

FIRM EXPANDS LOCAL GOVERNMENT AND CORPORATE LAW PRACTICE

Michael B. Lavery has joined the firm as a Member in the Local Government Department. Mr. Lavery, formerly a partner in the firm of Sirkis & Lavery, concentrates his practice in local government law, zoning, land use and litigation. Mr. Lavery presently represents a number of governmental entities serving as Special Counsel to the County of Warren for Open Space & Farmland Preservation, Township Attorney for Hardwick, Lopatcong, Oxford and Washington Townships, as well as attorney for the Frelinghuysen Township Planning Board and the Warren County Soil Conservation District.

Mr. Lavery joins the firm after 16 years with Sirkis & Lavery. Mr. Lavery earned his law degree from Rutgers University, where he served as a member of the Stratton Moot Court Board and President of the Student Bar Association. He received his B.A. from the University of New Haven where he received the Dean's Award for Outstanding Contribution to the University. Mr. Lavery is admitted to practice in the State and Federal Courts of New Jersey and Pennsylvania, and before the United States Court of Appeals for the Third Circuit. Mr. Lavery is also a member of the Election Law Committee for the New Jersey State Bar Association and a member of the Local Government Law Section of the State Bar Association.

Mr. Lavery presently serves as the Mayor of Hackettstown. He has also served as Republican State Committeeman for Warren County and Legislative Aide to Senator Leonard

Lance (R-23). Mr. Lavery presently serves the community as a member of the Hackettstown Regional Medical Center Board of Trustees and former President of the Hackettstown Regional Medical Center Foundation Board. Mr. Lavery has also served as President of the Hackettstown Area Chamber of Commerce as well as a Founding member of the Warren County Regional Chamber of Commerce. Mr. Lavery also formerly served as Chairman of the District 13 Fee Arbitration Committee.

Also, joining the firm with Mr. Lavery is his associate Katrina L. Campbell. Ms. Campbell began as an associate at the law firm of Sirkis & Lavery in 2006. Ms. Campbell concentrates her practice in local government, farmland preservation, zoning and land use. She is admitted to the Bar of the State of New Jersey, the Commonwealth of Pennsylvania, and United States District Court for the District of New Jersey.

Ms. Campbell is a 2002 honors graduate of James Madison University, in Harrisonburg, Virginia where she received her B.S. in Sociology/Criminal Justice. In 2005, Ms. Campbell earned her Juris Doctorate from Seton Hall Law School in Newark, where she earned the Best Oral Advocate award for Appellate Advocacy. After graduating from law school, Ms. Campbell served as a Judicial Law Clerk to The Honorable Amy O'Connor, J.S.C. in the Civil and Family Divisions of the Superior Court of New Jersey. Ms. Campbell is a member of the New Jersey State Bar Association, Pennsylvania Bar Association and Warren County Bar

Association. Ms. Campbell is also a member of the Bethlehem Township Board of Education in Hunterdon County.

Thomas F. Craig, II has also joined the firm as Member of the Business and Real Estate Department. Mr. Craig, formerly a partner with the law firm of Schenck, Price, Smith & King, LLP, concentrates his practice in the areas of general corporate and commercial transactions, finance and banking. Mr. Craig has extensive experience in the purchase, sale and financing of businesses and related commercial transactions, including the structuring and restructuring, negotiating and closing of complex asset and stock sales and acquisitions. He has represented numerous financial institutions, both large and small and has served as counsel to both large and family held businesses.

Mr. Craig joins the firm after a ten year career with Schenck, Price, Smith & King and a 23 year career with Evans Hand where he was also the managing partner. After receiving an undergraduate degree with honors from Seton Hall University in 1970, Mr. Craig attended the Georgetown University School of Law where he was graduated in 1973. Prior to joining Evans Hand he served as Law Secretary to the Honorable Eugene Lora, Superior Court of New Jersey, Appellate Division.

Mr. Craig is a member of the New Jersey State and American Bar Associations, Business Law Section and also a Member of the ABA's Negotiated Mergers Committee and the Small Business Committee. ♦

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EMPLOYEE THEFT ON THE RISE

By Howard A. Vex, Esq.

The economy has hit a rough patch and the cost of living has sharply increased in recent months. Many employees, at all economic levels, now face an increased risk of significant economic duress which can lead to foolish decisions and, ultimately, illegal conduct. Therefore, although it is never a pleasant topic to discuss, prevention of employee theft must be openly addressed by every business. Indeed, small businesses are believed to lose up to \$40 billion in this country each year as a result of employee theft.

Although most people find it difficult to believe that someone hired to fill a trusted position in their company would actually steal from the company, it happens every day, in all kinds of businesses, and in a variety of ways. Employee theft can take many forms, from diverting sales leads or improperly reporting sick leave, to stealing intellectual property and confidential information.

In the unfortunate event employee theft is discovered, it is always advisable to remember that theft is a business problem and addressing it as such will aid in quick resolution and prevention. Do not let anger or outrage guide your response. The first step that must be taken is to complete a detailed and strictly confidential investigation, securing all available evidence of the misconduct and, if possible, a written confession and resignation. Prompt corrective

action must be taken to assure that the door to any further theft has been closed. If you require the assistance of a human resources specialist or legal professional, do not hesitate to make that call. An "ounce of prevention" can often prevent the need for the proverbial "pound of cure."

You must also take a thorough second look at your organizational processes. Theft usually occurs as a result of a breakdown in procedure. Does the business lack a system for checks and balances? Are employees not following clearly defined procedures? Are the appropriate personnel in management paying enough attention? Use the situation as a wake-up call to re-examine the way the company does business.

Although each organization is unique, the following tips are generally applicable across the board:

1. Be sure to complete reasonable background checks on all your employees. In a hurry to find workers, some employers will just go on a "gut" reaction or assume that because someone is a friend or relative of a current trusted employee, the same must be true of the new prospect. Sometimes that theory works; sometimes it fails with significant and costly consequences. Check everyone out thoroughly. Nothing is foolproof, but doing some research will help avoid an obvious mistake.
2. Don't assume that a well-paid employee will resist the temptation to steal, or that a trusted

employee will report others who steal. Don't assume that new employees are more likely to steal than those with the most seniority. Remember that things change in our employees' lives, just like they do in ours. Increased debt load from a child in college, strained personal relationships, an addiction or pressure from peers could all change a long-time, trusted employee's attitude.

3. Minimize the opportunities to engage in dishonest conduct. Establish a system of checks and balances and oversight for key processes that ensures different people are performing tasks and can routinely check one another's work.
4. Provide a confidential forum in which employees can speak up about their suspicions without fear of repercussion. Ensure that employees know that management and ownership are subject to the same rules and processes as anyone else in the company.
5. Finally, management must serve as a positive role model. The tone for integrity and trust starts at the top of any organization. Talk the talk and walk the walk. Set an example of ethical behavior and equitable management. If employees view management and the business as a whole as generally unethical, they will be far less motivated to focus on ethical issues in the conduct of their own job duties. ❖

COMPUTER FRAUD AND ABUSE ACT UPDATE

By James F. Moscagiuri, Esq.

The federal Computer Fraud and Abuse Act (CFAA) is most closely associated with criminal prosecutions brought by the Department of Justice. But the CFAA also provides for a civil cause of action for anyone who suffers damage or loss because of a violation of the statute. In light of the expansive reading that some courts have given to the law, victimized companies should give consideration to taking the civil route. A civil lawsuit gives the wronged party more control and may provide a quicker fix. By

means of such a lawsuit, the victim can retrieve stolen data, enjoin illegal access to data, and even get compensatory damages for the theft and destruction of data.

The CFAA applies to all companies and all computers that are connected to the Internet. Potentially, there are multiple, distinct types of violations of the statute that could support a civil action. On a recurring issue in such cases—whether the defendant had authorization for his actions—the courts look at several factors:

whether the defendant was an agent of the plaintiff's, with particular powers;

whether an employment contract, such as may have been embodied in company rules and policies, was breached; and whether the defendant's use of the computer exceeded normal use that was expected by the plaintiff.

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"HOURS OF SERVICE" UNDER THE FMLA

By Amanda L. Mulvaney, Esq.

To be eligible for leave under the federal Family and Medical Leave Act (FMLA), an employee must have been employed by the employer for the preceding 12 months, and the employee must have put in at least 1,250 "hours of service" during that time. Neither the FMLA nor the Fair Labor Standards Act (FLSA) defines "hours of service."

When a hospital determined that a nurse it employed was about seven hours short of the 1,250 hours threshold, and therefore denied the nurse FMLA leave in connection with her surgery for carpal tunnel syndrome, the circumstances required a federal appellate court to construe the proper meaning of "hours of service."

Both sides agreed that, in terms of actual hours spent on the job, the nurse came up just short of the FMLA threshold. But the facts were not that cut and dried. Under a "Weekender"

compensation program devised by the hospital to provide an incentive for nurses to work undesirable weekend shifts, for every two-week period during which the nurse worked 48 weekend hours, she was paid as if she had worked 68 hours instead. If the hospital had calculated the nurse's hours in her first year using the "bonus hours" in addition to the hours the nurse was at work, she would have been eligible for FMLA leave.

The court upheld the hospital's decision and declined to find it liable under the FMLA. While the legislation itself provided little guidance for the court, an FMLA regulation on the subject of the requirement of 1,250 hours does state that "[a]ny accurate accounting of actual hours worked under FLSA's principles may be used." Another regulation states that "all hours are hours worked which the employee is required to give his employer." In this case, the

court reasoned that the bonus hours for which the nurse received extra compensation could not count as "hours of service" because she was not required to "give" them to her employer, but rather could spend that time for her own purposes.

The nurse argued to no avail that her case should have had the same outcome as another case decided by the same court, in which the court held that an employee's "hours of service" under the FMLA did include some hours not actually worked. In that case, however, the employee requested FMLA leave after successfully suing for wrongful termination and obtaining a remedy that included full service credit and back pay for the hours she would have worked but for the termination. Thus, the employee could use these hours that would have been worked in calculating FMLA eligibility. ♦

THE MURKY WATERS OF WETLANDS PROTECTION

By Michael S. Selvaggi, Esq.

It has been over a year since a splintered United States Supreme Court issued a decision on the scope of the federal government's jurisdiction under the Clean Water Act to regulate wetlands. In that time, confusion has reigned as lower courts have interpreted the decision. The Act, now 35 years old, prohibits dumping certain pollutants into the "waters of the United States," which are defined as "navigable waters." Property owners of isolated wetlands have the "murky" task of determining whether their property is protected or not.

The question before the Court was whether wetlands into which fill material was deposited were "navigable waters." The Court set forth a confusing standard to guide the analysis. On the one hand, it said that the term "navigable waters" includes only relatively permanent,

standing, or flowing bodies of water, not intermittent or ephemeral flows of water, and that only those wetlands with a continuous surface connection to such waters are covered by the Clean Water Act. At the same time, it said that wetlands may be protected by the Act if they have a "significant nexus" to navigable waters or could "affect the chemical, physical and biological integrity of other covered waters." Lower courts have been split as to which standard to apply.

In an effort to clarify, the Environmental Protection Agency and the U.S. Army Corps of Engineers have published a Guidance that identifies those waters over which the two agencies will assert jurisdiction categorically and on a case-by-case basis. (Go to www.epa.gov.) Essentially, the agencies have not picked one of

the competing standards from the Supreme Court over another, but instead will use both of them.

There definitely will be assertion of Clean Water Act authority over wetlands that abut tributaries that come within the "relatively permanent" standard. This refers to tributaries that typically flow year-round or that have continuous flow at least seasonally. Wetlands adjacent to waters not fitting in the "relatively permanent" category will be assessed on a case-by-case basis, using the "significant nexus" test. Perhaps eager to make some kind of pronouncement that is unequivocal, the authors of the Guidance also state that Clean Water Act authority will not be stretched so far as to cover swales, gullies, and ditches that drain only uplands and do not carry a relatively permanent flow of water. ♦

FIRM DIRECTORY

John J. Abromitis
Katrina L. Campbell
Lawrence P. Cohen
Jim Courter
Thomas F. Craig, II
Kevin M. Hahn
Joel A. Kobert
Michael B. Lavery
James F. Moscagiuri
Amanda L. Mulvaney
Michael S. Selvaggi
Howard A. Vex

Of Counsel
Peter J. Cossman
Hon. Harry K. Seybolt,
J.S.C. (Ret.)
Jeffrey A. Guth
(2000-2004)

1001 Route 517
Hackettstown, NJ 07840
Tel. (908) 852-2600 • Fax (908) 852-8225

23 Cattano Ave.
at Chancery Square
Morristown, NJ 07960
Tel. (973) 285-1281

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

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PEOPLE IN THE NEWS

KEVIN M HAHN has been elected to the Executive Committee of Legal Services of Northwest Jersey.

MICHAEL S. SELVAGGI was nominated to serve as Vice-President on the Board of Directors for The Arc, Warren County Chapter, Inc. Mr. Selvaggi has served on the Board since 1994.

MICHAEL B. LAVERY was appointed as a Warren County Republican County Committee member for the 3rd District in Hackettstown.

KATRINA L. CAMPBELL was elected as a Hunterdon County Republican County Committee member for the 3rd District in Bethlehem Township.

COMPUTER FRAUD AND ABUSE UPDATE
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RECENT COURT DECISIONS

A real estate business was allowed to proceed with a civil action against a former employee for violations of the CFAA. In violation of his employment contract, the employee decided to quit and start a competing business. Before he returned the company's laptop, he deleted all of the data in it, including data that would have revealed his misconduct. Knowing that "deleted" files can be retrieved, he erased the incriminating data by loading into the laptop a secure-erasure program.

All of this, if proven in court, violated the CFAA as "transmission" of a program that damaged the computer (defined to include files in the computer), and as intentionally accessing the computer without authorization. Although the employee had not yet left his job when he installed the program, by law any authorization

he might have had evaporated as soon as he violated the duty of loyalty to his employer.

In another case brought under the CFAA, a tour company secured an injunction against a competing company run by one of its former employees. The ex-employee improperly used confidential information from his former employer to enable his new company to glean pricing data from his former employer's website, so that his new enterprise could effectively undercut those prices.

Although the website was open to anyone, the unauthorized use of the confidential information, combined with the use of a "scraper" software program, violated the CFAA. On top of the injunction, the plaintiff could recover, as a compensable "loss" under the CFAA, the thousands of dollars it had paid in computer consultant fees for diagnostic work after the defendant's conduct was discovered. ❖

Hackettstown, New Jersey 07840
1001 Route 517
Courter, Kobert & Cohen, P.C.

