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Jacob M. Monty, Coeditor • Monty & Ramirez, LLP

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PRIVACY

Texas employers may limit or prohibit audio recording in the workplace

by Jacob M. Monty
Monty & Ramirez, LLP

With the introduction of camera phones, digital voice recorders, pen recorders, and wristband audio recorders, individuals can effortlessly record anything with the touch of a button. Some of those devices are so small that individuals are unaware they are being recorded. The arrival of new technology has created various implications for employers and employees. While Texas and federal law allow surreptitious recording as long as one party to the conversation consents to recording (of course), some activities still aren't permitted—e.g., recording conversations in restrooms and installing surveillance cameras in employee changing areas or locker rooms.

Different times, different perspectives

The subject of surreptitious recording has been at the forefront of people's minds, especially with the arrival of small voice recording devices. At one point, the legal community discussed whether it was proper for attorneys to make undisclosed recordings of conversations with clients or third parties. The authorities on the issue originally opined that it was improper for attorneys to record telephone conversations with clients or third parties without informing them that the conversations were being recorded because it offended "the sense of honor and fair play of most people."

That view has changed. In 2006, the Texas Professional Ethics Committee ruled that lawyers are permitted to make undisclosed recordings of telephone conversations between themselves and other people in Texas absent an unlawful purpose or affirmative act of deception. The committee considered the legitimate reasons a lawyer would have a need to record conversations with a client or third party. Among many reasons, the committee proffered "to aid memory and keep an accurate record," "to gather information from potential witnesses," and "to protect the lawyer from false accusations." Furthermore, the committee found that nothing in the ethics rules prohibited "a lawyer's unannounced recording of telephone conversations in which the lawyer participates."

The ethics committee's ruling complements Texas' one-party consent law. Under Texas' wiretapping law, surreptitious recording is permitted as long as one party to the conversation consents to the recording. That means at least one party must participate in the conversation. An individual would not be able to claim the benefits of the one-party consent law if she were to leave a recording device out in the open, just waiting for it to pick up something.

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Regardless, you would be well advised to always disclose up front that a conversation is being recorded. Regarding the workplace, employers and employees in Texas can ordinarily record workplace conversations they are part of. However, workplace privacy can still affect the legality of recording audio conversations.

Some recording activities still unpermitted

There is no "expectation of privacy" in public work areas such as conference rooms, stairwells, and lobbies. There are locations in the workplace, however, where privacy interests will outweigh an employee's lawful right to record audio conversations. One example is restrooms. For obvious reasons, employers and employees may never record conversations in restrooms. Similarly, an employer that installs surveillance cameras in employee changing areas or locker rooms will be inviting invasion of privacy claims. Furthermore, employers are prohibited from filming, recording, or secretly attending union meetings.

Implementing policies that prohibit recording

While the law generally permits employees to record conversations in public workplaces, Texas employers do not have to allow workplace recordings. Texas' "one-party consent" law allows individuals to legally make secret recordings of conversations they are part of, but employers have the authority to implement policies that limit or prohibit recordings in the workplace. However, an overly broad no-recording policy is not permitted.

In 2017, a federal court of appeals held that an employer's overly broad recording ban was not permitted under the National Labor Relations Act (NLRA). When crafting an enforceable no-recording policy, employers should tailor their policy narrowly and identify legitimate reasons for enforcing it. Employers that choose to implement narrowly tailored policies restricting employees' ability to record conversations in the workplace should provide notice of the policy to all employees. Federal courts have found no problems with employers' policies prohibiting secret recordings that are narrowly tailored and are enforced uniformly and fairly among all employees.

Jacob M. Monty, the managing partner of Monty & Ramirez, LLP, practices at the intersection of immigration and labor law. He can be reached at jmonty@montyramirezlaw.com or 281-493-5529. ✤

IMMIGRATION

Civil rights law opens door for DACA recipients to file alienage discrimination claims

by Jacob M. Monty
Monty & Ramirez, LLP

In the past, employers were comfortable instituting policies that permitted them to refuse to hire Deferred Action for Childhood Arrivals (DACA) recipients with employment authorization. The policies were founded on the belief that since DACA recipients were not classified as "protected individuals" under the Immigration and Nationality Act (INA), employers had absolute discretion under the law in choosing not to hire them.

In 2014, a federal court in New York pronounced that refusing to hire DACA recipients with employment authorization could constitute "alienage discrimination" under the Civil Rights Act of 1866. The development has had far-reaching implications for employers. Employers are getting hit with a string of lawsuits over policies that allow them to deny employment opportunities to DACA recipients. The spike of alienage discrimination lawsuits by DACA recipients will certainly transform employers' practices on hiring, firing, and recruitment or referral for a fee from here on out.

INA's antidiscrimination provisions only go so far

The INA contains antidiscrimination provisions that prohibit employers from participating in national origin discrimination, citizenship status discrimination, unfair documentary practices (e.g., employers specifying the types of documentation employees may provide or refusing to accept valid documents), and retaliation against individuals who assert rights protected under the INA. National origin discrimination and citizenship status discrimination are distinct in nature.

National origin discrimination occurs when an employer treats an injured party unfavorably regarding hiring, firing, or recruitment or referral for a fee simply "because the injured party is from a particular country

or part of the world," "because of the injured party's ethnicity or accent," "because of limited English ability," or "because the injured party appears to be of a certain ethnic background, even if he or she is not." When an employer participates in any of those prohibited discriminatory acts but does so on the basis "of the injured party's immigration status" or the fact that the injured party "is or is not, a U.S. citizen," citizenship status discrimination occurs.

Under the INA, all work-authorized individuals may obtain relief for national origin discrimination. However, only individuals who are classified in one of five protected classes may obtain a remedy for being discriminated against on the basis of their citizenship status. The INA defines "protected individual" as (1) a citizen or national of the United States, (2) a permanent resident, (3) a lawful temporary resident, (4) a refugee, or (5) an asylee. Individuals with DACA status do not fit in any of the protected classes. Regrettably, the INA's antidiscrimination provisions only go so far in protecting DACA recipients.

Employers' practices may soon become outdated

DACA is a federal program created by President Barack Obama that authorizes "recipients to remain in the United States for two years and to obtain an Employment Authorization Document (EAD), a federal work permit, and a Social Security number." Faced with citizenship status discrimination, DACA recipients were unable to file charges under the INA's antidiscrimination provisions because they did not belong to a protected

JUST ASK JACOB

Requiring exempt workers to take PTO in full- or half-day increments

by Jacob M. Monty
Monty & Ramirez, LLP

Q *We are considering having exempt employees account for time away from work in increments of one hour. Is there a specific law that requires exempt employees to take paid time off (PTO) in increments of either four hours (half a day) or eight hours (a full day)?*

A There is no specific federal law requiring exempt employees to take PTO in increments of four or eight hours a day. Because federal law is silent on PTO, you are largely free to deduct from PTO balances in four-hour, eight-hour, or other increments. However, some states have unique rules governing PTO, and laws change regularly. Thus, you should always consult a local employment attorney before making a policy change.

Q *An employee recently put in her two-week notice, but her manager went ahead and removed her from the schedule. Are we obligated to pay her for the time she was scheduled in those two weeks?*

A No. You are obligated to pay only for time actually worked. But you should consider the impact not paying the employee will have on morale and how it might affect whether other employees give a two-week notice.

Q *Can company payroll personnel ever be held personally responsible/liable for errors made while processing payroll?*

A Under the Fair Labor Standards Act (FLSA), anyone who qualifies as an "employer" can be liable for violations of its wage and hour provisions. "Employer" refers to someone acting directly or indirectly in the interest of an employer in relation to an employee and generally refers to managers, supervisors, and owners. Payroll personnel will not typically qualify, but the determination requires a fact-intensive review of the position and the authority of personnel. For a more complete answer, please consult an employment attorney who can review your specific situation.

Q *Are we allowed to ask job candidates for a copy of their most recent performance evaluation from their previous employer when they come in for an interview?*

A Yes, you can request the information. However, you must consistently apply your policy, requesting the information from all candidates for a position rather than requesting the data selectively.

Jacob M. Monty, the managing partner of Monty & Ramirez, LLP, practices at the intersection of immigration and labor law. He can be reached at jmonty@montyramirezlaw.com or 281-493-5529. ✤

AGENCY ACTION

DOL issues opinion letters on FLSA. The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) in April announced three new opinion letters related to the Fair Labor Standards Act (FLSA) and other laws. The letters released on April 12 concern (1) what counts as work time under the FLSA when employees travel for work, (2) whether 15-minute rest breaks required every hour by an employee's serious health condition must be paid or may be uncompensated, and (3) whether certain lump-sum payments from employers to employees are considered "earnings" for garnishment purposes under Title III of the Consumer Credit Protection Act. An opinion letter is an official document authored by the WHD on how a particular law applies in specific circumstances presented by the person or entity requesting the letter. Opinion letters represent official statements of agency policy.

DOL issues bulletin on tip pools. Since provisions related to tipped workers were included in the Consolidated Appropriations Act, the DOL in April issued a Field Assistance Bulletin (FAB) to address enforcement of tip credit rules under the FLSA. As a result of the legislation, employers may establish tip-pooling arrangements between "front of the house" and "back of the house" staff such as cooks and dishwashers. The Act vacated the WHD's 2011 regulations that barred tip pooling when employers pay tipped employees at least the full minimum wage. Additionally, Congress gave the DOL authority to prevent employers from taking employees' tips in all circumstances. FAB 2018-3 confirms that employers that pay the full federal minimum wage to tipped workers may allow nontipped workers to participate in tip pools.

USCIS unveils new E-Verify website. U.S. Citizenship and Immigration Services (USCIS) in April announced a new website, E-Verify.gov, to be a source for information on electronic employment eligibility verification for employers, employees, and the general public. The site provides information about E-Verify and Form I-9, Employment Eligibility Verification. E-Verify.gov allows employers to enroll in E-Verify directly and permits current users to access their accounts. Individuals with myE-Verify accounts also can access their accounts through E-Verify.gov.

New guidance addresses multiemployer pension plans. The Pension Benefit Guaranty Corporation (PBGC) announced in April it was issuing guidance to assist multiemployer pension plans that request PBGC review of alternative plan rules for satisfying employer withdrawal liability. The guidance explains the PBGC's review process, the information needed, and factors the PBGC considers in reviewing plan proposals. ✤

class. Employers found an opportunity to tailor their policies in a manner that would preserve their ability to deny DACA recipients employment opportunities without breaching the INA's antidiscrimination provisions.

Everything changed in 2014, however, when a federal district court in New York found that refusing to hire DACA recipients with employment authorization could constitute "alienage discrimination" under the Civil Rights Act of 1866 as codified by 42 U.S.C § 1981. In its commentary, the court revealed that § 1981 prohibits race and alienage discrimination in making and enforcing contracts, including employment contracts. Lawyers representing DACA recipients began to use § 1981 to bring alienage discrimination lawsuits. The law was becoming the proper avenue to bring citizenship status discrimination claims. In every single one of the lawsuits, DACA recipients asserted that their employer's policies constituted intentional discrimination based on alienage by rescinding or denying them employment contracts because they were not U.S. citizens, permanent residents, refugees, or asylees.

The new development in the law has begun to have far-reaching implications on not only foreign nationals but also employers. Employers' practices may soon become outdated. A policy that reflects a prohibition on hiring DACA recipients may show intentional discrimination by the employer if it's based on an employee's or candidate's alienage.

Bottom line

Section 1981 fills a gap that was left by the INA's classification of protected classes. Although it may once have been the norm for employers to implement policies that allowed them to refuse to hire DACA recipients with employment authorization, that may no longer be the case. Employers that choose not to hire DACA recipients based on their policies should think carefully about updating them since failing to do so may invite alienage discrimination lawsuits.

Jacob M. Monty, the managing partner of Monty & Ramirez, LLP, practices at the intersection of immigration and labor law. He can be reached at jmonty@montyramirezlaw.com or 281-493-5529. ✤

FAMILY AND MEDICAL LEAVE

New tax credit rewards companies that offer paid FMLA leave

Employers that offer paid family and medical leave may get an unexpected tax benefit next year at tax time. The tax reform law that passed earlier this year contains a little-noticed tax credit for employers that provide qualifying types of paid leave to their full- and part-time employees. The credit is available to any employer, regardless of size, if:

- *It provides at least two weeks of qualifying leave annually for employees who have been with the company for at least 12 months; and*
- *The paid leave is at least 50% of the wages normally paid to the employee.*

The IRS recently issued a series of FAQs on the credit that are designed as a temporary measure to help employers understand (and hopefully take advantage of) the credit while waiting for official guidance in the form of regulations. Let's take a look at some of the key things employers need to know to claim the credit on their 2018 taxes.

What types of leave qualify for the credit?

The credit is available when an employer pays for leave that would fall into the same categories for which leave is available under the federal Family and Medical Leave Act (FMLA). That includes both the FMLA's original reasons for leave (pregnancy, childbirth, and serious health conditions) and leave that relates to the military service of an employee's family member (military caregiver and qualifying exigency leave).

In addition, however, employers can claim the credit when they offer paid leave for *any* of the listed (FMLA-like) reasons. For example, an employer that offers paid parental leave would be able to claim the tax credit even if it doesn't offer paid leave for the other types of qualifying leave. Employers that offer self-funded disability benefits should discuss whether they can claim the credit for those benefits with their attorney.

WORKPLACE TRENDS

Women more likely to see pay disparity, survey finds. Nearly a third of women (32%) participating in CareerBuilder's Equal Pay Day survey in April said they don't think they are making the same pay as men in their organization who have similar experience and qualifications. That compares to 12% of men who think that way. The survey also found that men are more likely to expect higher job levels during their career, with 29% of men saying they think they will reach a director level or higher, compared to 22% of women. The survey also found that 25% of women never expect to reach above an entry-level role, compared to 9% of men. Almost a third of the women in the survey (31%) said they think they've hit a glass ceiling within their organizations, and 35% don't expect to reach a salary over $50,000 during their career, compared to 17% of men who expect that salary.

Study finds banning use of salary history easier than anticipated. The total rewards association WorldatWork has released data showing that 44% of employers that have implemented a ban on asking job candidates about their salary history say imposing the ban was either very or extremely simple. Just 1% reported implementing the ban was extremely difficult, and 8% said it was very difficult. The survey of WorldatWork members found that 37% of employers have implemented a policy prohibiting hiring managers and recruiters from asking about a candidate's salary history in all U.S. locations, regardless of whether a local law exists requiring the practice. Thirty-five percent of employers reported prohibiting the practice only when laws are in place. The data show that for employers that have yet to implement a nationwide salary question ban, 40% are somewhat likely or extremely likely to adopt a nationwide policy in the next 12 months.

Brand familiarity found important to attracting talent. Employers with low brand awareness are more likely to be overlooked by jobseekers, according to research from job site Glassdoor. A survey showed that candidates are 40% more likely to apply for a job at a company in which they recognize the brand compared to a company they have not heard of. The survey, conducted among 750 hiring decision makers (those in recruitment, in HR, and responsible for hiring) in the United States and the United Kingdom, also found 60% of those surveyed said their employer brand awareness is either a challenge or a significant barrier to attracting and hiring candidates. Seventy-five percent of those surveyed agreed that if a candidate is aware of their brand name and products or services, the recruiting process is easier. ✤

UNION ACTIVITY

Teamsters president slams threat to public-sector unions. Teamsters General President James P. Hoffa spoke out against the U.S. Supreme Court case *Janus v. AFSCME* during an April conference, saying the case is about politics and "people who hate unions." The case could remove the requirement that nonunion members pay certain union fees to cover costs of collective bargaining. In March, Hoffa also met with Senator Bernie Sanders (I-Vermont) to discuss the threat the *Janus* case poses to public-sector unions.

Unions demand disclosure of how companies use gains from tax cut. Leaders from the Communications Workers of America, the Service Employees International Union, the American Federation of Teachers, and the Teamsters in April sent letters to several corporations requesting detailed information about how they are using their gains from the recently enacted corporate tax cut. The request is to determine how much the companies are benefiting from the tax cut, what portion of those benefits they are using to raise wages and create jobs, and how the tax cut legislation has affected their decisions to send and keep jobs overseas. A union statement said failure to disclose the information could subject the companies to an unfair labor practice complaint under the National Labor Relations Act (NLRA).

Laborers' union praises changes to permitting processes. Terry O'Sullivan, general president of the Laborers' International Union of North America (LIUNA), spoke out in April to praise the Trump administration's action to streamline the federal review and permitting processes for major infrastructure projects. "LIUNA members are America's builders, but costly and time-consuming review processes are holding us back from rebuilding our nation's great roadways and bridges, unlocking our domestic energy reserves, and making crucial repairs to our aging drinking water systems," O'Sullivan said.

Workers call for wage theft investigation. The Communications Workers of America announced in April that workers at five federal contract call centers operated by General Dynamics Information Technology filed wage theft complaints with the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD), calling for an investigation of allegations of misclassification and underpayment of workers. The complaints were filed on behalf of current and former workers in Phoenix, Arizona; Tampa, Florida; Corbin and London, Kentucky; and Waco, Texas. The new allegations follow other recent wage theft complaints made by the union on behalf of workers at four of the company's other call centers: Lawrence, Kansas; Bogalusa, Louisiana; Hattiesburg, Mississippi; and Alexandria, Virginia. ✤

The credit isn't available for paid sick leave, paid vacation, or paid time off unless it's specifically offered for one or more of the qualifying reasons listed. Nor is it available for paid leave that is otherwise required by law.

Who must offer (and be offered) leave?

Employers don't have to be subject to the FMLA to take advantage of the credit. In other words, employers with fewer than 50 employees may claim the credit if they offer a qualifying type of paid leave.

The credit may be claimed when paid leave is offered to employees who (1) have worked for you for at least 12 months and (2) made less than $72,000 in the previous year. There is not yet any guidance on how the salary amount is calculated.

How much is the credit?

For employers that offer paid leave in the amount of 50% of an employee's wages, the credit is 12.5% of the amount paid. The credit is increased by 0.25% for each percentage point by which the paid leave exceeds 50% of the employee's normal wage, but it is capped at a maximum credit of 25%.

Ordinarily, employers would claim paid leave as a general business deduction for wages or salaries paid or incurred. To claim the credit, that deduction would have to be reduced by the amount of the credit claimed. So it's possible that you would claim the credit for some employees (those who make less than $72,000 per year) and the deduction for others (those who make $72,000 or more).

The maximum period of paid leave for which the credit may be claimed is 12 weeks.

Final thoughts

The law specifically requires employers to have a written policy describing the paid leave offered. In addition, employers are required to provide part-time qualifying employees a

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AUSTIN LEGAL LIMITS

Austin's paid sick leave ordinance challenged

by John Duke
Constangy, Brooks, Smith & Prophete, LLP

Austin's much-ballyhooed sick leave ordinance is under attack. The ordinance mandates that private-sector employers with more than 15 employees allow their workers to accrue one hour of paid sick leave for every 30 hours they work in Austin, amassing up to 64 hours per year. Employees at small businesses with 15 or fewer workers can accrue up to 48 hours each year. The ordinance is scheduled to go into effect on October 1, 2018, for employers with six or more employees and on October 1, 2020, for employers with five or fewer employees. Although the Texas Legislature seems poised to overturn the ordinance when it reconvenes in January 2019, many employers have questioned what to do in the meantime.

On April 24, 2018, several business groups and staffing organizations jumped into the fray and sued Austin to prevent the ordinance from taking effect. According to the lawsuit:

> The Texas Minimum Wage Act prohibits municipalities . . . from regulating the wages of employees of private businesses, incorporating the standards of the federal Fair Labor Standards Act [FLSA] into state law, but further [preempts] any municipal ordinances from going beyond those standards. Through the Texas Minimum Wage Act and FLSA, Texas state law caps the minimum wage at the federal rate. In direct conflict, the Paid Sick Leave Ordinance requires that employers must pay [minimum wage] to employees for hours not actually worked. The effect is to push their hourly wage above the minimum-wage ceiling set by Texas law.

The business groups also argue that the ordinance violates their "due course of law" rights under the Texas Constitution because "its actual, real-world effect . . . is so burdensome as to be oppressive in light of the alleged governmental interest" since it requires employers whose employees work both inside and outside of Austin to keep track of how many hours their employees work in Austin to determine their paid sick leave entitlement. Not to be left out, the Texas Attorney General's Office (AG) has intervened in the case, arguing that since Austin is a "home rule" city, it cannot enact ordinances that conflict with state statutes. The AG notes that Austin's ordinance requires employers to pay employees for hours not worked and therefore increases wages beyond those required by state law.

As far as I am aware, only two other municipalities' paid sick leave ordinances have been challenged to date, and they haven't fared well. Minneapolis enacted an ordinance requiring employers with six or more employees to allow workers to accrue one hour of paid sick leave for every 30 hours they work in Minneapolis, up to a maximum of 48 hours per year. A trial court struck down the ordinance on May 8, 2018, but not on preemption grounds. In fact, the court held that the ordinance wasn't preempted but instead was invalid because of the burdens it would impose on employers that have employees who work in Minneapolis sporadically. Similarly, on May 17, 2017, a Pennsylvania appellate court held that Pittsburgh lacked the authority to mandate paid sick leave under Pennsylvania's home rule statute. That case is currently pending before the Supreme Court of Pennsylvania.

What could this mean for Austin's ordinance? The Minneapolis and Pittsburgh decisions suggest it may have a problem. After all, the Austin ordinance is similar to the Minneapolis ordinance in that it applies to employers that have employees who work sporadically in Austin, and as a result, it may impose significant burdens on those employers. Likewise, the argument that the ordinance is preempted is similar to the argument accepted by the Pennsylvania court: Austin is a home rule city and therefore cannot enact ordinances that conflict with state statutes. To be sure, Texas home rule cities have greater autonomy than Pennsylvania home rule cities, but the concept remains the same.

The upshot of the legal challenge to Austin's ordinance is that employers that might be affected by it may not have to wait for the legislature to act because the ordinance could be prevented from taking effect before the legislature reconvenes. A hearing on the business groups' application for a temporary injunction is set for June 25.

John Duke is senior counsel in both the Boston and Austin offices of Constangy, Brooks, Smith & Prophete, LLP. He can be reached at jduke@constangy.com. ✤

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proportionate amount of paid leave (based on their expected work hours).

At this time, the credit is available only for wages paid in 2018 and 2019, which may make it unlikely that employers will adopt new paid leave policies just to claim the credit. If you've been considering paid leave, however, the availability of the credit (and a conversation with your attorney and/or accountant) may help you in your decision. ✤

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Editorial inquiries should be directed to Michael P. Maslanka at FisherBroyles, LLP, 100 Highland Park Village, Suite 200, Dallas, TX 75205, 214-559-7210, michael.maslanka@fisherbroyles.com.

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