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GIVE ME BACK MY STUFF!: ADDING BITE TO AN EMPLOYER'S DEMAND THROUGH THE CFAA

The Computer Fraud and Abuse Act ("CFAA") was passed by Congress in 1984 primarily to deter computer hackers. 18 U.S.C. § 1030 *et seq*. Although the CFAA is generally a criminal statute, it does permit private parties to bring a cause of action to redress violations. Importantly, this private cause of action can serve as a valuable tool for employers to protect their intellectual and proprietary information.

Employers frequently entrust employees with their intellectual and proprietary information, which are stored and used by the employee on company-issued laptops in the regular course of employment. When the employment relationship does not work out for whatever reason, the employer will request the return of the laptop along with all intellectual and proprietary information. Sometimes, the former employee will refuse to return the laptop and/or destroy the information it contains.

These familiar facts are very similar to the facts in a recent district court decision that found that two former employees violated the CFAA when they "deleted confidential and trade secret information from [the employer's] computer" and waited well over a month to return "all electronic and hard copy information in [their] possession belonging to [the employer]." *See*, *e.g.*, *Lasco Foods, Inc. v. Hall and Shaw Sales*, 600 F. Supp. 2d 1045 (E. D. Mo. 2009). In reaching this conclusion, the *Lasco* Court found that the employer had established "damage" and "loss."

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The CFAA defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e). Damage, for example, can include the deletion of information from a single laptop because it "impairs the integrity or availability of data, programs, or information on the computer." While the CFAA does not define "loss," courts, including *Lasco*, have consistently interpreted that word "to mean a cost of investigating or remedying damage to a computer, or a cost incurred because the computer's service was interrupted." A "loss" must result in the "interruption in service," which can be established by showing the former employee physically withheld the return of the laptop computer.

While this language is meant to combat computer hackers and their deleterious effects on computer systems, the *Lasco* decision shows us that the CFAA has beneficial application in the familiar and nontechnical setting that employers regularly face, as discussed above. First, the CFAA gives employers an additional tool to maintain control over their laptops, electronic devices, and the confidential information they may contain. Second, because the CFAA is a broad statute covering the unauthorized and unlawful access of all electronic information or interruption of service, the employer can theoretically use the CFAA as a proverbial sword without necessarily showing that the information is proprietary, confidential, or otherwise protected. Third, by creating a private cause of action for the unauthorized and unlawful access of electronic information, employers now have another claim they can raise and therefore obtain additional leverage over the defendant employees.

Finally, the CFAA should also remind employers of the importance of having confidentiality agreements and/or agreements that protect intellectual property with those employees who have access to confidential and/or protected information. Additionally, if appropriate, employers should consider whether a noncompete, nonsolicitation, and/or anti-piracy agreement is required or, if already existing, whether it is sufficient, to protect the employer's interests. If you have any questions on the subject of this article or would like more information, please contact the author or another Snell & Wilmer attorney at 303.634.2000.