STRATEGIES TO PROTECT YOUR BUSINESS

THURSDAY, SEPTEMBER 20, 2018

Embassy Suites at Cleveland Rockside

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Agenda

- Welcome/Opening Remarks
- #MeToo
- Wage & Hour Claims

Break

- Cyber Security

Lunch

- Panel: Cyber Strategies

September 20, 2018

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#You Too: The Impact of #MeToo on Sexual Harassment Claims

Tami Z. Hannon
Partner

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HISTORY OF #METOO

Alyssa Milano
@Alyssa_Milano
Follow

If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

Me too.

Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."

4:21 PM - 15 Oct 2017

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#HERTOO

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BY THE NUMBERS

- **Facebook reports that 45% of users had a friend that posted #MeToo.**
- **Percent of women that report being harassed?**
  - Most comprehensive study
  - Restaurant environments – 37% of complaints filed with EEOC
  - Legal profession
- **Percent of men that reported hearing sexist comments?**
- **Percent of women that report harassment internally?**

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- **Harassment**
  - 28% reported unwanted sexual advances
  - 50 – 60% of harassment concerned making inappropriate comments or trying to discuss sex
  - 50% report occurring 5 or more times

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Employee complained a male coworker made sexual jokes and comments, and showed sexually inappropriate pictures to her and other female employees. Employee reported the events, but the employer failed to respond. When left unchecked, the behavior escalated to unwanted touching. The employee continued to complain and was subject to what she perceived as retaliation. After sending an email to corporate office complaining of her treatment, she was fired.

Jury awarded $300,000 in compensatory damages and $1.75 million in punitive damages.

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JURY AWARDS

- **March 2, 2018 - $13.4 million awarded by New York jury against Domino's Sugar**
  - $11.7 million represented punitive damages
- **March 8, 2018 - $2.6 million awarded by California jury**
  - "We're glad it didn't happen to a woman."
- **April 5, 2018 - $3 million awarded to LAPD officer**
- **November 14, 2017 - $1 verdict against university researcher**
  - $300,000 attorney's fees
  - "Preventing sexual harassment to enable broad participation of all genders in the workforce is an important public goal."

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WHAT DOES THIS MEAN FOR EMPLOYERS?

- **Americans favor zero tolerance of sexual harassment – 87%**
  - 78% of women now say that they are more likely to speak up
  - 77% of men now say that they are more likely to speak up
- **Jury Make-up**
  - Typical jury – 8 people, about half women
  - 40-60% - 2 women who have been harassed
  - 45% - 4 who know someone that has been harassed

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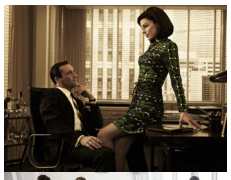
CULTURAL SHIFT



Powerful Men
Vs.
Work should be about work.

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WHAT DO JURIES EXPECT?

- **Fair procedures to uncover the truth**
  - Accessible reporting methods
- **Employee to be placed on leave or at least separated**
- **Investigation**
- **Standard credibility evaluation**
- **Appropriate discipline**
  - Not automatic termination
  - Discipline of **all** employees involved
- **Policy**
- **Training of employees**

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POLICY EXPECTATIONS

- Clear and simple explanation of conduct with examples
- Retaliation protections
- Clear process with multiple reporting avenues
- Assurances of confidentiality
- Process for prompt, thorough and impartial investigation
- Prompt and proportionate corrective action
- Respond to behavior that can rise to level of harassment if left unchecked

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Navigating Wage & Hour Class and Collective Actions

Doug Holthus
Partner

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REMEMBER:

"The nine most terrifying words in the English language are: 'I'm from the government and I'm here to help.'"

- Ronald Reagan

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CONSIDER:

- **2017:**
  - **Top ten wage & hour claim (suit) settlements**
    - **approx. $525M**
  - ***Second*-highest figure in the last decade.**
- **2016:**
  - **Wage & hour claims represented the single largest employment practices-related insurance exposure.**
  - **8,308 FLSA private lawsuits were filed around the country.**
  - **Exclusive of State A.G. and Fed. DOJ enforcement actions.**
  - **Top 10:**
    - **Approx. $695M.**
- **2002:**
  - ***Only* 2,035 such suits were filed.**

Sources: Marsh & McClennan Companies; 2017 International Risk Management Institute, Inc

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FLSA APPLIES TO:

- **More than 135 million workers**
- **In more than 7 million workplaces**
- **Violations:**
  - Enforced by the Wage and Hour Division of the U.S. Department of Labor
  - State Attys; General
  - Private Suits (Atty. Fee Awards)

- **Source: U.S. Dept. Of Labor; "Fact Sheet"**

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ENTERPRISE & INDIVIDUAL COVERAGE

- **Two principal coverages under the FLSA:**
  - **1. "Enterprise"**
    - **Enterprise as a whole is covered, and all workers are protected.**
      - **Two (2) or more employees.**
      - **Not less than $500,000 annual gross revenue.**
  - **2. "Individual"**
    - **Enterprise as a whole is not covered, but certain individuals / categories of workers may be.**
      - **Focus = the individual employee's activities.**
      - **Applies on basis of "workweek".**

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INDIVIDUAL COVERAGE: APPLICATION

- **Applies to:**
  - **Any worker engaged in *"interstate commerce"*, including:**
    - **Out of state telephone calls / telemarketing.**
    - **Interstate email, etc. communications.**
    - **Ordering / receiving goods or services from vendors in other states.**
    - **Credit card, banking, etc. transactions.**
  - **Domestic services.**
  - **Home health care.**
  - **Etc.…**

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ENTERPRISE COVERAGE:
Non-Profit Organizations

Generally exempt.
However:

* **Exemption applies only to *charitable* activities.**
  * **Fund Raising.**
  * **Speaking Engagements.**
  * **Etc.**
* **If activity is performed for *business* purpose, FLSA likely applies:**
  * **THINK: office staff, etc.**

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"Exempt" vs. "Covered / Non-Exempt" Employees

- **THINK: Hourly workforce.**
  - **Federal Minimum Wage must be paid to all covered, non-exempt employees, "in cash or its equivalent".**
  - **Includes employees in private industry as well as government workforce.**
  - **"Workweek" hours worked must be accurately tracked / recorded.**
  - **"Workweek" overtime hours must be properly tracked, recorded:**
    - **And paid, in the regular pay-period.**

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"However beautiful the strategy, you should occasionally look at the results."

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"EXEMPT" VS. "COVERED / NON-EXEMPT" EMPLOYEES

"Compensation" includes:

1. Wages.
2. Commissions.
3. Bonuses.
4. Tips / eligible employees. (* Where employer takes a "tip credit".)
5. "Reasonable Cost" of room / board provided by the employer.
   - * lodging is regularly provided by the employer.
   - * employee voluntarily accepts the accommodations.
   - * lodging is provided principally for employee's benefit.
   - * employer keeps accurate records of the incurred costs.
   - * lodging complies with other app. federal / state laws.

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"HOURS WORKED" / "WORKWEEK" / "WORKDAY"

- **"Hours Worked" - ordinarily includes "*all the time during which an employee is required to be on the employer's premises, on duty, or at a prescribed workplace.*" 29 C.F.R. § 778.223.**
- **"Workweek" - ordinarily includes "*all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place.*"**
- **"Workday" - in general, means *"the period between the time on any particular day when such employee commences his/her 'principal activity' and the time on that day at which he/she ceases such principal activity or activities.*"**
  - **Any given "workday" may, consequently, be longer than the employee's scheduled shift, hours, tour of duty, or production line time.**
- **To determine if an employee surpasses the 40-hour overtime threshold, an *"employer must total all the hours worked by the employee for him in that workweek."* 29 C.F.R. §778.103.**
  - **"Hours Worked" includes *"all time during which an employee is suffered or permitted to work whether or not he is required to do so."* 29 C.F.R. § 778.223.**
  - **The FSLA defines the term "employ" as meaning "to suffer or permit to work."**

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"HOURS WORKED" / "WORKWEEK" / "WORKDAY"

- **However, the FLSA does not define "work."** ***Musch v. Domtar Indus., Inc.*****, 587 F.3d 857, 859 (7th Cir. 2009).**
- **U.S. Sup.Ct. has "clarified that 'exertion' was not in fact necessary for an activity to constitute 'work' under the FLSA" and that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." Id. (quoting** ***Armour & Co. v. Wantock*****, 323 U.S. 126, 133 (1944)).**
  - **Two years later (1946) the Court "defined 'the statutory workweek' to 'includ[e] all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace.'" Id. (quoting** ***Anderson v. Mt. Clemens Pottery Co.*****, 328 U.S. 680.**
    - **Majority view: "[b]y definition, 'work' is performed not for the employee's 'convenience,' but for the employer's benefit."** ***Kellar v. Summit Seating Inc.*****, 664 F.3d 169, 176 (7th Cir. 2011).**

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The "Continuous Workday Rule"

- **Under the "Continuous Workday Rule":**
  - ***… "workers must be compensated for time they spend doing what might otherwise be non-compensable activities if those activities occur during the 'period between commencement and completion on the same workday of an employee's principal activity or activities,' subject to FLSA carve outs."***
    - ***Mitchell v. JCG Indus., Inc.*****, 753 F.3d 695, 696 (7th Cir. 2014) (Williams, J., dissenting from denial of rehearing** ***en banc*****; emphasis added.)**
  - **The term "'principal activity or activities' . . . embraces all activities which are 'an integral and indispensable part of the (employee's) principal activities.'" IBP, 546 U.S. at 21 (quoting** ***Steiner v. Mitchell*****, 350 U.S. 247, 256 (1956); emphasis added).**

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The "Continuous Workday Rule" (CONT.)

- **Under the "Continuous Workday Rule":**
  - **Courts often consider three factors to determine whether an employee's activity is integral and indispensable and thus a "principal activity":**
    1. **Whether the activity is required by the employer;**
    2. **Whether the activity is necessary for the employee to perform his or her duties;** ***and***
    3. **Whether the activity primarily benefits the employer.**

Franklin v. Kellogg Co.**, 619 F.3d 604, 620 (6th Cir. 2010);** ***Harvey v. AB Electrolux*****, 9 F. Supp. 3d 950, 969 (N.D. Iowa 2014);** ***Ceja-Corona v. CVS Pharmacy, Inc.*****, 2013 WL 796649, at *3 (E.D. Cal. Mar. 4, 2013);** ***Adams v. Alcoa, Inc.*****, 822 F. Supp. 2d 156, 162 (N.D.N.Y. 2011).**

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OVERTIME / TIME + 1/2

The FLSA requires an employer who employs an employee "for a workweek longer than forty hours" to pay that employee "compensation for his employment in excess of" 40 hours "at a rate not less than one and one-half times the regular rate at which he is employed."

* 29 U.S.C. § 207(a)(1).

* An employee's "Regular Rate is *calculated "by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid."*

* 29 C.F.R. § 778.109.

* The FLSA defines "regular rate" to include - subject to some exclusions - "all remuneration for employment paid to, or on behalf of, the employee."

* 29 U.S.C. § 207(e) (emphasis added).

* *Chavez v. City of Albuquerque*, 630 F.3d 1300, 1305 (10th Cir., 2011) ("The regular rate may include more than just an employee's contractually-designated hourly wage if the employee is, in fact, paid more than that hourly wage.") (Emphasis added.)

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OVERTIME (CONT.)

- All remuneration that is not encompassed by an exclusion must be included when calculating the regular rate.
  - 29 C.F.R. § 778.200
  - It is important to determine the scope of these exclusions, since all remuneration for employment paid to employees which does not fall within one of the various exclusionary clauses must be added into the total compensation received by the employee before her/his regular hourly rate of pay is determined.
- Relative to commuting wage claims:
  - Even payments for hours spent traveling to and from a workplace that *"are not regarded as working time under the [FLSA]"* must be included in the regular rate unless an exclusion applies.
  - 29 C.F.R. § 778.223.
  - *Excludes* normal commuting times (to / from work.)
  - Travel within the workday *is* compensable; even as overtime.

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OVERTIME (CONT.)

A *few* examples of the "exceptions" under FSLA 207(e)(2) / corresponding Code Sections.

- Excluded: "*payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause.*"
  29 U.S.C. § 207(e)(2).
- Excluded: failure to provide work because of *"unpredictable obstacles beyond [the employer's] control."*
  29 C.F.R. § 778.218(c).
- Excluded: *"other similar causes", but this covers only "payments made for periods of absence" when those absences are "of a non-routine character which are infrequent or sporadic or unpredictable."*
  29 C.F.R. § 778.218(d).
- Excluded: *"reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer" as well as "other similar payments to an employee which are not made as compensation for his hours of employment."*
  29 U.S.C. § 207(e)(2).

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OVERTIME (CONT.)

- **FSLA compliance is determined by the employee's "Workweek"**
  - **FSLA "Workweek"**
    - **Seven (7) consecutive days / 24 hour periods of time.**
    - **This equals 178 consecutive hrs.**
  - **FSLA "Regular Rate" calculation:**

Total "Workweek" earnings
(* exclusive of overtime)
÷
Total Hours worked

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"WHITE COLLAR" EXCEPTION

- **Consider:**
  - **Is employee's primary function one of management of entire enterprise or a particular department?**
  - **Does employee customarily direct the work of two (2) or more other employees?**
  - **Does the employee have the authority to hire, fire, promote or otherwise change another employee's status?**
  - **Does the employee own / control at least 20% of the enterprise?**
  - **Does the employee actively engage in management / managerial decisions?**
  - **Is the employee permitted to exercise managerial discretion?**
  - **Are the employee's typical job functions: tax, legal, audit, QC, HR/Benefits, IT Dept. Admin., advertising / marketing (research), etc.**

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TYPICAL "WHITE COLLAR" EXEMPTED:

- **Lawyers**
- **Physicians**
- ***Registered* Nurses**
- **Registered or Certified Medical Techs.**
- **Dental Hygienists**
- **Certified Phys. Assistants**
- **Chefs**
- **Teachers**
- **Accountants**
- **Pharmacists**
- **Actuaries**
- **Licensed funeral directors**
- **Embalmers**
- ***Certified* Athletic Trainers**
- **Musicians, composers, Graphic Artists, actors, novelists/writers *who select their own subject material***

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NON-EXEMPT

- ***Some* examples:**
  - *Licensed Practical* Nurses
  - Paralegals / Legal Assistants
  - Engineering Techs
  - Accounting Clerks
  - Bookkeepers
  - Cooks
  - IT Techs

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WAITING TIME

- **Waiting Time = "Hours Worked" when:**
  - Employee is unable to use the time for her/his own benefit; *or*
  - The "waiting time" is controlled by the employer.
- **Waiting Time ≠ "Hours Worked" when:**
  - Employee is completely relieved of any obligation to employer.
    - "Break Times": these are *not* compensable for that portion of any sufficient time for employee to pursue his/her own purpose.

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EMPLOYER RECORD-KEEPING:

Employers must also keep the following accurate time and pay records, although no particular form or formatting is required:

*** Employee's full name, social security number and address with zip code.**
*** Employee's birth date, if younger than age 19 yrs.**
*** Employee's sex and occupation.**
*** Employee's time and day of week when employee's workweek begins.**
*** Employee's hours worked each day.**
*** Employee's total hours worked each "workweek".**
*** A record / document establishing the basis upon which the employee's wages are paid (e.g., "$9 per hour", "$440 a week", "piecework")**
*** A record / document establishing the employee's regular hourly pay rate.**
*** A record / document showing the employee's total daily or weekly straight-time earnings.**
*** A record / document showing the employee's total overtime earnings for any "workweek."**
*** A record / document showing all additions to or deductions from the employee's wages.**
*** A record / document showing the total wages paid to the employee each pay period.**
*** A record / document identifying the date(s) of payment to the employee and the pay period covered by the payment.**

It is recommended, *at a minimum*, that such records be maintained for a period of five (5) years.

These records can be maintained at the employer's office or off-site, at any location where the employer's other business records are routinely and regularly maintained.

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REST / MEAL PERIODS

- ***Generally*, not part of "Hours Worked":**

1. **Short rest periods - generally, twenty (20) minutes or less - are to be included within "Hours Worked."**
2. **Legitimate meal times - generally, thirty (30) minutes or more - *need not be* included within the "Hours Worked" calculation.**

*** HOWEVER - during such periods, the employee must be completely relieved of her/his work responsibilities.**

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CYBERSECURITY EURO-STYLE

THE GDPR AND THE U.S. RESPONSE

Barry Miller
Partner

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WHAT IS THE GDPR

- **G**eneral **D**ata **P**rotection **R**ule
  - a/k/a Regulation (EU) 2016/679
- **Single standard for data controllers and processors**
- **Focuses on protection of data and breach notification**

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CURRENT U.S. APPROACH

- **Ad hoc**
  - Federal agencies govern data in their area
    - HHS governs HIPAA (OCR enforces)
    - FTC governs banking and credit
- **States' focus – breach notification**
  - All 50 states now have notification laws

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CURRENT U.S. APPROACH (OHIO)

- **Ohio statute passed in June, effective Nov. 2**
  - Safe harbor defense in suits for data breach
  - Defense available if the business creates a plan that "reasonably conforms" to one of eight cybersecurity frameworks
    - NIST Cybersecurity Framework
    - Security requirements of HIPAA, HI-TECH, etc.

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CURRENT U.S. APPROACH

- **Who owns the data?**
  - Data aggregators believe they own it
- **Is there any such thing as too much data?**
  - Most aggregators think not
- **What can I do with the data?**
  - Most aggregators think anything short of disclosure

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GDPR v. U.S. APPROACH

- **Single-source comprehensive data regulation**
- **The "data subject" owns the data**
  - And mostly controls how the data can be used, having the ability to withdraw consent
- **"Privacy by design" (as little data as possible)**
- **Opt-in to processing v. Opt-out**
- **Breach prevention emphasized**

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DO I HAVE TO WORRY ABOUT THE GDPR

- **Applies to data processers/controllers**
  - Who provide "goods and services"
  - Who collect "personal data" of a EU resident, OR of a person who is in the EU at the time of collection, regardless of whether data is held or processed in EU

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DO I HAVE TO WORRY ABOUT THE GDPR

- **Requires those covered to "implement appropriate technical and organizational measures to ensure and to be able to demonstrate that processing is performed in accordance with the Regulation."**
  - In other words: "have a data protection plan."

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DO I HAVE TO WORRY ABOUT THE GDPR

- **Requires those covered to "implement appropriate technical and organizational measures to ensure and to be able to demonstrate that processing is performed in accordance with the Regulation."**
  - In other words: "have a data protection plan."
  - And your plan better include third party vendors.

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REVIEW

- **Do you actively market goods or services in the EU, and collect data from EU residents?**
- **Do you have a client who actively markets goods or services in the EU, and collects data from EU residents?**
- **If either answer is "yes," then you may have to worry about the GDPR.**

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CALIFORNIA CONSUMER PRIVACY ACT (2018)

- **Tracks the EU GDPR in many ways, including:**
  - A broader definition of "personal data" than is in general use in the U.S.
  - Requiring businesses to implement opt-in rather than opt-out for their consumers

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NY DFS CYBERSECURITY REGULATION (2017)

- **Banks, insurers, and other financial service providers doing business in NY**
- **Imposes minimum standards for**
  - Data protection and encryption
  - Access controls
  - Penetration testing
  - Funding your cybersecurity program
  - Preparing incident response plans

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NY DFS CYBERSECURITY REGULATION (2017)

- **Requirements re Third Party Vendors (TPVs)**
  - Assess cyber risks of all TPVs
  - TPVs must meet minimum cybersecurity standards
  - Due diligence in evaluating TPV cyber practices
  - Regular continued assessment of TPV readiness

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CALIFORNIA CONSUMER PRIVACY ACT (2018)

- **Tracks the EU GDPR in many ways, including:**
  - A broader definition of "personal data" than is in general use in the U.S.
  - Requiring businesses to implement opt-in rather than opt-out for their consumers

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REVIEW

- **Do you do business with EU residents, financial institutions in New York, or with California residents?**
- **Do you do business with someone who does business in these jurisdictions? Each of them reaches third party vendors.**
- **Do you do business with someone who does business with someone who does business…?**

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U.S. PUSHBACK?

- **U.S. Chamber Privacy Principles (Sept. 6, 2018)**
  - Calls for a "Nationwide Privacy Framework" that pre-empts state law
  - Relates privacy protections to "benefits provided and risks presented" by data
  - Encourages "Privacy Innovation"
  - Encourages "Flexibility" in privacy law/regulation

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U.S. PUSHBACK?

- **Chamber principles do not address:**
  - Who owns the data?
  - Opt-in v. opt-out
  - Can consent be withdrawn?

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SO WHERE DOES THAT LEAVE ME?

- **No clear appetite to support Chamber approach**
- **European approach, as reflected in New York and California, appears to be gaining steam**
- **European approach encourages many things that are part of a good data security plan**
  - Especially in Ohio, under the Safe Harbor Law
  - Implementing such a plan will likely comply with any law based on the Chamber principles

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SO WHERE DOES THAT LEAVE ME?

- **Time to start thinking about your data plan**
  - What data you need?
  - What data you need to keep?
  - Where your data is kept?
  - Is your data encrypted?
  - Who can access your data?
  - What do you do if your data is breached?

N. Hanacek/NIST

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THURSDAY, SEPTEMBER 20, 2018
Embassy Suites at Cleveland Rockside

Navigating Wage & Hour Class and Collective Actions

An Introduction

I. Miscellaneous.

The FLSA applies to *non-exempt* employees working in both the private and public *(federal, state and local governments and their respective political subdivisions)* sectors.[1]

The FSLA covers and applies to all employees *(with certain limited exceptions)* working for public and private sector employers "engaged" in interstate commerce *"producing goods for interstate commerce, or handling, selling, or otherwise working on goods or materials that have been moved in or produced for such commerce by any person"*.

The FSLA refers repeatedly to "covered enterprises" and includes within the definition any *"related activities performed through unified operation or common control by any person or persons for a common business purpose* ***and (1)*** *whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated);* ***or (2)*** *is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill who reside on the premises; a school for mentally or physically disabled or gifted children; a preschool, an elementary or secondary school, or an institution of higher education (whether operated for profit or not for profit);* ***or (3)*** *is an activity of a public agency"*..

Employees of organizations which are not covered enterprises under the FLSA still may be subject to FSLA minimum wage, overtime pay, recordkeeping, and child labor provisions *if* they are individually engaged in interstate commerce or in the production of goods for interstate commerce, or in any closely-related process or occupation directly essential to such production.

- As is suggested by the Wage & Hour Div., *"Such employees include those who: work in communications or transportation; regularly use the mails, telephones, or telegraph for interstate communication, or keep records of interstate transactions; handle, ship, or receive goods moving in interstate commerce; regularly cross State lines in the course of employment; or work for independent employers who contract to do clerical, custodial,*

[1] The following information is summarized from the U.S. Dept. of Labor, Wage & Hour Division web portal.

maintenance, or other work for firms engaged in interstate commerce or in the production of goods for interstate commerce."

The FSLA also provides that "*domestic service workers such as day workers, housekeepers, chauffeurs, cooks, or full-time babysitters are covered* ***if: (1)*** *their cash wages from one employer in a calendar year are at least $*_____ (this calendar year threshold is adjusted by the Social Security Administration on an annual basis)*; or (2) if they work a total of more than 8 hours a week for one or more employers."*

The FSLA establishes minimum standards relative to the following employment categories:

- **Minimum Wage.**
    - While the federal government will establish a minimum wage, the various states are free to legislate any greater amount.
    - In those states an employee is subject to both state and federal minimum wage laws, the employee is entitled to the higher minimum wage.
- **Overtime Pay.**
    - Covered *nonexempt* employees must receive overtime pay for hours worked over forty (40) per workweek (any fixed and regularly recurring period of 168 hours — seven consecutive 24-hour periods) at a rate not less than one and one-half times the regular rate of pay.
    - There is no limit on the number of hours employees 16 yrs. or older may work in any "workweek".
    - The FLSA does not require overtime pay for work on weekends, holidays, or regular days of rest, unless overtime is worked on such days.
    - An employee's "workweek" for these purposes need not coincide with a calendar week. Rather, the "workweek" may begin on *any* day and at *any* hour of the day.
    - An employer may establish varying "workweeks" for different employees or groups of employees.
    - *Generally* speaking, the FSLA obligates an employer to pay overtime pay earned in a particular "workweek" on the regular pay day for the pay period in which the employee's regular and overtime wages were earned.
- **Hours Worked.**

- For purposes of the FSLA, "hours worked" ordinarily *"include all the time during which an employee is required to be on the employer's premises, on duty, or at a prescribed workplace."*

- Under the FSLA, the "workweek" also ordinarily includes "*all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place."*

- "Workday", in general, means *"the period between the time on any particular day when such employee commences his/her 'principal activity' and the time on that day at which he/she ceases such principal activity or activities."*[2]

    - Any given "workday" may, consequently, be longer than the employee's scheduled shift, hours, tour of duty, or production line time.

- To determine if an employee surpasses the 40-hour overtime threshold, an "employer must total all the hours worked by the employee for him in that workweek." 29 C.F.R. §778.103.

- The term "hours worked" includes "all time during which an employee is suffered or permitted to work whether or not he is required to do so." 29 C.F.R. § 778.223.

- The FSLA defines the term "employ" as meaning "*to suffer or permit to work."*

- However, the FLSA does not define "work." *Musch v. Domtar Indus., Inc*., 587 F.3d 857, 859 (7th Cir. 2009).

- Regardless, the U.S. Supreme Court has provided significant guidance:

    - In 1944, the Supreme Court "described 'work or employment' as 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.'" *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005) (quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)).

    - Later the same year., the Court "clarified that 'exertion' was not in fact necessary for an activity to constitute 'work' under the FLSA" and that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." Id. (quoting *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944)).

[2] There has been, historically, much litigation relative to the phrase "principal activity".

- Two years later (1946) the Court "defined 'the statutory workweek' to 'includ[e] all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace.'" Id. (quoting *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680.

- As noted before, "hours worked" also includes "[a]ll time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace." 29 C.F.R. § 778.223.

- The Seventh and other Circuits have noted that, in light of these Supreme Court decisions, "[b]y definition, 'work' is performed not for the employee's 'convenience,' but for the employer's benefit." *Kellar v. Summit Seating Inc*., 664 F.3d 169, 176 (7th Cir. 2011).

- The "Continuous Workday Rule":

  - Under the "Continuous Workday Rule" … "workers must be compensated for time they spend doing what might otherwise be non-compensable activities <u>if those activities occur during the 'period between commencement and completion on the same workday of an employee's principal activity or activities,' subject to FLSA carve outs</u>." *Mitchell v. JCG Indus., Inc*., 753 F.3d 695, 696 (7th Cir. 2014) (Williams, J., dissenting from denial of rehearing *en banc*; emphasis added.)

  - The term "'principal activity or activities' . . . embraces all activities which are 'an integral and indispensable part of the (employee's) principal activities.'" IBP, 546 U.S. at 21 (quoting *Steiner v. Mit*chell, 350 U.S. 247, 256 (1956)). Courts often consider three factors to determine whether an employee's activity is integral and indispensable and thus a "principal activity":

    - whether the activity is required by the employer;

    - whether the activity is necessary for the employee to perform his or her duties; **<u>and</u>**

    - whether the activity primarily benefits <u>the employer</u>. *Franklin v. Kellogg Co*., 619 F.3d 604, 620 (6th Cir. 2010); *Harvey v. AB Electrolux*, 9 F. Supp. 3d 950, 969 (N.D. Iowa 2014); *Ceja-Corona v. CVS Pharmacy, Inc*., 2013 WL 796649, at *3 (E.D. Cal. Mar. 4, 2013); *Adams v. Alcoa, Inc.*, 822 F. Supp. 2d 156, 162 (N.D.N.Y. 2011).

- **Overtime:**

  - The FLSA requires an employer who employs an employee "for a workweek longer than forty hours" to pay that employee "compensation for his employment in excess of" 40 hours "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).

  - An employee's regular rate is calculated "by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. § 778.109.

  - The FLSA defines "regular rate" to include, subject to some exclusions, "all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. § 207(e) (emphasis added); see also *Chavez v. City of Albuquerque*, 630 F.3d 1300, 1305 (10th Cir. 2011) ("The regular rate may include more than just an employee's contractually-designated hourly wage if the employee is, in fact, paid more than that hourly wage.").

  - All remuneration that is not encompassed by an exclusion must be included when calculating the regular rate. 29 C.F.R. § 778.200 ("It is important to determine the scope of these exclusions, since all remuneration for employment paid to employees which does not fall within one of these seven exclusionary clauses must be added into the total compensation received by the employee before his regular hourly rate of pay is determined.").
  - Relative to commuting wage claims, even payments for hours spent traveling to and from a workplace that "are not regarded as working time under the [FLSA]" must be included in the regular rate unless an exclusion applies. 29 C.F.R. § 778.223.

  - Examples of the "exceptions" under FSLA Section 207(e)(2): and the corresponding Code Sections.

    - <u>Excluded</u>: "payments made for occasional periods when no work is performed due to vacation,

holiday, illness, failure of the employer to provide sufficient work, or other similar cause." 29 U.S.C. § 207(e)(2).

- Excluded: failure to provide work because of "unpredictable obstacles beyond [the employer's] control." 29 C.F.R. § 778.218(c).

- Excluded: "other similar causes", but this covers only "payments made for periods of absence" when those absences are "of a nonrountine character which are infrequent or sporadic or unpredictable." 29 C.F.R. § 778.218(d).

- Excluded: "reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer" as well as "other similar payments to an employee which are not made as compensation for his hours of employment." 29 U.S.C. § 207(e)(2).

- **Employer Recordkeeping.**

  - Employers must display an official poster (no cost; provided by / available through local offices of the Wage and Hour Division of the Dept. of Labor) outlining the requirements of the FLSA.

  - Employers must also keep the following *accurate* time and pay records, although no particular form or formatting is required:

    - Employee's full name, social security number and address with zip code.
    - Employee's birth date, if younger than age 19 yrs.
    - Employee's sex and occupation.
    - Employee's time and day of week when employee's workweek begins.
    - Employee's hours worked each day.

- Employee's total hours worked each "workweek".
- A record / document establishing the basis upon which the employee's wages are paid (e.g., "$9 per hour", "$440 a week", "piecework")
- A record / document establishing the employee's regular hourly pay rate.
- A record / document showing the employee's total daily or weekly straight-time earnings.
- A record / document showing the employee's total overtime earnings for any "workweek."
- A record / document showing all additions to or deductions from the employee's wages.
- A record / document showing the total wages paid to the employee each pay period.
- A record / document identifying the date(s) of payment to the employee and the pay period covered by the payment.

  - It is recommended, at a minimum, that such records be maintained for a period of five (5) years.

  - These records can be maintained at the employer's office or off-site, at any location where the employer's other business records are routinely and regularly maintained.

- **Youth employment standards (*aka* "Child Labor").**

  - As explained by the Wage & Hour Div., *"(T)hese provisions* (of the FSLA) *are designed to protect the educational opportunities of minors and prohibit their employment in jobs and under conditions detrimental to their health or well-being."*

  - There is an established federal minimum wage permitted for employees under 20 yrs. of age and which applies during their first ninety (90) *consecutive calendar days* of employment with an employer.

  - It must be noted that the FSLA expressly prohibits employers from taking any action to displace "older" employees in order to hire employees at the designated lesser / youth minimum wage.

  - The FSLA also expressly prohibits partial displacements of "older" workers in favor of younger employees … such as may be attempted through the reduction of an "older" employees' hours, wages, or other employment benefits.

II. Class and Collective Actions.

Seemingly with increased regularity, groups of employees are banding together in an effort to prosecute class or collective action litigation relative to the various minimum wage and overtime obligations imposed upon employers under the FSLA and the corresponding Regulations.

Such suits can also be of interest to the employment *(employee representation)* bar because when successful, the Act provides for payment, to the attorney representing the class - or collective - her/his attorney's fees and costs.

There is a distinction between "class" and "collective" actions. Section 216(b) of the FLSA provides that employees may bring a *collective* action on behalf of themselves and other 'similarly situated' employees against employers who violate the FSLA's minimum wage or overtime provisions." *Smallwood v. Illinois Bell Tel. Co.*, 710 F. Supp. 2d 746, 750 (N.D. Ill. 2010).

While the standards for both types of action have largely been merged, it is nevertheless true that a collective action under the FLSA differs from a *class* action certified under Federal Rule of Civil Procedure 23. See, e.g., *Flores v. Lifeway Foods, Inc*., 289 F. Supp. 2d 1042, 1044 (N.D. Ill. 2003); *Espenscheid v. DirectSat* USA, LLC, 705 F.3d 770, 772 (7th Cir. 2013).

Consequently, when a trial court is tasked with considering an employer's Motion to Decertify a collective action and a class action in one lawsuit, trial courts will generally treat them as a single class action and apply the Fed.R.Civ.P. standards. See e.g., *Dekeyser v. Tyssenkrupp Waupaca, Inc*., 860 F.3d 918, 920 (7th Cir. 2017).

Importantly; under Fed.R.Civ.P. 23(c)(1)(C), "[a]n order that grants or denies class certification may be altered or amended before final judgment." Thus, even in th event of an initial ruling granting certification, the trial court will remain "under a continuing obligation to review whether proceeding as a class action is appropriate." So, as discovery procees the employer can continually challenge any initial class or collective determination. *Shurland v. Bacci Cafe & Pizzeria on Ogden, Inc*., 271 F.R.D. 139, 142 (N.D. Ill. 2010) (quoting *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 419 (N.D. Ill. 2003)).

When the employer does move to decertify a class, the employer "bears the burden of producing a record demonstrating the continued propriety of maintaining the class action.'" *Farmer v. DirectSat* USA, LLC, 2013 WL 2457956, at *2 (N.D. Ill. June 6, 2013) (quoting *Ellis*, 217 F.R.D. at 419); see *also Jacks v. DirectSat USA, LLC*, 2015 WL 1087897, at *1 (N.D. Ill. Mar. 10, 2015).

A. Plaintiffs' Burden / Class Action Certifiction.

A group of allegedly aggrieved employees seeking class certification must first prove that the purported / requested class meets the four requirements of Fed.R.Civ.P.23(a) **and** at least one of the three alternatives provided in Rule 23(b).

In this regard, Fed.R.Civ.P.23(a) requires the following elements be established: (1) "numerosity", (2) "typicality", (3) commonality, and (4) "adequacy of representation."

- "Numerosity": the petitioning party / claiming employees must establish a sufficient number of potentially impacted employees, such that individual suits would be inefficient and impose an undue burden on the court and the parties.

- "Typicality": the petitioning party / claiming employees must establish that the designated class representative's claims and damages are "typical" of all other presumptive class members.

  Under Fed.R.Civ.P.23(b)(3), certification is proper when questions of law or fact common to the members of the proposed class predominate over questions affecting only individual class members, and a class action is superior to other methods of resolving the controversy.

  See *Boelk v. AT&T Teleholdings, Inc*., No. 12-cv-440-bbc, 2013 WL 261265, at *10 (W.D. Wis. Jan. 10, 2013). Where the court refused to certify wage and hour class claims brought by cable technicians); *Clausman v. Nortel Networks, Inc*., 2003 WL 21314065 (S.D. Ind. May 1, 2003) (withdrawing conditional certification and denying certification going forward because determining liability would require individual factual inquiry into each member's circumstances).

  The "commonality" and "typicality" requirements do not mean that the proposed class members have merely "all suffered a violation of the same provision of law." *Wal-Mart Stores v. Dukes*, 131 S.Ct. 2541, 2551 (2011). Rather, "the claims of a class must depend upon a common contention, and that common contention must be capable of classwide resolution." *Elder v. Comcast Corp*., No. 12 C 1157, 2015 WL 3475968, at *6 (N.D. Ill. June 1, 2015).

- "Commonality": the petitioning party / claiming employees must establish that the designated class representative's claims, and the claims of all others sought to be joined to the class, are common.

  Generally speaking and as to this third requirement, certification will be deemed proper "when the plaintiffs' primary goal is not monetary relief, but rather to require the defendant to do or not do something that would benefit the whole class." *Chicago Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chicago*, 797 F.3d 426, 441 (7th Cir. 2015).

  Without evidence of continuity, plaintiff's claims cannot be considered collectively. *Bayles v. Amer. Medical Response of Colorado, Inc*., 950 F.Supp. 1053 (D. Colo. 1996) (decertifying collective action of hourly employees where "each plaintiff's proof of violation will be individualized because it depends on how or whether Defendant's policy was implemented by individual managers with regard to individual plaintiffs, not what the policy was.")

"Where an FLSA case turns on actual practice – as opposed to corporate policy – courts have held that the case, by definition, involves individualized claims that do not lend themselves to collective action treatment." *See Dawkins v. GMAC Insurance Mgmt. Corp*., 2005 WL 3729931 (M.D. Fla. June 2, 2005) (denying plaintiffs' motion to certify FLSA claims); *see also Espenscheid v. DirectSat USA, LLC*, No. 09-cv-625 bbc, 2011 WL 2009967, at *7 (W.D. Wis. May 23, 2011), *aff'd* 705 F.3d 770 (7th Cir. 2013) ("At a high level of generality, the opt-in plaintiffs and class members perform similar job duties and are subject to the same corporate policies. But in terms of individual experiences, the evidence shows that opt-in plaintiffs and class members have different work experiences and were affected by defendants' policies in different ways.").

Class certification is not warranted when the trial court must evaluate jobsite-specific and worker-specific details because the individual questions dominate any potential common questions. *See Bolden v. Walsh Constr*., 688 F.3d 893, 895 (7th Cir. 2012); *see also Smith v. Family Video Movie Club Inc*., No. 11 CV 1773, 2013 WL 1628176, at *6 (N.D. Ill. Apr. 15, 2013) (no companywide policy to support commonality across multiple Illinois stores); *Elder v. Comcast Corp*., No. 12 C 1157, 2015 WL 3475968 (N.D. Ill. June 1, 2015) (when the alleged instructions that Plaintiff claims violated the FLSA varied by supervisor, the individual determinations the Court must make undermine the commonality requirement of Rule 23(a)(2)").

- "Adequacy of Representation": this requirement kind'a speaks for itself. It is generally given as granted by the trail court.

B. Motions to Decertify; Employer's Burden

When considering an employer's Motion to Decertify and thus evaluating whether plaintiffs have met their burden for certification under the FLSA, the trial court should consider: **(1)** whether the plaintiffs share similar or disparate factual and employment settings; **(2)** whether the various affirmative defenses available to the defendant would have to be individually applied to each plaintiff; **and (3)** fairness and procedural concerns. *Camilotes v. Resurrection Health Care Corp*., 286 F.R.D. 339, 345 (N.D. Ill. 2012).

"A class may be certified only if 'the trial court is satisfied, *after a rigorous analysis*' that the prerequisites of Rule 23(a) have been satisfied.'" *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 916 (7th Cir.2011) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550 (2011)). The Court "must make whatever factual and legal inquiries are necessary to ensure that requirements for class certification are satisfied before deciding whether a class should be certified, even if those consideration overlap the merits of the case." *American Honda Motor Co. v. Allen*, 600 F.3d 813, 815 (7th Cir.2010).

Ultimately, though, the trial court has "broad discretion to determine whether certification of a class-action lawsuit is appropriate." *Ervin v. OS Restaurant Servs*., Inc. 632 F.3d 971, 976 (7th Cir.2011) (international quotations and citations omitted).

Before evaluating whether a plaintiff has satisfied all of the Civ.R.Fed.P.23(a) requirements, the trial court must first determine whether plaintiff's proposed class is ascertainable. See *Quality Mgmt. & Consulting Servs., Inc. v. SAR Orland Food Inc*., No. 11 C 06791, 2013 WL 5835915, at *2 (N.D. Ill. Oct. 30, 2013) ("there is a 'definiteness' requirement implied in Rule 23(a)") (citations and quotations omitted)). Moreover, the plaintiff must demonstrate that the proposed class is "indeed identifiable as a class." See *Oshana v. Coca-Cola Co*., 472 F.3d 506, 513 (7th Cir. 2007).

This "definiteness" requirement serves two purposes: **(1)** "it alerts the parties and the Court to the burdens that identification of the class might entail, which is relevant to whether the proposed class action is manageable", **and (2)** "ascertaining a definite class ensures that the parties actually harmed by the defendants' conduct will be the recipients of the relief eventually awarded." *Quality Mgmt*., No. 11 C 06791, 2013 WL 5835915, at *2.

C. Insurance Coverages; Wage & Hour Claims.

According to at least one study, the top ten wage and hour claim (suit) settlements in 2017 totaled $525 million, representing the second-highest figure in the last decade.[3]

The year before (2016), wage and hour claims represented the single largest employment practices-related insurance exposure. In that year, a total of 8,308 FLSA lawsuits were filed around the country.

This is contrasted to 2002, when *only* 2,035 such suits were filed.

Also in 2016, the top ten private settlements in 2016 totaled approx. $695.5M. This figure represented a fifty percent (50%) increase over the preceding year (2105; $463.6M). And … these figures do not include defense costs/fees, state attorneys general claims, or claims brought by the Federal Dept. of Labor. [4]

Most every Commercial General liability ("CGL") and Employment Practices Liability Insurance (EPLI) policy forms contain language specifically *excluding* "wage and hour claims" from coverage. However, a "Wage & Hour Insurance Coverage Endorsement" may be underwritten by certain carriers. Such endorsements are typically attached to (EPLI) policy forms.

Generally speaking, because the risks and potential damages exposures (back-pay, penalty, interest, opposing counsel's fees/costs) associated with such claims is significant and the underwriting parameters so uncertain, such endorsements will typically only provide coverage for defense costs and attorneys' fees associated with defending claims … generally not exceeding $500,000.

In instances where coverage is made available for settlements or judgments, the indemnity limits available often are relatively minimal … from $100,000 to $500,000 (but in some instance policies are underwritten to $5M)..

[3] Marsh & McClennan Companies
[4] 2017 International Risk Management Institute, Inc

MRR ALERT

Ohio Safe Harbor for Cybersecurity Compliance Effective this November

By Chenee M. Castruita, Esq.

Ohio's incentive for businesses to actively create, maintain and comply with cybersecurity programs becomes effective November 2, 2018. Senate Bill 220, also known as the Data Protection Act, will amend Ohio Revised Code Sections 1306.1 and 3772.01 and enact Chapter 1354, and will encourage businesses to comply with an industry-recognized cybersecurity framework. Those who do, may use such compliance as an affirmative defense to any tort action arising out of an alleged failure to implement reasonable information security controls.

Personal and Restricted Information

The safe harbor defense is available not only for those actions based on an alleged breach of personal information, but restricted information as well. Personal information is defined as the connection of a person's name with another identifier such as their Social Security number, driver's license or state identification number, or a financial account number. Businesses are currently required to disclose data breaches involving personal information under O.R.C. § 1349.19.

Restricted information is much broader in that it includes "any information about an individual, other than personal information, that, alone or in combination with other information, can be used to distinguish or trace the individual's identity or that is linked or linkable to an individual". Consider information such as email addresses, member ID numbers, or PINs being released without any connection to the individual's name. The inclusion of restricted information in O.R.C. Chapter 1354 gives businesses an opportunity to demonstrate compliance even if the information affected is not of a nature which would trigger the disclosure requirements of O.R.C. § 1349.19.

Compliance Requirements

To be eligible for the affirmative defense, the cybersecurity program must 1) protect the security and confidentiality of the information; 2) protect against any anticipated threats or hazards to the security or integrity of the information; and 3) protect against unauthorized access to and acquisition of the information that is likely to result in a material risk of identity theft or other fraud to the individual to whom the information relates.

As this safe harbor provision is available to businesses of all sizes, Ohio legislators have recognized that a "one size fits all" approach is not appropriate when it comes to evaluating a cybersecurity program. Whether the scale and scope of a cybersecurity program is appropriate will depend on a number of factors, including the business's size and complexity, the nature and scope of its activities, the sensitivity of the information to be protected, the cost and availability of tools to improve information security and vulnerabilities, and the resources available to the business.

An eligible business will create, maintain, and comply with at least one of multiple frameworks identified in the legislation, including frameworks developed by the National Institute of Standards and Technology (NIST), the Center for Internet Security Controls for Effective Cyber Defense, the security requirements of HIPAA, and the Payment Card Industry Data Security Standard (PCI DSS).

These programs contain administrative, technical and physical safeguards as required under O.R.C. Chapter 1354. Administrative safeguards address security and information management, incident procedures, and contingency plans, among other items. Technical safeguards include controls on access, audits, and integrity. Finally, physical safeguards relate to who physically accesses the information and how the information is used.

A business complies with one of the identified frameworks so long as it updates its own program within one year of any revisions to the framework itself.

Implementation and Looking Forward

A compliant cybersecurity program will touch on every aspect of a business and should influence employee training, vendor selection and agreements, and top-to-bottom evaluation of access to information.

Vendors should be able to provide information as to their own cybersecurity measures and policies. Employees should be made aware of your cybersecurity program, and they should be trained in its procedures as much as they are in the day-to-day operations of your business. Finally, there should be an ongoing evaluation as to who should have necessary access to information, what kind of information they should be able to access, and when they should be able to access the information.

Generally, cybersecurity firms differ from IT firms, and as such businesses should feel comfortable having a conversation with their current IT vendors about their ability to assist in implementing and maintaining a cybersecurity program. It may be necessary to retain a cybersecurity firm.

It is important to note that the safe harbor only provides an affirmative defense-not an absolute immunity- to tort actions. This will not apply to actions arising out of breach of contract, and the business will still need to demonstrate its compliance with its chosen framework.

Also noteworthy is the legislation's allowance of transactions and contracts via blockchain technology, which allows transactions with cryptocurrencies such as Bitcoin to take place. While not all businesses are comfortable using these technologies, currencies like Bitcoin are increasing in use and popularity due in part to the ability to verify the legitimacy of the transaction. Ohio's Data Protection Act gives some peace of mind to businesses who have been hesitant to participate in blockchain technology.

Ohio's Data Protection Act encourages businesses to jumpstart their cybersecurity programs and provides them with the frameworks to do so. While there is certainly an up-front cost to implementing a cybersecurity program, the amount of data and privacy breaches in recent years makes it a worthwhile investment.

NIST Privacy Framework

An Enterprise Risk Management Tool

Why a Privacy Framework

The challenge

It is a challenge to design, operate, or use technologies in ways that are mindful of diverse privacy needs in an increasingly connected and complex environment. Inside and outside the U.S., there are multiplying visions for how to address these challenges.

Why good cybersecurity doesn't solve it all

While good cybersecurity practices help manage privacy risk by protecting people's information, privacy risks also can arise from how organizations collect, store, use, and share this information to meet their mission or business objective, as well as how individuals interact with products and services.

Addressing the privacy challenge

The U.S. Department of Commerce is developing a forward-thinking approach that supports innovation and strong consumer privacy protections. The National Institute of Standards and Technology (NIST) is leading the development of a voluntary privacy framework as an enterprise risk management tool for organizations while the National Telecommunications and Information Administration is leading the development of a set of privacy principles, and coordinating with the International Trade Administration to ensure consistency with international policy objectives.

What is the NIST Privacy Framework

- NIST aims to collaboratively develop the Privacy Framework as a voluntary, enterprise-level tool that could provide a catalog of privacy outcomes and approaches to help organizations prioritize strategies that create flexible and effective privacy protection solutions, and enable individuals to enjoy the benefits of innovative technologies with greater confidence and trust.
- It should assist organizations to better manage privacy risks within their diverse environments rather than prescribing the methods for managing privacy risk.
- The framework should also be compatible with and support organizations' ability to operate under applicable domestic and international legal or regulatory regimes.

NIST's Collaborative Process

- NIST has a long track record of successfully and collaboratively working with the private sector and federal agencies to develop guidelines and standards. With experience in developing the *Framework for Improving Critical Infrastructure Cybersecurity* (Cybersecurity Framework) and extensive privacy expertise, NIST is well positioned to lead the development of this framework.
- NIST will model the approach for this framework based on the successful, open, transparent, and collective approach used to develop the Cybersecurity Framework.
- NIST will convene and work with industry, civil society groups, academic institutions, Federal agencies, state, local, territorial, tribal, and foreign governments, standard-setting organizations, and others, conducting extensive outreach through a series of workshops and requests for public comment.

National Institute of Standards and Technology
U.S. Department of Commerce

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LEARN MORE | Visit www.nist.gov/privacyframework

U.S. CHAMBER PRIVACY PRINCIPLES

The United States Chamber of Commerce believes that consumers benefit from the responsible use of data. Technology and the data-driven economy serve as the twenty-first century's great democratizer by empowering and enabling increased access to educational, entrepreneurial, health care, and employment opportunities for all Americans.

Consumers have more options than ever when it comes to goods, services, information, and entertainment. Data-driven innovation and investment enable consumers to take advantage of faster, higher quality, and customized services at lower or no costs. This Fourth Industrial Revolution, relying on data and technology, requires policies that promote innovation, regulatory certainty, and respect for individual privacy and choice. Underpinning these efforts is a recognition that consumers must have assurance that data is safeguarded and used responsibly.

The Chamber offers the following principles to achieve this goal:

A NATIONWIDE PRIVACY FRAMEWORK

Consumers and businesses benefit when there is certainty and consistency with regard to regulations and enforcement of privacy protections. They lose when they have to navigate a confusing and inconsistent patchwork of state laws. While the United States already has a history of robust privacy protection, Congress should adopt a federal privacy framework that preempts state law on matters concerning data privacy in order to provide certainty and consistency to consumers and businesses alike.

PRIVACY PROTECTIONS SHOULD BE RISK-FOCUSED AND CONTEXTUAL

Privacy protections should be considered in light of the benefits provided and the risks presented by data. These protections should be based on the sensitivity of the data and informed by the purpose and context of its use and sharing. Likewise, data controls should match the risk associated with the data and be appropriate for the business environment in which it is used.

TRANSPARENCY

Businesses should be transparent about the collection, use, and sharing of consumer data and provide consumers with clear privacy notices that businesses will honor.

INDUSTRY NEUTRALITY

These principles apply to all industry sectors that handle consumer data and are not specific to any subset of industry sectors. These principles shall be applied consistently across all industry sectors.

U.S. CHAMBER PRIVACY PRINCIPLES

FLEXIBILITY

Technology evolves rapidly; laws and regulations should focus on achieving these privacy principles. Privacy laws and regulations should be flexible and not include mandates that require businesses to use specific technological solutions or other mechanisms to implement consumer protections. A federal privacy law should include safe harbors and other incentives to promote the development of adaptable, consumer-friendly privacy programs.

HARM-FOCUSED ENFORCEMENT

Enforcement provisions of a federal data privacy law should only apply where there is concrete harm to individuals.

ENFORCEMENT SHOULD PROMOTE EFFICIENT AND COLLABORATIVE COMPLIANCE

Consumers and businesses benefit when businesses invest their resources in compliance programs designed to protect individual privacy. Congress should encourage collaboration as opposed to an adversarial enforcement system. A reasonable opportunity for businesses to cure deficiencies in their privacy compliance practices before government takes punitive action would encourage greater transparency and cooperation between businesses and regulators. In order to facilitate this collaboration, a federal privacy framework should not create a private right of action for privacy enforcement, which would divert company resources to litigation that does not protect consumers. Enforcement authority for a federal privacy law should belong solely to the appropriate state or federal regulator.

INTERNATIONAL LEADERSHIP

Congress should adopt policies that promote the free flow of data across international borders for consumer benefit, economic growth and trade. A national privacy framework will bolster continued U.S. leadership internationally and facilitate interoperable cross-border data transfer frameworks.

ENCOURAGING PRIVACY INNOVATION

Incorporating privacy considerations into product and service design plays an important role and benefits all consumers. A national privacy framework should encourage stakeholders to recognize the importance of consumer privacy at every stage of the development of goods and services.

DATA SECURITY AND BREACH NOTIFICATION

As part of a national privacy framework, Congress should include risk-based data security and breach notification provisions that protect sensitive personal information pertaining to individuals. Keeping this information secure is a top industry priority. Security is different for individual businesses and one-size-fits-all approaches are not effective; therefore, companies should have flexibility in determining reasonable security practices. Preemptive federal data security and breach notification requirements would provide consumers with consistent protections and would also reduce the complexity and costs associated with the compliance and enforcement issues resulting from different laws in the 50 states and U.S. territories.