



## UNITE HERE In Hot Water With Cintas Employees

By Michael S. Mitchell (New Orleans)

Picture yourself leaving work at the end of the day. As you enter the company's parking lot you see several strangers around your car. They appear to be photographing your license plate, and taking notes. Later that week two more strangers come to your house at night. They call you by name and ask if you'd like to hear more about their union. When you ask how they got your name, they say by running your license plate number through the State's department of motor vehicles. That chilling scenario is what happened to between 1,758 and 2,005 Cintas employees in 2004.

A group of those employees at the company's Allenwood, Pennsylvania plant, who felt their privacy had been invaded, filed a class action lawsuit against the Union under the Driver's Privacy Protection Act (DPPA) a federal anti-stalking law that prohibits this kind of behavior.

A federal district court ruled against the Union and awarded each of the employees \$2,500 in liquidated damages. A court of appeals not only upheld that judgment, but sent the case back down for consideration of punitive damages. *Pichler, et. al. V. UNITE HERE*.

### Creepy Behavior

The DPPA was passed in 1994 mainly to protect the privacy of individuals from stalkers and potential criminals. At that time, personal information was easily available from the departments of motor vehicles (DMVs) in at least 34 states. Part of the impetus for the law included the death of a Tempe, Arizona woman who was murdered by a man who had obtained her home address from that State's DMV, and the death in California of a television actress who had an unlisted home number and address, but who was shot to death by an obsessed fan who obtained her name and address through the DMV.

The DPPA prohibits the disclosure and resale of the personal information that a prospective licensee must disclose to the state motor vehicle department in order to secure a driver's license. Included are such basics as name, address, telephone numbers and social security numbers.

But the law contains 14 exceptions — legitimate reasons to obtain the information referred to. Two of these are the "litigation exception" (when information is being obtained in anticipation of filing a lawsuit) and the "acting on behalf of the government exception." These are the arguments that the union raised in its defense, and which the U.S. Court of Appeals for the 3rd Circuit rejected.

### "The Government Wants Me To Invade Your Privacy, Really."

Cintas is the largest domestic employer in the industrial laundry industry. They have long been a target of a UNITE HERE corporate campaign. Over the years UNITE HERE has filed "dozens of ... lawsuits and administrative actions ... before the EEOC, OSHA, NLRB, and other agencies," according to documents filed with the court. The goal, of course, is to get Cintas to stop opposing union organizing, to which it is "philosophically opposed," again according to court papers.



The theory behind this, or any, corporate campaign is that if enough charges, petitions, complaints and lawsuits can be ginned up, perhaps Cintas (or any other UNITE HERE target) will back off and sign a "labor peace" agreement, guaranteeing neutrality in future organizing campaigns, or even agreeing to recognize the union based on a card check instead of a secret-ballot election.

The Third Circuit's reasoning was straightforward. The Union's obvious goal, no matter how they tried to disguise it, was union organizing. This is definitely *not* one of the 14 exceptions listed in DPPA.

And, in the Court's view, it doesn't matter how many "permissible" reasons you might have, the fact that you are also invading privacy for an "impermissible" reason, like union organizing, brings you within the law's proscriptions. Result? \$2,500 per person, per violation. And each use or disclosure of personal information is considered a separate violation.

### But Wait, There's More

The lower court found in favor of the employees, and assessed the minimum amount of liquidated damages specified in the law. But the DPPA also allows punitive damages, and on appeal the 3rd Circuit agreed with the employees that the lower court should have considered this.

According to the Court's decision, if there is "a genuine issue of material fact regarding the willfulness or recklessness of a defendant's conduct, we hold that the Seventh Amendment [to the U.S. Constitution] requires a trial by jury on the issue of punitive damages under the DPPA."

The Union argued that such punitive damages can only be assessed if there were also "actual" damages. Not so, according to the 3rd Circuit's opinion. The statute allows a court to award actual damages — however high that might be — but in no case shall the damages be less than the liquidated amount of \$2,500. In addition, the court "may" grant punitive damages. But there is nothing in the law that ties actual damages to liquidated damages, and nothing that ties either of those amounts to punitive damages.

In other words this law has teeth: even with no showing that you have been "actually" damaged in any way, you are entitled to liquidated damages of \$2,500 per violation, and in addition, if the behavior is reckless or willful, an award of punitive damages, as well.

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# Restaurant Association Challenge To SF Healthcare Ordinance Fails

By Callan Carter (San Francisco)

In what may become a trend statewide, or even nationwide, the San Francisco City Council passed what is called the Health Care Security Ordinance (HCSO). The purpose of the ordinance is to require employers to pay certain monetary amounts for health care, based on the number of persons employed.

The Golden Gate Restaurant Association challenged the ordinance arguing that it is preempted by ERISA. A federal district court agreed with the Association, but the City of San Francisco appealed. On September 30, 2008, the U.S. Court of Appeals for the 9<sup>th</sup> Circuit overturned the district court decision, ruling that the HCSO is not preempted by ERISA.

## Coverage Includes Companies Not Based In San Francisco

The HCSO covers nonprofit employers with 50 or more employees, and for-profit employers with 20 or more employees, regardless of their worksite, job classification or hours worked. The HCSO requires that covered employers make qualifying health care expenditures to or for the benefit of their covered employees every calendar quarter.

In addition to the size requirement, covered employers are those who *engage in business* within the City of San Francisco and who are required to obtain a valid San Francisco business registration certificate. Whether or not an employer is physically located in San Francisco has no bearing on its status. For leased employees and co-employees under professional employer organizations (PEOs), both the worksite employer/client and the PEO or leasing agency may be considered a covered employer.

Covered employees are all persons who have been employed for at least 90 calendar days (not necessarily consecutive and including periods of leave), are entitled to payment of minimum wage and work at least 10 hours per week within San Francisco (this number decreases to 8 in 2009). Certain employees are excluded, including: 1) managerial, supervisory or "confidential" employees earning more than \$76,851 (or \$36.95/hour) in 2008 (this amount indexed annually); 2) employees eligible for Medicare or Tricare/CHAMPUS; 3) employees covered by the San Francisco Health Care Accountability Ordinance (which covers City contractors); 4) trainees of non-profit organizations, in accordance with a federal bona fide training program; and 5) employees who voluntarily provide written verification that they are covered by another employer's health plan (as an employee or dependent) and waive coverage annually on a specific waiver form.

## What's Required

Health care expenditures are amounts paid to covered employees or to a third party on their behalf for the purpose of providing health care services or reimbursing employees for health care services. This can include medical, dental and vision care, as well as services or goods which qualify as deductible medical expenses under Section 213 of the Internal Revenue Code, including over-the-counter drugs.

Examples of qualifying health care expenditures include payment of insurance premiums, expenditures by self-insured plans (including administrative fees paid to third parties), contributions to health care flexible spending accounts, health savings accounts and health reimbursement accounts. Alternatively, payment to the City of San Francisco for the Health Access Program or to establish medical reimbursement accounts with the City qualifies as well.

Employers may choose to satisfy the required Health Care Expenditures via more than one method, but if you choose to satisfy the requirement by making payments to the City, you must provide your employees with a specific written notice.

## So Pony Up The Dough...

The amount of health care expenditures that a covered employer is required to make is based on each hour paid for each covered employee during a quarter, as follows:

Employers with 100+ employees = \$1.76/hour paid (\$1.85 after Jan. 1, 2009);

Employers with 50-99 employees = \$1.17/hour paid (\$1.23 after Jan. 1, 2009);

Employers with 20-49 employees = \$1.17/hour paid.

Starting January 1, 2010, these rates will be set by the City based on the City Health Service System contributions. "Hours paid" includes all hours worked in the City of San Francisco plus any paid time off (if a covered employee also works outside San Francisco, paid time off included will be pro rata, based on hours worked in San Francisco).

A covered employer's required health care expenditure is calculated by multiplying the total number of hours paid to each covered employee during the quarter (starting on the first day of the calendar month following 90 days of employment), up to a maximum of 172 hours per month or 516 hours per quarter, by the applicable rate. Quarterly health care expenditures must be made within 30 days of the end of the preceding quarter.

## ...And Keep Good Records

Covered employers must also keep records of health care expenditures made and calculations of minimum health care expenditures required under the law (including wage and hour information), as well as any waiver and notice given regarding payments to the City, for four years after a covered employee's employment terminates, and must also report their compliance to the City annually.

Penalties include payment of any missed health care expenditures or reimbursement of a covered employee's out-of-pocket expenses (or both), an administrative penalty of 1.5 times the unpaid expenditure, plus interest of 10% (total administrative penalty maximum of \$1,000/covered employee per week of failure).

Make sure you're in compliance, and if you're concerned that you might not be, contact your Fisher & Phillips attorney.

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## Conclusion

Corporate campaigns are tough. There are often nasty allegations involved, in a union's efforts to bring a company around to a "neutral" way of thinking. But there are limits to what unions can do, and ways for companies, and their employees, to fight back. The DPPA is one of those ways.

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# Breaking Up Is Hard To Do

## Love Contracts Can Make It Easier

By Joe Gagnon (Houston)

A 2007 Spherion Workplace Snapshot survey revealed that approximately 40% of U.S. workers have dated a co-employee, and that another 40% would consider doing so. Inevitably, most workplace relationships end. Some end badly, and many of those result in litigation involving claims of coercion or retaliation, despite the fact that most of these relationships are completely consensual at the outset.

And it's not just the jilted lover who could be your company's next adversary in workplace litigation. A few years ago a group of California employees *not* involved in a workplace romance succeeded in establishing hostile work environment discrimination based upon favoritism bestowed on those who were romantically linked with a supervisor. This "reverse *quid pro quo*" theory of liability will undoubtedly be tested in other states.

In response to litigation arising from workplace relationships, many businesses, including some in the hospitality industry, have implemented non-fraternization policies designed to prohibit or discourage workplace relationships. But these non-fraternization policies have had limited effect. According to the Spherion survey, 84% of U.S. workers either have no idea whether their employer has such a policy or believe it has chosen not to have one. Clearly, most employers are doing a poor job of making their expectations known to employees on these issues.

Additionally, many employers recognize that it is neither possible nor desirable to ban all workplace relationships. First, employers generally prefer not to chaperone employees. Second, most employees consider employer monitoring of personal relationships an invasion of privacy, and some jurisdictions may prohibit it altogether. Third, failing to enforce a non-fraternization policy evenhandedly and consistently, increases the possibility of a discrimination claim, the very thing the policy was designed to prevent. Finally, and probably most important, outright bans of employee relationships simply don't work. Since most workers spend at least one-third of each day in the office, it is hardly surprising that personal relationships will develop.

### P.S. I Love You

In response to the limited effectiveness of non-fraternization policies, many companies have developed Employee Relationship Acknowledgements, otherwise dubbed "love contracts," in which employees in a relationship make certain disclosures to the employer. Despite the unfortunate name, love contracts, when properly implemented, can serve as a powerful deterrent to future litigation. With this in mind, any hotel considering the use of love contracts should know the following:

#### *The essential elements*

Although the precise language will vary, an effective love contract should contain the following disclosures:

- the relationship is consensual and is not based on intimidation, threat, coercion or harassment;
- the employees have received, read, understood, and agree to abide by the company's policy against harassment and discrimination;
- the employees agree to act appropriately in the workplace and avoid any behavior that is offensive to others;
- the employees agree not to let their relationship affect their work, or the work of their co-employees;

- neither employee will bestow upon the other any favoritism or preferential treatment;
- either employee may end the relationship at any time, and no retaliation of any kind will result;
- the contact information for the person in the HR department (should either employee feel the relationship is affecting his/her work); and
- the employees have had sufficient time to read the document and ask questions before executing it of their own free will.

#### *Unenforceability as a "contract" is a non-issue*

Whether the document is an enforceable contract doesn't matter, and is almost beside the point. The real strength of a love contract lies in the nature of the acknowledgements made. It shows the employer took affirmative steps to maintain a workplace free from sexual harassment and retaliation, and it serves as powerful evidence that, at least at the time of execution, the relationship was consensual. Finally, it reaffirms that both employees are aware of the existence of a policy prohibiting sexual harassment, discrimination, retaliation, and their obligation to abide by it.

#### *A love contract will not prevent litigation, but it will assist your defense*

As with many other steps an employer can take, a love contract can be a strong deterrent to employee claims, but it will not prevent all future litigation arising out of a workplace relationship. What it does do is lay the groundwork for a solid defense should litigation ensue.

For example, aggrieved employees can still claim they suffered retaliation after a breakup, but a love contract confirming that the relationship began consensually can help support a defense that the perceived post-relationship retaliation was based on personal animosity rather than gender-based discrimination.

#### *Considerations before utilizing love contracts*

Although not a concern in all states, employers should confirm whether privacy laws of the jurisdiction where the business operates prohibit or limit employer monitoring of workplace relationships. You should also consider how the idea of a love contract will be presented to a couple, and decide in advance what you will do if one of the participants denies the relationship or refuses to sign the document.

Finally, since there is no one way of developing an effective love contract, you should consult experienced labor and employment counsel to draft the appropriate language that meets the particular needs and objectives of your property.

### To Sum It Up

Properly implemented and appropriately drafted, love contracts will reduce the likelihood of litigation arising from workplace relationships. In the event of litigation, an effective love contract will help lessen the chances of misunderstandings or even lawsuits, and bolster a hotel's defenses in the event one is filed.

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# Uniformity

By John Thompson (Atlanta)

It has long been industry practice for employers, including many in the hospitality industry, to require workers to wear clothing of a particular kind or appearance. What many do not realize is that this practice can have significant ramifications under the federal Fair Labor Standards Act. If your clothing policy violates the FLSA, “everybody does it” will not be a defense. A new U.S. Labor Department guidance letter has added at least a little clarity in this area.

## The Basics

So how are clothing requirements and the FLSA connected in the first place? If clothing is viewed as a uniform under that law, then the cost of or deposits on the required apparel cannot be deducted from an employee’s

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wages (or otherwise placed upon the employee) to the extent that this cuts into the required minimum wage *or* overtime due the person at 1.5 times his or her regular rate of pay.

For example, let’s say your hotel or restaurant requires certain employees to buy uniforms. You generally cannot compel them to bear the costs of the purchase to the extent that it reduces the employees’ wages to below the FLSA-required wages due for the week in which the expense is incurred. This is also true where an applicant has to buy such items in order to be hired by the employer.

DOL says that items of an ordinary, basic, street-clothing nature which the employer specifies only in general terms and as to which it allows variations in the details generally do not fall within the definition of a “uniform.” But DOL has also warned that, if the employer prescribes a specific type and style of clothing to be worn at work – such as where a restaurant or hotel requires a tuxedo or a skirt and blouse, or jacket of a specific style, color, or quality – that sort of clothing would be considered a uniform. It’s usually best to evaluate these matters on an item-by-item basis, because the employer bears the risk of erroneously deciding that clothing is not subject to the FLSA’s limitations.

## The Latest On Shoes

Recently, a DOL opinion letter addressed whether a requirement that employees wear “dark-colored,” closed-toe shoes with a non-slip sole triggered the FLSA’s cost limitations. Employees were allowed to wear complying shoes they owned when they were hired, or they could buy the necessary shoes anywhere they wanted. They could wear the shoes outside of work. DOL concluded that the shoes appeared to be a general type of ordinary footwear, and that the employer-required characteristics did not cause them to rise to the level of a “uniform” for FLSA purposes.

But DOL made it clear that there are no hard-and-fast rules on this subject. It also cautioned that the issue “is a question of fact to be considered in the context of each particular case.” And while the letter did not say so, it is also true that DOL’s position does not necessarily preclude employees from suing in court if they disagree.

By the way, these principles can also apply to the cost of cleaning and maintaining required uniforms: generally, that cost may not be imposed upon an employee to the extent that this reduces the worker’s wages to below the required amount(s) due for the hours worked. DOL has taken the enforcement position that, where uniforms are 1) made of wash-and-wear materials; 2) may be routinely washed and dried with other personal garments; and 3) need not be ironed, dry-cleaned, washed daily, commercially laundered, or otherwise specially handled, then uniform-maintenance costs need not be reimbursed under the FLSA.

But where special treatment is required, such as in order to meet a company’s particular appearance standards, or standards imposed by law, then a reimbursement must be made to the extent that the related cost cuts into the required FLSA minimum wage or overtime.

## Beyond The Feds

Of course, you should always take any relevant state laws into account whenever you are assessing wage-hour compliance. This is especially true where required apparel is concerned, because a number of States apply their own, particular limitations. Many of those rules further restrict what employers may do as to uniform costs or charges even more than the FLSA does.

For instance, some States prohibit charging employees for uniforms in *any* amount. As another illustration, a State might not follow the “wash-and-wear” position adopted by DOL and might require maintenance-related reimbursements even for clothes of that variety. States having their own rules also tend to take a broad view of what constitutes a “uniform.”

As with most wage/hour matters, if you’re unsure, it’s probably best to check with your legal counsel.

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