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Document Retention—Do You Have a Policy?

*By Thomas C. Sadler, Jr. and
Wendy R.S. O'Connor*

In recent years, several high-profile companies have found themselves embroiled in governmental investigation and scandals which have, at best, brought professional, and at worst, criminal liability—all because of poorly-managed document retention policies, or “DRPs.” The cases of Arthur Andersen and Frank Quattrone provide immediate illustrations of just how damaging the failure to implement and follow through on a company-wide DRP can be. Quattrone, once a prominent investment banker who made millions for his clients and his company during the dot-com explosion of the 1990’s, lost everything when, during a governmental investigation, it was revealed that he had encouraged employees to “clean up” their e-mailboxes (translation: delete anything that looks bad). In the wake of direction from in-

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LEGAL UPDATE

Insights and Developments in the Law

Fall 2008

The Great Pennsylvania Smokeout: Keystone State Enacts Clean Indoor Air Act

By Cory P. Balliet

The suits in Harrisburg have recently made it more inconvenient for smokers in Pennsylvania to light up. On September 11, 2008, the Keystone State enacted the Clean Indoor Air Act (“CIAA”) and extinguished the rights of citizens to smoke tobacco products in certain establishments throughout the Commonwealth. *See generally* 35 P.S. § 637.1 (2008) *et seq.* The CIAA directly affects the rights of 2.2 million adults in Pennsylvania who are regular cigarette smokers.

The stated purpose of the CIAA is to “protect the public health and to provide for the comfort of all parties” by regulating smoking in certain places. The CIAA is an attempt to cut down on Tobacco Smoke Pollution (the result of smoke emanating from the end of a lit butt, and the smoke exhaled from a smoker’s lungs). As a whole, the regulation appears to be a welcomed change. For example, approximately seven in ten Pennsylvania adults favor a ban on smoking in indoor work areas and shopping malls, while 99% of Pennsylvania adults favor some restriction on smoking in the dining areas of restaurants.

Where and when, exactly, is smoking prohibited? The CIAA states that “an individual may not engage in smoking in a public place.” It defines a “public place” as an “enclosed area which serves as a workplace, commercial establishment or an area where the public is invited or permitted.” If your workplace is an indoor area serving as

a place of employment, business, trade or volunteer activity, you are expressly prohibited from smoking inside under the CIAA. Additionally, the prohibition includes places such as train stations, sport or recreational facilities, theaters, education facilities, trains, buses, planes, subways, taxicabs and limousines, among others. And yes, smoking is now generally prohibited at food and dining establishments.

This prohibition is pretty expansive. Are there any exceptions? Patrons at a drinking establishment, such as a bar, which operates pursuant to an eating place, restaurant or retail dispenser license may continue to light up inside, as long as the bar has total annual food sales of less than or equal to 20% of its combined gross sales and it prohibits individuals under 18 years of age from entering. A cigar bar may also allow indoor smoking if it operates pursuant to an eating place retail dispenser or restaurant liquor license and has total annual sales of tobacco products of at least 50% of its combined gross sales. Not surprisingly, tobacco shops may permit indoor smoking provided their sales of tobacco and tobacco-related products make up at least 50% of their gross annual sales. To qualify, these establishments must file an Application for Exception with the Pennsylvania Department of Health. The 14-page form is available on the Department’s

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Firm Welcomes New Shareholders

We are pleased to announce that **Sandra Jarva Weiss**, formerly “of counsel” has become a Shareholder and **Jeffrey S. Stewart**, former associate of the Firm, has been elected a new Shareholder.

Sandra Jarva Weiss has been practicing health-care law for more than 20 years and has extensive experience in all areas of health-care regulation. She has designed numerous compliance programs, and counsels hospitals and providers on compliance with the Anti-Kickback Statute and the Stark Statute, federal and state patient privacy laws and the Medicare and Medicaid reimbursement requirements. Sandra earned both her degrees at George Washington University, and has extensive practical experience from having served as in-house counsel for a large teaching hospital system for five years.

Sandra serves on the boards of Good Shepherd and the Council of Lafayette Women. She resides in Easton, PA with her husband Dan who is President of Lafayette College and their two sons Teddy and Joel.

Jeffrey S. Stewart focuses his practice in the areas of labor and employment. Since joining Tallman Hudders & Sorrentino in 2001, he has represented management in traditional labor law matters and employment-related litigation. Jeff has negotiated numerous collective bargaining agreements, defended grievances and defended clients before the NLRB. In addition to representing clients before the PHRC, EEOC and the courts, he counsels clients in such matters as non-compete agreements, sexual harassment investigations, FLSA compliance, unemployment compensation and drafting employment policies and handbooks. Jeff has also taught numerous seminars on employment law in the Lehigh Valley and has taught Employment Law for Moravian College and DeSales University.

Jeff received his law degree from the Dickinson School of Law of the Pennsylvania State University. He is also a Phi Beta Kappa magna cum laude graduate of Syracuse University. Prior to his association with Tallman, Hudders & Sorrentino, Jeff served as a law clerk to Justice J. Michael Eakin of the Pennsylvania Supreme Court.

Jeff is admitted to practice before the State Courts of Pennsylvania and New Jersey. He is also admitted to practice before the District Court of the Eastern District of Pennsylvania. Jeff is a member of the Board of Directors of the Lehigh Valley Chapter of the Society of Human Resource Management and a member of the American, Pennsylvania and Lehigh County Bar Associations.

Announcements

Scott B. Allinson was appointed to serve on the Lehigh Valley Commuter Rail Coalition Steering Committee. The Committee was recently established in order to investigate the potential development of commuter rail from midtown Manhattan to Easton in partnership with the NJ Transit, Cities of Easton and Phillipsburg, and the Delaware River Joint Toll Bridge Commission.

Scott recently co-chaired the 2008 KidsPeace Formal Autumn Ball along with Michael Caruso. The event was held at Saucon Valley Country Club and raised funds to establish after school care for children with autism.

Scott was elected by the Board of Directors to serve as Corporate Secretary to the Greater Lehigh Valley

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New Attorneys

The Firm is pleased to announce the addition of two new associates.

Cory P. Balliet received a B.A. in Economics and Business from Lafayette College in 2004 and a J.D., *cum laude*, from Syracuse University College of Law in 2008. While in law school, Cory was an Executive Editor of the *Syracuse Law Review* and a graduate assistant for the Whitman School of Management at Syracuse University. He was previously a clerk for a federal judge in the United States District Court for the Northern District of New York and an intern in the Office of the Corporation Counsel for the City of Syracuse. Cory practices in the fields of corporate, business, and transactional law.

Avery E. Smith received a B.A. in Government from Franklin and Marshall College and a J.D. from the Temple University Beasley School of Law in 2008. While in law school, Avery served on the editorial board of the *Political and Civil Rights Law Journal* as well as the Hiring Committee for Law Professors. She worked as a summer associate with Tallman, Hudders & Sorrentino during the summer of 2006 and as a judicial intern for the Honorable Kevin Dougherty, Administrative Judge for the Family Court Division of the Philadelphia Court of Common Pleas in 2007. Avery’s practice areas focus on estate planning, the administration of trusts and estates, and adoptions.

Document Retention

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house legal counsel on the eve of an investigation to “adhere to the company’s DRP,” Arthur Andersen employees undertook a shred-fest of potentially damaging documents pertaining to Enron’s pension account. Quattrone ultimately scored a deal pursuant to which he dropped out of the investment banking market for a year, while Arthur Andersen is virtually non-existent despite the fact that prior criminal convictions were recently overturned.

So what is a company to do? Faced with volumes of documents—both in hard-copy and electronic format—many companies choose to save everything, with attendant expense and accessibility issues. Others take a slash-and-burn approach, only to learn at a later date that certain critical data is no longer available. Many businesses may not appreciate that, in addition to being an administrative problem, document retention is a legal issue as well: Most businesses are subject to some regulation concerning document retention of various types of information, while litigation considerations may mandate the preservation of data under certain situations.

Organizations greatly benefit from the development and implementation of a DRP—a set of guidelines governing the storage, access, retention and ultimate destruction of documents. DRPs will vary from company to company depending upon the size and type of business, but the following caveat applies across the board: An effective DRP is essential to retain only those documents which are needed for only as long as they are needed, in a way that is efficient, cost-effective, and protects the organization to civil or criminal liability. When a company can establish that its DRP was implemented in good faith and is reasonable considering the facts and circumstances surrounding the rele-

vant documents, a court will generally not impose liability for the destruction of documents in furtherance of the DRP. *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104 (8th Cir. 1988).

As a general rule, an organization must retain documents which are necessary to the conduct of the organization’s business, are required to be kept by statute or government regulation, or are relevant to pending or foreseeable investigations or litigation. A company has a great deal of discretion in determining which of its corporate, employment, tax and financial information to retain, but each organization must determine whether state or governmental statutory schemes provide specific retention periods for various types of documents. Most businesses will be impacted, at the very least, by state and federal employment law regulations, but many other laws—for example, ERISA, the ADA, CERCLA, or HIPAA—may also apply. TH&S attorneys can provide guidance regarding statutory retention requirements that affect particular industries.

Since most businesses are sued at some point, it is also critical that organizations understand and appreciate their duty to preserve documents in the event of litigation. As a general rule, once a party reasonably anticipates litigation or becomes aware of the likelihood of governmental investigation, it must suspend routine purging systems and put into place a litigation “hold” to ensure the preservation of relevant documents. Under the Federal Rules of Civil Procedure, as well as the provisions of Sarbanes-Oxley, it is a crime, punishable by fine or imprisonment, to intentionally alter or destroy documents with the intent of impeding or obstructing any official proceeding. *See* 18 U.S.C. § 1512(c); 18 U.S.C. § 1819.

In the twenty-first century, document retention necessarily includes electronic documents, such as e-mail, audio or video files, web captures, in-

stant messages, or texts. The sheer volume of e-data is staggering; in one case, it was estimated that production of a company’s relevant e-data during discovery would cost \$9.75 million. *Rowe Entertainment, Inc. v. The William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002). Thus, electronically generated or stored information should be the centerpiece of an organization’s DRP.

Companies desiring to develop and implement a DRP will face fairly broad considerations applicable company-wide as well as department specific requirements. It is critically important, however, that the entire management team be on board, involved, and engaged in the process. A good DRP will identify what documents must be maintained, for how long, where, and in what form, but in-house training and follow-through is essential to the overall success of your company’s DRP. Once the universe of documents is identified, your attorney can help you put together a program that makes sense for your company and can help develop the administrative protocol for management and follow-up. Once your DRP is in place, it will be up to you to make sure it is followed, and frequent in-house training and updates are essential. Regular audits of your DRP will make sure that established policies are adhered to and that your organization’s DRP goals of efficiency and ease of use are accomplished. Finally, a DRP should be reviewed every two years to account for changes in the law as well as the evolution of your company.

Developing and implementing a DRP can not only help your business run more efficiently and eliminate needless expense, it can also protect you in the event of litigation. If your company hasn’t put into place a DRP, there’s no time like the present. Now more than ever, it’s important to make sure your business is protected by a DRP—document retention isn’t just good business, it’s the law.

Actual resolution of legal issues depend 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.

Clean Indoor Air Act

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official website: (www.health.state.pa.us).

There are also exceptions available for long-term care, residential adult care, and drug and alcohol facilities. Private clubs may allow indoor smoking, provided the club is not open to the public through general advertisement for a club-sponsored event. If you are at a theater or sporting event (think Eagles' football game), you may smoke inside in the designated smoking areas. And, of course, you're free to continue lighting up in private homes, residences and vehicles (although 71% of Pennsylvania adults prohibit smoking in their homes!).

Keep a lookout for signs posted at your favorite eating or drinking spot. The CIAA requires owners, operators and managers of establishments to post and maintain "No Smoking" signs in areas that are regulated by the Act. Additionally, "Smoking Permitted" signs must be prominently posted at every entrance to establishments where smoking is allowed. No real surprises here.

What do you do if the guy sitting next to you at dinner is smoking? What if the restaurant fails to post the required signs? You have a few options. If you want to keep things more informal, you can alert the manager or owner of the establishment. You can also report a possible violation to the appropriate law enforcement agency, such as the Pennsylvania State Police. Finally, you can report the individual to the Department by filing an official complaint either in writing by completing a Violation Report Form, by phone (1-877-835-9535), or via an electronic submission on the Department's website.

The penalties for violations of the CIAA have a little bite. There are three categories of penalties that may be assessed: (1) Commonwealth administrative penalties, (2) local administrative penalties, and (3) criminal penalties. The Department or a State licensing agency can assess administrative fines of \$250 for a first offense, \$500 for a

second offense within a calendar year, and \$1,000 for a third offense within a year. A local county board of health can also assess fines ranging from \$250 for a first offense to \$1,000 for a third within a year. Finally, a person that violates the CIAA can be found guilty of a summary offense in a court of law, with fines ranging from \$250 to \$1,000. Consequently, establishments that repeatedly violate the CIAA could take a hit.

In conclusion, it is unclear what overall impact the CIAA will have on the health of the 12.4 million people living in the Commonwealth. The legislature hopes that it will reduce the 20,000 annual deaths in Pennsylvania that are caused by smoking.

Announcements

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Chamber of Commerce Foundation (GLVCC). The mission of the Foundation (the charitable arm of the Chamber) is to create vibrant downtown communities by serving as a valley-wide advocate and partner for business development and success in the Lehigh Valley downtowns.

Scott was re-elected by the Board of Directors to serve as co-counsel for the Associated Builders and Contractors (ABC) Eastern PA Chapter. ABC is an organization of general contractors, construction managers, design professionals, subcontractors, suppliers and associates with one main objective: to defend and promote the Merit Shop construction industry philosophy.

Theodore J. Zeller, III was recently nominated President-Elect of the Bar Association of Lehigh County and will begin his presidency in January of 2009.

Jeffrey S. Stewart was recently appointed to the Board of Directors of the Lehigh Valley Chapter of the Society of Human Resource Management (SHRM), a trade organization for human resource professionals. SHRM exists to promote the highest level of professionalism in Human Resource Management and offers members professional development opportunities and fosters awareness of the role of Human

Resource Management in creating high-performance organizations. Jeff also serves on the chapter's legislative committee and gives legal seminars for the chapter's members on a regular basis.

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