

The Retail Review

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Opportunities for Business Growth in 2005!

by George Whalin

The year 2004 presented some interesting challenges for retailers. The first quarter started out strong, but then consumer spending slowed, the war in Iraq heated up, and gasoline prices went crazy. Some retailers saw increases over 2003, but many were happy just to stay even.

In the final months of the year, retailers were cautiously optimistic heading into the holiday season. After a slow Thanksgiving weekend and poor sales during the following two-week period, most retail industry observers began to dial back their predictions. From the beginning, I have held to the belief that we must look at the holiday season as the entire period from Thanksgiving week through the end of January to determine whether or not retail sales goals were met. I also believe online and gift card sales must be counted as part of the overall total to get a clear understanding of what, when, where, and how much consumers buy.

While we can't predict the challenges retailers might face in 2005, we can identify some opportunities for growth.

GIFT CARDS

As was evident this holiday season, consumers love gift cards. Given the chance, they will buy them for any and every gift-giving occasion. One of the ways you can capitalize on this gift card popularity is to use them as an incentive—to get customers into your store and to get them to buy other merchandise.

For example, on Thursday, December 16, Saks Fifth Avenue held a gift card promotion. Rather than offer discounts on purchases made that day, customers who spent prescribed amounts were given gift cards. Saks gave \$25 gift cards for purchases of \$250 to \$499, \$50 gift cards for purchases of \$500 to \$999, \$100 gift cards for purchases of \$1000 to \$1,999, \$200 gift cards for purchases of \$2,000 to \$2,999, and \$450 gift cards for purchases of \$3,000 or more. The gift cards could be given as holiday gifts or used personally by the customer for subsequent in-store purchases.

INTERNET AND CATALOG

The Internet and catalog businesses continue to provide growth opportunities for retailers. One of the complaints I frequently hear from independent retailers is how difficult it is to start an online or catalog business. Nothing can be further from the truth. You don't have to start out big. Begin with one product. Create a single page catalog sheet and mail it along with an order form to your customer list and see what happens. And there's no reason, you can't create a single page, one product web site. Mail a postcard to your customers encouraging them to visit your site and buy the item. If that doesn't appeal to you, begin offering online sales by setting up an account with eBay and posting items for sale there. With millions of people buying online, there are tremendous opportunities for nearly every retailer to expand and grow his or her business.

IN-STORE CUSTOMER RELATIONSHIPS

The best opportunity for growth is with the customers who come through your doors every day. Whether customer traffic is good or bad, make sure every customer has a pleasant experience and is given every opportunity to buy. Build long-term relationships with your customers so they come back again and again, buy lots of merchandise, and tell their friends and relatives how wonderful it is to shop in your store.

MAXIMIZE THE OPPORTUNITIES

What steps will you take at the beginning of 2005 to maximize every sales opportunity every day? What will you do to ensure every customer gets every opportunity to buy? What will you do to make the experience in your store pleasant, convenient, and rewarding for every customer? What will you do to bring customers back again and again?

Are there product categories or brands your customers would buy if they were available in your store? Would you sell more merchandise and better serve your customers if you were to remodel and rearrange the layout of your store? Would you do more business if your hours were more convenient for your customers? What did you do in 2004 that you can build on in 2005?

(Reprinted with permission George Whalin's Retail Management E-Letter, December 2004.)



VERMONT RETAIL ASSOCIATION




President's Corner

Richard Huestis

Tell Your Friends About The VRA

Numerous proposals that might hurt Vermont businesses are pouring down from the Legislature. Certainly our elected representatives mean well, but legislation introduced on energy, minimum wages, health care, and other subjects is likely to result in further increases to the cost of doing business in our state.

Vermont Retail Association is at the Statehouse, proudly and professionally representing our members. However, our legislative voice can only be as loud as our membership ranks permit. Sadly, some non-member retailers might think they can get a free ride on the back of your membership dues, since VRA is already at the Statehouse lobbying on these issues with or without them in our association.

On the other hand, maybe your retail colleagues simply are not aware of our work. Please tell your friends what we do and why they should join. If you are unfamiliar with our government affairs work, please take a moment to look over a recent copy of our Statehouse Report. I hope that you will agree that this work is of vital importance to us all. 

Are You Complying With Wage Laws? Equal Pay Audit Available On-Line

The Vermont Commission on Women, the Civil Rights Unit of the Vermont Attorney General, and Vermont Federation of Business and Professional Women have collaborated on a new resource outlining rights and obligations in our state's equal pay laws. This informational brochure addresses:

- Where different wages are okay
- Retaliation against employees who file complaints
- Definitions for equal work
- Discharging employees

It presents a specialized tool, the "Equal Pay Audit" that can be used to protect your workplace against pay equity violations. It can be found at www.women.state.vt.us, the website of the Vermont Commission on Women or at www.bpwusa.org, the website for Business and Professional Women/USA, or contact the VRA for a copy.

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**PROTECTING AND PROMOTING
THE RETAIL INDUSTRY IN VERMONT!**



Executive Director's Corner

John Klesch

Help Put Some Money Where My Mouth Is

During the first half of the young 2005-06 Vermont Legislative Session, Vermont Retail Association has been one of the lead opponents against proposals to increase the Vermont minimum wage. At \$7.00/hr., Vermont currently has the 5th highest minimum wage in the U.S. In light of recent substantial minimum wage increases in 2004 (from \$6.25/hr. to \$6.75/hr.) and 2005 (to the present \$7.00/hr.), annual double-digit percentage increases in health insurance and workers compensation premiums over the last several years, and many other challenges to doing business in Vermont, we have tried to impress upon Legislators that wage inflation can have a serious negative impact on retail businesses (and retail jobs).

Unfortunately, another minimum wage increase of some type is a virtual certainty to become law this year (and go into effect in 2006). Aside from business associations' directors and lobbyists, the Legislature has not heard any real outcry from actual Vermont business owners.

One point VRA has been promoting to Legislators is that workers actually getting paid \$7.00/hr. are most likely eligible to have their income supplemented by the Earned Income Tax Credit ("EITC"). The EITC is a federal tax credit, with the highest eligibility ceiling being for families with two or more dependent children. For instance, a married person with two or more children who earned less than \$35,458 in 2004 is eligible for an EITC up to \$4,300. The federal EITC is refundable, meaning that, in cases where the credit exceeds tax liability, the IRS actually issues a payment to the tax filer.

In Vermont the EITC story does not end there. Of the 17 states in the U.S. that have a state version of the EITC, Vermont's is one of the most generous: 32% of the federal credit. Thus, for a married sole earner with two children being paid minimum wage, Vermont already has the highest effective hourly pay rate in the U.S. when both the federal and Vermont EITCs are included: \$9.73/hr. (31 cents higher than the next highest, Oregon, at \$9.42). Also, Vermont is

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Planning For Higher Profits

by Linda Carter

It has been shown that the mere act of writing down your goals makes it much more likely that you will achieve them. In fact, a well-known Harvard University study reported that 3% of a given study group regularly wrote down their goals, while 14% had goals but did not write them down, and 83% did not have clearly defined goals. The results were amazing: The 3% who regularly wrote down their goals accumulated more wealth than the other 97% of the study participants put together!

To be a successful retailer, it has always been important to pay attention to all aspects of your business. In today's retail climate it is essential for your survival. For example, what good does it do to increase sales volume by the use of constant promotions if the markdowns kill Gross profit? What good is a 44% Gross Profit if Operating Expenses are 46% of sales? Can a well thought out and followed Open-To-Buy help business if the sales effort is lacking?

The retailer needs a way to organize the efforts being made to achieve more profit and a way to know during the year if there are problems that may prevent the store from reaching this profit goal. This is where the formal business plan comes in.

In working with independent retailers throughout the country we have found that too many of them do not have formal written business plans. They do not know how to go about developing them, or do not 'have time' to develop plans, or feel that the development of formal plans will not help their business. We think they are making a mistake. The experts tell us, and it has been shown in studies, that people who put their goals in writing are more likely to achieve them. Writing your goals will not guarantee that you will reach them; however, it will significantly increase the chance for success. Every business should also have a set of written business goals to help in planning business strategies during the year and for measuring actual performance during the year so corrective measures can be taken before it is too late. This is the formal business plan.

The business plan must be based on sound, attainable goals for the coming year. Expressed in financial terms, it charts the course for the retailer's goals and future actions.

Who should take part in this planning process? Every manager who will be accountable for achieving a significant portion of the plan should provide input regarding the following, which we will discuss in detail

below:

1. Gross Margin Plan
2. Open-To-Buy
3. Budgeted Income Statement
4. Cash Flow Budget
5. Salesperson Sales Goals
6. Sale Promotion Plan

GROSS MARGIN PLAN

The store's Gross Margin could be planned for this year by looking at historical figures from past year-end financial statements, but this method is prone to error since it does not take into consideration the current business environment. For example, the retailer may be planning to add new merchandise lines that have a higher Initial Markup.

The method we recommend to our clients is that Gross Margin planning be done at the classification level. To simplify the calculation we have excluded freight and purchase discounts at the class level. Of course, these must be included when calculating Cost of Goods Sold at the company level. The information required to calculate Gross Margin for each classification is:

- planned annual sales
- achievable Initial Markup %
- planned markdown %
- anticipated shrinkage.

The formula is as follows: $\text{Planned Gross Margin \%} = \text{IMU\%} - ((100.00 - \text{IMU\%})(\text{MD\%} + \text{Shrink\%}))$

To calculate the planned Gross Margin dollars, simply multiply the planned annual sales for each classification by the planned Gross Margin % for that classification. Once the Gross Margin is planned at the classification level, the results must be totaled to arrive at the total company planned Gross Margin dollars. This allows management to make sure the Gross Margin dollars will be adequate to cover operating expenses and generate the desired level of profit.

The Gross Margin Plan also allows the retailer to review the anticipated performance of each classification before the year begins. If the Gross Margin Plan shows that one or several classifications will not be profitable there will be time to make any changes before the new year begins. It may be possible to search for new resources that will allow a higher initial markup or that require fewer markdowns. Or, management may make the decision to eliminate a classification altogether. The

important point to remember is that management will have the information on which to base these merchandising decisions.

Of course, an effectively used Open-To-Buy is critical to the achievement of the planned Gross Margin.

OPEN-TO-BUY

The Open-To-Buy is simply a merchandising budget. It is used by the buyer to plan the seasonal purchase of merchandise, and monthly delivery schedules, for each classification to ensure that the right amount of merchandise will be available to meet sales plans. The Open-To-Buy for next year should be completed in a timely manner so the information it generates will be available for completion of the company's formal business plan.

There are good retail software packages available that contain Open-To-Buy programs to handle the tedious computations involved in calculating and updating an Open-To-Buy. In order to calculate the Open-To-Buy the following information is needed for each classification: planned sales by month (annual sales from the Gross Margin Plan divided into monthly sales plans), planned markdowns (from the Gross Margin Plan) and planned beginning of month inventory. The Open-To-Buy formula we recommend, and use in our office, requires the planned annual stock turn rate for each classification (to compute the optimum planned beginning of month inventory for each month).

The formula to compute the monthly Open-To-Buy for each classification is as follows:

Planned Sales + Planned Markdowns + Planned End of Month Inventory – Planned Beginning-of-Month Inventory – On Order = Open-To-Buy

BUDGETED INCOME STATEMENT

The Budgeted Income Statement will be prepared in the same format as your company's current Income Statement. It is to be completed for the entire year, by month. The information needed to complete the Income and Cost of Goods Sold sections are available on the Gross Margin Plan and Open-To-Buy. All that is left now is to budget the company's expenses and other income items.

How does the retailer go about planning expenses for next year? One method is to look at the company's historical records to determine how much each expense was last year, then adjust that amount for inflation and other factors for the coming year. Another method is called zero-based budgeting. Zero-based budgeting requires that you start from zero and justify every expenditure. It examines the costs and benefits of all expenditures. Whichever method is used, and it may be a combination of
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Profits

(Continued from page 5)

the two, this is a good time to thoroughly review all the company's expenses to find new and better ways of doing things or discover what expense items can be eliminated entirely. For example, would an outside alteration service work as well and be less expensive than an in-house tailor? Are there housekeeping tasks being done by store employees, such as cleaning windows and waxing floors, that could be done cheaper by outside contracting services? Don't continue doing things just because that is the way things have always been done. Every expense dollar saved is added to the bottom line for increased profits.

Once all items on the Budgeted Income Statement have been determined, the planned Net Income can be calculated and reviewed for adequacy.

CASH FLOW BUDGET

A company can operate for a time without making a profit—but it can not operate without enough cash to pay its bills. The preparation of a Cash Flow Budget, the final step in the business plan, allows the retailer to know ahead of time when extra operating funds will be needed so there will be time to search for and negotiate short term loans or make other adjustments to operations so bills can be paid on time.

There are two basic ways to approach Cash Flow budgeting:

1. The Cash Receipts And Disbursements Method
2. The Adjusted Net Income Method.

We recommend the Adjusted Net Income Method. Since the Adjusted Net Income Method begins with Net Income it is simply a continuation of the Budgeted Income Statement.

Using this method, we begin with the Net Income and make adjustments to it as needed to take into account non-cash items such as depreciation that appear on the Income Statement and cash items such as note principal payments that do not appear on the Income Statement. Adjustments are also made to net income for any anticipated increases or decreases in payables, receivables and inventory. A simplified version appears below:

Cash Flow Adjustments

1. Net Income
2. Adjustments to Income:
 - Depreciation
 - Increase/(Decrease) in A/P
 - (Increase)/Decrease in A/R

(Increase)/Decrease in Fixed Assets
(Other Capital Expenditures)

3. Monthly Cash Flow (Incr/Decr) (#1 +/- #2)
4. Plus Beginning Cash Balance
5. Adjusted Cash Balance (#3 + #4)

FOLLOW-UP

It is important to remember that a budget is our "best guess" of what will occur in the future. As the year progresses and actual performance is compared to the plans, you may find that sales or Gross Margin are below plan or that expenses are above plan. When this occurs, steps must be taken as soon as possible to correct the problem or revise the plans to keep them in sync with what is actually occurring in your store. This is an important part of the planning process. Also, remember that it is much more effective to analyze variations from plan than to examine comparisons to last year's results.


SALESPERSON SALES GOALS

It is not enough just to set the store's sales goals. In order for the store to achieve the overall goal, each salesperson must have their own set of sales goals for which they are responsible. These should be given to them for each month of the year. They can then break them down into weekly and daily goals. Of course, management must follow up by comparing each salesperson's sales against their goal and working with the salespeople to help them improve their performance, if needed.

SALES PROMOTION PLAN

The Sales Promotion Plan Should be developed prior to the beginning of the year. It will be your guide to monthly promotions, both Sales and Events. The sales promotion plan will list the general advertising focus for each month plus any planned Sales. For example, January-Clearance Sale, February-Valentines Day. Events such as fashion shows, trunk shows, etc. bring customers into your store. If done well, customers will react to an event as well as to a sale and merchandise can be sold at full price. Once the Sales Promotion Plan has been determined, a plan of action needs to be developed for carrying it out. This is done by determining for each month's promotional event, which type of media would work best while staying within the constraints of the advertising budget. It is important to note that spending more dollars does not necessarily guarantee more effective advertising. A smaller advertising budget can be just as effective as a larger budget if used creatively.


SUMMARY

The preparation of the business plan forces you to take a good hard look at your business—where it is, where you want it to be a year from now. Since each store is unique, each will have its own method for reaching its profit goal. For example, if we set 10% as our profit goal we can achieve it by attaining a 48% Gross Profit and keeping our expense level at 38%. We could also achieve a 10% profit with a 44% Gross Profit if we lower our expenses to 34%. The choice is yours. The important thing to remember is that a good profit level does not just “happen”. You must realistically set your goal and then strive to achieve it. 

Reprinted with permission Linda Carter of The Retail Management Advisor, January – March 2005. The web site is www.the-retail-advisor.com and Linda can be reached at l.carter@the-retail-advisor.com or toll free at 1-877-206-1299.

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Employee Privacy in Vermont

A multi-part series for VRA members
by John H. Klesch, VRA Executive Director

(Continued from December, 2004 *Retail Review*)

Part IV

Medical Records

Employers have certain obligations with regard to employees' medical records. This article reviews some of the legal requirements concerning such information. According to the EEOC (per the Enforcement Guide), an employer must keep any medical information on applicants or employees confidential, with the following limited exceptions:

- supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations
- first aid and safety personnel may be told if the disability might require emergency treatment
- government officials investigating compliance with the ADA must be given relevant information on request
- employers may give information to state workers' compensation offices, state second injury funds or workers' compensation insurance carriers in accordance with state workers' compensation laws; and
- employers may use the information for insurance purposes.

Here are some frequently asked questions, with answers from EEOC:

Q. May medical information be given to decision-makers involved in the hiring process?

A. Yes. Medical information may be given to — and used by — appropriate decision-makers involved in the hiring process so they can make employment decisions consistent with the ADA. In addition, the employer may use the information to determine reasonable accommodations for the individual. Of course, the employer may only share the medical information with individuals involved in the hiring process (or in implementing an affirmative action program) who need to know the information.

Q. Does the employer's confidentiality obligation extend to medical information that an individual voluntarily tells

the employer?

A. Yes. For example, if an applicant voluntarily discloses bipolar disorder and the need for reasonable accommodation, the employer may not disclose the condition or the applicant's need for accommodation to the applicant's references.

Q. Can medical information be kept in an employee's regular personnel file?

A. No. Medical information must be collected and maintained on separate forms and in separate medical files.

Q. Does the confidentiality obligation end when the person is no longer an applicant or employee?

A. No, an employer must keep medical information confidential even if someone is no longer an applicant (for example, s/he wasn't hired) or is no longer an employee.

The case of Cossette v. Minnesota Power & Light, 188 F.3d 964 (8th Cir. 1999) provides a very interesting study in ADA medical records/confidentiality requirements. The evidence indicated that a supervisor disclosed the employee's back injury and lifting restriction to the U.S. Postal Service when Cossette sought employment there, and second, disclosed the back injury and Cossette's perceived mental deficiencies to his subordinates (Cossette's coworkers) when Cossette sought a transfer to his department. The disclosure was to address concerns that co-workers might have morale problems if they had to do extra work to cover for Cossette where necessary.

Cossette claimed that the disclosure to the co-workers caused her damages because she was allegedly ostracized and patronized, and the disclosure to the Postal Service delayed her hiring by some fifteen months, resulting in some \$19,500 in lost wages. The Court held that "these facts establish a submissible case of illegal disclosure of confidential medical information under 42 U.S.C. §§ 12112(d)(3)-(4)." 188 F.3d at 969.

The key holding in Cossette is that the ADA's confidentiality provisions apply whether or not the individual's condition (here the back injury) qualifies as a disability. The Court reasoned that (1) under 42 U.S.C.

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Privacy

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§ 12112(d) “it is only discrimination itself (and not illegal disclosure) that requires a showing of disability;” (2) “it makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability;” and (3) the Ninth and Tenth Circuits had already held that a plaintiff need not be disabled to state a claim for the unauthorized gathering or disclosure of confidential medical information. 188 F.3d at 969.¹

While the co-employees’ negative treatment would not qualify as an adverse employment action sufficient to prevail on a discrimination claim, the question whether it was sufficient for Cossette to claim damages for illegal disclosure of medical information was remanded to the district court. The cost to Cossette of the delay in being hired by the Postal Service did qualify as damages sufficient to sustain such a claim.

Employee Monitoring And Surveillance – Telephone Monitoring

Employees who have sued their employers for invasion of privacy with respect to email and voice mail access have brought their claims under the Electronic Communications Privacy Act and related state laws, common law invasion of privacy, and the Fourth Amendment of the Constitution.

The federal Electronic Communications Privacy Act², sometimes referred to as the federal wiretap act, prohibits the interception, disclosure, or unauthorized access of private electronic communications, including telephone, electronic mail, and voice mail communications. Employers are, however, permitted to monitor such communications under the following exceptions: a) the employee consents to the monitoring; b) the communication is readily accessible, such as bulletin boards and other open communications; and c) the communication is made for business-related purposes. An employer may monitor the last group of communications pursuant to what is often referred to the “business phone extension exception.” Excluded from the federal wiretap act’s prohibition of interception of communications through use of any electronic, mechanical, or other device is “any telephone or telegraph instrument or facility, or any component thereof furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by a subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of business. . .”

Courts have usually found the business phone extension exception applicable when the monitoring has a legitimate business purpose. If an employer is monitoring a call for a business purpose, but realizes that the call is personal, the employer must immediately cease the monitoring activity. If, however, employers prohibit personal calls from employer telephones, the employee cannot be ensured protection from employer monitoring of personal calls.

Computer Monitoring

Employers are generally permitted to monitor computer activity when they own or provide employees access to such equipment and the monitoring is done for legitimate business purposes. Computer monitoring by employers expands and changes as quickly as technology advances. Employers can purchase and install a variety of computer monitoring tools to see what their employees are doing with their personal computers, and how they are doing it. Commercial software is available to retrieve files viewed with a computer or stored on hard drives or servers. Employers are also able to run reports on employee usage of the Internet, including time spent viewing websites, as well as identification of websites visited. Employers may also be able to retrieve files employees have attempted to delete from their email from backed up magnetic tapes, as well as viewing active copies of employee email databases.

The ability to monitor employee Internet usage is generally driven by the architecture of an organization’s Internet connection. The two most common architectures for Internet connectivity are to either use of a proxy server, or to allow Internet traffic to flow directly to the Internet from the personal computers within an organization.

An owner of computer equipment and the data contained therein may also bring a civil suit against a person who “intentionally and without claim of right” takes, transfers, copies, conceals or destroys such equipment and data if the owner has been damaged as a result of such wrongdoing. 13 V.S.A. § 4105. A person may also not intentionally and without authority access a computer or computer equipment for fraudulent purposes. 13 V.S.A. § 4103. When Vermont enacted the Computer Crimes statute in 1999, it became the last state to implement a computer crimes law. The Computer Crimes statute provides additional protection for employers with respect to employees or former employees who copy or take sensitive or confidential data through the employer’s computer system, or with respect to former employees who fail to return computer equipment or confidential information upon termination of employment.

Electronic Communications: E-mail and Voice Mail

The Electronic Communications Privacy Act, discussed above, protects email communications as an electronic communication, and voice mail is also likely to be covered as a wire communication. The exclusions from the prohibition of interception of such communications would also apply to email and voice mail monitoring.

Employee may challenge employer email monitoring pursuant to common law invasion of privacy claims, which include:

- Unreasonable intrusion upon the seclusion of another,
- Unreasonable publicity given to another's private life,
- Publicity the unreasonably places another in a false light before the public, and
- The appropriation of another's name or likeness.

The first privacy tort above, intrusion upon seclusion, is more likely than any other to provide a successful challenge to email monitoring. Under the Restatement (Second) of Torts, "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts at 652B (1977). In Bourke v. Nissan Motor Corp., the plaintiffs brought an invasion of privacy claim based upon the employer reading their email communications. However, the court found that since the plaintiffs were aware that the company had read their email and they had signed a statement acknowledging the company's policy that employees should restrict their use of company computer equipment to business use, the plaintiffs had no reasonable expectation of privacy. No. B068705 (Cal. Ct. App., July 26, 1993) (unreported decision).

Similarly, in Michael A. Smyth v. The Pillsbury Company, the District Court for the Eastern District of Pennsylvania dismissed an employee's claim of invasion of privacy based on an employer's interception of email. The plaintiff claimed that the employer's discharge of him based on an email communication was in violation of public policy, claiming that his termination was in violation of his right to privacy. The plaintiff compared his termination to that of an employee who refused to submit to urinalysis screening. The court, however, disagreed, explaining that no "reasonable person would consider the defendant's interception of [email] communications to be a substantial and highly offensive invasion of [] privacy. .

. . [t]he company's interest in preventing inappropriate and unprofessional comments or even illegal activity over its e-mail system outweighs any privacy interest the employee may have. . ." 914 F. Supp. 97, 101 (E. D. Pa. 1996).

Other Surveillance Technology: Knowing Your Legal Boundaries

Some employers may wish to use additional surveillance methods, such as private investigators, security personnel, and video surveillance to protect their employees and their property. Many companies hire security personnel to ensure only authorized employees are entering the employer's premises and to aid in the exiting or calming of volatile employees who have been disciplined or discharged from employment. In addition, when employees of a company are subject to domestic violence in the workplace or on the employer property, employers may want to consider hiring private detectives to monitor the premises for additional protection. When employers hire private detectives and security personnel, either temporarily or as part of their normal business practices, they should hire duly licensed professionals who are trained and understand how to balance employee privacy and employer business protections.

Employers may also wish to videotape employees, to either validate claims of workers' compensation or personal injury, or to observe employee performance in the workplace. Employers who engage in this activity should use such surveillance techniques without audio and should avoid areas where employees would reasonably expect privacy, such as in rest rooms, in order to minimize the risk of invasion of privacy claims.

Faulty Investigation Techniques

Generally, where feasible an employee's identity should be kept confidential with regard to an employer's investigation. In a situation where an employee is being investigated, disclosure of information that might unnecessarily reveal an allegation against an employee suspected of misconduct could lead to a defamation claim where the employee is later proved to be innocent of the charges.


In the context of a sexual harassment investigation, the employer must take care to protect the identity of both the alleged victim and alleged harasser. As stated in the Attorney General's Civil Right's Division's model sexual harassment policy: "Care will be taken to protect the identity of the person with the complaint and of the accused party or parties, except as may be reasonably

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necessary to successfully complete the investigation. It shall be a violation of this policy for any employee who learns of the investigation or complaint to take any retaliatory action which affects the working environment of any person involved in this investigation.” As suggested by the model policy, there exists a concern of revealing the alleged victim’s identity and potentially exposing said person to retaliation in the workplace.

Giving References for Former and Current Employees

In today’s business environment, employers often refrain from providing references for former or current employees for fear of claims of defamation and other legal claims. Many employers will respond to telephone inquiries only by stating or confirming dates of employment, full or part-time status, and job title. To avoid legal liability in providing references, employers should obtain a release from the employee before providing any information other than dates of employment and job title. 


¹*Citing Fredenburg*, 172 F.3d at 1181-82; *Griffin*, 160 F.3d at 593-94 (subsection (d)(2)); *Roe*, 124 F.3d at 1229 (subsection (d)(4))

² 18 U.S.C. § 2510-2522, 2701-2711.

Money (Continued from page 3)

one of 12 states that have a refundable EITC, meaning that, like the IRS, the Vermont Department of Taxes will also send a check in qualifying cases.

We have asked Legislators to consider that the EITC is a far more effective tool to reduce poverty among working families than is the minimum wage. A minimum wage law cannot distinguish between employees in need and those, like second-earners or adult children living at home, that are living in relatively wealthy families. For example, a recent study of a proposed minimum wage hike in California from \$6.75 to \$7.75 found that over 27% of the additional wages paid by employers would have gone to workers who lived in families already earning at least \$40,000/yr. Imagine the public outrage that would arise over a government program to help the needy where 27% of the benefit went to relatively well-off individuals! This result is what a minimum wage increase produces.

One problem cited by proponents of the minimum wage increase is that only a fraction of those eligible for EITC benefits actually apply for them. Within the next week, VRA will thus be sending its members a handout that we urge you to provide to all of your employees explaining the EITC and how to apply for it. The EITC is funded by Vermont’s entire tax-base – not like the minimum wage where one narrow group, employers, carries the burden for the whole state. We have been telling Legislators there is a better way to help Vermont working families than continuing to saddle employers with ever-increasing costs of doing business here. Let’s show them we mean it by helping eligible employees receive EITC benefits. 

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