

## **New DOL LM-10 Guidance on Reporting of Payments to Unions Provides Clarity and Leniency**

[March 2006 Update: DOL Extends Deadline]

The U.S. Department of Labor ("DOL") has issued a new guidance on its LM-10 reporting requirements (which require employers to report certain payments made to union organizations or officials). Under the DOL's new guidance, absent "extraordinary circumstances," employers who should have filed LM-10 reports in years past and have not done so are exonerated, provided they comply now and in the future. Employers have 90 days from their fiscal year-end to submit their LM-10 reports for that fiscal year. The new guidance also increases the LM-10 *de minimis* exception from \$25 to \$250.

### *LM-10's general reporting requirements*

The DOL requires employers to file a Form LM-10 within 90 days of the close of their fiscal year. Generally speaking, the Form LM-10 requires employers to disclose all payments and loans made to any union or union official (union officer, agent, shop steward, union employee or other union representative) within the preceding fiscal year, with the exception of *de minimis* payments and payments and loans made in the regular course of business by insurance companies and credit institutions. An employer does not need to report a payment made to an employee who serves as a union official if the payment is compensation for his or her service as an employee.

With few exceptions, every private sector business or organization (whether unionized or non-union) with one or more employees is considered an "employer."

### *The DOL will forgive past LM-10 compliance violations provided employer complies now*

Under the DOL's new guidance, absent "extraordinary circumstances," the DOL will not investigate an employer's failure to submit LM-10 reports for fiscal years beginning prior to January 1, 2005. Examples of "extraordinary circumstances" are the existence of an ongoing investigation, egregious conflicts of interest, and outright attempts to purchase official favors through cash or in-kind payments. To receive this leniency, however, an employer must comply with the DOL's LM-10 requirements for any fiscal year which ends on or after December 31, 2005. Employers have 90 days from the end of their fiscal year to submit LM-10 reports.

In addition, for an employer's first fiscal year beginning on or after January 1, 2005, the president and treasurer need not sign the LM-10 and employers do not need to attest "under penalty of perjury" that they have reported all LM-10 payments. Instead, the employer must conduct a good faith inquiry and must act diligently to identify covered transactions and payments. The DOL has relaxed these two requirements for one fiscal year only, recognizing the fact that some employers may not have kept track of covered transactions and payments in 2005. LM-10 reports for future fiscal years, however, must be signed by the president and treasurer and must be attested to under penalty of perjury.

*The de minimis exception is now \$250*

Form LM-10 states that employers need not include "sporadic or occasional gifts, gratuities, or favors of insubstantial value, given under circumstances and terms unrelated to the recipients' status in a labor organization." This is referred to as the *de minimis* exception. The DOL's new guidance has increased the definition of "insubstantial value" in the *de minimis* exception from \$25 to \$250. As a result, LM-10 reporting is not required if the aggregate value (over the entire fiscal year) of gifts or loans from a single employer to a single union or union official is \$250 or less. Note that gifts or loans from multiple employees of one employer should be treated as originating from a single employer when determining whether the \$250 threshold has been exceeded.

The DOL, through its new guidance, seeks to increase LM-10 compliance by making compliance easier on employers and by forgiving past non-compliance. However, this leniency will only apply if the employer complies with LM-10 requirements going forward. Any employer that has contact with unions or union officials needs to comply now to take advantage of this leniency.

## **New Regulations Clarify Employers' Obligations Under USERRA**

The Department of Labor ("DOL") has issued final regulations interpreting and clarifying the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). Along with the new regulations, the Department made available a new poster that employers are now required to post to comply with USERRA's notice requirement.

This article will provide an overview of employers' rights and obligations toward employees on military leave and returning from military leave, as clarified in the new regulations. In addition, the Schiff Hardin Employee Benefits and Executive Compensation Group has prepared a summary of the regulations as they apply to employee benefit plans and pension benefits. (See the alert dated [February 13, 2006](#).)

### *Non-discrimination based on military status*

The new regulations clarify that USERRA's anti-discrimination and anti-retaliation protections (which prohibit discrimination or retaliation against any employee or potential employee because of his or her military or other qualifying uniformed service) apply to *all* employees or potential employees, regardless of whether the term of employment is for a brief, non-recurrent period, is temporary or seasonal, or is long-term.

### *Right to reemployment*

Under USERRA, employees who have been absent from work because of service in the military have a broad right of reemployment upon return from service. The regulations make clear that the reemployment protections, unlike the anti-discrimination protections discussed above, do not apply to brief, non-recurrent positions such as a one-time-only, three-month long position. However the reemployment provisions do protect temporary and seasonal employees — such as a life guard at a swimming pool, or a football coach — as well as long-term employees. According to the regulations, the key to determining whether the position is subject to USERRA's reemployment provisions is whether the employee has a "reasonable expectation of continued employment."

As stated in both the statute and the new regulations, the right to reemployment includes the right to be reemployed at the pay rate and in the position the employee would have held if not for the military leave — this is known as the "escalator principle." This means that individuals who are absent from work due

to service in the military are entitled to any promotion or increase in pay, benefits, or seniority that they would have received if their employment had not been interrupted. According to the regulations, employers need to look at length of service, qualifications, and disability, if any, in determining the appropriate reemployment position for an employee returning from military leave. Employers must determine with reasonable certainty what position the employee would have reached if his or her employment had been continuous. If the returning employee is not qualified for the position, the new regulations provide that the employer must use "reasonable efforts" to help the employee become qualified, such as providing training as long as that training does not place an undue hardship on the employer. The employer must also allow the service member additional time to take a skills test or promotion examination that the employee missed while on leave.

The regulations also acknowledge that the escalator principle may cause an employee to be reemployed at a lower position, laid off, or terminated, if, for example, due to the employee's seniority or job classification he or she would have been demoted or laid off during his or her period of service and the period of demotion or lay off continued after the date of reemployment.

#### *Seniority and non-seniority benefits must be provided*

The escalator principle embodied in USERRA and the regulations makes a clear distinction between seniority and non-seniority benefits that must be provided to service members. As noted above, all seniority rights (rights based on a reward for length of service) must be given to employees upon reemployment. This means that if a bonus, for example, is seniority-based, that bonus must be included in the escalator position and provided upon reemployment. However, employers must also provide service members any *non-seniority* rights and benefits generally provided by the employer to other employees with similar seniority on comparable leave (e.g. FMLA leave). The regulations clarify that accrual of vacation leave is considered a non-seniority benefit that must be provided only if the employer provides that benefit to similarly situated employees on comparable leaves of absence. Similarly, if a bonus is not based on seniority, it must be provided to employees on military leave only if bonuses are provided to employees on FMLA leave.

#### *Qualification for reemployment*

In general, in order to be covered by USERRA an employee must provide advance notice of the leave, receive a favorable discharge, and seek reinstatement in a timely manner. The regulations clarify that the notice can be either verbal or written, and must be given as far in advance as is reasonable under the circumstances. Upon return from service, an employee may have up to 90 days to submit an application for reemployment. Failure to submit a timely application does not necessarily forfeit entitlement to reemployment, however, but rather the employee becomes subject to the employer's general practices pertaining to absences from scheduled work.

#### *Protection from discharge upon return to work*

The regulations make clear that for a period of time after an employee returns from military service, he or she cannot be discharged from employment except for cause — regardless of whether an employment contract or collective bargaining agreement contains a "for cause" provision. Depending on the employee's length of service, this period may be as long as one year. "Cause" is defined in the regulations as discharge based on conduct, or other legitimate, nondiscriminatory reasons. It is the burden of the employer to prove that the employee was discharged for cause and not because of his or her service in the military.

## Conclusion

It is important that employers review workplace practices and policies to make sure that they comply with USERRA and its new regulations. In addition, employers should make sure that they are displaying the recently approved poster, which provides notice of USERRA rights for employees. Please contact a member of the Schiff Hardin Labor and Employment Group with any questions regarding employees who may be subject to USERRA's protections.

## Seventh Circuit Strikes Down Illinois Strikebreaker Amendment

The United States Court of Appeals for the Seventh Circuit has invalidated the 2003 amendment to Illinois' Employment of Strikebreaker Act ("ESA") which prohibited employers from contracting with day labor and temporary services for replacement workers during a strike. Although the Seventh Circuit remanded the case back to the lower court for a determination on its merits, this decision represents a significant victory for employers, as the Seventh Circuit confirmed the position of employer advocates that the 2003 amendment usurped the rights of management under the National Labor Relations Act.

The Congress Hotel filed its declaratory judgment action in October 2004 when it feared that it faced an enforcement suit from the Illinois Department of Labor because the Department had requested information about the Hotel's use of replacement workers during a strike. The suit sought a declaration that the amendment to the ESA violated the Constitution's Fourteenth Amendment and the National Labor Relations Act. The Hotel sought a permanent injunction prohibiting the Department from enforcing the ESA against it. The United States District Court for the Northern District of Illinois dismissed the Hotel's lawsuit on the basis that the Hotel had no "standing" to sue, since it could not demonstrate that prosecution by the Department of Labor was imminent.

On appeal, the Seventh Circuit disagreed with the lower court's decision to dismiss the suit. The Court reasoned that the Hotel *did* present a genuine controversy in its suit since the Hotel was caught between the need to comply with the state law and the need to reduce the costs of its operations. The Court noted that courts often engage in pre-enforcement review based on the potential cost that compliance with a statute creates.

Briefly addressing the case on its merits, Judge Easterbrook went on to state that resolution of this case was not difficult. He noted that states are forbidden to regulate on any subject that federal labor "reserves for the play of economic forces" — in this case the National Labor Relations Act, under which employers are free to hire temporary replacements during a strike. Judge Easterbrook stated that the amendment violated the Supremacy Clause of the United States Constitution, and gave a sharp rebuke to the state government for passing the amendment:

The state's efforts to make the hiring of replacement workers a crime is so starkly incompatible with federal labor law, which prevails under the Constitution's Supremacy Clause, that we do not understand how a responsible state legislature could pass, a responsible Governor sign, or any responsible state official contemplate enforcing, such legislation.

Our Labor and Employment Group will keep you apprised on new developments in this important case.

## New Requirements for Temporary Staffing Agencies

Recent amendments to the Illinois Day and Temporary Labor Services Act ("the Act") place new

restrictions on certain temporary staffing agencies and the companies that contract with them. The Act covers "day and temporary labor service agencies," which are defined as entities that are engaged in the business of employing day or temporary laborers to provide services for a fee to or for any third-party client ("staffing agencies"). "Day and temporary labor" does not include employment of a professional or clerical nature. As such, the new requirements do not apply to staffing agencies that provide workers only to perform professional or clerical work, nor to the entities who contract with such agencies. These new requirements do, however, impact any staffing agency that places non-professional, non-clerical workers with third-party clients. They also impact any entity that engages non-professional, non-clerical temporary workers through an agency.

#### *Registration with Illinois Department of Labor*

A staffing agency may not operate without first registering with the Illinois Department of Labor. There is a yearly fee for registration and failure to register is a violation of the Act. Companies that use temporary staffing agencies are required to verify a staffing agency's status with the Illinois Department of Labor before entering into a staffing contract and on March 1 and September 1 of each year thereafter.

#### *Minimum wage due and interaction with wage payment laws*

A temporary worker who is contacted by a staffing agency to work for a third party but is not utilized by the third-party client must be paid a minimum of four hours pay. However, if the staffing agency is able to place the worker at another location during the same shift, the minimum pay requirement is two hours pay. Also of note, the Act institutes a new requirement that the staffing agency provide its temporary workers with an itemized statement of their pay together with their regular paychecks.

#### *Notice and recordkeeping requirements*

Staffing agencies that provide non-professional, non-clerical employees are required to provide each temporary worker with a form setting forth the temporary worker's name, the nature of the work to be performed, his or her wage rate, his or her destination, the terms of transportation, and how meals and equipment will be handled. This notice must be provided on the first day of the assignment and on any day when the information changes.

In addition, staffing agencies are required to keep detailed records including details of the worksites and clients to which employees are assigned each day, information regarding the temporary workers, copies of the notices provided to workers, the race and gender of each employee sent out on an assignment, information relating to deductions from the employee's pay and other information. These records need to be kept for three years from their creation and may be inspected by the Illinois Department of Labor.

Finally, and particularly important for companies who use temporary workers for single-day assignments, the amendments place a new notice requirement on entities that contract with staffing agencies. Each day, the company where the temporary worker is working (not the staffing agency) is required to provide each temporary laborer who is contracted to work a single day with a Work Verification Form setting forth the date, the temporary worker's name, the work location and the hours worked that day.

#### *Restrictions on charges to temporary workers and transportation*

The amendments place new restrictions on the amounts that can be charged to an employee for meals and equipment. The staffing agency is also responsible for transportation of employees to and from the job site and for meeting safety requirements for such transportation.

### *Restrictions on temporary workers taking permanent position with client*

The amendments also operate to prohibit restrictions on the right of a temporary employee to accept a permanent position with a third-party client. While the staffing agency may charge a placement fee in this situation, the amount of that fee is limited by the statute for all but "skilled laborers."

### *Enforcement*

The amendments provide a private right of action for any person aggrieved by a violation of the Act, including any person who is retaliated against for exercising rights under the Act. Penalties and damages for violations are set forth in the statute and increase if the violation is found to be willful. For entities using temporary workers, the Act clarifies that any entity using temporary workers is jointly liable for the payment of wages under the Illinois Wage Payment and Collection Act and Minimum Wage Law.

The impact of the changes to the Day and Temporary Labor Services Act on Illinois businesses is not yet clear. However, staffing agencies and companies using temporary workers should focus on the Act's requirements and ensure that they are in compliance. If you require further information regarding the Day and Temporary Labor Services Act, the amendments or their implementation, please do not hesitate to contact any member of the Labor and Employment Group.

## **DOL Clarifies Rolling 12-Month Period for Eligibility Under the Family and Medical Leave Act (FMLA)**

Employers who track their employees' leave under the Family and Medical Leave Act (FMLA) by using a "rolling 12-month period" — one of the four tracking methods set forth in the regulations — should take note of a recent opinion letter issued by the U.S. Department of Labor ("DOL"). The DOL opinion letter answers two questions pertaining to tracking intermittent FMLA leave under the "rolling 12-month period" method: how leave availability is properly calculated and whether an employee may be disciplined for using more than his allotted FMLA leave in the rolling 12-month period. The letter is very technical in nature, but sets forth examples of how an employer can properly calculate an employee's FMLA leave balance under this method.

Under the "rolling 12-month period" method, each time an employee takes FMLA leave, the employee's remaining leave entitlement is measured by calculating the balance of 12 weeks not used during the 12 months immediately preceding the leave date. Thus for any day of FMLA leave, the employee's remaining available balance is 12 weeks minus whatever number of days (or hours) the employee used during the 12 months preceding that day.

The DOL addressed an employer's specific practices of tracking FMLA usage and entitlement under the "rolling 12-month" period. The employer would "add back" FMLA hours used for leave on the one-year anniversary of the leave, with the balance updated daily. (For instance, if an employee used 8 hours leave on February 14, 2005 and 6 hours leave on March 3, 2005, the employer would "add back" 8 hours to the employee's balance on February 14, 2006, and 6 hours to the employee's balance on March 3, 2006.) The employer asked whether this method of "adding back" was appropriate for purposes of calculating leave balance. The DOL responded that this employer's practice properly applied the "rolling 12-month period" method.

The employer next asked whether it could discipline an employee who used more than his allotted FMLA hours under this "rolling 12-month period" method. The employee at issue had used most of his FMLA leave during his initial 12-month period. He was then recertified for the same medical condition, accrued

hours under the employer's "add-back" method, and accumulated 5 days of FMLA leave entitlement. The employee was then absent for seven days, even though he had only 5 leave days banked. This meant that the employee was absent for two days after his total available FMLA hours were exhausted. The DOL stated that the employee could be subject to discipline under the employer's attendance policy. Eligible employees are entitled to a total of 12 weeks of job protected leave. Once the 12 weeks are exhausted, the employee is no longer entitled to the protections of the FMLA.

Finally, the DOL reiterated that under the "rolling 12-month period" method, leave entitlement is measured backward from the date the employee uses any leave. Thus the number of available hours remaining in the 12-week leave entitlement can change daily by adding back days or hours used on the 12-month anniversary of a given leave. The DOL reminded the employer that the fact that an employee may be eligible for and takes leave for more than one FMLA-qualifying condition does not change the fact that an employee is entitled to only 12 weeks covered leave within the rolling 12-month period.

## **U.S. Department of Labor Regulation on FMLA's 75-Mile Limit Upheld**

For the time being, it appears that the U.S. Department of Labor's ("DOL") regulation requiring that the FMLA's 75-mile limit be measured in road miles remains enforceable. In *Bellum v. PCE Constructors, Inc.*, the U.S. Supreme Court declined to review the Fifth Circuit Court of Appeals' decision upholding that regulation.

The FMLA applies to employees at a worksite of an employer if there are at least 50 employees within a 75-mile distance from the worksite. Although the federal statute does not specify how the distance is to be calculated, the DOL issued a regulation that requires the distance to be measured in road miles. The regulation provides that the "75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed." 29 C.F.R. §825.111(b). The regulation goes on to provide that the distance should only be measured "as the crow flies" when there is no available surface transportation between worksites.

The plaintiff, Larry Bellum, expected to be reinstated to his job as a construction site manager when he returned from a medical leave for heart surgery. When he returned, Mr. Bellum alleged that his supervisor advised him the project he worked on had been completed and that there was no work for him. Mr. Bellum's employment was terminated shortly thereafter. Mr. Bellum sued, claiming a violation of the FMLA. However, the court dismissed his case on the grounds that he was not an "eligible employee" under the statute, because the employer did not have the requisite number of employees within 75 miles of Mr. Bellum's worksite.

The company had 14 employees at its headquarters and 41 employees at Mr. Bellum's worksite. The worksite was between 66.5 and 69.5 linear miles from the headquarters, but 88.5 miles using public roads. The lower court relied on the DOL regulation in concluding that the employer did not have 50 employees within 75 miles of the worksite. On appeal, Mr. Bellum argued that the court erred in relying on the regulation, and that the regulation itself was invalid because it conflicted with the language of the statute. The Court of Appeals rejected these arguments, noting that to apply Mr. Bellum's method would undermine the purpose of the statute's exception to coverage, which is to relieve the burden of FMLA compliance on companies with widely dispersed operations.

The *Bellum* case appears to be the only federal Court of Appeals decision on this issue. The lack of any dispute among courts likely impacted the U.S. Supreme Court's declining to take the case. As for now, employers should be safe in relying on road miles in calculating the distance between worksites for

purposes of determining FMLA eligibility.

## **Nurse May Sue Hospital for Harassment by an Independent Contractor**

A doctor's status as an independent contractor does not relieve a hospital of its own obligation to provide employees with a nondiscriminatory workplace, the U.S. Court of Appeals for the Seventh Circuit has held. In *Dunn v. Washington County Hospital*, the court noted that employers may be responsible for discriminatory conduct committed by third parties under Title VII of the Civil Rights Act.

For years, Plaintiff Lisa Dunn worked as a nurse at Washington County Hospital in Nashville, Illinois. Dunn alleged that Dr. Thomas J. Coy, the head of obstetric and emergency services, harassed Dunn and other women on the staff. Dr. Coy was an independent contractor and not employed by the hospital.

The hospital began investigating Dr. Coy in 2000 after receiving a complaint from another female employee of the hospital. During that investigation, Dunn provided a written statement regarding Dr. Coy's allegedly sexually offensive conduct. Although the hospital promised to keep Dunn's statement confidential, Dr. Coy learned of the interview and repeatedly pressured Dunn to change her statement. On another occasion, Dunn was interviewed by Dr. Coy's attorney at a meeting at the hospital. Dunn alleged that after the meeting Dr. Coy approached Dunn, grabbed her by the arm, pushed her against a cabinet, formed a fist with his hand and tapped her on the face with it. Dunn also alleged that Dr. Coy also told her and others that he should have kicked her one day while she was leaning over.

Dunn wrote a letter to the hospital in 2002 complaining of Dr. Coy's harassing behavior. Dunn alleged that the conduct was so severe that she was forced to resign and that the hospital knew of Dr. Coy's behavior and failed to take any corrective action.

Dunn sued the hospital and Dr. Coy alleging sexual harassment and retaliation. The trial judge granted summary judgment in favor of the hospital after finding that Dr. Coy was not a hospital employee, and Dunn appealed.

The Seventh Circuit held that the trial judge erred in finding that the hospital could not be liable for intentional torts committed by independent contractors. The court explained that under Title VII "because liability is direct rather than derivative, it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer." The "[a]bility to 'control' the actor plays no role;" rather, "employers have an arsenal of incentives and sanctions (including discharge) that can be applied to affect conduct. It is the use (or failure to use) these options that makes an employer responsible — and in this respect independent contractors are no different from employees." Thus, it is the employer's responsibility to provide its employees with nondiscriminatory working conditions, and Dunn had stated a claim for sex discrimination under Title VII.

The court also examined Dunn's retaliation allegation and refused to reinstate the claim. The court held that the claim of retaliation against her for complaining about Dr. Coy's misconduct was incorrect because Coy was responsible for all of the supposedly discriminatory acts and Dr. Coy's conduct did not rise to the level of actionable retaliation, because almost all of the "retaliation" was in the form of unsubstantiated verbal requests that would not dissuade a reasonable person from protecting his or her own rights.

## **Sending Arbitration Policy by Email Raises Question of Enforceability**

A recent case from the First Circuit Court of Appeals in Boston serves to remind employers that caution

should be exercised when distributing certain employment policies by e-mail. In *Campbell v. General Dynamics*, 407 F.3d 546 (1st Cir. 2005), the court held that the employer's use of a mass e-mail to communicate a change in its dispute resolution policy failed to provide minimally sufficient notice of the significance and contractual nature of the policy. The court went on to find that, in light of this insufficient notice, it would not enforce the policy's mandatory arbitration provision.

General Dynamics employee Roderick Campbell was terminated for persistent absenteeism and tardiness, and he subsequently sued his employer alleging discrimination on the basis of disability. In its answer, the company asserted that the suit was precluded under the company's new dispute resolution policy that provided for mandatory arbitration and had been communicated to all employees via e-mail. Campbell contended that the policy was not binding on him as he had not reviewed the new policy and therefore did not willfully enter into it.

In addressing whether a valid agreement to arbitrate existed, the court focused on the sufficiency of notice to the employee. The court initially concluded that an e-mail can be an appropriate medium for forming an arbitration agreement. The court relied upon the E-Sign Act, which provides that "a signature, contract or other record relating to such transaction may not be denied legal effect, validity, or enforcement solely because it is in electronic form." However, the court looked to the workplace routines and conventions at General Dynamics in assessing the means of notification. The court noted that while e-mail was the preferred method of communication at the company, it was not the usual means of communication with regard to personnel matters. In fact, significant changes to the employment relationship on prior occasions had been memorialized in writings that required signatures. Moreover, the company did not require the employees to affirmatively acknowledge receipt and review of the e-mail by, for example, signing an acknowledgment form or clicking a box on the computer screen.

The court also addressed the content of the e-mail communication and concluded that it failed to notify the employee of its legal significance. The e-mail was not explicit in stating that the new policy contained an arbitration agreement that effectively waived the employee's rights to a judicial forum. In addition, the tone and phrasing of the e-mail downplayed the obligations set forth in the policy. The court ultimately concluded that the e-mail failed to put the employee on notice of the unilateral contract offer contained in the linked materials.

This case involved a fact-specific analysis and is binding precedent only within the First Circuit (which covers Maine, Massachusetts, New Hampshire, Rhode Island and Puerto Rico). Nonetheless, other courts may look to this case for guidance. In light of this decision, employers should consider the following precautions when e-mailing any change in employment policy (and particularly an arbitration agreement) to employees so as to increase the likelihood of its enforceability:

- Employers should require an affirmative response from the employee to signal and document that the new policy has been read and reviewed. Such affirmative responses could take the form of signature (electronic or written) or clicking a check box in an e-mail.
- Communicate in direct and explicit language in the announcing e-mail any change in the employee's substantive rights, rather than relying on an employee to click links to review the exact policy language.
- If communication of personnel matters is not ordinarily conducted via e-mail, before any policy is sent via e-mail the change in the method of communication should be announced.

**Employers May Have an Obligation to Monitor Possible Illegal Activity on the**

## Internet

A New Jersey state court recently expanded the area in which employers may be liable by finding that an employer who is on notice that its employee is using a workplace computer to access pornography has a duty to investigate the employee's activities and to take action to stop such activities. Notably, the court determined that no employee "privacy interest" stands in the way of the employer's duty to prevent such activities. In so holding, the court reversed a lower court's granting of summary judgment on behalf of the corporation.

Plaintiff Jane Doe sued XYZ Corporation on behalf of her daughter Jill Doe, seeking to hold the corporation responsible for an employee's (Jane Doe's husband and Jill's stepfather) visiting pornographic Web sites and uploading child pornography on his work computer. Members of the company's IT department had taken notice of this Internet activity. In addition, coworkers reported that the employee was known to quickly minimize and shield his computer screen from managers and IT personnel. A supervisor's review of the employee's computer revealed that the employee had visited various pornographic Web sites — including a site involving child pornography. The supervisor met with the employee and told the employee to cease these activities, which he did for a short time period. While engaging in this Internet activity at the workplace, the employee also engaged in secret nude and semi-nude videotaping and photographing of Jill at their home, and in mid-June 2001 transmitted three of these photos over the Internet from his workplace computer. The employee was arrested on child pornography charges on June 21, 2001.

The plaintiff alleged that the company knew or should have known of the employee's improper use of its computer and Internet service, and that it had a duty to report the employee to authorities. The court also found that XYZ had breached that duty, thereby directly and proximately causing harm to Jill Doe.

The court found that XYZ was on notice of the employee's activities and was under a duty to investigate further, and imputed to the company the individuals' knowledge that the employee was using his work computer to access pornography. The court based its determination in part on the fact that the company possessed and could have implemented monitoring software designed to track employees' activities on the Internet, and that it had distributed a policy recognizing its right to monitor employee Web site activity. As such, the employee had no legitimate expectation of privacy that would prevent his employer from accessing his computer to determine if he was using it to view adult or child pornography.

Significantly, the court relied upon tort law principles regarding an employer's duty to exercise control over its employees in finding that XYZ had a duty to report the employee's activities to the proper authorities and to take effective internal action to stop those activities. Under these principles, an employer has a duty to exercise reasonable control over an employee acting outside the scope of his employment on the employer's premises or using the employer's property so as to prevent the employee from intentionally harming others. The court also found that one could conclude that an appropriate investigation upon discovery of the employee's behavior could have led to a cessation of this behavior. However, the court remanded the case so that the lower court could address whether defendant's alleged breach of its duty proximately caused any harm to Jill Doe.

While this decision has direct application only to New Jersey employers, it is possible in the future that we will see other state or federal courts placing similar obligations on employers. Therefore, in light of this decision, employers should:

- Adequately monitor employees' personal use of the internet, and investigate any claims of improper use of company computers for personal use, especially with regard to an illegal activity

such as child pornography.

- Take action against the employee to ensure that the employee's offending behavior ceases.
- Report any illegal Internet activity to the proper authorities.

## **Arthur Andersen Indictment an "Unforeseen Business Circumstance" Under WARN**

The Supreme Court recently let stand, without comment, a Seventh Circuit decision holding that Arthur Andersen LLP did not violate the Worker Adjustment and Retraining Notification Act (better known as "WARN") when it engaged in mass layoffs following a federal indictment of the firm.

WARN generally requires that when a company intends to close a plant or otherwise engage in mass layoffs, it must provide the employees to be affected with 60-days notice prior to the layoffs taking effect. The notice is intended to soften the blow of an otherwise sudden economic event by giving employees a chance to relocate, retrain, or otherwise prepare for the loss of their jobs.

As a result of the highly-publicized collapse of Enron Corporation in 2001, the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ") began investigations of Arthur Andersen, which had provided accounting services to Enron. In March 2002, the DOJ filed an indictment of Arthur Andersen, charging the firm with obstruction of an SEC investigation by destroying and withholding documents. In the two weeks following the indictment, Arthur Andersen lost \$300 million in business — approximately 60 times the loss in business that the firm had experienced in the ten weeks immediately preceding the indictment. As a result, the firm laid off 560 employees.

Those employees filed a class-action complaint against the firm, alleging a violation of WARN. The employees argued that Arthur Andersen should have given notice 60 days before the layoffs, or February 22, 2002, because it should have known the indictment and resulting layoffs were imminent.

The district court held that the firm had not violated WARN because of an exception within the law, allowing employers to layoff employees without warning when the layoffs are caused by "unforeseen business circumstances." The Seventh Circuit affirmed, holding that while Arthur Andersen knew that the indictment (and layoffs) were a possibility as of February 22, WARN notice was not required unless the firm had known that the indictment was a probability. The court found that it did not have that level of certainty, and had not violated WARN. The court especially noted that the DOJ, not Arthur Andersen, controlled the timing of any indictment; that indictment of an entire firm as opposed to individuals was unprecedented; and that Arthur Andersen had no way to predict the magnitude of the effect the indictment had on its business.

Employers considering whether notice is required under WARN should note that notice is not required when the triggering event for the layoffs is "sudden, dramatic, or unexpected." The court held that companies that are "financially fragile, yet economically viable" need not give notice of layoffs that are possible, just those that are probable. To hold otherwise, said the court, would force some employers to layoff some employees prematurely, which runs exactly counter to the intent of the law.