

# **Reaching for the Clouds: Issues for Employers in Cloud Computing**

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**Sponsored by Ogletree Deakins**

**Panelists:**

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# What Is Cloud Computing?

- National Institute of Standards and Technology, NIST defines cloud computing as:

**“A model for enabling convenient on-demand network access to a shared pool of configurable resources, for example, network servers, storage, applications and services that can be rapidly provisioned and released with minimal management effort or service provider interaction.”**

- The benefits of moving to the cloud include:
  - Companies can expand their resources in real time as customer demand for product increases
  - Inexpensively add resources
  - Enhanced mobility
  - Shared resources
  - Third parties contractually responsible for appropriate security

- The downsides of moving to the cloud include:
  - Less control over the management of the infrastructure
  - Less control over the data
  - Less control over where and how data is stored
  - Potential problems if third parties make mistakes
  - Hackers may see cloud providers as enticing targets
  - Level of trust in third party's security and reliability

## ■ Obligations for Cloud Users

### – Federal statutes

- ◆ ADA (Americans with Disabilities Act)
- ◆ GINA (Genetic Information Nondiscrimination Act)
- ◆ FMLA (Family Medical Leave Act)
- ◆ HIPAA (Health Insurance Portability and Accountability Act)
  - Healthcare providers
- ◆ Gramm-Leach-Bliley Act (aka Financial Services Modernization Act of 1999)
  - Financial institutions

### – Contracts with Third Parties May Impose Duties

- ◆ Customers
- ◆ Business partners

# Employee Privacy Considerations

- Are you going to store personnel and HR related information in the cloud?
- Examples of Sensitive Personal/Personnel Information
  - Personnel files (Addresses, SSNs, birth dates of employees and beneficiaries, I-9 forms)
  - Bank account numbers (direct deposit forms)
  - Credit and consumer investigative reports (background checks)
  - Payroll, tax, medical and benefits information
  - HR and Legal Dept. investigations (harassment, misconduct, etc.)
  - Confidentiality of Employee Medical Information
    - ◆ FMLA, ADA, GINA

# Privacy Considerations

- U.S. Supreme Court holds search of text messages was reasonable and did not violate the Fourth Amendment
  - *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010)
  
- Some decisions support employee privacy rights, including protection of attorney/client privilege
  - *Mason v. ILS Tech*, 2008 WL 731557 (W.D. N.C. 2008)
  - *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010)
  
- Some decisions reject employee expectations of privacy, including attorney/client communications
  - *Holmes v. Petrovich Devel. Co.*, 191 Cal. App. 4th 1047 (Cal. Ct. App. 2011)
  - *Scott v. Beth Israel Hospital*, 2007 WL 3053351 (N.Y. Ct. App. 2007)
  
- See Whitepaper for Discussion of Cases

## ■ What Establishes a Reasonable Expectation of Privacy?



## ■ Employer's Policy Critical

- All Systems and Data owned by Employer
- No Expectations of Privacy regardless of when/from where system accessed
- Right to Monitor and Search

# Security Considerations

- Encrypt the data prior to transmission to the provider, this may provide substantial additional protections, as long as the encryption keys are not available to the provider
- Strong password protection
- Physical security where servers are located
- Negotiate good agreements with cloud providers
- Require background checks for third-party IT administrators and others with access to personal data
- Confirm that cloud provider's employees are bonded or insured
- Require cloud providers to sign Non-Disclosure Agreements
- Negotiate indemnification and audit rights

## ■ Data Breach Notification Requirements

- Businesses that have personal information
  - ◆ Personal information includes, by statute, social security number, driver's license, account numbers, credit or debit numbers, along with passwords, medical information, health insurance information.
- Must disclose any breach of security
- Following discovery of the breach
- Whose 'unencrypted' data was or is *reasonably* believed to have been acquired by an unauthorized person

# Breach Notification Requirements

- Must be written in plain language
  
- Must include:
  - Name and contact information of reporting person or business
  - List types of personal information believed to have been breached
  - Estimated date(s) of breach
  - Whether notification was delayed because of law enforcement investigation
  - Description of breach
  - Toll free numbers of credit reporting agencies

## ■ Uniform Trade Secrets Act

- Trade Secrets are information that:
  - ◆ (1) derives economic value from not being generally known to or readily ascertainable by other persons;  
***and***
  - ◆ (2) is the subject of reasonable efforts to maintain its secrecy

# Trade Secrets: Reasonable Efforts to Maintain Secrecy

- What Constitutes Reasonable Efforts?
  - Case law undeveloped
  
- Suggestions for Maintaining Secrecy
  - Encryption
  - Being proactive
  - Contract provisions with your provider for damages for breaches
  - Maintain separate infrastructure but this adds costs, complexity
  
- Concerns
  - Sharing resources with competitors
  - U.S. Government is pushing cloud computing but is keeping its classified and sensitive data on its own infrastructure

# E-Discovery and the Cloud

- Data preservation, retention, and disposal obligations extend to data in the cloud
- Cloud users should incorporate cloud data into records retention policies, data maps, litigation holds, and disposal procedures
- May need to take special steps to ensure that data in the cloud, which may be continuously overwritten, is preserved
- If data is already subject to a litigation hold, potential users of the cloud should evaluate whether such data should be placed in the cloud in the first instance
- Cloud users may not even realize how many copies of their data exist in a cloud environment

- **Best Practices for Legal Departments:**
  - Research cloud providers and get references
  - Don't be afraid to negotiate provisions that are different than "form" contracts
    - ◆ Indemnification
    - ◆ Responsibility for notice in case of security breach
  - Create a business continuity plan



## ■ Best Practices for IT Department:

- “Must Have” Encryption and Passwords
- Flag efforts to bypass normal security parameters
- Create logs that aggregate and analyze suspicious patterns
- Constantly vet access of high level executives
- Give Network Administrators authority to browse web and read email to limit virus spread

## ■ Best Practices For Human Resources:

- Implement proactive policies
  - ◆ Monitoring of Employee use of Electronic Media
    - Social Media Policy
    - E-mail Policy
    - Internet Policy
  - ◆ Return of Employer property after termination
- Implement Employee agreements
  - ◆ Non-Disclosure and Trade Secret Agreements

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Tammy Brandt is the General Counsel and Corporate Secretary at ServiceMesh, Inc., a company that provides Agile IT governance, security, and lifecycle management software and services for Global 2000 customers. ServiceMesh helps customers deliver game changing competitive advantages by leveraging cloud-based, "everything-as-a-service" IT environments with its software package.

Prior to joining ServiceMesh, Ms. Brandt was Managing Counsel at Toyota Motor Sales, U.S.A. where she was the lead marketing lawyer for the Lexus, Toyota and Scion brands in North America and involved in numerous complex marketing-related transactions, corporate matters and support for the racing division.

Ms. Brandt previously worked as a corporate attorney at Jones Day and Sheppard Mullin Richter & Hampton LLP where she handled public and private acquisition transactions and related corporate and finance matters. She has extensive experience advising high growth technology companies on a broad range of legal issues.

Ms. Brandt earned a BA degree in Economics and Business Administration from Bluffton University, and a JD degree from the Notre Dame Law School where she was Managing Editor of the Notre Dame Law Review. After law school, Ms. Brandt clerked for the Honorable James L. Ryan on the United States Court of Appeals for the Sixth Circuit.

## Attorney Bio - Alec Hillbo

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### Alec Hillbo

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J.D., *with high distinction*, University of Iowa, 1998

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**Practice Areas:**

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\* Currently only licensed in Arizona.

Alec is expert in restrictive covenant and trade secret litigation. He helps employers pursue and defend against injunctive relief. Additionally, he helps evaluate the protection of trade secrets and confidential information. He also has experience in pursuing injunctive relief in FINRA proceedings.

### Admitted to Practice:

Arizona

U.S. Court of Appeals, Ninth Circuit

U.S. District Court, District of Arizona

### Honors and Awards:

- *Iowa Law Review*
- Clerkship: Honorable Robert M. Parker, United States Court of Appeals, Fifth Circuit
- Externship: Honorable Robert W. Pratt, United States District Court, Southern District of Iowa
- Order of the Coif
- Note and Comment Editor

## Attorney Bio - Alec Hillbo

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### Experience:

Alec represents clients in employment litigation in federal and state courts. Alec has significant repeat experience with injunctive relief matters involving restrictive covenants and trade secret issues. Alec has been involved in several dozen matters involving preliminary and permanent injunctive relief.

Alec provides counseling on numerous issues such as restrictive covenants, trade secrets, confidential information, disciplinary action, investigations, terminations, and manuals and policies.

Alec has handled matters under Title VII and the Americans with Disabilities Act. His experience extends to the defense of allegations of employment discrimination, retaliation, sexual harassment, and wrongful termination. He has an interest in the use of statistics and data to defend against claims of discrimination.

Alec has presented and written on a number of topics such as restrictive covenants in Arizona, the direct threat defense under the Americans with Disabilities Act, religious accommodations, Family and Medical Leave Act interference and retaliation, psychiatric and learning disabilities, and issue preclusion and agency decisions.

### Professional Activities:

- State Bar of Arizona (Labor and Employment and Appellate Sections)
- State Bar of Arizona (Executive Council, Labor and Employment Section)

### Published works:

- June 2011 - Phoenix Law Review - "Restrictive Covenants In Arizona"
- 2006 - Arizona Employment Law Handbook - "Issue Preclusion and Agency Decisions"

## Attorney Bio - Betsy Johnson

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### **Betsy Johnson**

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**Practice Areas:**

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Ms. Johnson she provides day-to-day advice and counsel to her clients on a broad spectrum of employment and labor relations issues; including state and federal wage and hour, employee compensation, employee leaves of absence, discrimination and harassment, performance management, and discipline and termination. Ms. Johnson assists employers in developing, drafting and implementing personnel policies and procedures and developing strategies for managing disability and employee leave of absence issues. She assists and represents employers in negotiating collective bargaining agreements and in grievance and arbitration proceedings.

Ms. Johnson conducts training for Human Resources professionals and supervisory employees on topics including: California AB 1875 Mandatory Harassment Training, Effective Hiring and Interviewing, Proactive Performance Management, Avoiding Discrimination, Harassment and Wrongful Termination Claims, and Managing Disability and Employee Leaves of Absence.

Ms. Johnson is a frequent speaker at trade and industry conferences, Chambers of Commerce meetings and Bar Association seminars.

### **Admitted to Practice:**

California

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U.S. Court of Appeals, Second and Ninth Circuits

U.S. District Court, Central, Eastern and Northern Districts of California

U.S. District Court, Eastern, Southern and Western Districts of New York

U.S. Tax Court



### Experience:

Ms. Johnson represents management before state and federal courts and administrative agencies in the hospitality, retail, construction, manufacturing and shipping industries. Ms. Johnson defends clients in class action litigation and single and multiple plaintiff litigation, and in administrative audits, charges and complaints. She represents clients before the California Division of Labor Standards Enforcement, the California Department of Fair Employment and Housing, the California Employment Development Department, the California Workers' Compensation Appeals Board, the California Division of Occupational Safety and Health, the Department of Labor Wage and Hour Division, the Equal Employment Opportunity Commission, and the National Labor Relations Board.

### Professional Activities:

- National Association of Women Lawyers
- SHRM Southern California Chapter
- PHIRA Los Angeles Chapter
- Culver City, CA Chamber of Commerce

### Speeches:

- Association for Conflict Resolution's 2011 Annual Conference - "Social Media Issues in the Workplace" - San Diego - October 12, 2011
- ALI-ABA Telephone Seminar and Audio Webcast - "Doing Business in California: How to Decipher California Labor and Employment Law" - September 13, 2011

### Media Quotes:

- August 30, 2011 - [Law360](#) - "Ogletree Deakins Nabs Epstein Employment Atty In LA"