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INTERNSHIPS

When is a 'trainee' really an employee entitled to pay?

by Andrew L. Rodman

Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Over the last few years, several companies have been sued by individuals seeking unpaid wages on the theory that they were misclassified as unpaid interns or trainees instead of employees. Historically, the U.S. Department of Labor (DOL) has applied a six-factor test to distinguish interns and trainees from employees. Recently, the U.S. 11th Circuit Court of Appeals (whose rulings apply to all Florida employers) weighed in on the relevant factors. In doing so, the court gave the DOL's six-factor test the cold shoulder.

Students seek unpaid wages

A group of 25 former student registered nurse anesthetists (SRNAs) who attended a master's degree program at Wolford College sued for unpaid wages and overtime under the Fair Labor Standards Act (FLSA) for clinical hours that were required for their degrees.

Accreditation standards required the SRNAs to participate in at least 550 clinical cases in a variety of surgical procedures so that they could monitor patients' status after graduation and licensure. The clinical phase of the training program covered completing preoperative forms, setting up anesthesia equipment, drawing medication, monitoring patients during medical procedures, stocking anesthesia cards, preparing surgical rooms, and cleaning equipment. Clinical supervisors evaluated and graded the SRNAs.

The SRNAs viewed their clinical education as employment, and they argued that Wolford failed to pay wages, including overtime, for hours "worked" in the clinical setting. The SRNAs argued that Collier Anesthesia, a medical group composed of physicians who held an ownership interest in the college, benefited financially by using them instead of licensed nurses. The SRNAs argued that they were scheduled to "work" at Collier-staffed facilities 365 days a year, including between school semesters. In other words, they claimed they "displaced" licensed nurses and allowed Collier to save money.

Wolford disagreed with the SRNAs' analysis, arguing that they did not displace licensed nurses and that they were "more of a burden than a benefit" to Collier. In addition, Wolford claimed that some surgeons, hospitals, and patients refused to allow students in the operating room and that Collier lost money as a result of the SRNAs.

Relying on the six-factor test used by the DOL, the trial court held that the

AGENCY ACTION

EEOC releases American workplace report. The Equal Employment Opportunity Commission (EEOC) in August 2015 released a report titled *American Experiences Versus American Expectations,* illustrating the changes to the demographics of the workforce since the agency opened its doors in 1965 as well as the continuing challenges to equal opportunity in employment. The new report, an update to the 1977 *Black Experiences Versus Black Expectations,* examines changes in participation in nine job categories for African Americans, Hispanics, Asian Americans, American Indians/Alaskan Natives, and women between 1966, the first year for which the agency collected data, and 2013, the most recent year for which data is available. "Despite notable progress in diversity and inclusion in the workplace over the past half century, this report highlights continued job segregation by race and gender, with women and people of color disproportionately occupying lower paying positions," said EEOC Chair Jenny R. Yang.

DOL, Alaska sign agreement on misclassification. The U.S. Department of Labor (DOL) and the Alaska Department of Labor and Workforce Development have signed a three-year memorandum of understanding intended to prevent workers from being misclassified as independent contractors or other nonemployee statuses when they should be considered employees. Alaska is the 25th state to join the effort with the DOL. The other states are Alabama, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New York, Rhode Island, Texas, Utah, Washington, Wisconsin, and Wyoming.

OSHA outlines new process on whistleblower complaints. The Occupational Safety and Health Administration (OSHA) on August 19 issued policies and procedures for applying a new process for resolving whistleblower disputes. The early resolution process is to be used as part of a regional alternative dispute resolution program, which offers whistleblower parties the opportunity to negotiate a settlement with the assistance of a neutral, confidential OSHA representative who has subject-matter expertise in whistleblower investigations.

OSHA updates amputations program. OSHA in August issued an updated National Emphasis Program (NEP) on Amputations. In existence since 2006, the program is targeted to industries with high numbers and rates of amputations. According to the most recent U.S. Bureau of Labor Statistics (BLS) data, manufacturing employers report that 2,000 workers suffered amputations in 2013. The NEP includes a list of industries with high numbers and rates of amputations as reported to the BLS. ✤

SRNAs were not employees and granted summary judgment (pretrial dismissal) in favor of Wolford and the other defendants. The SRNAs appealed, and the 11th Circuit threw out the trial court's decision.

Portland Terminal and the DOL's six-factor test

The 11th Circuit noted that the FLSA applies only to employees. However, the definition of "employee" is not precise. Although Congress intended "employee" to have a broad meaning, the term "cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction."

The 11th Circuit looked to the U.S. Supreme Court's 1947 decision in *Walling v. Portland Terminal.* In that case, the Supreme Court held that participants in a practical training course for yard brakemen were trainees, not employees. The training lasted seven to eight days, the participants worked under close supervision, they did not displace regular employees, and they did not expedite company business. The DOL later developed its six-factor test based on the *Portland Terminal* decision.

The 11th Circuit concluded that *Portland Terminal*—but not the DOL's six-factor test—provided relevant guidance. However, *Portland Terminal* by itself did not resolve the dispute between the SRNAs and Wolford because of the evolving nature of the modern internship.

The modern internship

The 11th Circuit focused on the benefits of modern internships and their importance in preparing students for their chosen careers. The fact that a company obtains a benefit by offering an internship does not render a student an employee. The 11th Circuit stated, "Indeed, there is nothing inherently wrong with an employer benefiting from an internship that also plainly benefits the interns." That said, the court recognized "the potential for some employers to maximize their benefits at the unfair expense and abuse of student interns." According to the court, the real question focuses on who the primary beneficiary is in a relationship in which both the intern and the company obtain significant benefits.

Ultimately, the 11th Circuit said the following factors are relevant in discerning the primary beneficiary of an internship:

- Whether the parties clearly understand that there is no expectation of compensation;
- Whether the internship provides training that is similar to instruction given in an educational environment;
- Whether the internship is tied to the intern's formal education program;
- Whether the internship accommodates the intern's academic commitments by corresponding to the calendar year;

- Whether the internship's duration is limited to the period in which the intern is provided beneficial instruction;
- Whether the intern's work complements—rather than displaces—the work of regular employees; and
- Whether the parties understand that the intern is not entitled to a job at the conclusion of the internship.

No single factor is dispositive. Rather, there must be a weighing and balancing of all factors.

ASK ANDY

Are unmarried parents entitled to FMLA leave?

by Andy Rodman
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.

Q *An unmarried male employee has requested Family and Medical Leave Act (FMLA) leave for the birth of his daughter. Is he entitled to FMLA leave if he is not married to the biological mother?*

A Eligible employees are entitled to 12 weeks of FMLA leave for, among other things, the birth of a son or daughter and to care for the child. The regulations define "son or daughter" to include a biological child and do not place a marriage requirement on parents. Therefore, if there is a biological relationship between the employee and the child, the employee is entitled to FMLA leave to care for the child, even if he is not married to the biological mother.

As an aside, note that "son or daughter" is defined broadly. It also covers adopted children, foster children, stepchildren, legal wards, and children of a person standing *in loco parentis.* (*In loco parentis* applies to anyone who has the day-to-day responsibility of caring for a child under 18 or a child who is 18 or older but is incapable of self-care).

Documenting the relationship

You are not required to accept the employee's representation that there is a biological relationship at face value. The regulations state that you may confirm the existence of a family relationship, including a son or daughter relationship, by asking the employee to provide "reasonable documentation" (e.g., the child's birth certificate) or a "statement of family relationship" (e.g., a written statement from the employee verifying the relationship).

Your right to confirm a family relationship extends beyond sons and daughters. For example, you may confirm the existence of a spousal or parental relationship to allow an employee to care for a spouse or parent with a serious health condition or to take qualifying exigency leave. Similarly, you may confirm the existence of a spousal, parental, or next-of-kin relationship to allow an employee to care for a servicemember with a serious injury or illness.

FMLA leave nuances for the birth of a son or daughter

Although the FMLA does not place a marriage requirement on parents who request leave for the birth of a son or daughter, unmarried employees do not have the same rights as married employees when it comes to caring for the expecting mother.

For example, the FMLA provides employees leave to care for a "spouse" with a serious health condition. A serious health condition includes incapacity due to pregnancy or prenatal care. Therefore, an employee is entitled to FMLA leave to care for a spouse who is incapacitated because of pregnancy, to care for a spouse during prenatal care, or to care for a spouse who has a serious health condition following the birth of a child.

The term "spouse" is defined broadly (and now includes same-sex spouses), but it requires an actual marriage. Thus, an unmarried employee is not entitled to FMLA leave to care for the mother during a pregnancy-related incapacity, during prenatal care, or following the birth of a child if the mother has a serious health condition.

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This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

Without deciding whether the SRNAs were employees under the FLSA, the 11th Circuit sent the case back to the trial court for an analysis using the above factors. *Schumann v. Collier Anesthesia, P.A., Wolford College, LLC, et al.* (11th Cir., 2015).

Takeaways

Think long and hard before bringing in an unpaid intern. If your primary goal is to save money by displacing a regular employee, the "intern" may really be an employee entitled to compensation. Unpaid internships should be thought of as an exception, not the rule. Internships must be truly educational in nature. "Education" generally does not include learning how to file papers, organizing supply rooms, or performing other routine secretarial or administrative functions. In addition, internships should not be used as "trial" or "test" periods used to make decisions regarding "regular employment." Keep in mind the 11th Circuit's warning: An employer may not maximize its benefit at the unfair expense and abuse of an intern.

You may contact the author at arodman@stearnsweaver.com or 305-789-3256. ✤

JOINT EMPLOYERS

NLRB ruling on 'joint employers' opens door to unionization

Businesses spend a lot of time and money making sure they comply with the myriad laws that govern the employment relationship. Employers have relied on decisions by the National Labor Relations Board (NLRB) that define "joint employers" in structuring their businesses. This is true of employers that use temporary or leased employees as well as those whose companies are organized into several subsidiaries or have a franchise model.

In a recent decision, however, the NLRB has turned this world upside down by redefining and broadening the definition of "joint employment" for purposes of collective bargaining under the National Labor Relations Act (NLRA). In reaching its decision, the Board stated that the use of contingent and temporary workers is increasing and that the "joint employer" standard needed to be revised to adapt to the "changing patterns of industrial life."

Facts

The employer in this case seems to have done everything right to avoid being a joint employer when it came to structuring a relationship to lease employees for part of its operation. Browning-Ferris Industries of CA, Inc., doing business as BFI Newby Island Recyclery (BFI), entered into an agreement with FPR-II, LLC, doing business as Leadpoint Business Services, in which Leadpoint agreed to staff part of BFI's recycling operations.

The agreement provided that Leadpoint would be the sole employer and supervise the workers' day-to-day activities. In fact, the company had a supervisor and an HR person on site at the facility where the employees worked, and the employees were subject to its policies. Leadpoint paid their wages, and its supervisors trained, counseled, and disciplined them when required.

The agreement had certain requirements related to new employees, including that Leadpoint was to ensure that all employees passed drug and alcohol tests and required training. BFI did not, however, get involved in the actual recruiting and hiring of the Leadpoint employees.

BFI didn't set wages for the Leadpoint employees, but the agreement did set a maximum wage. In addition, BFI didn't direct the day-to-day work of the Leadpoint employees, but it did set the hours of operations and shift schedules and controlled the speed of the sorting line at which the employees worked. Apparently, there was friction between the Leadpoint employees and the BFI managers over the speed of the sorting line.

BFI had employees who worked at the site and were represented by a union. The same union filed a petition to represent the Leadpoint employees, naming both BFI and Leadpoint as the employers. The NLRB's regional director determined that Leadpoint was the sole employer. The union appealed that decision to the full Board.

New joint employer standard

Under both the old and new tests, to be considered a joint employer under the NLRA, the employer must have the authority to control the essential terms and conditions of employment for the workers in question. The old test, however, also required that the joint employer exercise that authority in a direct and immediate way, not in just a "limited and routine" way. The essential terms and conditions of employment included hiring, firing, discipline, supervision, and direction of work. Under the old test, BFI wasn't a joint employer with Leadpoint, according to the NLRB's regional director.

In its decision, the NLRB rejected the existing test and stated that it will now consider the various ways two employers share control or codetermine the terms and conditions of employment. The Board determined that the essential terms and conditions of employment include not only wages and hours of work but also setting the number of workers supplied; controlling scheduling, seniority, overtime, and work assignments; and determining the manner and method of work performance.

The NLRB went on to say that when an employer has reserved the authority to control or codetermine the terms and conditions of employment—even when it has

chosen not to exercise that authority—it may be found to be a joint employer and subject to collective bargaining. Under the new test, if a business using contingent workers owns and controls the facility, dictates the essential nature of the job, and imposes the broad operational contours of the work, it can be found to be a joint employer.

The NLRB did state that a joint employer will be required to bargain only with respect to the terms and conditions of employment over which it has control. It appears by the facts in this case that the union seeks to bargain with BFI over the speed of the sorting line.

Next steps for employers

Employers that operate in a franchise environment, use temporary or leased workers, or are organized with subsidiaries under a single parent company should review these arrangements carefully to determine if there is a joint employment relationship under the new standard. Joint employers may also want to consult with labor counsel to evaluate if they are vulnerable to union organizing. ✤

ARBITRATION AGREEMENTS

Florida court allows pattern-and-practice suit to proceed based on arbitration language

by Rob Sniffen and Jeff Slanker
Sniffen and Spellman, P.A.

Many employers are well aware of the administrative process that most employment discrimination claims must pass through before a lawsuit can be filed. Indeed, most discrimination claims must first be filed with the Equal Employment Opportunity Commission (EEOC) or the Florida Commission on Human Relations. However, as a Florida district court's recent decision makes clear, the administrative process is not required in all circumstances. The case involved an arbitration agreement the EEOC said ran afoul of Title VII of the Civil Rights Act of 1964.

Facts

The EEOC filed suit against Doherty Enterprises for its use of an arbitration agreement that employees were required to sign. The agreement required employees to arbitrate employment disputes regardless of whether the disputes could be brought before a judicial forum or an administrative agency. The EEOC alleged that the arbitration agreement deterred employees from filing discrimination charges or cooperating with the EEOC or fair employment practices agencies in investigating alleged discrimination. Specifically, the EEOC claimed that the agreement and its purported effect constituted a pattern and practice of resistance to employees' full enjoyment of their rights under Title VII.

Doherty asked the court to dismiss the EEOC's lawsuit on several grounds. The employer alleged that employees did not file a discrimination charge concerning the allegations before the EEOC filed suit and that the EEOC failed to engage in conciliation efforts before filing suit. When the EEOC issues a cause finding on a discrimination charge, it is required to engage in conciliation efforts before filing suit.

Court's decision

The court held that the lawsuit should not be dismissed on the grounds mentioned by Doherty. The court explained that in some instances, the EEOC has the authority to pursue a lawsuit on its own, regardless of whether a discrimination charge has been filed.

The EEOC filed suit under a provision of Title VII that prohibits individuals, including employers, from engaging in a pattern or practice of behavior that amounts to resistance to others' enjoyment of Title VII rights. Unlike the parts of Title VII that concern remedying individual acts of discrimination, the provision does not require a discrimination charge to be filed before a lawsuit can be initiated. In addition, the provision does not require the EEOC to engage in conciliation before filing suit.

Further, the court explained that the provision allows the EEOC to sue individuals and companies, regardless of whether a discrimination charge has been filed. The EEOC could challenge the arbitration agreement even though it was not a party to it. *Equal Employment Opportunity Commission et al. v. Doherty Enterprises, Inc.*, Case No. 9:2014-cv-81184—Document 32 (S.D. Fla., 2015).

Takeaways

Employers that use arbitration agreements must make sure the agreements are drafted very carefully. Overly broad language that prevents an employee from participating in investigations conducted by the EEOC or other state or federal agencies may be subject to legal challenge. Further, the EEOC does not have to exhaust the administrative process that most employment discrimination claims must go through when alleging that a practice restricts the enjoyment of Title VII rights. According to the court, such an allegation gives the EEOC a direct route to challenge employers' actions in court.

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NONCOMPETE AGREEMENTS

Beware: Hiring an employee with a noncompete agreement may violate Florida law

by Tom Harper
Law and Mediation Offices of G. Thomas Harper, LLC

Does a Florida employer have a duty to fire employees when it learns they have a noncompete agreement with a former employer? The 11th Circuit has said that in some cases, the answer is yes. Read on to see what happened in a recent case that dealt with a situation many Florida employers face.

Background

In 2013, Aerotek, Inc., a Maryland-based recruiting company, hired Kevin Zahn and Jason Jimenez. The company had the employees sign noncompete agreements (also called restrictive covenants) that lasted for 18 months after their employment ended. The noncompete agreements stated that Zahn and Jimenez could not work for Aerotek's competitors or communicate with its customers.

After Crawford Thomas, LLC, hired Zahn and Jimenez, Aerotek sent the new employer a letter explaining the noncompete agreements. Crawford Thomas responded by saying that it was not a party to the agreements and thus was not bound by them. Aerotek sued Crawford Thomas and both employees.

Aerotek claimed that Crawford Thomas committed tortious (wrongful) interference with a business relationship. In Florida, the elements of a claim for tortious interference with a business relationship are:

(1) A business relationship that affords the plaintiff existing or prospective legal rights;

(2) The defendant's knowledge of the business relationship;

(3) The defendant's intentional and unjustified interference with the relationship; and

(4) Damage to the plaintiff.

Crawford Thomas claimed that it did not know about the noncompete agreements when it hired Zahn and Jimenez. Therefore, it did not commit a tortious act. A Florida federal court agreed and dismissed the suit. However, Aerotek appealed, and the appellate court had a different view.

11th Circuit's decision

Aerotek argued that after Crawford Thomas knew about the noncompete agreements, every day Zahn and Jimenez continued to work for the company constituted a new tortious act. The appeals court agreed. The court looked to previous Florida cases in which courts found that a restrictive covenant being violated by ongoing separate acts was a continuing violation. In those cases, courts held that each day the employees worked for a competitor in violation of a noncompete agreement constituted a separate breach of the agreement. If the employer knew about the agreement and kept the employee on the job, it opened itself up to a tortious interference claim.

The 11th Circuit stated:

> Extending this reasoning to the matter at hand, there are reasonable inferences that each day that the employees worked in violation of the covenants constituted a separate breach and that each day that [Crawford Thomas] employed [the] employees knowing that they were acting in violation of the noncompete covenants . . . constituted a separate breach. Thus, it was not only the hiring of the employees that breached the covenants. Taking the reasonable inferences in favor of Aerotek, we believe there are allegations that [Crawford Thomas] had knowledge of such breaches following receipt of the cease-and-desist letter, and therefore, Aerotek pled a plausible . . . case of tortious interference.

The 11th Circuit reinstated Aerotek's lawsuit and sent the case back to the trial court for further proceedings. *Aerotek, Inc. v. Kevin Zahn, Jason Jimenez, and Crawford Thomas, LLC,* Case No. 15-11407 (11th Cir., August 26, 2015).

Takeaways

Add a note to your interview checklist to ask applicants whether they have signed any agreements with previous employers. If you don't know about an employee's noncompete agreement, learning about it from a previous employer can be a nasty surprise. In today's competitive business environment, that situation is fairly common in Florida. Indeed, unlike other states, Florida has a law that provides that noncompete agreements are valid and enforceable if they meet certain requirements.

In Florida, noncompete agreements are presumptively valid for two years after an employee leaves, regardless of the reason, so you should be concerned about new employees. If an employee violates his agreement during the two-year period and the violation becomes known after two years end, a previous employer may still file suit to enforce the agreement. If that happens, you will likely be added to the lawsuit under a tortious interference theory.

Tom Harper is board-certified in labor and employment law. He is also a Florida Supreme Court Circuit civil and appellate mediator and a panel member of the American Arbitration Association. ✤

IDENTITY THEFT

Growth of tax fraud leads states to expand data breach laws

According to data from the Federal Trade Commission (FTC), tax fraud is the most common consumer complaint from victims of identity theft. In 2014, nearly one-third of complaints from identity theft victims were related to tax fraud. In response, some states have revisited their existing data security laws. This trend may create additional responsibilities for your business now or in the future.

Several states revise data breach laws

Unsurprisingly, California was the first U.S. state to pass a data breach law. That law, which took effect in 2003, has served as the template for similar laws now on the books in all but three states (Alabama, New Mexico, and South Dakota).

In the 12 years since, many states' lawmakers not only have passed new laws but also have revisited their existing laws and expanded them to include and protect more types of personal data and to add state agencies to the notification requirements. This year, several states, including Montana, Nevada, North Dakota, Washington, and Wyoming, amended and expanded their existing laws.

Wyoming and Nevada. Wyoming's security breach law follows the standard template of requiring entities that conduct business within the state and that own or license computerized data that includes personal identifying information about any resident of the state to notify affected individuals in the event the personal data is accessed by unauthorized parties.

However, effective July 1, 2015, the definition of "personal information" significantly expanded. The law already protected data when the first name or initial and the last name of a person were accessed in combination with obviously sensitive data elements such as Social Security numbers; credit, debit, and other financial account numbers; and details on any federal, state, or tribal issued identification card. But the law now also extends to protect data elements such as medical information, health insurance information, taxpayer identification numbers, biometric data, and certain information that would permit access to "an online account." Nevada has similarly expanded its law to include new forms of personal information.

In the event of a breach, covered Wyoming entities must also provide "clear and conspicuous" notice to affected individuals that includes, at a minimum, the date of the breach, a general description of the breach and the types of information affected, any actions taken by the company to prevent further data loss, and advice to the affected individuals (for example, recommendations to review account statements or credit reports).

Montana and North Dakota. Effective October 1, 2015, Montana's existing law also expands its protection and the duties of covered entities. As with Wyoming's law, Montana adds new forms of protected data to the definition of personal information. Montana law now also protects medical record

WORKPLACE TRENDS

Survey explores move away from 9-to-5 workdays. The traditional eight-hour workday is showing further signs that it's on its way out, according to a survey from CareerBuilder that gathered responses from more than 1,000 full-time workers in information technology, financial services, sales, and professional and business services—industries that historically have more traditional work hours. The survey, conducted online by Harris Poll on behalf of CareerBuilder from May 14 to June 3, 2015, found that 63% of workers in those industries believe working 9:00 a.m. to 5:00 p.m. is an outdated concept, and many have a hard time leaving the office mentally. Twenty-four percent of the respondents said they check work e-mail during activities with family and friends. Sixty-two percent of the workers perceive working outside of required office hours as a choice rather than an obligation, with that view more often expressed by workers 55 and older than by workers ages 18 to 24.

2016 pay raises seen holding steady in 2016. A survey from global professional services company Towers Watson says pay raises for U.S. employees are expected to hold steady in 2016. The nationwide survey of more than 1,100 U.S. companies also found that employers continue to reward their best performers with significantly larger pay raises as they look for ways to retain top-performing talent in a tightening labor market. The survey found that 98% of respondents plan to give employees raises next year and are projecting average salary increases of 3% for their exempt nonmanagement employees, the same as those employees received in 2014 and 2015. Employers also plan 3% increases for nonexempt salaried and nonexempt hourly employees. Executives and management employees can expect increases that will average 3.1% in 2016, according to the survey.

Census report shows how people get to work. The U.S. Census Bureau released a report in August showing the prevalence of employees who commute to work by car. The report states that about 86% of U.S. workers commuted to work by automobile in 2013, and three out of four drove alone. The report also found that driving alone peaked in 2010 at 76.6% but changed little between 2010 and 2013. Urban workers ages 25 to 29 showed about a 4% decline in automobile commuting between 2006 and 2013, and they showed the highest increase in public transportation commuting between 2006 and 2013, from 5.5% to 7.1%. The rate of carpooling has declined during each decade since 1980, the report found. About 9% of workers carpooled in 2013, down from 19.7% in 1980. ✤

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information, taxpayer identification numbers, and any identity protection personal identification number issued by the federal IRS when the information is accessed in combination with an individual's first name or initial and last name.

Montana's law also imposes an additional reporting requirement on affected entities. Now victims of a data breach will be required to notify the state Attorney General's Office of Consumer Protection (or, if the affected entity is an insurer, the state insurance commissioner). Effective August 1, 2015, North Dakota also added a requirement that breaches affecting more than 250 covered persons must be reported, by mail or e-mail, to the state attorney general.

Washington. Washington's expanded law, effective July 24, 2015, makes two primary changes that expand the type of data protected. First, the law now protects data regardless of whether it is computerized (previously the law's protection extended only to computerized data). Second, the law also requires notice to be provided for encrypted data in some circumstances. Previously, if data was encrypted, then it was presumed to be secure. However, the law now accounts for situations in which the encryption isn't sufficient to secure the data (for example, the person who accesses the data also obtained access to or can easily decipher the encryption key).

Bottom line

Though these changes represent only a handful of states, they demonstrate that many state lawmakers continue to revisit and revise existing security breach laws as new types of data are created, stored, and made vulnerable to unauthorized access. Proactive employers may wish to expand existing data security and breach notification protocols to include these new categories of personal data—even if your state laws don't yet require that you do so. ✤

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