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ELECTRONIC WORKPLACE

CADRA protects you against unauthorized access of computers and data

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Effective October 1, 2015, Fla. Stat. §§ 668.801-668.805, Florida's Computer Abuse and Data Recovery Act (CADRA), provides a new civil remedy to business owners harmed by unauthorized access to their computers or information stored on protected computers.

Seeking protection under CADRA

Under CADRA, businesses can pursue a civil action for "harm or loss" suffered as a result of unauthorized access to "protected computers." "Harm" means "any impairment to the integrity, access, or availability of data, programs, systems, or information." "Loss" is defined as reasonable costs incurred in conducting a damage assessment, remedial measures (e.g., restoring the data), economic damages, lost profits, consequential damages (including interruption of service), and profits earned by the violator.

In addition to damages for those losses, CADRA provides for injunctive relief and reasonable attorneys' fees. The time limit for filing an action is three years after the violation occurred, is discovered, or, with due diligence, should have been discovered.

Under CADRA, a "protected computer" is defined as a "computer that is used in connection with the operation of a business and stores information, programs, or codes in connection with the operation of the business in which the stored information, programs, or codes can be accessed only by employing a technological access barrier." To seek protection for its data, a business must take reasonable measures to protect the data by employing a technological barrier such as a password, security code, token, key fob, access device, or similar measure.

How to prove a CADRA violation

To prove a violation under CADRA, the business owner must demonstrate that someone "without authorization" accessed a protected computer. That means the computer was accessed by a person who:

(1) Was not an authorized user;

(2) Stole a technological access barrier of an authorized user; or

(3) Circumvented a technological barrier on a protected computer without the permission of the owner of the computer or the owner of the information stored on the computer.

Employers should be aware that if an employee was deemed an

"authorized user," his authorization ceases upon termination or upon the employer's express revocation.

Employer takeaway

If you want to take advantage of the protections afforded by CADRA, you should:

- Assess your information security systems, and implement appropriate measures ("technological access barriers") to safeguard your computers and data.
- Review your computer use and data access policies to ensure that they define "authorized users," state when authorization may be revoked, and explain the type of conduct that is improper and may result in disciplinary action.
- Conduct vulnerability assessments and penetration tests to ensure that your security systems and technological barriers are effective.

By following those steps, you will add another weapon to your arsenal for fighting back when unauthorized individuals (such as hackers or terminated employees) access your computers.

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REASONABLE ACCOMMODATION

What do you owe an employee who becomes disabled?

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

On August 12, a Florida judge entered an order that clarifies Florida employers' duty to accommodate employees who become unable to perform significant job duties. The Equal Employment Opportunity Commission (EEOC) sued a Tampa hospital over its treatment of a psychiatric nurse who developed mobility issues. After a three-day trial, the jury returned what some would call a split decision. Here's what happened.

Facts

Leokadia Bryk worked as a nurse in the behavioral health unit at St. Joseph's hospital for 20 years. In 2009, Bryk had to start using a cane because surgery on her hip and other health problems affected her mobility. After apparently accepting her mobility issues for some time, the hospital asked her in October 2011 to provide documentation from her doctor of her need to use a cane at work.

After confirming that Bryk had a medical need for the cane, the hospital then decided that her use of it in the psychiatric unit posed a risk of harm to her, the patients, and other employees. As a result, St. Joseph's decided that she could no longer work in the behavioral health unit. The hospital gave her 30 days to secure an alternate position or be fired.

Just before the hospital initiated its review of her disability, Bryk was demoted based on her poor job performance. She was also issued a final written warning, which, under St. Joseph's policy, made her ineligible to transfer to another position. Nevertheless, the hospital granted her an exception and allowed her to apply for a transfer to an available position.

Soon after receiving all this news, Bryk took a previously scheduled two-week vacation. To meet the 30-day deadline for finding an alternate position, she had to search for available positions through the hospital's online application system. The hospital suggested that she speak with the team resources manager, Krista Sikes, if she had any questions about applying for available positions.

The online job search proved a little overwhelming for Bryk. Even though there were 700 available positions, she decided that she really wasn't qualified for most of them. After all, she had worked in the behavioral unit for 20 years.

According to the court, Bryk stated that she "could not safely work on medical/surgical units" because she was not up-to-date on many of the newer procedures. Further, she did not even apply for many positions because she felt that she lacked the "skills, requirements and experience and she did not feel comfortable taking on certain roles and putting her license at risk."

Bryk eventually applied for seven available jobs at the hospital. Perhaps frustrated with the process, however, she also contacted Patricia Teeuwen, the director of team resources and Sikes' boss, claiming she was experiencing a "lack of accommodation." She told Teeuwen that "she [felt] an accommodation would be [for St. Joseph's] to find her another job." Teeuwen responded that the hospital was not required to locate a job for her.

EEOC sues hospital

The EEOC sued St. Joseph's after it terminated Bryk in November because she hadn't been selected for any of the positions she applied for. The EEOC claimed the hospital violated the Americans with Disabilities Act (ADA) by not offering her a job. By the time the case reached trial, the parties had narrowed the case to a dispute over three of the seven jobs Bryk had applied for: education specialist, care transition coordinator, and home health clinician II.

The hospital explained that the care transition coordinator position had been incorrectly posted, although no one had bothered to tell Bryk. It explained that the home health clinician II position had been offered to

another applicant who applied for the job before Bryk did. Finally, the hospital hired another candidate for the education specialist position, "stating that Bryk did not have the requisite experience needed for the position."

At the conclusion of a three-day trial, the jury found, based on a preponderance of the evidence, "that St. Joseph's hospital failed to provide a reasonable accommodation by not assigning [Bryk] to [any of the three positions]." But the jury also found that "the Hospital made good[-]faith efforts to identify and make a reasonable accommodation for [her]." Neither Bryk nor the hospital made specific objections to the jury's verdict before the court excused the jurors.

After the trial, the EEOC argued that St. Joseph's hadn't presented sufficient evidence to support the jury's second finding that it had made good-faith efforts to

ANDY'S IN-BOX

Breastfeeding and depositions and politicians . . . oh my!

by Andy Rodman
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As the candidates' campaigns for the 2016 presidential election kick into gear, the accusations, mudslinging, and dirt-digging has begun. In a story that hit the airwaves in July, Elizabeth Beck, a Florida attorney who deposed Donald Trump in connection with a real estate project in 2011, accused Trump of overreacting to her need for a break during the proceeding.

According to Beck, Trump erupted when she requested a break in the deposition so she could pump breast milk: "He got up, his face got red, he shook his finger at me, and he screamed, 'You're disgusting, you're disgusting,' and he ran out of there." Trump apparently doesn't dispute that he used the word "disgusting" during the encounter. In true Trump form, he let his feelings be known on Twitter: "Lawyer Elizabeth Beck did a terrible job against me, she lost (I even got legal fees). I loved beating her, she was easy."

A misunderstanding, perhaps? Trump's team contends that Beck intended to pump breast milk *in the deposition room* while Trump and others were present. Beck, on the other hand, claims that her breast-pumping break was set to coincide with a prescheduled lunch break and wouldn't have occurred in the presence of others. Very few people really know what happened during that deposition. So let's at least turn the entertaining squabble into an educational moment—a reminder about state and federal employment laws addressing breastfeeding and pumping at work.

In 2010, Congress amended the Fair Labor Standards Act (FLSA), the federal law that governs minimum wage, overtime, and child labor, to require covered employers to provide:

- "Reasonable break time" for a nonexempt employee to express breast milk for her nursing child for one year after the child's birth; and
- A functional location, other than a bathroom, that is shielded from view and free from intrusion where the employee may express breast milk. (An employer is not required to maintain a space that is dedicated solely for the use of lactating mothers. In terms of functionality, it would be prudent to make sure the room has an electrical outlet, a locking door, adequate ventilation, and a chair.)

The FLSA amendment does not apply to employers with fewer than 50 employees (in the aggregate at all locations) if the requirement would impose an undue hardship on the business. Undue hardship is determined by looking at the difficulty or expense of compliance in comparison to the size, financial resources, nature, and structure of the employer's business.

There also are state-specific laws to consider. In Florida, a mother may breastfeed her child in any location, public or private, where she is otherwise authorized to be, even if her breast or nipple is exposed.

Make sure that all HR representatives and supervisory/managerial employees in your organization are aware of the rules so that nobody responds with a "You're disgusting!" comment when he's approached with a pumping issue.

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identify and reasonably accommodate Bryk. The agency claimed that the ADA requires employers to reassign disabled employees to available jobs without making them compete with other applicants.

Judge says reassignment isn't automatic

This is a question that has not been addressed by the federal appeals court over Florida, and Judge Moody ruled that the law does not require employers to reassign a disabled employee *without competition* to an available job. Instead, the court concluded that "whether Bryk had to compete with others for the vacant positions is one factor, out of many, that the jury may consider regarding the reasonableness of the accommodation. The ADA does not require an employer to accommodate an employee in the manner she desires, so long as the accommodation it provides is reasonable."

Reviewing the evidence presented at trial, Judge Moody found that St. Joseph's had provided sufficient evidence to justify the jury's decision. The court noted that the hospital had:

(1) Waived the prohibition against applying for a job transfer that should have been in effect because of Bryk's recent demotion and final written warning;

(2) Assigned Sikes to assist Bryk by being available for questions and reaching out to recruiters to discuss the status of her applications; and

(3) Gave Bryk 30 days to identify and apply for jobs through its online application system.

Judge Moody thought it was reasonable under the ADA for St. Joseph's to leave it up to Bryk to identify the jobs for which she thought she was qualified.

Although the court found that the EEOC was the prevailing party at trial, it denied the agency's request that Bryk be awarded back pay and front pay. The court reasoned, "The Hospital should not be responsible for back pay in an amount exceeding $100,000 [when] it acted in good faith. Due to no fault of the Hospital, Bryk's inaction contributed to a breakdown of the interactive process." And instead of the reinstatement requested by the EEOC, Judge Moody ordered the parties to mediation to try to reach a resolution on Bryk's reinstatement.

The court concluded by stating:

> Bryk is entitled to an *opportunity* for reinstatement. Therefore, [she] must identify and apply for vacant positions at the Hospital. The Hospital shall reinstate [her] if a position is found for which she is equally or better qualified than other applicants. The Court will permit the parties to define the specific parameters of this application process at mediation, including the time period for the search and application, and the time for response by the Hospital.

U.S. EEOC v. St. Joseph's Hospital, Inc., Case Number: 8:13-cv-2723-T-30TGW (M.D. Fla., August 12, 2015).

Takeaway

For now, this decision answers an accommodation question that Florida employers have had for some time. Unless Judge Moody's ruling is reversed, an employer does not have to reassign a disabled employee to an available position without requiring her to compete for the position with other applicants. The employee will need to show that she is qualified for the available position—perhaps even the most qualified candidate.

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. ✤

WAGE AND HOUR LAW

Florida appeals court clarifies willfulness standard for FLSA actions

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

The Fair Labor Standards Act (FLSA) is a federal law mandating, among other things, that employees be paid minimum wage for all of the hours they work and that any employee who works more than a certain number of hours be paid overtime. FLSA claims can be a source of significant liability for an employer that fails to properly pay its employees overtime when they are entitled to it. As with any statute, however, FLSA claims must be brought in a timely manner.

An employee must file a claim under the FLSA within two years of the date the violation occurred, unless the violation was willful. If the violation was willful, the statute of limitations is three years. The 11th Circuit recently held that actions an employer might not consider a willful violation of the FLSA may, in fact, be willful.

The lesson? If you have reason to believe your employees are working overtime but not reporting it, you should seek to correct the issue as soon as possible and make sure they are properly compensated. Let's look at the facts of the case viewed in the light most favorable to the employee, the standard used by the 11th Circuit on appeal.

Facts of the case

Wanda Gilbert worked as a crime intelligence analyst for the city of Miami Gardens. She filled out her own time sheets, accounting for any overtime she worked on the same time sheets. At some point during her employment, one of her supervisors told her that her department could no longer afford to pay her overtime, and if she needed to work extra hours, she needed to get approval

from him first. After that, she continued to work overtime, but merely stopped noting on her time sheets that she was working extra hours.

At one point, Gilbert was the only crime intelligence analyst in the department, although there was normally enough work for two analysts. As a result, she performed the duties of two analysts until another employee was hired and trained, which meant she worked longer hours to complete her job duties. She informed her supervisors about her long working hours at least once during her employment.

Gilbert eventually left her job with the city and filed an FLSA lawsuit. The district court granted judgment in favor of the employer after a trial, finding that no reasonable jury could determine that the city acted willfully in failing to pay Gilbert overtime. That was important because she filed her lawsuit after the statute of limitations for typical violations of the FLSA had expired, but within the statute of limitations for willful violations. Gilbert appealed.

Appellate court's decision

The 11th Circuit reversed the district court's decision and sent the case back to the lower court for further proceedings. The court of appeals found that a reasonable jury could infer that the city's actions in failing to pay Gilbert overtime were willful. As a result, her claims were not then time-barred.

Gilbert filed her lawsuit more than two years, but less than three years, after her final day of work, when the last violation would have occurred. That meant that if she could prove the city's actions were willful, she could prevail on her claim against it for failing to pay overtime.

Gilbert argued on appeal that the city had reason to believe she was underreporting her hours, but it failed to correct the issue and pay her overtime. The 11th Circuit agreed, holding that a jury could conclude that the city's actions amounted to a reckless disregard for whether it was violating the FLSA. That was a sufficient standard to establish a willful violation of the statute.

Reckless disregard, the court explained, is a "failure to make adequate inquiry into whether conduct is in compliance with the [law]." In holding that a jury could find reckless disregard in this case, the court noted that Gilbert had previously recorded her overtime but stopped after she was instructed that she had to get approval first. This continued even though she was performing the duties of a second crime intelligence analyst in addition to her own job and there was evidence that she couldn't complete her duties without incurring overtime. Further, the appellate court noted that some of her coworkers testified that it was obvious she was working long hours.

Based on the evidence, the court held that a jury could find that the city should have suspected that Gilbert was underreporting her hours and should have inquired into whether her time sheets were accurate and whether she should have received overtime. *Gilbert v. City of Miami Gardens,* Case No. 14-15432, 2015 WL 4930907 (11th Cir., Aug. 19, 2015).

Takeaway for employers

Wage and hour claims are becoming a bigger and bigger source of potential liability for employers. This case highlights the fact that you must be vigilant in policing your workforce for potential wage and hour violations. You cannot ignore signs that an employee is working overtime and not getting paid for it. Rather, you must ensure that your employees are compensated appropriately for all hours they've worked.

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OVERTIME

New proposed overtime rules are call to action for employers

Just in time for the 4th of July holiday, the U.S. Department of Labor (DOL) released its long-awaited proposed changes to the rules for determining which employees are exempt from overtime requirements. This is the first major overhaul of the overtime rules since 2004, and you need to understand and plan for the impact the proposed changes will have on your organization.

Large increase in minimum salary threshold

The DOL proposes to more than double the minimum salary threshold for the "white-collar" exemptions (executive, professional, and administrative employees) from $455 per week to $921 per week, or on an annual basis from $23,660 to $47,892. The new salary level is set at the 40th percentile of the nationwide average wages for salaried workers and will increase annually based either on average earnings for salaried workers or on the Consumer Price Index (CPI).

As President Barack Obama announced, this will likely lead to a minimum salary threshold in 2016 of $50,440 on an annual basis, and the DOL anticipates that millions more workers will be eligible for overtime under the new rules.

Other proposed changes

There are also changes proposed for the computer employee exemption. Under the proposed rules, the overtime exemption would apply to any computer employee who is compensated on a salary or fee basis at a rate of $921 per week, which is an increase from the current $455 per week, or on an hourly basis at a rate of at least $27.63 an hour. In addition to meeting the minimum salary threshold, employees must work in a computer-related job that is covered by the exemption.

In addition, the DOL proposes to set the total annual compensation level for highly compensated employees (HCEs) at $122,148 per year to "ensure that the HCE exemption continues to cover only employees who almost invariably meet all the other requirements for exemption." The current salary threshold for HCEs is $100,000 annually. An employee earning $122,148 annually would be exempt if she customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.

No changes to duties tests yet

The DOL's proposed rule doesn't include any changes to the duties tests for the white-collar exemptions, but that doesn't mean changes aren't coming. The DOL sought comments on whether there should be changes in light of the new salary threshold and specifically asked for comments on the following questions:

- What, if any, changes should be made to the duties tests?
- Should employees be required to spend a minimum amount of time performing exempt work that is their primary duty to qualify for the exemption?
- And, if so, what should that minimum amount be?

In particular, the DOL asked for comments on whether to adopt standards similar to California's law requiring that 50 percent of an employee's time be spent exclusively on work that is her primary exempt duty or whether there is some other threshold (less than 50 percent) that might be "a better indicator of the realities of the workplace today."

In addition, the DOL asked for comments on whether it should reconsider its 2004 decision to eliminate the long and short duties test structure. You may recall that before the 2004 changes in the overtime regulations, there was both a long and a short duties test to determine whether an employee was exempt from overtime requirements.

The DOL also requested comments about whether the duties test for the executive exemption should be changed to modify or eliminate the performance of concurrent duties (allowing the performance of both exempt and nonexempt duties concurrently). The concern is that lower-level executive employees are being classified as exempt when they are also performing nonexempt work, working long hours, and being paid a relatively low salary (think retail store manager or assistant manager).

Status of proposed regulations

The notice of proposed regulations was published in the *Federal Register* on July 6, and there was a 60-day comment period through September 4. Now that the comment period is closed, the DOL will finalize the regulations.

Take action, prepare for changes

Here's what you need to do now that the DOL has finally issued its proposed rule:

- Determine which positions in your organization may become nonexempt under the new salary threshold.
- Analyze the financial impact the increased salary threshold will have on your organization, including what the impact will be if employees are classified as nonexempt and paid overtime or if salaries are raised to meet the new threshold.
- Work with senior management to understand the impact of the proposed regulations and develop a response strategy.
- Review job descriptions to make sure exempt duties are listed first as the primary duties, and where appropriate, use language such as "exercises independent judgment" with regard to specific duties.
- Review and revise policies to take advantage of the safe harbor for deductions from the pay of exempt employees.
- Consider working with local counsel to audit existing exempt designations so that any corrections can be made in conjunction with changes required by the proposed rules. ✤

INDEPENDENT CONTRACTORS

DOL issues guidance on employee vs. independent contractor classification

Determining whether a worker is an employee or an independent contractor can be a confusing (and, if done incorrectly, costly) endeavor. Though some employers may knowingly misclassify workers to reduce costs and avoid the burden of certain employment laws, it is equally—if not more—likely that the fact-specific multipart classification tests used for this purpose have simply confused well-meaning employers into getting it wrong.

In an effort to provide some clarity and guidance on employee classification, U.S. Department of Labor (DOL) Administrator David Weil recently issued an Administrator's Interpretation that sheds additional light on the existing tests. The primary takeaway from this document: Most workers are employees under the Fair Labor Standards Act (FLSA).

Why does misclassification matter?

When workers are misclassified, it creates two significant areas of concern to state and federal governments. First, the workers may not be receiving—and the employer may not be bearing the cost and responsibility of providing—appropriate protections granted by state and federal laws. These protections, which are typically limited to "employees," include not only wage entitlements such as overtime and minimum wage but also benefits such as unemployment and workers' compensation.

> **An employer's ignorance of the law won't be a defense to misclassification.**

Second, misclassification has tax implications because employers aren't required to pay or withhold taxes for independent contractors. A 2009 study conducted by the U.S. Treasury inspector general for tax administration revealed that misclassification costs $15 billion each year in unpaid FICA and unemployment insurance taxes alone. That doesn't include the additional $54 billion in losses created by underreporting of federal employment taxes, nor does it account for similar lost state tax revenues.

Because of the tremendous financial losses that occur because of misclassification—and the unfair advantage noncompliant employers have over their rule-abiding counterparts—the IRS, the DOL, and state governments have become particularly active, even working collaboratively in recent years to combat employee misclassification. To supplement these efforts, Administrator Weil opted to issue additional guidance to assist employers and further curtail misclassification.

FLSA's 'economic realities' test

The interpretive guidance, which was released on July 15, 2015, doesn't change the current standards for employee classification. The DOL will continue to use the well-established six-part "economic realities" test for determining employee versus independent contractor status under the FLSA. The test considers the following factors in the employment relationship:

(1) Whether the work is an integral part of the employer's business;

(2) Whether the worker's managerial skill affects her opportunity for profit or loss;

(3) How the worker's relative investment compares to the employer's investment;

(4) Whether the work performed requires special skill and initiative;

(5) Whether the relationship between the worker and the employer is permanent or indefinite; and

(6) The nature and degree of the employer's control.

Classification in light of interpretation

The Administrator's Interpretation provides valuable insight on how the DOL approaches the elements of the economic realities test when determining whether a worker is an employee or an independent contractor.

First, the DOL begins with the presumption that every worker is an employee. The burden of proof to establish that a worker is actually an independent contractor then lies with the employer. With that in mind, you should also operate under the presumption that every worker is an employee unless and until sufficient evidence can be shown to justify that a worker is an independent contractor.

You should also note that, as is the case with exempt and nonexempt status under the FLSA, labels and job titles aren't persuasive. Simply referring to an employee as an independent contractor, partner, owner, or member won't factor into the test of economic *realities*—that is, how the actual day-to-day work and responsibilities are carried out.

Finally, the interpretive guidance clarifies that no single factor of the economic realities test is dispositive. In particular, employers tend to rely too strongly on the last factor—the amount of control exerted over the employee—without considering all relevant factors and the other elements of the test.

Instead, while considering each of the six individual factors, you should also consider the broader overall

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purpose of the six-factor test, which is to determine whether the worker is economically dependent on *you* or on her own *independent business.* When this test is appropriately applied, most workers are dependent on the *employer* and, as a result, are employees under the FLSA. Specifically, Weil notes, "The goal is not simply to tally which factors are met, but to determine whether the worker is economically dependent on the employer (and thus its employee) or is really in business for him or herself (and thus its independent contractor)." The factors are simply a guide to make this ultimate determination.

Bottom line

Through this guidance, the DOL is making an important effort to ensure that employers are well-informed of their obligations. Thus, as is typically the case, an employer's ignorance of the law won't be a defense to misclassification, regardless of good faith and well-meaning intent. The Administrator's Interpretation provides specific examples and relevant case law for each part of the six-factor test. You are encouraged to review these factors and, as necessary, reconsider, reclassify, or amend existing relationships with independent contractors.

The full text of the Administrator's Interpretation 2015-1 is available at www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf. ✤

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