Law Office of Edward E. Sharkey LLC

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August 2012

BUSINESS LAW DEVELOPMENTS

Legal updates for entrepreneurs and business owners from the Law Office of Edward E. Sharkey LLC.

Dear Friends of the Firm,

This is the August issue of our firm's newsletter, featuring coverage of legal developments important to business owners and entrepreneurs. You are receiving it because you are a client or have previously solicited legal resources from the firm. If you do not wish to receive periodic updates and analysis from the firm you can unsubscribe using the link above.

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Very truly yours,

Ed

In This Issue

Signature Not Required: Conduct or Circumstances Alone May Create a Binding Contract

A legally enforceable contract is formed when parties mutually agree to, or have a "meeting of the minds" regarding, a bargained-for exchange. A recent opinion from the United States Court of Appeals for the Tenth Circuit reminds us that a formal, signed document is not required to form a contract. The full text of the opinion is available at http://tinyurl.com/9zngel4.

In most cases, no writing is required at all. Rather, the parties' meeting of the minds may be inferred from their conduct or any other fact or circumstance, including:

- Partial performance;
- The context of negotiations;
- The parties' ordinary course of dealing; and
- Communications among the parties.

In the Tenth Circuit case a seller sued a hospital, claiming that the hospital breached an agreement to purchase medical equipment. The hospital disputed whether the parties had formed a contract. Even though there was no signed agreement or purchase order, the court held that the parties had formed a contract. The court reasoned that the parties' meeting of the minds regarding the sale was evidenced by the following:

- Email communications;
- The hospital's knowledge of and failure to correct the seller's belief that they had reached agreement; and
- The hospital's internal communications characterizing their email communications with the seller as an offer and acceptance.

The court also held that, in cases where a signed writing is required, email may be sufficient to satisfy the writing requirement. The contract at issue in this case required a signed writing pursuant to the Uniform Commercial Code. The Code is a uniform act that was created in an effort to standardize state law governing certain commercial transactions. Maryland, like most states, has adopted the Code.

The principle to remember is that you can bind yourself to terms without signing a formal document. Our office handles disputes concerning contract formation. If you have any questions relating to the existence of a contract, please feel free to contact us.

New Decision May Limit Businesses' Ability To Address Employee Fraud

One legal tool available to businesses to address fraud perpetrated by employees is the Computer Fraud and Abuse Act (CFAA). The CFAA creates penalties for persons who, with the intent to defraud, access computer systems without proper authorization.

"Without proper authorization" includes "exceed[ing] authorized access." Companies have used this language to bring claims against employees who were authorized to access the system in question but then took and misused confidential information in violation of company policy.

Businesses like the CFAA because it provides for damages normally not available under state law. Now, a recent decision by the U.S. Court of Appeals for the Ninth Circuit may limit the usefulness of the CFAA for this purpose.

In the case, an employee was indicted for using his log-in credentials to download confidential customer information from his employer's database. He used the information to start his own business. The employee was authorized to access the information, but his use of the information violated company policy.

The appeals court affirmed dismissal of the charges. The court held that the CFAA is meant to address computer hacking and other types of unauthorized access to computer systems; it is not

meant to address the authorized access to systems and subsequent misuse of information found therein.

The decision contrasts with decisions from other courts, which have interpreted the law more broadly, and creates a split in the law that can only be resolved by the Supreme Court or Congress. There is no decision addressing the issue in Maryland's federal circuit, the Fourth Circuit.

The takeaway for businesses: one tool for addressing the misuse of confidential data by employees is now less reliable (and is ineffective in California and the rest of the states in the Ninth Circuit). Traditional claims under state law, however, are still available. Businesses should be sure to have robust computer use policies in place and to publicize them to all employees.

Our law firm monitors the state of the law concerning employee misconduct. If you have questions about this subject or any other business law topic, please feel free to contact us.

Broad Social Media Policies Create Legal Trouble for Employers

Social media sites, such as Facebook, Twitter, and LinkedIn, continue to gain popularity. As the visibility of social media has increased, so have employers' worries about negative postings by employees. For example, employers may be concerned with employees voicing their dissatisfaction with work on their personal blogs or posting comments discussing their pay on colleagues' Facebook pages. Many employers are attempting to preclude such postings by creating polices that limit employee use of social media.

Employers must take care, however, to ensure that these policies do not violate the National Labor Relations Act. Among other protections, the Act safeguards the rights of employees to organize labor unions, bargain collectively, and discuss wages and working conditions. An employer violates the Act by maintaining a workplace rule that could reasonably be construed by employees as prohibiting those rights protected by the Act.

The National Labor Relations Board (the federal agency tasked with enforcing the Act) recently investigated several employers' social media policies and found that most violated the Act. The Board distinguishes between policies which are too broad or ambiguous and policies that are clarified by example or have limited application. Employees could construe broad or ambiguous policies as restricting activities which are protected under the Act; therefore, such policies may be unlawful. If the policies are clarified and restricted, however, they are more likely to be upheld. The following are examples of broad, general restrictions found in employers' social media policies that the Board contends violate the Act:

- Precluding employees from releasing confidential company information;
- Requiring employees' posts to be "completely accurate and not misleading";
- Telling employees to "avoid harming the image and integrity of the company"; and
- Prohibiting disparaging or defamatory comments.

A more detailed summary is set forth in a memorandum issued by the Board and available as a PDF download at http://tinyurl.com/869myx8. The memorandum provides general guidance for employers interested in creating acceptable social media policies. If you have any questions about employment policies or any related matter, please feel free to contact our office.

ABOUT US

The Law Office of Edward E. Sharkey LLC is a firm of dedicated business and trial lawyers in Bethesda, Maryland, concentrating on business law and commercial litigation. Other areas of practice include pension, securities, negligence/professional liability, and construction law.

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