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Message From the Managing Partner

In this fall edition of our firm's *Quarterly,* we want to make our readers aware of the many skills and services our attorneys provide in the area of Employment Law. In this issue, we highlight some of the latest developments in the *Employment & Labor Law Practice Group* providing our readers with practical and up-to-date information on recent developments in employment law through brief and non-technical articles on matters of current interest. By this means we hope that our readers will come to know our firm and our attorneys somewhat better.

The *Employment & Labor Law Practice Group* attorneys have extensive experience in litigating federal and state court cases involving employment discrimination, sexual harassment, wrongful discharge, defamation, whistleblower claims, alleged trade secrets violations, restrictive covenants, other workplace torts and insurance coverage disputes arising from such claims. The practice also includes representation of clients at arbitration, mediation, labor negotiations and administrative proceedings before the EEOC, DCR and other governmental agencies. The articles in this issue highlight the wide range of employment and labor matters that this practice group has encountered over the years.

In our lead article *"Insurance Coverage for Employment Claims"*, Jerry Hanson discusses the impact that disputes between employers and their employees have on the world of litigation. *"Workers' Compensation—The Exclusive Remedy for the Employee"* written by Ed Herman concentrates on the exclusive remedy in the event of a workplace injury. Rocky Peterson gives insight to School Boards in their labor contract needs in his article *"New Legislation Changes Negotiation Impasse Procedures for School Boards"*. Julie Colin discusses efficient procedures for resolving employment disputes in her article *"Waiving the Right to a Jury Trial In Employment Matters",* while Suzanne Marasco outlines the protection of the statute of limitations in her article *"The Statute of Limitations: Does it Really Protect Employers?"*

Maeve Cannon with Law Clerk, Ryan Kennedy examine employee benefit plans in their article *"Employee Benefit Plans—A Overview of ERISA Applicability…"*. Todd Leon explains the route to escape sexual harassment liability in his article *"Employers Beware: Merely Creating Sexual Harassment Policies May Not Be Enough to Escape Vicarious Liability",* while Susan Inverso brings us up-to-date on exposure to liability for e-mail communication in her article *"Employers Beware: You May Be Liable for Your Employees' Harassing E-Mails"*. Finally Andrew McDonald educates employers to avoid liability associated with violating the rights of a "whistleblower" in his article *"Prepare For An Encounter with the Whistleblower"*.

We are sure that you will enjoy both the substance and the variety of the articles in this issue. Again, please let us know the subjects you would like to see covered in the *Quarterly.* As always, we invite you to contact us with your comments, suggestions and questions. We hope that you will find this newsletter useful, and we would be pleased to have your comments or suggestions.

– Robert W. Bacso

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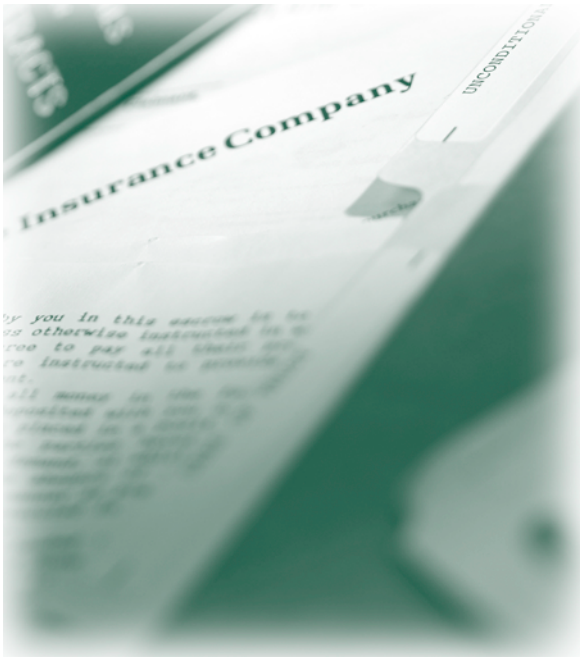
Insurance Coverage for Employment Claims

by Gerard H. Hanson

One need not be a lawyer to recognize the impact that disputes between employers and their employees has had on the world of litigation. Rarely does a week pass where either a national or local newspaper is not reporting on an employment discrimination claim filed by an employee against his or her employer—be it at the highest levels of corporate America, federal, state or local government, or charitable organization. In response to the increased volume of employment litigation, employers have developed policies prohibiting harassment and discrimination, as well as training programs to sensitize their employees to avoid conduct that may create hostile work environments for other employees. Notwithstanding these efforts by employers, lawsuits have arisen, and will continue to do so into the future. When the lawsuit does come, the most compelling question for the employer is whether or not the specific claim is covered by insurance. This article is intended to briefly identify what coverages may be available.

Employment Practices Liability Insurance

As a response to the increased volume of employment-related litigation, the insurance industry commenced underwriting and issuing Employment Practices Liability (EPL) policies in the early 1990's. Since EPL coverages are not regulated by federal or state statute, each policy issued by each carrier may be different from the other. Thus, buying an EPL policy does not guarantee that any claim brought by an employee will be covered. Notwithstanding this caveat, EPL insurance will typically cover employers against claims of wrongful discharge and employment discrimination, which would include the most talked about offense of sexual harassment. EPL policies may also typically cover



claims for retaliation, demotion, and failure to promote. Also typically covered are ancillary causes of action that accompany an employment discrimination suit such as defamation and/or invasion of privacy. While I have stated above that the aforementioned claims are "typically" covered, the issue for the reader is whether **your** policy covers these claims.

A secondary analysis to be conducted by policyholders procuring EPL coverage is "who" is covered. Once again, there are no statutory mandates. However, as a general rule,

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Workers' Compensation—The Exclusive Remedy for the Employee

by Edward H. Herman

Employers often inquire whether they can be sued by an employee in tort rather than relying on workers' compensation as the exclusive remedy should an injury occur in the workplace. The "short" answer is that employees are limited to workers' compensation benefits. Having said that, an employer would be wise to become aware of those situations that will give rise to liability in tort since a failure to do so could lead to financial ruin for the employer. This very issue has been the subject of much litigation in New Jersey and elsewhere in recent months as injured employees seek to erode the protection afforded to the employer by the "exclusivity rule".

Workers' Compensation in New Jersey is statutory social legislation and is the legislative expression of a desire to care for injured workers swiftly, without costly protracted litigation. Workers' Compensation insurance is mandatory for all employers, and N.J.S.A. 34:15-8 provides that this requirement "shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided by this article."

"Workers' Compensation insurance is mandatory for all employers…"

Early on, our Supreme Court stated in *Ramos v. Browning Ferris Industries,* "Fundamental to the Act is the premise that by accepting the benefits provided by its schedule of payments, the employee agrees to forsake a tort action against the employer." However, the second paragraph of N.J.S.A. 34:15-8 sets forth the limited exception to the "exclusivity rule". Under this provision, an employee may sue an employer for any behavior, act or omission that is an "intentional wrong". The challenge to the "exclusivity rule" revolves around the definition of an "intentional wrong".

In 1985, our Supreme Court in *Millison v. E.I. duPont Nemours* dealt with the categories of employer conduct which would be sufficiently flagrant to constitute an "intentional wrong" and thus avoid the exclusivity bar of the Workers' Compensation law. In *Millison,* the employee alleged that their employer knowingly and deliberately exposed them to hazardous work environment (asbestos exposure) and fraudulently concealed existing occupational diseases from the employees. At that time, the Court held that only an employer's deliberate intent to injure would avoid the exclusive workers' compensation remedy and went on to develop the "substantial certainty" rule. Not only must the court find that the employer acted deliberately, but it must also find that the very injury was a substantial certainty to occur.

Approximately 17 years later, our Supreme Court, in *Laidlow v. Harition Machinery Company, Inc.* was again confronted with an intentional wrong theory in a products liability tort action. In this case, the employee lost much of his left hand in a rolling mill accident after the employer effectively removed a machine guard. The court concluded that the removal of a safety guard may indeed cause the employer to loose the immunity in tort afforded by workers' compensation, but the analysis must be on a case by case basis. The Court wrote:

> "…as a practical matter, when an employee sues an employer for an intentional tort and the employer moves for summary judgment based on the Workers' Compensation bar, the trial court must make two separate inquiries. The first is whether, when viewed in a light most favorable to the employee, the evidence could lead a jury to conclude that the employer acted with knowledge that it was substantially certain that a worker would suffer injury. If that question is answered affirmatively, then the court must then determine whether, if the employee's allegations are proved, they constitute a simple fact of industrial life or are outside the purview of the conditions the Legislature could have intended to immunize under the Workers' Compensation bar. Resolving whether the context prong of *Millison* is met is solely a judicial function…"

Since the decision in *Laidlow* by the Supreme Court, the Appellate Courts have twice reviewed similar issues. In *Crippen v. Central Jersey Concrete Pipe Co.*, the Court upheld summary judgment in favor of the employers since it found that the

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New Legislation Changes Negotiation Impasse Procedures for School Boards

by Rocky L. Peterson

On July 10, 2003, the Governor signed A-3419, which changes significantly the impasse procedures school boards follow in the event that mediation fails to result in a negotiated settlement. The most significant change is that boards of education are prohibited from implementing their last best offer if post fact-finding negotiations fail to produce an agreement. Fact-finding and "super conciliation" are now required parts of the impasse process. Finally, the law requires public release of the neutral's recommendations ten days after the recommendations are received by the parties.

Under the prior law, public employers, such as school boards, had the right to impose the last, best offer if and when negotiations reached a genuine impasse. Impasse occurs when after engaging in good faith negotiation, mediation, fact-finding with a mediator and post fact-finding negotiations, the parties are unable to reach an agreement. In that situation, public employers **had** the right to impose their last, best offer. There was no further step in the process requiring mediation or arbitration. Under the prior statute, a neutral's fact-finding recommendation was not required to be released to the public.

Effective immediately, if after mediation, the parties are not able to reach a negotiated settlement, fact-finding is now a statutorily mandated step of the impasse process. The fact-finding is conducted by a neutral selected and paid for by the parties. If no settlement is reached through fact-finding, the fact-finding neutral issues a report to the parties. Ten days after the release of that report to the parties, the report is to be made public. The parties are given twenty days after issuance of the fact-finder's report to reach a settlement. If the parties are not able to reach an agreement within twenty days after receipt of the fact-finder's report, then super conciliation is a required step. Another neutral is chosen as a super conciliator in an attempt to reach a settlement. If the super conciliator is unable to reach a settlement, a written recommendation must be issued. Ten days after its release to the parties, it is also released to the public.

While the law requires release of the fact-finder's and super conciliator's reports, these recommendations still remain advisory only. The public release of the fact-finding does not require the board or public entity to reach a settlement pursuant to the terms of the released documents. The board and union maintain sole responsibility and authority to reach a mutual agreement. As under prior law, pending the impasse procedures, the board and the union retain the rights it had under the labor agreement. Expired agreements can still be enforced, although the board cannot unilaterally make changes to the terms and conditions of the labor contract.

The new law went into effect immediately. It, therefore, applies to all negotiations at impasse on the day of its signing. It also applies to current negotiations which may subsequently reach the impasse stage.

The Public Employment Relations Commission (PERC) is currently developing the necessary regulations to clarify and administer this change in the impasse procedures. The New Jersey School Boards Association

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"Effective immediately, if after mediation, the parties are not able to reach a negotiated settlement, fact-finding is now a statutorily mandated step of the impasse process."

Waiving the Right to a Jury Trial in Employment Matters

by Julie Colin

Providing speedier and more efficient procedures for resolving employment disputes can save both employers and employees time and money. Recently, our New Jersey judiciary has answered a question that has been on the minds of many employers with regard to limiting such costs and even liability to employees. That question is whether an employee can waive a statutory entitlement to a jury trial by agreement with the employer. Most of the statutory entitlements under both Federal and State law, such as the Family Leave Act, the Americans with Disabilities Act, and the New Jersey Law Against Discrimination provide the aggrieved employee the option of demanding a trial by jury.

In two cases that have been heard within the past year, the courts have made it clear that so long as the language drafted by the employer is clear, and the employee accepts a position with knowledge of that provision, a waiver of rights to a jury trial, usually in favor of arbitration is valid. Prior to these decisions, employers and lawyers alike questioned whether courts would enforce contractual language drafted by employers which serves to negate rights established through the legislature.

Limiting An Employee's Rights Through Contract

The courts have been careful to remind employers that if they choose to limit an employee's statutory right to access to a jury trial, such waiver must be made in clear and unambiguous terms. The court will look to the contract and its contents to determine if the language put the employee on notice of such waiver. Prior to these decisions, there had been some doubt that the courts would enforce such a contract over the rights of the employee contained in the legislation.

"The courts have been careful to remind employers that if they choose to limit the employee's statutory right to access to a jury trial, such waiver must be made in clear and unambiguous terms."

In one recent case decided by the court, the employer included a clear notice of waiver in the employment application. The court found that the language was clear and that the employee, by signing the application for employment, agreed to arbitrate any matter concerning the terms and conditions of employment should the employee accept the job.

Employee Handbooks Can Be Binding Agreements

In the other recent case, the New Jersey Supreme Court held that language contained in an employee handbook served as a binding agreement between the employer

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Employee Benefit Plans—An Overview of ERISA Applicability—What is ERISA?

by Maeve E. Cannon and Ryan P. Kennedy

If you are an employer, chances are you have a benefit plan for your employees. Employers with such plans should familiarize themselves with the statutory and regulatory processes impacting the administration of these benefit plans to prevent such a plan from providing an avenue for future lawsuits.

The Employee Retirement Income Security Act of 1974 ("ERISA") is a comprehensive regulation of employee welfare benefit plans, which among other things, creates duties for plan administrators and rights for plan beneficiaries. Most importantly, employers and insurers have a fiduciary duty under ERISA to conduct the plan solely for the interests of the beneficiaries. While one of the purposes of ERISA is to promote and foster employee benefit plans, it also creates a federal cause of action that may be asserted by beneficiaries against plan administrators who violate their duties under the Act. Employers, who are aware of and maintain compliance with ERISA regulations, may reduce the chances of having to defend against a suit and the number of issues should one arise.

"…the plan administrator must supply a written summary of the benefits plan to each beneficiary."

Plans Covered by ERISA

While the issue of whether a particular plan constitutes an ERISA plan may sometimes be the subject of debate, generally the statute itself is broad. To be covered, an employee benefit plan must be a plan, fund, or program established or maintained by an employer or an employee organization, for the purpose of providing certain benefits to participants or beneficiaries. Courts have also, on occasion, looked beyond the statute's definitions and asked if a "reasonable person" would determine that the plan in question constitute a covered employee benefit plan. A narrow exception exists for employers whose involvement in a plan is solely to advertise it to its employees and facilitate payments through paycheck deductions. This is known as the "Safe Harbor" exemption. However, if the employer contributes at all to the plan, if the plan is not completely voluntary, or if the plan is considered part of an employee's compensation, the benefit plan would not be exempt.

ERISA in General

ERISA creates many duties for covered benefit plans, many more than can be mentioned here. The first and foremost is the fiduciary duty created for plan administrators with discretionary authority over the plan. Plan administrators are held to the standard of a "prudent man" acting on behalf of the plan beneficiaries in all decisions regarding provision of benefits, in diversifying the assets against loss, and in acting in accordance with the plan rules and regulations. Plan administrators are prohibited from managing the benefit plan in such a way that fosters the interest of any party other than the beneficiaries, or in favoring any one or group of beneficiaries over another. Also, an inherent conflict of interest exists where the insurer of the plan is also the plan administrator. In that

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The Statute of Limitations: Does It Really Protect Employers?

by Suzanne M. Marasco

In 1993, the Supreme Court established a two year statute of limitations for claims arising under the New Jersey Law Against Discrimination. See *Montells v. Haynes.* Traditionally, this would mean that a claim for harassment or discrimination must be filed by the aggrieved party within two years of the occurrence or incident giving rise to such claim. Yet, interestingly, employers often find themselves facing multiple claims of discrimination or harassment which extend back for years beyond the applicable two year statute of limitations. To the employers' surprise and obvious dismay, the employers' attempt to dismiss the aggrieved employee's claim for failure to file such claim within the statute of limitations is often denied.

The "Continuing Violation Doctrine"

Naturally, being forced to contend with and defend claims that go back well beyond the two year statute of limitations can be unsettling for any employer. An employer may erroneously assume that it can rest easy with each passing year after one of its problem employees engages in prohibitive conduct if no claim is made. Unfortunately, such is not the case, and employers must be keenly aware of unlawful work place conduct—the longer it occurs, the greater the liability the employer may eventually be subjected to.

Indeed, in New Jersey, the statute of limitations does not begin to toll until the final act of harassment if there is a "continuing violation" stemming from the same basic operative facts. Stated differently, the "continuing violation doctrine" allows a plaintiff employee to pursue a discrimination claim for "conduct which began prior to or beyond the statute of limitations period if such plaintiff can demonstrate that the act is part of an ongoing practice of discrimination of the defendant." *Horovath v. Rimtech.* For discriminatory conduct to fit within the continuing violation doctrine, it must be intentional, pervasive and regular and consist of more than the occurrence of isolated or sporadic acts. Additionally, at least one act of harassment or discrimination must have occurred within the statute of limitations filing period.

"…employers must be keenly aware of unlawful work place conduct—the longer it occurs, the greater the liability the employer may eventually be subjected to."

Three Factors to Look At

There are three factors utilized to make this determination. Do the alleged acts involve the same type of discrimination tending to connect them in a continuing violation? Are the alleged acts recurring, or are they more in the nature of an isolated work assignment or employment decision? And does the act have the degree of permanence which would trigger an employees' awareness of a duty to assert his or her rights?

Thus, where an aggrieved employee is subjected to sexual harassment by a supervisor, for example, by continually requesting sexual favors over the period of 5 years, the employee will most likely be permitted by the court to pursue a claim of harassment that occurred over the course of the full five years since the conduct was not isolated or sporadic, but was a continuing violation. On the other hand, in a case where an employee claims that a

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SPOTLIGHT

NEW ASSOCIATES

Jessica F. Battaglia has joined **Hill Wallack** in its **General Litigation Division.** She will concentrate her practice in municipal law and general litigation. Ms. Battaglia earned her law degree from Seton Hall University Law School - Newark. She previously served as a Judicial Law Clerk to The Honorable William L'E Wertheimer. A resident of Princeton, NJ, she is admitted to practice in New Jersey.

Cherylyn Waibel has joined the firm in its **Land Use Division** which includes the firm's **Land Use Applications, Land Use Litigation** and **Environmental Applications Practice Groups.** Ms. Waibel is a graduate of Seton Hall University School of Law - Newark and is admitted to practice in New Jersey and Massachusetts. She previously served as Judicial Law Clerk to The Honorable James Petrella and is a resident of Ewing, NJ.

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APPOINTMENTS & RECOGNITION

Keith P. Jones, a partner in the **Trial & Insurance Practice Group** of **Hill Wallack,** was recently appointed to the New Jersey District VII Ethics Committee for a four year term. The District VII Ethics Committee is one of 17 regional district ethics committees in the State of New Jersey. Each district ethics committee consists of volunteer attorneys and lay persons appointed by the New Jersey Supreme Court. The District VII Ethics Committee receives and takes initial action on all grievances alleging misconduct on the part of New Jersey lawyers whose offices are located in District VII – Mercer County. Mr. Jones is a graduate of the United States Military Academy at West Point, where he received a Bachelor of Science degree. He earned his law degree from the University of Texas at Austin. A member of the New Jersey State Bar Association and the State Bar of Texas, Jones is admitted to practice in both New Jersey and Texas, and before the U.S. Army Court of Military Review, the U.S. Court of Military Appeals, and the U.S. Supreme Court. He is a resident of Bordentown, New Jersey.

Nielsen V. Lewis, a partner of the firm was recently honored by the Humane Society of the United States for outstanding work for the cause of humane care of animals. At a recent reception at the Nassau Club in Princeton, Mr. Lewis received a certificate of recognition from the Humane Society for many hours of pro bono work in the field. Mr. Lewis, is a partner of the **Environmental Law Practice Group.** He has over twenty years of experience in environmental law, solid and hazardous waste law, insurance law, general civil litigation and land use and development. Since entering into private practice, he has focused on counseling and representing private companies, municipalities and individuals in disputes and litigation concerning the environment, land use and insurance. He is admitted to the Superior Court Roster of Court-Appointed Mediators. He is the outgoing Chair of the Insurance Law Section and a member of the Environmental and Dispute Resolution Sections of the New Jersey State Bar Association. Mr. Lewis earned his law degree from the University of Michigan Law School and is admitted to practice in New Jersey, the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit.

Mark E. Litowitz, a partner of **Hill Wallack** has accepted Chairmanship of a Task Force on Workers' Compensation Lien Issues, at the request of Director/Chief Judge Peter Calderone of the New Jersey Division of Workers' Compensation. The Task Force is comprised of leading practitioners and highly respected Judges of Compensation. They consider all issues regarding the liens which must be reviewed and resolved in all workers' compensation cases, including: state and private plan temporary disability, medicaid, medicare, prior attorney, child support, Section 40 and medical provider liens. The Task Force will consider all issues with respect to these liens and forward recommendations for improving the processing and resolution of them. Mr. Litowitz is a partner of the **Workers' Compensation Practice Group,** where he concentrates his practice in all aspects of workers' compensation and related alternative dispute resolution. Prior to joining Hill Wallack, Mr. Litowitz was the former Director and Chief Judge of the Division of Workers' Compensation in New Jersey from 1990-1994. A judge for more than 27 years, Mr. Litowitz was first appointed to the Workers' Compensation Bench in 1966. From 1964-1966, he served as assistant United States Attorney.

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SEMINARS

Patrick D. Kennedy and ***Maeve E. Cannon,*** partners in the firm and members of the firm's **Administrative Law/Government Procurement Practice Group,** were recently featured speakers at the Government Procurement Law Forum Series

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Employers Beware: Merely Creating Sexual Harassment Policies May Not Be Enough to Escape Vicarious Liability

by Todd J. Leon

In 1993, the New Jersey Supreme Court handed down its landmark decision in one of the most important employment law cases ever decided: *Lehmann v. Toys R Us.* In *Lehmann,* the court established the criteria for both what constitutes an actionable claim for sexual harassment, as well as what standards should apply when assessing vicarious liability for an employer. Those standards have been applied and discussed by courts countless times during the past decade. Of all of these new cases, perhaps the most important from the perspective of an employer seeking to avoid liability was issued during the Summer of 2002 by the New Jersey Supreme Court in *Gaines v. Bellino.* This new decision imposes a greater burden on the employer to demonstrate not only that its anti-harassment policy and procedure are in place, but that the policy is "meaningful and effective" in order to avoid vicarious liability.

"…it is the establishment of a meaningful and effective anti-sexual harassment workplace policy and complaint mechanism that protects the employer from vicarious liability."

In *Gaines,* the plaintiff filed a complaint against her direct supervisor and employer (the County of Hudson Correctional Facility), alleging violations of the New Jersey Law Against Discrimination ("LAD") arising from allegations of sexual harassment over a five-year period of time. Although there was evidence that the employer had an anti-harassment policy in effect, the plaintiff presented evidence that the County's policies were loosely enforced. Defendants moved for summary judgment on the issue of vicarious liability; asserting that the County had taken sufficient preventative steps in respect to sexual harassment. The trial court granted defendants' motions and dismissed plaintiff's complaint in its entirety, finding that the policy against harassment was known to the plaintiff; that the policy was known to the superior officers; that plaintiff did not choose to report the behavior; and that the employer acted when it was brought to the attention of higher authorities. Plaintiff appealed the dismissal of her claims and the Appellate Division affirmed, applying *Lehmann.* The court held that the employer was insulated from vicarious liability because the employer had a policy, publicized it through posters, promulgated it through successive editions of employee handbooks, conducted training, and acted when facts were brought to its attention.

The Supreme Court Speaks

In July of 2002, the Supreme Court—in a 7-0 vote—reversed and remanded the case for further proceedings. The court essentially expanded its holding in *Lehmann* with regard to employer's insulation from vicarious liability, holding that it is the establishment of a meaningful and effective anti-sexual harassment workplace policy and complaint mechanism that protects the employer from vicarious liability. An employer can be liable vicariously for sexual harassment in the workplace if the anti-harassment policy is "no more than words." It is only when the policy is effective at preventing harassment and protecting the employees will an employer be protected from vicarious liability.

To support its conclusions, the court reiterated its ruling in *Lehmann* regarding what standards apply when assessing employer liability under the LAD for various forms of relief. The court identified several factors as being relevant to determining whether an employer had acted negligently in failing to establish an anti-harassment policy in its workplace, including whether the employer had: (1) created formal policies prohibiting harassment in the workplace; (2) fashioned complaint structures for employees' use, both formal and informal in nature; (3) provided mandatory anti-harassment training for supervisors and managers and available to all employees of the organization; (4) enforced effective sensing or monitoring mechanisms to check the trustworthiness of the policies and complaint structures; and (5) made an unequivocal commitment from the highest levels of the employer that harassment would not be tolerated and demonstration of that policy commitment by consistent practice.

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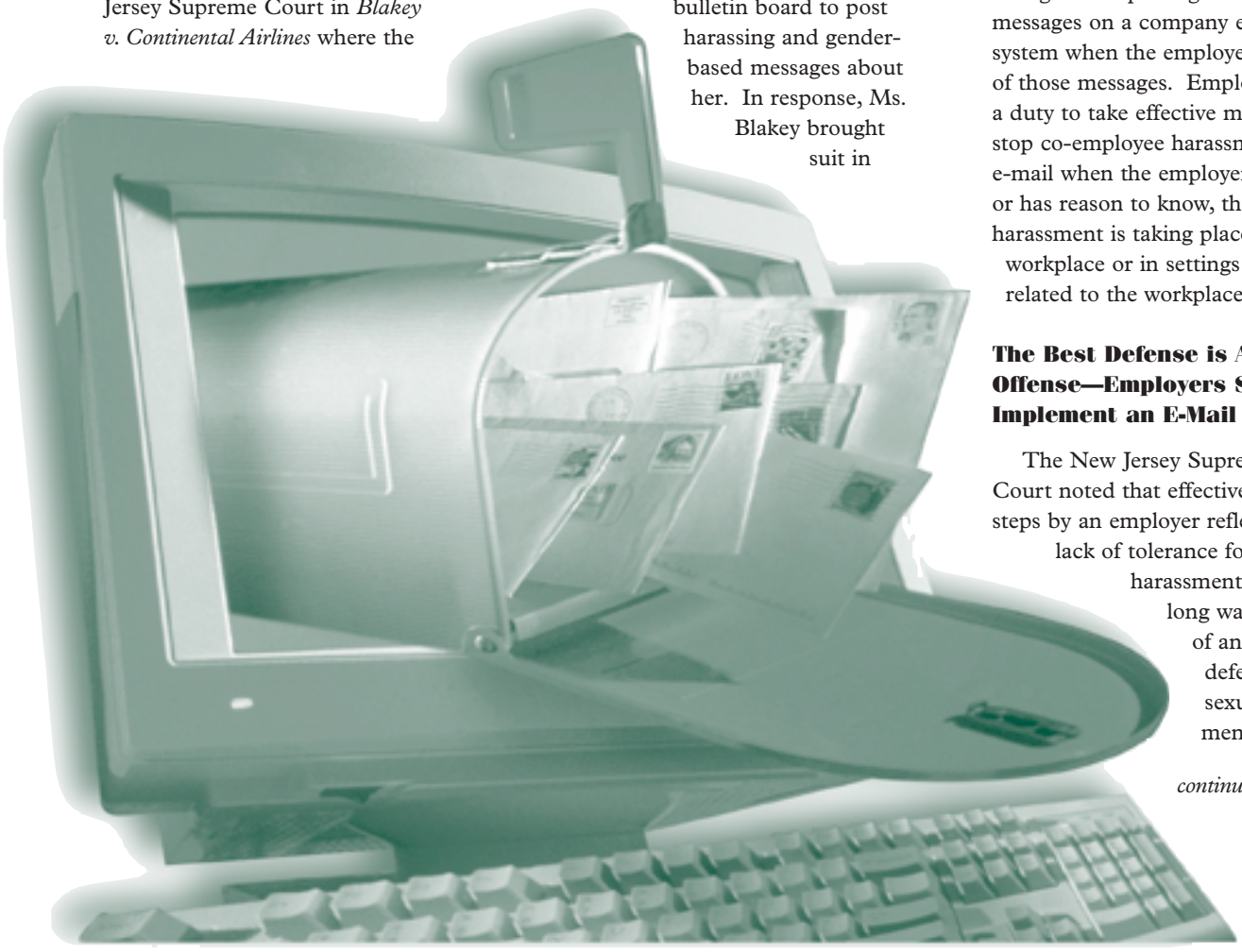
Employers Beware: You May Be Liable for Your Employees' Harassing Emails

by Susan E. Inverso

As the use of e-mail becomes the predominant method of communication for many businesses, employers are finding themselves faced with many unexpected problems, including exposure to various forms of legal liability. For example, employees can use the company's e-mail system to infringe copyrights, violate trade secrets, commit the company to contracts, defame people or businesses, and even harass co-workers.

One such problem was recently addressed by the New Jersey Supreme Court in *Blakey v. Continental Airlines* where the court considered whether an employer has the legal duty or obligation to monitor its employees' private communications on a company provided electronic forum. The plaintiff, who was a female pilot, sued her employer, Continental Airlines and certain other male co-pilots for sexual harassment. While Ms. Blakey's sexual harassment lawsuit was pending in federal court, certain male co-pilots utilized their employer's electronic bulletin board to post harassing and gender-based messages about her. In response, Ms. Blakey brought suit in New Jersey Superior Court against those co-employees, for publishing defamatory statements about her. Her claim against the employer alleged liability for a hostile work environment arising from those defamatory statements.

"…employers have no duty to monitor their employees' e-mail or other private communications…"



Although the court found that employers have no duty to monitor their employees' e-mail or other private communications, this does not mean that employers can disregard the posting of offensive messages on a company e-mail system when the employer is aware of those messages. Employers have a duty to take effective measures to stop co-employee harassment by e-mail when the employer knows, or has reason to know, that such harassment is taking place in the workplace or in settings that are related to the workplace.

The Best Defense is A Good Offense—Employers Should Implement an E-Mail Use Policy

The New Jersey Supreme Court noted that effective remedial steps by an employer reflecting a lack of tolerance for such harassment went a long way in support of an employer's defense in a sexual harassment case. In

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Prepare for An Encounter with the "Whistleblower"

by Andrew T. McDonald

As a matter of public policy, the New Jersey Legislature has carved out protections for employees who seek to expose, what they subjectively deem to be, improper conduct in the workplace. These protections are embodied in the Conscientious Employee Protection Act, or "CEPA." The New Jersey Supreme Court has interpreted CEPA to protect and encourage employees to report illegal or unethical workplace activities, and to discourage employers from engaging in such conduct. CEPA applies to at-will employees, contractual employees and employees covered by collective bargaining agreements, as well as, public employers and private employers. As such, employers need to educate their workforce, together with management, in order to avoid costly liability associated with violating the rights of any potential "whistleblower."

"…employers need to educate their workforce, together with management, in order to avoid costly liability associated with violating the rights of any potential 'whistleblower.' "

The Act

CEPA provides protection for employees who disclose employer conduct reasonably believed to be unlawful. Additionally, the CEPA protects those who give testimony or provide information to a public body investigating misconduct, or object to or refuse to participate in an act reasonably believed to be illegal or against public policy. The whistleblower must demonstrate a reasonable belief that a statute, rule, regulation or a clearly mandated public policy regarding public safety, health, or welfare will be violated by the conduct in question. To be successful in a CEPA claim, the law requires an employee to perform a whistleblowing activity. This whistle-blowing activity includes providing the employer with notice of the violation, and a reasonable opportunity to correct the conduct. Providing notice is not required if the employee is reasonably certain that a supervisor knows of the illegal conduct, or the employee reasonably fears physical harm as a result of the disclosure.

Proofs

The whistleblower is required to demonstrate that he or she was subjected to adverse employment action as a result of whistleblowing. An employer cannot discipline an employee who objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes to be illegal or against public policy. The judiciary continues to define what constitutes an adverse employment action. However, it is clear that discharge from employment, suspension and

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Insurance Coverage... cont. *(continued from page 2)*

EPL insurers will typically cover the corporate entity, its directors and officers, as well as senior management. Most policies will also cover the individual employees who may be the target defendants. In other words, the individual engaging in acts of employment discrimination, whether it be with or without knowledge of the senior management of the company, is probably entitled to insurance coverage under an EPL policy.

With respect to the insurer's "duty to defend," EPL policies may differ from Commercial General Liability (CGL) policies. With CGL insurance, the carrier will almost always assign its own attorneys to defend and thereby control the litigation. However, with EPL policies, the policyholder **may** have the right to select their own attorney, which law firm's fees may be reimbursed by the insurer. However, the payment of defense fees to the insured's attorneys may deplete the limits of the EPL coverage.

"A secondary analysis to be conducted by policyholders procuring EPL coverage is 'who' is covered."

EPL policies also have exclusions. For example, punitive damages will almost always be disclaimed by the insurance carrier. Certain intentional conduct may also be excluded, as well as conduct that may have occurred outside the course of the insured's employment relationship. For example, alleged acts of sexual harassment that may occur at a gathering of employees at a Friday night Happy Hour may or may not be subject to exclusions in the policy.

Surprisingly, there has been very little case law interpreting Employment Practices Liability policies. Thus, to the extent that disputes may exist between policyholders and their insurers concerning the interpretation of the scope of coverage in an EPL policy, neither the carrier nor the insured will find any specific guidance on the issue.

Workers' Compensation Insurance

In August 1998, the New Jersey Supreme Court handed down a landmark decision in *Schmidt v. Smith,* 155 N.J. 44 (1998). In the simplest of terms, the Supreme Court mandated that any insurer issuing Workers' Compensation insurance in New Jersey must defend and indemnify its policyholders to the extent that a lawsuit has been filed asserting a claim for wrongful discharge/employment discrimination that seeks damages for "physical manifestations of emotional distress." Perhaps by way of oversimplification, to the extent that an employee suing his/her employer for employment discrimination seeks recovery for headaches, heart palpitations and/or diarrhea, the Workers' Compensation insurer has a duty to defend and indemnify this suit. However, no duty exists to the extent that the emotional distress claim seeks recovery of emotional distress unaccompanied by physical manifestation, e.g., sleeplessness and humiliation.

Notwithstanding the landmark decision in *Schmidt v. Smith,* there are limits to the Workers' Compensation's insurer's duty to cover employment discrimination. For example, the carrier has no obligation to cover economic loss, including back pay and front pay. Nor is there a duty to cover punitive damages. As also noted above, there is no duty on the part of the carrier to cover claims for "pure" emotional distress. Most carriers will also seek to limit their duty to defend suits by allocating defense costs between covered and non-covered claims. For example, if a plaintiff seeks both economic loss and emotional distress accompanied by physical manifestations, the insurer may pay only a percentage of the insured's counsel fees.

To the extent that an insured has both Employment Practice Liability insurance and Workers' Compensation insurance, disputes will frequently result between the EPL insurer and the workers' compensation insurer as to each carrier's respective obligation to defend and/or indemnify the policyholder. By way of example, the EPL carrier may have a duty to defend all claims; whereas the Workers' Compensation carrier's duty is limited to physical manifestations of emotional distress. While the EPL carrier will defend the entirety of the suit, the EPL insurer may litigate with the workers' compensation insurer for reimbursement with respect to the physical manifestations of emotional distress claim.

Due to the lack of case law, issues addressing what coverage may exist for employers sued for wrongful discharge and/or employment discrimination is a particularly difficult area of the law to predict. The best way for an employer/policyholder to avoid the traps of coverage litigation is to purchase the best EPL coverage available in the marketplace. Thus, when shopping for EPL coverage, an analysis of the terms, conditions and exclusions of the policy is essential. If one shops EPL coverage by premium alone, you may get what you pay for. Be careful—you want to know you are covered if the lawsuit arrives on your desk!

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...Sexual Harassment Policies... cont. *(continued from page 9)*

A Rededication to Enforce the Lehmann Standards "Meaningfully"

In arguing her case before the Supreme Court, Ms. Gaines contended that the Appellate Division misapplied the *Lehmann* principles and failed to recognize that material issues of fact implicated at least two of the factors relevant to the question of employer liability: (1) that training must be mandatory for supervisors and managers and must be offered for all members of the organization; and (2) that the employer must have effective sensing or monitoring mechanisms to check the trustworthiness of the prevention and remedial structures available to employees in the workplace. The Supreme Court analyzed the motion record and found that the facts clearly did not support the summary disposition granted to defendants. The court found that the plaintiff's informal, verbal reporting of the incidents to several superior officers failed to result in any remedying for the plaintiff. Further, the court concluded that plaintiff provided a satisfactory explanation for being reluctant to file a formal harassment complaint, as she perceived the formal reporting of the incidents to be of no avail because she believed that nothing would change for her. Moreover, the record demonstrated that although plaintiff did not file a formal written complaint, she did protest orally to several co-workers and superior officers immediately after the incidents of harassment took place.

The employer's defense to the cause of action focused upon plaintiff's failure to file a formal complaint. The court found, however, that the plaintiff's inaction alone is insufficient to entitle defendants to an affirmative defense insulating the employer from liability for an alleged hostile work environment. The court held that plaintiff's failure to file a formal complaint must be considered in the context of whether the employer had been negligent in combating the creation of a sexually discriminatory hostile work environment by failing to establish meaningful and effective policies and procedures for employees to use in response to harassment.

In *Gaines,* the failure of the defendant employer to demonstrate that its policy was more than implemented permitted plaintiff's complaint to survive. The employer needed to demonstrate that its anti-harassment policy represented an unequivocal commitment from management of the employer's opposition to sexual harassment, and that its policies are meaningful and effective and more than just mere words encapsulated in the policy. Stated plainly, mere implementation and dissemination of anti-harassment procedures with a complaint procedure does not alone constitute evidence of due care. The court recognized that although the existence of effective preventative mechanisms provides some evidence of due care on the part of the employer, given the foreseeability that sexual harassment may occur, the absence of effective preventative mechanisms will present strong evidence of an employer's negligence.

The import of the Supreme Court's admonitions in *Gaines* were recently reiterated in the case of *Vélez v. Jersey City,* where the Appellate Division reversed a trial judge's grant of summary judgment to the defendant City in the plaintiff's LAD claim. Relying heavily upon *Gaines* in overruling a trial court's grant of summary judgment in favor of the employer, the appellate court commented that the reasonableness of an employer's dissemination, implementation, monitoring and enforcement of its anti-harassment policy will be closely scrutinized.

The *Gaines* case raises serious questions concerning the effectiveness of policies and provides plaintiffs with the opportunity to prove that an employer may be liable vicariously for sexual harassment in the workplace because the anti-harassment policy is no more than words. As always, Hill Wallack stands ready to assist any employer facing issues regarding the implementation and/or enforcement of anti-harassment policies.

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Spotlight... cont. *(continued from page 8)*

"Current Issues in State and Local Government Contracting" sponsored by **Hill Wallack** and held at the Trenton Marriott at Lafayette Yard on July 25, 2003. This Government Procurement Law Forum is the first in a series of government procurement seminars which attracted more than 80 worldwide and national companies. Mr. Kennedy and Ms. Cannon provided an update on the "Pitfalls of Procurement and Contract Administration – What to Be Aware of In Your Next Procurement". Other speakers included Robert L. Smart, Deputy State Treasurer of the State of New Jersey, Department of Treasury; John Kennedy, Assistant Director of the Department of Materials Management at University of Medicine and Dentistry of New Jersey and Enrico "Henry" Savelli, Former Supervisor, State Purchase Bureau and current President of Henry Savelli & Associates.

Mr. Kennedy and Ms. Cannon concentrate their practice in Administrative Law and Corporate Litigation including Public Procurement and Environmental Litigation with a particular emphasis on administrative, environmental and regulatory compliance.

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Waiving the Right to a Jury Trial... cont. *(continued from page 5)*

and employee to arbitrate any matter arising out of the employment. The Court held that to be binding, the language must be clear as to what right an employee is giving up. Language that advises an employee that he is waiving his right to a jury trial in favor of arbitration for all federal, state and local laws, whether they are statutes, regulations or common law doctrines with regard to any claim arising from employment discrimination, employment conditions or termination, is enforceable.

Of course, it is important for employers to review the language of their contracts, handbooks and employment applications on a periodic basis to ensure that they not only comply with current law, but also to take advantage of the evolution of the law. Often waiver of rights clauses which force parties into arbitration for employment disputes result in a reduced exposure to excessive jury awards and keep legal fees to a minimum.

To determine if such language should be drafted into employment documents, or to determine if existing language complies with the current holdings of the court, employers should consult with counsel for a thorough review of documents.

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The Statute of Limitations... cont. *(continued from page 7)*

former supervisor harassed her once by making a sexual advance, but years later the employee was subjected to discriminatory conduct based upon her gender—unrelated to the sexual advance—the employer would likely be successful in having a claim arising from the earlier conduct dismissed despite that it may have been committed by the same supervisor against the same employee.

Mitigating Potential Liability

While most employers appreciate their obligation to investigate and remediate complaints of harassment or discriminatory conduct, it is also important for any employer who is aware of harassment or discrimination to immediately respond to the same even if no complaint is voiced by the employee. Simply because an employee does not assert a complaint until many years later does not mean that the employee has waived his or her right to pursue a claim for such illegal conduct. Significantly, the delay in the prosecution of a continuing violation of illegal conduct exposes the employer to greater liability. Thus, if such circumstances arise, having legal counsel to intervene and provide advice as to the proper handling of such matters can oftentimes mitigate potential liability.

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Workers' Compensation... cont.

(continued from page 3)

record provided no basis for establishing an intentional wrong by either an intent to injure or knowingly exposing the employee to risk that was substantially or virtually certain to result in harm. In so finding, the Court noted that the exclusivity bar of the Workers' Compensation Act was still the law in New Jersey. Later in *Tomeo v. Thomas Whitesell Construction Co., Inc.* the Court reversed a jury award of $160,000.00 to the injured employee finding that although the employer committed an intentional wrong by removing a safety item, there was insufficient proof as to the "virtual certainty" of harm to the employee by the removal of the safety device.

These decisions make it clear that the employer can no longer act in such a manner so as to intentionally put their employee in danger, while knowing that it is a virtual certainty that the employer's actions will lead to the very injury suffered by the employee.

While Workers' Compensation may still be the "exclusive" remedy for an employee, recent case law analyzing the two pronged test established by our Supreme Court raises questions as to the remedy's protection to the employer. There can be no doubt that plaintiffs in New Jersey have set their sights on the erosion of the exclusivity remedy of the Workers' Compensation Act. The only question is whether they will succeed and when.

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"The Whistleblower"... cont. *(continued from page 11)*

demotion are disciplinary acts that constitute "retaliatory action" under CEPA.

Many affirmative defenses found in the New Jersey Tort Claims Act, available to public employers for claims brought by an employee, do not apply to claims brought under CEPA. The CEPA claim must be filed within one year of the violation and the claimant has a right to a jury trial. If the employee is successful in a CEPA claim, the employer is strictly liable for equitable relief such as reinstatement and restoration of back pay. Moreover, the employer will be liable for punitive damages in the event that upper management participated in the violation, or was willfully indifferent to the employee's complaint. Punitive damages are directed at deterring future discriminatory conduct by the employer by economically punishing the employer. Other relief available to the employee is an injunction to restrain continued violation of the act, compensation for lost benefits, and payment of reasonable costs and attorney's fees.

It should become apparent that violating the rights of a whistleblower could be an expensive endeavor. As the Legislature and Judiciary seek to overcome the victimization of employees in order to protect those who are especially vulnerable in the workplace from the improper or unlawful exercise of authority by employers, employers need to seek proper counsel to educate themselves and their workforce in order to avoid the propensity for whistleblowing, and to refrain from violating the rights of a whistleblower.

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New Legislation Changes... for School Boards cont. *(continued from page 4)*

advises that PERC can also be expected to specify procedures (including form and timelines) for the assignment of a super conciliator. Pending adoption of these new rules, parties who must initiate super conciliation should contact PERC for the appointment of a super conciliator.

Finally, while adoption of the new law appears to increase the power of the public labor unions to obtain a more favorable settlement, local school districts are not required to adopt terms to which they strenuously object. As with the prior impasse procedures, all settlements must be mutual. It can be expected, however, that the public release of a neutral's recommendation can and will drive all parties toward settlement. Hill Wallack is readily available to provide legal counsel to school boards in all their labor contract needs.

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...Employees' Harassing Emails cont. *(continued from page 10)*

other words, employers may protect themselves against liability by establishing and adhering to a policy regarding employee use of the company's e-mail system that expresses zero tolerance of sexual harassment. The policy must make it clear that the employee has no right to privacy to any information transmitted or received by company e-mail. Further, employees should be informed that the employer has access to all e-mails and retains the right to read employee e-mail. Importantly, the employer must warn employees that they are prohibited from sending discriminatory or harassing messages including, sexual comments, jokes or images, racial slurs and gender-specific comments. Employers should post the no tolerance sexual harassment policy on its electronic bulletin board and include it as part of the employee handbook for their protection.

The basic purpose of implementing an e-mail use policy is to let employees know that their employer may be reviewing their e-mails. This may prevent employees from sending inappropriate e-mails in the first place. The actions of employers in establishing a policy which is clearly intolerant of harassing or offending e-mails, is the first step in avoiding liability when the policy is violated. If your company is in need of advice regarding modifications to its employment manual and policies, given the change in technology and heightened awareness of anti-discrimination practices, Hill Wallack's Employment & Labor Law Practice Group is available to provide assistance.

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...ERISA? cont. *(continued from page 6)*

circumstance, the administrator's actions will be closely scrutinized to ascertain if a benefit decision was influenced by the potential conflict of interest.

There are also record-keeping and notice requirements which must be observed. For instance, the plan administrator must supply a written summary of the benefits plan to each beneficiary. The plan administrator is required to furnish this and other governing documents to a beneficiary upon written request.

There is also a duty to produce adequate notice of denied benefits. Thereafter, the administrator must provide a "full and fair review" opportunity wherein the plan participant is afforded the opportunity to appeal the benefit denial decision. On appeal to the Courts, a well-reasoned decision premised on a properly developed record without evidence of conflict is subject to an arbitrary and capricious appellate review standard. In other words, the review will be limited to whether the decision was arbitrary and capricious based on the record that was before the plan administrator. In such a situation, the participant will not be afforded a new trial with an opportunity to present new or different evidence. However, evidence of conflict or an unsubstantiated record may trigger a de novo review, which affords the appellant an opportunity to develop and supplement the record regarding his claim.

In addition to having the benefit of an arbitrary and capricious standard of review on appeal, ERISA also provides other advantages for the employer in litigation. For instance, the Statute provides a favorable Federal Court forum for litigation brought under it. Although there is co-extensive jurisdiction with the State Courts, it is generally preferable to remove an action commenced in State Court to Federal Court. Furthermore, state insurance laws and state causes of action are, for the most part, preempted by ERISA. Thus, consideration must be given as to whether any state law claims, punitive damages or other claims for relief should be the subject of a motion to dismiss.

The attorneys at Hill Wallack provide a wide range of employer and insurance related representation, including defense of claims arising from the creation and administration of ERISA regulated benefit plans.

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