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THE FLORIDA EMPLOYER

A Bulletin on Employment, Labor, Benefits and Immigration Law for Clients and Friends of Jackson Lewis P.C.

Is Your Business Adequately Protecting the Personal Information it Maintains?

All businesses maintain personal information on the individuals they employ and those with whom they do business. This may include the individual's name, address, age, gender, identification numbers, assets, liabilities, payment records, personal references, and health records. If this sensitive data falls into the wrong hands, it can lead to fraud, identity theft, or similar difficulties for the individuals affected.

Florida is one of many states requiring that businesses safeguard appropriately personal information of customers, employees and other individuals, as well as be prepared to respond to a breach should one occur. The Florida Information Protection Act of 2014 (effective July 1, 2014), which has been called one of the broadest and most encompassing data security breach laws in the nation, imposes on covered entities (definition below) a statutory requirement to safeguard Floridians' personal information, to report a breach to the state attorney general, and to comply with other affirmative obligations.

Upon passage of the data breach law, Florida Attorney General Pamela Bondi promised greater enforcement.

Key provisions of the law include:

- A "covered entity" means a sole proprietorship, partnership, corporation, trust, estate, cooperative, association, or other commercial entity that acquires, maintains, stores, or uses personal information.
- "Personal information" means an individual's first name or initial and last name, in combination with (i) a social security number, (ii) a drivers' license or identification card number, or (iii) an account number, credit or debit card number in combination with any required security code or password to access the account or an individual's user name or e-mail address, in combination with a password or security question and answer that would permit access to an online account without the account number.
- Covered entities must safeguard the personal information they maintain. (Other states with this requirement include California, Connecticut, Maryland, Massachusetts, and Oregon.)
- An individual affected by a breach must be notified as expeditiously as possible, but no later than 30 days from discovery of the breach when the individual's personal information was, or the covered entity reasonably believes it was, accessed as a result of a breach.
- If the breach affects at least 500 Floridians, the state's Attorney General must be notified no later than 30 days after determination that a breach has occurred or reason to believe one had occurred. In addition, the Attorney General may require covered entities to provide copies of their policies regarding breaches, steps taken to rectify the breach, and a police report, incident report, or computer forensics report.

Businesses in Florida that maintain personal information about Florida residents should ensure they have reasonable and adequate safeguards to prevent data breaches, including clearly written, disseminated, and published policies and procedures, regular employee training and reminders, and purging of mobile electronic devices before they are sold, donated or otherwise discarded. Published policies should make it clear to employees that the employer's business information, regardless of where it is located, is confidential and should not be used or disclosed other than for purposes of performing work for the employer.

Moreover, as data becomes more easily accessible and portable, the risks for breaches increase. Businesses need to assess and address these risks continuously from an enterprise-wide perspective. A key source of these risks, many experts have noted, is the

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Lillian Chaves Moon is a Shareholder in the Orlando, Florida office of Jackson Lewis P.C. Ms. Moon earned a Bachelor of Arts degree in 1995 and her Juris Doctor degree in 2000 from Brigham Young University in Provo, Utah. The majority of her practice is devoted to employment litigation, defending employers in federal and state courts, as well as before the EEOC and other administrative agencies. She also provides clients with day-to-day advice and counseling regarding employer policies and various workplace law issues as they arise. In addition, prior to practicing in Florida, Ms. Moon served as an appellate attorney for the United States Department of Labor in Washington, D.C., representing the Secretary of Labor in federal appellate courts in cases brought pursuant to the Occupational Safety and Health Act. Ms. Moon is a member of the Florida Bar, and the U.S. Supreme Court Bar.

widespread use of smartphones. In addition to network and perimeter e-security, a good place for many companies to start is by dealing with a mobile workforce and employees' demand to use their own devices. State-of-the-art policies should address Bring-Your-Own-Device (BYOD) guidelines, use of social media, employee monitoring and protection of private data, as well as standard protection of trade secrets and confidential information.

For more information regarding an employer's compliance obligations and instituting an information data security program, please contact a member of our Privacy, e-Communication and Data Security practice, Joseph J. Lazzarotti, at LazzaroJ@jacksonlewis.com, or Lillian Chaves Moon, at MoonL@jacksonlewis.com.

Key Considerations for Using GPS Tracking Devices

More Fair Labor Standards Act ("FLSA") cases are filed annually in Florida than in any other state. Understandably, employers want to better track employee work time in order to prevent FLSA claims for unpaid overtime, or defend against them. Employers considering the use of monitoring or tracking devices, including global positioning system ("GPS") devices (on equipment such as vehicles, cellular phones, laptops, and IPADs), also want to increase efficiency, to address safety concerns, to ensure compliance with company policies, and to protect employer-owned property. They also may use such devices to improve customer service. While the decreasing costs of global positioning technologies give employers new options for keeping track of their employees and make these devices even more attractive, they also raise concerns for employee privacy.

Legality of GPS Tracking

Most courts that have addressed the issue have held that employers may use GPS tracking devices on company-owned equipment, where the employee does not have a reasonable expectation of privacy in its use.

(California, Minnesota, Tennessee, and Texas are among the states that prohibit the use of mobile tracking devices to track individuals. Common exceptions to these laws include instances where consent has been obtained from the owner of the device or vehicle to which a tracking device is attached.)

Expectation of Privacy

Employers should consider whether employees have a reasonable expectation of privacy in using the equipment on which the GPS device is to be attached or installed. The employee's expectation of privacy must be balanced against the reasonableness of the intrusion upon that privacy (i.e., being tracked by the employer) and the employer's legitimate business purpose for utilizing the tracking device.

These considerations are particularly important where the device is attached to an employee's personal property or to company-owned equipment that the employee uses or transports after work hours and the tracking system continues to record such after-hour usage.

Non-Work Time

Tracking an employee during non-work hours can invade the employee's privacy, whether the tracking is done on employer-owned or employee-owned equipment. This may occur when the device tracks non-work time (such as during the evenings, weekends, and when the employee is on vacation), when the employer may gain private information about an employee. For example, an employer may find out that each day after work an employee travels to a dialysis center or attends particular religious services. Not only can obtaining and acting upon information about off-duty conduct lead to employee invasion of privacy claims, it also may result in discrimination or wrongful termination allegations (such claims are permitted under New York state law).

Legitimate Business Purposes

Information an employer collects through GPS monitoring should concern an employee's job performance. It should be disseminated only to employees who have a legitimate business reason for knowing the information.

The bottom line: Tracking should be limited to legitimate business purposes, conducted only during working hours, and done only after the company has addressed the employee's expectations of privacy. Policies should be drafted carefully to explain the legitimate business purpose for monitoring and the circumstances under which monitoring will take place. They should provide notice of the company's right to monitor employee actions while the employee is using company-owned property, explain the GPS-monitoring capabilities of the company-

issued property, and tell employees they should have no expectation of privacy while using the property.

For employee-owned equipment, employers should consider a well-crafted Bring-Your-Own-Device policy. It should require employee consent for the use of the tracking device on the employee's equipment, which should be activated only while the employee is working.

Jackson Lewis attorneys are available to assist your company in navigating employee monitoring issues and instituting appropriate policies. Please contact a member of our Privacy, e-Communication and Data Security practice, Joseph J. Lazzarotti, at LazzaroJ@jacksonlewis.com, or Lillian Chaves Moon, at MoonL@jacksonlewis.com.

Workers' Compensation Law Unconstitutional, Judge Rules

Florida law providing employers with an affirmative defense that workers' compensation benefits are the exclusive remedy for an injured employee (Section 440.11, Florida Statutes) is "constitutionally infirm and invalid," Miami-Dade Circuit Judge Jorge E. Cueto has ruled. *Florida Workers' Advocates v. State of Florida*, Case Number 11-13661-CA-25, 11th Judicial Circuit in and for Miami-Dade County, Florida.

The case was originally filed as a negligence suit by an injured employee and his wife. The employer argued that workers' compensation was the employee's exclusive remedy. Attorney groups intervened as plaintiffs. The original parties (employee and employer) reached a settlement and exited the case. The attorney groups were joined by an individual, Elsa Padgett, as an intervenor. The case was transformed into a constitutional controversy with the intervenors seeking a declaratory judgment as to whether the exclusive remedy of Florida's workers' compensation statute is valid under the Fourteenth Amendment of the U.S. Constitution and the Florida Constitution.

Florida's workers' compensation law, enacted in 1935 and amended in 1968, provided for full medical benefits and compensation for partial loss of wage earning capacity. An employee, however, had the right to opt out of the remedies provided by the statute and bring a tort action against the employer. Over time, the statute (and case law interpretations) continued to be amended, and eventually an employee's right to opt out of coverage was repealed, and full medical benefits for all injuries were no longer available as such benefits were restricted to total permanent injuries.

Judge Cueto found that, over time, statutory amendments eliminated workers' rights and eroded the benefits system. The court said the workers' compensation act "lacks any provision for compensating for permanent partial disability." Indeed, Judge Cueto emphasized, "The benefits in the Act have been so decimated since [1968] that it no longer provides a reasonable alternative to tort litigation. . . . The Act is the most intrusive way to compensate citizens for injuries on the job by taking away access to courts and removing the inviolate right to trial by jury."

Judge Cueto concluded that because the law no longer provides full medical care or any compensation for a permanent partial disability, "it is inadequate as an exclusive replacement remedy for all injured workers." Accordingly, the court found the Florida workers' compensation law unconstitutional on its face "as long as it contains §440.11 as an exclusive replacement remedy."

As of this writing, the Florida Attorney General has not decided whether to appeal Judge Cueto's ruling. The ruling does not have any precedential value on pending or future workers' compensation claims or cases. However, a similar argument is being made by an injured firefighter in a case pending before the Florida Supreme Court. *See Westphal v. St. Petersburg, et al.*, Case Number SC13-1930. We will continue to monitor the cases.

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Accolades for Jackson Lewis

Jackson Lewis P.C. is pleased to announce 119 of the firm's attorneys have been named in the 2015 edition of *The Best Lawyers in America*© in the area of employment and labor law. The firm's presence in this publication has grown each year, with the number of attorneys listed more than tripling since the 2010 edition.

We are pleased to announce the firm and 62 of its attorneys have been recognized in the 2014 edition of *Chambers USA: America's Leading Lawyers for Business*. The annual legal guide ranks firms and lawyers across the country in a variety of practice areas, including Labor & Employment, on the basis of written submissions, in-depth attorney and client interviews, and its own database resources.

In addition, Florida attorneys designated as "Leaders in Their Field" for 2014 are:

David E. Block (Miami)

Ralph C. Losey (Orlando)

Susan K. McKenna (Orlando)

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Jackson Lewis P.C. represents management exclusively in employment, labor, benefits and immigration law and related litigation.

The firm has more than 770 attorneys practicing in 55 locations throughout the U.S. and Puerto Rico.

Jackson Lewis represents employers before state and federal courts and administrative agencies on a wide range of issues, including discrimination, wrongful discharge, wage/hour, affirmative action, immigration, and pension and benefits matters. Jackson Lewis negotiates collective bargaining agreements, participates in arbitration proceedings and represents union-free and unionized employers before NLRB and other federal and state agencies. The firm counsels employers in matters involving workplace health and safety, family and medical leaves and disabilities

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