HRHero.com
A division of BLR®

NEW YORK
EMPLOYMENT LAW LETTER

Part of your New York Employment Law Service

Charles H. Kaplan, Editor • Sills Cummis & Gross P.C.
Paul J. Sweeney, Editor • Coughlin & Gerhart, LLP

Vol. 21, No. 12
December 2014

What's Inside

Contracters
Too much control over newspaper carriers makes them employees 3

Arbitration
Employee agreed to be bound by ADR provision in handbook 4

Wage and Hour Law
Food-service employers: Be sure you're paying tipped workers correctly 5

HR Issues
Follow these tips to make sure your annual handbook review goes smoothly 5

Data Security
Major corporations aren't the only ones at risk of data security breaches 7

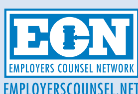
What's Online

Infographic
Employee leave: HR policies, practices, and challenges
http://ow.ly/DN6Xv

FMLA
10 things HR needs to know about FMLA administration
bit.ly/1sbdwQu

Protected Activity
NLRB is aggressively expanding its reach
bit.ly/1yI95O2

Find Attorneys
To find the ECN attorneys for all 50 states, visit
www.employerscounsel.net



EMPLOYMENT CONTRACTS

Sign here: when franchise agreements don't deliver

by Edward O. Sweeney
Coughlin & Gerhart, LLP

Franchise agreements have grown increasingly common in the retail and service industries. Intended to shield the franchiser from employment, joint venture, and other liabilities, such agreements are often incredibly detailed and comprehensive. The U.S. Court of Appeals for the 2nd Circuit (whose rulings apply to all New York employers) recently used a franchiser's own agreement and its poor record-keeping practices to raise questions about whether it should be liable as an employer of its franchisees.

Background

U.S. Pack Courier Services, Inc., and U.S. Pack Network Corp. (collectively "USP") are companies that deliver packages to customers in the New York City area. Each of USP's couriers entered into a subscription agreement (SA) with USP from the late 1980s through 2000. Under the SA, the couriers paid USP a $15,000 "subscription fee" for the right to deliver packages to its customers over a 20-year term. In return, the couriers received a weekly paycheck based on commissions earned from the deliveries they made.

The couriers had the option of paying the subscription fee in a lump sum at the beginning of the agreement or through weekly paycheck deductions, with interest. In addition, USP charged the couriers, mostly immigrants from Eastern Europe, various one-time and recurring "fees" and required that they purchase or lease a delivery van and pay for many of their operating costs (e.g., vehicle registration and taxes, gasoline, maintenance, insurance, and uniform costs).

Oral employment agreements

The couriers became dissatisfied with the SAs and alleged that USP refused to pay them the full promised commission. The couriers sued USP in district court, alleging violation of the Fair Labor Standards Act (FLSA), New York state's Franchise Sales Act (FSA), and New York state's Labor Law (NYLL) as well as breach of contract. In response to USP's request to dismiss the claims, the district court held that the couriers' FLSA claims were barred by the application of the FLSA's "motor carrier exemption." It also held that their NYLL claims and common-law breach-of-contract claims were barred by the "Statute of Frauds." Under the Statute of Frauds, oral contracts generally will not be enforced if they cannot be performed within one year. However, the court allowed the couriers' claims under the FSA to proceed to trial.

At trial, the jury found against USP on the FSA claims. USP appealed

Sills Cummis & Gross P.C. and Coughlin & Gerhart, LLP are members of the *Employers Counsel Network*

the jury verdict, and the couriers appealed the district court's pretrial dismissal of their NYLL and breach-of-contract claims. On appeal, the 2nd Circuit dismissed some of the FSA claims but reversed the district court's dismissal of the NYLL and breach-of-contract claims.

The 2nd Circuit held that the couriers' claims that they were "promised" a 60 percent commission for each delivery weren't barred by the Statute of Frauds. Instead, the court determined that the promise was part of an oral at-will-employment agreement that was capable of performance within one year.

The 2nd Circuit also held that given the couriers' inability to verify underpayments and their poor English skills, they had raised a question of fact about whether they knowingly "waived" their wage and commission claims over time. *Kroshnyi v. U.S. Pack Courier Servs., Inc.*, No. 11-2789-CV (2d Cir., Nov. 4, 2014).

Bottom line

Given its breadth, franchisers should be extremely wary of the 2nd Circuit's holding. Although the court's apparent displeasure with USP's business arrangement with the couriers may explain the outcome, the ruling creates real pitfalls for all franchisers. The 2nd Circuit's decision potentially opens the door to all manner of oral employment claims by independent contractors and creates employer liability under the FLSA and the NYLL.

Because New York's franchise laws are exacting, franchisers should consult with qualified counsel when drafting and filing franchise prospectuses, franchise agreements, and related documents. Moreover, great care must be taken to establish that franchisees understand and agree to key franchise terms, especially compensation, and that the franchiser hasn't exerted too much control over franchisees. In this case, USP was unable to produce copies of franchise agreements for all of the couriers, a defect that left it even more exposed to claims that the oral employment agreements were valid.

The author can be reached at esweeney@cglawoffices.com or 607-723-9511. ✤

MEET THE EDITORS

New editors from two NY law firms collaborating on newsletter coverage

Kaplan

The new editors of *New York Employment Law Letter* are veteran attorneys Charlie Kaplan, with the New York City office of Sills Cummis & Gross P.C., and Paul Sweeney, with Coughlin & Gerhart, LLP, in Binghamton. The longtime friends will work together to cover employment law developments affecting workplaces across the state.

Sweeney

"In most of the 50 states where we provide employment law letters, we've relied on one or a few attorneys at a single firm to keep readers up to date and informed on the latest compliance news," said Dan Oswald, CEO of Business & Legal Resources (BLR), which publishes the newsletters. "New York is so big, and there is so much going on in both the New York City metropolitan area and the rest of the state that it made sense for us to pair up a strong city firm and a firm with great regional presence upstate. We were lucky to find Charlie, and he immediately identified Paul as the person he needed to complete the team."

Sills Cummis & Gross, a full-service firm, is headquartered in Newark, New Jersey, and has an office in Princeton, New Jersey, in addition to its office in New York City. In addition to its Binghamton headquarters, Coughlin and Gerhart, also a full-service firm, has several branch offices in Central New York and Northeastern Pennsylvania.

Kaplan, a member of his firm's employment and labor law group, is a new editor but not an unfamiliar face. Over the years, he has presented BLR master classes on defeating union organizing, New York workplace law developments, and other topics in Los Angeles and New York. The Harvard Law School, Harvard Business School, and Yale College alum is a member of the American Employment Law Council, the International Bar Association, the American Bar Association, and many other professional groups. He can be reached at ckaplan@sillscummis.com or 212-500-1563. His firm's Manhattan offices are on Park Avenue.

Sweeney cochairs his firm's labor and employment law practice group, which represents public- and private-sector employers across New York. Before joining Coughlin & Gerhart in 1992, Sweeney, a Brooklyn Law School and Fordham University grad, served as a Marine Corps lawyer. He recently retired as a colonel in the Marine Corps Reserves with more than 29 years of active duty and reserves service, including a combat deployment to Fallujah, Iraq. He serves on the executive committee of the New York State Bar Association's labor and employment law section and is the treasurer of the Northern District of New York Federal Court Bar Association. He can be reached at psweeney@cglawoffices.com or 607-723-9511.

"We feel very privileged to be able to put Charlie's and Paul's names at the top of this newsletter," Oswald added. "They are great people and solid professionals and will help New York employers and HR professionals stay in compliance with the many workplace challenges coming their way." ✤

INDEPENDENT CONTRACTORS

Read all about it: when control of a contractor makes the news

by Keith A. Gorgos
Coughlin & Gerhart, LLP

Two recent newspaper delivery cases offer good examples of what happens when an entity exercises too much "control" over individuals the entity believes are its independent contractors. If too much control is established, an independent contractor may be unintentionally converted into an employee, subjecting the entity to costly wage and hour, payroll tax, workers' compensation, and unemployment insurance liability as well as claims for negligence and other employer liability.

Background

In the first case, newspaper carriers who delivered papers for Absolute Distribution, Inc., risked being terminated if they failed to deliver papers to residents by a time specified by the company. The carriers were also restricted to certain distribution outlets established and assigned by Absolute. The carriers could not exchange customers with other carriers or turn down customers assigned by Absolute. The carriers' remuneration rates were also established by Absolute.

In the second case, Gannett Company, Inc., assigned its newspaper carriers specific routes within predetermined delivery areas and required proof of a driver's license and vehicle insurance from the carriers or their replacements. Carriers were required to remove unsold publications from newspaper racks, ensure that racks were properly maintained, reserve publications for vacationing customers, and create and maintain accurate circulation records for Gannett. Finally, Gannett controlled other aspects of the carriers' activities, including directives not to use inserts without its approval.

'Control' is key test

The New York State Commissioner of Labor issued determinations finding that Absolute and Gannett were "employers," making them liable for contributions toward unemployment insurance. Absolute and Gannett appealed, claiming that the carriers were independent contractors. The Unemployment Insurance Appeal Board upheld the adverse determination. Absolute and Gannett then appealed to the New York Appellate Division, 3rd Department, which affirmed the board's decision.

In both cases, the 3rd Department reasoned that when a potential employer exercises control over either the results produced or the means used to achieve the results, an employer-employee relationship may exist. Although neither of those factors is determinative alone, the 3rd Department found there were sufficient indications that the companies had enough control over the carriers' work to impose employer liability. *In re Lewis,* 121 A.D.3d 1488 (3d Dep't, 2014), and *In re Armison,* ___ A.D.3d ___, 2014 WL 6475324 (3d Dep't, Nov. 20, 2014).

AGENCY ACTION

Homecare rule enforcement action delayed. A new rule taking effect January 1, 2015, entitles most direct care workers to receive federal minimum wage and overtime pay protections, but the U.S. Department of Labor (DOL) has announced it won't file enforcement actions against employers violating the new rule until after June 30. Direct care workers are workers who provide homecare services, such as certified nursing assistants, home health aides, personal care aides, caregivers, and companions. An announcement on the DOL blog in October said the department decided to adopt a time-limited nonenforcement policy to best serve the goals of rewarding hard work with a fair wage while not disrupting innovative direct care services. For six months, from January 1, 2015, to June 30, 2015, the department won't file enforcement actions against any employer that fails to comply with obligations newly imposed by the rule, and for the next six months (July 1, 2015, to December 31, 2015), the department will exercise its discretion in determining whether to file enforcement actions.

New website highlights accessible workplace technology. The DOL's Office of Disability Employment Policy has announced a new website for its Partnership on Employment & Accessible Technology (PEAT) initiative. PEATworks.org has information, educational articles, and interactive tools to help employers and the technology industry learn about and adopt accessible technology for workers with disabilities. PEAT works to improve the employment, retention, and advancement of people with disabilities through the use of accessible technology. Features of PEATworks.org include an action guide for employers and informational articles. It also will serve as a platform for collaboration and dialogue around accessible technology in the workplace. Also featured is "TechCheck," an interactive tool to help employers assess their technology accessibility practices and find resources to help develop them further.

USCIS launches myE-Verify. U.S. Citizenship and Immigration Services (USCIS) in October announced the launch of myE-Verify, a new website designed for employees. The site allows employees to create and maintain secure personal accounts and access new features for identity protection. It allows workers to participate in the E-Verify process by accessing features aimed at employees, including Self Check and the Employee Rights Toolkit. Some of the new features will initially be accessible to individuals in five states—Arizona, Colorado, Idaho, Mississippi, and Virginia—and Washington, D.C. In future releases, USCIS will roll out myE-Verify across the country with plans for additional features. ✤

Best practices

It isn't surprising that most businesses want professional, qualified, and responsible independent contractors to service their customers. Who wants to hear complaints from a valued customer about poor service by a contractor? On the other hand, many businesses also want to avoid the hassle, expense, and exposure associated with employing a workforce to service their customers. Of course, the trouble comes when a business seeks to control how its contractors do their job.

Be aware that the IRS and the New York State Department of Labor (NYSDOL) use multipart tests for determining the existence of an independent contractor relationship and freely share their findings with other "task force" enforcement agencies such as the Workers' Compensation Board. To make things more difficult, many administrative agencies use different independent contractor tests. Because these agencies derive revenue from the "misclassification" of independent contractors (i.e., fines and penalties), there is an incentive for zealous and aggressive enforcement.

Best practices include consulting with qualified counsel to draft an independent contractor agreement that unambiguously states the contractor has the freedom to perform the agreed-on service with minimal control by the entity engaging him. Other best practices include not micromanaging contractors' actual performance of the work. Given the expense and liability that results from a defective independent contractor relationship, it's wise to tread carefully and avoid the impulse to unnecessarily control the work being performed by your contractors.

The author can be reached at kgorgos@cglawoffices.com or 607-723-9511. ✤

EMPLOYMENT CONTRACTS

Binding arbitration clauses and the importance of employee handbooks

by Angelo Catalano
Coughlin & Gerhart, LLP

Many employers understand that the handbook they provide new employees is the place that holds important company policies. However, handbooks may also contain alternative dispute resolution (ADR) procedures such as binding arbitration. Arbitration of employment disputes can often be a cost-effective risk management strategy. In a recent case, a New York appellate court relied on the employer's handbook to uphold arbitration of an employee's dispute.

Background

Clyde & Co., a large international law firm, has a New York City office. The law firm has a comprehensive employee handbook that includes all of its policies. One policy requires employees to resolve all disputes with the law firm through a mandatory ADR program.

Upon being hired by Clyde & Co., John D. McKay, an attorney, executed an acknowledgment in which he agreed to be bound by the policies set forth in the firm's employee handbook. The handbook he acknowledged receiving contained the ADR provision. He later sued Clyde & Co. for $6 million, alleging that it and others defamed him and violated his privacy by reviewing his private files saved on a work computer.

Clyde & Co. asked the New York County Supreme Court to stay (halt) the litigation and compel arbitration of the dispute. The court granted the firm's request. McKay then appealed the court's decision to the Appellate Division, 1st Department, which unanimously affirmed the lower court's decision to compel arbitration.

Although the arbitration of employment disputes isn't new and courts have upheld arbitration clauses found in employment agreements, this area of law is still developing. For example, in a 2009 case, *14 Penn Plaza LLC v. Pyett,* the U.S. Supreme Court used an arbitration clause in a collective bargaining agreement to compel the arbitration of employees' discrimination claims. The *McKay* case adds to this line of cases. *McKay v. Wilson,* 2014 NY Slip Op 07265 (1st Dept., 2014).

Arbitration as a policy

Arbitration is often a less expensive way to resolve workplace disputes and avoid the uncertainty of litigation. As a result, it's no surprise that more employers are seeking to implement mandatory ADR via policy. However, be aware that the National Labor Relations Board (NLRB) routinely opines on the enforceability of employment handbooks and policies, regardless of whether the employer has a unionized workforce. Similarly, the Equal Employment Opportunity Commission (EEOC) may scrutinize a worker's purported waiver of the statutory right to sue his employer for discrimination.

It's imperative that you engage qualified legal counsel to regularly review your employment handbooks and other company policies to ensure their legal compliance. It's equally important that you be able to establish, through a written or electronic acknowledgment, that you provided a copy of your handbook and policies to all employees upon hiring them. You should also document that any subsequent policy revisions and updates have been provided to and acknowledged by employees.

The author may be reached at acatalano@cglawoffices.com or 607-723-9511. ✤

WAGE AND HOUR LAW

Tip of the week: avoiding wage claims in the bar and restaurant industry

by Zachary D. Morahan
Coughlin & Gerhart, LLP

The U.S. District Court for the Western District of New York recently found that a group of tipped servers, hostesses, and bartenders were not properly compensated under the Fair Labor Standards Act (FLSA).

Background

The restaurant workers alleged that Joe's Crab Shack was improperly applying the "tip credit" while requiring them to spend an excessive amount of their work shifts performing nontipped duties. Joe's Crab Shack argued that some non-tip-producing activities constituted tipped employment that fell under the FLSA's tip credit exception.

The FLSA's tip credit exception allows an employer to pay tipped employees at an hourly rate below the minimum wage if the employees' hourly rate and tips, taken together, are at least equivalent to the minimum wage.

Improper use of tip credit

In rejecting Joe's Crab Shack's arguments, the district court held that when an employee is employed by a single employer in both tipped and nontipped positions, the employer may use the tip credit only for hours the employee spends in the tipped occupation. Therefore, if a tipped employee works two jobs (even in the same restaurant), the tip credit cannot be taken for any hours he worked in the non-tip-producing occupation.

The court cited an opinion in which the U.S. Department of Labor (DOL) concluded that tipped employees must be paid the full minimum wage for hours during which they perform nontipped work if they spend a "substantial amount of time, or more than [20] percent of their workweeks," engaged in related but non-tip-producing work. *Hart v. Crab Addison, Inc.*, No. 13-CV-6458 (W.D.N.Y., Oct. 28, 2014).

Avoiding minimum wage claims

Although this case applies to restaurant owners in general, it may be particularly important for small restaurant owners whose employees often perform a variety of tipped and nontipped duties. FLSA claims, which provide for statutory attorneys' fees if the employee prevails, can be very expensive to litigate. As a result, you should have qualified counsel review the duties of employees who perform tipped and nontipped work.

If other arrangements cannot be worked out, you should take proactive steps to limit a tipped employee's non-tip-producing but related work to no more than 20 percent of his workweek and ensure that wages paid for the dual work are in compliance with the FLSA and New York's minimum wage laws.

The author may be reached at zmorahan@cglawoffices.com or 607-723-9511. ✤

EMPLOYEE HANDBOOKS

Want to build ~~a snowman~~ an employee handbook? Start with a solid foundation

Yes, winter is coming—time for snowflakes (whether real or paper), holiday celebrations, and, of course, the annual review of your employee handbook. Is there anything that makes the season as merry and bright as updating policies for the coming year? Of course not!

Before embarking on a blustery trip down handbook lane, be sure to bundle up with this look at a few evergreen basics and best practices to ensure your annual handbook review is as smooth as a frosty glass of eggnog.

At-will disclaimers— you have one, right?

Before you even get to the first policy, you want to set a few expectations for your handbook itself. For example, you want to establish that the handbook is just that—a handbook. It's a guidance document full of policies and helpful information. What it isn't is a promise, contract, or alteration to an otherwise at-will-employment relationship.

Employment is at will in 49 states (Montana is the exception). That means you generally can terminate someone at any time for any legal reason. Problems can arise, however, if an employee handbook seems to establish a *contract* and make certain promises that employment will be guaranteed unless, for example, every listed step of a disciplinary procedure is followed.

An at-will disclaimer can help you avoid apparent promises by stating right up front that "Hey, this isn't a contract! It's just your employee handbook! This relationship is still at will, and we both have the ability to break it off and move on at any time!"

Passing NLRA muster— for nonunion employers, too!

Another important disclaimer that sets the scope of your handbook and, in this case, the rights it is *not* intended to restrict is a National Labor Relations Act (NLRA) disclaimer. The NLRA's primary purpose is to protect employees' collective bargaining rights.

However, that doesn't mean the Act applies only to unionized workplaces. Section 7 of the NLRA, which applies to *all* private workplaces, provides employees with the right to engage in "concerted activities" to advance their interests as employees. These activities include discussing pay, workplace conditions, and discipline with others.

The National Labor Relations Board (NLRB) has been increasingly vigilant in interpreting and protecting employees' Section 7 rights. In particular, the Board has cracked down on numerous handbook provisions that could reasonably "chill," or deter, employees from exercising those rights.

For example, a social media policy that prohibits employees from posting "negative remarks" about the company could dissuade an employee from discussing wage practices or workplace conditions with others. Other policies that may be subject to NLRB scrutiny include at-will disclaimers, conduct standards, media contact policies, antidisparagement standards, and arbitration policies. Essentially, any policy that touches on an employee's ability to discuss work with another person is fair game for the NLRB, so it's a good idea to review these policies with a couple of principles in mind.

First, be specific about the type of activity you wish to restrict. Vague policies that prohibit "negative attitudes" or "discussing sensitive information on social media" are far less likely to pass muster than policies that specifically state that employees shouldn't harass colleagues or disclose customers' data to people outside the company.

Further, when in doubt, remember the power of the disclaimer. An NLRA disclaimer can help clarify an otherwise vague policy by specifically telling employees, "Nothing contained in this policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms or conditions of employment. Company employees have the right to engage in and refrain from such activities."

Binding agreements, restrictive covenants, and other lumps of coal

Restrictive covenants are contractual provisions such as noncompetes, confidentiality agreements, and nondisclosure agreements. In general, employee handbooks should *not* contain these types of agreements. If your employee handbook isn't meant to create a contract and you have put a disclaimer in the handbook specifically stating that it isn't a contract, then it's extremely confusing and contradictory to later include language and policies intended to do just that—create binding, legally enforceable agreements.

Therefore, if you want to enforce these types of restrictions, they need to be drafted and executed separately. Many states are extremely strict and employee-friendly when enforcing these agreements (if they are permitted at all), and the agreements typically must be very specific in intent, must be limited in duration, and often must provide something in exchange for the contract. So a catchall blanket agreement often won't be effective anyway.

Of course, there's nothing wrong with referencing these documents in your handbook, just as you would reference a summary plan description for your health benefit plans. Doing so reminds employees that they may be subject to these agreements and then directs them to their own contracts, if applicable, or the appropriate company personnel for more details.

Did you get a signed acknowledgment of receipt?

So you've put all that work into developing a handbook and researching policies, and you're absolutely sure your employees have read it and understand it. No? Well, you at least know they received copies, right? No?

A signed handbook acknowledgment can be helpful for employers and immediate supervisors when an employee claims ignorance of an established company policy. At a minimum, it's recommended that you require a signed and dated acknowledgment from each employee that the handbook was received. It's even better to get an acknowledgment that the handbook was *read.*

Further, you may wish to specifically list or reference particularly important policies or recent policy changes on the acknowledgment and require employees to confirm that they *understand* them or know with whom to speak if they have questions or need additional information and guidance.

Of course, depending on the size of your handbook, it may not be practical to expect your workers to read the document from cover to cover. So if you're introducing a brand new handbook, distributing it to new hires, or making significant changes, it's also a good idea to set up an orientation meeting to go over the key elements of the document. Then you can ask employees to turn in their signed acknowledgments within a reasonable time after the meeting—a week or two—so they have time to look through the document on their own and ask any individual questions that arise.

Bottom line

Before tackling the host of new laws that can affect your business and your employees during the new year, establishing a solid legal foundation for your handbook will help ensure that it brings you nothing but tidings of comfort and joy year after year. ✤

DATA SECURITY

Feeling insecure? Understand notice requirements under state security breach laws

Apple iCloud, J.P. Morgan, Home Depot—these high-profile names represent only a handful of the businesses and services that fell prey to malicious data breaches in 2014.

It's certainly troubling when large, sophisticated companies are vulnerable to hackers—not only because of the probability of being personally affected by the breach but also because it seems futile for smaller companies to try to prevent security breaches when even Fortune 500 companies can't.

Though smaller companies might be less tempting for such intrusions, data compromises can happen in any company, large or small, single state or multistate. For this reason, it's important to put a proactive plan in place to quickly and legally respond in the event a security breach occurs.

Most states require notice when data breach occurs

As an individual, if your personal data is compromised, receiving reasonable notice of the breach allows you to take corrective action—for example, changing passwords, reporting suspicious activity, or obtaining credit monitoring services—before greater loss or identity theft occurs.

Therefore, if your company falls victim to a security breach, your customers, clients, vendors, employees, and any other individuals whose personal data is stored in your system should be notified. It's a good ethical business practice, and in most states, it's the law.

Almost every state—only Alabama, New Mexico, and South Dakota are the exceptions—has passed a security breach law. The laws vary regarding who must comply with the law, what type of data is protected, and when a breach occurs, but active notice requirements are a common theme across the board.

When to provide notice

Though data breach laws initially arose in the interest of protecting consumers, sensitive employee data can be equally vulnerable. As more businesses centralize personnel records into HR information systems (HRIS) and similar electronic record-keeping processes, data breaches that expose sensitive employee information are more common.

Generally speaking, if unencrypted digital information is *acquired* by an unauthorized third party, you should be ready to provide reasonable notice to all persons affected by the breach. Some state laws also require notice when data is *accessed*—in other words, when an unauthorized party has broken into a server or database but there is no evidence that data was actually downloaded or otherwise taken. (For example, consider a scenario in which a former or current employee accesses but doesn't take payroll data to confirm personal beliefs of wage disparity.)

Which data is protected? The specific definition of "personal information" varies from state to state, but regardless of state law, notice should be provided as a best practice if there is a breach of records containing any sort of financial or medical information or any use of an employee's Social Security or driver's license number. In addition, some states protect "online identification data" such as e-mail addresses, user names, and passwords.

How long do you have to supply notice? Most state laws simply require that notice be provided within a reasonable time and without delay, but some states impose a notice deadline of 30 or 45 days from the discovery of the breach unless there is a specific reason to delay (for example, law enforcement requests that you not report the breach pending its investigation).

Who should receive notice?

If, for example, an employee records database is breached, certainly all affected individuals should be alerted. Keep in mind this may include not only current employees but also former employees whose information is still retained in the system.

In addition, depending on the severity of the breach and the type of information accessed, some state laws require that notice be provided to local authorities, state consumer protection agencies, attorneys general, and the three major credit bureaus.

Some state laws do provide exceptions and safe harbors from the notice requirements in limited circumstances. For example, if the employer finds there is no reasonable likelihood of harm or identity theft as a result of the breach, then notice may not be required. Notice also isn't required if the breach was restricted to encrypted data.

Beware of these exceptions, however, since it may be difficult to determine exactly which data an unauthorized third party has accessed and what it plans to do with the data. In most cases, unless providing notice would be particularly burdensome or damaging, it may simply be preferable to provide notice as a courtesy.

What to include in the notice

Some states may provide a model notice form. If no such form is available or notice must be provided to multiple jurisdictions, a general notice template should include the following information:

- A plain-English explanation of how the breach occurred;

TRAINING CALENDAR

Call customer service at 800-274-6774 or visit us at the websites listed below.

FULL-DAY WEB SEMINARS
http://store.HRHero.com/events/virtual-conferences

1-20 FMLA Compliance for 2015: Master New and Challenging Leave Management Situations

WEBINARS & AUDIO SEMINARS
Visit http://store.HRHero.com/events/audio-conferences-webinars for upcoming seminars and registration information. Also available on CD and in streaming audio after broadcast.

COMING IN 2015:

1-6 2015 Payroll Tax Update: New Forms, Healthcare & 401(k) Mandates, Benefits & More

1-6 Federal Employment Law Outlook for 2015: HR's Essential Policy and Practice Update

1-7 California Employee Handbook Update for 2015: Essential Changes and Drafting Tips for Success

1-8 California Employment Law Update: HR's Guide to Staying in Compliance in 2015

1-8 Compensation Budgeting in 2015: How to Balance Employee Expectations and Economic Reality

1-13 I-9s for 2015: HR's Completion, Retention & Reverification Rules

1-14 Reality-Based Rules for Employee Engagement: Beyond Buzzwords to Meaningful Action

1-14 Pay Grades and Job Value: How to Correctly Assemble All the Pieces of the Compensation Puzzle

1-20 Safety and the ADA: How to Ensure That Your Organization Is Compliant

1-21 Employee Coaching & Mentoring Programs: How to Build Leaders & Improve Workplace Morale in Five Easy Steps! ✤

- Whether the breach has been secured and, if appropriate, steps that have been taken to eliminate the vulnerability and prevent future breaches;
- A description of the type and scope of information believed to have been accessed/obtained (e.g., payroll data collected between 2010 and 2011, medical leave certifications for employees with last names ending in A through H, and user names and passwords for company e-mail accounts);
- A broad description of categories of sensitive information that weren't compromised (e.g., "The breach was limited to e-mail addresses collected from active customers; no personal identification numbers, passwords, or financial data was accessed.");
- Any services or assistance the company will provide and instructions for obtaining the service;
- Protective steps affected individuals should take (e.g., changing passwords, requesting replacement credit cards, or reviewing free credit reports);
- Contact information and instructions for obtaining further information; and
- Any additional requirements under applicable state laws (e.g., the right to a credit or police report or instructions for placing a security freeze on affected accounts).

Notice always may be provided in writing via mail. E-mail notices also may be acceptable, but some states may require that employees first give consent to receiving such notices via e-mail. For particularly large breaches, notice also may be provided to local news media, on the company website or intranet, and to state agencies, as mentioned above.

Cross-border notification

Although the actual data breach may have occurred in one company location, be aware that your notice and response strategy may need to cross borders and comply with the laws of other jurisdictions.

For example, even though South Dakota employers may not be required to provide notice of a security breach, if a company has remote workers, vendors, or customers who reside or principally operate out of one of the states with notice requirements, then the employer may still be required to provide notice.

Finally, consider whether any active collective bargaining agreements, employee contracts, or nondisclosure agreements with employees or vendors impose additional notification obligations or remedies. ✤

NEW YORK EMPLOYMENT LAW LETTER (ISSN 1072-9178) is published monthly for $447 per year by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094. Copyright 2014 BLR®. Photocopying or reproducing in any form in whole or in part is a violation of federal copyright law and is strictly prohibited without the publisher's consent.

Editorial inquiries should be directed to Charles H. Kaplan, ckaplan@sillscummis.com, or Paul Sweeney, psweeney@cglawoffices.com.

NEW YORK EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in New York employment law. Questions about individual problems should be addressed to the employment law attorney of your choice.

For questions concerning your subscription or Corporate Multi-User Accounts, contact your customer service representative at 800-274-6774 or custserv@blr.com.