

New Immigration Enforcement Effort Is On The Way

By Brock McCormack and Kim Thompson (Atlanta)

The Department of Homeland Security (DHS) took another step in its worksite enforcement efforts on August 19, 2009 when it announced its intention to rescind the embattled Social Security No-Match Rule, and to focus on increased compliance through its E-Verify, IMAGE and other employment verification programs.

All of the enforcement activities that have taken place since the beginning of July should put employers on notice that the government is serious about enforcing the nation's immigration laws and getting tough on employers who hire unauthorized workers. Both DHS and Immigration and Customs Enforcement (ICE) have been busy ramping up their scrutiny of employers through increased audits and on-site inspections. It's more important than ever that you ensure that your company's I-9 forms are in compliance with the law and that you are not caught off guard if ICE pays a surprise visit.

Here is our advice on preparing your company and employees for any of the following DHS and ICE actions.

ICE I-9 Audits

An official from ICE speaking publicly at a recent conference stated that the agency is nearing completion of its review of I-9 documents turned over in response to the 652 Notices of Inspection issued to employers across the country on July 1. The official indicated that the agency is preparing to launch a second round of nationwide employer audits in late summer or early fall. The initial round of I-9 audits targeted businesses in manufacturing, hospitality, construction, and trucking, among others, and were driven either by complaints or on-going ICE investigations.

If you receive a Notice of Inspection, insist on your right to a three-day notice period and contact your attorney. The lawyers in our Global Immigration Practice Group can assist you in preparing the I-9 documentation requested in the notice. If you are using the Fisher & Phillips Electronic I-9 Solution program to electronically complete and store I-9 forms, you will be able to provide the I-9 forms in electronic form to ICE.

USCIS Site Visits For H-1B Program

U.S. Citizenship and Immigration Services (USCIS), a division of DHS responsible for processing visa petitions, has initiated surprise site-visits to H-1B employers to ensure compliance within the H-1B visa program requirements, and to confirm that the H-1B visa holder is working and being paid in accordance with the terms of the H-1B visa petition. Some employers report that the investigators conducting these visits have asked to speak with the individual who signed the visa petition on behalf of the company, sought to confirm the employee's current title, salary, and working conditions, requested a brief interview with the H-1B visa holder, and taken photos of the outside of the building. If a USCIS



investigator comes to your office, we recommend that you cooperate with the inquiry and contact your immigration counsel as soon as possible.

Social Security No-Match Rule

DHS published a notice on August 19 proposing to rescind the Social Security No-Match rule that was issued by the Bush Administration in 2007. The rule was never implemented due to a lawsuit challenging the legality of the rule. Comments regarding the proposal to rescind the rule are due by September 18 and rescission of the rule is expected before the end of September. The Social Security Administration (SSA) stated that it would not issue any No-Match letters until the pending litigation had been resolved.

A rescission of the rule would resolve the litigation and allow the SSA to resume issuance of No-Match letters. With no rule in place, employers who receive a SSA No-Match letter will not be required to take steps to verify an employee's work authorization but we recommend that you review internal records to verify the information to determine whether additional verification of the employee's work authorization is warranted and lawful. If you have questions, check with us.

E-Verify Requirement For Federal Contractors

A long-delayed rule requiring certain federal contractors and subcontractors to use E-Verify is set to take effect on September 8, 2009. All federal contracts covered by the rule that are awarded (or an existing indefinite delivery/quantity contract that is amended) on or after September 8 will contain a clause requiring the prime contractor and most

Continued on page 4

Workplace Privacy: Not Just a Problem for Erin Andrews

By Christina Kotowski (San Francisco)

With the disclosure of personal information now rampant on social networking sites like Facebook and Twitter, it sometimes seems like privacy is a relic of the past. Don't be fooled: privacy is a hot legal topic with serious implications for employers.

The Erin Andrews Saga

Sports fans may have heard of a recent incident in which ESPN reporter Erin Andrews was filmed nude in her hotel room through a peephole, by someone who posted the video on the Internet. ESPN's General Counsel quickly fired off an e-mail to the website demanding the immediate removal of the video and disclosure of its source. The video was removed shortly thereafter, but not before causing a media sensation.

The buzz continued for weeks, with Ms. Andrews later calling 911 to complain that she was being harassed by men who had knocked on her door and parked their car in front of her home in a gated community. Later news reports speculated that the Peeping Tom who videotaped Ms. Andrews may actually have been a co-worker, because the posted video appears to be a compilation of several different videos shot at different locations. Ms. Andrews and her attorneys have promised civil and criminal prosecution of the perpetrator.

To the casual observer, this incident may seem like just another incident of a TV personality being "overexposed" in the media, but to employment attorneys and Human Resources professionals, it's a sexual-harassment nightmare. As a sports reporter, when Ms. Andrews travels she's on the job, and ESPN, like all employers, has a duty to prevent and correct sexual harassment – whether by strangers or by co-workers. It was essential for ESPN to take immediate steps to stop the harassment and contain the damage as much as possible, both for the sake of Ms. Andrews and to limit the company's potential liability.

To Catch A Thief (Or A Voyeur)

But what about other situations? Is it ever okay for employers to secretly videotape their (clothed) employees? The California Supreme Court recently said yes. Although the California State Constitution has strong privacy protections applicable to public and private actors alike, the Court held that in some circumstances, the employer's business needs may trump an employee's right to privacy.

In *Hernandez v. Hillside, Inc.*, two female employees of a 24-hour residential facility for abused and neglected children sued their employer for invasion of privacy after discovering a small video camera and motion detector hidden in their shared office. The equipment had been hidden among some plants and a stuffed animal on a bookcase. When the women

discovered the video equipment, a red light on the motion detector flashed and the electrical cord attached to the camera was hot to the touch. The women's office had blinds that could be closed and a door that locked, and one of the women regularly changed into her gym clothes in the office after work to go running.

The employer placed the video equipment in the women's office without notifying them because someone had repeatedly used a computer in that office to access pornographic websites late at night. Although the employer did not suspect the female employees, several employees had keys to their office, and Hillside was concerned that one of its program directors – who are responsible for the abused children living at the facility – was involved. The employer did not tell the women of the surreptitious taping, for fear that gossip about the video equipment would alert the perpetrator.

The video camera was activated only at night, and only on three occasions during a three-week period. The camera was never turned on during the day when the women were working in their office.

When the women discovered the camera, the employer apologized, explained why he had not told them about it before, and showed them all of the video footage he had captured. Neither woman appeared on the videotape. (Neither did the perpetrator, so ultimately the secret sting operation was a bust.) Nevertheless,

the employees sued Hillside for invasion of privacy.

The trial court threw the women's lawsuit out without a trial, holding that the employer had not violated their right to privacy. An appeals court disagreed and reinstated the case, holding that the employer had intruded into a protected zone of privacy, and the intrusion was so unjustified and offensive that it constituted a violation of their privacy.

Not So Fast

But the California Supreme Court reversed the appellate court and dismissed the case. It held that the women had a "reasonable expectation of privacy" in their office – specifically, a reasonable expectation that their employer would not install video equipment capable of monitoring and recording their activities behind closed doors without their knowledge or consent. However, the court also found that the intrusion on their privacy was not so great as to be "highly offensive" to a reasonable person, because of the limited nature of the invasion and the employer's reason for doing it.

The Court gave great weight to the fact that the surveillance took place only for a limited period, Hillside took steps to avoid capturing the female employees on video during the daytime, and immediately showed them the video once the equipment was discovered. In addition, there was a legitimate reason for the videotaping: to protect the abused children who lived at the facility from possible further abuse. This reasoning is



Continued on page 4

Up In Smoke: The Rise Of Medical-Marijuana Laws

By Tex McIver and Deepa Subramanian (Atlanta)

As more states enact laws allowing patients to ingest marijuana as a means of coping with various diseases and symptoms, the question quickly arises for human resources professionals about how this affects the employment relationship. If employees are legally allowed to smoke at home to manage night seizures, are they still going to be affected by marijuana the next day at work? Do you have to accommodate this?

Background

Although some statutes specifically provide that employers are not required to “accommodate” marijuana in the workplace, the meaning of such one-to-two-sentence directives can be unclear. Does it mean that employees cannot smoke at work, cannot be high at work, or does it mean that the employer does not have to provide a room or the means to smoke marijuana during work hours?

Furthermore, our system of federalism brings federal as well as state laws into the mix. U.S. Attorney General Eric Holder recently stated that federal agents will not seek criminal charges against marijuana users unless they are in violation of both federal *and* state laws. This is a departure from the Bush administration’s policy of prosecuting people for violating federal drug laws despite the user being a medical marijuana user in line with appropriate state laws. Holder’s stance seems likely to lead to increased usage and more legal drug sales as the Obama administration has clearly demonstrated a hands-off approach in this area. The hands-off approach will also make it difficult for employers to predict what they can and cannot do in the midst of a myriad of state and federal laws that sometimes seem to conflict.

The Legal Landscape

The U.S. Supreme Court has ruled that people who are arrested under federal marijuana-distribution charges may not raise a “medical necessity” defense in federal court. The Court discussed the Controlled Substances Act and the federal recognition that marijuana is a strongly restricted, Schedule I drug. *United States of America v. Oakland Cannabis Buyers’ Cooperative*.

The high Court also ruled that the federal government has the power, under the Commerce Clause of the Constitution, to prohibit purely intrastate cultivation and possession of marijuana even if that cultivation and possession is authorized by state marijuana laws. Thus, the ultimate message is that federal authorities could continue to arrest marijuana users, even if those users were using for state-authorized, medicinal purposes. *Gonzales v. Raich*.

A district court in the State of Washington held that the Americans with Disabilities Act (ADA) did not protect individuals who are currently engaged in the use of illegal drugs, regardless of whether state law allowed the use. *Barber v. Gonzales*.

These cases tell us that even though some states are choosing to allow the use of medical marijuana, the federal stance on marijuana is still strong and anti-use. Therefore, the likelihood of medical marijuana use adversely affecting federal employment claims is questionable at this time.

Michigan, one of the most recent states to pass medical marijuana laws, removed state penalties for the use, possession, and cultivation of

marijuana if one applies for a permit and is registered with the Department of Community Health. To obtain a permit, the applicant must submit a doctor’s note, paperwork stating the need for medical marijuana, attach a copy of a photo ID, and pay a fee.

Going even further, Rhode Island in June 2009 joined just two other states, New Mexico and California, that allow the sale of medical marijuana from licensed producers. The states that do not allow such producers turn a blind eye to where the patients are getting the marijuana and do not condone its sale. But in Rhode Island, legislators voted to override the governor’s veto and the state will now allow state-licensed dispensaries to supply patients with marijuana for medical usage.

How Medical-Marijuana Laws Affect Employment

Essentially, many states’ medical-marijuana laws appear to be decriminalization statutes which provide a defense in state court to those who are using marijuana under a doctor’s recommendation. In a wrongful-discharge case that was brought in Montana, the Supreme Court of Montana ruled in April 2009 that the state’s medical-marijuana act did not protect an employee who was fired for using marijuana. The court not only held that the employer’s policy and subsequent termination did not violate the state’s Act, but it also did not violate the federal ADA. The court relied on the fact that the Act did not require an employer to accommodate the medical use of marijuana.

The ADA states that an employer may hold an illegal drug user to the same standards as other employees. But the issue remains as to whether employees can successfully claim the underlying disease which causes them to ingest the marijuana is a qualifying disability deserving of ADA protections. With the recent expansion of the ADA we may see things changing in the treatment of medical marijuana use. Keep in mind that even though federal law may not protect illegal drug use, state laws and arbitral decisions could interpret use and impairment issues differently.

What Do You Need To Do?

Review your company’s drug policies and make sure that testing is done in a fair and non-discriminatory manner. Additionally, make sure that reasonable accommodations are made for those with disabilities and that negative employment actions are not being taken under the guise of marijuana use when in fact the employee is being adversely treated for having a disability. If you will not allow your employees to use marijuana in their off time, you may have to provide for reasonable accommodations for the underlying disability itself so that the employee can still work.

Review policies in light of your state’s medical-marijuana laws, fair-employment-practice laws, and the courts’ interpretations.

As the laws in this area evolve, more states adopt medical-marijuana laws, and the federal government becomes increasingly “hands-off,” it remains to be seen what the outcome will be if employees sue their employers after being terminated for marijuana use. Case law is limited but we can assume more suits will arise. Always ask for help before making any questionable termination decisions, especially in touchy areas such as this one that may have case-by-case legal implications beyond the ADA and drug testing laws.

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Workplace Privacy: Not Just a Problem for Erin Andrews

Continued from page 2

consistent with the balancing test often used in invasion-of-privacy cases in the state.

Despite dismissing the case, the Supreme Court expressly discouraged employers from engaging in surveillance, especially if the employees within camera range are not given adequate notice that they may be viewed and recorded. This disclaimer failed to soothe civil libertarians who complained that the decision will give employers permission to spy on employees so long as the employees don't know about it.

For legal reasons, you should diminish your employees' expectations of privacy in their offices, desks, lockers, computers and e-mail accounts. Typically this will take the form of a written policy acknowledged by the employee (in an employee handbook or otherwise) in which you notify the employee in advance that these areas are not private, and that the company may search or monitor them under certain circumstances. And be mindful of special statutory protections: for example, some states expressly prohibit videotaping or monitoring of bathrooms, locker rooms and other changing areas.

Spying On Private Websites Can Be A Problem, Too

Invasions of employee privacy are not limited only to surreptitious videotaping – spying on private employee websites can be a problem, too.

In *Pietrylo v. Hillstone Restaurant Group*, a federal court in New Jersey recently allowed an invasion of privacy case to go to trial over

claims arising from managers' viewing of a private MySpace page set up by some employees. Employees of the Houston's restaurant chain had set up an invitation-only site called "Spec-Tator" to gripe about their jobs at Houston's. The site was maintained on an employee's personal computer and accessed on employees' own time.

The initial posting on the "Spec-Tator" MySpace page stated that it was to allow employees to "vent about any BS we deal with [at] work without any outside eyes spying in on us. This group is entirely private, and can only be joined by invitation." The posting went on, "Let the s**t talking begin." Unsurprisingly, employees used the site to complain about their jobs, their supervisors, and so on.

Eventually, a non-management employee who had legitimate access showed the site to a manager. Another manager subsequently asked the employee for her password, which she provided, and other managers also viewed the site. Ultimately the employee who had created the site and another Houston's employee were fired.

They sued the restaurant for invasion of privacy, wrongful termination, violation of state and federal wiretapping statutes, violation of the federal Stored Communications Act, and the equivalent state act. The restaurant asked the court to dismiss the case without a trial, but the court refused to do so.

The court held that a trial was required to resolve the disputed fact of whether the employee who gave her password to management had been coerced into doing so. If she had, the restaurant was not an "authorized user" of the site and was potentially liable for violating the law and invading the other employees' privacy. The employees argued that management's request for her private password was inherently coercive under the circumstances of the case; the managers countered that they had merely asked the employee to provide her password without threats or coercion, and she had done so.

Ultimately the case comes down to the degree of pressure (if any) exerted on the cooperating employee by the employer. This is not a place you want to be in litigation.

Words To The Wise

What lessons, if any, can employers draw from these cautionary tales? First, recognize that employees may have privacy rights in and out of the workplace, and that failing to recognize and respect these rights can create or exacerbate legal problems. Second, issue written policies that place employees on notice that their right to privacy in the workplace is limited. Third, tread carefully when issues arise that implicate privacy concerns. Just because you have the capability to videotape or otherwise monitor employees without their knowledge doesn't mean it's the best way to solve a particular problem. Sometimes it even creates more problems.

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Continued from page 1

subcontractors to use E-Verify to check the work authorization of covered employees.

The E-Verify System currently allows employers to verify the employment eligibility of only newly-hired employees against information contained in the SSA and DHS databases. But under this rule, covered federal contractors and subcontractors will be required to use E-Verify during the term of the covered contract to verify the employment eligibility of **both new-hires and current** employees who are directly performing work on the covered federal contract.

For more information about any of the information included in this alert, please contact any of the lawyers in the Global Immigration Practice Group at 404.240.4224 or immigration@laborlawyers.com.

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