Labor & Employment

Internships: Worthwhile Programs or Liability Traps?

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BY MICHAEL C. SCHMIDT

Wage and hour lawsuits under the federal Fair Labor Standards Act (FLSA) and related state laws continue to be red hot, and the issues raised continue to offer a panoply of questions, challenges and risk for employers in New York.

One of the more recent trends in this area—and one not likely to fizzle out any time soon—involves the surge in lawsuits brought on behalf of a company's current (and former) unpaid interns.

What's New With Internships?

For decades, internships have been offered by corporate America to serve a dual purpose: providing students and others new to the industry a welcomed opportunity to learn the trade in a real-world working environment, while at the same time defraying the cost of such training by bringing in the individuals as unpaid interns. However, a series of lawsuits have threatened to turn the world of internships upside down, and place companies at risk of significant liability at a time when the economy still cries out for the valuable experience these internships offer when individuals still have trouble finding good, paying jobs.

It is not just the small, mom-and-pop shop at risk. The big name companies have been placed in the litigation spotlight as well: Fox Searchlight Pictures, Hearst Corporation, Charlie Rose, Condé Nast Publications, just to name a few. And last month in early September, the production companies of The Late Show with David Letterman were hit with a lawsuit in New York County Supreme Court alleging that current and former interns were not paid required minimum wage and overtime, despite being forced to work more than 40 hours in a week. *Musallam v. CBS Broadcasting*, Supreme Court of the State of New York, County of New York, Index Number 158662/2014.

Less than a week after the lawsuit was filed, the plaintiff in *Musallam* curiously withdrew the lawsuit. Nevertheless, the claims made in *Musallam* are representative of those made in all of these recent intern cases, and alleged that plaintiff "performed various tasks, including, but not limited to, research for interview material, deliver film clips from libraries, running errands, faxing, scanning, operating the switchboard, and other similar duties." Essentially, plaintiff claims that the interns at The Late Show replaced and displaced "regular" employees, without getting paid for their work.

That filing came on the heels of significant action within the Second Circuit involving two internship cases with markedly different outcomes at the moment. In *Wang v. The Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013), Judge Harold Baer Jr. of the Southern District of New York refused to certify a class of interns, and also refused to grant summary judgment. Yet, one month later, Judge William Pauley III reached a different conclusion by granting summary judgment and certifying a class of unpaid interns in *Glatt v. Fox Searchlight Pictures*, 293 F.R.D. 516 (S.D.N.Y. 2013). In *Glatt*, the court expressly found that unpaid interns working on the film *Black Swan* "were classified improperly as unpaid interns and are 'employees' covered by" federal and state law. In November 2013, the U.S. Court of Appeals for the Second Circuit agreed to hear appeals in both cases in tandem, which will hopefully provide a clearer roadmap (at least for cases brought within the Second Circuit) as to how to determine whether an intern has been misclassified for purposes of the FLSA.

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The attempt to have interns classified as "employees" can reasonably be viewed as part of a larger push in New York and across the country to afford better wage and benefit protection to workers. It is impossible to not hear or read a story today about federal efforts to change overtime exemptions in a manner that would increase the number of employees who fall outside the exemptions, or about efforts to increase the minimum wage in fast food and other industries, or about paid sick leave legislation being enacted on multiple state and local levels.

Yet, it is also worth noting that these pro-worker initiatives do not end with wage and hour issues. For example, on July 22, 2014, N.Y. Gov. Andrew Cuomo signed into law an amendment to the New York State Human Rights Law that expressly prohibits discrimination, harassment, and retaliation against unpaid interns. N.Y. Exec Law §296-C. That new law became effective immediately, and followed similar legislation signed by New York City Mayor Bill de Blasio to amend New York City's Human Rights Law.

Although one thing at a time for purposes of this article. The uptick in wage and hour lawsuits filed by interns is significant, not only because of the impact an adverse decision on the merits could have for employers and internship programs generally, but because of the far-reaching net of potential interns involved in these cases. Thus, like most other types of wage and hour lawsuits, these internship cases are brought as collective and class actions, with New York's six-year statute of limitations for wage claims increasing the size of the potential group of plaintiffs.

What's the Issue?

Put simply, the issue is: Whether an intern is an "employee" for purposes of an employer's minimum wage, overtime, and other wage and hour obligations.

The FLSA defines "employ" as "to suffer or permit to work." 29 U.S.C. §203(g). It defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee[.]" Id. at §203(d). Quite helpful. As the Department of Labor has » Page 11

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Courts Put Down Their **Blue Pencils**

Recent trends affect drafting of restrictive covenants.

BY NEAL H. KLAUSNER AND DAVID FISHER

Several recent decisions have underscored that New York courts continue to disfavor post-employment restrictive covenants. In recent months, both state and federal courts in New York have refused even to partially enforce restrictive covenants that they found to be unreasonable in scope.

Additionally, the Southern District of New York recently held that if an employee has not signed an enforceable restrictive covenant, it will take extraordinary circumstances for a former employer to stop the employee from working for a competitor, even if the employee had access to the former employer's trade secrets and his new position is similar to his prior post.

The courts in *Brown & Brown v. Johnson*[1] and *Veramark Technologies v. Bouk*[2] refused to judicially narrow or "blue-pencil" overbroad post-employment restrictions to make them enforceable. Rather, the courts held that employers should know the requirements for an enforceable restrictive covenant and prepare their agreements accordingly. At the same time, the Southern District, in *Janus Et Cie v. Kahnke*,[3] emphasized that without an enforceable restrictive covenant it will be extremely difficult for employers to restrict an employee's post-employment activities even if the employer believes there is a high risk that the employee will inevitably use the employer's confidential information in his or her new job.

The N.Y. Court of Appeals picked up the blue pencil in *BDO Seidman*. For many employers, their most important assets include their employees, their proprietary information and their client relationships. All of these assets may be jeopardized when an employee resigns or is terminated. As a result, employers often seek to protect these business interests by entering into agreements with their employees that restrict the employees' ability to perform certain activities after their employment terminates.

These "restrictive covenants" vary from prohibitions on working for a competitor, to prohibitions on soliciting and/or hiring the employer's employees and prohibitions on soliciting and/or servicing the employer's clients.

In 1999, in the seminal case of *BDO Seidman v. Hirshberg*,[4] the New York State Court of Appeals held that a post-employment restriction is reasonable "only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and » Page 13

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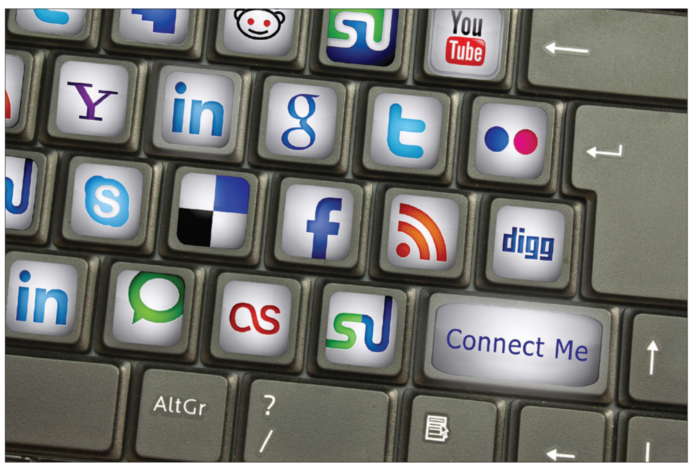

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Cases Illustrate Creative Uses Of **Social Media Evidence**

BY A. JONATHAN TRAFIMOW AND JACQUELYN J. O'NEIL

As Internet communications quickly replace the use of pen and paper, the field of electronic discovery continues to increase in importance. Many articles have been written about the ability to request and receive electronic discovery including various forms of social media—such as information from Facebook, LinkedIn, Myspace, Twitter and Instagram.

However, the right to obtain discovery and its actual use to support a claim or defense are two very different battles. In the employment law context, once an employer has obtained social media evidence (whether through discovery or from its own investigation) the question becomes: How is this evidence actually used—if at all—in the course of litigation? Several recent cases around the country have demonstrated unique or creative ways in which social media evidence has been used to either support or defend a claim of employment discrimination.

Litigators representing employers should consider ways in which they can use social media evidence to demonstrate that the employer had a reason to terminate or discipline the employee and that the stated reason was not pretextual. For example, one employer used social media evidence to support its claim that it terminated an employee due to her failure to follow office procedure, when she had an opportunity to do so, and not because of any discriminatory motive. In *Tabani v. IMS Associates*, an x-ray technician claimed that she was discriminated against based upon her sex in violation of Title VII of the Civil Rights Act of 1964.[1] The employee informed her employer that she was being hospitalized on Jan. 3, 2011, due to pregnancy complications, and thus, would be absent from work. The employee was admitted and did not communicate with her employer again until Jan. 6, 2011. On Jan. 7, 2011 the employee informed her employer that she was being released, at which time the employer notified her that she was being terminated. The employee claimed that by this conduct "[s]he was singled out for termination on account of her pregnancy."[2] The employer moved for summary judgment, arguing that the employee was terminated because she violated company policy when she failed to inform her employer of her absences on January 4, 5 and 6. In order to demonstrate that the employee could have informed her employer of her absence despite being admitted to the hospital, the employer submitted Facebook screen captures of the employee's "posts" during the relevant time frame. Although the Nevada District Court found that a material issue of fact existed as to whether or not the employee failed to adhere to the employer's policy and as to whether or not the employee performed her job responsibilities in a satisfactory fashion,[3] this creative strategy and use of social media evidence demonstrates how an employer may use an employee's posts as powerful evidence regarding material factual issues during a relevant time frame.

Similarly, Facebook posts on social media websites have been used to demonstrate an employee's ability to access the Internet during a relevant time frame, and thus, as evidence that the employee had the ability to retrieve information concerning company policy. This strategy proved to be successful in *Odam v. Fred's Stores of Tennessee*, when the U.S. District Court for the Middle District of Georgia granted an employer's motion for summary judgment and dismissed an employee's claims of sexual harassment, constructive discharge and retaliation.[4] In *Odam*, the employer established an affirmative defense to plaintiff's sexual harassment claim by demonstrating that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that the employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer or otherwise to avoid harm. Specifically, the employer in *Odam* had an anti-harassment policy in place that outlined complaint procedures, and thus the first element of the affirmative defense was satisfied. The defendants established the second element of the affirmative defense using, among other things, plaintiff's own Facebook posts during the relevant time frame. The court in *Odam* found that the plaintiff had no justifiable excuse for failing to follow reporting procedures because, inter alia, "[j]udging by plaintiff's Facebook posts on the day after she quit her job, she had Internet access and could reasonably have discovered the designated procedure for reporting sexual harassment even if she had mislaid [the employer's] anti-harassment policy."[5] Thus, by utiliz- » Page 13

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Inside

Contractors Face Uncertainty

Amid New Labor Law-Related Requirements

BY KATHARINE PARKER

On July 31, 2014, President Barack Obama issued yet another executive order addressed to roughly 24,000 federal government contractors.[1] The order, entitled "Fair Pay and Workplace Safety," imposes significant new regulatory requirements and administrative burdens on contractors and bidders for contracts valued in excess of $500,000. It will be implemented in stages starting in 2016.[2]

The order's stated purpose is to "create incentives for better compliance and a process for helping contractors come into compliance with basic workplace protection laws," as well as to "increase efficiency in federal contracting."[3] Its requirements, however, are more stick than carrot. The provisions discussed here are some of the most concerning. Specifically, the order mandates disclosure of employment law violations and establishes a new watchdog position, Labor LCAs, who will review the disclosures and take actions against contractors, including rejection of a bid and debarment, based on the disclosures.[4] As discussed below, these provisions will complicate the contracting process and increase the costs of doing business with the government.

Self-Reporting of Violations

The order's self-reporting provisions require bidders and contractors with contracts for goods and services, including construction, valued in excess of $500,000 to disclose violations of various employment laws. It also requires contractors to solicit information from covered subcontractors about their labor law violations and report those as well. The disclosure requirements are aimed at rewarding "contractors who invest in their workers' safety and maintain a fair and equitable workplace" and eliminating competition from other contractors and bidders who "offer low-ball bids—based on savings from skirting the law—and then ultimately deliver poorer performance to taxpayers."[5] Businesses that wish to do business with the government will have to make disclosures during the bidding process, and as discussed below, their disclosures may prevent them from being awarded a contract and cause them to be referred to the Department of Labor for additional oversight. Once awarded a contract, contractors must update disclosures for themselves and covered subcontractors every six months. Serious labor law violations may lead to termination of a contract or even debarment.

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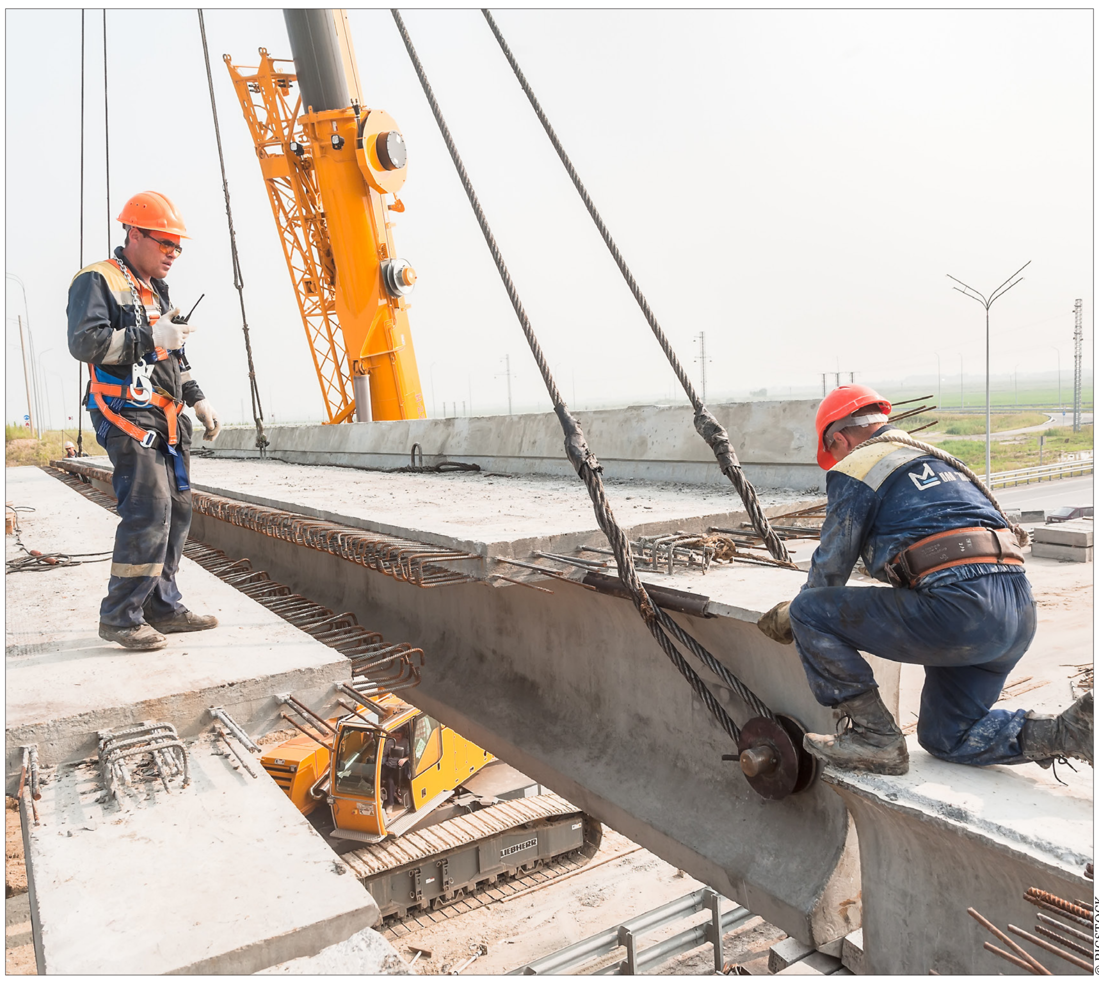
Self-Reporting During the Bidding Process. The disclosure obligations during the bidding process are quite broad. Bidders must self-report any "administrative merits determination, arbitral award or decision, or civil judgment" rendered against them in the previous three years for violations of any of 14 federal labor laws and analogous state laws.[6] These laws include:

- Wage and hour law violations under the Fair Labor Standards Act, the Davis Bacon Act, the Service Contract Act, and Executive Order 13658 (establishing a minimum wage for contractors);
- Workplace safety violations under the Occupational Safety and Health Act of 1970;
- Violations of the National Labor Relations Act (which protects, among other things, employees' right to form a union);
- Violations of non-discrimination laws including §503 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Vietnam Era Veterans' Readjustment Assistance Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, Executive Orders 11246 (Equal Employment Opportunity);
- Violations of the Family and Medical Leave Act;
- Violations of the Migrant and Seasonal Agricultural Worker Protection Act; and
- Equivalent state laws, as defined in guidance to be issued by the Department of Labor.

Bidders will also be required to represent that, to the best of their knowledge, they have disclosed all labor law violations, if any, and to describe any steps taken to correct those violations or improve compliance.

Self-reporting During the Life of a Contract. After being awarded a contract, the company must report its self-report every six months. In addition, at the time of signing a contract, the company must represent that it will require the same disclosures of labor law violations from subcontractors to which it awards, or plans to award, contracts valued at over $500,000—except those for commercially available off-the-shelf items. Contractors also must require their covered subcontractors to update their disclosures every six months during the life of the subcontract.

> Bidders will also be required to represent that, to the best of their knowledge, they have **disclosed all labor law violations**, if any, and to describe any steps taken to correct those violations or improve compliance.



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Oversight Schemes and Consequences of Reporting

The order directs each contracting agency to designate a senior official as its Labor LCA (LCA). The LCA's key role will be to assist contracting officers and agency officials in assessing whether a company's self-reported violations are of a "serious, repeated, willful, or pervasive nature" and, if the violations are "serious, repeated, willful or pervasive," taking action against the company. LCAs may recommend any of a host of actions ranging in severity from rejecting a bid or terminating a contract and debarring a contractor, as well as recommending that a contractor be required to enter into an "agreement" designed to remedy violations and prevent future violations.[7] When evaluating a company's disclosures and what actions, if any, to take against the company, the LCA and the contracting agency also may consider information sent by the Department of Labor about completed and pending investigations of the company. The most impactful consequences will be reserved for businesses whose histories of violations are judged to reflect a "lack of integrity or business ethics."[8]

In addition to recommending various actions against bidders and contractors and their subcontractors, LCAs will be empowered, among other things, to consult with agency officials and the Department of Labor, as necessary, in the development of regulations, policies, and guidance addressing labor law compliance by contractors and subcontractors and strengthening agency management of contractor compliance. LCAs also will publicly[9] provide a yearly summary of agency actions taken to promote greater labor law compliance, including reporting about actions taken with respect to contractors and subcontractors who have been deemed to have "serious, repeated, willful and pervasive" violations of labor laws.

Contractor Review and Action Against Subcontractors. Surprisingly, government officials are not the only ones required to act against violators of labor laws. A contractor must not only solicit and report violations of subcontractors, but it also must evaluate its subcontractors' disclosures before awarding them a subcontract and avoid doing business with subcontractors with a history of violations. But, when a subcontract would be effective within five days of the execution of the prime contract, the contractor will have 30 days to review the subcontractor's disclosures and, presumably, terminate the subcontract if appropriate. As they receive subcontractors' required disclosure updates every six months, contractors must continue to evaluate subcontractors' compliance with labor laws throughout the life of the subcontract and take any necessary actions.

Undefined Review Standards. Notwithstanding the importance of the assessments by contractors and contracting officers of the egregiousness and prevalence of reported violations, the order does not define what constitutes "serious," "repeated," "willful," or "pervasive" violations. Rather, the order tasks the Secretary of Labor with developing guidance that defines those terms by incorporating existing statutory standards or, if none exist, new standards that take into account the number of employees affected by the violations, the degree of risk posed or actual harm done by the violation to the health, safety, or well-being of a worker, the amount of damages incurred or fines or penalties assessed with regard to the violation, the number of violations, the size of the business and other considerations as the secretary finds appropriate.

The responsibility of developing the regulations to be used in determining whether violations reflect a lack of integrity or business ethics falls on the Federal Acquisition Regulatory (FAR) Council. Following the order's limited guidance, the regulations will provide that a single violation will not, in most instances, support a finding of lack of responsibility. The regulations also are supposed to ensure that any "remedial measures or mitigating factors" taken by contractors and subcontractors in response to violations are appropriately considered.[10]

Practical and Legal Implications

The order's reporting and compliance enforcement requirements raise many practical and legal concerns for contractors and subcontractors. These include:

- What is the scope of the disclosures? Must contractors and subcontractors report violations found against affiliated entities and subsidiaries that are not directly involved with fulfillment of the contract?
- If the regulations set a broad scope of disclosure, how will a contractor ensure that all violations of all of its covered affiliated entities and subsidiaries are reported? Will contractors be subject to the False Claims Act and qui tam litigation if disclosures are incomplete?
- How will the terms "serious," "repeated," "willful" and "pervasive" ultimately be defined?
- Under what circumstances will disclosures lead to audits or investigations and the potential imposition of remedial measures or other obligations? Will the "agreements" recommended by LCAs be non-negotiable mandates? Will companies that lose bids based on their disclosures nevertheless be required to enter into such "agreements"?
- How will contractors coordinate collection of information about violations from subcontractors and ensure that disclosures are timely and complete? Will critical subcontractors terminate relationships to avoid reporting obligations and hinder the contractor's ability to fulfill a contract?

Given the potential serious and far-reaching ramifications of the mandatory disclosures, contractors may need to reconsider their risk management and litigation strategies. President Obama has made no secret of the fact that the order is designed to encourage settlement of employment claims and lawsuits—settlements need not be disclosed.[11] But that goal competes with two other stated goals of the order: reducing contracting costs and increasing contracting efficiency.

Publicly available disclosures obtained through Freedom of Information Act[12] requests or the public annual reports by LCAs could be used by plaintiffs' attorneys to target companies with a history of certain types of violations for lawsuits. They also might seek to introduce disclosures into evidence in support of new claims. Plaintiffs' attorneys may also simply target government contractors for suit, seeking to capitalize on the additional settlement leverage they may perceive they gain from the order. To avoid the risk of an adverse judgment and the potentially serious consequences that could follow after reporting a judgment, contractors and subcontractors might feel pressure to settle all but the most frivolous of claims. Additional litigation and settlement increases the cost of doing business with the government and may ultimately increase the costs that companies must charge to fulfil a contract.

Mandatory public disclosures may affect not only the costs but also the *effectiveness* and *quality* of the federal contracting process. A company that loses a bid might try to use the winning bidder's disclosures to support a bid protest, seizing on what is sure to be the inherent subjectivity of contracting officers' relative assessments of competitors' "integrity" and "business ethics" based on the "nature" of reported violations and remedial actions taken. Sour would-be contractors trying to get a second bite of the apple could, thus, unnecessarily delay the final approval of validly awarded contracts.

Ultimately, the prospect of increased litigation and compliance costs and tremendous administrative burdens may drive away many responsible businesses that could or do provide high-quality services and goods to the government. To avoid this, the rules and guidance that regulators eventually decide to promulgate must be clear and specific enough to allow contracting officers across federal agencies to impose corrective actions that are uniformly proportionate to the severity and pervasiveness of reported violations. This is especially critical regarding the extent to which subcontractors' wrongdoings will impact their prime contractors' ability to do business with the government. In the end, ensuring that the costs of the order do not outstrip its intended benefits is in the government's hands—unless, of course, it contracts out the work.

1. Press Release, The White House, Fact Sheet: Fair Pay and Safe Workplaces Executive Order (July 31, 2014) (on file with author), available at http://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order.
2. Id.
3. Id.
4. The order's provisions also will require covered contractors and subcontractors to provide detailed information on wage statements of employees, to notify employees if they are exempt from overtime pay in some circumstances, and to notify independent contractors of their non-employee status. In addition, the provisions will prohibit all supply and service contractors and subcontractors with contracts with an estimated value above $1 million, other than those for commercially available goods, from entering into pre-dispute agreements to arbitrate claims arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e17 (2012), or any tort related to or arising out of sexual assault or harassment, with some exceptions. Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (Aug. 5, 2014) [hereinafter Fair Pay and Workplace Safety Order], available at https://www.federalregister.gov/articles/2014/08/05/2014-18561/fair-pay-and-safe-workplaces.
5. Press Release, The White House, supra note 1.
6. Fair Pay and Workplace Safety Order, supra note 4.
7. Id.
8. Id.
9. The order does not detail what information will be included in LCAs' summaries, so it is unclear whether the specific businesses against which actions were taken will be identified. Fair Pay and Workplace Safety Order, supra note 4.
10. In addition, under the order, the Director of the Office of Management and Budget will work with the Administrator of General Services to include in the Federal Awardee Performance and Integrity Information System information provided by contractors and data on the resolution of any issues related to such information. Fair Pay and Workplace Safety Order, supra note 4. Ultimately, the government hopes to develop one website for all mandatory reporting. Press Release, The White House, supra note 1.
11. Press Release, The White House, supra note 1.
12. The order does not state whether the mandatory disclosures will be subject to any of the Freedom of Information Act's nine applicability exemptions. See 5 U.S.C. §552(b)(1)-(9).

Internships

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recognized, the good news is that the Supreme Court has limited the scope of the definition to prevent those who serve only his or her own interest from being considered an "employee" of someone who provides aid and instruction. However, the less-than-good news is that that exclusion is narrowly drawn and wholly dependent upon the facts and circumstances of a particular case. Companies may be at substantial risk if their current or former interns file suit under the FLSA and the internship is held to be an employment relationship.

The New York State Labor Law is not much more helpful, as it defines "employee" as "any individual employed or permitted to work by an employer in any occupation." N.Y. Lab. Law §651. In New York, an "employee" must be paid a guaranteed minimum wage of $8.00 per hour (to be increased again on Dec. 31, 2014), as well as time-and-a-half the employee's regular rate if he or she works more than 40 hours in a workweek, unless the employee is otherwise classified properly as exempt.

What's the Standard?

The federal and New York State Departments of Labor provide tests to determine whether an intern is an "employee" and must, therefore, be paid as such. But neither test is very helpful either.

The FLSA contains exemptions for volunteers in state and local government agencies and those who volunteer "solely for humanitarian purposes" at private, nonprofit food banks. The Department of Labor also exempts volunteers who donate their time, freely and without expectation of compensation, for religious, charitable, civil or humanitarian purposes to nonprofit organizations. Otherwise, the Department of Labor generally considers interns in the for-profit sector to be employees within the meaning of the FLSA, unless all of the following elements in the six-part test are met:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; *and*
6. The employer and the intern understand (preferably in writing) that the intern is not entitled to wages for the time spent in the internship.

Interpretation of this six-part test can be confusing, and application can be difficult. For example, giving an intern meaningful work (whatever that may mean) increases the risk that the company is deemed to derive an immediate advantage from the activity of the intern. On the other hand, assigning an intern only mundane tasks poses the risk that the company is found to not be providing training similar to what would be given in an educational environment and of displacing regular employees. Furthermore, whether the intern understands that he or she may be entitled to receive wages for time spent in the internship is somewhat illusory, since the right to receive earned wages generally cannot be waived in the case of a true employee.

Any time an agency interpretation or guideline is at issue, courts grapple with the notion of how much deference to afford the agency. The deference question applies equally here, as courts have taken mixed approaches to the Department of Labor's six-part test. For example, in *Solis v. Laurelbrook Sanitarium and School*, 642 F.3d 518 (6th Cir. 2011), the Sixth Circuit called the test "a poor method for determining employee status in a training or educational setting." Id. at 525. In *Kaplan v. Code Blue Billing & Coding*, 504 Fed. Appx. 831 (11th Cir. 2013), the Eleventh Circuit acknowledged the test for determining whether an unpaid intern was an "employee," but only after first considering the "economic realities" of the relationship and concluding that the economic realities test did not support an employee relationship. And, in *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023 (10th Cir. 1993), the Tenth Circuit considered the test as only one piece of the puzzle of factors to be viewed when judging the totality of the circumstances.

To further complicate things for employers in New York, the New York State Department of Labor requires that an internship program must meet *11 factors* in order for it not to be considered an employment relationship, consisting of the six federal factors above and the following five additional factors:

7. Any clinical training is performed under the supervision

> The company should require an intern to sign a document acknowledging, at a minimum, that he or she is not an employee, does not expect to be paid for the internship, and may not be entitled to a job once the internship ends.

and direction of people who are knowledgeable and experienced in the activity;

8. The trainees or students do not receive employee benefits;
9. The training is general, and qualifies trainees or students to work in any similar business. It is not designed specifically for a job with the employer that offers the program;
10. The screening process for the internship program is not the same as for employment, and does not appear to be for that purpose. The screening only uses criteria relevant for admission to an independent educational program; and
11. Advertisements, postings, or solicitations for the program clearly discuss education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.

New York's 11-factor test tends to be even more strictly construed than its federal counterpart. Still, like many complicated classification questions in employment law, it can be whittled down to English: If it walks like a duck, quacks like a duck, and looks like a duck, it's a duck. Put another way, if a company has trouble articulating a real difference between the role of and services provided by an intern in contrast to a regular employee, a court or the Department of Labor will probably not recognize a difference either. A company needs to look at the totality of the facts and circumstances involved with *that company's* internship program, and should never rely on a determination made with respect to other interns at other companies.

What's the Takeaway?

It would be easy for a company to avoid the fray and simply avoid internship programs going forward altogether. While that kind of policy change may certainly eliminate all risk in this area completely, such a reaction may be extreme and an unnecessary overcompensation. Like many areas of employment law, the key to creating effective (and lawful) workplace policies and practices in this area is in developing the appropriate mindset and *managing* expectations and the risks involved.

First, the company should immediately rid itself of any notion that its unpaid interns can simply do the job of a paid employee. Remember, a duck is a duck, and New York employers should apply all 11 factors of the internship test—not simply the six used on the federal front—to the company's internship program to ensure that its position can be defended if challenged.

Second, the company should create or modify its internship program with an eye toward making sure that the program is not only defensible on paper, but also is consistently maintained as such on a day-to-day basis by an internship coordinator assigned to the operation of the program.

Third, the company should create or modify the company's record-keeping so that documentary support can be easily provided, if challenged, as to the nature of the program, and what is being performed by both the interns and those tasked with supervising the interns.

Fourth, while written agreements between the company and intern are not determinative in and of themselves, the company should certainly still require an intern to sign a document acknowledging, at a minimum, that he or she is not an employee, does not expect to be paid for the internship, and may not be entitled to a job once the internship ends.

Finally, the company should stay in touch with counsel, and abreast of emerging developments in this area. The Second Circuit, and undoubtedly other courts and government bodies, will soon have much more to say.

Social Media

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ing the plaintiff's own social media activity, counsel for the employer demonstrated the ease by which plaintiff could have discovered the employer's complaint procedures, and therefore could have reported any harassment in accordance with company policy.

Social media evidence can also be useful in hostile work environment claims as a means of demonstrating an employee's comfort with conversations and/or humor of a sexual nature. As set forth by the U.S. Supreme Court in *Faragher v. City of Boca Raton*, in order to establish a hostile work environment claim under Title VII "[a] sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."[6] Thus, in order to demonstrate the latter prong—the victim's perception of whether or not the sexual environment was offensive—some attorneys are creatively turning to a plaintiff's activity on social media. For example, in *Targonski v. City of Oak Ridge*, a police officer filed a hostile work environment claim, among other gender discrimination claims, which began with sexual rumors about the plaintiff.[7] Specifically, plaintiff claimed that a fellow police officer was spreading rumors about the plaintiff's sexual orientation and desire to participate in an orgy, which led to plaintiff's fellow employees approaching her about the rumors as well as "[s]ix unwanted calls on her cell phone '[w]ith heavy breathing and giggling' perhaps 'having been made by a male disguising his voice in a manner to sound scary.'" At her deposition, plaintiff testified that "[I]'m a Christian and I strive really hard to be a moral person. So for someone to start thinking of me as someone who has orgy parties at my house while my son is at home, that's severely humiliating to me." In opposition, in order to demonstrate that the plaintiff would not have found the rumors offensive, the defendant pointed to plaintiff's own conduct on her Facebook page on which she had discussions relating to her desire for a female friend to join her naked in the hot tub, naked Twister, and female orgies involving plaintiff and others. Although the court noted that the Facebook conversations may have been the source of the rumor and that the argument presented was "very enticing," the court declined to grant summary judgment.[8] However, subsequent to the court's decision on the motion for summary judgment, when addressing the plaintiff's motion in limine, which included a request to exclude the plaintiff's Facebook entries, the court specifically noted the relevance of such evidence when it stated that "[t]he evidence is relevant to the source of the alleged rumors and to whether plaintiff could truly have found those alleged rumors offensive."[9]

In contrast to *Targonski*, in *Gelpi v. Autozoners*, Judge Benita Y. Pearson of the Northern District of Ohio relied in significant part on social media evidence to conclude that allegedly harassing conduct was not, in fact, unwelcome by the plaintiff. In *Gelpi*, the plaintiff claimed that she was subjected to comments of a sexual nature every day for four years and that she received text messages of a sexual nature from a manager.[10] Defendant moved to dismiss and, among other things, argued that plaintiff welcomed the sexual banter. The court noted the legal proposition that "[w]here the plaintiff was a frequent or welcome participant in the sexual hijinx or banter at issue, it is fatal to her sexual harassment claim."[11] In holding that the conduct in question was not unwelcome, the Northern District of Ohio relied upon, among other things, plaintiff's Facebook page. The court noted that plaintiff's Facebook page "[r]eveal[ed] that she is very comfortable with sexual humor and contains numerous comments and e-cards making sexual references and jokes" and that since plaintiff was "Facebook friends" with nearly all of her former coworkers, "[h]er Facebook posts and status updates are indicative of jokes her coworkers would reasonably believe she found funny, particularly given her participation in the sexual jokes and banter at work."[12] Thus, litigators faced with hostile work environment claims should not discount the possibility of using a plaintiff's social media activity to strengthen their argument that the plaintiff did not find the questioned conduct offensive.

Although litigators may tend to think to use social media evidence in connection with the question of whether or not the questioned conduct amounts to employment discrimination, such evidence has also been used to prove or disprove that the defendant was, in fact, an employer of the employee. This question arose in *Blayde v. Harrah's Entm't*, where, in response to plaintiff's age discrimination claims the defendants, Harrah's Entertainment and Harrah's Operating Company, claimed that they were not the corporate entities that employed the plaintiff.[13] However, the plaintiff successfully attacked this position through the creative use of social media evidence. While the plaintiff's supervisor testified for the defendants at trial and denied that he and the plaintiff were employees of the defendants, plaintiff's supervisor's LinkedIn page listed Harrah's Entertainment Company as his employer. Based on the LinkedIn page (and other evidence), the court concluded that Harrah's Entertainment and Harrah's Operating Company met the definition of "employer" under the Age Discrimination in Employment Act and further found that plaintiff was an employee of those entities.[14]

Similarly, in *Dooling v. Bank of the West*, plaintiff brought an action for employment discrimination under the Family Medical Leave Act (FMLA) against (her former employer) GSB Mortgage and Bank of the West.[15] Defendants moved for summary judgment arguing, in part, that plaintiff was only employed by GSB Mortgage, which was not an "employer" under the FMLA because GSB Mortgage only had 12 employees. Plaintiff responded that the defendants were integrated or joint employers under the statute, and, because together the Defendants had more than 50 employees, they were an "employer" for purposes of the FMLA. Although the court found that the defendants were not joint employers, the court found that there was an issue of fact as to whether or not the defendants were integrated employers. In coming to this determination, the court looked to, among other things, the fact that the defendants had a shared Facebook page.[16] Thus, the plaintiff successfully defeated the defendants' motion for summary judgment by, among other things, using the defendants' social media activity to her advantage.

As the use of social media continues to increase in contemporary American society, litigators in employment discrimination cases must be cognizant of the support social media evidence can provide (or the damage it can cause) to their clients' cases. In all likelihood, social media evidence will continue to play a meaningful role in discrimination cases. Apart from admissibility considerations,[17] the recent case law suggests that a litigator who is willing to expend the time and resources necessary to obtain discovery of social media evidence will only be constrained by his own creativity and thus should try to think "outside the box" when developing his litigation strategy.

Recent case law suggests that a litigator who is willing to expend the time and resources necessary to obtain discovery of social media evidence should try to **think "outside the box"** when developing his litigation strategy.

1. *Tabani v. IMS Assocs.*, 2:11-cv-00757-MMD-VCF, 2013 U.S. Dist. LEXIS 20090, at *2 (D. Nev. Feb. 14, 2013).
2. *Tabani*, 2013 U.S. Dist. LEXIS 20090, at *5.
3. *Tabani*, 2013 U.S. Dist. LEXIS 20090, at *11. A review of the District Court of Nevada's docket reveals that the parties settled this matter after the court's decision. See Order Dismissing Case, Sept. 11, 2013, ECF No. 56.
4. *Odam v. Fred's Stores of Tennessee*, No. 7:12-CV-91 (HL), 2013 U.S. Dist. LEXIS 175040 (M.D. Ga. Dec. 11, 2013).
5. *Odam*, 2013 U.S. Dist. LEXIS 175040, at *28-29.
6. *Faragher*, 524 U.S. 775 (1998) (citing *Harris v. Forklift Sys.*, 510 U.S. 17 (1993)).
7. *Targonski v. City of Oak Ridge*, No. 3:11-CV-269, 2012 U.S. Dist. LEXIS 99693 (E.D. Tenn. July 18, 2012).
8. *Targonski*, 2012 U.S. Dist. LEXIS 99693, at *n.2, *28.
9. *Targonski v. City of Oak Ridge*, 921 F. Supp. 2d 820, 30 (E.D. Tenn. 2013). The Eastern District of Tennessee Docket indicates that the parties subsequently filed a Stipulation of Dismissal. See Stipulation, February 8, 2013, ECF No. 64.
10. *Gelpi v. AutoZoners*, No. 5:12CV0570, 2014 U.S. Dist. LEXIS 38477, at *3-4 (N.D. Ohio March 24, 2014).
11. *Gelpi*, 2014 U.S. Dist. LEXIS 38477, at *12 (citing *Romaniszak-Sanchez v. Intl. Union of Operating Eng'rs, Local 150*, 121 Fed. App'x 140, 146 (7th Cir. 2005); *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991); *Balletti v. Sun-Sentinel*, 909 F. Supp. 1539, 1546-47 (S.D. Fla. 1995) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982)); *Orton-Bell v. Indiana*, No. 1:11-cv-805-WTL-TAB, 2013 U.S. Dist. LEXIS 1333, at *10 (S.D. Ind. Jan. 4, 2013); *Ripley v. Ohio Bureau of Emply. Servs.*, 2004 Ohio 881 (Ohio App. 10th Dist. 2004).
12. *Gelpi*, 2014 U.S. Dist. LEXIS 38477, at *14.
13. *Blayde v. Harrah's Entm't*, No. 2:08-cv-02798-BBD-cgc, 2010 U.S. Dist. LEXIS 133990 at *3 (W.D. Tenn. Dec. 17, 2010).
14. *Blayde*, 2010 U.S. Dist. LEXIS 133990 at *16.
15. *Dooling v. Bank of the West*, No. 4:11-cv-00576, 2013 U.S. Dist. LEXIS 99618, at *1 (E.D. Tex. July 17, 2013), report and recommendation adopted by 2013 U.S. Dist. LEXIS 140001 (E.D. Tex. Sept. 30, 2013).
16. *Dooling*, 2013 U.S. Dist. LEXIS 99618, at *10-13. The court's docket shows that a Stipulation of Dismissal was subsequently filed. See Stipulation, April 30, 2014, ECF No. 91.
17. The court's decision in *Targonski* suggests that the admissibility of social media evidence would be governed by the application of traditional principles of relevance, prejudice and hearsay. See 2012 U.S. Dist. LEXIS 99693, at *24-27.

Blue Pencils

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(3) is not injurious to the public."[5] The court in *BDO Seidman* further held that a restriction prohibiting post-employment solicitation of clients is unreasonable, and therefore unenforceable, where it purports to restrict an employee from soliciting *any* of the employer's clients. The court held that client-based restrictions must distinguish between those clients with which the employee developed a relationship due to his or her employment (an employer rightfully could restrict post-employment solicitation of such clients), as opposed to clients with which the employee had a pre-existing relationship or never acquired such a relationship (restrictions with respect to those clients would be unenforceable). In *BDO Seidman* and many subsequent cases, however, the courts blue-penciled restrictions that did not make this required distinction and then enforced the judicially-narrowed restrictions.

The practice of "blue-penciling" occurs when courts strike or revise the part of a restrictive covenant that is unenforceable and then enforce what remains. Historically, New York courts regularly provided employers with this backstop even when a restrictive covenant was unreasonably overbroad so that employers still obtained some benefit from the original bargain, even if that original bargain did not comply with established parameters of reasonableness. But recent decisions suggest a trend in which courts are becoming increasingly unwilling to blue-pencil overly broad restrictive covenants and instead strike them completely.

Fifteen years after *BDO Seidman*, courts seem less willing to blue-pencil overbroad restrictions. This trend against blue-penciling was evident in the Appellate Division, Fourth Department's decision in *Brown & Brown v. Johnson*, issued in February 2014. In that case, Johnson had been hired by plaintiffs, insurance intermediaries, to provide actuarial analysis. On her first day of work, Johnson signed an employment agreement containing a non-solicitation provision. This covenant restricted Johnson from soliciting, either directly or indirectly, "any insurance or bond business of any kind or character from any person, firm, corporation, or other entity that is a customer or account of the New York offices of the Company" for two years following termination. Despite the ruling in *BDO Seidman* seven years earlier, the restriction did not delineate between clients with which Johnson acquired relationships during her employment and those with which she did not. Accordingly, when Brown & Brown attempted to enforce the restriction after Johnson's employment terminated, the Fourth Department held that the restriction was overbroad and unenforceable.

Brown & Brown urged the court to blue-pencil the restriction and enforce a judicially-narrowed provision, but the court refused. The court, citing *BDO Seidman*, held that courts should only partially enforce otherwise overbroad restrictions where "the employer demonstrates an absence of overreaching, coercive use of bargaining power, or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing." In other words, the Fourth Department held that courts should not blindly blue-pencil overbroad restrictive covenants, but instead analyze whether the original, overboard restriction was agreed to between the parties in good faith. The court noted that Brown & Brown had not presented the restrictive covenant agreement to Johnson until her first day of work, after she had already resigned from her prior job. Additionally, the court emphasized that Brown & Brown had provided the agreement to Johnson many years after *BDO Seidman*, and, therefore, found that Brown & Brown should have known the requirements for enforceable non-solicitation restrictions. Accordingly, the court held that the circumstances did not warrant the blue-penciling of the restrictive covenants.

The Fourth Department further held that even if the agreement states that, if a court found the restrictions overbroad, "the parties agree that such court shall be authorized to modify such covenants so as to render … [them] valid and enforceable to the maximum extent possible" did not *require* the court to engage in any such modification. Instead, the court held that allowing for partial enforcement of covenants employers should know are overbroad would allow employers to "use their superior bargaining position to impose unreasonable anti-competitive restrictions, uninhibited by the risk that a court will void the entire agreement." The court was unwilling to permit employers to impose the deterrent effect of an overbroad covenant without the risk of losing its ability to enforce the covenant altogether if the employee challenged it.

The Fourth Department is not alone in refusing to blue-pencil otherwise unenforceable restrictive covenants. On April 2, 2014, the U.S. District Court for the Western District of New York, in *Veramark Technologies v. Bouk*, refused to blue-pencil a non-compete provision. The restriction at issue prohibited a former employee from "directly or indirectly performing services for any enterprise that engages in competition with the business conducted by Veramark or its affiliates." Veramark argued that it needed this worldwide non-compete to protect "customer goodwill." The court found that this restriction was not targeted to protecting customer goodwill, and held that "[o]n its face, the non-compete is overreaching and coercive, and partial enforcement would not be appropriate."

Recent decisions suggest a trend in which **courts are becoming increasingly unwilling to blue-pencil overly broad restrictive covenants** and instead strike them completely.

As the court in *Brown & Brown* had done, the court in *Veramark* emphasized that the employer had presented the employee with the agreement at issue many years after *BDO Seidman* and, therefore, found that the employer should have known the standard for a reasonable restrictive covenant. Quoting *Brown & Brown*, the court in *Veramark* held that blue-penciling under these circumstances would permit employers to "use their superior bargaining position to impose unreasonable anti-competitive restrictions, uninhibited by the risk that a court will void the entire agreement."

The court in *Veramark* further found that the employer did not need to enforce the non-compete provision because the non-solicitation provisions in the agreement sufficiently protected the employer's proffered legitimate interest of protecting customer goodwill. This aspect of the decision is significant: While the court would not blue-pencil the unreasonable non-compete restriction, it severed that provision and enforced the remaining restrictive covenants. This suggests that employers should draft restrictive covenant agreements so that each restriction (non-competition; employee non-solicitation; client non-solicitation; etc.) is contained in a stand-alone provision. If a court finds that one of those restrictions is unreasonable, then, even without blue-penciling the unenforceable provision, it may enforce the separate restrictions.

The risk of "Inevitable Disclosure" alone will not support enjoining an employee from competing. If an employee has not signed an enforceable restrictive covenant, it will be difficult to restrict that employee from working for a competitor in a similar job, even if that competitive position raises the concern that the employee might use the former employer's confidential information. Many employers have tried to stop certain former employees who had not signed any restrictive covenant agreements from accepting similar posts with a competitor on the theory that they will "inevitably" use or disclose the former employer's confidential information. The recent decision by Judge William H. Pauley III of the Southern District of New York, in *Janus Et Cie v. Kahnke* held that, under New York law, there is no stand-alone claim of inevitable disclosure to support enjoining a former employee from competing.

In February 2008, Janus et Cie had hired Andrew Kahnke as a sales associate. At the time of his hire, Kahnke signed a non-disclosure agreement, but did not enter into any non-compete or other post-employment covenants. Three years later, in March 2011, Kahnke was promoted to the position of sales manager, and his responsibilities included the development and customization of Janus' account management system and other documents containing critical customer and competitor information. This information included financial, marketing and new production information, selling reports, order processing, product flow, inventory management, historical customer information and customized management systems. He did not enter into any new agreements at the time of his promotion or thereafter. In August 2012, Kahnke notified Janus that he had accepted a "very similar position" with Dedon, Inc., a direct competitor of Janus.

In response to Kahnke's resignation, Janus sued to enjoin Kahnke from disclosing any of Janus' trade secrets or confidential information and from working for Dedon in any area where Janus and Dedon are direct competitors. But Janus had no evidence that Kahnke had violated his non-disclosure agreement, misappropriated any trade secrets, or disclosed any trade secrets to Dedon or any other third party. Instead, Janus alleged that "Kahnke's position with Dedon is so similar … that he cannot possibly perform the functions of his position … without using and/or disclosing confidential information and trade secrets belonging to Janus."

The court granted Kahnke's motion to dismiss Janus' action, holding that inevitable disclosure of trade secrets is not a recognized cause of action in New York. Pauley explained that the concept of inevitable disclosure may be relevant for purposes of evaluating whether to enforce an existing restrictive covenant agreement or whether to enjoin a former employee from competing when there is evidence that he or she actually stole the former employer's trade secrets. Absent an otherwise enforceable restrictive covenant agreement or evidence of the former employee's misappropriation of confidential information, however, the risk of inevitable disclosure is an insufficient basis to enjoin a former employee from working for a competitor in a position that is similar to the one he or she held while working for the former employer.

Given the decision in *Janus et Cie*, it remains critical that employers protect their trade secrets (and other legitimate business interests) through the use of restrictive covenant agreements. But the decisions in *Brown & Brown* and *Veramark* should remind employers that, to be enforceable, these agreements must be narrowly drawn so that, consistent with the standard set forth in *BDO Seidman*, they are no broader than necessary to protect the employer's legitimate interests.

1. *Brown & Brown v. Johnson*, 115 A.D.3d 162 (4th Dep't. 2014).
2. *Veramark Technologies v. Bouk*, 2014 U.S. Dist. LEXIS 46198 (W.D.N.Y. April 2, 2014).
3. *Janus Et Cie v. Kahnke*, 2013 U.S. Dist. LEXIS 139686 (S.D.N.Y. Aug. 29, 2013).
4. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 389 (1999).
5. This article focuses on restrictive covenants under New York law. Other jurisdictions may have drastically different requirements and engage in very different analyses.