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First Quarter, 1999

## LABOR UPDATE

*Recent Developments in Labor and Employment Law*

### **A NEW NAME - A VALUED PARTNER**

We are pleased to announce the formation of the law firm of Peters & Lyons, Ltd., effective January 1, 1999. As always, Chris, Dave and I look forward to energetically fulfilling our commitment to provide timely, professional, practical advice and guidance to our clients.

A lifetime Chicago area resident, Chris Lyons attended the University of Illinois, as an Evans Scholar. He is a distinguished graduate of the University of Illinois, College of Law. Licensed to practice law in 1990, Chris Lyons first was associated with McBride, Baker and Coles before joining the Law Offices of Donald F. Peters Jr., as an associate in 1993.

Concentrating his practice in the representation of management, in labor and employment law matters, over the past eight years Chris Lyons has successfully represented clients before various federal and state trial and appellate courts, as well the EEOC and Illinois Department of Human Rights.

Chris is married to Maureen (Ryan) and lives in Chicago. Successfully finishing the 1998 Chicago Marathon, Chris is an avid sportsman, enthusiastic Evans Scholar alumnus and is known to enjoy a fine cigar on occasion.

We thank all those who have offered their support and extended their good will toward our new firm. We appreciate the opportunity to serve you and those whom you may recommend to us.

## **EMPLOYEE E-MAIL AND INTERNET CONNECTIONS**

The enormous increase in electronic mail use in the workplace has recently created numerous and novel legal issues for employers. Recent cases concerning e-mail have dealt with employee privacy rights, the disclosure of confidential information, unions' rights to access employee e-mail, and the rights of third parties to obtain company records by e-mail. Whether employers provide their employees with external e-mail access through the Internet or with basic internal e-mail systems, recent legal developments should encourage employers to implement comprehensive e-mail policies. Such policies are especially critical for those employers that may need to monitor their employees' e-mail transmissions.

Because e-mail allows employees virtually unfettered communication with an unlimited number of people, employers must be acutely aware of what their employees are saying and doing with their office e-mail. A quick review of just a few cases dealing with employee e-mail reveals a wide range of potential problems for employers who fail to monitor the e-mail transmissions of their employees.

For example, recent cases have documented:

A company executive's inadvertent discovery of an employee's e-mail message in which the employee threatened to murder members of the company's management;

An e-mail message sent to all company employees containing a list of reasons "why beer is better than women", which became the subject of a hostile work environment sexual harassment suit, eventually settled for \$2.2 million;

A supervisor's many e-mail messages to a female subordinate referring to male genitalia, sex acts, and containing racially offensive material; and,

A supervisor, who randomly selected employee e-mail messages as part of an e-mail instruction class and uncovered personal employee correspondence of a sexual nature.

These examples demonstrate how critical it is for an employer to have some control over employee e-mail. Not only can an inappropriate or abusive e-mail reflect badly upon the employer, but it may form the basis for an expensive and well-publicized lawsuit.

However, the monitoring of employee e-mail may raise legal concerns. Employees have filed invasion of privacy suits against employers for monitoring or intercepting supposedly "private" employee e-mails. For this reason, an employer who wishes to monitor employee e-mail should insure that its employees are aware that it can and will do so.

The lawyers of Peters & Lyons, Ltd. would be happy to assist you in the drafting, dissemination, and implementation of an e-mail/internet policy which will clearly inform all

employees that e-mail is a business tool, not personal toy, and may be monitored. These policies can eliminate an employee's expectation of privacy in the e-mail system, making the employer less susceptible to an employee invasion of privacy suit or other legal action. In addition, e-mail policies can promote e-mail's true purpose - to make employees more efficient and productive.

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## **MEDICAL AND GENETIC TESTING OF EMPLOYEES ON TRIAL**

In a suit likely to have a long-term impact on how companies hire, the Equal Employment Opportunity Commission has filed a lawsuit challenging Rockwell International's practice of testing potential employees for susceptibility to diseases and conditions which the applicant may develop in the future. This practice, the EEOC contends, violates the anti-discrimination provisions of the Americans with Disabilities Act.

The lawsuit began when Rockwell required hundreds of potential employees to submit to medical tests as a part of their application process. One of the tests, called a nerve-conduction procedure, was used to determine employees' propensity to develop carpal-tunnel syndrome, particularly in assembly jobs requiring repetitive physical movements. As a result of these tests, over eighty employees were denied work. Although the company defended its use of the tests as a legitimate method of excluding employees more likely to develop expensive diseases or become injured on the job, the EEOC claims that it is illegal to treat individuals differently because of a condition which the employee has yet to develop.

The true significance of this case goes beyond mundane physical testing and impacts the increasing use of genetic testing by employers. Presently, about one percent of American companies test for genetic markers indicating a susceptibility to disorders such as breast cancer and Huntington's disease. However, with the vast increase in genetic studies linking medical conditions to their genetic origins, the number of companies making use of genetic testing is expected to quickly increase.

Such testing has been scrutinized because there is no direct correlation between genetics and most diseases. Even though a particular genetic marker may indicate an increased likelihood that an individual will develop a particular disease, it is not a guarantee. Medications, diet, lifestyle changes, or luck may prevent the individual from becoming afflicted.

The question of whether employers may use medical and genetic tests to exclude employees with a propensity to develop a disease will likely be decided by a federal judge in Chicago early next year.

## **BITS AND PIECES**

The phrase "You can kiss my grits" has now become permanently enshrined in Illinois law in an unemployment case that wound its way up to the Appellate Court. The claimant, Sharron Greenlaw, uttered the offending phrase while in a heated discussion with her supervisor over a reduced workload. She was terminated for insubordination and filed for unemployment benefits. Although the Department of Employment Security found Greenlaw ineligible for benefits, its decision was overturned by a circuit court judge who interpreted the statement using the literal dictionary meaning of "grits" as "ground hominy with the grain removed". The appellate court took a more common-sense approach and found that the phrase was abusive and "violated the standard of behavior an employer has the right to expect". As a result, Greenlaw was denied unemployment benefits.

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A recent survey by the American Management Association showed that the stereotype of the leering supervisor as the instigator of sexual harassment does not always hold true. Instead, almost fifty percent of harassment complaints named co-workers and peers as the source of the problem. Direct supervisors were named in only twenty-six percent of the claims. The survey also found that even though eighty-nine percent of reporting companies have a formal sexual harassment policy, complaints of sexual harassment have increased twenty-seven percent in the past four years.

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During a brief but unsuccessful organizing drive, the Retail Clerks' Union circulated a flyer accusing the company of lying to them. The company offered to pay \$100,000 to any employee who could prove that it had lied. One employee claimed he had such evidence but, when he was asked for specifics, refused to specify what the lies were. The employee then prepared a "breach of contract" claim based on the company's failure to pay the \$100,000, but never filed it in court. Two months later, the employee was disciplined for getting into a fight with a customer. He then began distributing his unfiled lawsuit among his coworkers and was terminated. The administrative law judge and the NLRB determined that the employee had engaged in "protected concerted activity" and ordered his reinstatement.

## QUOTABLE

*The most enlightened judicial policy is to let people manage their own business in their own way.*

*Oliver Wendell Holmes*

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Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of the Law Offices of Donald F. Peters Jr. Written entirely by this office, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed nor as covering all significant developments in labor and employment law. The LABOR UPDATE is not intended to be a substitute for legal advice.

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