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EMPLOYMENT LAW LETTER

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TECHNOLOGY POLICIES

Florida bans texting while driving

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Effective October 1, 2013, Florida became the 41st state to prohibit texting while driving. Let's take a look at what the law covers, its exceptions, and how it will affect your current policies.

Prohibitions and exceptions

Under the new law, Florida Statutes § 316.305, it's unlawful to manually type, send, or read a text, e-mail, or instant message while operating a motor vehicle. Talking on a cell phone is not restricted.

Violators are subject to a $30 ticket for the first offense. A second offense within five years would be a moving violation, punishable by as much as a $60 fine and three points added to the driver's record.

Violation of the law is considered a *secondary offense,* meaning a police officer can't pull someone over for just texting. The driver must be committing another violation such as speeding or running a stop sign. If there's an accident, motorists' cell phone records can be used against them only if the accident results in death or personal injury.

Exceptions to the law include:

- Reporting an emergency or criminal activity to law enforcement;
- Using the device for navigation purposes (checking a map);
- Receiving messages that are related to safety (traffic or weather alerts);
- Issuing voice commands (like with the iPhone's Siri); or
- Listening to music or other online programming that doesn't require manual entry of multiple letters, numbers, or symbols.

Drivers also can text legally while their vehicle is stationary—for example, while parked or stopped at a light.

Employer liability

Even though drivers who break the law are subject to a small fine, the bigger concern for businesses is that employers may be liable for distracted driving accidents caused by negligent employees. An employee who has an accident while talking on a hand-held cell phone, *texting,* or e-mailing may expose his employer to significant liability. The employer can be held liable if the employee was driving a company car, using a company-issued cell phone, or performing company business while driving. Fortunately, you can take precautions to reduce the risk of potential litigation.

Suggested handbook/ policy revisions

There are several things to consider when implementing or revising a handbook policy in light of this new law:

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- Modify your existing cell phone policy—or adopt a new policy—to prohibit texting while driving.
- Consider adopting a comprehensive portable communication device (PCD) policy that covers not only cell phones but also other handheld electronic communication devices (e.g., smartphones, personal digital assistants, tablets, minicomputers, and watch phones).
- Distribute the policy to all employees and require them to sign a document acknowledging receipt of the policy.
- Consider adopting a total ban on cell phone/PCD use while driving (with a limited exception to report an emergency or imminent danger). This ban would apply when an employee is operating a vehicle owned, leased, or rented by you, when the motor vehicle is on your property, when the employee is using the PCD to conduct company business, and when the PCD is owned or leased by you.
- If you can't adopt a total ban and you allow or require employees to make and receive calls while driving, provide simple, clear instructions on the safe use of PCDs while driving (such as using hands-free devices).
- Add language to the policy encouraging employees to turn off PCDs and similar devices while driving or place them on vibrate before starting the vehicle.
- Encourage employees to use any "Don't Text Me" application for their PCD (if available) and autoresponder (which automatically replies to all calls and text messages with a pretyped automatic response or voice message indicating that the employee is driving and will respond later).
- Prohibit employees from using their employer-provided or personal PCD for work purposes outside of regular work hours or while on leave without prior written authorization from management.
- Train all employees regarding the new law, and educate them on the risks of texting while driving.
- Monitor employees to ensure compliance with the policy.
- Take appropriate disciplinary action, up to and including termination, for any violations and avoid having an unenforced policy that's "just for show."

Even though a carefully drafted cell phone/PCD policy may not completely shield you from liability, it could significantly reduce the risk of finding yourself on the wrong side of a costly lawsuit for any injuries caused by an employee who used such a device while driving.

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ALTERNATIVE DISPUTE RESOLUTION

Court enforces arbitration agreement in workers' comp dispute

by Robert J. Sniffen and Jeff Slanker
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Arbitration agreements between employers and employees that require the employee to waive his right to file a lawsuit stemming from claims arising from the employment relationship are becoming increasingly popular. Given the proliferation of arbitration agreements, courts throughout the country have been active in determining their proper scope and whether the claims they cover are actually arbitrable. A Florida appellate court recently issued an opinion that greatly supports the scope and applicability of these agreements in precluding employees from filing certain claims in court.

Arbitration agreements

Arbitration agreements require employees to resolve disputes stemming from employment discrimination, wrongful termination, wage and hour violations, or other employment relationship issues with an *arbitrator* rather than in a lawsuit filed with a state or federal court. Litigation over the enforceability, applicability, and scope of such agreements has increased over recent years as their popularity has increased.

The surge in the popularity of these agreements with employers reflects the obvious benefits they create. The process of resolving disputes before an arbitrator tends to be more focused, more streamlined, and quicker than litigation in state and federal courts. That leads to saved costs and time for employers. Further, arbitrators will resolve these disputes rather than juries, which tend to be more biased toward employees.

Of course, the increase in these agreements has led to litigation over whether they actually operate to preclude suits in a traditional judicial forum. One Florida appellate court has put the scope and applicability of arbitration agreements on more solid ground after interpreting an agreement to preclude the litigation of a workers' compensation retaliation claim in Florida courts.

The suit and the trial court's opinion

In April 2012, Michael Spiessbach sued his former employer, Audio Visual Innovations, Inc. (AVI), after it terminated him from employment. He contended AVI retaliated against him for seeking workers' comp benefits and thus violated Florida's workers' comp law, which forbids employers from retaliating against an employee for obtaining or attempting to obtain workers' comp benefits as a result of a workplace injury.

Spiessbach injured his back at work in January 2012 while moving a heavy object. He told AVI about his injury and filed a workers' comp claim. He alleged in his suit that AVI began treating him differently after he filed his claim. He also alleged that his termination was a result of his claim.

After early mediation of Spiessbach's claim failed, AVI asked the court to force arbitration under an agreement he entered into with the company when he first began working there. The trial court *denied* the request. The court concluded that the remedial purposes of Florida's workers' comp retaliation provisions would be defeated by the arbitration agreement.

Appellate court's opinion

AVI appealed, and the Florida 2nd District Court of Appeals (DCA) *overturned* the trial court's order. The appellate court found as an initial matter that the arbitration of Spiessbach's workers' comp retaliation claim didn't frustrate the remedial purposes of the workers' comp law. While the appellate court noted that "any arbitration agreement that substantially diminishes or circumvents [statutory] remedies stands in violation of the public policy of the State of Florida and is unenforceable," it nonetheless held that nothing in the arbitration agreement or the arbitration of the claim conflicted with the nature of the workers' comp law.

The appellate court then analyzed whether the elements of arbitrability, which are required in order to submit a dispute to arbitration, were met. Those elements are "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived."

In addressing the first element, the court found that the arbitration agreement was valid. It then looked at the remaining two elements. The court determined that an arbitrable issue existed given the manner in which the agreement was drafted and the claim at issue. The agreement provided in part that "statutory claims" filed "by a current or former employee relating to or arising out of the individual's employment" were subject to arbitration. Spiessbach attempted to argue that his claim for workers' comp benefits was subject to an exclusion in the agreement covering such claims, but the appellate court found that argument unavailing given that *his claim focused on entitlement to damages for retaliation and not workers' comp benefits.*

Finally, the appellate court found that the right to arbitration wasn't waived even though AVI participated in early mediation of the claim and filed several routine-type court requests before asking for arbitration. In finding that the right to arbitration *wasn't* waived, the appellate court noted that those actions didn't amount to taking a position on the substantive merits of the lawsuit that was inconsistent with the right to arbitration. *Audio Visual Innovations, Inc. v. Spiessbach.*

Takeaway

A carefully drafted arbitration agreement entered into with employees at the outset of employment allows you to resolve disputes before an arbitrator and not an unpredictable—and potentially employee-friendly—jury. A properly drafted arbitration agreement can also reduce the cost and time needed to litigate employment claims in a traditional judicial forum. The key is to draft the arbitration agreement carefully and properly to ensure these disputes do indeed end up before an arbitrator and not a jury, especially with the increased litigation concerning the propriety of such agreements.

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HEALTHCARE REFORM

Has ACA mandate prompted shift to part-time work? Yes and no

If you've opened a newspaper or its online equivalent in the past six months, you've likely read about employers that are cutting workers' hours and shifting full-time staff to part-time schedules to circumvent the looming health insurance mandate of the Affordable Care Act (ACA). Depending on the source, you may be told that this shift is a significant problem for workers and employers alike and that it offers strong evidence of the many flaws in the ACA. Or you may read that these shifts to part-time schedules are actually quite limited and that they have been blown out of proportion by critics of the Act (with a little help from zealous journalists).

Unsurprisingly, there are statistics and survey results to support both sides of the argument. According to data from the U.S. Bureau of Labor Statistics (BLS), the number of workers holding full-time positions declined by 240,000 in June. Meanwhile, the number of part-time workers increased by 360,000—continuing a three-month period of consistent part-time worker increase. But these numbers tell us only of general trends. They say nothing of the intent behind the shifts or even if the decline in full-time positions is remotely correlated with the increase in part-time hires.

Certainly, there is plenty of anecdotal evidence of employers that confirm they have shifted full-time workers to part-time schedules—with hours restricted to 29 or fewer per week—with the specific intent of avoiding the ACA mandate or reducing total penalties under the "pay" portion of the "play or pay" provisions. Most commonly in the food service

industry, several notable employers, including Papa John's and Subway, have announced such policies, while others—Olive Garden and Red Lobster, for example—adopted but later abandoned the reduced-hour policies.

Survey says . . .

One survey by consulting firm Mercer reports that 12% of employers surveyed planned to cut staff hours to avoid the mandate. Another survey by the International Foundation of Employee Benefit Plans found that nearly 16% of employers were reducing hours to avoid or reduce costs under the ACA mandate, while another one in five small businesses reported a reduction in hiring for similar reasons. A regional survey of manufacturers by the Philadelphia Fed found that 5.6% of manufacturers had already shifted to more part-time workers in advance of the mandate and that 8% plan to do so (or continue to do so) over the next year.

Meanwhile, opposing statistics and surveys, including data directly from the White House, cite different factors that explain the increase in part-time work—for example, state and federal budget cuts and related furloughs. Further, several studies, including one from the Kaiser Family Foundation, have repeatedly found that the ACA mandate will affect only a very small percentage—typically between 1% and 2%—of employees and employers. That's because (1) most workers already work for companies with more than 50 employees and (2) those companies already provide health benefits.

Ensure that you have considered the big picture before reducing workforce hours to part-time.

Nonetheless, even 2% of the total workforce—particularly when those workers are employed by easily recognized brands of national food service chains—can create a lot of news when their hours are cut.

What if you're in the 2%?

So the underlying question is, does any of this matter to you? It could.

Certainly if you are one of the 2% of employers near the 50-employee threshold and the ACA mandate would increase your benefits costs (or penalties) in 2015, then other employers' means of working around the mandate—and the results thereof—may be of utmost importance.

Further, as the actual results and impact of the ACA mandate become clearer, legislation and regulations to either curb employers from skirting the mandate or better define the meaning of "full-time" under the law may surface. There already have been lobbying and legislative efforts to redefine the full-time threshold to a 40-hour workweek, and further debate can be expected—probably up until the 2015 effective date of the related provisions.

If you must cut hours, don't overlook hidden costs

The ACA notwithstanding, employers have long reaped the benefits of hiring independent contractors, temporary workers, and part-time or seasonal workers for transitory assignments, and the reduction of worker hours is typically a welcome alternative to layoffs during times of economic struggle.

However, whether prompted by ACA mandates, benefits costs, or a need to realign the structure of your workforce, if cost reduction is your ultimate goal, ensure that you have considered the big picture before reducing workforce hours to part-time.

Actual cost of benefits. First and foremost, if the cost of benefits is a factor, ensure that your calculation of the cost of providing benefits isn't based merely on the market cost of health insurance. Also make sure you have accounted for all available tax deductions and cost discounts.

Logistics. When hours are reduced to part-time, many employees must seek additional sources of income—perhaps from a second part-time job. This could result in more scheduling conflicts, absenteeism, and administrative costs for employers.

Turnover. Further, don't forget or underestimate the cost of employee turnover—particularly if you're in an industry that typically isn't subject to (and equipped to handle) rapid turnover and the associated costs. The potential cost savings of shifting staff to part-time may be quickly erased if you are forced to constantly rehire and retrain.

Competition. Along those lines, consider the risk of losing key staff to larger competitors that already offer health benefits and simply factor those costs into the cost of doing business. This is particularly true for part-time workers who must pick up additional employment—when your workers are already building relationships with another employer, it's that much easier for them to jump ship.

Public relations. Also keep in mind that across-the-board work reductions often need special public relations management, not only for internal employee morale but also for customers, clients, and stakeholders who may question the financial security and strength of your business.

Growth inhibition. Could your company make more money if it were allowed to grow unfettered, irrespective of maintaining a workforce of fewer than 50 full-time equivalents? If so, don't lose sight of the long-range goal for your business. ✤

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