IT'S THE LAW

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SERVING THE CONSTRUCTION INDUSTRY IN EMPLOYMENT AND LABOR MATTERS AND CONSTRUCTION CONTRACT CLAIMS

FAX SOLICITATIONS MAY VIOLATE THE LAW

A stream of class-action lawsuits have been filed against businesses alleging that they unlawfully solicited business through the use of fax machines.

Many businesses use facsimile advertisements to solicit business from current or prospective clients. Such businesses should be aware that certain business faxes are regulated by the Federal Trade Commission ("FTC"). In 1991, Congress passed the Telephone Consumer Protection Act ("TCPA") primarily in an effort to curtail telephone marketers' invasion into the American consumer's safety and privacy. This law is perhaps most associated with the "Do not call list" and regulations targeted at unsolicited phone calls from telephone marketers. However, among other things, the TCPA restricts the sending of unsolicited advertisements by facsimile (or any other device).

Unsolicited advertisements are defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without the person's prior express invitation or permission." 47 C.F.R. Sec. 64.1200(f)(5). Under the TCPA, businesses may not send unsolicited faxed advertisements unless the communication falls within one of the TCPA exceptions. One notable exception is that businesses may send unsolicited faxed advertisements to persons and entities with which it has an established business relationship. It is important to note, however, that the established business relationship exception was recently reevaluated by the FTC in its July 3, 2003 Order and Report which declared that the TCPA "requires a person or entity to obtain the prior express invitation or permission of the recipient before transmitting an unsolicited fax advertisement." (July 3, 2003 Report and Order; FTC 03-153). Pursuant to the July 3, 2003 Report and Order, the express invitation or permission must be in writing, the recipient must indicate their acceptance by their signature, the recipient must clearly indicate that they wish to receive faxed advertisements from the business and the recipient must indicate the facsimile number to which the advertisements may be sent.

On October 3, 2003, the FTC issued an Order (FTC 03-230) which stayed the limitations placed on the established business relationship exception to faxed advertisements until January 1, 2005, or pending a decision by the FTC reconsidering the express invitation or permission limitations. However, absent any Order to the contrary, as of January 1, 2005, businesses will only be able

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This Newsletter is not intended as legal advice since each situation depends specifically on the facts presented. Persons reading this Newsletter should seek competent legal advice with regard to the subjects contained herein before making any employment or other decisions.

to send advertisements by fax to individuals and companies who have provided their express invitation or permission. Therefore, businesses should take this time to obtain written permission from their customers.

Business owners should apprise themselves of the developments in this area if they utilize faxed advertisements, especially in light of the evolving law in this area. Violations of the TCPA can be reported to the FTC which may fine a violating party. Also, States or individuals may initiate lawsuits against the persons or businesses that violate the TCPA.

ILLINOIS ENACTS EQUAL PAY ACT

The title "stay at home mom" is no longer commonplace in middle class suburbia. With costs of living, health, and education on the rise, it is becoming more and more difficult for families to survive on one income, and women are entering the work force in record numbers. However, despite carrying impressive academic accolades and being equipped with skills equal to their male counterparts, women still earn less than men. An April 2003 report compiled by the Illinois Department of Labor based upon the most recent census data indicates that Illinois women are earning $.71 for every $1.00 earned by a man. This disparity exists in every region of the state and in every ethnic category. Illinois' pay gap is worse than the national average of $.73 paid to women for every $1.00 paid to men. In an effort to remedy this disparity, the Illinois Legislature enacted the Equal Pay Act, which goes into effect January 1, 2004.

Illinois' Equal Pay Act prohibits employers from paying a man more for performing the same or similar work as a woman, unless the wage difference is based on seniority, merit, quantity or quality of production, or another valid factor other than gender. If an employer is found guilty of pay discrimination, it will be required to make up the wage difference to the employee, pay legal costs, and may be subject to civil fines up to $2,500 per violation. The new Illinois' Equal Pay Act expands the scope of the federal Equal Pay Act of 1963 to cover all public and private employers with four or more gainfully employed employees. There is, however, an exception for construction employers who must comply with the Prevailing Wage Act. For example, if the prevailing rate is $20.00 in County W, and $23.00 in County X, females working in County W are not entitled to $23.00 that their male counterparts are making in County X, despite the fact that the jobs require equal skill, effort, responsibility and are performed under similar working conditions.

In addition, the new law affords greater protection to employees who share wage information. For example, an employer cannot discharge or discriminate against an employee who inquires about, discloses, or compares his or her wage to that of another employee. Although the sharing of wage information between employees is clearly protected conduct, it is unclear whether employers are required to provide such information upon request. It would be prudent for all employers to review their policies regarding disclosure of wage information and develop a written policy which addresses such inquiries.

The Act also imposes record keeping and posting requirements upon the employer. The Act requires employers to keep records documenting the name, address, occupation, and wages paid to each employee. Additionally, it would be beneficial to also include a brief description of the employee's job duties, responsibilities, and any other information which would justify paying an employee more or less than his or her gender counterpart. The Act mandates that such records must be kept not less than three years after the employee's departure. Lastly, the new law requires employers to post a notice in their workplace summarizing workers' rights under the Act. A copy of the required notice can be found on the Illinois Department of Labors' website at www.agency/idol/forms/pdfs/epavessanotice.pdc or will be provided to you by Berglund & Niew, P.C. upon request.

The Illinois Department of Labor will only review complaints concerning violations occurring on or after January 1, 2004. All Illinois employers of four (4) or more employees must be in compliance with the Equal Pay Act by January 1, 2004. In the meantime, employers have the opportunity to review the compensation paid to employees with apparently similar jobs and should determine if they are vulnerable to an equal pay claim.

MORE LEAVE OBLIGATIONS PLACED UPON EMPLOYERS

Victims of domestic violence, dating violence, sexual assault, and stalking face the threat of job loss and loss of health insurance as a result of such illegal acts perpetrated against them. According to a 1998 report of the U.S. General Accounting Office, between one-fourth and one-half of domestic violence victims surveyed in

three studies reported that victims lost jobs due, at least in part, to domestic violence. In an effort to reduce these losses, the Illinois Legislature enacted the Victims' Economic Security and Safety Act ("VESSA"). VESSA went into effect on August 25, 2003, and its provisions must be followed by employers who employ at least fifty employees.

VESSA mandates that employers permit an employee who is a victim of domestic or sexual violence, or has a family or household member who is a victim, up to twelve weeks per year of unpaid leave from work to address domestic or sexual violence issues. The employee shall provide the employer with at least forty-eight hours advance notice of the employee's intention to take the leave. Once the employer receives notice, the employer may require the employee to provide certification that the employer or employee's family or household member was a victim of domestic or sexual violence. The twelve week leave may be taken intermittently or on a reduced work schedule, and cannot be added to the unpaid leave time permitted by the federal Family and Medical Leave Act of 1993.

The employee may take the leave to seek medical attention for, or recover from: physical or psychological injuries caused by domestic violence; obtain services from a victim services organization; obtain psychological or other counseling; participate in safety planning; temporarily or permanently relocate; take other actions to increase the safety of the employee or the employee's family or household member, from future domestic or sexual violence or ensure economic security; or seek legal assistance or remedies to ensure the health and safety of the employee or the employee's family or household member. Although the employer is not required to provide paid leave under VESSA, the employer may not suspend group health plan benefits during the leave period. Upon the employee's return from such leave, he or she is entitled to the same position of employment held by the employee when the leave commenced, or be given an equivalent position, with equivalent pay and benefits.

Additionally, VESSA prohibits employers and public agencies from refusing to hire an individual or discharging an employee based on his or her status as a victim of domestic or sexual violence. This provision, along with the provisions governing the leave policy must be posted on the premises of the employer where notices to employees are customarily posted. A copy of the required notice can be found on the Illinois Department of Labors' website at www.agency/idol/forms/pdfs/epavessanotice.pdc or will be provided to you by Berglund & Niew upon request.

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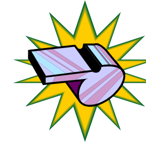

Illinois' Whistle Blower Act is Effective January 1, 2004

Governor Blagojevich signed the Illinois Whistle Blower Act which becomes effective January 1, 2004. This Act prohibits employers from making, adopting or enforcing any rule, regulation or policy which would prevent an employee from disclosing information to a governmental or law enforcement agency if the employee has reasonable cause to believe that the information so disclosed is a violation of a Federal or State law, rule or regulation. This law covers all employers having at least one employee. Governmental entities are excluded. Employees who are not only employed full-time but also part-time and contractual employees are also given a private right of action under this Act.

This Act also prohibits employers from retaliating against any employee for disclosing information to a governmental or law enforcement agency. In the event an employee successfully brings suit under this Act, the Act provides for reinstatement, back pay, interest, and compensation for any damages incurred as a result of the violation including litigation costs, expert witness fees and reasonable attorney fees.

Unlike many other employment laws which provide only monetary and/or injunctive relief, this new law provides for potential criminal penalties. Not only are employers subject to lawsuits by employees but this new law also provides that violations are also a Class A misdemeanor. As a result, employers are potentially at great risk if they retaliate against an employee who reasonably believes that he or she is disclosing a violation even if the employee is wrong.