UTAH EMPLOYMENT LAW QUARTERLY

Volume 2 / Issue 2

Spring 2017

UPDATES AND BEST PRACTICES

Businesses, employers, and employees face constant changes in statutes, regulations, and laws. Staying current on these changes is vital to the effective operation of business and to safeguard rights and interests.

This newsletter provides quarterly updates and reminders of best practices for businesses located or operating in the state of Utah.

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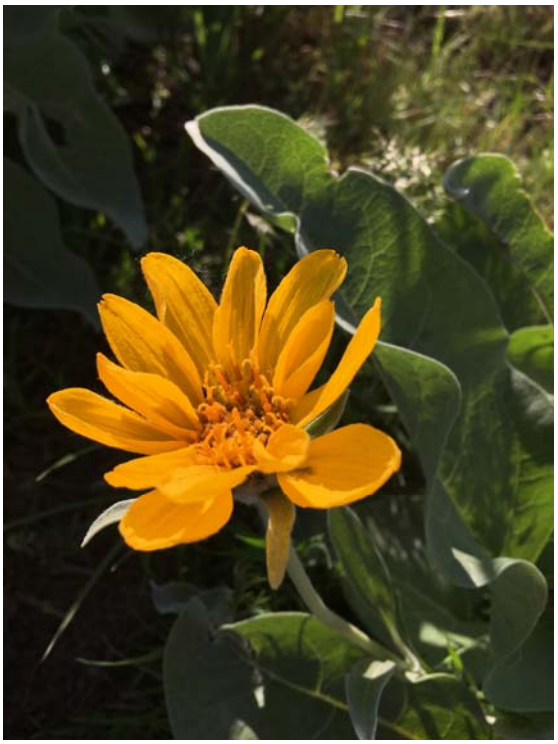

SMITH HARTVIGSEN PLLC
ATTORNEYS AT LAW

AN OVERVIEW OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 ("ERISA")

By: Clayton H. Preece

ERISA is a comprehensive federal law regulating employer provided pensions and benefit plans. It is codified at 29 U.S.C. 18 §1001 *et seq*. ERISA was adopted to provide a consistent framework for benefit plans; prior to its enactment, various state and federal laws created a disjointed regulatory framework. Once employee benefit plans are offered, ERISA governs and preempts any state law which is contrary to its provisions. The purpose is to protect promised employee benefits offered by private employers. Note that ERISA does not require employers to provide or offer benefit plans.[1] Rather:

> ERISA requires plans to provide participants with plan information including important information about plan features and funding; sets minimum standards for participation, vesting, benefit accrual and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; gives participants the right to sue for benefits and breaches of fiduciary duty; and, if a defined benefit plan is terminated, guarantees payment of certain benefits through a federally chartered corporation, known as the Pension Benefit Guaranty Corporation (PBGC).[2]

Additionally, note that ERISA does not apply to retirement plans established or maintained by government entities, churches, or other plans intended comply only with workers compensation, unemployment, or disability laws and regulations.[3]

ERISA contains three main sections Subchapter I – Protection of Employee Benefit Rights, Subchapter II – Jurisdiction, Administration, Enforcement; Joint Pension Task Force, Etc. and Subchapter III – Plan Termination Insurance.

The purpose of ERISA is to:

> protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.
>
> ...
>
> [and] to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.[4]

The central provisions of ERISA:

1. Establish requirements that must be met to adopt or amend benefit plans;
2. Place limits on exclusions;
3. Enable DOL to regulate benefit plans;
4. Set minimum standards for vesting;
5. Set minimum standards for funding;
6. Create fiduciary duties owed by administrators to participants
7. Create reporting requirements;
8. Guarantee payment of certain benefits; and
9. Create claims procedures for review of adverse determinations.

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[1] United States Department of Labor, *ERISA*, https://www.dol.gov/general/topic/retirement/erisa
[2] *Id.*
[3] *Id.*
[4] 29 USC § 1001(b)-(c)

Applicability

ERISA only applies to certain plans. Specifically, ERISA applies to benefit plans, funds or programs established by private employers and private employee organizations.[5] Under ERISA an "employee welfare benefit plan" or "welfare plan" is defined as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).[6]

According to this definition, a welfare plan requires (1) a plan, fund, or program (2) established or maintained (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services or severance benefits (5) to participants or their beneficiaries.[7]

The 11th Circuit Court of Appeals in *Donovan v. Dillingham* established the following test to determine if a "plan, fund, or program" is a plan for the purpose of ERISA:

> At a minimum, however, a "plan, fund, or program" under ERISA implies the existence of ***intended benefits, intended beneficiaries, a source of financing, and a procedure to apply for and collect benefits.***
>
> …
>
> To be an employee welfare benefit plan, the ***intended benefits*** must be health, accident, death, disability, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services or severance benefits; the ***intended beneficiaries*** must include union members, employees, former employees or their beneficiaries; and an employer or employee organization, or both, and not individual employees or entrepreneurial businesses, must establish or maintain the plan, fund, or program.[8]

In other words, there are four elements to establish a plan, (1) intended benefits; (2) intended beneficiaries; (3) a source of financing and (4) a procedure to apply for and collect benefits. The United States Supreme Court added a fifth element in *Fort Halifax Packing Co, Inc. v. Coyne*:

> The courts' conclusion that they should be so regarded took into account ERISA's central focus on administrative integrity: if an employer has an administrative scheme for paying benefits, it should not be able to evade the requirements of the statute merely by paying those benefits out of general assets. Some severance benefit obligations by their nature ***necessitate an ongoing administrative scheme***, but others do not.[9]

Under this fifth element, a single payment as part of a severance plan is not part of an "ongoing administrative scheme" and does not fall under ERISA.

Notably, ERISA contains numerous exclusions, including an exclusion for employee benefit plans that are (1) a governmental plan, (2) a church plan, (3) a plain maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws, (4) such plan is maintained outside of the United

[5] 29 USC § 1003(a)
[6] 29 USC § 1002(1)
[7] *See Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982).
[8] *Id.* at 1371-73 (emphasis added).
[9] *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 18, 107 S. Ct. 2211, 2221, 96 L. Ed. 2d 1 (1987)

States primarily for the benefit of persons substantially all of whom are nonresident aliens; or (5) such plan is an excess benefit plan.[10]

Types of Plans

ERISA contemplates two distinct types of plans, employee pension benefit plans and employee welfare benefit plans.

Employee Welfare Plans include plans that provide:

1. medical, surgical, or hospital care or benefits,
2. benefits in the event of sickness,
3. accident, disability, death or unemployment, or vacation benefits,
4. apprenticeship or other training programs,
5. day care centers,
6. scholarship funds,
7. prepaid legal services, or
8. pooled holiday, severance, or similar benefits under Section 302(c) of the Labor Management Relations Act of 1947.[11]

Employee Pension Benefit Plans include:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program:
> **(i)** provides retirement income to employees, or
> **(ii)** results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.[12]

Fiduciary Duties

ERISA creates specific fiduciary duties for administrators of employee benefit plans. Plan fiduciaries have a duty to act as in prudence. Fiduciaries are those who exercise any discretionary authority or control over the plan or assets, and render investment advice or have discretionary authority in administrating the plan.[13] Specifically, ERISA creates a "Prudent Man Standard of Care" which requires the following:

1. Acting for the exclusive purpose of:
   a. Providing benefits to participants and their beneficiaries; and
   b. Defraying reasonable expenses of administering the plan;
2. Act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use; and
3. Diversify the investments of the plan to minimize the risk of large losses.[14]

Additionally, a fiduciary may not maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.[15] Note that there are exceptions to the fiduciary duty when the plan beneficiaries or participants participate in the management of the plan.[16]

Fiduciaries are also prohibited from engaging in the following transactions under ERISA if the fiduciary knows or should know that such a transaction constitutes a direct or indirect:

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

[10] 29 USC § 1003(b)
[11] 29 USC § 1002(1)l 29 USC § 186(c)
[12] 29 USC § 1002(A)
[13] 29 USC 1002((21)(A)
[14] 29 USC § 1104(a)
[15] 29 USC § 1104(b)
[16] 29 USC § 1104(c)

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of certain percentage limitations under ERISA.[17]

ERISA also prohibits transactions between plan and fiduciary. Additionally, a fiduciary with respect to a plan shall not--

> (1) deal with the assets of the plan in his own interest or for his own account,
>
> (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or
>
> (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.[18]

Vesting/Nonforfeitability Requirements

ERISA also creates minimum vesting and nonforfeitability requirements under § 1053. First it requires that pension plans "provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age...."[19] This can be satisfied if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.[20]For defined benefit plans, the plan must either provide that "an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions" or allow for nonforfeitable percentages of accrued benefits as follows[21]:

Years of Service:	**Nonforfeitable Percentage**
3	20
4	40
5	60
6	80
7	100

Minimum Funding Standards

ERISA requires plans to meet a minimum funding standard each year. ERISA provides requirements which must be met for different types of plans in order to meet this minimum standard. First for defined benefit plans (single-employer) the employer must make contributions not less than the sum of:

(A) the target normal cost of the plan for the plan year,

(B) the shortfall amortization charge (if any) for the plan for the plan year determined under subsection (c) of this section, and

(C) the waiver amortization charge (if any) for the plan for the plan year as determined under subsection (e) of this section; or

(2) in any case in which the value of plan assets of the plan (as reduced under subsection (f)(4)(B) of this section) equals or exceeds the funding target of the plan for the plan year, the target normal cost of the plan for the plan year reduced (but not below zero) by such excess.[22]

Next, in the case of a money purchase plan which is a single-employer plan, the employer makes contributions to or under the plan for the plan year which are required under the terms of the plan.[23] For a multiemployer plan, the employers make contributions to or under the plan for any plan year which, in the aggregate, are sufficient to ensure that the plan does not

[17] 29 USC § 1106(a)
[18] 29 USC § 1106(b)
[19] 29 USC § 1053(a)
[20] *Id.*
[21] *Id.*
[22] 29 USC §1082(a)(2)(A) and 29 USC § 1083(a)
[23] 29 USC §1082(a)(2)(B)

have an accumulated funding deficiency.[24] For CSEC plan, the employers make contributions to or under the plan for any plan year which, in the aggregate, are sufficient to ensure that the plan does not have an accumulated funding deficiency.[25] Note that ERISA allows for variances or waivers under certain circumstances.[26] Additionally, note that ERISA allows certain plans to include amortization and provisions on how to treat underfunded plans.[27]

Reporting and Disclosure Requirements.

ERISA requires the disclosure of various information and disclosure requirements. The Department of Labor has a comprehensive reporting and disclosure guide for employee benefit plans.[28] Generally, ERISA requires annual reports to be filed with the Secretary of Labor[29], certain Terminal and Supplementary reports,[30] notice to beneficiaries of failure to meet minimum funding standards,[31] notice to participants of transfers of excess pension assets to health benefit accounts,[32] and defined benefit plan funding notices.[33] Other information must also be made available upon request.[34]

Enforcement

In order to give some teeth to requirements, ERISA provides for certain enforcement mechanism and penalties. Generally, the Department of Labor ("**DOL**") and the Employee Benefits Security Administration ("**EBSA**"), and the PBGC enforce employee benefit issues. The IRS may also become involved. Note that ERISA allows for both criminal and civil penalties.[35] ERISA also creates a private right of action whereby participants or beneficiaries may bring legal action to enforce ERISA and obtain relief or clarify future benefits. If an administrator refuses to supply requested information, a court may access a penalty of up to $100 a day.[36] If the administrator fails to file an annual report, the Secretary of Labor may assess a civil penalty of up to $1,000 a day.[37] Further, Employers that fail to make certain notices may be liable of up to $100 per day. For certain violations of ERISA, the Secretary may assess a fine of up to $1,000 per day.[38] Additionally ERISA provides for enforcement for the improper use of genetic information.[39]

Preemption

It must be noted that ERISA specifically preempts state statutes and laws relating to employee benefit plans.[40]

EMPLOYER RIGHTS TO MONITOR EMPLOYEES

By James W. Stewart

On one hand, an employer—whether public or private—needs to be aware of employee's activities in the workplace in order to assure not only productivity and proper functioning of the company, office, agency, etc., but protection of company property, trade secrets, etc. and compliance with governing law. Employees, however, have certain rights of privacy, borne of common law rights, state and federal statutory rights, and state and federal constitutional rights. To some degree, these potentially-competing interests can be balanced through the employment agreement, although the employer needs to be aware of areas in which specific employees in specific situations have legally-protectable privacy rights that the interests of the employer may not invade. The technology

[24] 29 USC §1082(a)(2)(C)
[25] 29 USC §1082(a)(2)(D)
[26] 29 USC §1082(c)
[27] 29 USC §§ 1083-84
[28] Department of Labor, *Reporting and Disclosure Guide for Employee Benefit Plans*, available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/rdguide.pdf
[29] 29 USC § 1023.
[30] 29 USC § 1021.
[31] 29 USC § 1021(d).
[32] 29 USC § 1021(e).
[33] 29 USC § 1021(f).
[34] 29 USC § 1021(g).
[35] 29 USC §§ 1131-33
[36] 29 USC § 1132(c)(1)
[37] 29 USC § 1132(c)(2)
[38] 29 USC § 1132(c)(3), fines may be assessed for violations of subsection (j), (k), or (l) of section 1021 of Title 29 , section 1021(g), or section 1144(e)(3).
[39] 29 USC § 1132(c)(10).
[40] 29 USC § 1144.

revolution has complicated this balancing act by preserving all types of communications—whether business-related or not—for discovery by governmental and adverse interests, which creates a duty to preserve electronic communications in the event of an actual or threatened dispute, and the need to be proactive in ensuring compliance with governing laws.

Email Monitoring

As with other areas of employee communications monitoring, monitoring of email by an employer is generally allowed if it does not violate an employee's reasonable expectation of privacy.

Email monitoring was discussed in In re Reserve Fund Securities and Derivative Litigation, 275 F.R.D. 154 (S.D. N.Y. 2011), where the Securities and Exchange Commission sought discovery of email from an employee of Reserve Management Company, Inc. ("RMCI") sent to his wife.

The court first examined RMCI's email policy, which provided: "The stated purpose of RMCI's email policy is to 'promot[e] the use of email as an efficient communication tool' and 'to prevent unauthorized or inadvertent disclosure of sensitive company information via a forwarded or redirected email.'" To that end, the policy states that "Employees must exercise extreme caution when forwarding any email from inside the Reserve to any other email account. The email address you are forwarding to must be valid and verified .... Sensitive information ... will not be forwarded via any means, unless that email is critical to business and is encrypted ...." (Id.) The policy also states that "Employees may use only the e-mail system provided by Reserve to communicate with clients and the public. Use of outside Internet service providers or Websites providing e-mail accounts while on Reserve's premises is prohibited...Employees are reminded that client/public e-mail communications received by and sent from Reserve are automatically saved regardless of content. Since these communications, like written materials, may be subject to disclosure to regulatory agencies or the courts, you should carefully consider the content of any message you intend to transmit[.]

The Court held that "[t]o determine whether [the RMCI employee] had a reasonable expectation of privacy in the emails he sent to his wife over RMCI's server, the Court must consider whether he was on actual or constructive notice that these communications could be 'read[ ] or otherwise monitored by third parties.'" See In re Asia Global Crossing, Ltd., 322 B.R. 247, 258–59 (Bankr. S.D. N.Y. 2005) ("[T]he question of privilege comes down to whether the intent to communicate in confidence was objectively reasonable .... Accordingly, the objective reasonableness of that intent will depend on the company's e-mail policies regarding use and monitoring, its access to the e-mail system, and the notice provided to the employees.").

As to the second factor, the court held that the second Asia Global Crossing factor is whether the employer monitors employee email. RMCI's email policy provides that the company will not "routinely monitor employee's email and will take reasonable precautions to protect the privacy of email." However, in its policy, RMCI "reserves the right to access an employee's email for a legitimate business reason . . . or in conjunction with an approved investigation[.]"

Thus, where an employer reserves the right to access or inspect an employee's email or work computer, courts often find that the employee has no reasonable expectation of privacy. See e.g., United States v. Angevine, 281 F.3d 1130, 1135 (10th Cir. 2002).

Note, however, the provisions of the ECPA (discussed above) that prohibit the real-time interception of content, including emails.

Telephone Monitoring

Both the ECPA and the Utah Interception of Communications Act (discussed above) apply with equal force to (and in fact, were initially limited to) telephonic communications.

All principles discussed above concerning email transmission apply equally to telephonic transmissions, or, by extension, to voicemail.

The soundest policy, once again, is to have a clearly-worded employment agreement authorizing the employer to monitor telephonic communications, and to review stored voicemail messages.

Again, moreover, any monitoring or review should be limited to legitimate business purposes.

There is more significant case law dealing with telephone monitoring under the Federal Wiretap Act, 18 U.S.C. § 2510, et seq., prior to modification by the Electronic Communications Privacy Act, thus giving a better indication of how federal limitations on monitoring surveillance apply.

The Act permits the undisclosed monitoring of business-related calls under the "business exception" rule discussed under Email Monitoring, above.

If the interceptor discovers, however, that the call is personal rather than business in nature, monitoring must cease – Rassoull v. Maximus, Inc., 209 F.R.D. 372 (D. Md. 2002).

As such, blanket round-the-clock monitoring of telephone conversations within the workplace is not permissible – Sanders v. Robert Bosch Corporation, 38 F.3d 736 (4th Cir. 1994).

See, however, Arias v. Mutual Central Alarm Service, Inc., 202 F.3d 553 (2d Cir. 2000) – an alarm service which recorded all telephone calls to or from the office did not engage in unlawful interception of electronic communications, in that "legitimate business reasons support continual recording of all incoming and outgoing calls at mutual" due to the nature of the business.

Attempts by employees to challenge the monitoring of telephone calls under the common law invasion of privacy theories have generally gone in favor of the employer – see, e.g, Muick v. Glenayre Electronics, 280 F.3d 741 (7th Cir. 2002).

Computer Monitoring

Rule No. 1: All workplace computers are property of the employer.

Try to avoid having employees bring personal computers into the workplace.

By the same token, try to avoid having employees tap into the workplace server, network, wi-fi, etc.

Rule No. 2: have a strongly-worded policy against inappropriate use of computers and company servers/networks

- No porn
- No dirty emails
- No hate talk, threats, etc.

People have it in their heads that these things are ephemeral, like water cooler chat, and they let down their guard. Note that E-discovery is a gold mine for unwary employers

As a general rule, an employee is answerable for what he/she stores on a company-owned computer, and has no reasonable expectation of privacy with respect to such items.

Even in the case of a public employee with Fourth Amendment assurances against unreasonable searches and seizures, a situation-appropriate examination of the agency-owned computer has been held defensible if it is appropriate in scope – Leaventhal v. Knapek, 266 F.3d 64 (2d Cir. 2001).

See, also, U.S. v. Hassoun, 2007 W.L. 141151 (S.D. Fla. 2007) – given the employer's policy regarding internet and email usage and monitoring, an employee did not have a reasonable expectation of privacy in the context of his computer.

There is a major exception, however: Communications which are otherwise privileged (attorney-client, spousal, etc.) trump the employer's right of monitoring and inspection, even if the employee's contract contains a blanket provision to the contrary – Sims v. Lakeside School, 2007 W.L. 2745367 (W. D. Wash. 2007) ("public policy dictates that such communications shall be protected to preserve the sanctity of communications made in confidence . . ." 2007 W.L. 2745367, *2).

If employee, in legal proceeding, is communicating by email with his lawyer, the fact that the communication goes out over the company server or from a company computer doesn't waive the privilege.

Social Media

Under Utah Code Ann. § 34-48-201 an Employer may not request an employee (or an applicant for employment) to disclose a user name and password, or a password that allows access to the employee's or applicant's personal internet account.

The employer may not likewise take adverse action, or refuse to hire or otherwise penalize an employee or applicant for failure to disclose such information.

Translation: Improper employee activity on social media may be monitored by following the employee's posts or via reports from other individuals who are doing so; the employer may not compel the employee to divulge passwords for this purpose, however.

Utah's law is in contrast to other state laws, where employers are expressly given the right to compel disclosure of internet and social media passwords – see, e.g., Louisiana Personal Online Account Privacy Protection Act, LARS 51: 1951.

Under Federal Law

In general, an employee who posts on Facebook, Twitter, etc. has made a public communication and has no reasonable expectation of privacy.

Where posting is part of a "concerted action" under the National Labor Relations Act, however, adverse disciplinary action against the employee may result in a finding of unlawful termination by the National Labor Relations Board – National Labor Relations Act, 29 U.S.C. § 151, et seq.

Board has taken a keen interest in employers taking adverse action against employees who use social media to discuss terms and conditions of employment.

The Board's website summarizes the two relevant actions:

In the fall of 2012, the Board began to issue decisions in cases involving discipline for social media postings. Board decisions are significant because they establish precedent in novel cases such as these.

In the first such decision, issued on September 28, 2012, the Board found that the firing of a BMW salesman for photos and comments posted to his Facebook page did not violate federal labor law.

The question came down to whether the salesman was fired exclusively for posting photos of an embarrassing accident at an adjacent Land Rover dealership, which did not involve fellow employees, or for posting mocking comments and photos with co-workers about serving hot dogs at a luxury BMW car event.

Both sets of photos were posted to Facebook on the same day; a week later, the salesman was fired. The Board agreed with the Administrative Law Judge that the salesman was fired solely for the photos he posted of a Land Rover Incident, which was not concerned activity and so was not protected.

In the second decision, issued December 14, 2012, the Board found that it was unlawful for a non-profit organization to fire five employees who participated in Facebook postings about a coworker who intended to complain to management about their work performance.

In its analysis, the Board majority applied settled Board law to social media and found that the Facebook conversation was concerted activity and was protected by the National Labor Relations Act. See https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media.

Physical Inspection of Desks and Workspace

By contract, an employee's desk, work area, etc. can be made open to the employer for inspection at any time, for any reason, but to be very safe, this should be clearly stated in an employee handbook or policy that is signed by the employee.

Employees should not be permitted locked desks to which the employer has no key.

The same holds true for locking file cabinets, closets, storage rooms, etc.

Policies or contracts must indicate that an employee has no justifiable expectation of privacy in any location within the work space.

What about purses, briefcases, etc.? Here, an objective and reasonable expectation of privacy is going to be far stronger.

Contracts and policies may address this issue as specifically as possible and demand consent; however, a challenge is more likely to be successful.

Try to obtain consent to a specific search after explaining its purpose. If consent is withheld in the face of such an explanation, a "negative inference" is a legitimate conclusion.

Mail Interception

The opening of private mail, even if addressed to the employee at the workplace, is dangerous.

Federal law governing the interception of U.S. mail typically does not apply in that mail is "delivered" when it arrives at the workplace.

Personal mail arriving at the workplace but addressed to an individual employee, however, carries with it a substantial and reasonable expectation of privacy.

In addition, personal mail – even when sent to the employee's workplace – tends to contain information of a personal and confidential nature which may create invasion of privacy rights in third parties.

Best advice: Request that employees not solicit or receive personal mail at the workplace.

In addition, if you do open and examine employee mail, make sure that it is kept strictly confidential – any copies which are made should be kept in a separate investigation folder, and destroyed immediately upon conclusion of the investigation.

Video Surveillance Monitoring

Video surveillance of the workplace is a common and accepted practice, provided it is reasonable (no cameras in the ladies' room – People v. Dezek, 107 Mich. App. 78, 308 N.W.2d 652 (1981)).

Be certain that all incoming employees are aware that the premises are under video surveillance, and that they have no expectation of privacy in any of the work areas.

If an employee claims that video surveillance violates his or her expectations of privacy, courts will likely assess the following factors:

1. Whether the work area in question was given over to the employee's exclusive use;
2. The extent to which others had access to the space;
3. The nature of the employment; and
4. Whether office regulations placed employees on notice that certain areas were subject to employer intrusions – Vega-Rodriguez v. Puerto Rico Telephone Co., 110 F.3d 174 (1st Cir. 1997).

2017 UTAH LEGISLATIVE UPDATE

The following bills were enacted in the 2017 legislative session and may impact businesses and employment in the State of Utah:

- **H.B. 28 – Public Employees Long-term Disability Act Amendments**
  This bill modifies the circumstances when a monthly long-term disability benefit shall be reduced or reimbursed; requires an eligible employee that is under a total disability to inform the Public Employees' Insurance Program of certain information; provides penalties if an eligible employee knowingly misrepresents or fails to disclose certain information; and makes technical changes.

- **H.B. 34 – Employment Security Act Sunset Extension**
  This bill extends the sunset date of certain statutory provisions related to the Department of Workforce Services sharing certain information with the Wage and Hour Division of the United States Department of Labor.

- **H.B. 41 – Utah Revised Business Corporation Act Modifications**
  This bill amends the provision addressing general standards of conduct for directors and officers; enacts provisions related to business combinations; and makes technical changes.

- **H.B. 94 – Occupational and Professional Licensure Review Committee Amendments**
  This bill defines terms; modifies the responsibilities of the Occupational and Professional Licensure Review Committee; and makes technical changes.

- **S.B. 120 – Workers' Compensation Dependent Benefits**
  This bill modifies the calculation of death benefits paid to one or more dependents of a deceased employee; and makes technical changes.

PRACTICE PROFILES

Kathryn J. Steffey

Kathryn J. Steffey is a partner at Smith Hartvigsen and has extensive experience in representing a diversity of clients in both state and federal courts. Ms. Steffey has acted as lead counsel for local general contractors regarding multi-faceted construction contract disputes concerning both private and public projects. She has also defended local governments in actions concerning a variety of matters ranging from breach of contract to violation of civil rights to union contract disputes. Ms. Steffey has also provided legal counsel and advice to governmental entities and private corporations regarding compliance with federal and state laws and regulations. In addition to appearing before the Tenth Circuit Court of Appeals, the United States District Court for the District of Utah, the Utah Supreme Court, the Utah Court of Appeals, and the state district courts located throughout Utah, she has also represented clients before state and local administrative agencies, including, but not limited to, the Utah Anti-Discrimination and Labor Division and Utah's Division of Occupational and Professional Licensing.

James W. Stewart

James W. Stewart is of counsel in the law firm of Smith Hartvigsen, PLLC. He is listed by his peers and *Utah Business Magazine* as one of the Legal Elite labor and employment attorneys in Utah. Mr. Stewart has also been listed by the nationwide *Chambers* business publications as one of Utah's key labor and employment attorneys. He represents national, regional, and Utah employers. Mr. Stewart advises employers in virtually all areas of employment law and labor law, and frequently defends employers in court litigation and arbitration in employment disputes at both the trial and appellate level. He has been the director of employment law continuing education programs for the Utah State Bar. Mr. Stewart frequently gives employment law seminars for business. He has written numerous employment law publications and is a former editor of the *Utah Employment Law Letter* and the *Brigham Young University Law Review*. Mr. Stewart has served as a founding member for the First American Inn of Court and has been a board member and president of the Utah Lawyers for the Arts. He earned a Bachelor's of Arts, magna cum laude, a Juris Doctorate, and a Master's in Business Administration from Brigham Young University. Mr. Stewart also served as a judicial clerk to the Honorable Stephanie Seymour, U.S. Federal Court of Appeals for the Tenth Circuit. In addition, Mr. Stewart has substantial experience providing transactional advice to businesses and represents businesses in other corporate and commercial litigation.

For regular updates and best practices relating to labor and employment law, subscribe to the Employment Law for Business Blog at https://employmentlawyerutah.com or subscribe to the twitter feed @UTemploylaw.

Clayton H. Preece

Clayton H. Preece is an associate in the law firm of Smith Hartvigsen, PLLC. He represents businesses and employers in a wide range of litigation matters including labor and employment. Mr. Preece assists both national and local businesses with their labor and employment concerns. Mr. Preece is an author and editor of the Employment Law for Business Blog. Additionally, Mr. Preece represents individuals, businesses, and governmental entities, relating to land use and zoning, construction litigation, commercial litigation, natural resources litigation, and corporate and business transactions. He also serves on the Utah State Bar's Unauthorized Practice of Law Committee and serves the community through the University of Utah's Street Law Clinic. Mr. Preece earned his Juris Doctorate from The George Washington University Law School in Washington, D.C. For his outstanding trial advocacy, Mr. Preece earned a position representing The George Washington University Law School in the American Bar Association's Labor and Employment Trial Advocacy Competition. Mr. Preece also served for two terms as the Chair of the National Religious Freedom Moot Court Competition. Mr. Preece is a former editor of the *Federal Communications Law Journal*. Mr. Preece earned his Bachelor's in Arts from Utah Valley University, graduating summa cum laude and valedictorian, where he also was the editor in chief of the *Intersections Journal*.

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Smith|Hartvigsen is a law firm comprised of attorneys, paralegals, legal assistants, and staff who are dedicated to professionalism and providing quality legal services to our clients. To us, professionalism means using our combined decades of experience to zealously advocate for our clients and to develop creative and effective solutions to our clients' problems. Professionalism means listening to our clients, and working within our clients' budgets to accomplish their goals. Professionalism means promptly responding to our clients' emails and phone calls, and keeping our clients informed regarding all aspects of their case. Professionalism means being big enough to handle large complicated matters, but small enough to provide personal service to each client. Professionalism means always striving to be the most knowledgeable experts in our areas of practice, and practicing law with the highest level of ethics, integrity, and ability. We look forward to meeting your legal needs by serving as your counsel and demonstrating to you our commitment to professionalism. Smith Hartvigsen represents individuals, businesses, and governmental agencies in almost all areas of law, including, Water Law, Family Law & Estate Planning, Municipal, District, and Local Government Law, Real Estate, Land Use and Redevelopment, and both trial and appellate litigation.

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UTAH EMPLOYMENT LAW FOR BUSINESS

The Employment Law for Business Blog provides general information and updates regarding general business and employment law relevant to businesses and employers in the State of Utah and through the United States.

Businesses, employers, and employees face constant changes in statutes, regulations, and laws. Staying up to date on these changes is vital to the effective operation of business and to safeguard rights and interests. For regular employment law updates follow the Employment Law for Business Blog or subscribe to our Twitter feed.

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