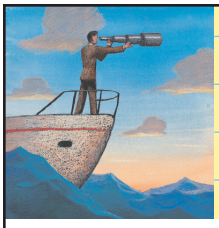
ATTORNEYS SERVING PRIVATELY HELD BUSINESSES AND THEIR OWNERS

MOTSCHENBACHER & BLATTNER LLP

117 SW TAYLOR STREET, SUITE 300, PORTLAND, OR 97204-3029 PHONE 503-417-0500 FAX 503-417-0501



# Legal Advisory

IDEAS AND STRATEGIES FOR YOU AND YOUR BUSINESS / THIRD QUARTER 2017

*inside*

**COBRA**
Continuation coverage required

**Passport Book or Card?**

**Spendthrift Trusts**

**Protecting Your Computer Network**

**Legal Briefs**

## New Cases Address FMLA Issues

Three new cases point out the need for both employers and employees to understand the rules relating to the Family and Medical Leave Act (FMLA).

Background: Under the FMLA, an eligible employee may take up to 12 weeks of unpaid leave to care for a newborn child; a parent, spouse or child with a serious health condition; or a personal illness. It generally applies to public and private employers with 50 or more employees.

To be eligible for FMLA leave, an employee must work for a covered employer and

- have worked for that employer for at least 12 months;
- have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave; and
- work at or within 75 miles of a location where at least 50 employees are employed.

These guidelines are relatively clear, but FMLA matters are often contested in the courts.

New case #1: An employee took leave from his job as a security guard when his wife fell ill. However, upon his return, the employer questioned whether he was actually married. The security guard provided proof but was fired anyway. He sued two years later.

Result: The employer argued that the legal action was too late, but the court ruled that the complaint was properly lodged within the three-year period for a willful FMLA violation.

New case #2: A nursing manager remarked to a supervisor that her mother was sick with cancer. Eventually, she accepted a demotion and went on FMLA leave to care for her mother. But she then sued the employer, alleging that she was demoted because she said she might need to take FMLA leave.

*(see FMLA Issues on next page)*

## Don't Ignore This Health Care Law

The controversial Affordable Care Act has been in the news lately, but another key federal health care law can have a major impact. Under the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), an employer with a group health insurance plan may be required to offer continued coverage to a departing employee.

Background: COBRA applies to private employers with 20 or more employees in the preceding calendar year. Also, some states have enacted comparable laws for employers with fewer than 20 employees.

Generally, COBRA coverage is also extended to a covered employee's spouse, dependent children and even an ex-spouse if group coverage would be lost due to a qualifying event. To be eligible, the covered employee must have been enrolled in the employer's health plan when he or she worked there, and the plan must still be an active one.

Although employers are required to notify employees of their COBRA rights and to offer continued coverage, the health insurance cost (plus a 2% administrative fee) may be shifted to the departing employee. Continuation of health insurance coverage may be required for one of the following events:

- Termination of the employee's employment for any reason other than gross misconduct;
- Reduction in the number of hours of employment;
- The covered employee becomes entitled to Medicare;
- Divorce or legal separation of the spouse from the covered employee;
- Death of the covered employee; or
- Loss of dependent child status under the plan.

COBRA requires continuation coverage to be extended for up to 18 or 36 months. The length of time depends on the type of qualifying event creating the COBRA rights.

When the qualifying event is the covered employee's termination of employment or a reduction in hours of employment, the employee is entitled to 18 months of coverage. However, if the qualifying event is termination of employment or reduction of the employee's hours AND the employee became entitled to Medicare less than 18 months before the qualifying event, COBRA coverage for a spouse and dependents can last for 36 months after the time the employee is eligible for Medicare. For the other qualifying events, coverage must be provided for the maximum 36-month period.

Remember that under COBRA certain notification requirements must be met. Employers should coordinate these activities with assistance from their professional business advisers. ✍

## New Cases Address FMLA Issues *(continued from front page)*

Result: The Fifth Circuit Court of Appeals sided with the employer. Merely mentioning her mother's illness was not sufficient to trigger FMLA notice or support a retaliation claim.

New case #3: An x-ray technician who suffers from colitis was approved for intermittent leave. However, when he missed work for other reasons, he was terminated based on performance. Subsequently, he claimed his intermittent leave was not treated properly because he had to obtain frequent recertifications.

Result: The court ruled that the employer had followed the rules. The employer had allowed him plenty of time to obtain recertification and had provided notice. Therefore, the case was dismissed.

Do not leave matters to chance. If you have any questions about the FMLA from an employer or employee standpoint, seek guidance from your attorney. ✍

### Checking in on Passports

Do you need a passport book or card? A passport book is required for U.S. citizens traveling internationally by air. To enter the United States at land border crossings or seaports from Canada, Mexico, the Caribbean and Bermuda, you can use either a passport book or card.

Generally, you can follow regular procedures if you need the passport in three or more weeks. Otherwise, you may have to follow an expedited process. Visit www.usa.gov/passport for more information.

## Key Benefits of a Spendthrift Trust

Are you worried that beneficiaries of your estate might squander the funds when you're gone? Depending on your situation, one or more of your heirs may not have the financial acumen to manage the assets or may have shown an inclination to spend money without restraint. In that case, you might take steps to protect the wealth. One common option is to use a "spendthrift trust."

How it works: With assistance from an attorney, you set up a trust according to state law and transfer assets to the trust. Usually, the assets will include securities such as stocks and bonds, and possibly other property like real estate and cash. Then you designate someone—usually a professional—to manage the assets as the trustee.

Significantly, the terms of the trust restrict the ability of beneficiaries to spend the money or sell off assets in the trust account, so your 18-year-old child can't go out and buy a Lamborghini or take a year-long cruise around the world. In addition, the assets transferred to the trust are protected from the reach of the beneficiary's creditors.

In lieu of direct access, beneficiaries may receive regular payments from the trust or based on the discretion of the trustee. For instance, if a beneficiary is in college, the trustee may provide payments to the school. However, once a distribution is in the hands of a beneficiary, he or she has control over it.

Not surprisingly, naming the trustee is critical to the process. Depending on the trust terms, the trustee may have wide discretion over the use of funds. For instance, the trust may empower the trustee to make payments to a beneficiary on an "as needed" basis. Alternatively, the trustee may be held responsible for making scheduled payments or be authorized to act in the event of a specific occurrence (e.g., a child's reaching a certain age).

Whom should you name as the trustee? Technically, it is not illegal to act as the trustee yourself, but this may lead to complications and is generally not recommended. More often than not, the trustee will be a professional like the attorney who helps create the trust, or you might choose another family member or close friend. Either way, it should be someone with the requisite financial knowledge.

Furthermore, it is important to name a successor trustee in the event the designated trustee dies before the end of the term or otherwise cannot handle the duties. At the very least, you should name a professional as the successor trustee.

Is that all there is to it? Not by a long shot. There are several other aspects to consider, including provisions for terminating the trust and addressing contingencies such as a beneficiary's predeceasing the grantor. Along the same lines, the trust may have to be revised to accommodate changes in the tax law or other new developments.

Final advice: If you are interested in establishing a spendthrift trust, consult an estate-planning attorney to determine whether this approach makes sense for your family.

# How to Protect Your Computer Network

Do you ask a salesperson to hold onto your wallet while you go shopping in the store? Of course not. Yet small-business owners are effectively doing the same thing with their computer networks when they conduct business online.

There are several ways outsiders may be able to gain access to a company's network. One way is to use a password-guessing program that seeks and identifies Internet addresses. Another type of program allows users to scan multiple host computers for vulnerabilities.

What's more, certain sophisticated computer programs that were originally designed as theft deterrents may end up being used for illicit means. In many cases, the hackers are more innovative than the creators.

So can you stop online thieves or, at the very least, slow them down? Consider the following safety measures:

- **Maintain physical security.** Is it possible for someone to walk up to your network and shut the entire system down with one flip of a switch? The network server should be kept in an area off limits to most personnel. You might even install security software that limits access to the keyboard and screen.

- **Install a firewall.** A firewall simply separates the Internet from your company's computer network. In effect, it screens or blocks outside intrusions that look suspicious. Firewalls can also be used to partition one department of your company from another.

- **Review your list of network users.** Make sure that passwords are changed on a regular basis. Instruct your employees to use nonsensical passwords rather than common words or family names. Also, limit supervisory privileges to a select group of high-ranking employees. File sharing that is too rampant may give outsiders easy access to sensitive data.

- **Seek protection against computer viruses.** The most common method is to acquire software that protects you against the type of viruses that could infect your network. Keep current with the latest updates.

Naturally, there are no absolute guarantees that these precautions will provide the security you need in all cases. At the very least, however, these steps are a good first line of defense.

## BRIEFS

- **Adverse Actions**—An employee of the New York Police Department (NYPD) sued for racial discrimination. She cited receiving unfair reviews, being denied a promotion and having to perform extra work compared with her coworkers. But the district court sided with the NYPD. **Reason:** Although the claims are troublesome, the worker could not show they were adverse actions.

- **Bullying Laws**—Bullying exists from grade school to workplaces filled with adults. There is no single bullying law, but employees who believe they have been bullied for a variety of reasons—including race, religion, sexual orientation or natural origin—may pursue legal action under federal or state discrimination or sexual harassment statutes. In addition, an employee may initiate an action based on retaliation.

- **R-e-s-p-e-c-t**—In a new case, a worker was habitually disrespectful to her supervisor. She also frequently questioned her employer's compliance with federal laws. At one point, she formally complained about the company's marketing practices. When she was fired, the employee sued, alleging that the employer was retaliating against her. But the Third Circuit Court of Appeals ruled the employee had established a pattern of disrespectful behavior.

- **Deposition Tactics**—Have you been called for a deposition in an employment-related matter? To prepare, follow these five steps: (1) Stay calm. Body language is meaningful to opposing counsel. (2) Role-play ahead of time. (3) Keep your answers short. (4) Do not volunteer any information you are not questioned about. (5) Know the basis for the lawsuit. This will help you understand the line of questioning.

Legal Advisory is published for our clients, friends and professional associates. It is designed to provide accurate and authoritative information with respect to the subjects covered. The information contained in this newsletter is intended to be general in nature. In addition, state law may have an impact on specific situations. Before any action is taken based on this information, it is essential that competent, individual, professional advice be obtained. © 2017 Legal Advisory