



Weekly Wright Report (1/02/18)

DOES OUR INSURANCE COVER THAT?

By Don Walsh DWalsh@wcslaw.com

Employers are cautioned to check their Employment Practices Liability Insurance (EPLI) and Cyber insurance policies to ensure protection for hacks of employee data. According to the federal court in New York, employers owe their employees a duty to protect personal information which could be accessed during a cyberattack. *Sackin v. Transperfect Glob. Inc.*, (S.D.N.Y. Oct. 4, 2017). The court held that employers have a duty to take reasonable precautions to protect the information that they require from employees since the employer is in the best position to avoid the harm to employees. This potential liability should be a huge economic incentive to act reasonably in protecting employee data from the threat of cyberattack.

EPLI COVERAGE REVIEW

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The increasing awareness of employees and employers of sexual harassment and the increased willingness of employees to come forward have employers looking at their insurance coverage. Here are few

simple tips to keep in mind with your coverage.

- Make sure the policy covers all potential damages including emotional distress. Some policies exclude bodily injury but do not ensure coverage still exists for mental distress.
- Ensure your policy has proper and broadly worded definitions in your state for discrimination, harassment and retaliation.
- Evaluate who is considered insured making sure it includes all levels of management and the company.
- Is there coverage for investigations, agency level actions, and arbitration proceedings?
- Do you have the right to choose your own counsel? Having consistent representation who knows your company, policies and personnel is critical in effective, prompt and efficient representation.
- How much influence do you have to control the settlement? Can the insurer force a settlement? This is important since the new tax code limits the deductibility of settlement payments and fees associated with harassment claim settlement agreements which have non-disclosure obligations.



DISCIPLINING EMPLOYEES WHILE THEY ARE ON FMLA LEAVE

By Laura Rubenstein
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Employees requesting, on leave or just returning from leave under the Family and Medical Leave Act (“FMLA”) may still be terminated for legitimate reasons unrelated to their FMLA leave. In *Jennings v. Univ. of N.C.*, (July 5, 2017), the North Carolina Court of Appeals ruled that an employer did not violate the FMLA when the allegations of misconduct arose prior to her FMLA leave. However, in *Diamond v. American Family Mutual Insurance Company*, (Nov. 9, 2017), the court denied summary judgment allowing the case to proceed to trial when there was a dispute raised as to the timing of the performance reviews relative to the request for FMLA leave. Employers should have a serious conversation with their counsel before taking disciplinary action against an employee who has requested or is on FMLA leave.

NEW YEAR- NEW IDEAS Introducing ... Protected Weekends

By Laura Rubenstein
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A few employers have tossed around the idea of a protected weekend. While novel, some companies are beginning to require that employees take vacation and at least

some time off on the weekends. Both Citigroup and JP Morgan have recently implemented a “Protected Weekend” day on which employees may not come into the office or log on remotely to work. They may however monitor their emails in case any critical issues arise. We’ll keep you updated on developments in this area as data begins to accumulate on the policy’s effectiveness. The companies that are implementing this have cited as their reason better work /life balance, a benefit that is known to appeal to younger workers.

Although currently this practice seems limited to certain industries like banking, the goal of better work/ life balance has increasingly gained in popularity and across industries, as attested by such practices as tele-commuting, flex time and job sharing.