

LABOR UNION PRACTICE OF "TAGGING" VIOLATES DRIVER'S PRIVACY PROTECTION ACT

On September 9, 2008, the United States Court of Appeals in Philadelphia held that the practice of "tagging" by labor unions violates federal privacy law. "Tagging" is a process in which a union seeking to organize an employer will take note of the license plate numbers of cars entering, leaving, or parking on the employer's premises. Union organizers will then obtain the contact information of employees (as well as non-employee individuals whose license numbers the union obtains) by searching state motor vehicle records using the license plate numbers, and visit the employees at their homes.

In *Pichler v. UNITE*, 2008 U.S. Dist. LEXIS 19226, the United States Court of Appeals for the Third Circuit held that unions which engage in tagging as an organizational tool violate the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. §§ 2721-2725. The DPPA prohibits individuals from obtaining or using information from individuals' motor vehicle records, except in certain limited circumstances. In *Pichler*, the union, UNITE, had argued that its tagging activities were protected as permissible uses of drivers' information because the tagging was a component of its litigation efforts (another union organizational tool), and because the union was "acting on behalf of the government" in seeking to enforce workers' rights.

The court rejected these arguments, holding that union organizing is not a permissible use under the express terms of the DPPA, and the law's "litigation" and "on behalf of the government" exceptions could not be read so broadly as to include union organizing. Notably, one of the judges on the Third Circuit panel disagreed, and would have held that tagging is a legitimate practice under the DPPA's litigation exception. Litigation regarding the scope of the DPPA with respect to union tagging is therefore likely to continue, and the law may be addressed by courts in other jurisdictions around the country in future cases.

The DPPA as interpreted by the Third Circuit panel majority in *Pichler* establishes a significant disincentive for unions to engage in tagging. Individuals whose personal information is obtained through tagging may recover \$2500 each in liquidated damages, as well as punitive damages if they can prove that the union acted in willful or reckless disregard of the law. While employers cannot bring DPPA claims on behalf of their employees and other individuals who are contacted by unions after tagging, employers should be aware of the DPPA and its potential impact for union organization. Further, employers may wish to educate employees about their rights under the DPPA in the event that they are contacted as a result of union organizers' tagging.

If you have any questions or comments regarding this E-Flash, please contact Post & Schell Business Law & Litigation associate Ross G. Currie at (215) 587- 1134 or rcurrie@postschell.com. The attorneys of Post & Schell's Labor group provide legal advice and litigation counsel to a broad

range of sophisticated employers and management personnel.

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