308 Strolling Through the Minefield: Unknown Laws & the Things You Think You Know

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Before joining Ogletree Deakins, he co-founded the firm, Stanton Hughes, after having helped build a labor and employment practice at another prominent New Jersey firm.

He is an adjunct professor in Fairleigh Dickinson University's M.B.A. (for executives) program. In addition, he serves as a lecturer on employment law issues for ACC, the New Jersey Institute of Continuing Legal Education (ICLE), and is a contributing author of New Jersey Labor and Employment Law published by ICLE in cooperation with the New Jersey State Bar Association labor and employment section. He is a past member of the Sidney Reitman Employment Law American Inn of Court, and is past member of the John J. Gibbons American Inn of Court for intellectual property law.

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PROGRAM 308

STROLLING THROUGH THE MINEFIELD:
UNKNOWN LAWS AND THE THINGS YOU THINK YOU THINK YOU KNOW

I. INTRODUCTION

Companies are subject to an overwhelming number of statutes, regulations, ordinances, and other laws. Labor and employment laws are a significant part of the legal and regulatory scheme. Compliance is a full-time job and counsel has to work overtime just to keep up. This is especially true where large companies have multi-state operations, as the differences between state and federal, and between various states, can be pronounced.

There are a number of peculiar and little-known laws that can trip up employers. Some are state and some are federal. Some are local ordinances. Even with respect to better-known laws, like the federal Family & Medical Leave Act, there are regulations and court-decisions that can turn into a “gotcha!” situation for the company and for counsel.

This outline will highlight some of these legal landmines. Please note that the statutes, regulations, and cases cited below are only examples, and are not intended to be an exhaustive list of all the legal challenges an employer may face in the various jurisdictions in which it does business.

II. WHATEVER HAPPENED TO EMPLOYMENT AT WILL?

Remember when employment law used to be summed up as, “employees are terminable for good reason, bad reason, or no reason” as long as there is no discrimination? The “at will” doctrine has been under attack for 30 years. Most counsel

are aware of the major inroads: implied contract, "whistleblowing," and wrongful discharge. However, there are a number of laws that place further limitations on the employer's right to discharge. Puerto Rico goes the furthest, and requires that employees be discharged only for "good cause," as defined in the statute. Otherwise, the employer must pay severance according to a fixed schedule. 29 P.R. LAWS ANN. §185a and §185(b).

Other restrictions on the right to terminate are more subtle. Some of these are counter-intuitive, and may only apply in a few isolated states. They make it difficult to confidently promulgate and apply policies consistently across multi-state operations.

A. Criminal Convictions

Most employers know that you cannot base employment decisions on arrest records, and cannot even ask about them. In some states, though, one cannot fire, or refuse to hire, an individual because he or she has been *convicted* of a crime, unless the employer can show that the crime for which the individual was convicted somehow relates to the duties of the position. *See, e.g.,* N.Y. CORRECTIONS LAW §750 *et seq.;* 18 PA. CONS. STAT. §9125 *et seq.;* WASH. ADMIN. CODE §162-12-140; WIS. STAT. ANN. §111.335. California goes one step further and prohibits adverse action based on any marijuana-related communications that are more than two (2) years old. CAL. LABOR CODE §432.7.

B. Disclosing Wage Information

In several states, an employer cannot take action against an employee for disclosing or complaining about wages. Of course, this has long been true for non-supervisory employees under federal law, specifically, the National Labor Relations Act, because such conduct constitutes "concerted protected activity." 29 U.S.C. §157; NLRB v. Waco Insulation, 567 F.2d 596 (4th Cir. 1977). The state laws, however, apply to supervisory and non-supervisory employees alike. See, e.g., CAL. LABOR CODE §232; 820 ILL. COMP. STAT. 112/10; VT. STAT ANN., tit. 21, §495. Again, California goes the extra mile, and protects complaints about "working conditions" as well. *Id.*

C. Displaying the American Flag

Not to be outdone by anyone in the area of patriotism, in 2002 both New York and New Jersey made it unlawful to prohibit an employee from displaying the American flag, unless it interferes with business operations. N.J.S.A. §10:5-12.6; N.Y. LABOR LAW §215-c.

D. No No-Nepotism Policies

Two states, Colorado and Oregon, prohibit employers from refusing to hire, or taking adverse job action, against an individual because they have family relationships. COLO. REV. STAT. §24-34-402; OR. REV. STAT. §659A.309. There are some exceptions, notably, where the family member would have supervisory, appointment, or grievance adjustment authority over another family member.

E. Take a Look at Those Offer Letters

Some states' laws provide that description in an offer letter of a time-basis for computing wages, *e.g.*, "annual salary," is strong evidence of an intent that the employment will last at least that long, and be renewed for comparable periods. See, e.g., GA. CODE ANN. §34-7-1; MONT. CODE ANN. §39-2-602; SOUTH DAKOTA CODIFIED LAW §60-1-3.

F. Lawful Off-Duty Conduct

Want to fire an employee because she smokes? Or because she goes hang gliding? Sorry, but in several states employers are prohibited from taking adverse action because of employees' lawful off-duty conduct. Some of these laws protect only use of lawful "consumables," *i.e.*, tobacco and alcohol. 820 Ill. Comp. Stat. 55/5 and 55/15-55/20; N.J.S.A. §34:6B-1 *et seq.;* MISSOURI STAT. ANN. §290.145; NORTH CAROLINA G.S. §§95-28.2; OREGON R.S. §659.380. But other states' laws are broader, and prohibit the employer from disciplining or discharging an employee for any lawful off-duty conduct, as long as it does not materially interfere with the employee's duties. See, e.g., CAL. LABOR CODE §96(K); COLO. REV. STAT. 24-34-402.5; N.Y. LABOR LAW §201-d.

Connecticut prohibits employers from disciplining or discharging an employee for exercising rights protected by the First Amendment of the U.S. Constitution, so long as the exercise does not materially interfere with the employee's "bona fide job performance or the working relationship between the employee and the employer." CONN. GEN. STAT. §31-51q.

G. Discrimination Issues

Employers generally are familiar with the federal prohibitions on certain discrimination, specifically, race, sex, religion, age, national origin, disability, etc. Many states, however, provide for additional protected categories, or add wrinkles to the traditional areas of discrimination protection. These can result in liability for the employer.

1. Reverse Age Discrimination

Most people know that federal law prohibits age discrimination against employees 40 years and older. Age Discrimination In Employment Act, 29 U.S.C. §625 *et seq.* ("ADEA"). The Supreme Court has expressly held that the ADEA does not prohibit discrimination against younger workers in favor of older workers. *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004). Some states however, provide protection against age discrimination for all employees over the age of 18. Oregon, New Jersey and Michigan are examples. *See*, *Ogden v. Bureau of Labor*, 299 Or. 98, 699 P.2d. 189 (1985); *Bergen Community Bank v. Sisler*, 157 N.J. 188, 723 A.2d 944 (1999); *Zanni v. Medaphis Physician Services Corp.*, 240 Mich. App. 472, 612 N.W. 2d 845 (2000) appeal denied, 463 Mich. 879 (2000) (all holding that discrimination against a younger person in favor of an older person constitutes discrimination under state civil rights law). Think about that the next time you are reviewing the list of potential layoffs in RIF; are your numbers skewed too *young?*

2. Marital Status

Many states prohibit employers from discriminating on the basis of whether a person is married or unmarried. Neither status may be preferred. See, e.g., MICH. COMP. LAW §37.2202; N.Y. EXEC. LAW §296; 775 ILL. COM. STAT. 511-10; et seq. This can have unusual implications. In one New Jersey case, the employer terminated the employee because he was having an extramarital affair with another employee; however, other non-married employees had intimate relationships with co-workers and had not been disclosed. The Court held that this was discrimination on the basis of marital status. *Slohoda v. United Parcel Service, Inc.*, 193 N.J. Super. 586, 475 A.2d 618 (App. Div. 1984).

3. Sexual Orientation

Though it is not yet protected by federal law, a number of states prohibit discrimination on the basis of an individual's sexual or affectional preferences. CAL. GOV'T CODE §51 *et seq.;* CONN. GEN. STAT. §46A-81G; MINN. STAT. ANN. §363A; 775 ILL. COMP. STAT. 5/1-101 *et seq.;* N.Y. EXEC. LAW §296; WIS. STAT. ANN. 111.36(d).

4. Obesity

An employee's obesity can constitute a disability. MICH. COMP. LAWS. ANN. §37.2102 (prohibiting discrimination on the basis of height or weight, among other things. *Viscik v. Fowler Equipment Co., Inc.*, 173 N.J. 1, 800 A.2d 826 (2002); *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y. 2d 213, 480 N.E.2d 695 (1985); *Cassita v. Community Foods, Inc.*, 5 Cal. 4th 1050, 856 P.2d 1143 (1993); *Morrison v. Pinkerton, Inc.*, 7 S.W. 3d 851 (Tx. Ct. App. – 1st Dist. 1999). These cases generally hold that merely being overweight is not enough, instead, the employee must provide medical evidence that the excessive weight is the result of a psychological condition. S*ee also*, *Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997) (mere failure to meet employer's weight standard is not a disability). However, see the next section.

5. Differing Definitions of "Disabled"

Employers also need to be aware that several states' civil rights laws provide protection for physical and mental conditions that would not be serious enough to qualify as "disabilities" under the federal ADA. Under federal law, to qualify as a disability, the condition must be such that it substantially interferes with a major life function. State laws may not be so restrictive. *See, e.g., Failla v. City of Passaic*, 146 F.3d 149 (3d Cir. 1998) (affirming jury verdict for employee under the New Jersey Law Against Discrimination, even though the same jury found the employee was not "disabled" within the meaning of the ADA). *See also*, California Fair Employment and Housing Act, which specifically states that although the ADA "provides a floor of protection, this state's law has always, even prior to the passage of the federal act, afforded additional protections." CAL. GOV'T CODE, §12926.1(2).

III. LEAVES OF ABSENCE

Most companies are familiar with the obligations under the Federal Family & Medical Leave Act, 29 U.S.C. §2601. *et seq.* ("FMLA"), which require employers to provide eligible employees with up to twelve (12) workweeks of leave every 12 months for qualifying reasons. They often are chagrined to find, however, that the FMLA is not the end of the story, nor does it delimit the full extent of an employer's obligation to provide leave. Additional obligations may be imposed under various state laws, and even under the Americans With Disabilities Act, 42 U.S.C. §1201 *et seq.* ("ADA"). The eligibility requirements under state law can be significantly different, and more favorable to employees, then the FMLA.

A. Leave as a "Reasonable Accommodation" Under the ADA

The EEOC and many courts have held that allowing an employee to take a leave of absence may be a form of reasonable accommodation an employer must provide under the ADA. EEOC, *Guidance on Reasonable Accommodation Under the ADA*, Question No. 16 (March 1999); *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000); *Conoshenti v. PSE&G*, 364 F.3d 135 (3d. Cir. 2004); *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir. 2001) *cert. denied*, 535 U.S. 1011 (2002). Leave also may be available as a reasonable accommodation under state laws prohibiting

disability discrimination. *Williams v. GenenTech, Inc*.., 139 Cal. App. 4th 357, 42 Cal. Rptr. 3d 585 (1st Dist. 2006) *review filed* (June 15, 2006).

This reasonable accommodation leave may be required in addition to any leave to which the employee is entitled under the FMLA. 29 C.F.R. §825.702; *Rogers v. New York University*, 250 F.Supp. 2d 310 (S.D.N.Y. 2002) ("The FMLA's requirement of twelve weeks of leave does not establish as a matter of law that a leave longer than twelve weeks would not be a reasonable accommodation of a disability under the ADA").

B. State Leave Laws

1. Lower Eligibility Thresholds

Under the FMLA, to be eligible for qualifying leave, an employee must have been employed for at least twelve (12) months, must have worked 1250 or more hours in the twelve (12) months preceding the leave, and must work at a site with 50 or more employees within a 75 mile radius. Several states have lesser requirements. For example, under the Oregon Family Medical Leave Act, OR. REV. STAT. §659A.156, an employee is eligible after only 180 days, as long as they work 25 hours per week on average; employers of as few as 25 employees are eligible. (NOTE: Under the Oregon law, employees must be reinstated to their exact job, not merely a comparable one, which is the standard under the FMLA). Under New Jersey's Family Leave Act, N.J.S.A. 34:11B-1 *et seq.*, a worker must be employed for twelve (12) months, but need only have worked 1,000 hours in the year preceding the leave, and is eligible even if he is the only employee in the state. Rhode Island's Family Leave Act provides that employees are eligible after twelve (12) consecutive months of employment, with no minimum hours requirement. R.I. GEN. LAWS §28-48-2. Be sure, therefore, that the leave policies and practices at each of your sites comply not just with the FMLA, but with local law as well.

2. Reasons For Which Leave May Be Taken

Under the FMLA, leave may be taken for the employees' own serious health condition, for the birth or adoption of a child, or the serious health condition of a "family member" (defined to be the spouse, parent, or child of the employee). When the applicable state law provides leave for the same reasons, the leave generally runs concurrently under the FMLA and the state law.

However, many states' laws are not identical to the FMLA. For example, New Jersey provides leave only for family members' medical conditions, not the employee's own condition. N.J.S.A. 34:11B-1. While, on its face, this may appear unfair, in fact it potentially provides an advantage to the employee. If the employee takes FMLA leave for his own medical condition, none of that counts against the employee's New Jersey Family Leave Act entitlement, and he still will have 12 weeks of leave remaining. See also, CAL. GOV'T CODE §12945 (employee's pregnancy-related disability leave is over and above FMLA entitlement).

This also can come into play because some states' laws define "family" more broadly than the FMLA does, *e.g.*, allowing leave for serious illness affecting a parent-in-law or a domestic partner, which are not qualifying reasons under FMLA.

3. School Activity Leave

Several states require employers to provide unpaid leave to allow employees to attend teacher conferences, and other activities connected with their children's schooling. See, e.g., CAL. ED. CODE §48900.1; MASS GEN. LAWS, ch. 149, §52D; MINN. ST. ANN. §181.940.

4. Crime Victim Leave

Several states require leave for victims of, or witnesses to, crimes. See, e.g., MINN. ST. ANN. §611A.036; OR. REV. STAT. 659A.820. Other states provide for such leave to victims of domestic violence. 820 ILL. COMP. STAT. 180/1 *et seq.*; MAINE, tit. 26, §98; N.C. GEN. ST. §50B-5.5 *et seq.*

5. Family Military Leave

Illinois requires employers to provide eligible employees with leave in connection with the military service of the employee's spouse or child. 820 ILL. COMP. STAT.§151/1 et seq. Depending on the size of the employer, the employee may be entitled to up to 30 days of leave. This is **not** required under USERRA, the federal law that deals with the employment and reemployment rights of those actually serving in the military. To be eligible, the employee must have been employed for the employer for twelve (12) months and have worked 1250 hours in the year preceding the leave.

6. Workers' Compensation Leave

A small minority of states provide enhanced leave and reinstatement rights to employees who are incapacitated due to an injury that is covered by Workers' Compensation. West Virginia's is perhaps the fullest reaching. It provided that an employee who has suffered a compensable injury to entitled to be reinstated to her position or, if it is unavailable, to a comparable position. If neither the former position nor any comparable position is available, the employee has a right of preferential recall for one year from the date of the employee is able to resume work. W.VA. CODE S23-5A-3.

7. Pregnancy Leave

Some states provide enhanced leave rights in connection with childbirth and adoption. Tennessee requires employees with 100 or more full-time employees to provide up to four (4) months of leave. TENN. CODE. ANN. §4-21-401 *et seq.* Under California law, the employee can take up to four (4) months for pregnancy-related disability, followed by a three (3) month family leave. CAL. GOV'T CODE §12945. See also, D.C. CODE §32-501 et seq. (16 weeks of leave); MASS. GEN. LAWS ch. 149 §1050 (eligible for eight weeks of leave after only three months of employment); OR. REV. STAT. §659A.150 (employees leave for pregnancy related disability does not count against entitlement under Oregon Family Leave Act, and employee may take up to additional 12 weeks for sick-child leave, thus presenting the potential for 36 weeks of leave in one year).

IV. COMPENSATION ISSUES

Myriad state and federal laws regulating compensation present another minefield to employers. Some tricky issues are presented by the federal law itself. Others are presented by the differences between state and federal laws, and among the various states, so that pay structures and programs must be evaluated on a state-by-state basis.

A. Section 409A Issues

Section 409A of the Internal Revenue Code can wreak havoc with plans and agreements that provide for deferred compensation. Specifically, unless the deferred compensation plan meets certain criteria, the employee can have the entire amount of the deferred compensation included in the current year's gross income – even if she did not actually receive a penny – and the IRS also may impose a 20% tax penalty and punitive interest charges. This possible liability can arise in unexpected places. For example, an executive agreement that provides for salary continuation following retirement, but which allows for payment in a lump sum, could fall within Section 409A. When structuring these arrangements, the parties need to be aware of the possible consequences of allowing acceleration of payment by either party, and to draft the plans and agreements accordingly.

B. Overtime Pay Issues

1. Exempt vs. Non-Exempt

Employers can run into difficulties classifying employees as "exempt" or "non-exempt." While determining who is "exempt" from the overtime requirements under the federal Fair Labor Standards Act ("FLSA") is problematic enough, it is complicated by the fact that several states have their own wage and hour laws, and have different standards and definitions for exemption. Consequently, it is possible that you may have an employee who is exempt from overtime under federal law, but non-exempt under state law. This was exacerbated in 2004 when the federal Department of Labor ("DOL") overhauled the "white collar exemption" regulations under the FLSA, but most states did not change. Where the state or local law and the FLSA are different, the employee must be given the benefit of whichever applicable law is more generous or beneficial to the employee. 29 U.S.C. § 218. Michigan, for example, revised its wage laws to increase the minimum wage to $6.95 per hour effective October 1, 2006, with increases in 2007 and 2008. Most Michigan employers have not had to worry about overtime under Michigan law because the law provides that employers who are subject to the FLSA will not be subject to state law, unless the FLSA results in payment of a lower minimum wage that what the state law provides. There has been no problem as the federal minimum wage has been higher than the state minimum wage. The new law changes this and subjects employers to the state law. The really bad news is that Michigan law does not have many of the exemptions from overtime provided by the FLSA (e.g. drivers regulated by the U.S. dept. of Transportation; taxicab drivers; certain salespersons). Thus, absent a modification of the law, Michigan employers will have to start paying overtime to many employees who have up to now been exempt from overtime under the FLSA.

2. When Does "Overtime" Begin?

This is another rule that varies, depending on location. Under federal law and the laws of many states, employees are eligible for overtime only after they have worked 40 hours in a week. In California and other states, however, employees are entitled to overtime when they work more than eight (8) hours in any day. See, e.g., CAL. LAB. CODE §510; CONN. GEN. STAT. §31-21.

3. How is Overtime Calculated ?

Generally, overtime must be paid at the rate of time and one-half for all hours worked over 40 in the pay week. However, for salaried employees, there is a method that can be used that will substantially reduce the overtime pay. If there is a clear understanding between the employer and employee that the salary constitutes straight-

time compensation for all hours worked each workweek, overtime may be calculated by dividing the weekly salary by the total number of hours worked in the week. The result is the hourly rate. The employer then pays half time, or half the hourly rate, for all hours worked in excess of 40. This method is referred to as the "fluctuating workweek" basis or "variable rate overtime" ("VROT").

Some states, however, prohibit the use of VROT. Alaska, *8* Alaska Admin. Code 15.100(d); Cal. Labor Code Sec. 515(d); Conn. Gen. Stat. § 31-76b(1) (Drivers and Sales Merchandisers).

C. Required Meal/Rest Periods

The federal law does not require employers to provide meal or break periods to employees. Many states' laws are silent on the issue as well, and it is left to the employer's discretion as to what, if any, breaks it will provide. *See*, *e.g.*, New Jersey, Florida, Michigan, and Texas.

Other states, however, impose specific obligations on employers to provide meal time and other breaks. See, e.g., CAL. LABOR CODE §512; 820 ILL. COMP. STAT. 140/3; MASS. GEN. LAWS, ch. 149, §100; Colo. Minimum Wage Order #22 (August 1998). Some states have special rules for employees in certain industries, or those working certain shifts. See, e.g., N.Y. LABOR LAW §162. Failure to provide required break periods can result in liability for the employer, and class or collective actions for the seemingly innocuous failure to provide break time can mean large damage awards and attorneys fees.

D. Breastfeeding

In a number of states, employers are required to provide break time to nursing mothers who need to express breast milk for their infants. See, e.g., 820 ILL. COMP. STAT. 260/5; CAL. LABOR CODE §§1030, 1032; CONN. GEN STAT. §31-40. These laws usually provide that the breast-feeding time is to run concurrently with other breaks.

E. Payment on Termination

Employers with multi-state operations face a daunting task in determining when they need to pay terminated employees because the law on this issue is, literally, all over the map. In certain states, payment must be made immediately upon termination where the employee is involuntarily discharged. CAL. LABOR CODE §201 (NOTE: in California, "wages" includes commissions due); NEV. REV. STAT. §608.020; MASS GEN. LAWS ch. 149, §148. Connecticut requires that discharged employees be paid wages the next business day, and commissions no later than 30 days after they have been calculated. CONN. GEN STAT. §31-71c. Alaska, on the other hand, requires payment within three (3) business days following involuntary termination. ALASKA STAT. §23.05.140.

Still other states allow the employer to pay wages due on the next regularly scheduled payday, or even later. See, e.g., N.J.S.A. 34:11-4.3; KENTUCKY REV. STAT. §337.055 (next scheduled payday or 14 days after termination, whichever is later).

V. PLANT CLOSINGS/MASS LAYOFFS

The federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. §2101 *et seq.* ("WARN") imposes notice obligations on employers when they undertake layoffs or plan closings that affect a specified number and/or percentage of employees. A number of states impose their own "mini-WARN" requirements. Some of these kick in

at much lower thresholds than the federal WARN. Wisconsin, for example, requires 60 days' advance notice of a business closing that affects as few as 25 employees. WIS. STAT. ANN. §109.07. California's law requires notice where at least 50 employees will be laid off, regardless of how small a percentage of the employee's workforce they represent. CAL. LABOR CODE §1400 et seq. Hawaii requires notification in the case of a full or partial closing of a facility, regardless of the number of employees affected. HAWAII REV. STAT. §394B-1 et seq.

Kansas actually has a law requiring employers in certain industries to apply to the State Department of Human Resources for permission to cease operations at a particular facility. KAN. STAT. ANN. §44-616.

It is therefore critical, where your company may be undertaking a nationwide RIF or other action affecting employees in multiple states, to ensure that the company has provided sufficient notice and taken other actions required in each affected location.

VI. MISCELLANEOUS ISSUES

There are a variety of other laws, imposing obligations on employers, or limiting traditional prerogatives. Again, some of these are unexpected, and even counter-intuitive, but have the force of law.

A. Firearms In The Workplace

Several states allow citizens to carry firearms, even concealed firearms, at all times. In order to avoid having firearms in the workplace – whether by employees, vendors, or their guests – the employer must conspicuously post signs at the entrances to the facility, notifying people that firearms are prohibited. See, e.g., MINN. STAT. §624.714; OHIO REV. CODE. ANN. §2923.126; TENN. CONS. ACT. §39-17-1315; UTAH CODE ANN. 63-98-102. However, in several of these states, the employer cannot prevent the employee from keeping the weapon locked in his or her car while it is parked on the employer's premises. See, e.g., 21 OKLA. STAT. §1289.7.

B. Non-Competition Agreements

The enforcement of post-employment restrictions on employees is entirely a matter of state law, and varies tremendously from state to state. Some states are very hostile to such restrictions and will enforce them only in very limited circumstances or not at all. By statute California prohibits any non-competition agreements between employers and employees. CAL. LABOR CODE §442.5. Texas will not enforce a non-competition agreement that is supported only by an "at will" employment relationship. TEX. BUS. & COMM. CODE §15.50(1); *CRC-Evans Pipeline Int'l, Inc. v. Myers*, 927 S.W. 2d 259 (Tex. Ct. App. – 1st Dist. 1996). Georgia will enforce non-competition agreements to the extent they are reasonable in terms of time, geography, and scope of conduct prohibited. However, Georgia courts will not "blue pencil" an agreement, *i.e.*, they will not modify unreasonable terms to make them reasonable. Consequently, if any portion of the non-competition agreement is unreasonable, the court will invalidate the entire agreement. *Gale Industries, Inc. v. O'Hearn*, 257 Ga. App. 220, 570 S.E. 2d 661 (2002). Under Florida law, an employer may not assign its rights in a non-competition agreement, even to a successor, unless it expressly reserves the right to do so in the agreement. FLA. STAT. ANN. §542.335(1)(f)2.

Actions to enforce non-competition agreements can backfire, too. In Hawaii, if the former employee prevails, he or she is entitled to recover attorney's fees from the employer. HAW. REV. STAT. §480-4. Under Texas law, the court can award attorneys

fees to the employee if the employer tried to enforce an unnecessarily restrictive agreement. TEX. BUS. & COMM. CODE §§15.03, 15.50 to 15.52.

C. Service Letters

In several states, upon request of a terminated employee, the employer must provide a letter setting forth information about the dates of employment, positions held, and reason for termination. See, e.g., IND. CODE §22-6-3-1; KAN. ST. ANN. §44-119A; MO. REV. STAT. ANN. §290.140; MAINE REV. STAT. ANN. tit. 26, §630.

D. Personnel Files

Several states require employers to give employees and former employees access to their personnel files. See, e.g., WIS. STAT. ANN. §103.13; MASS. GEN. LEAVE, ch. 149, §52C; MINN. STAT. §181.960. Certain limited information can be withheld, but this varies from state to state. Employers also need to respond promptly to such requests as several state laws impose potentially hefty penalties. WIS. STAT. ANN. §103.13 ($10 to $100 per day of non-compliance); MINN. STAT. §181.967 (Dept. of Labor and Industry can impose a $5,000 fine).

A twist on the personnel files rule is provided by Vermont, which requires the employer to give notice to the employee whenever the file is requested by a third party. VT. STAT. ANN., tit. 12, §1691a.

E. Assignment of Inventions

Several states have laws addressing the ownership of things invented by an employee during the period of employment, but on her own time. These laws generally hold that – with limited exceptions – such inventions belong to the **employee** not the **employer**. See, e.g., DEL. CODE. ANN., tit. 19 §805; N.C. GEN. STAT. §66-57.1; WASH. REV. CODE §49.44.140. The Minnesota statute goes further and requires that, at the time the employee is asked to sign any agreement respecting assignment of inventions, the employer must provide written notification to the employee of the employee's rights under the law. MINN. STAT. §181.78.

H. Privacy Issues

A number of laws protect employees' right to privacy in the workplace.

1. Social Security Numbers

The use of Social Security numbers ("SSNs") is regulated in several states, including Arizona, California, Michigan, Connecticut, and New Jersey. ARIZ. REV. STAT. ANN. §44-1373; CAL. CIV. CODE §1798.85; CONN. GEN. ST. §42-470; N.J.S.A. 56:8-164. These laws limit the use of SSNs for all businesses, and the restrictions have implications for the use of SSNs in the employer-employee relationship. Michigan's Social Security Number Privacy Act, which took effect January 1, 2006, is among the most comprehensive. MICH. COMP. LAWS. ANN. §445.81 et seq. It prohibits businesses from practices such as publicly displaying SSNs; using SSNs as primary account numbers; printing more than four (4) sequential digits from the SSN on identification badges, cards, or anything mailed to an individual. The Michigan law also requires all entities to implement a formal privacy policy to protect SSNs.

2. Substance Abuse Testing

A number of states have, by statute or common law, placed restrictions on substance testing of employees. Some of these laws simply mandate that certain testing procedures if an employer chooses to test for substances, without limiting the employer's right to conduct testing. See, e.g., MISS. CODE ANN. §71-7-1 et seq.; ARIZ. REV. ST.

§23-493 et seq.; N.C. GEN. STAT. §95-230 et seq. These laws vary from state-to-state, so a program that conforms in one state may have to be tweaked in another. In Oklahoma, for example, employers cannot have a substance testing program unless they also have in place a *bona fide* employee assistance program. OKLA. STAT., tit. 40, §552 et seq.

Some states have prohibited random testing, except where the employee works in a safety-sensitive position. See, e.g., CONN. GEN. STAT. §31-51t et seq., *Hennessy v. Coastal Eagle Point Refinery*, 129 N.J. 81, 609 A.2d 11 (1992); *Kraslawsky v. Upper Deck Company*, 56 Cal. App. 4th 179, 65 Car.Rptr.2d 297 (1997).

Still other states limit what action an employer can take after an employee tests positive. In Iowa, for example, an employer with 50 or more employees cannot discharge an individual who tests positive for the first time if: (1) the individual has been employed for at least twelve months; or (2) the employee agrees to enroll in a rehabilitation program. IOWA CODE §730.5. Under Oklahoma law, the employer cannot discipline for a positive test, other than temporary suspensions or temporary transfers, unless the positive result has been confirmed by a second test performed according to state-mandated procedures. OKLA. STAT., tit. 40, §552 et seq.

Of course, if the employee works in a position covered by federal regulations mandating drug testing, such as Department of Transportation regulations the federal requirements will prevail over any state-law restrictions.

There has been some question as to whether employees' use of marijuana for medical purposes, which is legal under some states' laws, would forestall employers' efforts to discipline employees who test positive for marijuana use. That issue is currently before the California Supreme Court, which is reviewing the appellate court's dismissal of such a claim. *Ross v. Ragingwire Telecommunications, Inc.*, 132 Cal.App.4th 590, 33 Cal.Rptr.3d 803 (3d Dist. 2005) *review granted and opinion superseded*, 36 Cal.Rptr.3d 494, 123 P.3d 930 (2005). The Court of Appeals noted that, while "medical marijuana" use is legal under California law, use or possession remains criminal conduct under federal law, which supersedes the state law, *citing, Gonzales v. Raich*, 545 U.S. 1 (2005). It reasoned that a "reasonable accommodation" of an employee's disability under the state civil rights laws could not be one that required the employer to acquiesce in the violation of federal law, nor to jeopardize its ability to be a federal contractor under the Drug-Free Workplace law. *See also, Washburn v. Columbia Forest Products, Inc.*, 340 Or. 469, 134 P.3d 131 (2006).

3. Tracking Employees

California prohibits use of electronic devices to each the movements of employees or their vehicles. CAL. PENAL CODE. §637.7.

4. Monitoring Electronic Communications

Telephones, computers, and the internet are essential tools used regularly by employees for legitimate business purposes. However, many employees make personal use of tools on company time, causing lost productivity and concerns of the use of employers' computers for improper or potentially illegal purposes. Many employers seek to monitor employees' use of these devices. There are, however, federal and state laws that may limit the employer's right to do so. The Federal Electronic Communications Privacy Act ("ECPA") prohibits parties from intercepting, or trying to intercept, others' wire, oral, and electronic communications. However, it contains significant exemptions making it legal for an employer to intercept an employee's communications under certain

circumstances. For example, the ECPA allows an employer to intercept an employee's communications if the employee has consented, or if the interception occurs as an ordinary part of the employer's business – such as interception recording of all customer service phone calls for quality control purposes. 18 U.S.C. §2511(d) and 18 U.S.C. §2510(5)(a)(1). Note, however, the consent may be explicit or implied, but it must be actual consent, rather than constructive consent. Thus, in *Smith v. Devers*, 2002 WL 75803 (M.D. Ala. 2002) the court found that the employer's listening to the employee's telephone conversations about her private life potentially was an invasion of privacy in violation of the ECPA, because the employer recorded personal as well as business-related telephone calls, and because there was a question as to whether the plaintiff had ever consented to having her telephone calls recorded. Similarly, in *Zaffuto v. City of Hammond*, 308 F.2d 485 (5th Cir. 2002) the plaintiff had been under the mistaken belief that only incoming calls were recorded; he placed an outgoing call to his wife from his private office. Another employee recorded the conversation, and transferred it off the master tape on to a cassette tape, and played it for other employees. A jury found in favor of the plaintiff on a state-law invasion of privacy claim which was affirmed on appeals. The Appeals Court found that the plaintiff had a reasonable expectation of privacy, since he made the call from a private office and the other employee had no legitimate business reason for playing the tape to other officials.

Employers also need to be keenly aware of state privacy laws when undertaking monitoring of communications. In most states, statutory or common law require that consent be obtained from at least one participant in the communication. *E.g.*, New York, New Jersey, Arizona, Georgia, the District of Columbia, Missouri, and several other states require "one-party consent." However, a number of other states require "all-party consent," *e.g.*, California, Florida, Massachusetts, Illinois, Nevada, and Pennsylvania, among others. Obtaining consent is critical, because intercepting communications without consent is a felony in several states. See, e.g., OKL. STAT., tit. 13, §176.1 et seq.; Cal. Penal Code §19.8;

A further wrinkle arises when calls are made from a location in an "all-party consent" state to an employer's location in a "one-party consent" state. An excellent example of the problem is *Kearney v. Salomon Smith Barney Inc.*, 39 Cal.4th 95, 45 Cal.Rptr.3d 730 (2006) which, though not an employment case, presents a very similar issue. The plaintiffs were California clients of the defendant. Plaintiffs' calls to brokers employed by defendant in Georgia were recorded. Georgia law allows recording with the consent of only one participant; California requires consent of all. The California Supreme Court held that the California law applied, and that as long as the calls were with California residents in California, all participants must consent. Employers' must review their policies and practices to ensure they do not run afoul of the various rules and regulations.

The monitoring of computers and internet use also presents issues. In order to ensure that they have the right to monitor and inspect computers, employers should disseminate a policy advising employees of that right. It will not necessarily be implied. *See*, *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001); *United States v. Slanina*, 283 F.3d 670 (5th Cir. 2002) *vacated on other grounds*, 537 U.S. 802 (2002). On the other hand, in *U.S. v. Ziegler*, - F.3d -, 2006 WL 2255688 (9th Cir. August 8, 2006) and *Muick v. Glenayre Electronics*, 280 F.3d 741 (7th Cir. 2002) the Courts held that employees had no reasonable expectation of privacy in information contained in the company-owned

computer where the company had announced that it reserved the right to inspect company owned computers at any time.

Also be aware, however, that if the employer does monitor employee's computer use, and finds something that raises serious questions, the employer may be under an obligation to take action. An extreme example of this is Doe v. XYC Corporation, 382 N.J. Super. 122, 887 A.2d 1156 (App. Div. 2005) where the Court held that an employer potentially was liable to a victim of child pornography, specifically, its employee's step-child. The employer had monitored the employee's computer use and determined that he was viewing pornography. The company was not aware that he was viewing child pornography and that he had, in fact, taken nude pictures of the step-daughter, a minor, and had transmitted them over the internet. The Court found that the employer breached its duty to use reasonable care to report or take effective action to stop the employee's activities in viewing child pornography on the workplace computer; the Court held that when the employer was viewing pornography on the computer, it had an obligation to investigate further.

VII. IT'S NOT ALL NEGATIVE

There actually some obscure laws that favor employers. For example, under federal law, as well as statutes in several states, it is a crime to intentionally delete, damage, copy, or modify computer files without authorization of the owner. Some of these laws provide civil remedies for victims, which can include actual damages, costs of investigation, and attorneys' fees. *See, e.g.*, "Computer Fraud and Abuse Act," 18 U.S.C. §1030; N.J.S.A. 2A:38A-1 *et seq.* (New Jersey's law, which permits recovery of actual damages, punitive damages, attorney's fees, and costs of investigation and litigation). An employee who uses his computer to compete with the employer, or who deletes data in a way to prevent subsequent recovery of the deleted data, may be in violation of these laws. In a recent case, the Seventh Circuit ruled that a former employee violated the Computer Fraud and Abuse Act when he used a "secure erasure" program to cover up the fact that he deleted data from his firm-provided laptop. *International Airport Centers, LLC v. Citrin*, 440 F.3d 418 (7th Cir., 2006). *See also*, *ViChip Corp. v. Lee*, - F.Supp.2d -, 2006 WL 1626706 (N.D. Cal. June 9, 2006) (former employee liable where, upon learning he was about to be terminated, deleted substantial information from the company's server and company-issued computer).

Want to strike back against crime? Laws in certain states allow employers to sue drug dealers for damages – including lost productivity, costs of workplace accidents, medical costs, treatment and rehabilitation costs – caused by employees' use of drugs sold by the dealer. See, e.g., N.J.S.A. 2C:35B-1 et seq.; OKLA. STAT. tit. 63, §2-421 et seq. New Jersey's law allows recovery of actual damages, punitive damages, and attorneys' fees.

VIII. CONCLUSION

Again, the above are merely examples of the types of obligations and liabilities imposed on employers by federal, state, and local governments. The more extensive your company's operations are, the more likely it is you will have to deal with these laws. It is critical for the employer to understand the differences, including subtle differences, between the laws of the various locales where it does business. It is a minefield, and employers need to step carefully.