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LABOR AND EMPLOYMENT NOTES
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EMPLOYERS URGED TO MAINTAIN RECORDS OF DELETED DATA

Of course employers should keep records of all documents and correspondence pertaining to employees that may be involved in future litigation against them, but did you know that "paper trail" extends to all e-mail correspondence related to the employee, included deleted e-mails? This is the position that a federal district court in New York has recently taken, and its decision serves as a warning to all employers that they have the ultimate burden of maintaining records of all documents and correspondence that relate to their employees when there is a reasonable expectation of litigation – even deleted e-mails and other forms of electronic data.

In *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003), the plaintiff, a female, sued her employer for gender discrimination and illegal retaliation because she was fired two weeks after bringing an E.E.O.C. discrimination charge against her employer. During discovery, the plaintiff asked her employer to produce all documents concerning any communication by her employer that concerned her, including "electronic or computerized data compilations." Essentially, the plaintiff was asking her employer to go through volumes of deleted e-mails that were stored on backup tapes and optical disks, and find only the ones that related to the plaintiff.

The employer objected. Although the employer admitted it had implemented extensive e-mail backup and preservation protocols, it argued that the cost of producing the deleted e-mails, an estimated $175,000, outweighed the plaintiff's need to discover the deleted e-mails. The Court disagreed and ordered the employer to produce all e-mails and responsive e-mails that concerned the plaintiff, even those that had been deleted from the employer's computer network and were contained on backup tapes and optical disks. The Court also ordered the employer to bear the cost of producing these deleted e-mails, but reserved the right to conduct an analysis to see if the plaintiff should pay for some of the costs after the employer produced a record of its expenses associated with producing the deleted e-mails.

The *Zubulake* decision should be noted by employers for several reasons. First, it is the employer's responsibility to maintain backup copies of all e-mail correspondence that occurs in its offices. This responsibility may be costly as the employer must invest in technologically advanced methods of maintaining records of deleted e-mails and other electronic data. Second, the employer should also be warned that if it does not have records of its deleted e-mails, the results could be very damaging in litigation with an employee seeking to discover such information. Under the doctrine of spoliation, most courts assume that evidence deliberately destroyed by a party must have been unfavorable to the employer's case, and will instruct juries accordingly. Thus, if an employer has not maintained its deleted e-mails and cannot produce them, the jury will be instructed that it must assume the deleted e-mails would have been detrimental to the employer's case.

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DO YOU HAVE THIS POLICY?

The U.S. Department of Labor issued new regulations, effective August 23, 2004, in regard to certain individuals who may be exempt from the minimum wage and overtime requirements of the federal Fair Labor Standards Act, including those who meet the requirements for an employee employed in a bona fide executive, administrative or professional capacity. One paragraph of the regulations refers to a policy and complaint mechanism which may be of benefit to employers. This paragraph refers, in part, to a "clearly communicated policy that prohibits the improper pay deductions specified in" another portion of the regulations. This clearly communicated policy is supposed to include a "complaint mechanism." Do you have this policy?

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WORK AT RESPECT, L.L.C.

Michael C. Garrard is also a presenter with Work at Respect™, L.L.C. Work at Respect, L.L.C. makes on-site presentations about the value of respect in the workplace and work relationships. These presentations, which are not legal advice or legal services, help employers avoid claims of harassment and discrimination. Work at Respect, L.L.C. has made presentations at the request of entities including:

- the Equal Employment Opportunity Commission (Bill Snapp – 404.562.6974);
- the NAACP (Georgia Noone, Regional Director of the NAACP – 713.927.8344); and
- the U.S. Navy (Carol Matteo, Training Director, Human Resource Service Center South East – 228.871.2935).

Please contact Mike at 225.389.3750 to discuss a presentation for your supervisors or employees.

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