

# LABOR PERSPECTIVES

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## TELECOMMUTING: IS IT RIGHT FOR YOUR EMPLOYEES?

Laptops. High Speed Internet. Wireless networks. Smartphones. E-mail. All of these technological advancements make it possible for employees to venture outside of the conventional office space and work from the comfort of their own homes. As our society becomes more mobile, more employers are offering employees the alternative of working from home, or other locations outside of the office. "Telecommuting" or "working remotely" offers employees more flexibility and control over their working time and conditions. For the employer, telecommuting in many instances offers a way to improve productivity, boost employee morale and can even serve as a recruiting tool to attract potential candidates.

Nevertheless, employers considering telecommuting as an option for their workforce should be aware of the legal pitfalls of permitting employees to work from home. The following are some of the areas that employers should carefully evaluate before permitting employees to work regularly outside of the office environment:

### Monitoring Hours Worked.

Employers should be mindful of the importance of monitoring hours worked for non-exempt employees participating

in a telecommuting arrangement. Federal and local legislation regarding the payment of weekly and daily overtime, and the observation of the meal period and day of rest apply regardless of where the covered non-exempt employee works. Thus, employers should ensure that proper procedures are in place to control accurate reporting of hours. Also, if a non-exempt employee's work schedule will vary from day to day because of a telecommuting arrangement, employers should obtain flexible work agreements to avoid incurring liability for daily overtime.

Another issue to consider with a telecommuting employee is compensation for travel time to the office for non-exempt employees. Generally, travel time from home to the office is not compensable. However, if an employee starts the day by working remotely from home and subsequently has to travel to the office or another location for work purposes, for example, the travel time from home to the office could be compensable in certain situations.

### Workers' Compensation.

Puerto Rico's Workers' Compensation Statute was amended by Act 284 of December 22, 2006 to specifically include employees who work from home; these

had been previously excluded from the Act's coverage. Thus, employers should take employees who work at home into consideration for purposes of the calculation of the yearly premium paid to the Corporation of the State Insurance Fund, the local administrative agency which oversees Workers' Compensation matters.

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### Confidentiality and Security.

Employees who work from home will necessarily have to take information and data outside of the secure and controlled environment of the office. In addition, many companies offer remote access to the company's computer systems which can make sensitive company information vulnerable. Thus, security and confidentiality are additional concerns that should be addressed with telecommuters. Employers should consider having telecommuting employees subscribe confidentiality agreements that address the confidentiality and security of the information and company records taken outside of the office.

### Eligibility for telecommuting.

Not all jobs lend themselves to being conducted outside of an office location. Since a telecommuting arrangement is often viewed as a benefit by employees, employers should make sure that clear guidelines are set forth with regard to eligibility requirements for participating in a telecommuting arrangement. More importantly, employers must ensure the guidelines are applied in a uniform and consistent manner to avoid any future claims of discrimination.

In sum, offering employees the ability to work from home can provide substantial benefits, but these should be carefully balanced with the risks it can entail. In addition to establishing guidelines which clearly set forth eligibility requirements for participating in such an arrangement, employers might consider drafting a telecommuting agreement outlining both the company's and the employees' responsibilities and obligations while working from locations outside the office. Some of the issues that should be addressed in the telecommuting agreement include:

- In the case of non-exempt employees, the employee's expected work schedule, including meal periods, and procedure for reporting hours worked to the supervisor (for example, daily reports to be sent to supervisor by e-mail). Also included should be instructions regarding overtime work and circumstances under which overtime must be approved by a supervisor.
- Disclaimers that the telecommuting arrangement is voluntary and can be revoked or modified by the employer.
- List of the equipment to be provided to the employee by the employer, assurances that the employee will take reasonable efforts to maintain equipment and data in a safe and secure place and the obligation to return the equipment to the employer at its request or if the employee stops working for the employer.
- Statements as to when travel time is compensable.
- Commitment from the employee to comply with all company security and confidentiality policies. *M&V*

## PRACTICE GROUP NEWS

by: *María Antongiorgi*

**The Labor and Employment Law Practice Group** hosted its first Round Table Seminar of the year on January 25, 2008. The Seminar was held at McConnell Valdés LLC facilities with **Anita Montaner**, **Elaine Maldonado**, and **Jessica Figueroa** as speakers. The topics discussed were the new regulations issued by the Department of Labor of Puerto Rico regarding the restrictions to the use of social security numbers, as well as Confidentiality Issues arising from medical information. The seminar was attended by over 60 of our clients. Round Table Seminars are provided free of cost to clients and friends of the firm several times during the year.

**Francisco (Frankie) Chévere**, Vice-Chairman of the Labor and Employment Practice Group, and **Jorge Antongiorgi** will be among the speakers at a Labor Seminar sponsored by the Society for Human Resources Management (SHRM) on February 26, 2008. During their presentation, they will discuss recent legislation and tendencies in employment law. The Honorable Federico Hernández Denton, Chief Justice of the Puerto Rico Supreme Court, will also be among the speakers at the seminar.

**Elaine Maldonado** will be a speaker at a seminar hosted by Ikon Benefits Group for its clients on February 29, 2007. **Elaine's** topic "Employee Benefits Compliance" will include, among other things, a discussion on the compliance requirements under COBRA and HIPAA.

**Radamés A. (Rudy) Torruella** will be a speaker at a seminar sponsored by the International Bar Association in Mexico City, Mexico from February 28 to March 1, 2008. **Rudy** will be among a group of panelists discussing "How to Deal with Expatriates in Latin America."

**Agustín Fortuño Fas** was a speaker at the Annual Labor Conference of the Chamber of Commerce of Puerto Rico on October 24, 2007. Agustín's topic covered the legal aspects involved in employee retention.

**McConnell Valdés LLC** was the recipient of the Colegio de Abogados de Puerto Rico Special President's Award for the pro bono work performed in the cases of Pueblo v. Minguela and Departamento de la Familia v. Minguela. The ceremony was held at the firm's facilities on November 14, 2007 and Celina Romany, Esq., President of the Colegio de Abogados de Puerto Rico, was present during the ceremony. The ProBono Program was established to provide legal services to persons in need and to not-for-profit organizations serving persons of limited means. The McConnell Valdés Pro Bono Program is the first formal program of its kind in Puerto Rico. Its main objective is to support and encourage pro bono legal services among the firm's attorneys. Through this program, the firm has established an alliance with United Way of Puerto Rico and the Puerto Rico Community Foundation to provide legal services to their members-non-profit organizations in the areas of corporate, tax exemption and labor laws. *M&V*



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# WHAT ARE YOU DOING TO PROTECT YOUR EMPLOYEES' SOCIAL SECURITY NUMBERS?

Identity theft, or pretending to be someone else for an illegal purpose, has been around for many years. Stealing employees' Social Security numbers is only one variation to the many ways this crime takes place. In Puerto Rico, the increasing amount of identity theft cases has caused a big concern among private and governmental entities; and they have been searching for ways to prevent and eliminate this terrible problem.

As part of this effort, Puerto Rico's legislature enacted Act No. 207 of September 27, 2006 ("Act 207"). Act 207 prohibits employers from displaying their employees' Social Security numbers on identification cards and/or in any other visible place or document of general circulation. Following the enactment of Act 207, the Secretary of Puerto Rico's Department of Labor issued Regulation 7413 ("Regulation 7413") on October 1, 2007; it became effective on November 4, 2007. This regulation contains all the requirements and steps that employers must comply with when requesting and/or disclosing their employees' Social Security numbers.

The steps that employers will have to take to comply with Act 207 and its Regulation include:

- eliminating, if any, Social Security numbers from employees' identification cards, personnel directories or lists of general circulation;
- not displaying employees' Social Security numbers in public places or documents;
- not disclosing employees' Social Security numbers to other entities, unless mandated by law;
- guaranteeing confidentiality in the

transmission of employees' Social Security numbers through digital or electronic means;

- destroying all papers or electronic documents that contain Social Security numbers which do not comply with Act 207's and Regulation 7413's purposes.

According to Regulation 7413, employees' Social Security numbers shall be requested by employers only if this request is made mandatory by a governmental entity. Additionally, employers have the obligation of editing, by making the number illegible, any document that is publicly disclosed and contains the Social Security number of an employee.

*Act 207 prohibits employers from displaying their employees' Social Security numbers on identification cards and/or in any other visible place or document of general circulation*

Any inquiry regarding an employee's Social Security number shall state whether said disclosure is voluntary or mandatory. Employees may, voluntarily and in writing, waive their rights under Act 207. However, this waiver cannot be required by the employer as a condition of employment.

On or before April 5, 2008, employers must implement Regulation 7413's provisions and certify their compliance to the Puerto Rico Labor Standards Bureau ("the Bureau"). This is done by completing the "Certification of Application of Law No. 207 of September 27, 2006," which is available at the Bureau. If employers cannot implement Regulation 7413's provisions on or before April 5, 2008, the statute provides for the filing with the Bureau of a working plan proposal pursuant to which the employer agrees to comply with Regulation 7413. The implementation of the working plan must be completed within one year after the effective date of the Regulation on or before November 6, 2008. Once the one year term elapses, employers must file the corresponding certification of compliance with the Bureau.

An employer's violation of Act 207 or its implementing Regulation 7413, including a failure to protect the confidentiality of employees' Social Security numbers, entails a penalty of not less than \$500 nor more than \$5,000 per violation. Employees are entitled to serve as witnesses or provide information to the Department of Labor regarding violations by employers of Act 207 and/or Regulation 7413. These employees will be entitled to the "whistle blower" protection against retaliation provided by Act No. 115 of December 20, 1991. **M&V**



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# FINAL RULE APPROVED REGARDING THE ANNUAL FILING OF FORM 5500 BY PENSION & WELFARE BENEFITS PLANS

On November 16, 2007, The U.S. Department of Labor (“DOL”), the Department of the Treasury, and the Pension Benefit Guarantee Corporation (“PBGC”) jointly issued the Final Rule and Notice on the annual reporting and disclosure requirements under Part I of Subtitle B of ERISA.

Titles I and IV of ERISA, and the regulations thereunder, impose annual

*Because employee welfare and pension benefits plans frequently name the plan sponsor, i.e., the employer, as the plan administrator, these annual reporting and filing obligations are especially relevant to employers*

reporting and filing obligations on pension and welfare benefit plans. One of these obligations is that plan administrators must file Form 5500 Annual Return/Report of Employee Benefit Plan along with the applicable schedules and attachments (“Form 5500”). Because employee welfare and pension benefits plans frequently name the plan sponsor, i.e., the employer, as the plan administrator, these annual reporting and filing obligations are especially relevant to employers.

Form 5500 is the principal source of information and data available to the DOL, the Internal Revenue Service (“IRS”), and the PBGC concerning the operations, funding, and investments of approximately 800,000 pension and welfare benefit plans. These plans cover an estimated 150 million participants and hold an estimated \$4.3 trillion in assets.

Accordingly, Form 5500 constitutes an integral part of the enforcement, research, and policy formulation programs of each of these agencies and is a source of information and data for use by Congress and the private sector in assessing employee benefits, tax and economic trends and policies. It also serves as the primary means by which plan operations can be monitored by participants, beneficiaries, and the general public.

The changes to the various 5500 forms and implementing regulatory amendments have several purposes. These include facilitating the transition to an electronic filing system, reducing and streamlining annual reporting burdens, especially

for small businesses, and updating the annual reporting forms to reflect current issues and agency priorities.

A final rule was published requiring mandatory electronic filing for plan years beginning January 1, 2008. However, the effective date was postponed, once more, to plan and reporting years beginning on or after January 1, 2009. Form 5500 is generally required at the end of the seventh month following the end of the plan year.

The effective date deadline postponements were due to public comments. Also, the deadline was postponed in order to ensure an orderly and cost-effective migration to an electronic system by annual report filers and the DOL. The design of a new ERISA Filing Acceptance System (EFAST), from a largely paper-based system to a wholly-electronic filing and processing system (EFAST2), is still being developed.

A new, two-page “Short Form” (Form 5500-SF) is being adopted. The purpose is to streamline the reporting requirements for small pension and welfare plans that meet certain conditions. The addition of the Short Form 5500 does not eliminate the existing “simplified report” available for small plans; rather, it adds the Short Form as another simplified reporting option for eligible small plans.

For plan years beginning after December 31, 2008, the 5500 Forms will no longer include schedules that are required only for the IRS.<sup>1</sup> This change was also

intended to encourage the adoption of the wholly-electronic filing requirement for Form 5500. Nevertheless, the IRS has advised the DOL that it intends that plan administrators, employers, and other entities subject to additional filing and reporting requirements under the Internal Revenue Code will have to continue satisfying applicable requirements pursuant to IRS revenue procedures, regulations, publications, forms, and instructions.

A new Schedule A contains a special rule pursuant to which compensation paid by an insurer to third parties for certain administrative services will not have to be reported as fees and commissions if certain conditions are met. These services include claims processing or recordkeeping.

Schedule A was also amended to include a proposed "line item." This provides administrators a specific space to report insurance carriers' failure to provide necessary information. Some comments have alleged that this might single-out insurers who were not responsible for providing the required information. With this in mind, the instructions for Schedule A will be revised. Plan Administrators will be reminded that they must take reasonable measures to obtain the required information; also they should contact the insurer concerning the required information.

The final Schedule C requires direct compensation paid by the plan to be reported on a separate line item from sources other than the plan or plan sponsor. This requirement is meant to provide more informative disclosures concerning the types of fees being paid to or received by plan service providers.

Particular service providers may receive indirect compensation of various types from various sources. Thus, the final form revisions expand the codes currently required on Schedule C to better identify

the types of services provided and to require codes for the types of fees received by the service provider. This is in large part due to the fact that, pursuant to the recommendations of the Government Accountability Office ("GAO"), the Employee Benefits Security Administration ("EBSA") concluded that more information should be disclosed in Form 5500 regarding plan fees and expenses.

Various other technical and conforming changes are being adopted as part of the final changes to the 5500 forms. Of particular importance are:

- the revision of the instructions for Form 5500 and the development of instructions for the Short Form 5500

*Form 5500 is the principal source of information and data available to the U.S. Department of Labor and the Internal Revenue Service, among others, concerning the operations, funding, and investments of approximately 800,000 pension and welfare benefit plans*

to reflect the new structure of the returns/reports and electronic filing requirements;

- the addition of a compliance question on whether the plan failed to pay benefits when due under the plan;
- the expansion of the use of codes to report plan features information on pension and welfare benefit plans;
- the elimination of the optional entry of the form preparer's name and employer identification number (EIN);
- the requirement that small plans report administrative expenses separately from other expenses on Schedule I;
- the addition of a question on whether any minimum funding amount reported for a pension plan will be met by the funding deadline; and
- the adoption of a standard format for use in connection with an independent qualified public accountant ("IQPA") rendering an opinion on the supplemental schedule information on Line 4a of Schedule H and I relating to delinquent participant contributions.

In sum, Form 5500 has undergone considerable changes. Plan administrators should keep abreast of changes in federal regulations to ensure they are in compliance with the law.

Should you have any questions regarding these matters, please contact any of the members of the Labor & Employment Law Practice Group's ERISA and Welfare Benefits Practice Area. **M&V**

1. Accordingly, Schedule E (the Employee Stock Ownership Plan, "ESOP" Annual Information) and Schedule SSA (the Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits) will no longer be required to be filed with Form 5500. In light of the removal of Schedule E, selected questions from Schedule E will be incorporated into Schedule R (Retirement Plan Information); this was done in order to continue to collect certain information regarding ESOP's. Schedule R was also modified to include additional questions required by Section 503 of the Pension Protection Act and to collect information the PBGC needs to enable it to properly monitor the plans it insures.



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# REIMBURSEMENT AGREEMENTS FOR EMPLOYEE TRAINING ARE VALID IF CERTAIN REQUIREMENTS ARE MET

In the recent opinion of [Oriental Financial v. Nieves](#), 2007 T.S.P.R. 193, the Puerto Rico Supreme Court recognized the validity of education costs reimbursement agreements in the employment setting. However, certain criteria must be met.

A reimbursement agreement is a contract whereby the employee agrees to reimburse the employer for training expenses incurred by the employer if the employee quits before the company recovers its investment. Usually, these agreements require the employee to work for the company for a period of at least one year or the employee may be otherwise charged for the cost of their training.

This is a major development in Puerto Rico's employment law jurisprudence for two reasons: it is the first time that our Supreme Court has addressed the issue of whether Puerto Rico law allows for this type of agreement; and, secondly, because in doing so, it sets forth the elements that employers must bear in mind when drafting a reimbursement agreement for educational costs.

When considering the validity of these types of agreements, courts will evaluate the following elements:

- if the training is of a specialized nature;
- if the employer's economic investment is substantial;
- if the amount to be repaid is related to the real costs incurred by the employer;

- if the amount of time agreed for the repayment is reasonable (there must be a correlation between the term provided and the costs incurred by the employer);
- if the agreement was in writing; and
- if the employee's consent was given freely and voluntarily.

The repayment agreement considered by the Supreme Court in the [Oriental Financial v. Nieves](#) case was found unenforceable. The Supreme Court understood that the record did not contain sufficient evidence to demonstrate the correlation between the amounts required to be repaid and the costs incurred in employee training.

The [Oriental Financial v. Nieves](#) case did not answer all the relevant questions. For example, the Court does not specify the amount of time that will be considered "reasonable" for repayment; nor does it specify the amount of money that will be considered "substantial." However, the Court does provide a new set of guidelines that employers and counselors alike should consider. These guidelines will be useful both when drafting this type of agreement, as well as in determining if it is prudent to move for enforcement of an agreement.

Employers should be aware of these elements in evaluating the validity of their existing repayment agreements for educational costs. Should you need any assistance drafting or evaluating

the validity of your existing agreements, please contact any of the attorneys of the McConnell Valdés LLC Labor and Employment Law Practice Group. [M&V](#)

*A reimbursement agreement is a contract whereby the employee agrees to reimburse the employer for training expenses incurred by the employer if the employee quits before the company recovers its investment*



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# THE WAVE OF LABOR AND EMPLOYMENT LEGISLATIVE ACTIVITY CONTINUES

In the Summer 2006 edition of *Labor Perspectives*, we discussed the intense legislative activity on labor and employment issues which had been taking place as a result of the economic situation affecting the Island. Well, the wave of legislative activity continues both at a Federal and State level.

On November 7, 2007, the United States' House of Representatives passed the Employment Non-Discrimination Act of 2007 (H.R. 3685) which would prohibit employment discrimination on the basis of sexual orientation. The term sexual orientation is defined by the Act as homosexuality, heterosexuality, or bisexuality. If this Bill is signed into law, it will be an unlawful employment practice for an employer:

- (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation; or
- (2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's actual or perceived sexual orientation.

The procedures and remedies applicable to a claim alleged by an individual for a violation of said Act are those applicable for a violation

of Title VII of the Civil Rights Act of 1964, such as compensatory and punitive damages. The Bill is pending consideration by the Senate.

If this Bill is signed into law, employers will have to amend their policies to expressly prohibit discrimination on the basis of sexual orientation.

Furthermore, on January 28, 2008, President Bush signed the National Defense Authorization Act of 2008 (H.R. 4986) which includes an amendment to the Family Medical Leave Act ("FMLA") to include provisions providing for:

- (a) up to 26 weeks of leave for family members caring for military veterans injured while on active duty in the U.S. Armed Forces, and
- (b) 12 weeks of leave to family members of service members called up to active duty under certain circumstances.

Both leaves may be taken on an intermittent or reduced schedule basis. The amendment also authorizes the substitution of paid leave for these new unpaid, FMLA-protected service leaves.

On the home front, on December 26, 2007, Puerto Rico Act No. 213, (the "Act"), became effective, amending Act No. 17 of April 17, 1931, with respect to authorized methods for payment of wages. Pursuant to the amendment, employees will have the option, on a voluntary basis, to choose from the methods of payment made available by the employer, whether in cash, check or by electronic means. The amended statute allows for the following three types of electronic payments: 1) direct deposit, 2) electronic

transfer, or 3) payment to a payroll card. Employers are required to provide their employees, at the moment of selecting their wage payment method, with information regarding electronic fraud and the degree of responsibility of the employee, the employer and the bank in such cases. They are also required to deliver to each employee a voucher as evidence of the salary deposited or transferred. At the employee's option, the voucher may be delivered through electronic means.

Finally, the Commonwealth of Puerto Rico's House of Representatives passed House Bill 3735 of August 2, 2007 to amend Act 44 of July 2, 1985, as amended, in order to prohibit employment discrimination on the basis of genetic information. The term genetic information is defined as information related to any genetic test or exam performed on an individual or family member and the knowledge of physical or mental health disorders or illnesses obtained by any means. Furthermore, it shall be considered a discriminatory employment practice to require an employee or employment candidate to submit to a genetic test or exam or to provide genetic information pertaining to himself or herself or a family member as a condition of employment.

Considering that this is an election year, we can expect that legislative activity regarding labor and employment issues will continue.

As usual, McConnell Valdes LLC's Labor and Employment Practice Group will continue to keep its clients up-dated on significant legislative developments affecting employer-employee relationships and their possible impact on the clients' businesses. *M&V*

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