



# In The Trenches

By Mark A. Wagner

## Practical Answers to Your HR Questions

**Q** *We have several employees who smoke. They take their smoke breaks outdoors. Are there restrictions on where they can smoke outdoors, and, if so, what are they?*

**A** Yes, there are restrictions on where employees may smoke outdoors. The Utah Indoor Clean Air Act (“Act”) prohibits smoking inside public buildings and offices (those owned or rented by a state or local governmental entity or an agency that receives government funds) and in most indoor places of business to which the public or other non-employees have regular access. Although the Act is silent on the issue, regulations issued by the Utah Department of Health extend these prohibitions outdoors – for a distance. In particular, these regulations require employers to establish workplace smoking policies that prohibit employees from smoking within 25 feet of any entranceway, exit, open window, or air intake of a building in which smoking is prohibited. The only exception is where a physical or legal barrier (such as a wall, parking lot, street, or property line) makes the 25-foot requirement “impossible” to meet. In this instance, the policy must “maximize” the distance between the smokers and the entranceway, exit, open window or air intake. In addition to the distance restrictions, the regulations provide that, if a business locates ashtrays closer than 25 feet to an entranceway, such ashtrays must be accompanied by a sign stating, “No Smoking,” “For extinguishing cigarettes only- No Smoking,” or the like. The words “No Smoking” must be printed in letters at least 1.5 inches tall. Finally, these regulations also impose an affirmative duty on employers to enforce their workplace smoking policies.

**Q** *An employee has come to me with a concern that a coworker might be visiting Internet pornography sites – and possibly even child pornography sites. We have an Internet and E-mail usage policy that prohibits accessing such sites with company computers or while on company time, and which also states that the company may monitor an employee’s Internet usage.*

*Should we handle this situation any differently than any other situation of alleged improper Internet usage?*

**A** You should handle this situation with infinitely more care than you would handle any other case of alleged Internet “misuse,” and in close consultation with experienced legal counsel from the very outset.

Situations that might involve questions of child pornography are fraught with unique and serious hazards, and must be handled with unique and serious care. If you do nothing, you expose the company, and possibly yourself, to potential civil or criminal liability. A New Jersey appellate court recently held that when an employer has actual or imputed knowledge that an employee is using a computer at work to “access pornography, possibly child pornography, [the company] has a duty to investigate ... and to take prompt and effective action to stop the unauthorized activity.” It is not clear that a Utah Court would impose a similar duty on an employer under facts similar to those in the New Jersey case, or based on reasoning similar to that used by the New Jersey Court. What is clear is you do not want this question decided in a case involving you or your company. Separately, you might already have, or might soon obtain, sufficient information to trigger a legal duty to report the matter to law enforcement under Utah’s child abuse or neglect reporting statute. You might subject yourself and your company to criminal liability for failing to do so. Furthermore, it is possible that the company’s equipment is being used for illegal purposes. The criminal overlay is in addition to the “normal” multitude of potential problems in the areas of hostile work-environment and the like.

At the same time, there are numerous reasons for proceeding with extreme care when taking action. Issues of child pornography are highly sensitive and emotionally charged, and

■ in the trenches — continued on following page 11

## ■ In the trenches

can trigger powerful and possibly precipitous judgments, statements, and actions. Separately, potential digital image manipulation may make it difficult, if not impossible, to determine whether particular images that might be discovered during any inquiry or investigation are criminal or are just offensive. Moreover, the myriad of potentially applicable criminal laws dealing with the viewing, “possession,” and “distribution” of child pornography can render it unclear whether any particular actions you or the company might take in the course of investigating or documenting the matter might also be illegal.

In summary, you should not try to handle this yourself. Instead, you should seek guidance from legal counsel with experience in such matters, and you should do so promptly. ■



*In the Trenches* is provided courtesy of the Labor and Employment Law Group of Van Cott, Bagley, Cornwall & McCarthy, P.C., and is authored this month by Mark A. Wagner, who is Chair of the firm’s Labor and Employment Law Group. You can reach Mr. Wagner at 801.532.3333. If you have questions you would like considered for publication in future issues of *HR Views*, please send them to [pamgunnell@pipelinewireless.net](mailto:pamgunnell@pipelinewireless.net).

## ■ Legal and legislative update

employer is to only act on conduct that has a clear nexus and significant impact on the workplace or business.

### WELLNESS PLANS AND DISABILITY LAW

Another legal conference provides some good tips for employers regarding the risks of employee wellness plans. One speaker noted that according to a recent survey, forty percent of employers are involved with such programs. Under certain circumstances, such plans can run afoul of the ADA or state disability discrimination laws. For example, an ADA violation may occur if participation in a program is mandatory if information collected on wellness questionnaires is not kept confidential or is used in employment decisions. A state law violation could occur if the employee is sanctioned for involvement in a lawful off-duty activity (see discussion above). Each of these risks is manageable, but if not managed, it may be the employer who ends up with a fat lawsuit and an unhealthy hit to its bottom line. ■

Mike O'Brien practices employment law with the law firm of Jones, Waldo, Holbrook & McDonough P.C. in Salt Lake City, Utah. He serves on various national and local boards and legislative committees for the local and national Society for Human Resource Management (“SHRM”) and regularly addresses businesses and business groups on employment law topics. He recently was named Utah State Bar Employment Lawyer of the Year.

## Don't Get Nailed By The Unexpected

It's a delicate balance – nurturing and retaining employees while protecting and growing your business. Van Cott's Labor and Employment attorneys help employers maximize productivity by focusing on the prevention of lawsuits, and providing effective defense when litigation is unavoidable.

#### Preventative measures include:

- Hiring and retention policies
- Employment policies and procedures
- Drug and alcohol policies and testing
- Wage and hour law compliance
- Noncompete, confidentiality, and other employment agreements
- Employment inventions, work-for-hire agreements, and intellectual property protection
- Safety and Health law compliance
- Technology and employee privacy
- Harassment training and prevention
- Supervisory training programs
- Executive compensation and incentive arrangements

For more information about Van Cott's Labor and Employment Services, visit [www.vancott.com](http://www.vancott.com).



**VanCott**

*Serving Utah's Legal Needs Since 1874*

# Van Cott, Bagley, Cornwall & McCarthy, P.C.

50 South Main Street, Suite 1600, Salt Lake City, UT 84144 • Telephone: 801.532.3333 • Offices in Salt Lake, Ogden, and Park City