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# MASUD, PATTERSON, SCHUTTER & PETERS, P.C.

ATTORNEYS AND COUNSELORS  
*SPECIALIZING IN LABOR AND EMPLOYMENT LAW*

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## NEWSLETTER

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### New Identity Theft Notification Law in Michigan Requires Notice in the Event of a Security Breach

On July 2, 2007, Michigan joined a majority of other states with a new identity theft notification law that may require notification in the event of a security breach, which generally means any unauthorized access to and acquisition of unredacted and unencrypted personal information that compromises its security or confidentiality. This new law, which amends the Michigan Identity Theft Protection Act, will apply to any person doing business in Michigan who owns or licenses computerized information containing “personal information” of Michigan residents that is maintained in a database. This would include employers who maintain databases of employee’s personal information for employment, tax, and employee benefit purposes. “Personal information” means a last name and first name or initial, linked with one or more of the following: (1) a social security number; (2) a driver’s license or state ID number; or (3) a financial account number with any required PIN or access code.

The new law contains two general requirements: (1) notice to Michigan residents in the event of a security breach; (2) and destruction of personal information after it is removed from a database.

Under this new law, unless a business or an employer reasonably concludes that a security breach has not or is not likely to cause substantial loss or injury to Michigan residents, the employer or business will generally have an obligation to provide written notice to those individuals whose information was involved. Health plan records that are subject to HIPAA are exempt from the notice requirement, but only if the

entity is in compliance with HIPAA. There is also a notice exemption for personal information maintained by a financial institution that is subject to and in compliance with other federal regulations. If a security breach occurs which requires a notice to Michigan residents, the new law does not provide a specific deadline for providing this notice. Instead, the law requires that it be sent without unreasonable delay. The required notice must describe the security breach, the type of information involved, steps taken to prevent further security breaches, a contact number for additional information, and a reminder to remain vigilant for incidents of fraud and identity theft. If more than 1,000 Michigan residents are affected, the business or employer must also notify the national consumer reporting agencies.

If an employer or business fails to provide notice, the new law provides for a civil fine of up to \$250 for each notification letter that was not sent, not to exceed \$750,000 for any one security breach. A knowing violation could lead to 30 days imprisonment and a \$1,000 fine per affected resident.

The new law also creates an obligation to destroy any personal information that is removed from a database and is not being retained for some other lawful purpose. An employer or business can destroy the data by shredding, erasing or modifying it to make it indecipherable. There is an exemption from the destruction requirement for entities that are subject to and in compliance with federal record disposal laws. A knowing violation of the destruction requirement can result in a misdemeanor conviction and a fine of up to \$250 per affected resident.

(See **New Identity Theft Notification**, page 2)

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### **New Identify Theft Notification from page 1**

As a result of this new law, employers in Michigan would be wise to establish and/or revise their written policies concerning personal information protection and record retention.

### **Important Reminder: Michigan's Minimum Wage Increase**

This is a reminder that on July 1, 2007, Michigan's minimum wage increased to \$7.15 per hour.

### **United States Senate Will Not Vote on "Employee Free Choice Act"**

In our April 2007 newsletter we reported on the implications of the so-called Employee Free Choice Act (EFCA), which had passed in the House of Representatives by a wide margin. On June 26, 2007, supporters of the EFCA, which would eliminate an employee's right to vote on whether to be represented by a union, fell nine votes short of the 60 needed to limit Senate debate and permit the Bill to proceed to a vote on the Senate floor. No further action will be taken on it during this Congressional term.

### **New EEO-1 Filing Requirements Go Into Effect September 30, 2007**

If you are a private employer with 100 or more employees or a federal contractor with 50 or more employees and a contract of \$50,000 or more, you are required to submit annual EEO-1 reports to the Joint Reporting Committee each year by September 30<sup>th</sup>. These reports track employee data by race, ethnicity, sex, and job classification. These EEO-1 reports were recently revised and all employers must report using the new EEO-1 form beginning with the report due on September 30, 2007.

The revised EEO-1 form changed the race and ethnic categories to add a new category for "two or more races." In addition, the previous category of "Asian or Pacific Islander" has been divided into two separate categories: "Asian" and "Native Hawaiian or other Pacific Islander." The category previously described as "Black" has been renamed as "Black or African American," and the "Hispanic" category has been renamed as "Hispanic or Latino." In addition to revising the race and ethnic categories, the revised EEO-1 also splits the previous job category of

"Officials and Managers" into two new categories: "Executive/Senior Level Officials and Managers" and "First/Mid-Level Officials and Managers."

In order to fully complete the new EEO-1 form, employers will ultimately have to resurvey their workforce to gather the necessary race data. However, for the EEO-1 report due September 30, 2007, employers are only required to use the new EEO-1 form. Employers are not required to identify their workforce using the new racial and ethnic categories until September 30, 2008.

If you have any questions regarding these new EEO-1 requirements, please do not hesitate to contact our firm.

### **Unreported Overtime Not Compensable**

Under the Fair Labor Standards Act ("FLSA"), employers must pay eligible employees one and one-half times their regular rate of pay for all hours worked in excess of 40 hours in a given work week. A recent decision from the Sixth Circuit establishes that this obligation is not without limits.

In Wood v. The Mid America Management Corporation, a former employee sued his former employer for failing to pay him overtime wages under federal and state law. Although the employer paid the employee for all of the overtime hours he reported on his time cards, the employee claimed that he did not report all of the overtime he worked and, accordingly, the employer must pay him for this additional time as well. The Sixth Circuit Court of Appeals, in affirming the dismissal of the employee's lawsuit, held that in order to be entitled to overtime compensation an employee must show that the employer knew or should have known that the employee was working overtime or, better yet, the employee should report the overtime hours himself.

This case highlights the need for well-established policies and procedures including, but not limited to, policies concerning the payment of overtime.

### **Update on Residency Requirements for Public Employees**

The Residency of Public Employees Act generally prohibits public employers in Michigan from

requiring their employees (except volunteer or paid on-call firefighters, elected officials and unpaid appointed officials) to live within a specific geographic area. Public employers can, however, require that an employee reside within a specified distance from the nearest boundary of the employer, provided that the distance is not less than 20 miles. In Lash v. City of Traverse City, the Michigan Supreme Court held that the 20-mile distance is to be measured in a straight line between the employee's place of residence and the nearest boundary of the public employer as opposed to actual driving distance. The Court also held that an individual may not maintain a private cause of action for money damages for violation of the statute.

As a result of this decision, public employers should review their residency requirements to ensure they are in compliance with the law.

### **Michigan Supreme Court to Hear Same Sex Benefits Case**

The Michigan Supreme Court has granted leave to appeal in National Pride at Work, Inc. v. Governor of Michigan, a case involving the constitutionality of same sex benefits provided by public sector employers. The Court of Appeals had previously ruled that public employers are barred from providing such benefits by a 2004 amendment to the Michigan Constitution.

### ***LAW FIRM UPDATES AND CLIENT SUCCESSES***

### **ABC and Masud, Patterson, Schutter & Peters Prevail Against the State's Efforts to Enforce Apprenticeship Ratios**

In 1992, Associated Builders & Contractors ("ABC") and Masud, Patterson, Schutter & Peters ("MPSP") were successful in thwarting the State of Michigan's attempts to impose an apprentice-teacher ratio in the Michigan Electrical Administrative Act ("MEA"). ABC and MPSP argued that the state

statute, which was backed and lobbied for by labor unions who have included ratios in their collective bargaining agreements, was preempted by ERISA, a federal statute which governs pensions and benefits. At that time, the federal court imposed an injunctive order which prohibited the state of Michigan from enforcing the one-to-one ratio requirements of the MEA.

Fourteen years later, the State of Michigan chose to mount a new effort to enforce the apprenticeship ratio provisions contained in the MEA and to dissolve the injunctive order. The basis of the State's argument was that the law concerning ERISA preemption had changed in the years since 1992 and, therefore, the State should be able to mandate a one-to-one apprentice-instructor ratio. In response to this challenge by the State, ABC and MPSP mounted a vigorous defense, attacking both the State's legal analysis and its delay in seeking judicial review of the issue. In a result which sent the Union reeling, ABC was successful in its efforts to ensure that the apprentice ratio provisions of the MEA remain unenforceable and preserve the status of the injunctive order.

ABC's victory in this case is important not only because it preserves a contractor's right to maintain independent apprenticeship programs, but because it clearly signals that there are limits to the State's ability to regulate apprenticeship programs.

### **The Teaching Profession Getting Ready to Welcome a Masud, Patterson, Schutter & Peters Employee**

Over the past several summers, our law office has had the pleasure of employing Lauren Patterson as an assistant within the office. Lauren is the daughter of Gary Patterson, shareholder and vice-president of the firm. Lauren has recently been offered a teaching position with the Grand Ledge Public Schools. Please join us in wishing Lauren the best of luck in all of her future endeavors.