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EMPLOYMENT LAW UPDATE

SEPTEMBER 20, 2018

A LexMundi Member

- Effective **September 1, 2018**, a new statute, C.R.S. § 6-1-713.5, imposes obligations on employers regarding documents containing personal information of Colorado residents.

- The statute requires a covered entity to:
 - Maintain reasonable security procedures and practices;
 - Establish and follow a written policy for the destruction of personal information when it is no longer needed;
 - Ensure that third-party service providers handling personal information have implemented and maintained reasonable security measures and practices; and
 - Follow notification procedures when it becomes aware that a security breach may have occurred.

- A “covered entity” is any individual or entity that maintains, owns, or licenses personal identifying information.
- “Personal identifying information” is defined as:
 - A social security number;
 - A personal identification number;
 - A password;
 - A passcode;
 - An official state or government-issued driver’s license or identification card number;
 - A government passport number;
 - Biometric data;
 - An employer, student, or military identification number; or
 - A financial transaction device.

- Reasonable security procedures and practices:
 - Should be sufficient to protect against unauthorized access, use, modification, disclosure, or destruction of personal identifying information.
 - Should take into account the nature of the information and the nature and size of the business.

- Third-party service providers also must have reasonable security measures.
- Such providers are defined as any entity that has contracted to maintain, store, or process personal identifying information on behalf of a covered entity, including, without limitation:
 - Payroll providers;
 - Background check companies; and
 - Professional employment organizations.

- Destruction:
 - Hard copy and electronic documents containing personal identifying information must be destroyed by making it unreadable or completely indecipherable.
 - Destruction must be required by a written policy specifying destruction procedures.
 - Employment documents generally should be kept for at least three (3) years after an employee's separation from employment.

- A “security breach” is the unauthorized acquisition of unencrypted computerized data that compromises the security, confidentiality, or integrity of personal information.
- Within thirty (30) days of becoming aware that a security breach may have occurred, an employer must:
 - Notify affected Colorado residents by mail, telephone, electronically, or by substituted notice.
 - Include in the notice specific information about the breach and available options.
 - Notify the Colorado Attorney General if the breach affects 500 or more Colorado residents.

- Sanctions:
 - Enforcement proceedings from the Colorado Attorney General or Colorado District Attorneys.
 - Civil penalties of up to \$2,000 per affected person up to a maximum of \$500,000 per incident.
 - Civil lawsuits by affected persons to recover damages associated with the breach.

- Steps to take:
 - Develop and implement a written policy including:
 - Practices for protecting personal information;
 - Destruction procedures; and
 - A security breach response plan with notification requirements.
 - Review existing agreements or enter into new agreements with third-party service providers to make sure they have procedures in place to protect personal information.

- Arguments for arbitration agreements:
 - Faster than traditional litigation.
 - Less expensive than traditional litigation.
 - Reasonable and educated finder of fact.
 - Avoid the dangers of run-away jury awards.

- Realities of arbitration:
 - Not much faster than traditional litigation.
 - Just as expensive as traditional litigation.
 - Avoiding dangers of jury awards can be accomplished with a clear and conspicuous jury waiver provision.

- *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018) held that:
 - Contracts requiring individualized arbitration of employment-related disputes are enforceable.
 - In other words, a mandatory arbitration agreement may prohibit an employee from pursuing a class or collective action.

ARBITRATION AGREEMENTS

- The decision came up in the context of the National Labor Relations Act, but it applies more broadly, including to actions under the Fair Labor Standards Act.
- This means that employers have a mechanism to avoid the costly, and often employee-favorable, standards and procedures in FLSA collective actions.

- It's important to be aware that some economies of a collective action will be lost with a collective action waiver; specifically, an employer may be put in a position of having to defend multiple arbitrations, rather than a single action covering all employees.

- The opinion does not address whether right to bring collective/class actions may be waived absent an agreement to arbitrate.
 - The Sixth Circuit has refused to enforce a waiver of FLSA collective action rights.
 - The Second, Fifth, and Eleventh Circuits have held that FLSA does not preclude waivers of collective action rights.
 - The Tenth Circuit has not addressed the issue.

WAGE AND HOUR UPDATE: INDIVIDUAL LIABILITY UNDER WAGE ACT

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- Under the Colorado Wage Act, C.R.S. § 8-4-101, *et seq.*, a corporation's officers and agents are generally not liable for unpaid wages. *See Leonard v. McMorris*, 63 P.3d 323 (Colo. 2003).

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- *Paradine v. Goei*, No. 16CA1909 (Colo. App. Apr. 19, 2018): Corporate veil may be pierced to impose individual liability under Wage Act.
- Some of the factors for veil piercing:
 - Use of corporate funds to pay for personal expenses
 - Commingling corporate and personal funds
 - Disregard of corporate formalities
 - Inadequate recordkeeping of transactions
 - Undercapitalization of business

WAGE AND HOUR UPDATE: RECENT DOL OPINION LETTERS

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- Compensability of frequent rest breaks required by serious health condition
 - Under FLSA, breaks of up to 20 minutes are generally compensable because they benefit the employer.
- WHD Opinion Letter FLSA2018-19 (Apr. 12, 2018):
 - Extra 15-minute breaks for employee with serious health condition are not compensable because they are intended to accommodate employee and thus do not benefit employer.
 - But employees receiving FMLA-protected breaks must receive as many compensable rest breaks as their coworkers.

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- **Compensability of travel time under FLSA**
 - Time commuting to/from work is not compensable even if employee works at different job sites.
 - Exception: Travel time to first job site is extraordinary. WHD Opinion Letter, 1999 WL 1002360, at *2 (Jan. 29, 1999).
 - But travel from job site to job site during the workday is compensable.

WAGE AND HOUR UPDATE: RECENT DOL OPINION LETTERS

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- Travel away from home community
 - Always compensable if employee is working during travel. 29 C.F.R. § 785.41.
 - Also compensable when it cuts across regular workday. 29 C.F.R. § 785.39.
- WHD Opinion Letter FLSA2018-18 (Apr. 12, 2018)
 - How does an employer know if travel time is compensable when the employee *has no regular workday*? Various methods:
 - If time records during most recent month of regular employment reveal typical work hours, these can be considered normal working hours going forward absent a subsequent material change in circumstances;
 - Use average start and end times of workday; or
 - In rare cases, employer and employee may negotiate and agree to a reasonable amount of time/timeframe in which travel outside home community is compensable.

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- Common FLSA overtime exemptions:
 - White collar exemptions
 - Executive
 - Administrative
 - Professional
 - Outside sales
 - Computer
 - Highly compensated employee exemption

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- Retail or service establishment exemption applies where (29 U.S.C. § 207(i)):
 - Employee works for a “retail or service establishment”
 - Employee’s regular rate of pay > 1.5x minimum wage
 - More than half of employee’s earnings in a representative period are “commissions”

WAGE AND HOUR UPDATE: RECENT DOL OPINION LETTERS

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- What is a “retail or service establishment”?
 - Employer “engages in the making of sales of goods or services”;
 - 75% of sales of goods and services, or both, are recognized as “retail” in the particular industry; and
 - No more than 25% of sales of goods or services, or both, are sales for resale.

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- WHD Opinion Letter FLSA2018-21 (Aug. 28, 2018)
 - Sales of “goods or services” can be to commercial entities; need not be to individual consumers
 - No physical location necessary
 - Sales can still be “retail” even if purchasers use product to serve their own customers

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- Takeaways:
 - Review timekeeping practices for non-exempt employees who may be at risk of working uncompensated time
 - Exemptions are not always intuitive
 - Review exempt/non-exempt classifications periodically

PROTECTING EMPLOYER CONFIDENTIAL INFORMATION

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- Many different types of confidential information
- Protecting confidential information during employment relationship
- What to do upon separation of employment
- When litigation becomes necessary

THANK YOU FOR ATTENDING

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