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ALERT

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THE TIMES THEY ARE A-CHANGIN'. . .
RECENT EMPLOYMENT LAW DEVELOPMENTS

Recent decisions from the Supreme Court, new United States Department of Labor ("DOL") regulations and New York State legislative changes will impact potential liability for New York employers.

Workplace Searches and Emerging Electronic Technologies

On June 17, 2010, the Supreme Court made its initial foray into defining the scope of employee privacy rights in electronic communications in *City of Ontario v. Quon*. Although the Court's decision directly applies only to governmental employers and their employees, language in the Court's decision is of broader application.

In *Quon*, the City of Ontario issued pagers to certain members of its police force pursuant to a policy that allowed "light personal communications," but also warned officers that they should not have any "expectation of privacy or confidentiality." Sergeant Quon used the pager to send and receive personal text messages which the City subsequently audited (via a third-party), and learned that many of Quon's messages were not work-related, and some were sexually explicit. Quon alleged that he was subsequently disciplined, and sued the City, alleging that the City's audit violated his rights under the Fourth Amendment to be free from unreasonable searches and seizures.

The Court determined that while Quon had a "limited privacy expectation, with boundaries that we need not here explore," the City's limited search was reasonable. The Court noted that a reasonable employer in the City's position would not have expected that its search of Sergeant Quon's text messages would reveal intimate details of Sergeant Quon's life. The Court decided to dispose of the case on narrow grounds, and stated that "employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated."

While the Court declined to speculate on the future development of the law regarding emerging communication technologies, public and private employers must anticipate and prepare for possible claims involving text messaging, social networking sites and other emerging and evolving technologies. Many employers are discussing, developing and revising workplace policies with a view towards limiting their exposure to legal liability.

Parental Rights of Same Sex Partners Under the FMLA

The DOL has recently clarified that same-sex couples may stand *in loco parentis* for purposes of the Family and Medical Leave Act (the "FMLA").

The FMLA entitles an eligible employee to take up to 12 workweeks of job-protected leave, in relevant part, because of the "birth or placement of a son or daughter" of the employee in order to care for such son or daughter. The definition of a "son or daughter" under the FMLA includes not only a biological or adopted child, but also a foster child,

stepchild, legal ward or a child of a person standing in *loco parentis*. The DOL interpreted that either the day-to-day care or financial support of a child may establish *in loco parentis* status, provided the employee intends to assume the responsibilities of a parent for that child. The DOL explained that each case must be evaluated on its particular facts.

Under the DOL's guidelines, it is conduct that determines *in loco parentis* status, not biology. Employees who have no legal or biological relationship with a child may nonetheless stand *in loco parentis*, and thereby have a legal right to FMLA leave, if they assume the responsibilities of a parent in the manner required by the regulations. The Wage and Hour Division of the DOL has stated that "an employee who will share equally in the raising of an adopted child with a same sex partner, but who does not have a legal relationship with the child, would be entitled to leave to bond with the child following placement, or to care for the child, if the child had a serious health condition, because the employee stands *in loco parentis* to the child."

Time Limitations for Cases Brought Under the New York State Human Rights Laws

It has been known since 1971 that an employer need not intend to discriminate to be held liable under Title VII. Such claims often allege that an employment practice falls more harshly on protected groups, even if not intended to do so. On May 24, 2010, the Supreme Court explained in *Lewis v. City of Chicago* that such "accidental" discrimination claims may be brought after the time to file an intentional discrimination claim has expired—perhaps years later, depending on the facts of the case. Responding to arguments that this result is anomalous, the Court explained:

> it is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted. By enacting [Title VII], Congress allowed claims to be brought against an employer who uses a practice that causes disparate impact, whatever the employer's motives and whether or not he has employed the same practice in the past. If that effect was unintended, it is a problem for Congress, not one that federal courts can fix.

Separate from the *Lewis* decision, in New York there is now a legislative initiative to expand the time where claimants can file any type of discrimination or retaliation claim under the New York State Human Rights Law, which has a 3-year limitations period. Under the current law, that time begins to run on the date of the alleged discriminatory conduct. However, a bill that has already passed both houses of the legislature is on the Governor's desk for signature, which would change the method by which that 3-year period is determined. Under the proposed bill, the 3-year period to bring a lawsuit would begin with the issuance of a dismissal for administrative convenience and not when the discriminatory acts occur.

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We can assist you in understanding and addressing these issues, including reviewing your policies concerning electronic communications, employee privacy rights and FMLA leave.

Moritt Hock Hamroff & Horowitz LLP is a broad based commercial law firm with 42 lawyers and a staff of paralegals. The firm has experience in commercial foreclosure; construction law; corporate, securities & financial services; creditors' rights & bankruptcy; employment & labor law; equipment & vehicle leasing; healthcare law; intellectual property, unfair competition & licensing; litigation; marketing & advertising law; not-for-profit law; real estate law; tax; and trusts & estates.

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