

THE LORD & WHIP

REPORT

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THE IMPORTANCE OF WAGE AND HOUR LAWS

By: Edward M. Ranier

Employees who work over 40 hours a week must be paid overtime pay, which is time and a half of the employee's regular wage. Despite misconceptions to the contrary, compensable time off cannot be substituted for overtime pay. Doing so is a violation of the federal Wage and Hour Law unless the employee is a professional employee, an executive employee or an employee properly classified as an administrator who is exempt from the law's requirements.

Each year representatives of the Wage and Hour Division of the United States Department of Labor or the equivalent state agency inspect workplaces to determine whether employers are complying with the Fair Labor Standards Act, and specifically with the Act's overtime provisions. These investigations can occur as a result of routine audits or on the basis of an employee complaint.

The inspections usually reveal that employers fail to keep good records. Inspectors often find instances of unpaid overtime and compensable time given in lieu of overtime to employees, both violations of the Act. If there is a willful violation of the Act, the Department of Labor can institute criminal prosecution. In addition, the Wage and Hour Division of the Department of Labor and the affected employee who contends that he or she is due unpaid wages and overtime can bring a civil action in federal or state court.

In a civil action, the Court has the power to award back pay for the two year period preceding the filing of the complaint. In the case of a willful violation of the Act, the back pay period can extend to three years. The Court also has the power to award attorneys fees and additional damages equal to the back pay amount, which may effectively double the back pay award.

Employers whose gross annual sales exceed \$500,000 or who deal in interstate commerce, which is broadly interpreted, are covered by the Act. The only such companies not covered are those whose only regular employees are the owner or the parent, spouse, child or immediate family member of the owner.

Professional and executive employees (defined as employees whose primary duties are management) and administrative employees who regularly exercise discretion and independent judgment directly related to management policies or general business operations are not covered by the requirements of the Act. The exception for professional employees is narrowly interpreted by the United States Department of Labor.
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The Act requires employers to maintain complete employee records. Records showing the name, address and social security number of the employee must be maintained. Employers must document the hour and day when the work week begins and the total hours worked in each work week. Earnings information, such as the total daily and weekly straight time earnings, the regular hourly rate for any work week when overtime is worked, the total overtime pay for each week, deductions from or in addition to wages, and the total wages paid each pay period with the date of payment and the pay period covered must also be recorded. Records must be maintained for three years, unless the Internal Revenue Code requires that records be kept for longer time periods.

If records are not maintained, the employer is potentially violating the wage and hour laws. The employer also risks being unable to prove that it appropriately compensated its employees, risks being unable to defend itself if sued, and may be unable to limit its liability under the Act. Employers must understand that many states have also enacted wage and hour legislation with requirements on employers that differ from the federal Wage and Hour Law. Employers must also observe state laws regarding overtime, wages and minimum wage.

Mr. Ranier is a shareholder in the firm and devotes his practice to workers' compensation defense, regulatory, and OSHA law matters and provides counsel to the funeral profession.

LEGISLATURE CHANGES PARENT/CHILD IMMUNITY DOCTRINE

By: Karen L. Gunderman

The Maryland General Assembly enacted new legislation that eliminates parent child immunity with respect to personal injury, property damage, or wrongful death claims arising out of a motor vehicle accident. The new legislation only applies to an action between a parent and an unemancipated child. Under the new law, the parent or child who caused the death is barred from benefiting from the proceeds of a wrongful death action. Previously, the parent/child immunity doctrine prevented a child or a parent from pursuing a claim against the other in negligence actions.

Under the new legislation, found at Md. Cts. & Jud. Proc. Code Ann. §5-806, an unemancipated child may sue a parent for personal injury, property damage, or wrongful death claims arising out of the operation of a motor vehicle. This right of action by a parent or unemancipated child cannot be restricted by the doctrine of parent/child immunity or by insurance provisions. However, the statute does place a limitation upon the amount of recovery for these types of claims. Claims are capped at the mandatory minimum liability insurance coverage levels, which are statutorily set at \$20,000 per person and \$40,000 per occurrence at present. The new legislation applies to any case for wrongful death, personal injury, or property damage arising out of the operation of a motor vehicle filed on or

after October 1, 2001 regardless of the date of the accident.

Now that parents and children are able to recover damages from each other in motor vehicle accident cases, there are concerns about who will bear the cost of this change in the law. Insurers are liable for payment of damages, and will likely pass increased costs to consumers in the form of premium increases. The Maryland Automobile Insurance Fund (MAIF) estimates that six cases against MAIF insureds involving claims between parent and child will arise annually. If each case is settled for \$20,000, the total annual pay out would be \$120,000. This sum is regarded as minimal.

The change to the parent/child immunity doctrine may alter the manner in which certain claims are evaluated and adjusted. Claims adjusters, risk managers, and other insurance industry professionals should evaluate motor vehicle accident claims between parent and child on their merits, because such claims are no longer barred by the parent/child immunity doctrine.

Karen L. Gunderman is an associate at Lord & Whip, P.A. Ms. Gunderman is active in the workers' compensation practice, and she also handles civil litigation in state and federal court.

THE PERILS OF NEW TECHNOLOGY: INTERNET USE AS A BASIS FOR JURISDICTION

By: Kathleen M. Bustraan

The use of the internet by physicians, lawyers and other professionals has grown geometrically in the last few years. Professionals are using the internet to advertise their practices, to receive and reply to requests for advice and consultation, to share information with other practitioners, and to consult and communicate with their patients and clients. Practicing both law and medicine over the internet creates new and unique liability risks. One of the most important issues facing professionals using the internet is whether their actions will enable courts in distant states to exercise jurisdiction over them in a civil lawsuit.

Most courts that have addressed issues relating to jurisdiction based upon internet use have held that the nature and quality of the commercial activity that is conducted over the internet will determine whether personal jurisdiction may be constitutionally exercised. *See, e.g., Zippo Manufacturing Company v. Zippo.com*, 952 F.Supp. 1119 (W.D. Pa. 1997). Since information posted on a website becomes available world wide almost instantaneously, imposing traditional jurisdictional concepts on commercial internet users could have dramatic implications, possibly subjecting internet users to nationwide or even international jurisdiction. *Hasbro, Inc. v. Clue Computing, Inc.*, 994 F.Supp. 34 (D. Mass. 1997).

While a professional's use of a website may not always establish a basis upon which suit can be brought against the professional in a location far away from the professional's place of business, courts have found that a website, along with other contacts, is enough to allow suit when the Plaintiff viewed the site. *See, e.g., Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996). Courts that have found the use of a website by itself to be a sufficient basis for jurisdiction have ordinarily noted the interactivity of the site, such as

whether it contains a "800" number for prospective clients or patients to call, or whether the defendant directly contacts users of the site. *See, e.g., Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F.Supp. 161 (D. Conn. 1996); *Contra Heroes, Inc. v. Heroes Foundation*, 968 F.Supp 1 (D. D.C. 1996); *Maritz, Inc. v. Cybergold*, 947 F.Supp 1328 (E.D. Miss. 1996). If the wrong itself is committed over the internet, jurisdiction will likely exist wherever the victim is located.

In *Inset*, a Connecticut corporation that developed and marketed computer software throughout the world sued a Massachusetts corporation for trademark infringement. The Defendant, who was sued in Connecticut, claimed that personal jurisdiction was lacking because it did not have sufficient minimum contacts in Connecticut. The Court explained that the Massachusetts corporation purposely availed itself of the privilege of doing business in Connecticut by virtue of its web based marketing campaign, and that personal jurisdiction was proper.

By contrast, a federal court in Pennsylvania concluded that a website alone did not establish sufficient minimum contacts to allow the court to exercise jurisdiction over a Canadian corporation. The federal court explained that Pennsylvania was not an appropriate forum in which the Canadian corporation could be sued, because the Canadian corporation never transacted business, provided services, earned income, or entered into any contract in the state. Although the Canadian corporation had a web presence, its website did not accept orders, did not transact business, and the website interactivity was limited to exchanging files via the internet or through e-mail communications. The website was tantamount to a "passive advertisement" and the principles of general jurisdiction did not suffice to allow the federal district court to exercise long arm jurisdiction. *See,*

e.g., Desktop Techs v. Colorworks Reproduction and Design, Inc., 1999 U.S. Dist. LEXIS 1934 (E.D. Pa. Feb. 25).

The proliferation of websites through which lawyers provide legal advice and legal opinions to persons in other jurisdictions may raise concerns about the unauthorized practice of law. For example, the case entitled Birbrower, Montabano, Condon & Frank, P.C. v. ESQ Business Services, Inc., 949 P.2d 1 (1998) explains that a lawyer could be practicing law in California without a license although not physically present in the State by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Lawyers giving advice over the internet or via e-mail could find themselves in a similar predicament.

If a lawyer is not licensed to practice where the fee agreement is signed, this agreement may be unenforceable by the lawyer. Any rule giving clients a basis upon which not to pay their legal bills will likely lead to more fee claims brought by lawyers, and consequently, malpractice counterclaims. This is precisely what happened in Birbrower. Additionally, disciplinary actions against an attorney based on the unauthorized practice of law can be major interruptions to a lawyer's practice.

Lawyers' use of websites, including a law firm's own web page, implicates the ethical rules limiting lawyer advertising and direct solicitation of clients. *See, e.g.*, Massachusetts Ethics Opinion 98-2 (1998); New York City Opinion 1998-2 (1998); Ohio Supreme Court Ethics Opinion 99-3 (1999); Arizona State Bar Association Formal Opinion 97-04. Because each state has different rules, it will be difficult for lawyers to comply with the rules of every single jurisdiction in which the website can be accessed. Violation of advertising or solicitation rules can result in a disciplinary action against an attorney. Defense of disciplinary charges is often covered to some extent under legal malpractice policies.

E-mail also presents issues for professionals. Advice is frequently given via e-mail as opposed to

over the telephone or in more formal written form. When e-mail is used as a short hand method by which information is conveyed, in contrast to the more deliberative process traditionally associated with the preparation of written materials, e-mail messages may create problems if there is a later dispute.

Using e-mail to communicate with clients, patients, adversaries, and other professionals seems to bring with it the obligation to retain a copy of the e-mail. In the event that a dispute arises, either with the client, patient, or an adversary, and the e-mail has to be retrieved, this may present a significant financial and administrative burden. *See, e.g.*, In Re Brand Name Prescription Drugs Antitrust Litigation, No. 94-C-897, (court ordered Defendant to retrieve e-mail despite estimated costs of between \$50,000 and \$70,000). Moreover, if the professional has a policy for deleting e-mail after a certain period of time, e-mail may no longer be saved on the system, creating proof problems.

Professionals are embracing, and will continue to embrace, the opportunities offered by technology and the internet. These advancements will present new challenges and exposures for lawyers, physicians, and other professionals using these forms of technology. It is still unclear as to specifically what type of internet related activity will permit an out-of-state court to exercise personal jurisdiction based on e-commerce activity. Nevertheless, it is clear that courts examine the business activities and the degree of contact between the professional and the residents of foreign states.

One possible means of mitigating exposure to litigation in foreign jurisdictions is for the website or contract to include, along with the usual disclaimers, a forum selection clause requiring litigation to be held in the internet related entity's state. Lawyers, physicians, and other professionals that use the internet should carefully plan their business activities or face the prospect of defending themselves in foreign locations if they are named as parties to litigation.

Ms. Bustraan is a shareholder at the firm. Her practice areas include professional malpractice, employment, and general civil litigation.

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Save the Date

Friday, May 10, 2002 9:00 a.m. to 1:00 p.m.

ANNUAL SEMINAR AND RECEPTION

PIMLICO RACE TRACK, BALTIMORE,
MARYLAND

New Developments in Workers' Compensation
Law, Employment, Insurance Coverage, and
Professional Malpractice Will Be Discussed

Please Join Us

SEARCHES ALLOWED AT RACETRACKS

By: Michael H. Daney

The U.S. Court of Appeals for the Second Circuit ruled that the New York State Racing and Wagering Board may conduct unannounced searches of thoroughbred and harness racetracks to investigate illegal drug use and other activities that may affect the integrity of racing. The Court held that warrantless searches can be performed in all areas of the racetrack except in the dorms. The dormitories are equivalent to a residence and, therefore, receive Fourth Amendment protections against illegal searches and seizures.

Searches of places like barns were allowed because state regulations provide licensed individuals "with sufficient notice of the likelihood of a search to satisfy the Fourth Amendment." The Court went on to state that dorms at racetracks "enjoy the sanctity according private residences" and warrantless searches are

impermissible. The Court did not address whether warrantless searches of dorms would be permissible if the residents signed a waiver as a condition of their use of the dorm room.

This decision is significant because it affirms the ability of racetracks to conduct warrantless searches in the barn areas and other parts of the racetrack to search for illegal activity. Unfortunately, excluding dorm rooms from the searches provides a safe haven for illegal activity unless a waiver to search the room is provided. An appeal on the issue of the dorm rooms is expected. We will continue to monitor this case as the appeal continues.

Mr. Daney is a shareholder at the firm. His practice involves the defense of workers' compensation claims and matters involving the equine industry.

OFFICE notes

We are happy to welcome **Karen Gunderman** and **Christian Dorsey** as associate attorneys. Karen is a 2000 graduate of the University of Baltimore School of Law and joins us from private practice. She will defend workers' compensation claims and general civil litigation at the firm. Christian graduated from the University of Baltimore School of Law in 2001 and joins the civil litigation and asbestos practices . . . We are also pleased to announce that **Carmen**

Schwartz has returned as counsel to the firm. Carmen is admitted to practice in Maryland and the District of Columbia, and has experience in admiralty, aviation, employment, insurance, and products liability law. She is also active in the asbestos practice . . . Congratulations to **Mike DeBaugh** on his appellate practice. He successfully handled two insurance coverage cases, Burns & Russell Co. of Baltimore City, Inc. v. American Employers' Ins. Co.

and Allstate Ins. Co. v. Reliance Ins. Co., in the Court of Special Appeals this winter, and also won premises liability and statute of limitations cases in the appellate court . . . **Paul Mullen** continues to serve as an at-large member of the Judicial Appointments Committee of the Maryland State Bar Association. Paul will participate in the bar association's interviews of the applicants for state judgeships and will join with other members of the committee to make recommendations to the governor regarding the qualifications of the applicants . . . **Mike Daney** was appointed 2002 Chair of the Dublin Darlington Community Council by Harford County Executive Jim Harkins, and was also named to the Neighborhood Youth Panel. Mike will also be a guest lecturer in

April at the University of Maryland's horse management course in College Park . . . **Chris Erwin** is the new President of the Wiltondale Improvement Association, which represents approximately 350 homeowners in Baltimore County. In this volunteer post, he represents the community's interests when dealing with the local government on issues affecting the neighborhood. . . Last but not least, congratulations go out to **Mike Lind** who completed the Marine Corps Marathon. Mike ran in the marathon to raise money for the Leukemia and Lymphoma Society and personally raised over \$1700 to contribute to a very successful fundraising effort . . .

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