NELA THE NEW YORK EMPLOYEE ADVOCATE

National Employment Lawyers Association/New York • Advocates for Employee Rights

VOLUME 15, NO. 1 April 2009 Rachel Geman, Gary Trachten, Co-Editors

Editor's Note:

Are COBRA Premium Payments Made by a Former Employer Taxable Income to the Former Employee?

By: Gary Trachten, *gtrachten@kudmanlaw.com*

I confess. For a long, long time, I did not know but should have known the answer to this question: When an employer agrees in a severance package to pay the premiums for the ex-employee's coverage under COBRA, are premium amounts taxable income to the ex-employee? Since my clients have not wanted to pay me to research the issue, I did not give them tax advice on the question. I instead alerted them to the tax issue; explained that their tax liability (if any) would not legally depend on the employer's issuance of a Form 1099; (as Tom Daschle knows) suggested that they speak to their accountant or other tax advisor about the matter; and bargained with their ex-employer for direct payment rather than reimbursement of the COBRA premiums, just in case it might legally make a difference (and not merely to make less likely the issuance of a Form 1099).

I recently received a severance agreement that provided for the ex-employer's paying the full premium costs of my client's family

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The American Recovery and Reinvestment Act of 2009 and Its Impact on Employment Law

Nicole Grunfeld, *ngrunfeld@bmbblaw.com*

There has been much discussion among employment lawyers about how our practice may be impacted by certain provisions of the American Recovery and Reinvestment Act of 2009, commonly referred to as the "stimulus bill," and signed into law by President Obama on February 17, 2009. Although various aspects have been dissected in the mainstream media and blogosphere, no clear and comprehensive outline of the pertinent information has been collected in one place. I have therefore gathered the following information to create what I hope will be a useful source about the changes.

Changes to COBRA

Prior to enactment of the stimulus bill, COBRA entitled eligible employees to elect 18 months of post-termination coverage, but the employees had to shoulder the full amount of their premiums as well as a 2% administrative fee. Under the new law, eligible employees who sign up for COBRA will have to pay only 35% of their premiums, and the federal government will reimburse employers or health plans via a payroll tax credit for the remaining 65%, for up to nine months.

Who is covered by the 65% subsidy?

Eligible employees and their spouses, partners, and dependents are covered. Eligible employees are those who:

- Have been or will be involuntarily terminated between September 1, 2008, and December 31, 2009. The term "involuntary termination" is not defined in the bill.
- Are not eligible for another group plan, such as Medicare or a spouse's plan.
- Earn less than $145,000 for individuals and $290,000 for families. Technically, such employees (known as "high-income individuals") are eligible, however they will later be required to repay the subsidy as an additional tax for the year in which the subsidy was provided. This "recapture tax" phases in between $125,000 and $145,000 in adjusted gross income for singles and between $250,000 to $290,000 for married couples filing jointly. A plan administrator must allow a high-income individual to permanently waive the subsidy (in the manner to be prescribed by the Secretary of the Treasury) and pay the full COBRA premium.
- Either previously elected COBRA, or elect COBRA coverage during the new special election period (discussed below).

What is the special COBRA election period?

The stimulus bill gives individuals who meet the eligibility criteria described above but who hadn't elected COBRA coverage before February 17, 2009 (when the stimulus bill was enacted), to now receive health insurance through COBRA. More specifically, an employee who would oth-

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The NELA/NY Calendar of Events

Executive Board Meeting
6:15 pm
Wednesday, April 22, 2009
3 Park Avenue – 29th Floor
(All members in good standing are welcome)

NELA Nite
Wednesday, April 29, 2009
6:30 pm
Hosted by the Sex arassment/Sex Discrimination Committee
3 Park Avenue – 29th Floor
(Details to Follow)

NELA/NY Spring Conference
Friday, May 8, 2009
Yale Club of New York City
Register Online - www.nelany.com

NELA Nite
Wednesday, May 20, 2009
6:30 pm
3 Park Avenue – 29th Floor
Topic: FINRA
(Details to Follow)

Executive Board Meeting
6:15 pm
Wednesday, June 10, 2009
3 Park Avenue – 29th Floor
(All members in good standing are welcome)

NELA Nite
6:30 pm
Wednesday, June 17, 2009
3 Park Avenue – 29th Floor
Topic: Psychological Aspects of Employment Cases
(Details to Follow)

NELA National 20th Annual Convention
June 24 – 27, 2009
The Westin Mission Hills Resort & Spa
Rancho Mirage, California
Register Online – www.nela.org

A Word from Your Publisher

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Items for the calendar may be submitted by calling Shelley Leinheardt:
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Discount for Depositions

NELA/NY has entered into agreements with three court reporting services to provide discounted prices for NELA/NY members.

	Standard Page Rate	Expedited Rate	Bust Fee
Bee Court Reporting Agency, Inc. 1486 Kew Avenue Hewlett, NY 11557 (212) 327-3500 or (516) 485-2222	$4.25	$4.75	$95.00
Ellen Grauer Court Reporting 126 East 56th Street New York, NY 10002 (212)750-6434	$4.25	$5.75	$110.00
Veritext Court Reporting 200 Old Country Road Mineola, NY 11501 (212) 267-6868 or (516) 608-2400	$4.55	$6.30	$110.00

NELA/NY will receive $.10 per page from these agencies to cover its expenses in administering this program and other expenses.

We suggest that you and your staff keep a copy of this handy for future reference. This discounted service may be used not only by NELA/NY members but also by attorneys associated with them, and may be used for non-employment cases as well as employment cases.

President's Column

by Darnley D. Stewart, President, NELA/NY, *dstewart@gslawny.com*

Setting Aside Childish Things

Perhaps the most talked about passage of President Obama's inaugural speech was the admonition from Corinthians that "the time has come to set aside childish things." Pundits debated whether the reference was meant as recrimination for the country's recent lack of responsibility. A friend of mine from college, who is a minister, had a different take. She said what Paul was speaking about is "different spiritual gifts within the community and the need to honor everyone's gifts." Whatever. The point is this: this is an easy time to be selfish. In fact, it is a time when we have to be selfish in some respects. Our savings have been ravaged and we have to provide for ourselves and our families. Fortunately, we do have jobs and we are all really, really busy right now. That said, we can be selfish and look outward as well. In our community, giving of your time and knowledge is not a zero-sum game. The more we help each other, the better off all of us are. What I am asking of each member is that you do something this year for NELA/NY. One thing. Posting jury instructions for another member's use on the listserve. Volunteering to write a squib on a case for the Newsletter (please!). Mentoring a new member. Participating in a NELA Nite. Just one thing. In the hope that it helps in generating ideas for our form of community service, I have set forth below our Committees and what they're working on at present:

Amicus (Margaret McIntyre, Justin Swartz, Josh Friedman, Darnley Stewart): The Amicus Committee is in charge of evaluating requests for amicus briefs and affirmatively seeking out cases where we think an amicus brief from NELA/NY would be appropriate and helpful. Unfortunately, for the vast majority of the requests we receive we cannot find brief writers because of the time commitment required. If anyone would be willing to even write a section of an amicus brief, please let any of us know.

Attorneys' Fees (Ossai Miazad (Chair), Mariann Wang (Chair), Stephen Bergstein): This is a recently formed committee focused on you guessed it: attorneys' fees. Its stated mission is to monitor cases and ethics opinions on attorneys' fees, organize them in a centralized database, provide affidavits in connection with fee awards, and squib important decisions for the Newsletter.

Conference Committee (Mark Risk (Chair), Justin Swartz (Chair), Arlene Boop, Hollis Pfitsch, Kevin Mintzer, Randy Perlmutter): The Conference Committee organizes the conferences that are the lifeblood of our organization. These conferences offer invaluable education and materials, as well as provide an opportunity for us all to get together and share our experiences and knowledge.

Diversity Committee (Justin Swartz, Chair): Obviously, we would like to promote greater diversity in our ranks. Simply put, this Committee looks for ways to do that, including meetings with and outreach to other bar associations and public interest groups.

E-Discovery Committee (Patrick DeLince, Michael Gross, Deborah Karpatkin): The E-Discovery Committee grew out of a problem we face as a group and a creative solution proposed by Deborah Karpatkin. We plaintiffs' lawyers are falling behind our adversaries in terms of the technical knowledge and resources necessary to prosecute our cases effectively because we are not sufficiently "up" on e-discovery and/or cannot afford to hire a consultant to help us. This Committee has already come up with a slate of recommended e-discovery vendors and put on a terrific program on e-discovery. It is currently working on other initiatives – such as a possible sharing of consultants among several people so as to make them more affordable.

Fundraising Committee (Bill Frumkin (Chair), Josh Friedman, Sal Gangemi, Doris Traub): As with every other organization, we are struggling to make a profit every year and to continue to fund programs and pay for the administration of NELA/NY and NELARS. The annual fundraising event is our biggest moneymaker of the year and this committee is in charge of planning and running that fundraiser. We would love to hear from you what has worked and what has not worked for you in the past. If you have not attended in the past, why not and what might make you change your mind?

Judiciary Committee (Lee Bantle (Chair), Josh Friedman, Patrick DeLince, Linda Dardis): In the past, this Committee has organized events where our members can socialize with judges and communicated with elected leaders about individuals put up for promotion to the judiciary. As an example, the Committee recently drafted a letter to send to White House counsel regarding the need to promote progressive judges and not to bend to pressure from the right to nominate more conservative jurists.

Legislative Committee (Ron Dunn (Chair), Wayne Outten, Craig Gurian, Michael Grenert, Joseph Ranni): Earlier in the year, I distributed the very important and very impressive work of this Committee – the proposed legislation that would amend the NYS Human Rights Law and the whistleblower provisions contained in Labor Law 740 and NYS Civil Service Law Section 75-b. We are moving forward with the proposals. Again, if anyone wants to get involved in this process, please let us know. Also, if anyone knows a state sen-

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The Proxy Exception to the Faragher/Ellerth Affirmative Defense

By Stephen Bergstein, Bergstein & Ullrich, LLP, Chester, New York, *steve@tbulaw.com*

Employment discrimination attorneys know that a hostile work environment is not always enough to maintain a Title VII claim. Under agency principles, the plaintiff has to impute the sexual harassment to the employer. In 1998, the Supreme Court issued two decisions that remade the landscape in this area,[1] ruling as follows:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[2]

The **Faragher/Ellerth** affirmative defense has doomed many hostile work environment cases where the employer proves that it responded to the sexual harassment complaint with appropriate remedial action. While the cases also hold that this affirmative defense does not apply if the employer took tangible action against the plaintiff because of her sexual harassment complaint,[3] there is another way to avoid the affirmative defense: the proxy exception, which is increasingly gaining favor in the Federal courts.

In a nutshell, the proxy (or alter-ego) exception to the Faragher/Ellerth affirmative defense holds that, if the plaintiff is harassed by a company official sufficiently well-placed in the organization, his offensive acts are imputed to the company. This theory derives from a reading of Faragher itself.

Before setting forth the affirmative defenses outlined above, Faragher summarized the "definite rules" that courts have devised in determining employer liability. After noting that the Federal courts have held employers liable when management does nothing to stop the harassment,[4] the Court turned to the proxy argument: "Nor was it exceptional that standards for binding the employer were not in issue in Harris [v. Forklift Systems, 510 U.S. 17 (1993)]. In that case of discrimination by hostile environment, the individual charged with creating the abusive atmosphere was the president of the corporate employer . . . who was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy."[5]

See PROXY EXCEPTION, page 10

Electronic Discovery: Impact of Recent Amendments and Traps for the Unwary

By Joshua Friedman, *josh@joshuafriedmanesq.com*

The December, 2006 amendments to the Federal Rules of Civil Procedure concerning e-discovery and the new Federal Rule of Evidence 502, which became effective September 19, 2008, have made it easier to obtain discovery of electronically stored information (ESI), particularly in a format of your choosing, however they also include a few traps for the unwary. FRE 502 provides an elegant solution to a common problem encountered in e-discovery, inadvertent disclosure of privileged communications and work product.

Rule 34(a)

Rule 34(a)(1)(A) now permits the party requesting discovery to "inspect, copy, test, or sample any designated documents *or electronically stored information* . . . translated, if necessary, by the respondent into reasonably usable form." We are now asking for "documents and electronically stored information," in discovery and not relying on the definition of "document" contained in local rules, which often incorporate the FRCP by reference. The Advisory Committee Notes make it clear that the new language, "*or electronically stored information*," is intended to broaden the scope of what is discoverable beyond things which were generally accepted as within the definition of a document.

Under the old rule, a party would probably not have been in violation for failing to produce a "tweet" created using twitter, however tweets are now considered ESI and must therefore be produced. A defendant that serves a request for all ESI concerning a subject is going to be entitled not only to your client's tweets, but responsive postings on MySpace, Facebook and any of the myriad social networking sites.[1] We include a warning in our retainer not to create responsive material using social networking sites and instruct clients to preserve any they may already have created.

Rule 34(a)(1)(A) also provides express authorization to demand the electronic data "translated" into the format you find most usable. Our document requests demand that all documents be produced in "native format, unless otherwise indicated." This means that we are entitled to receive the actual email files and the actual Excel files, all of which contain "metadata." Emails can be produced in a number of file formats, so in our document demands we require that however emails are produced, the header information—which contains the metadata—be preserved.

We indicate that we do not want native format production when we know that defendant's program uses a proprietary file format we cannot open, such as PeopleSoft.[2] In that case, we ask the defendant to produce the PeopleSoft data in a format we can use, such as an Excel file, with Excel columns labeled to correspond with the PeopleSoft file's data fields.

Rule 34(a)(2) now provides authority that a party may be permitted access to an adversary's computers to "measure, survey, photograph, test, or sample." However, the Advisory Committee Notes state that:

> The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances.

Before you obtain direct access you are going to have to show the court the defendant is engaged in some sort of abuse, such as hiding responsive ESI.

Rule 37(e)

37(e) provides that, absent exceptional circumstances, "a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This is the so-called "safe harbor" provision that was much-discussed when the revised Rule 37 was being developed.

Some systems overwrite their *backups* within months or even a month; after that, a restore is impossible. One of the reasons defense lawyers were initially so keen on this safe harbor is that the Advisory Committee wrote that:

> [I]t is unrealistic to expect parties to stop such routine operation of their computer systems as soon as they anticipate litigation. It is also undesirable; the result would be even greater accumulation of duplicative and irrelevant data that must be reviewed, making discovery more expensive and time consuming.

May 27, 2006 Report of the Advisory Committee on the Federal Rules of Civil Procedure, at 71. n11 However the Advisory Committee notes state that "Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation."

What this rule means is that your litigation hold (also called document hold) letter should give the potential defendant all the specific information you can obtain from your client as to the probable location of relevant electronic data, so that the defendant cannot later argue that to comply would have required it bring to a halt the operation of a large business due to restoration obligations.

The document hold letter should also make clear that litigation is coming; the magic words are still "our client is going

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to sue you." In **Byrnie v. Town of Cromwell, Bd. of Educ.** 243 F.3d 93, *107 -111 (2d Cir. 2001) the court defined spoliation as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence *in pending or reasonably foreseeable litigation.*" Id., at 108 quoting **West v. Goodyear Tire & Rubber Co.**, 167 F.3d 776, 779 (2d Cir. 1999); **Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed**, LLC, 2007 U.S. Dist. LEXIS 15277, 29-30 (D. Colo. 2007)(no document hold required in light of new rule and fact that "letter did not threaten litigation . . . . Rather, Cache La Poudre hinted at the possibility of a non-litigious resolution.")

The new rule has not displaced the pre-rule case law on spoliation and **Zubulake v. UBS Warburg LLC**, 229 F.R.D. 422 (S.D.N.Y. 2004)(defendant's failure to preserve electronic evidence after notice from plaintiff's counsel constituted spoliation and warranted an adverse inference instruction) remains influential.

After backups are overwritten, recovery becomes impossible, or at least hit-or-miss and very expensive due to, among other reasons, possible involvement of forensic computer experts. This is why we are now sending out document preservation letters after the first meeting with the potential client, hopefully within the overwriting window. As discussed below, as long as a backup is available, it may be possible to obtain discovery of emails at less expense than paper discovery.

This is the document hold language we are presently using:

> We represent . They intend to bring a lawsuit against [ ] (""). [describe claim and facts]. [Describe documents to preserve]
>
> Federal and local law require the preservation of all relevant evidence, including documents, information and physical evidence. See, e.g., See 42 U.S.C. 2000e-8(c); 29 CFR 1602.14 ("In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of one year from the date of termination. . . . Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under title VII or the ADA, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action."); Title 8 of the Administrative Code of the City of New York, Chapter 1, § 8-114 Investigations and investigative record keeping ("A demand [to preserve evidence] made pursuant to this subdivision shall be effective immediately upon its service on the subject of an investigation and shall remain in effect until the termination of all proceedings relating to any complaint filed pursuant to this chapter or civil action commenced pursuant to chapter four").
>
> Before modifying any documents, including computer files, we strongly urge you to contact your attorney. Modern computer forensics has made it virtually impossible to conceal alterations and destruction of evidence. See, e.g., **Zubulake v. UBS Warburg LLC**, 229 F.R.D. 422 (S.D.N.Y. 2004)($20 million in punitive damages: defendant's destruction of evidence after notice from plaintiff's counsel constituted spoliation and warranted an adverse inference instruction).
>
> If you maintain insurance, including general liability, Directors and Officers, Employment Practices Liability, or other insurance which might cover these claims, your failure promptly to notify your carrier could result in a loss of coverage.

Because of the rule's implicit requirement of specificity do not use a boilerplate document hold letter.

Rules 16 and 26(f)

Rule 26(f) requires parties to confer to develop a proposed discovery plan prior to the scheduling conference. Rule 26(f)(3) requires that parties "address any and all issues related to the disclosure or discovery of electronically stored information, including the form of production, and also.., discuss issues relating to the preservation of [ESI] and other information that may be sought during discovery." Rule 16 now calls for parties to discuss whether they can agree on an approach to production that protects against privilege waiver[3] and requires counsel to discuss issues related to the formatting of electronic evidence. Amendments to Rule 16(b) provide that scheduling orders may include provisions on the disclosure or discovery of ESI.

We are now including an agreement in our report and proposed discovery plan on production of ESI and paper as follows:

> The parties have agreed that ESI will be produced in its native format. That means that a document which was originally created as a Microsoft Word file or an Excel spreadsheet must be produced as a .doc or .xls file (or successor), without redaction of metadata. Emails will be produced in .msg or .pst file format. Emails shall be produced so that the full header is accessible and readable. Native paper documents will be produced as scanned .tif files.
>
> Parties have agreed to produce their IT protocol on storage and overwriting of computer files and emails, if one exists.

If you prefer to receive .pdf scans you can specify pdf.

We are also telling our adversaries what we anticipate by way of searches for ESI during the Rule 16 planning meeting, and trying to get something incorporated into the discovery plan when possible. For example, where we have an allegedly bigoted decision maker we will let them know they will be getting request to search for all emails from/to decision maker

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which use language probative of prejudice. This might be summarized as:

> The plaintiff intends to request a narrowly targeted search for all ESI communications containing search terms probative of prejudice from/to the decision maker. The parties do not anticipate any disputes at this time relating to such a search.

In a case where the defendant has a Faragher/Ellerth defense, we are going to include:

The plaintiff intends to request a narrowly targeted search for all ESI communications containing search terms to/from a small group of managers or supervisors who might have received or responded to complaints regarding the alleged harasser. The parties do not anticipate any disputes at this time relating to such a search.

The rule change also provides authority for asking the defendant to make its expert or IT director available to your expert before the first demand goes out; however, in typical cases, this is unnecessary. The new rules have not changed the basics of discovery. You should still ask your client who would have been most likely to create relevant materials, including emails, to whom they would have been sent, and then ask for "all documents and electronically stored information concerning . . . ."

When you receive the response you will be able to evaluate whether what has been produced is likely complete, or whether a more specifically targeted demand for ESI must be formulated—requiring the defendant to conduct computerized searches—which brings us another issue: who bears the cost of a demand that requires that electronically stored information be restored.

Rule 26(b)(2)(B) now provides that "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." The Advisory Committee wrote that:

> Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is plain that the only change contemplated by the rule is potentially shifting the cost of production in those *unusual cases* where it is *more* expensive to produce electronically stored data than paper. Such cases would not include the routine operation of restoring backed up emails by an IT department whose mission is to do this quickly, inexpensively and reliably for its corporate master. An example of an unusually burdensome request is to go back 10 years to a time when backup systems were used which no current machines can read.

There is no change in the rules regarding the requirement that the defendant bear the cost of determining what is relevant (scope) or privileged. The new rule speaks of "sources" which are expensive to gain access to, however, under Rule 26, the court still has the power to limit the scope of demands that are unduly broad, which seems to be the appropriate remedy rather than cost shifting. While the new rule seems to contemplate cost shifting only when the cost of a restore (source) is too high relative the potential benefits, courts are going to mix in concepts of scope in the cost shifting discussion.

The typical case is going to involve emails which have been backed up onto a storage drive,[4] requiring the restoration of a PST or DBX file, in which Outlook and Outlook Express store emails. Taking backed up ESI and restoring it into its original form (PST/DBX) is the *raison d'être* of IT departments. They do this quickly and at no marginal cost to the defendant. There should no argument over cost shifting.

Searching through a party's own documents or ESI—the process of figuring out which emails are responsive or privileged—remains the burden of the responding party, unless it can show the demand is over broad, in which case the remedy is to trim it.

In **Zubulake I**, decided before the amendment to Rule 26, Judge Scheindlin conflated the cost of restoration, now evaluated under 26(b)(2)(B) with the scope of the request, which had always been considered under 26(b)(2)(C), long before ESI:

> Thus, cost-shifting should be considered only when electronic discovery imposes an "undue burden or expense" on the responding party. The burden or expense of discovery is, in turn, "undue" when it "outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."

Zubulake v. UBS Warburg LLC 217 F.R.D., 309, *318, 2003 WL 21087884, **7 (S.D.N.Y. 2003).

Approach issues of scope and cost by asking this basic question: is it expensive to obtain production of the electronically stored information? If not, 26(b)(2)(B) is out of the picture, and the analysis proceeds solely under the very liberal standard of 26(b)(2)(C).

In **Semsroth v. City of Wichita**, 239 F.R.D. 630, 640-641 (D. Kan. 2006), the court mixed up 26(b)(2)(B) and 26(b)(2)(C), the general provision allowing the court to limit overbroad searches, because it relied on the analysis in **Zubulake I**:

> Had the direct cost and expense of restoring and searching the back-up tape been larger in this case, as may often be the case with use of back-up tapes, the application of the cost-shifting factors outlined in the amendments to Rule 26(b)(2)(C) and Zubulake I would have easily supported a shifting of

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some of the costs to the Plaintiffs.

Coleman (Parent) Holdings, Inc., v. Morgan Stanley & Co., Inc., 2005 Extra LEXIS 94, (which ironically preceded the rule change), got it right:

> As we now know, archive searches are quick and inexpensive. They do not cost "hundred of thousands of dollars" or "take several months."

Federal courts are going to be suspicious of knee-jerk assertions by defense counsel that a routine restore is going to be burdensome. There are plenty of computer experts who are ready, willing, and able to debunk defense counsel's claims regarding the cost of restoring data. In addition, counsel has the option of deposing the head of defendant's IT department, and asking how often the department is called upon to restore data, and how the defendant accounts for the cost.

Federal Rule of Evidence 502: Attorney-Client Privilege and Work Product; Limitations on Waiver

Production of large amounts of ESI creates a risk that a party will inadvertently produce privileged material or work product. Another risk is posed by hitting the send button on your email program. Sooner or later you are going to inadvertently include your adversary.

Prior to the passage of FRE 502 the parties could address inadvertent disclosure under Rule 26(b)(5)(B):

> a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

According to the Advisory Committee Notes, Rule 26(b)(5)(B) was intended to allow parties to contract in advance out of inadvertent privilege waivers caused by voluminous e-discovery responses "through agreements reached under Rule 26(f)(3) and orders including such agreements entered under Rule 16(b)(6) [which] may be considered when a court determines whether a waiver has occurred. *Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).*" [italics added] These agreements are known as claw-back agreements.

Before FRE 502 a clawback agreement only protected the parties to the agreement from claims of waiver by parties to the claw back. What parties could not control is the effect of inadvertent productions in other contexts involving third parties. Third parties, such as the government, were not bound by the claw back agreement, and were free to treat inad-

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ARONS v. JUTKOWITZ

By Joshua Friedman
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The NY Court of Appeals held in **Arons v. Jutkowitz**, 9 N.Y.3d 393, 850 N.Y.S.2d 345 (N.Y. 2007), that where plaintiffs suing for medical malpractice puts their medical conditions at issue, they waive the physician-patient privilege, allowing defense counsel to speak to their doctors ex parte. Some NELA members have already been asked by defense counsel to provide HIPAA authorizations to speak to treating therapists. Anyone facing an Arons issue is encouraged to speak with a member of the NELA Amicus Committee. "http://www.nelany.com"

Arons involved three separate medical malpractice cases which had been appealed to different Appellate Divisions, which had reached somewhat conflicting results. In each case the plaintiff had refused a demand to execute a HIPAA compliant authorization to permit defense counsel to speak to the plaintiffsí treating physicians. The Court held that:

Plaintiffs waived the physician-patient privilege as to this information when they brought suit, so there was no basis for their refusal to furnish the requested HIPAA-compliant authorizations. . . . Of course, it bears repeating that the treating physicians remain entirely free to decide whether or not to cooperate with defense counsel. HIPAA-compliant authorizations and HIPAA court orders cannot force a health care professional to communicate with anyone; they merely signal compliance with HIPAA and the Privacy Rule as is required before any use or disclosure of protected health information may take place.

850 N.Y.S.2d 345, 356 ñ 357.

The Court of Appeals grounded its decision principally on its holdings in **Niesig v. Team I**, 76 N.Y.2d 363, 559 N.Y.S.2d 493 (1990) and **Muriel Siebert & Co., Inc. v. Intuit Inc.**, 8 N.Y.3d 506, 836 N.Y.S.2d 527 (2007), which had defined the scope of the prohibition on counsel speaking to employees of a represented defendant, under DR 7-104(a)(1). The Court observed that informal non-party ìdiscoveryî that it had sanctioned in Niesig had yielded benefits in reducing the expense of trial preparation, and would do so in these cases as well. It cited **Muriel Siebert & Co., Inc.** as proof that the rules it had laid down designed to protect the attorney-client privilege in **Niesig**, which required counsel to avoid eliciting any privileged communications in interviewing employees, were working. In **Muriel Siebert & Co., Inc.** counsel managed to conduct an interview of a former senior officer of defendant without eliciting any privileged communications.

The Court further reasoned that the scope of the waiver of the physician-patient privilege which resulted from plaintiff putting his injury at issue should be obvious to defense counsel and the physician and that they could be counted on to respect whatever privilege remained. The sole dissenter distinguished Niesig and **Muriel Siebert** on the basis that medical records and information were not at issue in those cases.

That is an understatement. Those decisions were based on the assumption that the attorney-client privilege must be protected at all costs. **Arons** proceeds from the assumption that the physician-patient privilege has already been waived, and that defense counsel could determine the scope of that waiver.

Arons is distinguishable from employment cases on several grounds.

First, it involved medical malpractice only. In a medical malpractice or personal injury case the injury is physical in nature and often narrowly defined. In the case of a broken femur, for example, a defense lawyer should not have good faith incentive to interview physicians whose work is unrelated to the broken bone.

In an employment discrimination case, the injury is never narrowly defined. It is psychological in nature, although it can affect educational development and physical function. Causation could arguably result from early childhood trauma, lead poisoning, prior discrimination, some combination of the above or other things. Defense counsel always question plaintiffs about every bad thing which has ever happened to them.

If **Arons** applied in the employment discrimination context, defense counsel ñ even those acting in good faith ñ would therefore likely have a hugely different from than plaintiffís counsel on the proper scope of waiver. Discovery through the normal channels, such as depositions, is the only way courts can fairly regulate these issues. Without such regulation, Arons could lead to injury of important therapeutic relationships.

Second, **Arons** did not authorize discovery of medical records prior to the incident which caused injury. Id. at 351 (when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue).

A broad inquiry into every event in a plaintiffís medical history, prior to the discrimination, which could have contributed in some way to stress or sadness, is plainly not what the court intended to authorize.

Arons should be less of in issue federal court where a body of case law holds that the mere bringing of an employment discrimination claim alleging emotional pain and suffering does not put the plaintiffís medical history at issue. These are so called 'Garden Variety' cases, where discovery of medical records and a Rule 35 exam are generally not allowed.

Post v. Merrill Lynch: What Does it Mean? Part II

By: Matthew Bergeron, *mbergeron@satterandrews.com*

This is the second installment of an article that was begun in the June, 2008 newsletter.[1] To refresh your recollection, the article as a whole explores the question of whether an at-will employee's[2] non-compete agreement is enforceable when s/he is terminated "without cause." Put another way, may an employer use the at-will/non-compete combo as a sword and a shield? As plaintiffs' counsel, to answer this question we turn reflexively to **Post v. Merrill Lynch**[3] and selected progeny. In the last article we looked briefly at the contract principles of consideration and mutuality of obligation and then turned specifically to Post and asked, what does it say?

Now that we know what **Post** says, it comes times to consider what the courts have interpreted it to *mean.* In what follows, for the reader's convenience, I will first recap briefly **Post's** findings. Next, we turn to how Post has been applied. While many courts (both federal and state) have cited the decision, their analyses fall into what I view as three categories: 1) reading **Post** broadly to apply to all non-competes; 2) interpreting **Post** narrowly to apply only to cases involving the employee-choice doctrine/post-employment forfeiture; and 3) applying or discussing **Post** in a more "neutral" manner which does not limit its application either way. Finally, to conclude, I'll offer brief commentary on where as the plaintiffs' bar we stand and how, unless and until we receive a definitive answer on **Post**, we can advance our clients' interests.

So, what was it that the Court of Appeals said in **Post** that many argue created the rule that an employee's otherwise enforceable non-compete is rendered invalid if s/he is terminated without cause? As will be seen below, the following language has been adopted (and rightfully so) by many courts to support this proposition:

> Acknowledging the tension between the freedom of individuals to contract, and the reluctance to see one barter away his freedom, the State enforces limited restraints on an employee's employment mobility where a mutuality of obligation is freely bargained for by the parties. An essential aspect of that relationship, however, is the employer's continued willingness to employ the party covenanting not to compete. Where the employer terminates the employment relationship without cause, however, this action necessarily destroys the mutuality of the obligation on which the covenant rests as well as the employer's ability to impose a forfeiture.

48 N.Y.2d at 89. However, no matter how wide reaching this language is, it cannot be disputed (and we are often reminded) that **Post** was decided in the context of the employee choice doctrine.[4] So, this begs the ultimate question: Was the holding intended to apply only in those situations? This very query has put the management and plaintiffs' bars into two camps; the strict, blind application of fact which plays in the former's favor, and the application of sound, well-reasoned rationale which plays in ours.

I. Cases Reading Post Broadly

What appears to be the earliest case in this regard is **Borne Chemical Co., Inc. v. Herman Dictrow**, et al., 85 A.D.2d 646 (2d Dep't 1981). Borne involved the sale of a company which, in connection therewith, defendant **Dictrow** was given an employment agreement. The agreement contained an initial term of three years, was subsequently extended, and contained a restrictive covenant. Notably though, the agreement did not contain a forfeiture-for-competition clause. After the employee was terminated prior to the extended agreement's expiration, he allegedly began competing with his former employer. Citing **Post**, the court stated unequivocally that "[i]n cases of involuntary discharge, if the employment has been terminated by the employer without cause, the employer will not be permitted to invoke the covenant." 85 A.D.2d at 649. Since no finding was made at trial level as to the nature of the termination, the court remanded, admonishing that termination without cause "necessarily destroys the mutuality of obligation on which the covenant [not to compete] rests." *Id., quoting* ***Post***, 48 N.Y.2d at 89.

If one is to cite **Borne** though, s/he must do so with abundant caution. The undisputed facts are that the employee was terminated prior to the expiration of his agreement's term. Since that was a material breach of the agreement, the employee could have argued, and the court could have found, that under **Cornell v. T.V. Dev. Corp.**, 17 N.Y.2d 69, 75 (1966) the restrictive covenant was unenforceable. However, neither did so and the court instead cited Post. Therefore, it can be argued that **Bourne** is unhelpful to our cause because there was a material breach, thus making **Post** irrelevant. Notwithstanding, the court ruled as it did; it applied **Post** and in doing so made abundantly clear what **Post** stands for. It is that express understanding of **Post** that is useful to us, regardless of whether the facts of that particular case called for its application.

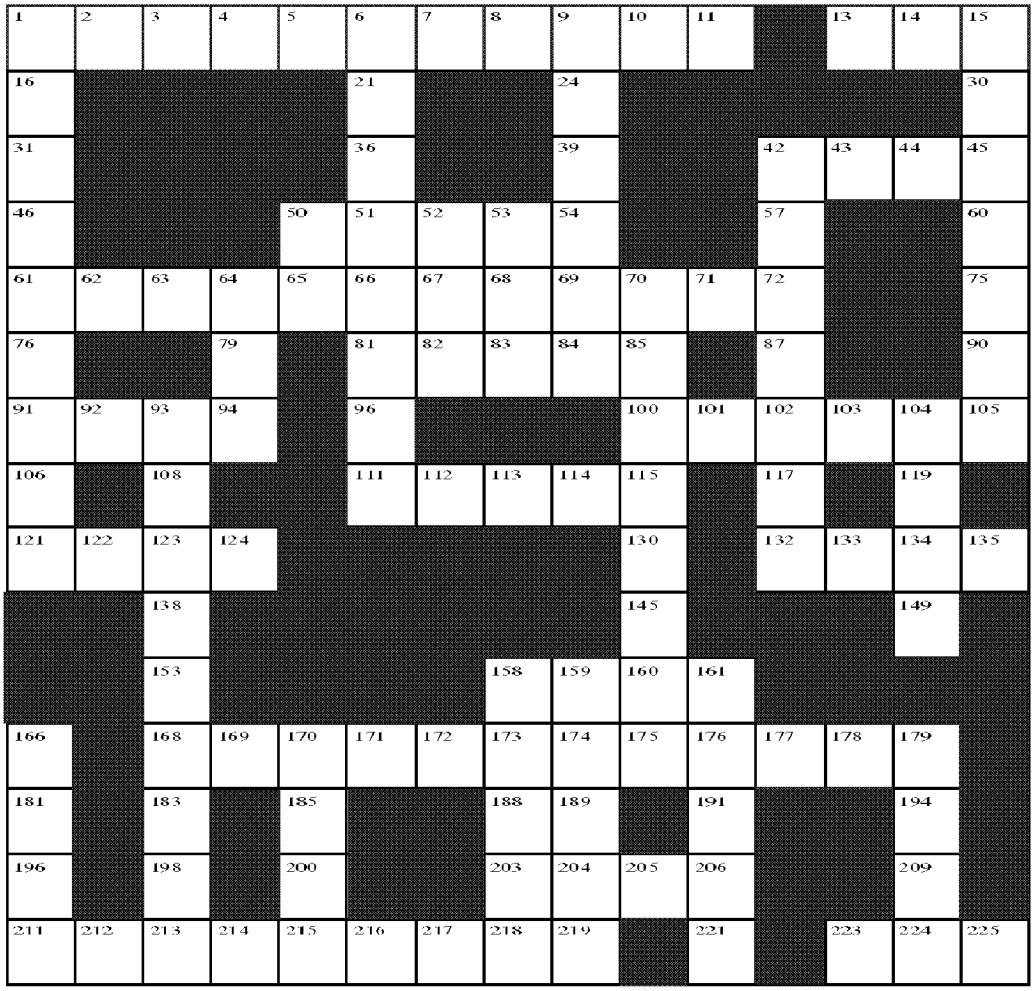
The cases to follow would turn to the same "mutuality of obligation" language from **Post** for support. The next notable decision to issue was **SIFCO Indus., Inc. v. Advanced Plating Tech., Inc.**, 867 F.Supp. 155 (S.D.N.Y. 1994). "An essential aspect [of enforceable restraints on employee mobility] is the employer's continued willingness to employ the party covenanting not to compete," wrote the court, citing **Post**. Because it was the employer's closure of a plant which resulted in the layoff of defendant-employees, there was no just cause. Accordingly, the court seamlessly ruled that under Post the covenants were unenforceable "as a mat-

See POST V. MERRILL, page 12

NELA-NY EMPLOYMENT LAW CROSSWORD

Rachel Geman *rgeman@lchb.com*

Rules: The number of letters that corresponds to a clue is set forth in the clue. For example, (4) refers to four letters; (2,4) means the answer is two words, the first of which has two letters and the second of which has four (e.g., "so what"). Only words of two or more letters have a corresponding clue; there are numerous one-letter orphans in the grid. Acronyms are treated the same as regular words, so "FRCP" would be (4). Have fun!



Across

1. Alternative to litigation- that defendants love.

13. Crappy euphemism for losing your job

42. Craze of 1958.

50. Novel by Nicholas Gage.

61. Something lawyers and ambitious high school students are good at.

68. Special type of book that shrugged.

81. Typical objection to discovery request.

91. Famous composer.

100. Case establishing disparate impact.

111. 1990s agreement with labor side accord.

121. Many of these aren't worth much now; type of retirement plan.

132. End (or, in Hebrew, the beginning) of famous palindrome.

158. Too, too.

168. Chairperson of 179 Down under Obama.

188. _____ Girl.

203. Beginning of something said to Scotty.

211. A refreshing epiphany.

223. Honestly, 161 Down is sometimes compared to him.

Down

1. _____ consequences (doctrine defendants sometimes inappropriately try to apply to employment cases).

3. Synonym for squib.

6. One of those old torts.

9. In its original place. (2,4)

15. Brought Don Vito to life . . . what a saint. (Hint: also an SDNY Magistrate Judge.)

42. Type of witness or tone.

50. Latin word in many captions or Spielberg hit.

53. Litigation or parenting tactic.

64. Volcano result.

70. Lawyer talk

93. Recent Supreme Court case confirming § 1981 encompasses retaliation.

104. Barry, Maurice, or Robin on Saturday.

158. What your client may need if you practice criminal law.

159. Some beers.

161. He appointed 168 Across.

166. Organization to distribute money to Madoff's victims.

170. Clapton favorite.

179. 168 Across is the chairperson of this.

See CROSSWORD ANSWERS, next page

PROXY EXCEPTION , from page 10

After next observing that the Federal courts also impose vicarious sexual harassment liability where the employee suffers a tangible job action,[6] **Faragher** concluded, "[t]he soundness of the results in these cases (and their continuing vitality), in light of basic agency principles, was confirmed by this Court's only discussion to date of standards of employer liability, in **Meritor [v. Vinson**, 477 U.S. 57 (1986)]," which suggests that "courts look to traditional principles of the law of agency in devising standards of employer liability in those instances where liability for the actions of a supervisory employee was not otherwise obvious."[7]

Courts around the country note that **Faragher's** extended discussion of the settled principles governing employer liability confirms that the Supreme Court agreed that the proxy, or alter ego, theory is consistent with **Meritor** and traditional agency principles. As the Fifth Circuit noted in **Ackel v. Nat'l Communs., Inc.**, 339 F.3d 376, 383 (5th Cir. 2003), "[t]he Court made it clear that it was not abandoning the reasoning and analysis of **Harris** and these earlier cases." However, since Faragher recognized the proxy argument in a roundabout way, defendants may argue that the Court did not affirmatively endorse the proxy argument. This argument was recently rejected in **EEOC v. Burlington Med. Supplies, Inc.**, 2008 U.S. Dist. LEXIS 17118 (E.D. Va. March 3, 2008).[8]

The practical consequence of finding that the employer's proxy committed the harassment is that the defendant "is not entitled to raise the affirmative defense that it acted reasonably to prevent and correct its president's sexually harassing behavior, or that the employee failed to make use of an internal mechanism provided by it to prevent or correct the sexually harassing behavior." EEOC v. J. H. Walker, Inc., 2007 U.S. Dist. LEXIS 3662, at *60 (S.D. Tex. Jan. 18, 2007) (citing Ackel, 339 F.3d at 383).

The Fifth Circuit offered a concise summary of the proxy exception in Ackel, 339 F.3d at 383: "[w]e read the Supreme Court's opinions in Faragher and Ellerth as the Seventh Circuit did in Johnson v. West, 218 F.3d 725, 730 (7th Cir. 2000), that the 'employer is vicariously liable for its employees activities in two types of situations: (1) there is a tangible employment action or (2) the harassing employee is a proxy for the employer.'"

The Seventh Circuit's decision in Johnson v. West, provides insight into which members of the corporate hierarchy qual-

See PROXY EXCEPTION, page 13

CROSSWORD PUZZLE ANSWER KEY:

1 A	2 R	3 B	4 I	5 T	6 R	7 A	8 T	9 I	10 O	11 N	■	13 R	14 I	15 F
16 V	■	■	■	■	21 E	■	■	24 N	■	■	■	■	■	30 R
31 O	■	■	■	■	36 P	■	■	39 S	■	■	42 H	43 U	44 L	45 A
46 I	■	■	■	50 E	51 L	52 E	53 N	54 I	■	■	57 O	■	■	60 N
61 D	62 E	63 B	64 A	65 T	66 E	■	68 A	69 T	70 L	71 A	72 S	■	■	75 C
76 A	■	■	79 S	■	81 V	82 A	83 G	84 U	85 E	■	87 T	■	■	90 I
91 B	92 A	93 C	94 H	■	96 I	■	■	■	100 G	101 R	102 I	103 G	104 G	105 S
106 L	■	108 B	■	■	111 N	112 A	113 F	114 T	115 A	■	117 L	■	119 I	■
121 E	122 S	123 O	124 P	■	■	■	■	■	130 L	■	132 E	133 L	134 B	135 A
■	■	138 C	■	■	■	■	■	■	145 E	■	■	■	149 B	■
■	■	153 S	■	■	■	■	158 A	159 L	160 S	161 O	■	■	■	■
166 S	■	168 W	169 I	170 L	171 M	172 A	173 L	174 I	175 E	176 B	177 M	178 A	179 N	■
181 I	■	183 E	■	185 O	■	■	188 I	189 T	■	191 A	■	■	194 L	■
196 P	■	198 S	■	200 L	■	■	203 B	204 E	205 A	206 M	■	■	209 R	■
211 C	212 A	213 T	214 H	215 A	216 R	217 S	218 I	219 S	■	221 A	■	223 A	224 B	225 E

PROXY EXCEPTION , from page 12

ify as proxies: "Faragher suggests that the following officials may be treated as an employer's proxy: a president, owner, proprietor, partner, corporate officer, or supervisor 'holding a sufficiently high position in the management hierarchy of the company for his actions to be imputed automatically to the employer.'" [9]

Along with **Passantino v. Johnson & Johnson Consumer Products, Inc.**, 212 F.3d 493, 516 (9th Cir. 2000),[10] Ackel and Johnson remain the leading cases in this area. The Federal courts continue to recognize that the **Faragher** affirmative defense does not apply when the company's proxy commits the sexual harassment. In **Bishop-Joseph v. Monroe**, 2007 U.S. Dist. LEXIS 48840 (D.S.C. 2007), the court noted "what appears to be the majority rule, that the **Faragher/Ellerth** defense does not apply where the alleged harasser is the organization's proxy."[11] Indeed, nearly every court addressing this issue holds that the **Faragher/Ellerth** defense is not available where the harasser is the employer's proxy.[12]

The Second Circuit has not definitively ruled in this area. In Faragher, the Supreme Court did cite **Torres v. Pisano,** 116 F.3d 625 (2d Cir. 1998) in support of the proxy theory, but **Torres,** of course, pre-dates Faragher. In March 2008, Magistrate Judge Yanthis of the Southern District of New York recognized the proxy argument in **Townsend v. Benjamin Enterprises**: "Although it appears the Second Circuit has not addressed the issue, this Court is guided – and persuaded – by the decisions of courts in other Circuits which have held that the **Faragher-Ellerth** defense does not apply where the alleged harasser is the organization's proxy."[13] Judge Yanthis concluded that "**Faragher** and **Ellerth** delineate two types of situations where the employer is automatically liable: (1) when the harassing supervisor holds a sufficiently high position in the organization's hierarchy for his acts to be deemed the acts of the employer itself, and (2) when the supervisor's harassment culminates in a tangible employment action."[14]

Finally, the EEOC recognizes the proxy argument. The Enforcement Guidelines state:

Harassment by "Alter Ego" of Employer

A. Standard of Liability

> An employer is liable for unlawful harassment whenever the harasser is of a sufficiently high rank to fall "within that class . . . who may be treated as the organization's proxy." Faragher, 118 S. Ct. at 2284. In such circumstances, the official's unlawful harassment is imputed automatically to the employer. Thus the employer cannot raise the affirmative defense, even if the harassment did not result in a tangible employment action.

B. Officials Who Qualify as "Alter Egos" or "Proxies"

> The Court, in **Faragher**, cited the following examples of officials whose harassment could be imputed automatically to the employer: president, owner, partner, corporateofficer." **Faragher**, 118 S. Ct. at 2284.

http://www.eeoc.gov/policy/docs/harassment.html#VI. The EEOC notes that "An individual who has an ownership interest in an organization, receives compensation based on its profits, and participates in managing the organization would qualify as an 'owner' or 'partner.'"[15]

In sum, plaintiff's attorneys handling a sexual harassment case where the plaintiff did not timely complain about the harassment and/or the employer arguably took appropriate remedial action should consider whether the proxy, or alter-ego, theory negates the **Faragher/Ellerth** affirmative defense. In discovery, counsel should explore the extent to which the harasser was a sufficiently high-placed company or corporate official. ■

1 *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).

2 *Faragher*, 524 U.S. at 807-08.

3 *See, id.* at 808 ("no affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment").

4Id. at 798.

5 Id. at 789 (citing, *inter alia, Torres v. Pisano*, 116 F.3d 625, 634-35 and n.11 (2d Cir. 1997) (noting that a supervisor may hold a sufficiently high position "in the management hierarchy of the company for his actions to be imputed automatically to the employer").

6 Id. at 790.

7 Id. at 791-92.

8 Id. at *35-36 ("To characterize the Supreme Court's discussion of the 'proxy' doctrine as mere historical commentary is an insufficient basis on which to disavow the theory. The Supreme Court's 'historical' discussion arose in the context of justifying the absence of standards for imputing liability to the employer in Harris v. Forklift Systems, Inc., 510 U.S. 17, 19 (1993). . . The Faragher Court explained that it was not 'exceptional' that these standards were not at issue in Harris because, 'the individual charged with creating the abusive atmosphere was the president of the corporate employer, who was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy.' After its discussion of the proxy theory, the Court noted that Meritor Savings Bank put its imprimatur on the 'soundness of the results in these cases (and their continuing vitality).' Then the Court announced, 'Meritor's statement of the law is the foundation on which we build today'").

Id. at 730 (citing 524 U.S. at 789-90). See also, Harrison v. Eddy Potash, Inc., 158 F.3d 1371, 1376 (10th Cir. 1998) ("the Supreme Court in Burlington [v. Ellerth, 524 U.S. at 758] acknowledged an employer can be held vicariously liable under Title VII if the harassing employee's 'high rank in the company makes him or her the employer's alter ego'").

Passantino cited Faragher's discussion of Harris for the proposition that "an individual sufficiently senior in the corporation must be treated as the corporation's proxy for purposes of liability," which "constitutes a bar to the successful invocation of the (Faragher/Ellerth) defense."

Id., at *4 (citing, inter alia, Distasio v. Perkin Elmer Corp., 157 F.3d 55 (2nd Cir. 1998). See generally, EEOC v. Geoscience Engineering & Testing, Inc., 2007 U.S. Dist. LEXIS 22330, at *6 (S.D. Tex. March 28, 2007).

See, e.g., EEOC v. J. H. Walker, Inc., 2007 U.S. Dist. LEXIS 3662, at *59-61 (S.D. Tex. Jan. 18, 2007); EEOC v. Cone Solvents, Inc., 2006 U.S. Dist. LEXIS 29866, at *31 (M.D. Tenn. April 21, 2006); Tillery v. Atsi, Inc., 242 F. Supp. 2d 1052, 1065-66 (N.D. Ala. 2003); Reynolds-Diot v. Group 1 Software, Inc., 2005 U.S. Dist. LEXIS 17102, at *8 (N.D. Tex. Aug. 17, 2005); Bishop v. Monroe, 2006 U.S. Dist. LEXIS 67651, at *18-19 (D. S.C. June 27, 2006). Cf., EEOC v. Bud Foods, LLC, 2006 U.S. Dist. LEXIS 54972, at *43-44 (D. S.C. Aug. 7, 2006) (rejecting proxy theory because Fourth Circuit has not adopted it and deeming the contrary language in Faragher dicta).

2008 U.S. Dist. LEXIS 19445, at *3-4 (S.D.N.Y. March 12, 2008).

Id., at * 6.

Id. at n. 97.

AMERICAN RECOVERY, from page 1

erwise be eligible, but did not elect COBRA coverage prior to February 17, 2009, or who had previously elected COBRA but whose COBRA coverage ended before February 17, 2009 because of non-payment of premiums, is allowed to elect coverage during the special election period as follows:

- The special election period began on February 17, 2009 and ends 60 days after an employee not currently receiving COBRA coverage receives notice of his or her eligibility for coverage. (The notice requirements are discussed below.) Ordinarily, this election period will end 120 days after the stimulus bill's February 17, 2009 enactment date.
- If an employee elects COBRA coverage during the special election period, that employee's coverage begins on the first day of the first COBRA coverage period beginning after February 17, 2009 (March 1, 2009 for group health plans using calendar months as COBRA coverage periods). Coverage is not retroactive to the date that the employee originally lost coverage.
- COBRA coverage for an employee who elects COBRA during the special election period will not go beyond the period of COBRA coverage that would have been required if COBRA had been initially elected (i.e. 18 months minus any time the employee may have received COBRA coverage prior to election during the special period).

How does the special COBRA election period affect the pre-existing condition exclusion?

The Health Insurance Portability and Accountability Act (HIPAA) limits the ways in which insurance plans can exclude coverage of pre-existing medical conditions. When joining a new plan, an individual's pre-existing condition may only be excluded if the individual received medical advice, diagnosis, care or treatment for that condition within six months of enrollment in the new plan. The exclusion can also only apply for the first twelve months that an individual is enrolled in a new plan.

Furthermore, HIPAA provides that if an individual moves to the new plan within sixty-three days of terminating the previous coverage, and had continuous health insurance for at least twelve months prior to terminating coverage, the new plan cannot exclude pre-existing conditions at all. Thus, any person with previous qualifying coverage who has exhausted COBRA coverage (if it was available) has a sixty-three-day window in which to enroll in a new plan without a pre-existing condition exclusion being invoked.

Under the stimulus bill, if an employee elects COBRA coverage during the special election period, the period of time between when the employee first became eligible for COBRA coverage (but didn't elect it) and when he or she begins receiving coverage (i.e. the first day of the first COBRA coverage period after February 17, 2009) is disregarded when determining if the employee had a sixty-three-day break in coverage. In other words, an employee who elects coverage during the special period will be deemed to have had continuous coverage for purposes of pre-existing condition exclusions. The deadline for such an employee to enroll in a new plan without facing pre-existing conditions exclusions will thus not come up until after sixty-three-days after the employee's COBRA coverage expires.

What are the notice requirements?

A group health plan administrator must provide notices to two groups of employees within 60 days after the enactment of the stimulus bill (i.e. by April 17, 2009):

- One notice must go to all employees who currently have COBRA continuation coverage, to advise them of the availability of the subsidy and the requirements to qualify for the subsidy. This notice must also be given to any eligible employee who is involuntarily terminated between now and December 31, 2009.
- The other notice must go to any employee who currently lacks COBRA coverage but is entitled to the special election period. The notice to these individuals must advise them of the availability of the subsidy and the requirements to qualify for the subsidy, as well as provide them forms necessary for electing COBRA during the special election period.

How is the 65% subsidy applied?

- The COBRA subsidy applies to general health insurance plans only, not to dental or vision-only plans, counseling plans, or health care flexible spending account.
- The subsidy applies only if 35% of the premium is paid by the employee or on the employee's behalf by someone other than the employer. The employer cannot claim a subsidy credit until the group health plan has actually received 35% of the COBRA premium. In other words, the employer can only claim a subsidy credit of 65% of what the total COBRA premium would be if the amount actually paid by the employee was 35% of the total COBRA premium.
- If the employer pays 100% of the employee's COBRA premium, the employer cannot claim any subsidy credit for that employee.
- The subsidy applies to periods of COBRA coverage beginning after February 17, 2009. A "period of coverage" is the monthly (or shorter) period for which COBRA premiums are charged. For group health plans using calendar months as the period of coverage, the subsidy applies beginning March 1, 2009.
- The subsidy ceases to apply, and a plan administrator may again charge the full COBRA premium, as of the earliest of:
  1. Nine months after the first day of the first month to which the subsidy applies; or
  2. The end of the maximum COBRA coverage period required by law (i.e. 18 months), including permissible early terminations; or
  3. For an employee who elects COBRA during the special enrollment period, the end of the maximum COBRA coverage period that would have applied if the employee had elected COBRA coverage when first entitled to do so; or
  4. The date the employee becomes eligible for coverage (not actually cov-

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ter of New York law." *Id. at 159. See also,* ***Gismondi v.Franco***, 104 F.Supp2d 223, 234 (S.D.N.Y. 2000) (*citing* **Post** with approval, but specifying that it is limited only to "without cause" terminations),[5] *citing* **Handel v. Nisselson**, 1998 U.S. Dist. LEXIS 19916, 1998 WL 889041 (S.D.N.Y. 1998); c.f. **MTV Networks v. Fox Kids Wordwide, Inc.**, *et al.*, 1998 N.Y. Misc. LEXIS 701, 1998 WL 57480 (N.Y. Sup. Ct. 1998) (citing Post for its "mutuality of obligation" language).[6]

The last case to be discussed is one that goes further than simply citing **Post** and reiterating its oft-cited passage. The court in *In Re* **UFG Int'l, Inc. et al. v. DeWitt Stern Group, Inc.**, et al., 225 B.R. 51 (S.D.N.Y. 1998) offers its own words as to why Post is a case of general application. In comparing cases which involved covenants that prohibited competition in general, versus the one before it that would have prohibited doing business with only certain customers, the court opined forcefully:

> Regardless of the scope of the restrictive covenant, an employer cannot hobble his employee by terminating him without cause and then enforcing a restriction that diminishes his ability to find comparable work.

Id. at 56, citing ***SIFCO****, supra.*

To date, **UFG** represents the most cogent and clear holding that **Post** is to be applied across the board. It is well-reasoned and adheres to **Post's** plain language and underlying policy. As discussed below, **UFG** is the primary weapon in our arsenal, followed very closely by **SIFCO**.

II. Cases Limiting Post to "Employee Choice"

Although there are not nearly as many as the cases applying **Post** broadly, those reading it narrowly are precisely within management's cross-hairs.[7] The first is **Wise v. Transco, Inc.,** et al., 73 A.D.2d 1039 (4th Dep't 1980). The context of **Wise** makes clear that the court felt Post applicable only in employee choice cases, particularly because of its discussion regarding the "strong public policy against forfeiture" of ERISA benefits. *Id. at 435-36, quoting* ***Post***. Specifically, although the court acknowledged that plaintiff was involuntarily discharged, it ruled that since the "restrictive covenant...[did] not involve a forfeiture of rights under an 'employee pension benefit plan' that would be covered by ERISA," Post did not apply and, therefore, the covenant was enforceable. *Id. at 436.*

The next decision to discuss **Post** narrowly was **Sarnoff v. Amer. Home Prods.**, 798 F.2d 1075 (7th Cir. 1986). Although not controlling in the Second Circuit, the decision, written by Judge Posner, engages in an extended discussion regarding **Post** and **Kristt** which cannot be ignored. In a case involving a forfeiture-for-competition and New York choice of law provisions, the **Sarnoff** court indicated that the "[t]he holding of **Post** is that a no-competition condition is unenforceable if it is unreasonable and if the employee was fired without cause." *Id. at 1075, underlined emphasis added.*

Finally, in **York v. Actmedia, Inc.**, 1990 U.S. Dist. LEXIS 3483, 1990 WL 41760 (S.D.N.Y. 1990), the court not only expressly construes **Post** to apply only in cases involving forfeiture clauses, but goes a step further to say that **Post** does not create a bright line rule of unenforceability even in those instances:

> Post does not hold that all non-competition forfeiture clauses are unreasonable as a matter of law if an employee is terminated without cause. Rather, it stands for the narrow proposition that such an employee has a right to challenge the reasonableness of a clause, and that a forfeiture clause which deprives an employee of his pension benefits will be held unreasonable as a matter of law.

*Id. at *4.* Since the post-employment benefits at-issue in York were stock options and not part of a pension plan, the restrictive covenant was found enforceable notwithstanding that plaintiff was terminated without cause.

III. Cases Applying Post Neutrally

We now turn to the middle ground: those cases that acknowledge **Post**, but not in such a manner that expressly limits its reach.[8] Two such cases are in the context of the employee choice doctrine. However, that is in no way dispositive of what **Post** means because Post itself was decided in that context. The important point being however is that neither **Cray v. Nationwide Mutual Ins. Co.**, 136 F.Supp.2d 171 (W.D.N.Y. 2001) nor **Scott v. Beth Israel Med. Ctr., Inc.**, et al., 41 A.D.3d 222 (1st Dep't 2007) limit **Post's** applicability. In **Cray**, the plaintiff was terminated for cause but argued that **Post** forbade his former employer from enforcing his forfeiture provision. In response, the court stated succinctly that "the court's holding in **Post** was limited to cases involving termination without cause." *Id. at. 178*, emphasis in original. As support, the court cited favorably non-forfeiture cases in which **Post** was applied–namely, **Gismondi**, **UFG**, and **MTV**, all of which are discussed supra. *Id. at 179.* Similarly, in **Scott** the court found that the question of whether an employee is terminated with or without cause is relevant in a forfeiture case; however, there is no attempt to limit **Post** to such instances. 41 A.D.3d at 224.

There seems to be only one case in which a court explicitly acknowledges the competing views on Post, yet it does not take a definitive position: **Globaldata v.**

See POST V. MERRILL, next page

CONDOLENCES

Jason Solotaroff's mother,
Shirley Fingerhood

Josh Friedman's mother,
Sylvia Friedman

We send our heartfelt sympathy to you and your families.

Congratulations
on the birth of Elissa Devins' daughter, **Olivia Marlo**

Yogita Peters, son,
Spencer Phoenix

POST V. MERRIL, from page 15

Pfizer, et al., 10 Misc.3d 1062A (Sup. Ct. N.Y. Co. 2005). The non-compete agreement in **Globaldata** did not have a forfeiture clause and the defendant-employee argued that he was terminated without cause and, therefore, the restrictive covenant could not be enforced. In support of his argument, plaintiff cited **UFG**, **SIFCO**, and **Handel**. *Id. at n9.* Declining to pass on the question because it was unclear whether or not a termination in fact took place, the court nonetheless cautioned that the cases cited by defendant "rely upon an arguably distinguishable Court of Appeals case which held that a termination without cause could not be the basis to forfeit an employee's pension benefits". Id., citing Post.

Finally, we come to the only instance in which the New York Court of Appeals has revisited **Post**. In **Morris v. Schroder Cap. Mgmt. Int'l**, et al, 7 N.Y.3d 616 (2006), the court addressed a question certified to it by the Second Circuit: Is the constructive discharge test the appropriate legal standard when determining whether an employee voluntarily or involuntarily left his employment for purposes of the employee choice doctrine? The court ultimately answered this question in the affirmative, but for our purposes there is a more important inquiry. Did the court simply apply **Post** to the facts before it, which happened to involve the employee choice doctrine, or did it more broadly construe **Post** to apply exclusively to such cases?

As is a black letter principle of jurisprudence, the court addressed and answered only the question before it. So, faced only with facts involving a forfeiture provision, the court discussed the employee choice doctrine and how Post holds that it does not apply when an employer terminates an employee without cause (or, in **Morris'** case, forces an employee out via constructive discharge). However, in its decision, the court revisited **Post's** "mutuality of obligation" language:

> An essential element of the [employee choice] doctrine is the employer's "continued willingness to employ" the employee. Where the employer terminates the employment relationship without cause, "his action necessarily destroys the mutuality of obligation upon which the covenant rests as well as the employer's ability to impose a forfeiture."
>
> Thus, although a restrictive covenant will be enforceable without regard to reasonableness if an employee left his employer voluntarily, a court must determine whether forfeiture is "reasonable" if the employee was terminated involuntarily and without cause (see, Post v. Merrill Lynch, 48 N.Y.2d 84, 397 N.E.2d 358, 421 N.Y.S.2d 847 (1979) (holding that a private pension plan provision permitting the employer to forfeit pension benefits earned by an employee who competes with an employer after being involuntarily discharged "is unreasonable as a matter of law and cannot stand").

Morris, 7 N.Y.3d at 621.

Through this iteration of **Post,** is the court signaling that since "an essential element of the [employee choice] doctrine is the 'continued willingness to employ'," that the converse is necessarily true? That is, does **Morris** stand for the proposition that the employer's continued willingness to employ is not an essential element of an enforceable restrictive covenant when the employee has no choice between competition or forfeiture? Notwithstanding this potentially grim language, this author thinks the answer is no.

The bottom line is, yet to be revisited or edified by the Court of Appeals is the **Post** court's very wide-reaching statement of policy underlying the "no-cause/no-enforcement" conclusion.[9] Notably, those courts which have read **Post** narrowly have made no attempt to address that language head-on, and instead resort to distinguishing **Post** on factual bases only (employee choice vs. no employee choice). Conversely, those applying **Post** to its fullest, intended extent have not shied from its underlying rationale. See, e.g. **UFG Int'l**, *supra* ("Regardless of the scope of the restrictive covenant, an employer cannot hobble his employee by terminating him without cause and then enforcing a restriction that diminishes his ability to find comparable work.").

If the Court of Appeals is to resolve this conflict in favor of narrow application, the task will be a formidable one. The language used by Judge Wachtler, and ratified by a unanimous court, is bold, open-ended and proclaims an unequivocal policy statement: "...the State enforces limited restraints on an employee's employment mobility where a mutuality of obligation is freely bargained for by the parties. An essential aspect of that relationship, however, is the employer's continued willingness to employ the party covenanting not to compete." Post, 48 N.Y.2d at 89. To convert this statement into one which applies only in employee choice situations, the court will need to say so clearly. In doing so, it will have to explain why such equitable and common sense policy is being unnecessarily eviscerated so as to favor a relatively small portion of the workforce, i.e. those who receive post-employment benefits subject to forfeiture. Moreover, and more interestingly, the court will also have to reconcile such a narrowing with the employment-at-will doctrine which is founded partially upon the (false) premise that an employee is free to come and go as s/he pleases.[10]

Obviously, this is not a challenge I hope that the Court of Appeals takes up. If given the opportunity, instead it should demonstrate courage and a willingness to stand up for New York's working class and embrace **Post** for what it truly says. What we do as plaintiff's attorneys until that day is a question that remains open.

IV. Where Do We Go From Here?

Now we have come full circle back to the message this author intended to put across, which is that although the question of whether restrictive covenants are enforceable when termination is without cause has not been answered definitively, there are solid arguments to be posed by the plaintiffs' bar (and, to a lesser extent, by management). However, as we all know, arguments are just that–arguments. We can and will pose them if we find ourselves in the midst of threatened

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or actual litigation. In this author's opinion, the best angle to argue is that of mutuality of obligation. It is upon this principle that the Court of Appeals based its Post decision and it is an argument that carries tremendous equitable appeal. *See, e.g.* ***UFG, SIFCO*** *supra.* Nonetheless, there are two other options that we must explore.

A. Negotiating Employment and/or Non-Compete Agreements

If at all possible, I think we would all agree that avoiding disputes is preferred over inviting them. Therefore, in negotiating agreements for clients it may benefit us to address what may well be this elephant in the room. As discussed in great detail in the article *"You're Fired! And Don't Forget Your Non-Compete...": The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, Kenneth J. Vanko, DePaul Business & Commercial Law Journal, Fall 2002, one idea to keep in mind during negotiations is to distinguish between termination with and without cause. Thereafter, depending on the parties' needs and negotiating positions, you may want to limit applicability of the non-compete to cause termination only. If you're unable to get such language, another possibility is to offer a modified, less restrictive covenant in the event of a without-cause termination. *Id.*

B. Legislative Changes

Fifteen states in the U.S. have codified their restrictions, or lack thereof, on non-competition agreements. *See generally supra, "You're Fired..." at fn.5.* Although some might want to see the outright legislative banishment of such agreements in New York, that is beyond the scope of this article and, notwithstanding, is highly unlikely to happen.[11] However, it is not beyond the pale to think that we could obtain codified restrictions on an employer's ability to enforce an agreement when the employee is terminated without cause. After all, the legislature and the governor have shown their willingness to tackle the issue of restrictive covenants by enacting *Labor Law §202-K*, which invalidates post-employment covenants for broadcasters.

The most prominent potential change that comes to mind is to codify what we (and many courts) read to be **Post's** ruling, to wit, a restrictive covenant will be unenforceable if the termination of employment is involuntary on the employee's part and without cause. Another angle would be to address the issue of consideration. Namely, New York should legislatively override the "past consideration" theory which has been adopted by the courts (see, **Zellner v. Conrad**, 183 A.D.2d 250, 254 (2d Dep't 1992), and state that an undefined period of "continued employment" is insufficient consideration to justify a restrictive covenant. Rather, the legislature should explore requiring a minimum period of employment for a non-compete to be binding.

Of course, the above are only impromptu ideas which are subject to criticisms and claims of infeasibility. However, they at least mark a starting point for discussion. This author recognizes the realities of the business world; that employers, in some instances, have an interest in protecting bona fide trade secrets,[12] customer lists, etc. However, the law should not condone an employer's attempt to receive that protection through using restrictive covenants as both a shield and a sword.■

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[1] My apologies for keeping everyone in suspense. Between a baby born in July, 2008 and sundry other things (you all know how it can be), it took a gentle reminder from Gary Trachten that I needed to get a move-on.

2Speaking of Gary, I'd like to thank him for working with me on some of the finer points in this area of law. Through several emails and phone calls, I believe he's helped me to put out a much more concise and accurate article. Thanks, Gary.

2In this context, "at-will" covers both the employee who has no employment contract whatsoever and one that may have an agreement, but the agreement has no term or otherwise permits the employer to terminate the agreement without cause.

[3]48 N.Y.2d 84 (1979).

[4]The doctrine is an exception to the rule of "reasonableness" ordinarily required of non-competes. Regardless of how unreasonable a restriction may be, an employee who voluntarily leaves employment will be bound thereby if the forfeiture of a post-employment benefit is the penalty for violating the covenant. See, Kristt v. Whelan, 4 A.D.2d 195 (1st Dep't 1957).

[5]However, one should exercise discretion when citing Gismondi because it did not arise in a true "at-will" situation (that is, either a situation with an employment contract allowing termination without cause or no agreement at all). As we know, where an employment contract contains limitations on the employer's ability to terminate the relationship, a breach of that agreement will necessarily invalidate the restrictive covenant. See, e.g. Cornell v. T.V. Dev. Corp., 17 N.Y.2d 69, 75 (1966). In Gismondi, there were such limitations, i.e. the employer could terminate the relationship only upon a showing of misconduct or breach of the agreement by the employee. See, Gismondi, 104 F.Supp.2d at 227. Having found that the employee was terminated for cause, it would seem that should have been the end of the court's inquiry–whether under Cornell or Post. However, in an attempt to avoid the non-compete, the employee pushed the envelope, arguing that he his termination (cause or no-cause) rendered the covenant invalid under Post. The court disagreed, finding that Post invalidated only no-cause terminations, not those where there was justification.

[6]Like Gismondi, the MTV decision has limited value, to wit, it recognizes the employee-friendly view that Post requires "mutuality of obligation" relative to continued employment for a restrictive covenant to be valid. Otherwise, it too is a case in which the employee had an agreement in which the employer could terminate him for cause.

[7]See, After Termination 'Without Cause': Restrictive Covenants, Epstein Becker & Green, P.C., February 8, 2007 at www.ebglaw.com/showarticle.aspx?Show=5302 and cases cited therein.

[8]However, as discussed below, there is one case that explicitly acknowledges the tension that exists over how Post should be read. See, Globaldata v. Pfizer, et al., 10 Misc.3d 1062A (Sup. Ct. N.Y. Co. 2005).

[9]"Acknowledging the tension between the freedom of individuals to contract, and the reluctance to see one barter away his freedom, the State enforces limited restraints on an employee's employment mobility where a mutuality of obligation is freely bargained for by the parties. An essential aspect of that relationship, however, is the employer's continued willingness to employ the party covenanting not to compete."

[10]Although the bona fides of the at-will doctrine are beyond the scope of this article, it bears saying that this premise is the epitome of elevating form over substance. While an employee is free to go, s/he often times cannot. Clearly, absent a unionized setting, the reality of the working world (in good and bad economic times) is that employers have a much superior bargaining position. As this author likes to say, the at-will doctrine refuses to acknowledge that in most instances "the employee needs the job more than the job needs the particular employee."

[11] Notwithstanding, although invalidation of restrictive covenants in New York is virtually impossible, we can always strive toward a statute that governs them and applies very employee-friendly conditions. See, Oregon Rev. Stat. §653.295. Recently amended in 2007, the Oregon law now states that a covenant will be enforceable only if, among other things, a) the employer tells the employee in a written job offer at least two weeks before starting that the non-compete will be required, or will be required later for advancement; b) the employee is exempt from that state's minimum wage and overtime laws; and c) at the time of termination, the employee makes more than the median family income for a family of four as calculated by the Census Bureau.

[12] However, one could also argue that an employer has no reason to obtain an express, written agreement because a former employee has a common law duty not to disclose such secrets.

ELECTRONIC DISCOVERY, from page 8

vertent production of a privileged communication as a waiver, with potentially dire consequences.

An email from counsel warning a client against a risky tax strategy might have lost its protection in a subsequent tax proceeding brought by the federal government while remaining privileged in the original proceeding. Also, under some states' laws, just entering into a claw back agreement could be deemed a waiver of privilege.

For cases filed after its effective date, September 19, 2008, FRE 502 is a complete and elegant solution to the third party problem. It applies to previously filed cases at the discretion of the trial judge. FRE 502(b) Inadvertent disclosure, provides that

> When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
>
> 1. the disclosure is inadvertent;
> 2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
> 3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Thus even if the parties have not entered into a clawback agreement, inadvertent disclosures in the context of a federal "proceeding" will not operate as a waiver of privilege, or the work product doctrine, in that proceeding, and this covers the wayward email to opposing counsel as well as ESI produced in discovery. However, FRE 502(d) goes further, and provides that:

> A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other Federal or State proceeding.

As a consequence, if the court rules that there was no waiver in the initial proceeding, no third party can claim a waived in any other proceeding, including in state court cases. The Advisory Committee Notes explain that:

> Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.

Under 502 the parties are still masters of their own fate if they enter into a claw back agreement under Rule 26(b)(5)(B), which may go further than FRE 502 in setting conditions on the right to avoid waiver. For example, the parties may find it desirable to require a demand of return or destruction of inadvertently produced material within a certain time frame following notice of the inadvertent production, failing which demand the inadvertent production may be deemed a waiver. Under 502(e) if the claw back "is incorporated into a court order" the terms have the same preclusive effects on third parties in state and federal courts.

[1] If you have a Facebook page, do not make your clients your "Friends;" their postings on your "Wall" will effect a waiver of the attorney client privilege, and not an inadvertent one at that.

[2] PeopleSoft was a company which sold a widely used Human Resource Management System which used a proprietary SQL database. http://en.wikipedia.org/wiki/PeopleSoft

[3] Rule 16(b) provides that scheduling orders may include provisions on the disclosure or discovery of ESI. The new Rule 16(b) also allows for a case-management order adopting the parties' agreements for protection against waiving privilege. As discussed below, new FRE 502 has radically changed the landscape, so discussion of clawback is postponed to the end of this article, where it is discussed in the context of FRE 502.

[4] This is a very different situation than where you have to bring in an expert to conduct a forensic examination of a computer. Cf. Thielen v. Buongiorno USA, Inc., 2007 U.S. Dist. LEXIS 8998 (D. Mich. 2007)(requiring party seeking discovery to pay for expert to mirror image drive and conduct searches for evidence that party accessed a website) ■

PRESIDENT'S, from page 3

ator or aide with whom we could speak about the proposed legislation, that would also be very helpful.

Membership (Phil Taubman, Chair): This Committee has been active in the past in attempting to recruit new members. It has been somewhat moribund in recent years, but I would like to resurrect it. If anyone has any ideas regarding increasing membership and/or would like to be involved in this effort, please let Phil know.

Newsletter (Rachel Geman, Gary Trachten): Without Rachel Geman and Gary Trachten, our organization would have no newsletter – and since they took the reins, it has been a terrific newsletter. Every quarter they struggle to get folks to write articles and squibs. We need content. The articles are supposed to be relatively short, so this is a great way to get your name out there on an issue that you are excited about without having to spend too much time. Also, if you come across a new case that you think is interesting or important to our group for some reason, please consider squibbing it.

Sex Harassment/Sex Discrimination Committee (Margaret McIntyre (Chair), Eugenie Gilmore): This group meets periodically to discuss issues and cases around sexual harassment and/or discrimination. Margaret has also squibbed cases for the Newsletter about these issues.

So, it is time to set aside our "childish things" and to help each other help our clients in this very challenging environment. Just one thing this year for NELA/NY is all I ask. ■

[1] *The relevant passage goes, in full, as follows:*

...When I was a child, I spake as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things.
For now we see through a glass, darkly; but then face to face: now I know in part; but then shall I know even as also I am known.
And now abideth faith, hope, charity, these three; but the greatest of these is charity.

AMERICAN RECOVERY, from page 14

ered) under another group health care plan (other than plans providing only dental, vision, counseling, or a health care flexible spending plan) or Medicare coverage. The stimulus bill requires an employee who becomes eligible for coverage under another group health plan to notify the plan providing COBRA coverage in writing. Failure to do so results in a penalty to the employee of 110% of the subsidy provided after the date the employee became eligible for the other coverage.

Changes to Unemployment Benefits

Extended benefits

New Yorkers are currently eligible to receive 26 weeks of regular unemployment insurance benefits and 20 weeks of extended benefits. The stimulus bill provides for an additional 13 weeks of extended benefits, bringing the total to 33 weeks of extended benefits, or 59 weeks of combined regular and extended benefits. The stimulus bill also extends the period of time to qualify for extended benefits. Previously, the deadline for applying for extended benefits was to be March 31, 2009, with no extended benefit payments made beyond August 2009. The stimulus bill now allows new claims for extended benefits to be made through December 31, 2009, with benefits payable through May 31, 2010.

Increased benefits

Everyone receiving unemployment benefits on or before Dec. 31, 2009 will get an extra $25 per week, through June 30, 2010.

Income tax break

Normally, a recipient must pay federal income tax on all unemployment compensation. The stimulus bill suspends federal income tax on the first $2,400 of unemployment benefits per recipient in 2009. Any unemployment benefits over $2,400 will still be subject to federal income tax.

Changes to Whistelblower Protections

The stimulus bill contains a whistleblower protection provision for employees of private contractors and state and local (but not federal) governments who report gross mismanagement, gross waste, public safety issues, abuse of authority, or violation of law in the implementation or use of the stimulus funds. Protected disclosures include those "made in the ordinary course of an employee's duties" to any of a long list of officials, including to Members of Congress.

For a discussion of the stimulus bill's changes to whistleblower protections, I refer you to the Whistleblower Law Blog, which provides excellent coverage of the topic. (http://employmentlawgroupblog.com/2009/02/15/congress-enacts-robust-whistleblower-protections-to-prevent-fraud-in-stimulus-spending/) ■

COBRA PREMIUM , from page 1

coverage under COBRA. The form of agreement also included this language: "COBRA is considered taxable income and, therefore, Employee will be subject to withholding for income and/or other applicable taxes." With that certitude of expression, I was inclined to believe that my adversary who drafted the document probably had it right. However, I soon learned that the IRS, at least, does not consider COBRA premium payments made by an employer for an ex-employee to be taxable.

Although I confess that I still have not analyzed the governing statute, regulations or rulings, I recently had the good fortune of coming across IRS Publication 15-B, (Cat. No. 29744N, Employer's Tax Guide to Fringe Benefits (for use in 2008), Page 6, which states as follows:

> *COBRA Premiums.* The exclusion for accident and health benefits applies to amounts you pay to maintain medical coverage for a former employee under the Combined Omnibus Budget Reconciliation Act of 1986 (COBRA). The exclusion applies regardless of the length of employment, whether you directly pay the premiums or reimburse the former employee for premiums paid, and whether the employee's separation is permanent or temporary.

With that certitude of expression, I am now inclined to believe that the IRS has it right. Therefore, I now send a copy of the IRS Publication to employers when I ask them to acknowledge in the severance agreement that since the COBRA premium payments are excluded from income, no Form 1099 will issue in connection therewith. (My adversary in the abovemention situation agreed to remove the "COBRA is considered taxable..." language.) More importantly, I offer the employee-side bar following suggestion: When our clients know that they will make substantial long term use of COBRA, we should consider bargaining for more employer-paid COBRA premiums – even if at the dollar-for-dollar expense of other (taxable) severance moneys. ■

Workers Compensation

&

Social Security Disability

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