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## OUR SERVICES

Represent management in all matters concerning

Welcome to another issue of the Employment Law Bulletin, a newsletter published throughout the year by the Employment and Labor Practice Group at Lerch, Early & Brewer as a service to our clients. Here, you will find articles written by our attorneys covering a variety of current legal issues as they affect employment law.

As always, we welcome article suggestions and requests. If you have a suggestion, you may send it to Ben Harris at [BJHarris@lercheearly.com](mailto:BJHarris@lercheearly.com).

This newsletter is sent via email in HTML format. If you wish to print a copy of the newsletter, you may access a .pdf version by following the "Printer-Friendly version" link below.

We appreciate any feedback and invite you to contact us with any questions. If you do not want to receive any further newsletters from us, follow the link at the bottom of this email to be removed from our list of recipients.

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### In This Issue:

#### Improved Technology = Greater Productivity + Greater Potential Employer Liability

The continuous advancement of technology generally enriches our personal and business lives. Occasionally, however, we are reminded that the technological devices that are intended to improve our lives also create new risks, particularly for employers which society is all-too-quick to blame for unfortunate events.

#### Seven Reasons Why Mediating Employment Disputes Is A Good Idea

The explosion of employment claims in this country has resulted in an increased focus on resolving employment disputes prior to trial, in particular, through mediation. Unfortunately, businesses and their managers often fail to appreciate why employment matters are particularly well-suited to mediation.

#### More Governmental Regulation: Information from Credit and Criminal Background Checks Has to be Disposed of Properly

The Federal Trade Commission recently implemented a new rule that requires most employers, effective as of June 1 of this year, in essence, to destroy or erase all information derived from a credit or criminal background check for an applicant or an employee, before that information is discarded.

#### Are We Tiptoeing Towards Mandatory Background Checks?

Although no court in Maryland, Virginia, or the District of Columbia appears to have held that an employer must perform a background check, an employer who fails to comply with a contractual obligation to perform such checks does so at its peril.

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The latest news from the attorneys of our group.

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### Improved Technology = Greater Productivity + Greater Potential Employer Liability

**THE CONTINUOUS ADVANCEMENT OF TECHNOLOGY -- FROM ONE GENERATION OF TECHNOLOGICAL IMPROVEMENTS TO THE NEXT --**

the employment relationship and workplace

Empowering employers with respect to their dealings with employees, to the fullest extent permitted by law

Defending employers against all claims, made either by individuals or by government agencies

Assisting employers in establishing sound workplace practices in order to reduce claims

Advising senior executives and managers in connection with employment contract issues or disputes

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[Fair Labor Standards Compliance Act](#)

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## GENERALLY ENRICHES OUR PERSONAL AND BUSINESS LIVES.

Instant Messaging, PDAs, cell phones, and Blackberries all make accessibility faster, with one result being that problems can be addressed and resolved with increasing speed.

Occasionally, however, we are reminded that the technological devices that are intended to improve our lives also create new risks, particularly for employers which society is all-too-quick to blame for unfortunate events and society's ills. Cell phones, for example, that enable employees to stay in touch with their supervisor, their customers, and their fellow workers, may also be distracting when used by employees who are behind-the-wheel. Similarly, picture phones, which may not even have any valid workplace purpose, nevertheless may provide a means of conducting industrial espionage or for violating the privacy rights of others. As with many other changes in the workplace, employee policies must be adopted or revised in order to meet the new challenges.

There are at least three respects in which cell phone use in, or in connection with the workplace, must be regulated and restricted by employers:

1. Cell phone use by any employee who is driving a car or truck in connection with his/her employer's business, including while driving to a business appointment, should be prohibited completely. The highly-regarded Insurance Institute for Highway Safety recently conducted a study that confirmed prior similar research which indicated that drivers using cell phones are four times as likely to be involved in a crash involving injuries than drivers not using a cell phone. Significantly, the study also suggested that use of a hands-free device behind the wheel instead of a hand-held phone does not appear to improve safety.

A plaintiff's lawyer who represents an individual injured or killed by an employee who was distracted by his/her cell phone while on company business thus may have grounds for pursuing the employer, if it did not prohibit cell phone use while driving. Juries, furthermore, have treated such employers harshly. For example, a jury in Florida awarded \$21 million to a woman injured by an employee of the defendant company, who was making cell phone calls while driving a company van. Similarly, the State of Hawaii paid out \$1.5 million in connection with an auto accident involving a state employee who was on the phone.

2. In a related vein, employees should be prohibited from making any kind of business call on behalf of their employer, even while driving for non-business related, that is, for personal reasons. A major stock brokerage house settled a case for a large amount of money, after one of its brokers dropped his cell phone during a business call and hit and killed a motorcyclist, while looking around for the phone on the car floor. Similarly, in a well-publicized case in Virginia in which a lawyer, driving erratically at night, killed a teenager, a jury issued a \$2 million award against the lawyer's firm, because the lawyer's cell phone records showed that she had been talking to a client on her cell phone at the time of the accident.

3. Use of camera phones by visitors to a facility or office, as well as by employees, should be banned in the workplace, except in a specified, secure area. Particularly as the resolution of the picture on these phones improves, they serve as a dangerous means by which, for example, the information in company documents may easily be stolen. They also provide a means by which an employee's privacy may be invaded, for example, by an individual's snapping a picture of a very attractive female co-worker, which is later circulated on an intranet or worse, on the Internet. (Two excellent articles on the many dangers of camera phones in the workplace are: "Security's Insecurity: Criminal Intent", by Mark Robertson in The Remediator Security Digest ([http://remediator.shavlik.com/e\\_article000242221.cfm](http://remediator.shavlik.com/e_article000242221.cfm)) and "Camera Phones Making Corporations Photo-Sensitive" by Paul Korzeniowski in TechNewsWorld (<http://www.technewsworld.com/story/35169.html>). The former article lists a number of "what if" situations; that is, what if a business courier, a salesperson, an office or facility visitor, a contractor or any other non-employee, or any employee were able to take pictures in a workplace. The second article, among other things, also briefly describes situations in which such pictures could harm an employer.) <sup>1</sup>

As with all policies, limitations with respect to cell phone use must be tailored to the specific needs and practices of each particular employer.

<sup>1</sup> - *The risks to employers posed by other workplace electronic devices, for example, PDA's and Blackberries that employees may use while driving, are beyond the scope of this article. So, too, are additional proposed solutions to such things as camera phone use in the workplace, for example, by monitoring of e-mails that have ".jpg" attachments, as suggested in an article in the Bureau of National Affairs' "Daily Labor Report" on October 27, 2004. These issues will be addressed in later issues of our Employment and Labor Bulletin.*

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## Seven Reasons Why Mediating Employment Disputes Is A Good Idea

THE EXPLOSION OF EMPLOYMENT CLAIMS IN THIS COUNTRY HAS RESULTED IN AN INCREASED FOCUS ON RESOLVING EMPLOYMENT DISPUTES PRIOR TO TRIAL, IN PARTICULAR, THROUGH MEDIATION.

Unfortunately, businesses and their managers often fail to appreciate why employment matters are particularly well-suited to mediation. This, in turn, discourages parties from participating meaningfully in mediation. This article will examine seven compelling reasons why mediation is an attractive and viable option for prospective litigants.

### 1. It Provides Control.

This voluntary non-binding process is actually empowering. It allows parties to control the outcome of their disputes in ways that courts and juries often are unable to do so. Judges and juries are routinely limited in the relief which they can provide. Typically, that relief is in the form of money and, sometimes, injunctive relief. Among other things, courts and juries typically cannot require apologies, dictate economic "win-win" creative solutions to business problems, or fully repair hurt feelings or damaged reputations. Mediation, on the other hand, has no such limitations. The participants' abilities to resolve their disputes is limited only by their imagination.

### 2. It is Personal.

Employment claims differ from ordinary commercial disputes for the fundamental reason that employment issues are routinely linked – sometimes completely intertwined with – a person's self-esteem or self-image. Because of the nature of employment claims, the calm dispassionate calculations which often govern commercial disputes are conspicuously absent when it comes to employment and personnel matters. Instead, they are replaced by unhealthy feelings of anger, remorse, regret and vengeance. Breaking through these emotional knots can sometimes become impossible, if they are not addressed fairly early on, because people far too frequently become emotionally "vested" in their positions. Mediation, particularly if conducted soon after it appears that the parties cannot resolve matters themselves, allows them to take another look at their problem in a calm, more reflective setting with the help of a trained impartial observer.

### 3. It is Safe.

Courtrooms and judges are often anxiety-producing. The mediation forum is a more relaxed environment. While it is always a good idea to come well-prepared to a mediation, the profound stress that comes with litigation is noticeably diminished and in some cases, absent during the mediation process. If the mediation is successful, parties feel comfortable sharing both the strengths and weakness of their cases with a trained mediator who will convey to the other side only that which he or she is authorized to do. This environment enables parties to reveal the pros and cons of their respective cases in an environment which is non-judgmental, insofar as the mediator is concerned, and very conducive to resolving disputes.

### 4. It Can Be Cathartic.

As noted, employment claims are unique, in that employees and employers may become wrapped in their positions and convinced of the moral (and legal) certainty of their positions. What mediation permits is the simple opportunity to vent. The alone may facilitate a solution to a matter that never would have been resolved without such an opportunity. Similarly, mediation facilitates and encourages parties to express regret to the extent that their actions have caused damage or hurt feelings, in a way that does not prejudice their positions in the future. This cathartic opportunity allows participants to get "unstuck" and therefore, free to explore creative solutions to an employment problem.

### 5. It is Informative.

One of the biggest impediments to resolving disputes is the absence of an opportunity to exchange information freely in a constructive environment. This perceived inability to exchange information often leaves to enhanced distress. Mediation allows information gathering. Employees, for example, who are utterly convinced that their termination was the result of an illegal or wrongful action, may learn that there is another explanation which never occurred to them. Similarly, employers can learn, during the mediation process, how the indifference of poorly trained managers can create a climate of mistrust. This ability to share and obtain information is useful, not only in evaluating whether there is actual liability, but also in assessing the prospect for damages. Far too frequently, employees file suit without any appreciation of their ultimate damages or even whether they have been economically damaged at all. Mediation allows parties to shed light on what is truly in dispute and determine whether litigation (or, as the case may be, additional litigation) is justified economically or otherwise.

## 6. It Usually Creates Positive Momentum.

Many employment disputes never settle (or are never in a position to be settled), because such a terrible momentum of negativity and distress has been created by one or both parties. This momentum includes destructive labeling, posturing, and threats. Mediation, on the other hand, encourages the exchange of information and constructive solutions to what once seemed insurmountable problems. The exchange of information, as well as the discussion of possible successful outcomes, often changes the climate of distrust and instead, creates a positive momentum towards exploring avenues of success rather than paths of destruction. As a result, even cases that are not settled during the initial mediation session may resolve later, because the parties have decided to devote their time and energy toward resolution rather than litigation. In short, they have interrupted patterns of negativity and replaced them with patterns of cautious optimism about the resolution of their dispute.

## 7. It Makes Dollars and Sense.

The litigation costs associated with employment claims are very high and becoming increasingly more expensive. It is not uncommon for cases to cost \$50,000 to \$100,000 (and more) through and including trial. The economics of a possible settlement can be shattered, if efforts to mediate are not made early. Regrettably, many employment disputes have been permitted to proceed down a lengthy and expensive litigation path, because parties have bypassed the opportunity to mediate early in a case, when most of the information was either available or readily available. If the parties had simply chosen a different, more constructive approach, a less expensive solution might have been found.

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## More Governmental Regulation: Information from Credit and Criminal Background Checks Has to be Disposed of Properly

**THE FEDERAL TRADE COMMISSION (FTC) RECENTLY IMPLEMENTED A NEW RULE UNDER THE FEDERAL FAIR AND ACCURATE CREDIT TRANSACTIONS ACT (THE SO-CALLED "FACT ACT").**

The rule requires most employers, effective as of June 1 of this year, in essence, to destroy or erase all information derived from a credit or criminal background check for an applicant or an employee, before that information is discarded. The disposal rule states that a covered employer must destroy "any record about an individual, whether in paper, electronic, or other form that is a consumer report or is derived from a consumer report" by which that individual can be identified. Inasmuch as the FTC's legal staff has consistently taken the position that a criminal background check performed by a third party is tantamount to a credit check, any employer who authorizes and obtains credit and/or criminal background checks with respect to applicants or employees must comply with the rule.

The rule appears to envision that documents will be shredded or burned and that electronic media containing the information in question will be erased or destroyed. An outside company may be retained to do the disposal, so long as the employer uses "due diligence" -- as defined by the rule -- in selecting the disposal company.

Information provided by the FTC about the rule may be found at <http://www.ftc.gov/opa/2005/06/disposal.htm> and the complete rule may be viewed at <http://www.ftc.gov/os/2004/11/041118disposalfrn.pdf> (You will need Adobe Acrobat to view this document.)

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### *Cases of Interest:*

## Are We Tiptoeing Towards Mandatory Background Checks?

Although no court in the Maryland, Virginia, or the District of Columbia appears to have held that an employer must perform a background check, for example, of any employee who will deal with the public, an employer who fails to comply with a contractual obligation to perform such checks does so at its peril. In a recent case decided by the federal Court of Appeals for the Fourth Circuit (whose jurisdiction encompasses Maryland, Virginia, West Virginia, North Carolina and South Carolina; see <http://www.ca4.uscourts.gov>), a claim against a janitorial staffing company, which contracted to do work at a college, was sent to a jury for consideration of the evidence. The company's contract with the college required it to perform a background check of any person whom it sent to work at the college. It failed to do so with respect to an employee who had a record of violence and who attacked a

coed at the college.

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## Employment Matters: Practical Tips For Employers

1. Effectively drafted arbitration agreements which employees are required to sign have been upheld as requiring arbitration, rather than litigation, of many employment claims. Arbitration is generally less costly than litigation, and in some circumstances, an arbitration judgment against an employer may be less than that which a jury would award in a courtroom litigation. Employers should consider adopting a policy that requires each employee to sign an arbitration agreement under which most employment claims must be submitted to arbitration, and not to litigation.

2. Prohibiting dating in the workplace is not only arguably invasive of individual rights, but also it is wholly impractical. Where, however, a supervisor is involved in the dating relationship, either with another supervisor or a subordinate, rank-and-file employee, a "kiss and tell" policy should apply. Under such a policy, the people involved in the dating relationship are required to acknowledge their relationship to a specific member or members of management. They may then be counseled as to their workplace rights and obligations, and each may be required to sign a so-called "love contract". Under this agreement, for example, the supervisor would expressly promise that the relationship would not:

- interfere with either his/her own work duties and responsibilities or those of the employee he/she is dating;
- result in the other employee's being accorded unfair favored treatment, to the detriment of other employees;
- result in the other employee's being subjected to unfair or unwarranted adverse treatment;
- adversely affect morale among any other employees of the Company; or
- result in a negative perception of the Company (including any of its officers, directors, or employees) by any members of the public.

The agreement would also provide, among other things, that any dispute between the employees who are dating would be submitted to mediation and then, if unresolved, to arbitration. The purpose of "kiss and tell" policies and "love contracts" is to prevent or reduce the likelihood of claims of sexual harassment or other workplace claims.

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## Lerch, Early & Brewer Employment and Labor Group News and Notes

THE LATEST NEWS AND INFORMATION FROM OUR GROUP.



### Rick Vernon Selected As Member of Washington, D.C. "Legal Elite"

The August issue of SmartCEO magazine recognized two Lerch, Early & Brewer attorneys in their feature section on the "Greater Washington Legal Elite." **Rick Vernon**, Chair of the firm's Employment and Labor Group, was selected as among the elite lawyers in the Washington, D.C. area. **Robby Brewer**, Chair of our firm's Land Use and Zoning Group and a principal in the Health Care Group, was selected as well. In all, 35 attorneys from across the D.C. region were selected for this distinction. The selections were based upon nominations received from other attorneys throughout the Washington metropolitan area, and was determined by the editorial staff of SmartCEO.

### Marc Engel Receives "AV" Distinction From Martindale-Hubbell

**Marc Engel**, a principal in the Employment and Labor and Litigation groups at Lerch, Early & Brewer, recently received a peer-review rating of "AV" from respected legal source Martindale-Hubbell. The "AV" rating, the highest rating possible, reflects a lawyer with "Very High to Preeminent" legal abilities. The rating is based upon feedback and ratings received from other attorneys in the area. Marc joins **Rick Vernon** and **Marty Hutt** as Employment and Labor Group members with this distinction.

## We Would Like To Hear From You

We publish this newsletter as a service to our clients in an effort to make them aware of certain aspects of the law. As always, we would like to hear feedback from our readers regarding the content of the newsletter. If there are items or topics you would like to see covered in future issues, or if you have a suggestion concerning the newsletter itself, you may send them to Ben Harris at [BJHarris@lercheearly.com](mailto:BJHarris@lercheearly.com), or via phone at 301-961-6096.

Additionally, a number of the Firm's other departments periodically issue highly informative newsletters on a variety of other subjects, including Business and Taxation, Community Associations, Health Care, and Real Estate. If you would like one or more of these newsletters, you may access them through our website, [www.lercheearly.com](http://www.lercheearly.com). To be added to the mailing list of any of the above-mentioned practice groups, simply send an email to Mr. Harris at [BJHarris@lercheearly.com](mailto:BJHarris@lercheearly.com).

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