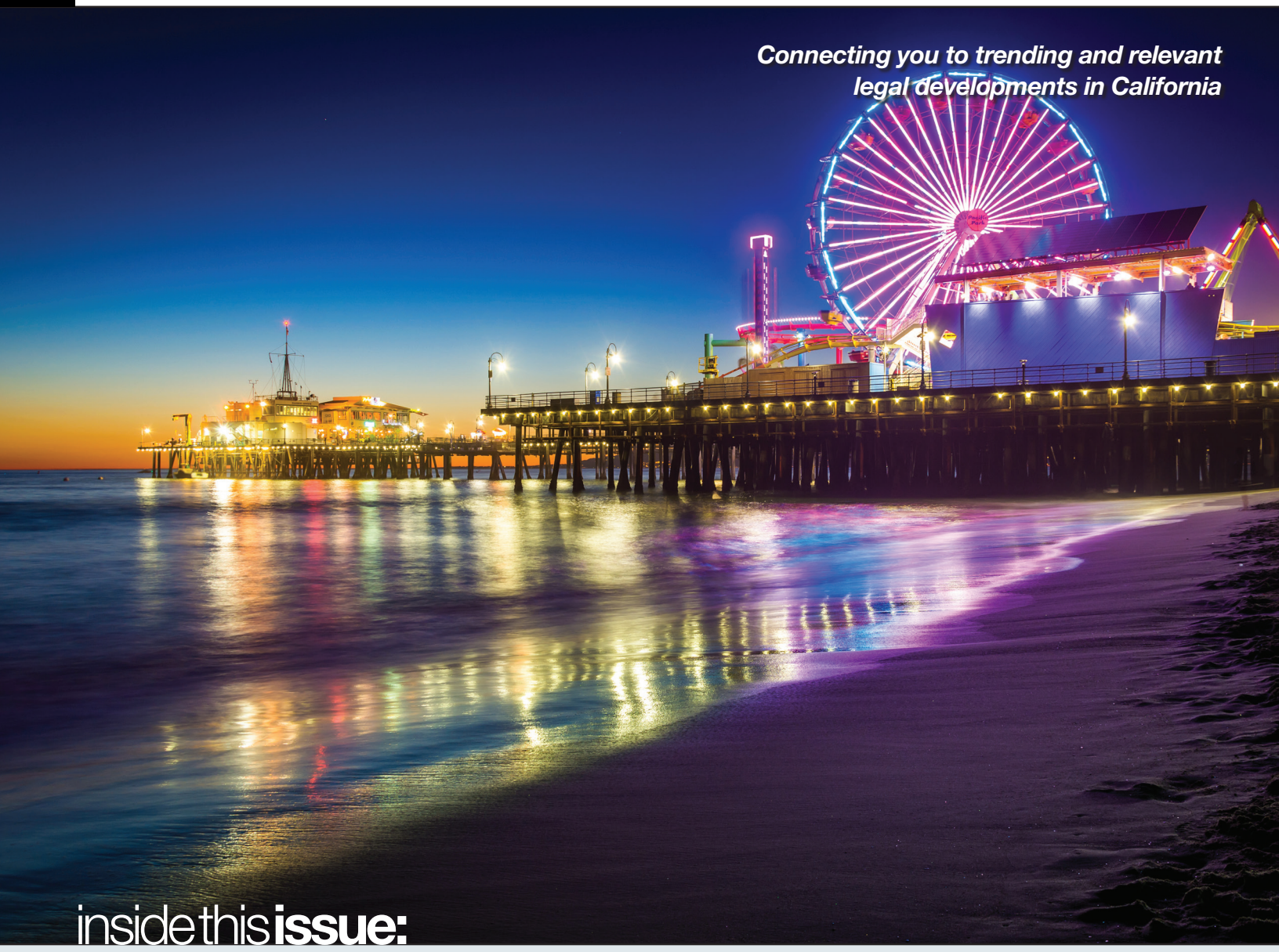
SUMMER 2017

atissue

A STONE | DEAN PUBLICATION



Connecting you to trending and relevant legal developments in California

inside this issue:

A Few Words from Stone | Dean

Spring has sprung, and alas, summer is already upon us. In the midst of family vacations and long, hot days, Stone | Dean brings you a variety of interesting and topical articles in our Summer Edition of At-Issue. We introduce our Firm FAQ segment, answering some of the more frequently asked questions in our Practice Groups. We also address new laws concerning food safety, applying for employment with a record, internet privacy regulations, the right of employees to attend protests, and our final segment of the New California End of Life Option Act. We hope these articles provide you with useful information and thought-provoking discussion.

We wish you a safe, entertaining and sunburn-free summer!

– Kristi Dean, Managing Partner

Firm FAQs

Our legal experts teamed up to answer some frequently asked questions in Business, Elder Law, Insurance, and more! If you have general questions for our legal team, send them to mharvey@stonedeanlaw.com for a chance to see it answered in the next edition of At Issue.

Elder Law – *Answered by Leslie Blozan, Esq.*

What is considered elder financial abuse in California? Financial elder abuse is defined in Welfare & Institutions Code §15610.30. A person guilty of financial elder abuse took, or assisted in taking, the property of a person 65 years old or older. The taking of property must have been done for a "wrongful use," such as personal enrichment; with intent to defraud; or by undue influence.

Undue influence is excessive persuasion that overcomes the elder person's will and causes them to take actions, or refrain from actions that cause an unfair result. There are many factors to undue influence, including the susceptibility of the elder person; the relationship of the abuser to the elder person; the tactics used by the abuser; haste or secrecy by the abuser in making changes in the elder person's financial affairs; and the unfairness of the result of the abuser's actions.

Where and how does one report elder financial abuse? Each county has Adult Protective Services, where complaints can be lodged. APS will investigate claims of abuse when the situation may be uncertain, or the concerned person has no definite proof. If there is a dire situation where immediate rescue is required, local law enforcement should be contacted. Physical abuse, under any circumstances, should be reported to law enforcement. Depending on specific circumstances, physical and financial elder abusers will be prosecuted and punished.

Premises Liability – *Answered by Greg Miller, Esq.*

When can a business be sued for a slip and fall? A company is always at risk for being sued when someone has a slip and fall on the property. Its ability to defend such a case is improved if it has complied with its floor inspection policies before the incident and has evidence to prove it, such as the security camera video, floor inspection documentation, and witness statements. Companies should also have a procedure for making settlement offers and securing a release promptly after an incident is reported, and before the individual is encouraged to sue.

What does one do if someone slips and falls in their restaurant/store? Thorough investigation is key in being able to defend against a slip and fall case. Do not make any statements regarding who is at fault or what should have been done to avoid the accident. Take photographs, secure contact information and statements from all witnesses, identify and document the person doing the last inspection of the area before the incident, and secure security camera video. Notify your insurance carrier and/or attorney promptly.

Insurance – *Answered by Leslie Blozan, Esq.*

What kinds of insurance policies are important for small businesses? Small business insurance is the same as any other insurance but with coverages, limits and costs consistent with the size and type of the business insured. A small business usually needs liability insurance, in case they are sued. It needs property insurance to cover business property such as desks, computers, phones, and inventory which can be wiped out by a fire, theft, flood or other catastrophe. If the business has employees, it needs workers' compensation insurance.

Specific types of small businesses may need specialty insurance. Professionals need professional liability insurance for malpractice claims. There are specialty policies available for most businesses tailored to specific risks of any particular industry.

The business owner must have a detailed conversation with an insurance professional to discuss the risks involved with any specific business, and the amounts of coverage required. An experienced broker can identify the proper policy for any small business.

What's the difference between insurance and reinsurance? Insurance covers an insured for specified risks of loss. When an insurance policy has a high limit, in the millions of dollars, the policy itself is often re-insured. This means reinsurance companies agree to underwrite, or guarantee, a portion of the risk.

For example, Insurer A may issue a policy to Jones Co. for $100 million. Insurer A may then purchase reinsurance for half of the policy limit, with Reinsurer 1 for $25 million of the limit, and Reinsurer 2, for another $25 million. Under this scenario, Insurer A retains responsibility for paying up to $50 million of a loss, and the reinsurers share the remaining $50 million. If a claim is made for policy limits, the insurer and reinsurers pay their proportionate share of the loss, according to the terms of the policies.

You can find the full-list of questions and answers on the Stone | Dean Blog at stonedeanlaw.com/Legal-FAQ

Clean Eating -

Complying with the FDA's Food Safety Modernization Act Rules on Sanitary Food Transportation

By Gregg Garfinkel, Esq..

George Bernard Shaw once said that "there is no sincerer love than the love of food." Well, rules created by the Food and Drug Administration (FDA) recently went into effect to ensure the food you love makes it to your table safe from contamination during transportation.

The FDA's *Food Safety Modernization Act* (FSMA) rule on Sanitary Transportation of Human and Animal Food is now final. This rule is one of seven foundational rules proposed since January 2013 to create a modern, risk-based framework for food safety. The stated purpose of this rule is to reduce illness outbreaks resulting from human and animal food contaminated during transportation.

The sanitary transportation rule establishes requirements for:

- **Vehicles and transportation equipment:** The design and maintenance of vehicles and transportation equipment to ensure that it does not cause the food that it transports to become unsafe. For example, they must be suitable and adequately cleanable for their intended use and capable of maintaining temperatures necessary for the safe transport of food.
- **Transportation operations:** The measures taken during transportation to ensure food safety, such as adequate temperature controls, preventing contamination of ready-to-eat food from touching raw food, protection of food from contamination by non-food items in the same load or previous load, and protection of food from cross-contact.
- **Training:** Training of carrier personnel in sanitary transportation practices and documentation of the training. This training is required when the carrier and shipper agree that the carrier is responsible for sanitary conditions during transport.
- **Records:** Carriers must maintain records of written procedures, agreements and training. The required retention time for these records depends upon the type of record and when the covered activity occurred, but does not exceed 12 months.

The final rule applies to shippers, receivers, loaders and carriers who transport food in the United States by motor or rail vehicle, whether or not the food is offered for or enters interstate commerce. Notably, the rule expressly applies to property brokers whose involvement, for the most part, is limited to arranging for the shipping of foodstuffs, rather than physically transporting same.

The FSMA marks a change in focus by the FDA from responding to contamination to preventing it. While the legal ramifications of the rule are beyond the purview of this brief article, the rule will surely have a positive impact on improving the safety and purity of food up and down the chain of distribution.

Transportation-industry professionals looking to update company practices to comply with the latest FDA regulations can find information directly, such as an FSMA Factsheet, at: https://www.fda.gov/food/guidanceregulation/fsma/.

For further assistance or advice on specific legal issues, contact the author Gregg Garfinkel at GGarfinkel@StoneDeanLaw.com.

The Transportation Law attorneys at Stone | Dean have defended some of the nation's largest trucking and logistics companies, helping them navigate litigation and regulations like FSMA. Find out more by visiting StoneDeanLaw.com/practice-areas/transportation-and-logistics or by calling (818) 999-2232.

What Happens After I'm Gone?

By Leslie Blozan, Esq.

The New California End of Life Option Act and What It Means – Part III

For the past year, terminally ill Californians have had the legal right to terminate their lives with medical assistance. The substance of the law was discussed in Part I of this series, and means of pursuing the decision in Part II. This final article in the series addresses medical and life insurance, and what coverages are available.

Death by suicide is typically not covered by insurance. Medical insurance usually will not cover medical costs incurred due to self-inflicted injuries. Life insurance usually excludes coverage for death at the insured's own hands. Remarkably, however, the California insurance industry sees things somewhat differently.

Under the terms of the California End of Life Option Act, medical insurers and HMOs are not required to cover aid-in-dying costs or expenses. This includes medications, doctor visits, or any other associated fees. Each medical insurance company, plan and HMO will have its own rules. Before considering seeking medical assistance under the Act, the patient should speak with an insurer/HMO representative to see if any coverage exists, even for a portion of the medical care that will be required. The answer may be no, but end-of-life planning requires understanding of the cost burden involved if there is no insurance.

Federally funded medical programs like Medicare and MediCaid do not pay for end of life medical care under the Act; in spite of that, California Medi-Cal does pay for medical services and expenses under the Act.

If the insurer/HMO does not participate in the program directly, they may be able to provide referrals for additional information and assistance. Some insurance organizations and HMOs, however, are opposed to the concept of a person ending their own life. These companies may refuse to provide information or referrals that might otherwise be available. If that happens, the patient can contact advocacy organizations within the state, for more information and referrals.

The California statute clearly states that a person's choice to end their life, after a diagnosis of a terminal condition, is not suicide. The law views the death as the result of the illness or condition that will lead to death, not as the result of voluntary measures taken by the individual. A death certificate will list the terminal illness or condition as the cause of death; it will not say "suicide."

The California Insurance Commission underscored the language and intent of the Act, stating in a press release, "Under the new law, if a terminally ill Californian, who meets the criteria in the law, chooses to take the medication to end their own life, the law is clear that is not a suicide, so life insurance policy exclusions for suicide do not apply."

Although death through means specified in the Act is not legally suicide, life insurance companies may still have a basis to deny a claim. Life insurance policies generally have a 1-3 year period during which the company can contest any claim for benefits. If an insured person dies during this contestability period, the insurer will investigate the death to determine if the policy was fraudulently obtained. An insured must disclose all medical conditions that affect their insurability when they apply for insurance. If any material information is withheld, the company can deny a claim. If an insured commits suicide during the contestability period, a claim will likely be denied. Instead of paying benefits, the company will often return the premiums paid up until the insured's death.

Even if there is no fraud or misrepresentation in the application, the insurers may be more aggressive in their investigations as to the circumstances surrounding the application and the knowledge of the insured. This remains an open issue, with no case law or statute addressing it yet. In time, suits will be filed and the courts will clarify how the new law works under these circumstances.

The best way to know how any insurer, life or health, will treat a death under the Act is to ask questions and learn in advance. This planning is just one of the many factors to be considered when making a life changing, and life ending decision.

If you or a loved one have questions regarding the End of Life Option Act, or any issue facing the aging population, email the author at LBlozan@StoneDeanLaw.com.

The Elder Law experts at Stone | Dean want to inform seniors and their care-givers of their legal rights and obligations in increasingly litigious times. Find how we can help you by visiting our website StoneDeanLaw.com/practice-areas/elder-law for more information.

What the Latest Internet Privacy Regulations Mean for You

By Marleigh Green & Matthew Harvey

The Death of Private Data?

The issue of online privacy has been nuanced since the inception of the internet. The lines between what is private and what isn't have been blurred by rampant social media use and the expectation for everyone to have an online persona.

Along with the Federal Communications Commission (FCC), the Obama administration created strict privacy rules for consumers by preventing internet service providers (ISPs) from mining their customers' data without express permission. The rule was set to take effect in December 2017, and would have required internet providers to be transparent about the data they collected, how they used it, and when information breaches (hacking) occurred.

Earlier this year, however, both houses of Congress voted to repeal these regulations, citing the Congressional Review Act, and President Trump signed the measure.

What Does This Mean?

This new bill strips the FCC regulations concerning ISP customer data mining, giving them free-reign to sell lucrative customer data without express permission, and effectively puts internet privacy oversight in limbo.

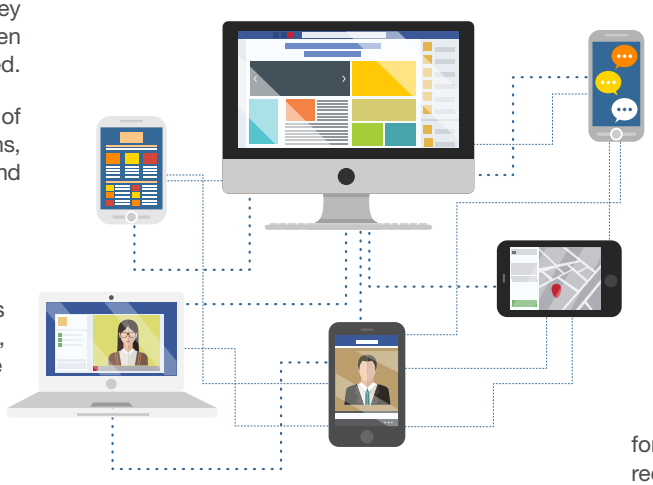
The FCC, which has authority to create rules for telecommunications companies (telcos), monitors how ISPs and phone companies handle customer data. However, the new administration aims to change the regulatory committee tasked with monitoring ISPs to the Federal Trade Commission (FTC), which does not maintain rule-making authority.

The FTC is the regulatory body that monitors online companies already data-mining their customers such as Facebook, Google, Amazon, etc.; these so-called "edge providers" weren't subject to the now-defunct FCC rules. Proponents of this change claim giving the FTC oversight consolidates internet privacy regulations under one body and "levels the playing field" for all internet-based companies.

Opponents of the bill argue that the FTC is too weak of a regulatory body to properly protect consumer privacy. Furthermore, they argue that the new FTC chairman, Maureen Ohlhausen, wouldn't act in the interests of protecting Americans; that she "wants to see harm first," instead of preemptively enacting rules to protect customers.

What data is being mined and what's being done with it?

The skinny: Online user-data is analyzed and profiled by telcos and edge providers in order to better-tailor internet advertisements to consumers.



The variety of information they compile includes what you do online, what you create and post, and information about who you are. The main idea is that better research allows companies to better target consumers.

Data analysis for the purpose of creating better-targeted advertising is nothing new. In fact, companies like Nielson have been compiling market research for decades with customer-segmentation systems like PRIZM.

However, with the rise of technology, people are creating more data now than ever. Information such as geographic location, search history, how one communicates and with whom has raised the question of whether recording this unprecedented level of data amounts to an invasion of privacy.

For instance, the world's largest advertising company, Google, originally used their email service, Gmail, to analyze emails sent or received by users. They used this content, along with searches, to create user-profiles for targeted advertisements. Google uses profiles to distinguish what each user is looking for, so it can provide accurate search results and better-targeted advertisements.

Why all the outcry about privacy?

Before these new regulations opened up mined-data-selling to ISPs, it was mostly limited to specific websites which consumers could decide not to use.

Don't want Google tracking your browsing history? Use a different search engine!

However, now that ISPs and other telcos have the ability to sell mined customer information, it will become a *lot* harder to hide one's browser data. There is no longer a framework for what information companies can record, how they use it, or how long they keep it.

What can I do to protect my online privacy?

Unfortunately for those wanting to protect their private internet information, there's no guaranteed way to run and hide from ISPs.

One could ask their internet provider to not track their information, but ISPs do not have to comply or even tell their customers how they handle their data.

One could instead try to find an internet-provider with a no-data-mining policy. This route proves difficult, however, in places with

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What Employers Need to Know About "Ban the Box" (Assembly Bill No. 1008)

By Kori Macksoud

In California, nearly one in three adults have an arrest or conviction record that can significantly undermine their efforts to obtain gainful employment. Experts have found that employment is essential to reducing recidivism, that people with criminal records have lower rates of turnover and higher rates of promotion on the job, and that a potential employer's personal contact with potential employees can reduce the negative stigma of a conviction by approximately 15%.

Assembly Bill No. 1008, more commonly known as "Ban the Box" was introduced in California in February 2017. Ban the Box aims to provide job applicants that have a criminal record with a more realistic chance at obtaining gainful employment by prohibiting employers from inquiring about an applicant's criminal history until a conditional job offer has been made. Nationwide, 24 states and over 150 cities and counties have adopted Ban the Box laws. Nine states and 15 major cities, including Los Angeles and San Francisco, have adopted Ban the Box laws that cover both public and private sector employers.

In a nutshell, nationwide Ban the Box laws aim to prohibit employers from:

- **asking any question** on a job application about an applicant's criminal history;
- **asking about or requiring disclosure** of the applicant's criminal history during a job interview;
- **independently searching the internet** for criminal conviction information; or
- **running a criminal background check** before a conditional offer of employment has been made.

If, after a conditional offer of employment has been made, an employer decides to decline to hire an applicant with a criminal history, the employer must disclose the basis for its decision and follow a 10-day procedure allowing the applicant to respond and rebut the information. Under the "Los Angeles Fair Chance Initiative for Hiring" ordinance, this process is known as the "Fair Chance Process." To comply with the Fair Chance Process, employers in Los Angeles must:

- Perform a "written assessment" that links the specific aspects of the applicant's criminal history with the risks inherent in the duties of the position sought. In performing the assessment, an employer must "at a minimum," consider the factors identified by the Equal Employment Opportunity Commission (e.g., conduct an individualized assessment) and follow any rules and regulations that may be issued by the Designated Administrative Agency (DAA) responsible for enforcement.
- Provide the applicant with written notification of the proposed action, a copy of the written assessment, and any other information or documentation supporting the employer's proposed adverse action.
- Wait at least five business days after the applicant is informed of the proposed adverse action before taking any adverse action or filling the employment position.
- Consider information or documentation the applicant provides the employer pursuant to the Fair Chance Process, and perform a "written reassessment" of the proposed adverse action. If the employer still elects to take the adverse action after such reassessment, it must notify the applicant of the decision and provide the applicant with a copy of the written reassessment.

The Los Angeles Ordinance applies to all employers located or doing business in the city that employ 10 or more employees.

Continued from page 5

little-to-no competition between ISPs, giving some consumers little choice in the matter.

One could also decide to browse the internet via an anonymous internet-program like the infamous Tor Browser (associated with the Deep Web). This option, though, requires higher-than-average technical knowledge and opens un-indexed sites to the user — many of which exist for illicit purposes.

Another option for privacy-centric users are Virtual Private Networks (VPNs) which are paid-services that allow users to connect to secure servers over a less-secure network such as the internet. This "secure tunnel" between your PC and browser can only be seen by yourself, the VPN-service-provider, and the website you're visiting. But *even VPNs can sell your mined data to advertisers*, so even these "private" networks aren't so private.

Should I be scared?

It's not likely that the new privacy regulations (or lack thereof) will have any effect on the lives of regular people, whose data has likely been unknowingly mined for years.

It's important to have a conversation about online privacy, however, and the current regulation-void makes it even more so. Common mistakes to avoid are: posting personal information publicly (contact info, addresses, etc.), shopping on unsecured websites (a secured website's address will begin with "https://" as opposed to "http://"), and posting passwords anywhere online.

"Think before you click" is true now more than ever, and it's worth keeping in mind that the internet, as well as the number of eyes watching it, grows every day. In a world full of connection, it shouldn't come as a surprise that the World Wide Web isn't very private.

Employee Absences to Attend Protests Might Be Protected Activity

By Robyn M. McKibbin, Esq.

Nationwide demonstrations have been, and most likely will continue to be, organized to voice different points of view. Employers have legitimate concerns how these rallies, especially walkouts, will impact their business operations and whether employees can be disciplined for violating attendance policies or disrupting production. Caution should be exercised before any disciplinary action is taken as the employee's conduct may be protected by federal or state laws. This article addresses organized activity during work hours, not any lawful off-duty conduct.

The First Amendment to the United States Constitution protects various things including the freedom of speech and assembly. But it is aimed at protecting individuals from government interference, not activity in a private workplace.

The Federal National Labor Relations Act (NLRA) protects the rights of employees to engage in "protected concerted activity," which is generally defined as two or more employees taking action relating to the terms of conditions of employment for their mutual aid and protection. The right applies to both union and nonunion employees.

Not all political activity warrants protection; it must be sufficiently employment-related. Purely political conduct that does not involve employee rights does not constitute protected activity. When employees get together to protest working conditions or job issues like low wages or safety concerns, the activity is most likely protected. If an employee takes time off to participate in a general rally to voice their displeasure with the current administration, it is less likely that they are trying to improve their working conditions, thus, it is probably not a protected activity.

California law protects private employers from controlling or retaliating against employees for political activities outside of work: "No employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office; (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees." *Lab. Code* § 1101. *Labor Code* § 1102 provides: "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

The definition of "political activities" under California law is broader than partisan or electoral activities. It covers any activity involving the "espousal of a candidate or cause," including participating in broad social movements such as supporting gay rights.

Public sector employees have the right to engage in political activities outside of the workplace, as well. *Govt. Code* § 3201, et seq.

California also has strong protections for immigrant workers who complain about unfair wages or working conditions. *Lab. Code* § 1019. Further, it is unlawful for a person to report or threaten to report the suspected citizenship or immigration status of an employee, former employee, prospective employee or a member of the employee's family because that person exercised a right under the *Labor Code*, *Government Code*, or *Civil Code*. This includes wage and hour issues and national origin harassment and discrimination complaints. *Lab. Code* § 244. An employer's business license may be suspended or revoked for reporting or threatening to report the same. *Bus. & Prof. Code* § 494.6. Moreover, a person may be guilty of criminal extortion. *Pen. Code* § 519.

The "Day Without Immigrants" march did not specifically connect any employment issue to the rally so it most likely would not be protected by the NLRA. But it most likely would be protected activity under California law.

The January 2017 Women's March in Los Angeles did not articulate a specific message. Some opined "women's voices should be heard"; some carried signs reading, "Not My President;" others voiced support for prochoice rights. Without a clear statement of purpose, similar marches most likely will not be protected conduct under federal or state law.

Because any of these laws may come into play with employee protests or rallies, employers should:

- Ensure their leave of absence policy is lawful and applied consistently and fairly.
- Treat an employee's request to take time from work to participate in a protest the same as requests to take time off for vacation or other personal reasons.
- Not threaten disciplinary action, or take disciplinary action for "political" rallies without the advice of counsel.
- Train managers and supervisors to be mindful of the broad range of characteristics and conduct that may be protected under federal or state law.

The Employment Law experts at Stone | Dean are committed to helping businesses meet challenges posed by ever-expanding federal and state regulations governing the workplace. Business-owners and corporations looking to comply with new changes and implement litigation-avoidance strategies should visit StoneDeanLaw.com/practice-areas/employment-law for

STONE | DEAN LLP
ATTORNEYS AT LAW

21600 Oxnard Street
Upper Lobby – Suite 200
Woodland Hills, CA 91367

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NEWS & ANNOUNCEMENTS

➔ In March, Leslie Blozan obtained a defense verdict in a slip and fall case. Plaintiff allegedly sustained a ruptured rotator cuff requiring "reverse" shoulder replacement surgery. The judge bifurcated the trial because of questionable liability, allowing the jury to hear evidence of liability first before proceeding to damages. After hearing the liability evidence, the jury ruled in favor of defendant and never learned of the serious injuries claimed.

➔ In May, Leslie obtained another summary judgment for a client. Plaintiff claimed injuries after slipping and falling on a grape in a grocery store. All within the space of two minutes, the floor was swept, the grape was dropped, and plaintiff slipped and fell. The motion asserted defendant was not responsible for plaintiff's fall because there was no time to discover and remedy the hazard. The Court agreed, granted the motion, and entered judgment in defendant's favor.

➔ In March, Kristi Dean and Leslie Blozan traveled to Fresno on behalf of an elderly client who was a victim of physical and financial elder abuse. They were successful in obtaining a civil judgment of nearly $300,000 for their client, including punitive damages and attorney's fees. They were also instrumental in ensuring the wrongdoer, who currently resides in jail, was criminally prosecuted for a federal crime.

➔ In early May, Gregg Garfinkel spoke at the California Moving & Storage Association's (CMSA) 99th Annual Conference on How to Defend Yourself & Succeed in Small Claims Court. The CMSA is comprised of some of the largest and most successful transportation companies in California.

➔ Kristi Dean presented a 3-hour Insurance Ethics continuing education course in May to the California Insurance Wholesalers' Association. The presentation gives insurance wholesalers and carriers the tools they need to implement effective core values and use them for ethical business practices.

➔ Congratulations to Kori Macksoud for graduating *cum laude* from University of West Los Angeles School of Law! Kori was awarded the Witkin Award for Academic Excellence in Constitution Law, Real Property, Pre-Trial Litigation, and Professional Responsibility/Ethics. The Witkin Award, granted by Thomson Reuters, is given to students that attained the highest grade in their course.

STONE | DEAN LLP
21600 Oxnard Street
Upper Lobby – Suite 200
Woodland Hills, CA 91367
T: (818) 999-2232
F: (818) 999-2269

Questions or Comments:
Marleigh Green – Editor
mgreen@stonedeanlaw.com

Contributions By:
Matthew Harvey

VISIT US ONLINE:
www.stonedeanlaw.com

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