What You Can Use and Will be Used Against You:

Information Employers Can Ethically Use in Making Employment Decisions

Matthew Deffebach and Punam Kaji

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Can you bypass the FCRA by finding some reason to terminate (or take other adverse action) based on something other than the background check?

- Keep in mind! Under FCRA, **Before** making an adverse action decision, a pre-adverse action notice is required. (15 U.S.C. § 1681b(b)(3).)

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Employee Social Media Use

What if an employee posts on his Facebook page that he committed a crime over the weekend. Co-workers who are Facebook friends are now scared to come to work. ***What do you do?***

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Snoop Doggy Dog

- Social media snooping
  - Is it OK to snoop into someone else's *private* social media posts? (No!)
- Three influential cases
  - *Konop* (9th), *Pietrylo* (DNJ), *Ehling* (DNJ)
- OK to use publicly-available information
- "Authorized User Exception"
  - ALL FORMS OF ELECTRONIC COMMUNICATION. **Consent** is KEY.

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From Tweet to Termination. When is it lawful?

Three D, LLC dba Triple Play Sports Bar and Grille, 361 N.L.R.B. No. 103 (Apr. 26, 2013).

- An employee discovered that her employer had done her taxes incorrectly and she owed state income tax.
- She took to facebook:

> Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I owe money, WTF!!!

> Comment: Me too

> Comment: They are ******

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Three D, LLC dba Triple Play Sports Bar and Grille, 361 N.L.R.B. No. 103 (Apr. 26, 2013).

- The Triple Play owners talked to the employee who hit the like button and said he obviously must not want to work there. The employee who used the explicative and the employee who liked the post were terminated.

The board found Triple Play violated the Act by discharging the two employees.

1. The facebook discussion was between multiple employees and clearly disclosed the existence of a labor dispute (tax issues)
2. The facebook discussion was not directed towards the general public
3. The facebook discussion was not "so disloyal . . . As to lose the Act's protection" because the comments did not disparage Triple Play's products or services
4. Triple Play's policy prohibiting employees from engaging in inappropriate discussion about the company, management, and coworkers was unlawful

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Richmond District Neighborhood Center, 361 N.L.R.B No. 74 (Oct. 28, 2014)

- Employee was demoted after a negative performance review and Beacon Teen Center (which runs summer camps)
- She got on facebook and communicated with a fellow employee about whether or not to continue working there.
- The exchange included the following topics:
  - Refusal to follow company policy of obtaining permission before organizing activities
  - Disregarding specific school-district rules
  - Undermining leadership
  - Neglecting duties; and
  - Jeopardizing the future of Beacon
- Beacon decided to rescind its offer for both employees to return the next summer.
- **Board found that the employer acted reasonably.**
- The numerous specific acts of insubordination "constituted conduct objectively so egregious as to lose the Act's protection and render the two employees unfit for further service."

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First FitBit Case – In Support of a Personal Injury Suit

- Plaintiff brought a lawsuit in Calgary
- Plaintiff was a personal trainer who led an “active lifestyle”
- Law Firm for Plaintiff is using her FitBit data to illustrate her reduced activity levels
- Utilized analytics platform Vivametrica, which uses public research to compare a person’s activity data with that of the general population.

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Rules on Recording Conversations

- **Opinion No. 575 (Nov. 2006),** issued by the Professional Ethics Committee for the State Bar of Texas: Absent an affirmative act of deception and absent an unlawful purpose, a lawyer in Texas is permitted to make (and use) an undisclosed recording of telephonic conversations between the lawyer and another person in Texas (who could be the lawyer's own client).
  - Reversed over 25 years of precedent emanating from Ethics Committee Opinions No. 392 (Feb. 1978) and No. 514 (Feb. 1996).
  - Third Party or Client.
  - The very act does not involve the lawyer engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." (a violation of Rule 8.04(a)(3)).

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Rules on Recording Conversations

- For a lawyer to be permitted to make undisclosed recordings of conversations, *all* of the following criteria must be met:
    1. All parties to the conversation must be within and subject to the jurisdiction **of Texas**;
    2. The recording attorney must be a party to the conversation and must consent to the recording;
    3. The recording attorney must **not engage in dishonesty** with regard to the recording of the conversation; the recording attorney must not create the false impression that the conversation is *not* being recorded;
    4. The recording attorney must not have an "unlawful purpose";
    5. The recording attorney must not otherwise be prohibited by state or federal law from recording the conversation (e.g., certain telephonic court proceedings cannot be recorded without permission of the Court and/or other parties); and
    6. Regarding clients, must be a **legitimate reason** to protect lawyer or client and must not violate Rule 1.05 (maintain confidential information) or Rule 1.06 (conflicts of interest).

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Off-Duty Conduct Laws

- There are risks associated with taking disciplinary action for conduct that is obnoxious or undesirable, but not illegal…
- Off-duty conduct laws provide protection for
  - Off-duty conduct
  - Off-site legal activities

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Off-Duty Conduct Laws

- California and Colorado
  - An employer's disciplinary action based on an employee's social media postings of such conduct, such as participating in a controversial political rally, could subject the employer to liability

- Illinois, Minnesota, Montana, Nevada, North Carolina, North Dakota, New York, and Wisconsin
  - Ban an employer from treating an employee adversely for using a lawful product during nonworking hours off of the employer's premises

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Can I Toss This or Can I Say That?: Ethical Issues Encountered During Corporate Layoffs

Victor Wright, Senior Counsel – Labor and Employment, KBR Inc.

October 6, 2016

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Potential Evidence in Corporate Layoffs

- WARN Act Notices
- Business decision-related documents regarding layoff
- Documents used to assess and rank employees
- Adverse Impact Analysis documentation
- Older Worker Benefit Protection Act material
- Training material
- Severance Agreement and termination documentation
- Personnel Files – manager and employee
- Electronically-Stored Information (e.g., email, texts, voicemail)
- Termination Checklists
- Employee's Personal Property

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Ethical Obligations and the Duty to Preserve

- Sarbanes-Oxley
- Federal Employment Law Statutes
- Texas Commission on Human Rights
- Spoliation
- Electronic Discovery
- Records Retention Program

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Defining the Duty to Preserve

- **A statutory requirement**
- **A regulatory requirement**
- **When the document in question is or could be used as evidence in current, pending or reasonably foreseeable lawsuit, regulatory action or government investigation**

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Sarbanes-Oxley Requirements

18 U.S.C. § 1512(c).

Prohibits destroying, altering, or concealing documents with intent to impair for use in official proceedings

- **Individual liability**
- **Fine or up to 20 years in prison**

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Sarbanes-Oxley Requirements (continued)

- **Prohibits falsification, alteration, destruction, or mutilation of records with intent to impede federal investigation or proceeding**
- **Criminal fines or up to 20 years in prison**

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Federal Employment Laws

- Title VII
  - Three Years
    - Personnel Records
  - One Year
    - Compensation Information
  - Discrimination Charge:
    - Keep records until final disposition of the action
- Americans with Disabilities Act
  - Similar to Title VII
- Age Discrimination in Employment Act
- Fair Labor Standards Act
- Family Medical Leave Act

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Texas Commission on Human Rights (TCHRA)

- **Similar to Title VII**
- **Retain personnel records for one year**
- **Document retention must conform to a similar record or report as required under Title VII**

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Spoliation

- **The destruction or significant alteration of evidence and the failure to properly preserve documents for evidentiary purposes**
- **Courts look at spoliation unfavorably**
- **May result in sanctions**
  - **FRCP 37(e)**

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Electronic Information

- **Includes computerized data, voice mail messages and files, back-up voice mail messages and files, e-mail messages and files, backup e-mail files, deleted e-mails, data files, program files, archival tapes, temporary files, and web site information**

- **Discoverable so long as request complies with Federal Rules of Civil Procedure**

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Risks of Sanctions in Employment Cases

- **Knickerbocker v. Corinthian Colleges – 298 F.R.D. 670 (W.D. Wash. 2014)**
- **Court imposed sanctions on employer for failing to put a litigation hold in place to stop the deletion of potentially relevant e-mails**
- **Employer's IT department would slate former employee's e-mails for deletion within 24 hours of receiving termination notice**
- **Employer automatically deleted a terminated employee's e-mail account thirty (30) days after the employee's termination**
- **Court determined that sanctions were appropriate given the employer's failure to abide by its discovery obligations**
- **Court awarded the plaintiffs' costs and attorney fees incurred due to employer's spoliation of evidence**
- **Court imposed a fine of $25,000 against employer and levied a fine of $10,000 on employer's counsel**

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An Effective Records Retention Program

A records retention program is a company's attempt to prospectively establish:

- **Evidence that all documents that are required to be preserved are preserved for the required amount of time**
- **Evidence that no document has been destroyed in anticipation of legal, regulatory or governmental investigation or action**

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What Does a Records Retention Policy Do For Your Company?

- **A records retention policy may provide an affirmative defense**
- **Companies demonstrate that its destruction of documents is part of the ordinary course of business**
- **NOT an attempt to purge its files of potentially incriminating documents.**

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Potential benefits of records retention policy in litigation?

- **If you are sued in July and a discovery request is made for documents you destroyed in April, then the fact that you destroyed the documents pursuant to your records retention policy is evidence that the destruction was not carried out to hide evidence or in anticipation of litigation**

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Tips for Creating an Effective Records Retention Policy

- **Identify Personnel Records to be Retained**
- **Determine How Long to Retain Records**
- **Establish a Specific Process for Destroying Personnel Records**
- **Establish a Process for Suspending Destruction of Personnel Records**
- **Document Compliance with the Personnel Document Retention Policy**

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Policy Tip No. 1

- **Identify Personnel Records that are to be Retained**
  - **Distinguish between documents that are essential to the ongoing and effective functioning of the company and those employment-related records that are merely personal, non-business and preliminary**

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Policy Tip No. 1 (continued)

- **Important business records include:**
  - **Documents necessary to meet government, record-keeping, reporting and compliance requirements;**
  - **Employment Contracts and other anti-discriminatory training documents;**
  - **Payroll information;**
  - **Official correspondence to and from government agencies;**
  - **Personnel policies and guidelines; and**
  - **Human Resources Guidelines**

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Policy Tip No. 2

- **Determine How Long to Retain Records**
  - **Retention periods can vary**
  - **Must consider both state and federal law**
  - **Evaluate pending and reasonably foreseeable litigation**
  - **Balance the importance of retention against the cost of retaining documents**
  - **Retain documents no longer than necessary to accomplish the task for which they were generated**

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Policy Tip No. 3

- **Establish a Specific Process for Destroying Personnel Records**
  - **Develop specific guidance on the process for destroying personnel records**
  - **Establish timetable to review personnel files**
  - **Describe circumstances in which personnel records can be discarded or shredded**
  - **Identify individuals who have authority and responsibility for carrying out document destruction**

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Policy Tip No. 4

- **Establish a Process for Suspending Destruction of Personnel Records**
  - **When any lawsuit or government investigation relating to the documents is pending or foreseeable**
  - **Be conservative**
  - **Err on the side of suspending destruction of personnel records potentially related to litigation**
  - **Appropriate management personnel and legal counsel ultimately determine what to destroy**

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Policy Tip No. 5

- **Document Compliance with the Personnel Document Retention Policy**
  - **Ensure that the company receives full protection of a valid personnel document retention policy**
  - **Document not only the policy itself, but also enforcement and compliance with the policy**
  - **Less likely to get an adverse inference from the Court**
  - **Be able to identify date of destruction and reason for destruction pursuant to policy**

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A RECORDS RETENTION POLICY HAS ITS LIMITS

- **A records retention policy is not a cure-all**

- **If a document is destroyed in accordance with Company policy, a Court can still find, based on the facts and circumstances presented at trial, that the destruction occurred at a time when the litigation was reasonably foreseeable, and that a duty to preserve the document was triggered**

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Ethics in Internal Communications During Layoffs

- **Be Transparent**
- **Plan, Plan, Plan**
- **Notify and Train Managers**
- **Be Genuine and Open with Affected Employees**
- **Control the Flow of Information**
- **Engage in Consistent Messaging**
- **Support Employees Remaining with the Organization**

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Ethics in External Communications During Layoffs

- **Maintain consistent messaging between internal and external audiences**
- **Avoid defamation and conversion of personal property claims**
- **Watch out for invasion of privacy claims**
- **Limit release of information to only those with a need to know**

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COMMUNICATIONS WITH CLASS MEMBERS:

WHAT EMPLOYERS AND LEGAL COUNSEL CAN ETHICALLY DO AND SAY IN RULE 23 CLASS AND FLSA COLLECTIVE ACTIONS

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Modinat “Abby” Kotun

October 6, 2016

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Two Major Types of representative Actions

Rule 23 Class Actions

(Opt-Out Classes)

- **Title VII**
- **Americans with Disabilities Act**
- **State law claims (under diversity jurisdiction and/or supplemental jurisdiction)**

Collective Actions

(Opt-In Classes)

- **Fair Labor Standards Act (wage and hour)**
- **Age Discrimination in Employment Act**
- **Equal Pay Act**

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Two Major Types of representative Actions

Rule 23 Class Actions

(Opt-Out Classes)

- **Each person who falls within the definition of a class member is bound by the judgment unless 23(b)(3) class and they opted out.**
- **Commencement of class action tolls the statute of limitations.**
- **Rigorous analysis for certification.**

Collective Actions

(Opt-In Classes)

- **A putative plaintiff must affirmatively "opt-in" to the action in order to be considered to be a class member and be bound by the outcome of the action.**
- **Opt-in by filing a written consent with the court.**
- **Commencement of a collective action does not toll the statute of limitations for putative class members.**
- **Two-step approach to certify and determine whether plaintiffs are "similarly situated."**

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THE ETHICAL RULES

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The MODEL Rules

- Model Rule 4.2 (Communication With Person Represented By Counsel)
  - In representing a client, a lawyer **shall not communicate** about the subject of the representation **with a person the lawyer knows to be represented by another lawyer in the matter**, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
- Model Rule 4.3 (Dealing With Unrepresented Person)
  - In dealing on behalf of a client with a person who is not represented by counsel, a **lawyer shall not state or imply that the lawyer is disinterested**. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The **lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel**, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

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The MODEL Rules

- Model Rule 7.3(a) (Solicitation of Clients)
  - A lawyer **shall not** by in-person, live telephone or real-time electronic contact **solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain**, unless the person contacted:
    - (1) is a lawyer; or
    - (2) has a family, close personal, or prior professional relationship with the lawyer.
- Model Rule 8.4 (Misconduct)
  - It is professional misconduct for a lawyer to:
  - (a) violate or attempt to violate the Rules of Professional Conduct, ***knowingly assist or induce another to do so, or do so through the acts of another***

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THE TEXAS RULES

- Texas Rule 4.02. Communication with One Represented by Counsel
  - (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
- Texas Rule 4.03. Dealing With Unrepresented Person
  - In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

THE TEXAS RULES

- Texas Rule 7.03. Prohibited Solicitations & Payments
  - (a) A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in paragraph (f), seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Notwithstanding the provisions of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization's members for the purpose of educating the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use legal services. In those situations where in-person or telephone or other electronic contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:
    - (1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;
    - (2) the communication contains information prohibited by Rule 7.02(a); or
    - (3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

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THE TEXAS RULES

- Texas Rule 8.04. Misconduct
  - (a) A lawyer shall not:
    - (1) violate these rules, ***knowingly assist or induce another to do so, or do so through the acts of another***, whether or not such violation occurred in the course of a client-lawyer relationship

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communicating with putative class members

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When Is An Employee Represented?

- Unnamed Members of the Putative Class
  - From the filing of the putative class or collective action suit?
  - Once the potential class member becomes an actual class member?

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When does a Potential Class Member Become an Actual Class Member?

- Class Actions
  - When the court certifies a class?
  - When the opt-out period has expired after certification?

- Collective Actions
  - When the court grants conditional certification?
  - When the employee opts into the collective action?

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Class/collective action filed, now what?

- After an action is filed, employers/defense counsel may:
  - Conduct fact investigations
  - Interview putative class members
  - Obtain declarations and affidavits from class members
  - Talk to employees about the plaintiffs' claims
  - Seek a settlement with putative class members
  - Require putative class members to sign arbitration agreements
  - Advise employees on whether to opt-out of the class or join the collective action

Ethical?

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ABA Formal Opinion 07-445 – Rule 23 Class Action Context

- Concluded that Model Rules 4.2 and 7.3 do not generally prohibit counsel for either the plaintiff or the defendant from contacting people who may become class members ***before*** class certification is granted.
- Rule 4.2
  - The relevant question is **whether an individual is represented by counsel in the matter at the time of the contact**.
  - If counsel for the named class members represents the potential class member, then Rule 4.2 prohibits defense counsel from contacting the potential class member.
  - However, **counsel for the named plaintiff does not have an attorney-client relationship with a putative class member unless the person has manifested an intention** that the lawyer provide services to him/her or "there is a substitute for that assent given by a court order or by another person authorized to act for the client."
  - "A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out has expired."

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ABA Formal Opinion 07-445 – Rule 23 Class Action Context

- Rule 4.3
  - If the putative class member is not represented, then Rule 4.3, which applies to contacts with unrepresented persons, governs any contacts by either plaintiffs' or defense counsel.
- Rule 7.3
  - This rule, which governs contacts with potential clients, also applies to contacts with prospective class members **by plaintiff's counsel**.
  - "The fact that an action has been filed as a class action does not affect the policies underlying Rule 7.3 that prohibit the types of contact [by plaintiffs' counsel] with prospective clients that have serious potential for overreaching and other abuse."

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COLLECTIVE ACTION CONTEXT

- Rule 4.2
  - Again, the relevant question is **whether an individual is represented by counsel in the matter at the time of the contact**.
  - Once a putative plaintiff opts-in to the collective action, then Rule 4.2 prohibits defense counsel from contacting the potential class member directly.
- Rule 4.3
  - If the putative plaintiff has not yet opted-in, then the putative plaintiff is not represented, and Rule 4.3 governs any contacts by either plaintiffs' or defense counsel.
- Rule 7.3
  - This rule, which governs contacts with potential clients, applies to contacts **by plaintiffs' counsel** with putative plaintiffs who have not opted-in.

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Gulf Oil Co. v. Bernard, 401 U.S. 89 (1981)

- In *Gulf Oil v. Bernard*, the U.S. Supreme Court rejected the argument that defense counsel are *per se* prohibited from contacting putative class members before a class is certified.
- Instead, a court **can only limit pre-certification communications** to address communications that **misrepresent the status or effect of the case** or that **have an obvious potential for confusion**, and must be based on "a specific record showing by the moving party of the particular abuses by which it is threatened."
- Where the complaining party cannot demonstrate actual abuses, federal district courts have routinely refused to exercise their supervisory authority over communications with putative class members.
- Abuses that would justify a gag order include:
  - Communications that coerce putative members into excluding themselves from the class,
  - Undermine cooperation with or confidence in plaintiffs' counsel, or
  - Suggest retaliation for participating in or assisting the class.

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Allowable communication Post-conditional certification/opt-in or post-class certification

EMPLOYER DIRECTLY

- Communications not related to the litigation (e.g., in the normal course of business)
- Communications that are neutral, non-misleading, and non-coercive

DEFENSE COUNSEL

- Depositions and discovery.
- *Jackson v. Bloomberg, L.P.*, 2015 WL 1822695 (S.D.N.Y. Apr. 22, 2015) – NY court certified a federal class action and NY class action; the defense sought leave to communicate with its team leaders who were also class members; the magistrate issued an order permitting this contact; plaintiff objected with the district judge. **District judge concluded that issuing the order permitting contact would be inappropriate because the defendant's need to prepare a defense was not "exceptional circumstances." Defense could always talk to the employees with their lawyers present.**

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Examples of improper communication

- Telling potential class members that their mental health records will become public unless they opt out. *See Romano v. SLS Residential*, Inc., 253 F.R.D. 292, 295–300 (S.D.N.Y. 2008).

- Urging potential class members not to join the lawsuit. *See Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. 630, 632-635 (N.D. Tex. 1994) (ordering defendant to refrain from contacting potential class members about the litigation after defendant sent three letters urging potential class members not to participate in litigation).

- Failing to inform employees solicited to make statements supporting their employer's position that such statements could be against their interest. *See Mevorah v. Wells Fargo Home Mortgage, Inc.*, No. C 05-1175, 2005 WL 4813532 (N.D. Cal. Nov. 17, 2005) (finding defendants' counsel pre-certification communications, in which counsel interviewed and attempted to obtain depositions from potential class members, were misleading and improper where counsel mischaracterized the litigation, did not inform them the depositions might be adverse to their interests, and at least one declarant indicated that she was misled by the communications).

Examples of improper communication

- Mischaracterizing the remedy sought in the lawsuit.
- Mischaracterizing the alleged unlawful behavior in the lawsuit.
- Undermining potential class plaintiffs' cooperation or confidence in class counsel. *See, e.g., In re School Asbestos Litigation,* 842 F.2d 671, 682 (3rd Cir. 1988); *Hampton Hardware v. Cotter & Co.,* 156 F.R.D. at 632; *Haffer v. Temple University,* 115 F.R.D. 506, 512 (E.D. Pa.1987).
- Obtaining declarations from potential class member employees who were told that the employer was conducting a survey of pay practices without informing them that a lawsuit was pending about those very pay practices that the employee could join. *Longcrier v. HL-A Co., Inc.,* 595 F. Supp. 2d 1218 (S.D. Ala. Dec. 9, 2008).
- Sending a letter with a check to potential class members advising employees that an audit revealed that they had not been paid properly because a potential class member employee was confused about whether he could join the collective action. *Goody v. Jefferson County*, 2010 WL 3834025 (D. Idaho Sept. 23, 2010) (ordering corrective notice and extending the opt-in period by 30 days).

IMPROPER COMMUNICATION SANCTIONS – DEFENSE

- *Randolph v. PowerComm Construction Inc.* 41 F. Supp. 3d 461 (D. Md. 2014)
  - Defendants tried to settle with several members of the class (FLSA collective action and Rule 23 Maryland Wage and Hour Law) during the opt-in period. The court granted the plaintiffs' motion for protective order and **invalidated opt-out forms obtained** because the communication with the plaintiffs was abusive and threatened the proper function of the litigation. The court also **ordered corrective notice and prohibited future communications about the litigation**.
- *Scott v. Chipotle Mexican Grill*, 2014 WL 4852063 (S.D.N.Y. Sept. 29, 2014)
  - In this FLSA collective action case, one plaintiff had already opted-in at the time defense counsel obtained a declaration from the opt-in plaintiff. The court found that defendant's counsel violated the local state rule of professional conduct (albeit not willfully and without coercion) preventing counsel from attempting to obtain an unfair advantage by communicating directly with an opposing party in the absence of opposing counsel. The defense was **not allowed to use the declaration** even though it was truthful.

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IMPROPER COMMUNICATION SANCTIONS – DEFENSE

- *Maddy v. General Electric Co.*, 2015 WL 1344626 (D.N.J. Mar. 23, 2015)
  - After conditional certification, a court-facilitated notice was sent with a 90-day opt-in period. Less than a month after the opt-in period started, a **manager** of some of the putative plaintiffs **sent an email** instructing the techs not to perform work off the clock which could result in disciple, up to and including termination. The court ordered **curative notice**, **extended the opt-in period by 30 days**, and **required** that the defendant **submit** to the court (presumably for permission) **copies of communications** to putative class members during the opt-in period and concerning timekeeping policies and procedures.

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IMPROPER COMMUNICATION SANCTIONS – DEFENSE

- *Sloan v. Ameristar Casinos, Inc.*, 2013 WL 1127062 (D. Colo. Mar. 18, 2013)
  - The court conditionally certified a collective action. Defendant's COO sent a letter to former employees who were prospective class members before any had opted-in to the collective action.
  - The Magistrate Judge found that the letter was misleading, coercive, and "a blatant attempt to undermine the purposes of a collective action."
  - The court imposed numerous sanctions, including:
    - **$480,000 penalty** against Defendants to be deposited into the Court registry and distributed in a manner so as to mitigate Defendants' threats against the former employees.
    - Corrective Notice.
    - Limitations on future *ex parte* communications with absent class members until the end of the litigation.

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Implementation of arbitration program after class or collective action is filed

- *Williams v. Securitas Sec. Services USA, Inc.*, No. 10 Civ. 7181, 2011 WL 2713741 (E.D. Pa. July 13, 2011).
  - After plaintiffs filed their wage and hour case, defendant distributed to all its employees a document entitled “Securitas Security Services USA, Inc. Dispute Resolution Agreement,” which required employees to agree to arbitrate all legal claims if they did not opt out of the agreement. On the last page, there was a line for employees to sign indicating acknowledgment of receipt of the document. The Court found such agreement violated the FLSA because it would likely cause confusion among putative class members.

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Implementation of arbitration program after class or collective action is filed

- *Billingsley v. Citi Trends, Inc.*, 560 Fed. Appx. 914, 922 (11th Cir. 2014).
  - The employer was served with an FLSA collective action. After the court set a scheduling conference, the employer began devising an alternative dispute resolution ("ADR") policy and began rolling it out after the scheduling conference occurred. The ADR policy included a **mandatory agreement to arbitrate all disputes individually rather than collectively**.
  - The court found that the employer gathered declarations and arbitration agreements "through back-room meetings that were 'highly coercive' and 'interrogation-like.'"
  - The employer moved to compel arbitration based on the arbitration agreements it procured.
  - The district court denied Citi Trends's motion to compel arbitration and concluded that **the arbitration agreements were unconscionable as a matter of law**. The Eleventh Circuit affirmed.

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Implementation of arbitration program after class or collective action is filed

- *Conners v. Gusano's Chi. Style Pizzeria*, 779 F.3d 835 (8th Cir. Mar. 9, 2015)
  - Plaintiff filed a proposed collective action lawsuit. One month later, Gusano's distributed a new arbitration agreement to all current servers which required individual arbitration of all employment disputes, including Conners' litigation.
  - The former servers, who were not subject to the new agreement, argued that Gusano's engaged in improper communication with putative class members and sought to enjoin the pizzeria from enforcing the agreement against the current servers.
  - The Eighth Circuit held:
    - The plaintiffs could not show an "actual or imminent" threat.
    - The plaintiffs lacked standing, and the courts did not have jurisdiction to enjoin the enforcement of the arbitration agreement.
  - Gusano's acted quickly after the collective action was filed. The arbitration agreement was **not coercive**, including proper advisements about the right to opt out and a mention of the pending lawsuit and the effect of the agreement on the lawsuit.

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Example of proper communication

- *Maddock v. KB Homes, Inc.*, 248 F.R.D. 229, 237 (C.D. Cal. 2007)
  - [P]laintiff submits no evidence to suggest that defendant engaged in any misleading or coercive communications with potential class members. In reply to plaintiff's objection, defendant submits the declaration of Paul R. Lynd, who states that all declarants signed a two-page document entitled "Prefactory Statement to Interviewees Re Purpose of Interview" (hereinafter "the Statement") ***before they were interviewed by defendant's counsel***. Defendant submits a copy of the Statement signed by each of the declarants. The Statement ***describes the nature of the instant case in a neutral fashion***, informs the interviewee that ***involvement in the case is voluntary***, that interviewees have the ***right to an attorney***, and that ***sales agents' interests may be adverse to defendants interests***. The mere fact that defendant communicated with its class members regarding the instant suit and requested that current employees file truthful declarations, absent any evidence that the communications were misleading or coercive, is insufficient to warrant striking the declarations.

Example of proper communication

- *Talamantes v. PPG Industries, Inc.*, 2014 WL 4145405 (N.D. Cal. Aug. 21, 2014)
  - Parties stipulated to conditional certification and the content of notice and opt-in consent forms. Parties agreed that the notice and consent forms would be the only unsolicited communication about the lawsuit during the opt-in period.
  - 6 days before the opt-in period began, defendant sent an encrypted email to potential plaintiffs explaining that their positions had been reclassified, what the employer's stance would be in court, and that there was a pending lawsuit.
  - The plaintiffs sought sanctions. The court found the email factually true, not misleading, and a statement of the employer's position. It did not violate the stipulation as it was not sent during the opt-in period.

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EMPLOYER Takeaways pre-certification/pre-opt-in

- When interviewing a potential class member employee or obtaining a signed statement or declaration (before class certification or before opt-in):
  - Inform the employee that the interview/statement is voluntary;
  - Inform the employee that the interview/statement is *not* privileged;
  - Inform the employee of the pending lawsuit describing it in a neutral fashion;
  - Inform the employee that you represent the employer and its interests, and not the employee or his or her interests, which may be adverse;
  - Inform the employee that he or she will not be retaliated against if he or she joins the lawsuit or does not opt out of the class;
  - Inform the employee that he or she will not be retaliated against if he or she does not want to provide a statement or be interviewed; and
  - Do not offer legal advice beyond informing the employee that it is his or her decision whether to talk with any attorney who might contact them about the matter.
- If made, communications must not be false, misleading, or coercive.
- Consider seeking a court order allowing the employer to directly communicate with potential class member employees depending on your jurisdiction.

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EMPLOYER Takeaways post-certification/post-opt-in

- Cease communications about the pending lawsuit as soon as the employer or its attorney knows that an employee has opted into a collective action or a court has certified a Rule 23 opt-out class action.

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