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LEGAL NOTES

INFORMATION FOR OUR BUSINESS AND CORPORATE CLIENTS

IN THIS ISSUE

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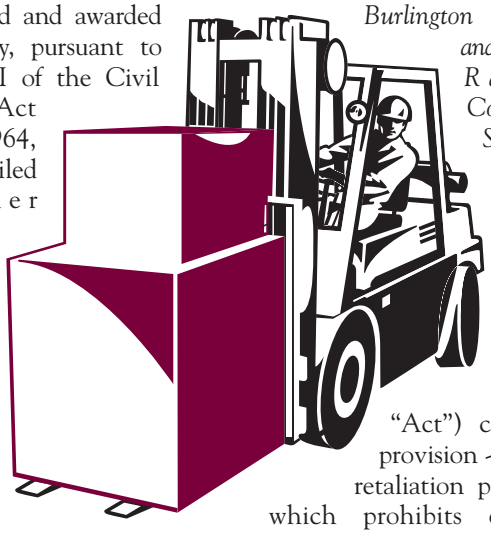
Wishing all of our Clients and Friends a Happy Holiday Season and Prosperous New Year!

AN EMPLOYEE REINSTATED WITH BACK PAY CAN STILL PURSUE A RETALIATION CLAIM

Sheila White, a track laborer for the Burlington Northern and Santa Fe Railway Company, was the only female employer at her worksite in Tennessee. Shortly after she was assigned forklift duty, the more prestigious tasks of a track laborer, White complained to Burlington officials that her immediate supervisor had made insulting and inappropriate remarks about women to her and in front of her male co-workers. White's immediate supervisor was disciplined for this conduct but, White was removed from forklift duty and reassigned the less prestigious and more arduous tasks of a track laborer. Effectively, Burlington demoted White.

White filed a complaint with the Equal Employment Opportunity Commission (the "EEOC") claiming that the reassignment was done in retaliation for her complaints against her immediate supervisor. After she filed this complaint, White was suspended, without pay, for a disagreement with another supervisor. White then invoked the company's internal grievance procedure. At the grievance hearing, White testified that the suspension, loss of income and uncertainty as to her future employment had caused her emotional distress which necessitated medical treatment. White won, but not before she lost 37 days of work and pay. After she was reinstated and awarded back pay, pursuant to Title VII of the Civil Rights Act of 1964, White filed another retaliation claim with the EEOC based on the suspension. White's cases were appealed to and heard by the United States Supreme Court in the *Burlington Northern and Santa Fe Railway Company v. Sheila White* matter.



Title VII of the Civil Rights Act of 1964 (the "Act") contains a provision - the anti-retaliation provision - which prohibits employers from discriminating, retaliating

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THE NEW PENNSYLVANIA UNIFORM TRUST ACT MAY AFFECT YOUR ESTATE

On July 7, 2006, Governor Rendell signed the Pennsylvania Uniform Trust Act ("UTA") which is a complete codification of Pennsylvania's law of trusts. The UTA is effective on November 6, 2006, and is modeled on the Uniform Trust Code which has been enacted in several other states.

The UTA is, for the most part, a restatement of current trust law in Pennsylvania; however, there are new notice requirements and changes in trustee liability that will impact both trustees and beneficiaries. Also, among the statutes more substantial enhancements is to place revocable trusts, often referred to as "living trusts", and Wills on the same level playing field. The UTA will govern the creation, interpretation and modification of trusts, non-judicial settlement of trust issues and change of situs and governing law questions. Additionally, the UTA establishes a methodology for creditor claims against trusts.

NOTICE PROVISION CHANGES

One of the more substantive changes includes the notice provisions. The UTA requires trustees to give notice of the existence of an irrevocable trust to any beneficiary over age 25 who currently may be entitled to receive income or principal. The notice must disclose the following: (i) the fact of the trust's existence; (ii) the identity of the settlor; (iii) contact information for the trustees; and (iv) a statement of the beneficiary's right to receive a copy of the trust and some form of annual report.

This requirement is similar to estate administration requirements regarding notice of an interest in an estate. However, certain trusts are exempt from this requirement. For instance, if the trust is revocable, notice is not required. Also, for any trust where the person who created the trust (the settlor) is still living and has not been declared incapacitated, notice is not required. Once the person who created the trust dies and the trust becomes irrevocable, notice must then be provided within 30 days. Additionally, some events such as a change of trustee will require notice.

OTHER CHANGES FOR TRUSTEES, SETTLORS, BENEFICIARIES

The UTA provides a greater protection from liability for a trustee's administration of a trust. Under the UTA, trustees may be relieved of liability for the administration of trust by providing certain annual reports to the beneficiaries. The UTA also provides statutory guidance concerning an individual's capacity to write a trust and the time period for contesting formation of the trust. The UTA provides a mechanism for creditors to reach the assets of the revocable trust at the death of the settlor and provides limitations for claims against the trust assets.

The same legislation that enacted the UTA also repealed the Pennsylvania Rule Against Perpetuities for all interests created after December 31, 2006. The practical effect is that for those who wish to create a long term trust that may extend for many generations, one does not need to go to another jurisdiction, such as Delaware, which had previously repealed this Rule.

The UTA answers many questions and codifies many general rules that related to trust interpretation. However, it has created additional rules and guidelines that will affect both settlors, trustees and beneficiaries in the future.

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SUPREME COURT TO REVISIT PUNITIVE DAMAGE LIMITS

Three years ago, the U.S. Supreme Court appeared to put an end to runaway punitive damage awards in a case called State Farm v. Campbell. A Utah jury had awarded punitive damages of $145 million against the carrier in an insurance bad faith case. The trial judge reduced the actual damages to $1 million, while upholding the $145 million punitive damage award. The case went to Utah's Supreme Court, which upheld this 145 to 1 punitive damage to actual damage ratio.

The U.S. Supreme Court took the case and found that such an award violated federal due process. The Supreme Court told the state and federal courts that punitive damages should rarely be greater than a single digit ratio of the actual damages.

At the same time, the Supreme Court set aside a number of other lower court decisions upholding punitive damage awards, that were sitting on the Supreme Court's docket. Without specifically ruling on those cases, the High Court sent those cases back to the lower courts; telling those courts to re-evaluate the large punitive damage awards in light of Campbell.

One of those cases was an Oregon decision, Williams v. Philip Morris, Inc. After going back to trial in Utah, a punitive damage award 97 times greater than actual damages was rendered. This was reduced at trial, but ultimately reinstated by Oregon's Supreme Court, despite what the U.S. Supreme Court said in Campbell.

The Oregon Court did not ignore the U.S. Supreme Court in permitting a nearly 100 to 1 punitive damage award. Instead, it looked to other principles to get around Campbell's apparent limitations. It relied on two principles to override Campbell's due process limitations. First, it found that the defendant's conduct was highly reprehensible and analogous to a crime; and second, it found that this criminal-like conduct created similar effects on other parties. These two findings were then used to override the due process principles that the Supreme Court otherwise imposed to restrain a judge or jury.

The Supreme Court recently decided to hear this Oregon case to decide whether these two principles can supplement a punitive damage analysis, or whether they have been improperly thrown into the mix to evade constitutional due process. Based on past performance, it seems likely the Supreme Court will once more tighten the clamps on punitive damages award; but all who face this potential risk should remember to challenge punitive damages at every level on the basis that the two Oregon principles should not be considered.

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TECHNOLOGY AND THE COURTROOM: FEDERAL COURTS ENACT RULES TO GOVERN "E-DISCOVERY"

Several amendments to the federal rules of civil procedure will go into effect in December 2006. These new rules will impact upon how electronic discovery is conducted and impose sanctions for failure to comply with them.

Written material in electronic form that can be discovered include e-mails, databases and websites, network servers, storage on a hard drive, deleted data on a hard drive, magnetic disaster recovery tapes and off line storage. Electronic data may also be retained in the memories of printers, facsimile machines, scanners and copy machines. Information may also be recovered on a computer, even if the user did not intend to save it.

DEVELOP A CONSISTENT POLICY

To avoid sanctions under the new rules, companies must review their document retention policy for both tangible and electronic documents. A consistent policy must be developed to include what is being stored, where it is being stored and how long it is being stored. This policy may in part be based upon any statutes or regulations applicable to your trade, government regulation or other industry practices.

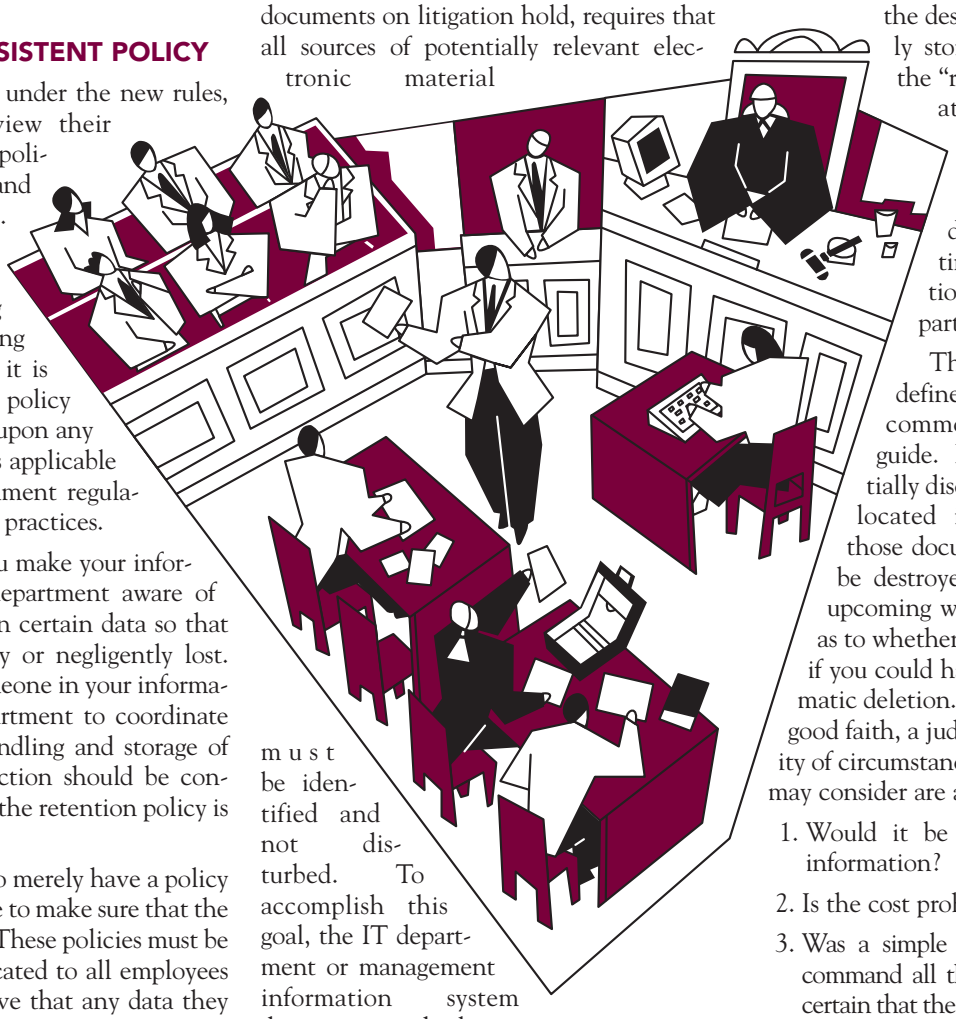
It is crucial that you make your information technology department aware of its obligation to retain certain data so that it is not intentionally or negligently lost. You should assign someone in your information technology department to coordinate and supervise the handling and storage of data. Periodic inspection should be conducted to ensure that the retention policy is being followed.

It is not sufficient to merely have a policy and a person in charge to make sure that the policies are enacted. These policies must be adequately communicated to all employees to make them sensitive that any data they create may be discoverable and also subject to the document retention protocol.

RE-EVALUATE YOUR POLICY

This policy should be re-evaluated periodically to make certain that data is not only being maintained in the normal course of business but that it is also being deleted in the normal course of business. Additionally, you should follow up with your attorney to make certain that new developments have not placed new requirements on your document retention policy.

Your policy, of course, may need to be suspended if there is potential for litigation. Once you have been sued, it is advisable to place a "litigation hold" on all electronic documents. If you believe that a lawsuit is a distinct possibility, it is also advisable to place a litigation hold on all electronic documents. This policy of placing electronic documents on litigation hold, requires that all sources of potentially relevant electronic material must be identified and not disturbed. To accomplish this goal, the IT department or management information system department and other persons involved in electronic discovery should be immediately notified.



KEEP YOUR LAWYER INVOLVED

Your lawyer should be fully involved in this process. Allow your lawyer the opportunity to interview key people so that he or she can provide you with insight into which material may be potentially discoverable. Once that assessment is made, you need to determine the steps to be taken to make certain that the information is retrieved and preserved. Furthermore, records must be provided to show the cost or potential cost for retrieval which may be an important factor in the court determining which party bears the expense.

One of the federal rules that goes in effect in December 2006 provides that the court will not impose sanctions upon a party for the destruction of electronically stored information due to the "routine, good-faith operation of an electronic information system." If electronic information is lost or destroyed due to the normal routine operations, no sanctions will be imposed if a party acted in good faith.

The term good faith is not defined in the rule. However, common sense will be the guide. If you know that potentially discoverable information is located in your database and those documents are scheduled to be destroyed automatically in the upcoming weeks, an issue may arise as to whether you acted in good-faith if you could have prevented the automatic deletion. In determining what is good faith, a judge will review the totality of circumstances. Factors that a judge may consider are as follows:

1. Would it be difficult to retain the information?
2. Is the cost prohibitive?
3. Was a simple change in the database command all that was needed to make certain that the information was not lost?

Ultimately, the new rules will provide a basis for avoiding sanctions when proper procedures are followed. Please consult with your lawyer to make certain that you are aware of the new rules and the procedures you must take to preserve evidence.

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AN EMPLOYEE REINSTATED WITH BACK PAY

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against their employees or job applicants. Under the Act, it is improper for an employer to discipline an employee for filing charges under, assisting with or participating in Title VII proceedings or investigations. Its purpose is to allow employees the freedom to file complaints when they feel their employers have violated the Act.

The Supreme Court found that, although neither of Burlington's acts ultimately affected the terms, conditions and/or status of White's employment, as her job description did not change and the suspension was overturned, Burlington's actions constituted retaliatory conduct prohibited by the Act. Under the circumstances, the Court found that demoting White and suspending her without pay violated the anti-retaliation provision because those actions would have deferred a reasonable employee from making a discrimination claim.

The Supreme Court's ruling emphasizes that it is the employer's conduct, not the actual consequences, that the anti-retaliation provision is designed to address. For example, although Burlington's internal grievance procedure worked (White won and was restored to her position with back pay), the Supreme Court found that Burlington had violated the Act. The Supreme Court held that, when Burlington suspended White for filing an EEOC Complaint, it sent a message that an employee's exercise of her rights under the Act could have a chilling effect on her employment status. The Supreme Court rejected arguments that its ruling would encourage employees to make claims based on petty slights, minor annoyances and/or personality conflicts - all common work place occurrences. Because the ruling requires that the employer's acts be sufficiently harmful to dissuade the employee from pursuing or supporting a discrimination claim, the Court felt that employers were adequately protected.

This decision, which has been characterized as "employee friendly", will likely lead to more retaliation based claims, particularly in jurisdictions served by our firm, where the Courts have traditionally applied more "employer friendly" standards.

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NEW BLOG DETAILS PENNSYLVANIA "BAD FAITH" CASES

Fineman, Krekstein & Harris has created a new blog, pabadfaithlaw.com, providing an up-to-date summary of cases on Pennsylvania insurance bad faith law. This blog was created because of our long experience in litigating coverage and bad faith cases in Pennsylvania. In addition to litigating these claims, we maintain an ongoing understanding of the case law shaping our cases, and new developments in this ever-expanding field of law.

In constantly trying to keep our clients on top of this area of the law, we will be posting ongoing updates of bad faith case law in Pennsylvania. We intend to post new cases throughout each month, and invite you to return frequently to read of these developments at www.pabadfaithlaw.com. Please feel free to take a look any time, and to become a subscriber if you wish to receive notices of new developments.

And, as you will see from our blog's "Links of Note," we have brought our expertise to public and client seminars, and to written materials covering a wide range of bad faith topics. We invite you to read these links for an even deeper understanding of this area of law.

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