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A COMPREHENSIVE LOOK AT COMPLIANCE ISSUES FACING GCs AND THE BOARD

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LITIGATION

Labor & Employment Digest

Compliance officers are no stranger to labor and employment matters. Dealing with regulations from the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC) and other federal organizations is part and parcel of the job of the compliance department. As always, labor and employment law is shifting and evolving, so compliance officers and general counsel must keep abreast of the latest news. Here are some of the matters that are on the minds of labor and employment counsel across the country.

While some of these issues may just now be coming into focus, our hope is to get you and your team thinking about the challenges you may face down the line. Whether these matters come to a head in six months or six years, it's never too early to evaluate your strategy to address these issues. If you'd like to share the labor and employment issues on your mind, email us at: **digest@insidecounsel.com.**

NLRB email decision could make communications trouble for employers

The National Labor Relations Board recently held that employees who have access to company email systems are presumptively allowed to use those email systems on nonworking time to engage in statutorily protected communications, such as communicating with other employees about the terms and conditions of employment. Consequently, policies limiting the use of company email to business purposes only may be unlawful (absent special circumstances warranting such a restriction). Companies should review their email policies to determine whether revisions are needed to comply with this ruling. Moreover, before taking any action against employees regarding their emails, companies should carefully consider whether such emails may be protected by the National Labor Relations Act.

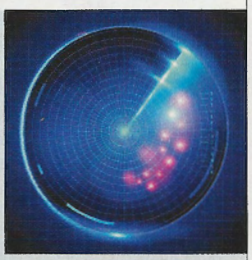
—Alicia Koepke, shareholder (Tampa, Fla.), Trenam Kemker LLP

Texting and driving

All states, with the lone exception of Montana, have passed legislation to limit or altogether ban texting while driving on any public highway or road. Employers should review their existing policies to discourage distracted driving by employees. The U.S. Department of Transportation's website, distraction.gov, offers a summary of state laws and a free toolkit for employers that includes a sample distracted driving policy and memo to employees.

—Reggie Belcher, shareholder (Columbia, S.C.), Turner Padget Graham & Laney P.A.

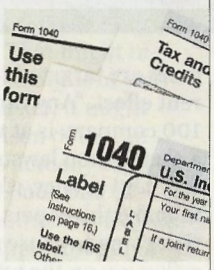
Tracking your employees



Smartphone apps that enable employees to track work time while not on the employer's premises and allow employers to track employees' location during work hours have been available for several years now. But should private employers be wary of the potential litigation "pinging" from use of these apps? Current regulation of geolocation tracking via vehicular GPS devices generally requires prior notice to employees and consent to be tracked unless the employer owns or leases the vehicle. Employers planning to track employees via electronic communications devices may likewise need to provide prior notice and obtain consent before tracking.

—Allegra J. Lawrence-Hardy, partner (Atlanta), Sutherland Asbill & Brennan LLP

Misclassified workers and the IRS



The Internal Revenue Service's (IRS) Voluntary Classification Settlement Program (VCSP) provides a way for employers who have misclassified workers as independent contractors to get a fresh start by paying the IRS just over 1 percent of a worker's previous year's compensation. To be eligible, a company can't be the target of an IRS or Department of Labor audit, must have filed 1099s for the worker, and must consistently have treated the worker as a nonemployee. But there are risks, because the VCSP does not absolve an employer of potential liability for misclassification under the Fair Labor Standards Act or other laws. Employers should carefully evaluate whether the voluntary settlement program is right for them.

—Michelle W. Johnson, partner (Atlanta), Nelson Mullins Riley & Scarborough LLP

L visa regulations

Fraud Detection and National Security (FDNS) recently began targeting U.S. employers who sponsor foreign nationals through the L visa program for site inspections to determine compliance with L visa regulations. Use of the L visa program is deemed consent to reasonable government inquiry, so employers should cooperate with FDNS, preferably with counsel present, even without advance notice of the inspection. U.S. employers who are currently sponsoring a foreign executive or manager from an affiliate abroad on a temporary assignment are the most likely to be inspected first and should have appropriate procedures in place.

—Anna Scully, attorney (Mobile, Ala.), Burr & Forman LLP