its intended purpose.

## Ninth Circuit Allows Driver Without Air Conditioning to Proceed with ADA Claim

A UPS driver was permitted to proceed with a retaliation claim under the Americans with Disabilities Act (ADA) when UPS refused to permit him to work in an air-conditioned vehicle after he disclosed the need for that accommodation due to a heart condition. The employee in *Gribben v. United Parcel Service, Inc.*, Charles Gribben, was diagnosed with heart conditions that caused him to become light-headed and to experience chest pain when working in extreme heat for extended periods of time. UPS informed him that it could not guarantee that he would always have an air-conditioned vehicle, but he refused to work without one.

A jury rejected Gribbens' claim based in part on the finding that he was not disabled because he could not establish that he was "substantially limited compared with the average person in the general population." The appellate court reversed that finding by concluding that Gribben could establish through his own testimony and that of his cardiologist that his heart condition substantially limited his ability to perform work-related function sufficient to trigger ADA coverage.

## Court Rejects "Association" Claim of Caucasian Employee

Under the state and federal anti-discrimination laws, an employer may act illegally when it discriminates against a person based on their "association" with someone who has a protected characteristic (such as race, age, gender, or sexual orientation, in

California). In two recent cases, the federal courts addressed the viability of such "association" discrimination claims, and provided further guidance to employers as to what kind of conduct may be prohibited.

In *EEOC v. QWest Corp.*, a federal district court in Oregon ruled that the Equal Employment Opportunity Commission could not proceed on a claim by a fired white network technician because his friendship with two Hispanic co-workers did not rise to a level "sufficient to invoke a claim of associational discrimination." The court ruled that in order for such a claim to proceed with respect to the alleged association by an employee with a non-family member, there must be more than a "mere work-related friendship."

However, in *Trujillo v. Pacificare Corp.*, the U.S. Tenth Circuit Court of Appeals held that a married couple fired by their employer for alleged time card fraud could proceed with an "associational" discrimination claim when they alleged that they were actually terminated because their son was undergoing expensive cancer treatments. The employees there produced some evidence of their self-insured employer's concern about burgeoning costs related to the treatment, as well as on the suspicious timing of their firings in relation to their son's treatment. The fact that their son was suffering from a disability, and that they were terminated within three weeks of his relapse that required extensive medical treatment, permitted them to proceed to a jury trial on their associational discrimination claim.

## "Same Actor" Defense Denied

In *Harvey v. Sybase, Inc.*, a state court of appeal rejected an argument that the same person who hired the employee could not have fired her because of her race. The Court of Appeal rejected Sybase's contention that "same actor" evidence should be accorded special weight, holding that the evidence does not place a higher burden on the plaintiff and that the weighing of competing inferences is the role of the jury, not the appellate court. The court also held that "substantial evidence" existed supporting the jury's conclusion, and that the trial court did not erroneously instruct the jury.

## Last-Minute Claim of Physical Disability Under FEHA Rejected

Upon learning he had become the subject of an internal investigation into missing cash by his armored transportation employer, Brinks, Carlos Arteaga attempted to stave off termination by notifying Brinks that he was suffering from pain and numbness in his arms, fingers, shoulders, and feet, and had been so suffering for the past year or more. He stated that he believed the condition to be work-related and filed for workers' compensation benefits. Several days later, upon concluding its investigation into the missing funds, Brinks terminated Arteaga.

Arteaga filed suit, alleging physical disability discrimination in violation of the Fair Employment and Housing Act (FEHA), and wrongful termination in violation of public policy, on the basis that he had been terminated in retaliation for filing his workers' compensation claim. Affirming the lower court, the California

Court of Appeal held that Arteaga failed to state a claim for disability discrimination because his symptoms did not constitute a “physical disability.” Specifically, Arteaga’s pain and numbness did not make it difficult for him to achieve the life activity of working.

Although Arteaga emphasized the close proximity in time between disclosing his symptoms and being terminated, the court stated that the close timing of events “does not create a triable fact as to pretext when the employer offers a legitimate, nonprohibited reason for its action.” Here, the employer’s legitimate, nondiscriminatory reason for terminating Arteaga – its loss of confidence in him as an employee – refuted both the discrimination claim and the claim of wrongful termination, especially given the fact that issues as to Arteaga’s performance occurred prior to him engaging in protected activity.

## Federal Contractors Required to Use E-Verify

Attempting to curb employment of unauthorized alien workers on federal government contracts, President Bush has amended Executive Order 12989 to require the use of E-Verify by federal contractors as a term in all future contracts with government agencies. According to Department of Homeland Security (DHS) Secretary Michael Chertoff, E-Verify is a “proven tool that helps employers immediately verify the legal working status for all new hires.” Under the Order, employers will be required to use E-Verify, a free internet program, to determine whether new hires and existing employees are eligible for employment on any new federal contract.

Employers will not be required to comply until thirty days after a final rule is promulgated by the Department of Homeland Security. However, if they regularly work on federal projects, you may want to consider enrolling early to verify the eligibility of any new hires. Employers may not currently use E-Verify to review the eligibility of existing employees.

## Congress Passes Genetic Discrimination Ban

On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act (GINA), which prohibits employers from discharging, refusing to hire, or otherwise discriminating against employees based on their genetic information. The law amends the Employee Retirement Security Act and Public Service Health Act to preclude discrimination by group health plans and health insurance issuers against individuals based on genetic information, and also prohibits such insurers from requiring genetic tests before determining whether health insurance can be obtained.

Any genetic information obtained by an employer, union or employment agency must be treated as a confidential medical record and kept separately from personnel records. It may only be disclosed in the limited instances described by the Act (upon the employee’s request, in response to a court order expressly authorizing such disclosure, etc.). While GINA specifically exempts employers who obtain genetic information through the processing of a family and medical leave request or who “inadvertently” obtain the information, the question is where one draws the line. The Act is silent as to other sick leave forms,

handling requests for accommodation under the Americans with Disabilities Act, or the limits on casual workplace conversation.

---

If you have any questions about these issues or any other labor matters, please contact any member of the Labor & Employment Department at Hill, Farrer & Burrill LLP.

**Kyle D. Brown**  
**Jonathan M. Brandler**  
**James A. Bowles**  
**Ronald W. Novotny**  
**Michael S. Turner**  
**Suzanne J. Holland**  
**Raymond W. Thomas**  
**Richard S. Zuniga**  
**E. Sean McLoughlin**  
**Warren J. Higgins**  
**Casey L. Morris**  
**Amy B. Messigian**

Of Counsel  
**Stuart H. Young, Jr.**

**The firm wishes to thank William A. Meyers for his assistance in preparing this edition.**

**Management News** is published periodically by the law firm of Hill, Farrer & Burrill LLP, 300 South Grand Avenue, 37th Floor, Los Angeles, CA 90071-3147 (213) 620-0460 Fax (213) 624-4840 <http://www.hillfarrer.com> Ronald W. Novotny, Editor and Department Chair

This occasional newsletter is published as a service to clients, friends and colleagues.

Each publication summarizes recent developments in state and federal law affecting employers, but should not be relied upon as an opinion or advice of the Firm regarding any specific matter.

---