24TH ANNUAL
LABOR, EMPLOYMENT, AND IMMIGRATION LAW FORUM

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FRIDAY, 11 NOVEMBER 2011

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BUTZEL LONG
ATTORNEYS AND COUNSELORS

November 11, 2011

Welcome to our 24th Annual Labor, Employment, and Immigration Law Forum.

Employers and HR professionals continue to face a dual-front of challenges; not only increasingly complex statutory and regulatory requirements, but the ongoing economic challenges that provide additional pressure to do more with less.

Our workshops and discussions are intended to help educate attendees about some of the legal issues and requirements they may confront regarding labor, employment, employee benefits, and immigration. It is our goal to provide practical advice on how to anticipate, identify, and minimize situations that may expose employers to liability.

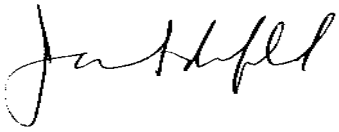
This year's Forum opens with an update on new developments and trends, including an overview of new decisions from the United States Supreme Court and new administrative agency regulations.

The conference continues with three workshop sessions that cover a broad range of employment discrimination, labor law, employee benefits, and immigration issues. Our keynote speaker, Dr. Lee E. Meadows, Ph.D., will discuss "Employee Engagement: The First Pillar For Retention." After lunch, we will have a general session in which our own Butzel Players will present "Men In Red Tape," followed by a panel discussion of the regulatory and enforcement processes of the various governmental agencies with which employers must deal.

Today's presentations are not intended to make you an expert in the law. Rather, our goal is to make you aware of significant developments and issues, and to assist you in identifying situations that can potentially expose employers to liability and litigation. The presentations and the material in this notebook are not intended to be, and should not be regarded as, legal advice. It is not possible to offer specific legal advice without a prior, thorough investigation and analysis of the facts attendant to any particular situation.

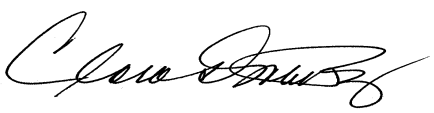
The labor, employment, employee benefits and immigration practitioners at Butzel Long welcome the opportunity and privilege of meeting your needs for legal consultation, advice and representation.

Daniel B. Tukel
Chair
Labor and Employment, Employee Benefits and Immigration Department



James S. Rosenfeld
Practice Group Leader
Labor and Employment

Jordan S. Schreier
Practice Group Leader
Employee Benefits



Clara DeMatteis Mager
Practice Group Leader
Immigration

Ann Arbor
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FIRM OVERVIEW

Founded in 1854, Butzel Long is one of the oldest law firms in the Midwest and has offices in Michigan, New York, Washington, D.C., Mexico, and China. Since our inception, we have played a prominent role in the development and growth of many industries. Business leaders have turned to us for innovative, highly-effective legal counsel for over 150 years.

Our firm has over 8,000 geographically diverse clients that are active in national and international markets. These clients come from many sectors, including advertising, automotive, banking and financial services, construction, energy, health care, insurance, manufacturing, media, pharmaceuticals, professional services, publishing, real estate, retail and wholesale distribution, technology, transportation, and utilities.

We have a long and successful history of developing new capabilities and deepening our expertise for our clients' benefit. We strive to be on the cutting edge of technology, manufacturing, e-commerce, biotechnology, intellectual property, and cross-border operations and transactions.

Our firm is a founding member of Lex Mundi, one of the first and largest networks of leading independent law firms located in 160 separate jurisdictions around the world. Lex Mundi allows us to provide clients with global and seamless first-rate counsel whenever the need arises.

We place great value on each client relationship, and we dedicate ourselves to providing clear, understandable, and practical advice. Our attorney-client relationships satisfy each client's unique situation, concerns, and requirements. Our attorneys understand our clients through industry-focused research, knowledge management, and one-on-one conversations. Every client relationship is a privilege, and we work tirelessly to earn our clients' trust and confidence in every engagement.

PRACTICE GROUP INFORMATION

Employment Litigation Butzel Long's labor and employment team has a rich and favorable track record in employment litigation. We have successfully defended employers in federal and state administrative, trial, and appellate matters. Our attorneys have appeared before the United States District Courts, United States Courts of Appeal, and the United States Supreme Court. We regularly practice before the Equal Opportunity Employment Commission, the United States Department of Labor, the Office of Federal Contract Compliance Programs, the Occupational Safety and Health Administration, the National Labor Relations Board, the Pension Benefit Guaranty Corporation, the National Mediation Board, and their state equivalents. We litigate claims arising out of the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Fair Labor Standards Act, the Family Medical Leave Act, Title VII of the Civil Rights Act, the WARN Act, and other discrimination claims, wrongful discharge claims, non-compete claims, unfair labor practices claims, and constitutional claims.

Traditional Labor With a substantial depth and breadth of experience, the industry leading attorneys in Butzel Long's Labor Practice have represented public and private sector employers and multi-employer associations across a wide array of industries in collective bargaining, representational campaigns and elections, unfair labor practice charges, strikes -- including injunction proceedings in both state and federal courts designed to end unlawful strikes or picketing -- wage and hour matters and arbitrations. Butzel Long's expertise is reflected over its long history, having had attorneys who have served on the National Labor Relations Board, including a recent chair of the National Labor Relations Board. Additionally, current Butzel Long attorneys include two past chairs of the Labor and Employment Law Section of the State Bar and a past chair of the International Law Section. Three of our attorneys are Fellows of the College of Labor and Employment Lawyers, an honor available only to those who have, in the eyes of their colleagues, distinguished themselves as outstanding professionals for more than 20 years of practice. Several are listed in The Best Lawyers in America, Chambers USA and one was voted among Southeast Michigan's top 10 business lawyers by Corp! magazine. Our attorneys also teach at several law schools and are frequent lecturers to state and national employer and professional organizations and to continuing legal education groups that update other attorneys on labor and employment issues. By establishing a synergy with members of the firm's other practice areas, our multi-disciplinary and nationally recognized teams of attorneys are able to represent clients in every aspect of labor and employment issues, including litigation, administrative agency charges, collective bargaining, arbitrations, benefits, non-competes, counseling, advising and training.

Counseling & Training Butzel Long's employment law team devotes a significant portion of its practice to counseling and training clients' human resources personnel in employment matters. This helps employers avoid lawsuits and help manage labor expenses. We successfully guide employees through difficult and risky labor and employment situations involving benefits administration, facility closings and mergers, non-discrimination compliance, reductions in force, strikes, terminations, and WARN Act notifications. We also help employers develop affirmative action plans, drug and alcohol testing programs, employee disciplinary procedures, employee handbooks, ERISA Family Medical Leave Act

policies, and reasonable accommodation of disabled employees guidelines. Our attorneys have developed over thirty on-site training seminars for human resources personnel. These seminars aim to ensure understanding of various employment laws so that supervisors and managers can recognize, address, and avoid potential problem situations.

Employee Benefits Escalating costs, increased governmental regulation and the current economic climate have all influenced the approach businesses need to take to employee benefit issues. Butzel Long emphasizes hands-on client service, particularly during challenging times, often serving as an extension of a company's human resources and tax planning departments, providing comprehensive legal counsel and business advice, along with the cross-disciplinary resources to handle any issues that may arise. We advise clients ranging from professional corporations with one or two employees to employers with several thousand employees at locations across the country or the world and they include both for-profit and non-profit entities. The Employee Benefits Group works closely with actuaries, accountants, other benefits consultants and members in the firm's other practice areas in the design and implementation of benefits programs. Our attorneys also regularly represent clients before the Internal Revenue Service, Pension Benefit Guaranty Corporation and the Department of Labor. Our group has the bench strength to handle a tremendous volume and variety of work and our attorneys provide ongoing legal services on a range of issues, including the design, drafting, preparation and termination of qualified retirement plans; counsel in connection with employee welfare and cafeteria plan benefits; as well as advisory services that can be critical in corporate mergers, acquisitions, financing arrangements, liquidations and other corporate transactions. We represent employers with multiemployer pension and health and welfare plan issues including benefit issues in union negotiations, delinquent contribution and audit defense, withdrawal liability strategy and approaches to plans in endangered or critical funding status. We provide on-going advice to clients on the tax, compliance and strategic implications of executive compensation arrangements. The Employee Benefits Group also advises clients with regard to interpretation and compliance with the benefits aspects of the Family and Medical Leave Act, Americans With Disabilities Act, Age Discrimination In Employment Act, HIPAA, GINA and other benefits related statutes.

Immigration Butzel Long is recognized as the premier international law firm in Michigan. The skilled team of attorneys in Butzel Long's Immigration Practice provides domestic and foreign-based clients with exceptional representation, multi-disciplinary support and creative problem solving to address a wide range of immigration issues, whether localized or on a global scale. Our diverse team is marked by resourcefulness and accessibility, has established relationships with members of the local and international immigration community and is dedicated to staying abreast of the latest developments in immigration law and practice. Our clients are as diverse as the issues we handle, including major corporations, small businesses, individuals and families based throughout the United States and the world. Butzel Long's Immigration Practice provides legal services in the areas of nonimmigrant and immigrant visas, citizenship, international/outbound visas and employer compliance and worksite enforcement. Butzel Long partners with clients to deliver efficient and timely personalized services. We continuously review our processes and technology to add value and improve efficiency. The Immigration Practice Group works closely with attorneys from the firm's other practice areas where

immigration issues intersect, such as Corporate, Tax, and Labor & Employment, to deliver prompt, specialized counsel on critical issues that impact our clients' businesses.

Mexico International Team Butzel Long attorneys have assisted clients in establishing and operating successful businesses in Mexico for many years. Our attorneys effectively provide U.S., Canadian, Asian and European companies doing business in Mexico with a wide array of services such as identification of business opportunities, incorporating legal entities such as maquiladoras (IMMEX), shelters, site location, real estate, joint ventures, mergers and acquisitions, tax, labor, immigration, customs, financing, intellectual property, litigation and government relations. To better serve our clients in Mexico, Butzel Long established Alliance offices in Mexico City and Monterrey. This is the result of a formalized long existing relationship with the law firm of Gil Elorduy, Yárritu y Asociados, S.C. This permits us to offer clients a single point of contact and billing for Mexican legal services with on-the-ground capabilities in Mexico's primary government and business centers. Our United States and Alliance offices have excellent relations at all levels of the Mexican government and the ability to conduct business in English, Spanish and other languages. Our Washington, D.C., Detroit and New York offices are close to Mexican Consulates, and we work closely with them and the Trade Agencies of both countries to facilitate investment and trade in the NAFTA region. Butzel Long offers a broad base of services within our Mexico legal practice and we efficiently assemble teams of attorneys and top third party service providers in fields such as site location; shelter operators; suppliers and customers identification; human resources and payroll; accounting and taxes; management and treasury; import and export clearance and regulations; logistics and freight consolidation and environmental studies.

SPEAKERS*

ATTORNEYS PRACTICING IN THE LABOR, EMPLOYMENT, AND IMMIGRATION LAW AREA

Linda J. Armstrong* is a shareholder practicing in Butzel Long's Detroit office. She is a graduate of Madonna College (B.S., 1982) and Detroit College of Law (J.D., 1988). Ms. Armstrong is listed in *The Best Lawyers in America* (Immigration Law). Ms. Armstrong concentrates her practice in the area of business and family immigration law, including all aspects involved with the international movement of personnel; immigration consequences of corporate restructuring, mergers and acquisitions; employer and workplace compliance issues, including I-9 and H-1B public access file investigations; inbound and outbound work-authorized immigrant and nonimmigrant matters; and labor certification. Ms. Armstrong is a member of the Firm's Pro Bono Committee and the Firm's Global Automotive Industry Group. Ms. Armstrong provides on-site training to business clients on numerous topics, including US nonimmigrant visas; US permanent resident processing; employer compliance issues, including I-9 completion and compliance and H-1B public access file compliance; and outbound general strategic planning. Ms. Armstrong is a frequent speaker on business immigration to professional and business organizations, including the International Law Section of the State Bar of Michigan, SHRM, and Datatel (DUG) Users Group. Ms. Armstrong has helped organize and has presented at Butzel Long's full-day Immigration Seminar for the past 12 years. She has also participated as a speaker at Butzel Long's Annual Labor and Employment Forum. Ms. Armstrong is a member of the American Bar Association; State Bar of Michigan: International Law Section, Council Member; State Bar of Michigan: International Law Section, Immigration Committee - past Co-Chair; Detroit Metropolitan Bar Association; American Immigration Lawyers Association (AILA); AILA Michigan Chapter; and AILA Michigan Chapter: Department of Labor Liaison - past Member. Prior to joining Butzel Long, Ms. Armstrong was an associate at another major Detroit law firm, where her practice was concentrated in the area of immigration law. She was also employed as Associate General Counsel with Federal-Mogul Corporation where she had responsibility for legal matters relating to employment relations, product liability, advertising, political action committees, and immigration.

Robert A. Boonin* is a shareholder practicing in Butzel Long's Ann Arbor office. He is an honors graduate of The University of Michigan Law School (J.D. 1985) and the Wharton School of the University of Pennsylvania (B.S. Economics 1976). He also holds a Masters Degree in Labor and Industrial Relations from Michigan State University (M.L.I.R. 1980). Prior to law school, Mr. Boonin served on the labor relations staff of the Michigan Association of School Boards (1978-1982), representing Michigan school districts in their labor relations. Before graduate school, Mr. Boonin worked for the Legislators' Education Action Project of the National Conference of State Legislatures in Washington, D.C. (1975-76). Mr. Boonin's practice is largely concentrated in the areas of labor, employment discrimination, public contract and education law. He has represented public and private sector clients across the country, in over thirty jurisdictions, in wrongful termination, employment discrimination, wage and hour, tenure proceedings and other employment-related lawsuits and claims, as well as in labor grievance arbitrations, labor negotiations, unfair labor practices and representational proceedings and labor strikes. His public sector clients include universities, community colleges, K-12 school districts, charter schools, as well as cities and townships. He has negotiated well over one hundred collective

bargaining agreements, and he has also successfully represented employers in over one hundred arbitration cases. He is also well versed in NLRB issues, having extensively practiced before that agency in many NLRB Regions. Mr. Boonin is active in national and state bar association sections in labor and employment law and public contract law. He is an active member of the American Bar Association's Federal Labor Standards Legislation Committee and the American Employment Law Council. He is a Fellow of the Litigation Counsel of America (a national legal honorary) and is a Past-President; he is also Chair-Elect of the Wage and Hour Defense Institute of the Litigation Counsel of America. He is also a Fellow of the College of Labor and Employment Law Lawyers (a prestigious and highly limited national honorary of employment law practitioners). Mr. Boonin has been repeatedly recognized by his peers as a *Super Lawyer* in labor and employment law matters, and he has also been recognized in *Chambers USA* as a leading attorney in labor and employment law. His other professional services include being: a member and Treasurer of the governing board of the Labor and Employment Law Section of the State Bar of Michigan; Past-President, Board member and a founder of the Michigan Council of School Attorneys; a member of the NSBA's Council of School Attorneys; a member of the National Association of College and University Attorneys; and a member of the local chapter of the Labor and Employment Relations Association (formerly IRRA). He is a past chair of the Washtenaw County Bar Association's Employment Law Section, and is a past Co-Chair of its Trial Practice Section. He also serves on the Board of Directors of the Ann Arbor/ Ypsilanti Regional Chamber Board of Directors. Mr. Boonin frequently publishes articles and presents at conferences on various topics involving labor and employment law matters. He is a Co-Editor of the chapter on national origin discrimination in the 2007 edition of the preeminent treatise *Employment Discrimination* (BNA 2007), and a contributor and Chapter Editor to the annual supplements of the American Bar Association's treatise *The Fair Labor Standards Act* (BNA 2007, 2008, 2009 and 2010), and is also on the Editorial Advisory Board of each of Thompson Publishing Group's four legal services on wage and hour law. Among his presentations are: recent seminars regarding overtime pay compliance – including presenting two seminars at the recent conventions of the Society for Human Resource Management in Las Vegas (2007), Chicago (2008), New Orleans (2009), San Diego (2010), and Las Vegas (2011); a regularly featured speaker at the Institute of Continuing Legal Education's Annual Employment Law Institutes. Among his other professional writings are: "The Constitutional Constraints in Dealing with Drug Abuse in the Schools," *Michigan Bar Journal* (Nov. 1989); "Wage and Hour Law for Michigan Public Employers, Michigan Public Employers, Michigan Public Employment and Labor Relations Law" (MPELRA 1994); "Damage Recoverable in the Employment Case, Michigan Wrongful Discharge and Employment Law" (ICLE 1994); MPELRA Manual Chapter on FLSA for Public Employers; numerous articles on the new overtime regulations; "Damages in Employment Litigation" (ICLE).

Alexander B. Bragdon is a shareholder practicing in Butzel Long's Bloomfield Hills office. He is a graduate of the University of Michigan (J.D., *cum laude*, 1970, B.A., 1967). Mr. Bragdon is listed in *The Best Lawyers in America* for Employee Benefits Law (2008-2011). Mr. Bragdon has extensive experience in pension and profit sharing law, employee benefits law, health care law, and ERISA litigation. His clients include several major health care institutions, large manufacturing concerns, employee groups, closely held businesses, and publicly held companies. Mr. Bragdon is a member of the Taxation Section of the State Bar of Michigan, the Taxation and Health Care Sections of the American Bar Association, and the Employee Benefits Committee of the American Bar Association. He has lectured and written extensively on various pension, benefits and health care law related issues.

Malcolm Brown is a shareholder practicing in Butzel Long's Bloomfield Hills office. Mr. Brown is a graduate of University of Minnesota Law School and Michigan State University. Mr. Brown has practiced labor and employment law representing management only for over 25 years. He has substantial experience in all areas of private and public sector labor and employment law including collective bargaining, Act 312 arbitrations, private sector interest arbitration, unfair labor practice cases, union organizing, labor contract arbitration, statutory and constitutional issues involving public employees, civil rights, employee discharge and discipline and other complex matters. Mr. Brown lectures frequently on labor law topics and has presented in-house training seminars on a variety of subjects including union organizing, interest arbitration, disability discrimination, discharge and discipline, drug testing, civil rights and wrongful discharge. He has published articles for several industry trade groups and professional associations including the American Society of Employers, Michigan Chamber of Commerce and the Construction Association of Michigan. Mr. Brown is a member of the State Bar of Michigan and the Labor Law Section of the American Bar Association.

James C. Bruno* is a shareholder practicing in Butzel Long's Detroit office and has served on the firm's Board of Directors. He is a graduate of Georgetown University, The University of Michigan Law School, and The University of Michigan Graduate School of Business. Mr. Bruno's primary practice includes corporations and limited liability companies; the Uniform Commercial Code; sales representatives and distributorships; automotive and other industry supplier relations; international business law and foreign employment; closely held business; mergers and acquisitions; and joint ventures. This includes counseling, negotiations, drafting, and dispute resolution. His clients include large and small entities, including foreign-owned start-ups. Mr. Bruno has been active in the firm's foreign practice, including oversight of the firm's Mexican alliance office. Mr. Bruno has been the firm's representative to the automotive trade association, the Original Equipment Manufacturers Association. He was Counsel General in Detroit for El Salvador from 1973 to 1997. Mr. Bruno is a member of the State Bar of Michigan and the American Bar Association. He has served as Chair of the State Bar of Michigan's Business Law Section, Co-Chair of the Corporate Laws Committee, Council Member of the International Law Section, Co-Chair of the International Business Law Committee, and Member of the Advisory Committee for the Michigan Bar Journal. Mr. Bruno was an initial recipient of the Michigan State Bar's prestigious Stephen H. Schulman Outstanding Business Lawyer Award and is listed in *The Best Lawyers in America* and in *The Best Lawyers in America Consumer Guide* for his work with closely held business entities. He is also listed in *DBusiness* Top Lawyers in Metro Detroit 2011, and *Michigan Super Lawyers*. He has written numerous articles and been a speaker and moderator at a variety of programs on international, corporate, immigration and business topics in automotive and other industries. Mr. Bruno was the editor of the Business Problems and Planning column of The Michigan Bar Journal for many years. His articles have been cited in legal briefs and court decisions and he is asked to serve as an expert witness on business law matters. Mr. Bruno's legislative work has included assisting in the drafting of the Michigan Business Corporation Act, Michigan Professional Corporation Act, and Michigan Limited Liability Company Act.

Robert G. Buydens is a shareholder practicing in Butzel Long's Detroit office. He is a graduate of the University of Michigan Law School (J.D., 1968) where he was a member of the Order of the Coif and on the Board of Editors of the *Michigan Law Review*, and Michigan State University (B.A., 1965). Mr.

Buydens concentrates his practice in the area of employee benefits including preparation of pension, money purchase, employee stock purchase, and profit sharing plans for individuals, partnerships, corporations and multiple-employer organizations, as well as the preparation of master plans for profit and non-profit corporations. He has substantial experience in providing advice on and drafting welfare benefit plans, including self-funded health care plans, flexible benefit plans, disability plans, and life insurance plans. He is experienced in executive compensation which includes the preparation of deferred compensation plans, management incentive plans, bonus plans and stock option plans. Mr. Buydens has been active in the multi-employer and multiple-employer pension area and is experienced in advising clients on plan terminations and withdrawals from multi-employer and multiple-employer plans. He has also acted as an arbitrator for the American Arbitration Association on ERISA disputes. Mr. Buydens has represented major financial and manufacturing institutions as well as large, medium and small corporations, professional corporations, and partnerships with respect to their employee benefit plan problems. Active in professional organizations, he is a member of the State Bar of Michigan, and the American Bar Association (Committee on Employee Benefits-Taxation Section, and Committee on Plan Terminations, Mergers, Asset Transfers and Insurance-Real Property, Probate and Trust Law Section). Mr. Buydens' ABA activities have included commenting on proposed Treasury regulations and legislation, and working with members of Congress, the Treasury Department, the Pension Benefit Guaranty Corporation, and legislative tax committees in drafting new tax legislation. He is a member of the Michigan Employee Benefits Conference, for which he previously served as member of the Executive Board and Chairperson. Mr. Buydens is listed in the Employee Benefits Law Section of *The Best Lawyers in America*. He has published articles in *Estate Planning, Probate and Property* and the *Michigan Bar Journal* and has lectured for various organizations on employee benefits matters.

Regan K. Dahle* is a shareholder practicing in Butzel Long's Ann Arbor office, counseling clients in the areas of employment law and labor relations. She has defended employers in arbitrations; unfair labor practice and representational proceedings; and employment-related litigation, including sexual and racial harassment, age, gender and racial discrimination, wage and hour, breach of contract and intentional tort litigation. Ms. Dahle has practiced extensively in both federal and state courts, as well as in front of various administrative agencies, including the Equal Employment Opportunity Commission, Michigan Department of Civil Rights and Michigan Department of Labor and Economic Growth. Ms. Dahle routinely advises clients on a wide range of labor and employment-related issues. Her experience involves advising employers about and drafting employee handbooks and employment policies, employment applications, independent contractor agreements, and employment agreements. Her clients include hospitals, medical practices, community colleges, automotive suppliers, third-party administrators and city and county governments. Her extensive experience and expertise in labor and employment law issues allow her to supply strategic, effective advice to her clients. Ms. Dahle has briefed and argued cases in a wide array of state and federal courts. Noteworthy cases in which she has been involved include: *Wojciechowski v. William Beaumont Hosp*., 2006 U.S. Dist. LEXIS 87526 (E.D. Mich. 2006) aff'd Case No. 07-1047 (6th Cir., Sept. 27, 2007). Summary judgment for the employer in a disability discrimination and failure to accommodate case brought under the Americans with Disabilities Act; *Vredevelt v. GEO Group, Inc*., 145 Fed. Appx. 122 (6th Cir. 2005). Summary judgment for the employer in a case alleging gender discrimination and sexual harassment by a female corrections

officer; *Savas v. William Beaumont Hosp*., 102 Fed. Appx. 447 (6th Cir. 2004). Summary judgment for the employer in a gender discrimination, retaliation, tortious interference and intentional infliction of emotional distress case brought by a physician with staff privileges with the defendant; *Langer et al. v. Bd. of Ed. of the Oak Park School Dist. et al.*, Case No. 06-073650-CD (Oakland Cty. Cir. Ct., Dec. 4, 2007). Summary judgment for the public employer on a multi-plaintiff case alleging breach of contract and promissory estoppel violations in relation to an early retirement severance plan; *Denman v. City of Taylor*, 2005 U.S. Dist. LEXIS 34187 (E.D. Mich. 2005). Summary judgment for the public employer in a case involving an alleged violation of the former employee's First Amendment right to political association. Ms. Dahle is co-author of the Chapter "Dealing with the Unionized Workforce," in the Institute of Continuing Legal Education's publication: *Employment Law in Michigan* and she authors a quarterly article for the State Bar of Michigan Labor and Employment Section's Lawnotes publication. She is also a frequent presenter on various labor and employment law topics, including effective employee handbooks and employment applications, the Family and Medical Leave Act, sexual harassment, alternative working arrangements, and the legal and practical implications of managing food allergies in public schools. Ms. Dahle is the former Chair of the Washtenaw County Bar Association's Labor and Employment Section. She is a member of the State Bar of Michigan, Labor and Employment Section and the Washtenaw County Bar Association. Ms. Dahle is also a graduate of the Leadership Ann Arbor program. She serves as an Advisory Board member of Gretchen's House, Inc., one of the largest daycare providers in the state, and is a founding member of the Food Allergy Children's Team, a support group for parents and caregivers of children with food allergies. Ms. Dahle is an honors graduate of Wayne State University Law School (J.D., *cum laude*, 1995), and the University of Michigan (B.A. with distinction, 1987). She serves as the Chairperson of the Firm's Paralegal Committee.

Rebecca S. Davies* is a shareholder based in Butzel Long's Detroit office. She received her undergraduate degree from the University of Michigan at Dearborn and her juris doctorate, *magna cum laude*, from the Detroit College of Law in 1995. She completed her masters degree in 2010 from Wayne State University Law School by obtaining her L.L.M. with a GPA of 3.79 in Labor and Employment Law. Ms. Davies concentrates her practice primarily in the areas of employment law and commercial litigation. She represents employers in federal and state court litigation and before state and federal administrative agencies. She regularly counsels employers regarding compliance under federal and state employment laws (including FLSA, FMLA, ADA and Title VII), drafts policies and procedures, and advises on preventative strategies. Ms. Davies' objective is to assist clients in implementing preventative strategies to avoid lawsuits. To accomplish this goal, she is a frequent author and lecturer, not only for client in-house trainings and publications, but also outside organizations, such as Walsh College, the Michigan Chamber of Commerce, Automation Alley and American Society of Employers.

Carey A. DeWitt*, based in Butzel Long's Detroit office, serves on the firm's Board of Directors and is past Chair (and Practice Group Leader, 1995-2003) of the firm's Labor and Employment Department. He is a graduate of the University of Michigan Law School (J.D. 1984), and Michigan State University (B.A. 1981). Mr. DeWitt has over twenty-seven years of experience representing employers in all phases of employment litigation, including employment discrimination matters, employment contract cases, non-compete/trade secret cases, as well as in labor arbitration, collective bargaining, and other employment matters. His clients include colleges and universities, technology based companies,

manufacturers, hospitals and health care institutions, and various service providers. Mr. DeWitt is listed in *Best Lawyers in America* (Employment Law - Management; Litigation - Labor and Employment) and *Michigan Super Lawyers* (Labor and Employment; Intellectual Property Litigation): Corporate Counsel. He is a Fellow of the Litigation Counsel of America and a Fellow of the Michigan State Bar Foundation. Mr. DeWitt has successfully represented clients in the following decisions/matters typical of his practice: *Superior Consultant Company v. Walling*, 851 F. Supp. 839 (E.D. Mich. 1994), appeal dismissed, 48 F.3d 1219 (6th Cir. 1995) (employee covenant not to compete; permanent injunction obtained after trial as to employee's non-use of trade secrets/bar of employment/non-solicitation); *Foster v. ANR Pipeline Co.*, Case No. 00-CV-73686-DT (E.D. Mich., Duggan, J., 2001) (alleged sex harassment, race discrimination, and retaliation; no cause obtained from jury), *aff'd*, 2002 U.S. App. LEXIS 15752 (6th Cir. 2002); *University of Michigan Hospital*, 1995 MERC Labor Opinions 399 (1995) (alleged refusal to bargain unfair labor practice; dismissed after trial); Arbitration: *American Association of University Professors (AAUP) and Board of Regents of Eastern Michigan University* (Glendon, Arb., 2010) (Arbitrator rules, inter alia, that University Board may take into account alleged "non-academic" behavior of professor upon application for tenure); *Regents of the University of Michigan and AFSCME*, 2001 MPER (LRP) LEXIS 71 (2001) (alleged union activity retaliation; dismissed after trial); *Sisson v. University of Michigan*, 174 Mich. App. 742, 436 N.W.2d 747 (1989) (alleged employment discrimination); *Rider, et al v. University of Detroit Mercy*, Michigan Court of Appeals, Case No. 166779 (education law, contract, and injunction), lv. app. den., 451 Mich. 865, 549 N.W.2d 563 (1996); *Owens v. University of Detroit Mercy*, Michigan Court of Appeals, Case No. 184740 (1997) (alleged employment discrimination); *Avery, et al v. Sinai Hospital*, Michigan Court of Appeals, Case No. 192191 (1997) (alleged employment discrimination); *Brogdon v. General Dynamics*, Michigan Court of Appeals, Case No. 188127 (alleged employment discrimination), lv. app. den., 451 Mich. 894, 589 N.W.2d 276 (1998); *Allen v. Wal-Mart Stores, Inc.*, Genesee County Circuit Court, Case No. 91-5253-CL, 5 Michigan Trial Reporter 424 (1992) (alleged retaliation, defamation, implied employment contract; no cause obtained from jury); *Davis v. United American Healthcare*, Michigan Court of Appeals, Case No. 204470 (1999) (court applies attorney client privilege as to employee file claim for employer investigation notes under Bullard Plawecki Employee Right to Know Act); *Wooten v. University of Michigan*, Case No. 84-009634-CM (1987) (Michigan Court of Claims; alleged implied employment contract; case dismissed at trial); *Telesource Services v. Grosse*, Case No. 03-016478CK (Oakland County Circuit Court Warren, J., (2003) (non-solicitation injunction obtained versus former employee on preliminary and permanent basis after trial); *Superior Consultant Company v. Bailey*, 2000 U.S. Dist. Lexis 13051 (E.D. Mich. 2000) (permanent anti-employee raiding injunction granted); *Gall v. RheTech, Inc.*, Case No. 07-764 CZ, Washtenaw County Circuit Court (Brown, J., 2009) (age discrimination claim by former company president); *Comtech International v. Price and the Bartech Group*, 2003-1 Trade Cas. (CCH) P74,047 (2003) (employee non-compete); *Fresenius Medical Care Cardiovascular Resources, Inc. et al v. Kenneth M. Nolan, et al*, Case No. 03-72813 (E.D. Mich. 2004) (defense of employees in Preliminary Injunction sought in trade secret and non-compete claim); *ASG, Inc. v. Pellmann, et al*, Case No. 2:05-CV-73207 (E.D. Mich. 2005) (trade secret and noncompete injunction claim defeated on behalf of Los Angeles, California corporation and automotive marketing employees); *ACS Consultant Company v. Williams*, 2007 U.S. Dist. LEXIS 15120 (E.D. Mich. 2007) (Uniform Trade Secrets Act/Non-Compete: California and Florida employees and corporation enjoined; personal jurisdiction established by employee server access/trade secret use/misappropriation); *Wilcox Associates, Inc. v. Xspect Solutions, Wenzel Group, et al*, Case No. 2:08-CV-

12388 (E.D. Mich. 2009) (Uniform Trade Secrets Act; preliminary and permanent injunctions as to employment, non-use of secrets, and competition obtained). Selected Labor Arbitrations: *Michigan Technological University and Michigan AFSCME, Council 25, Local Union 1166* (Glendon, Arb. 2001) (discharge); *Michigan Technological University and Michigan AFSCME, Council 25, Local Union 1166* (McDonald, Arb. 2004) (alleged misclassification of work); *Michigan Technological University and AFSCME Council 25, Labor Arbitration, AAA Case No. 54-390-01037-02* (Glendon, Arb., 2005) (bargaining unit work dispute related to the University's Keweenaw Research Center); *Michigan Technological University and Michigan AFSCME, Council 25, Local Union 1166* (Lyons, Arb. 1998) (discharge); *Wolpin Company/Great Lakes Distributing Company and Int'l Brotherhood of Teamsters, Local 1038* (Glendon, Arb. 1987) (use of employee driving records and insurability as criteria for driving assignments); *University of Detroit Mercy and University of Detroit Mercy Professors Union/MEA* (Roumell, Arb., 1995) (alleged retaliation; management right as to award of degree); *Eastern Michigan University and AFSCME Council 25, AAA Case No. 54-390-01037-02* (management rights; labor arbitration related to University parking facilities) (Glendon, Arb., 2004); *Michigan Technological University and AFSCME Council 25* (Glazer, Arb., 2001) (non-promotion of bargaining unit employee); *Michigan Technological University and AFSCME Council 25* (Glendon, Arb., 1997) (non-promotion); U*niversity of Detroit Mercy and UDMSSA, AAA Case No. 54 390 01449 07* (Dahn, Arb., 2008) (disability benefits under collective bargaining agreement); *Michigan Technological University and AFSCME Council 25, Case No. 001209-03084-8* (Gravelle, Arb., 2000) (employee benefits/health insurance); *Michigan Technological University and AFSCME Council 25* (Wolkinson, Arb., 1997) (non-promotion of bargaining unit employee); *Eastown Distributors and Int'l Brotherhood of Teamsters, Local 1038* (Arb., 1988) (discharge); *University of Detroit Mercy and Michigan Association of Police* (Glendon, Arb., 1990) (discharge). Mr. DeWitt has published many legal articles, including: "Trade Secret Law for the Employment Lawyer," 84 *Michigan Bar Journal* 20 (2005); Book Chapter: "Employee Privacy," in text, *Employment Law: The Workplace Rights of Employees and Employers* (Blackwell Publishing, 2nd Ed., Wolkinson, 2008); "Case Study: HP v. Hurd," *Employment Law 360*, http://www.law360.com/articles/193219 (September 29, 2010); "Enforcing Non-Competes: Ten Lessons from the Litigator," 80 *Michigan Bar Journal* 48 (December, 2001); "A Defense of the At-Will Doctrine," *Labor and Employment Lawnotes*, Vol. 8, No. 2 (Summer, 1998); "Can a Plaintiff's Attorney Contact Non-Managerial Employees of a Defendant Corporation in the Course of an Employment Discrimination Action?," *Federal Bar Association* (E.D. Mich. Chapter), Vol. 3, No. 1 (1996); "Recurring Issues with Written Employment Policies/Contracts," *The Michigan Broadcaster*, Vol. 21, Issue 2 (April, 2006); "Satisfaction Employment Contracts," *Michigan State Law Review* 3:287 (1992) (conclusion quoted and adopted by New Jersey Supreme Court in Silvestri v. Optus Software, Inc., 814 A.2d 602 (N.J. 2003)); "Action Accrual Date on Written Warranties to Repair: Date of Delivery or Date of Failure to Repair?," 17 *University of Michigan Journal of Law Reform* 713 (1984) (analysis quoted and adopted by Ill. Supreme Court in Mydlach v. Daimler Chrysler Corp., case no. 102588 (Ill.Sup. Ct. Sept. 20, 2007), and Alabama Supreme Court in Brown v. General Motors Corp., case no. 1061660 (Ala. Sup. Ct., January 16, 2009)); "How to Protect Your Company's Trade Secrets," *AllBusiness* (Dun and Bradstreet, Jan. 2005), p. 32, http://www.allbusiness.com/legal/laws-government; "Business Owners: Is Your Non Compete Contract Valid?," *Michigan Technology News/Mitechnews.com*, January 8, 2006; "Is Your Customer List a Trade Secret You Could and Should Protect?," *Michigan Technology News/Mitechnews.com*, December 22, 2005; "HP v. Jones: Bad Blood Or Trade Secret Protection?," *Competition Law 360*, http://www.law360.com/

articles/240441 (May 5, 2011); "Releases and Their Use in Employment Cases," 66 *Michigan Bar Journal* 138 (February, 1987); "Michigan Wage and Hour Act and Federal Fair Labor Standards Act," *Michigan Public Employer Labor Relations Association* (1987); "Human Resources – New Trade Secret Responsibilities," *Detroit Legal News*, July 18, 2007, Vol. CXII No. 143, p. 1; "20 Commandments to be a Decent Labor and Employment Lawyer," *Labor and Employment Lawnotes*, Vol. 21, No. 2 (Summer 2011). Mr. DeWitt has been a featured speaker at many conferences and forums, including presentations on Reductions in Force and Furloughs – Effective Planning and Implementation," NACUA Annual Conference, Toronto, Ontario, June 24-27, 2009; "The Unionized Professoriate: Handling Faculty Grievances Through Arbitration," NACUA Conference, New Orleans, Louisiana, March 21-24, 2002; "Getting to Goodbye: Facilitating the Termination of the Problem Administrator," NACUA Annual Conference, Minneapolis, Minnesota, June 22-25, 2003; "When the Rule of Reason Simply Isn't Enough: Best Employment Practices During Administrative Transitions," NACUA Annual Conference, Orlando, Florida, June 27-30, 2005; "Reducing Staff Without Increasing Litigation," Michigan State University College of Law / School of Labor and Industrial Relations, June 8, 2005; "Sexual Harassment Prevention," Rochester College, Rochester, Michigan (May 2002); Institute of Continuing Legal Education (ICLE) Presentation, "Representing Michigan Employers; Workplace Investigations, Surveillance, and 'Sting' Operations, a Management Perspective," Troy, Michigan (October, 1993); Institute of Continuing Legal Education (ICLE) Presentation, "Understanding the Obligations of Employers Upon Hiring; Hiring and Firing Employees," Troy, Michigan (March, 1995); "Employment Trade Secret Protection and Litigation: Aggressive Early Strategies for Protecting Your IP and Disposing of the Case" (ACI Expert Forum, Chicago, Illinois, May 27-28, 2009); "Protecting Your Most Valuable Assets in the Information Age: Confidential Information, Customer Relationships, and Trade Secrets," Automation Alley, Troy, Michigan, March 9, 2006; "Releases and Their Use in Employment Cases," Michigan State Bar, Labor Relations Law Section, Winter Meeting, Ann Arbor, Michigan (January, 1986); "Non-Competes and Trade Secrets," Michigan State Bar, Labor Relations Law Section, Winter Meeting, Ann Arbor, Michigan (January, 2004); Testimony before Michigan House of Representatives, Intergovernmental & Regional Affairs Committee (on Regional Transit Authority), Lansing, Michigan, February 23, 2010. Mr. DeWitt's memberships include: National Association of College and University Attorneys (NACUA); State Bar of Michigan (Labor and Employment Law Section); American Bar Association (Labor and Employment Law and Litigation Sections); Federal Bar Association, and the Detroit Metropolitan Bar Association. Mr. DeWitt's charitable activities have included serving as a member of the Boards of Birmingham, Michigan Little League Baseball (1999-2005), the Birmingham, Michigan Hockey Association (2005-2009), and the Metropolitan Affairs Coalition, a Regional public-private partnership of Labor, Business and Government (2008-present). Representative Clients: Owens Corning Corporation; Michigan Technological University; Eastern Michigan University; University of Michigan; ADP, ADP TotalSource; University of Detroit Mercy; Fresenius Medical Care North America; Ave Maria School of Law.

Katherine (Katie) J. Donohue* is an associate based in Butzel Long's Detroit office. Ms. Donohue concentrates her practice on employment, non-compete and trade secret litigation, traditional labor law, higher education law, and employment-related and e-discovery counseling. She is admitted to practice in the State of Michigan, the United States Court of Appeals in the Sixth Circuit, and the United States District Courts for the Eastern and Western Districts of Michigan. Ms. Donohue is a

graduate of the University of Detroit Mercy School of Law (J.D., *cum laude*, 2003), where she was a Jerome P. Cavanagh Scholar, a member of the Justice Frank Murphy Honor Society, a Symposium Editor on Law Review, and a Director on the Moot Court Board. She received the State Bar of Michigan Negligence Law Section Award for trial advocacy, the Frank Sengstock Award for Excellence in Legal Writing, and the Women Lawyers Association of Michigan Foundation Award for Outstanding Women Law Students. Ms. Donohue also is a graduate of the University of Michigan (B.A., 2000, honors with distinction). Professional and Community Involvement: State Bar of Michigan; Detroit Metropolitan Bar Association – Director on the Board of Barristers, Membership Chair, and Law Day Chair; American Bar Association – Employment Rights and Responsibilities Section Member and Non-Compete/Trade Secret and Technology Subcommittee Member; Sault Ste. Marie Tribe of Chippewa Indians. Representative Cases: *Moss v. Wayne State University*, No. 286034, 2009 Mich. App. LEXIS 2491 (Dec. 1, 2009) (affirming summary disposition in class action seeking refund of increased student tuition); *Kelly Services v. Eidnes*, 530 F. Supp. 2d 940 (E.D. Mich. 2008); *Kelly Services v. Noretto*, 495 F. Supp. 2d 645 (E.D. Mich. 2007) (issuing preliminary injunctions in trade secret and non-compete cases and dismissing defendants' motion to dismiss for lack of jurisdiction and improper venue and to transfer venue); R*ooyakker & Sitz, PLLC v. Plante & Moran, PLLC*, 276 Mich. App. 146 (2007) (affirming summary disposition in anti-piracy case based on arbitration agreement and finding company's restrictive covenants in employment agreements enforceable); *Myers v. Office Depot*, No. 06-cv-11252, 2007 U.S. Dist. LEXIS 59231 (E.D. Mich. Aug. 21, 2007) (granting summary judgment in same-sex harassment case); *PML North America, LLC v. ACG Enterprises of NC, Inc*., No. 05-cv-70404, 2006 U.S. Dist. LEXIS 94456 (E.D. Mich. Dec. 20, 2006) (granting partial summary judgment in breach of contract and fraud case, granting default judgment for e-discovery abuses, and subsequently awarding $4-million judgment, attorneys' and experts' fees, and costs). Publications: Author, "Are You Treating and Enforcing Your Non-Compete Agreements Consistently?," *The Michigan Broadcaster* (Nov./Dec. 2007); Co-Author, "Accommodations in Testing: Is a Level Playing Field Unfair?," *Michigan Bar Journal* (Aug. 2006); Co-Author, "Strategies for Right Sizing," *Michigan Institute of Continuing Legal Education Annual Labor & Employment Seminar* (April 2006); Co-Author, "Non-Competition and Trade Secret Agreements and Litigation," *Michigan Institute of Continuing Legal Education Annual Intellectual Property Seminar* (Mar. 2006); Co-Editor, *Tortious Interference in the Employment Context – Minnesota & Wisconsin Chapters* (ABA 2006 Supplement); Contributing Editor, "RICO and Labor Law" (Chapter 30), *The Developing Labor Law* (ABA 5th Ed. 2006); Author, *The Public Buildings Exception to Governmental Immunity in Tort Liability Does Not Extend to Inmates: Brown v. Genesee County Board of Commissioners*, 80 U. Det. Mercy L. Rev. 269 (Winter 2003); Author, *Who is Responsible for Your Protection? – The Michigan Supreme Court Limits a Merchant's Duty: MacDonald v. PKT, Inc*., 80 U. Det. Mercy L. Rev. 127 (Fall 2002). Speeches and Conferences: "Navigating Electronic Discovery," Michigan Defense Trial Counsel Annual Seminar (Nov. 2009); "Technology in the Workplace" and "Protecting Your Client's Most Valuable Assets," Butzel Long's Annual Labor and Employment Seminar (2006-2009)

Bernard J. Fuhs* is an associate based in Butzel Long's Detroit office. He concentrates his practice in the areas of business and commercial litigation. He has significant experience in non-compete, non-disclosure, and trade secret disputes, business and financial services industry disputes, franchise and dealerships, transportation and logistics industry disputes, construction, real estate, securities, and sales representative matters. He also advises start-up and closely held businesses, as well as sports

and fitness industry members. Mr. Fuhs is a member of Butzel Long's Associate Committee, Diversity & Retention Committee, and Recruiting Committee. Mr. Fuhs was also recently named to the 2011 Michigan Super Lawyers Rising Star list. Mr. Fuhs is a graduate of the University of Detroit Mercy School of Law (J.D., *magna cum laude*, 2006) and the University of Detroit Mercy (B.S., *summa cum laude*, 2003). He interned for Chief Justice Maura Corrigan of the Michigan Supreme Court; he was a four year player on the Division 1 Men's Basketball team at UDM; President of the 2nd Year Class at UDM School of Law; on Law Review; a member of the Justice Frank Murphy Honor Society; and a member of Beta Gamma Sigma and Beta Alpha Psi. Mr. Fuhs also enjoyed many honors as an undergraduate including the following: Captain of 2002/2003 UDM Division 1 Men's Basketball Team; the Wall Street Journal Award - Top Student in the UDM College of Business Administration; the Financial Executives International Award - most outstanding undergraduate student in Accounting and Finance; the Beta Alpha Psi Award - highest scholastic average in undergraduate program; member of the All Horizon League Athletic Academic Team – (2002/2003); the President's and Horizon League Honor Roll all four years; and the William Ebben Award for athletic and academic excellence. He was on the Dean's list all years attended at UDM and UDM School of Law, and received the Cavanaugh scholarship at UDM School of Law. Recent Case Highlights: Successfully defended a publicly-traded electronics corporation on a $40,000,000 breach of contract action brought by a New York based private equity firm; Acted as lead attorney and negotiator in a transportation/logistics dispute for a prominent tier-1 automotive supplier and successfully negotiated a settlement that saved the client over $1,000,000; On behalf of a leading developer of metrology software, successfully obtained ex parte TRO, preliminary injunction, and ultimately permanent injunction against former employee and a direct competitor prohibiting them from using or disclosing client's confidential information and trade secrets, disparaging client, developing any product or providing any services involving the use of client's confidential information and trade secrets, and from infringing upon client's copyrights; Successfully represented a structured products hedge fund in claims against a global European bank and its US broker-dealer affiliate arising out of the bank's refusal to complete and underwrite a contracted $1 billion ABS CDO^2; Represent corporate investors, including a Panamanian bank, sued by the foreign representatives overseeing the liquidation of one of the main feeder funds to the Ponzi scheme associated with Bernard L. Madoff Investment Securities, LLC; Successfully obtained numerous injunctions on behalf of a Fortune 500 staffing services company against former employees (ranging from regional managers to recruiters) relative to their non-compete, non-solicit, non-disclosure, and trade secret violations; Assisted in the negotiation, due diligence, and closing of a $27 million dollar asset purchase transaction on behalf of a global construction equipment manufacturer. Professional and Community Involvement: State Bar of Michigan; American Bar Association – Employment Rights and Responsibilities Section Member and Non-Compete/Trade Secret Subcommittee Member; American Bar Association (Forum on Franchising); Board of Directors of the University of Detroit-Mercy Titan Club; Dick Vitale Court Fundraising Committee (University of Detroit-Mercy); Detroit Athletic Club – North American Conference of Athletic Directors (NACAD) National Basketball Championships Committee; Big Head Corps (affiliated with The Parade Company). Speaking Engagements and Publications: Presenter, "Dealing with the Baggage that Travels with Employees Moving from One Financial Services Firm to Another. Trade Secrets, Non-Compete and Insider Trading Issues," Butzel Long Breakfast Briefing, March 2011, New York, New York; Presenter, "Protecting Your Confidential Information and Business Relationships," Michigan Press Association Annual Convention, January 2011, Detroit, Michigan; Co-author, "Under Attack:

Why the Foes of Non-Compete Agreements Are Firing Blanks," *The Voice* – Defense Research Institute (DRI) – The Voice of the Defense Bar, Summer 2010; Co-author, "The Evolution of Personal Jurisdiction through the Technological Advances of Our Time," *The Litigation Newsletter* – Litigation Section, State Bar of Michigan, Summer 2008; Co-author, Michigan chapter, "Trade Secrets and Agreements Not to Compete," Defense Research Institute (DRI) Winter 2008; Contributing Editor to *Products Liability Desk Reference: A Fifty-State Compendium*, Morton F. Daller, Editor-in-Chief (Aspen Publishers); Contributing Editor to *Tort Law Desk Reference: A Fifty-State Compendium*, Morton F. Daller, Editor-in-Chief (Aspen Publishers). Additional Information: Prior to joining Butzel Long, Mr. Fuhs was the President/Co-Owner of Fastdater, Inc. of Michigan. He also clerked with Chrysler Financial in the Office of General Counsel as well as the Executive Office of Chrysler Financial as a Field Operations Analyst. Additionally, Mr. Fuhs serves as a television color analyst for NCAA and MHSAA Basketball.

Roberta G. Granadier is a shareholder based in Butzel Long's Bloomfield Hills office. She is a graduate of Boston University Law School (J.D., 1985, *Law Review*), and the University of Michigan (B.A., 1981 with high distinction). Ms. Granadier practices in the area of employee benefits law. She has extensive experience in ERISA law, employee benefits, executive compensation and employment law. Her practice includes retirement and compensation planning, consulting and design of qualified and nonqualified plans, stock option and equity-based programs and compliance initiatives regarding fiduciary best practices and internal plan audits. Her practice also includes consulting and drafting regarding QDROs, QSLOBs, IRAs, cafeteria plans, health insurance issues, employment agreements and severance arrangements, golden parachutes, COBRA, FMLA, FLSA, ADA, ADEA and HIPAA. Ms. Granadier is a member of the Michigan, Oakland County and American Bar Associations. She served as Chairperson and Vice Chair of the Employee Benefits Committee of the Oakland County Bar Association (1998-2000). She has presented at employee benefit conferences and various seminars on executive compensation, target date investments, 401(k) plans and health care reform legislation. Ms. Granadier is listed in *The Best Lawyers in America* (Employee Benefits Law). She is licensed to practice in Michigan, Illinois and Pennsylvania.

John P. Hancock, Jr.* is a shareholder based in Butzel Long's Detroit office. He is a graduate of Duke University Law School and the University of Notre Dame. Mr. Hancock's practice focuses on collective bargaining negotiations and arbitrations as well as counseling of both public and private employers. He has also done extensive employment litigation and OSHA litigation. Mr. Hancock has served as chief negotiator in numerous collective bargaining negotiations for public schools, municipal and public utilities as well as clients in various other businesses ranging from casinos to steel plants to hospitals and country clubs. A good portion of his practice is devoted to counseling clients on employment issues. Mr. Hancock is a past Chair of the State Bar of Michigan Labor and Employment Section, and a member of the American Bar Association, the Detroit Bar Association, and the Michigan Council of School Attorneys. He is a Fellow of The College of Labor and Employment Lawyers, a Fellow of the Michigan State Bar Foundation, a Board Member of the National Safety Council of Southeastern Michigan and a member of the American Employment Law Council. He is past chair of the firm's Labor and Employment Practice Group and is a member of the Oakland County Roundtable on Education and the Workforce. Mr. Hancock has authored numerous articles and is a frequent lecturer on a wide variety of labor and employment related issues. He has overseen the development of the firm's

program of On-Site Seminars for Administrators and Supervisors in Labor and Employment Law. He is listed in *The Best Lawyers in America*, the *International Who's Who of Labor and Employment Lawyers*, *Who's Who Legal USA – Management Labor & Employment* and *Chambers USA*, *America's Leading Lawyers for Business* and has been selected a *Michigan Superlawyer* and *Best Of Class*.

Mark W. Jane is an associate practicing in Butzel Long's Ann Arbor office. He practices in the area of ERISA, employee benefits and compensation, and has experience working with 401(a) defined benefit plans, 401(k) and 403(b) defined contribution plans, 457(b) tax-exempt plans, comprehensive health and welfare plans, and multi-employer pension and welfare benefit plans. Mr. Jane has worked on a wide variety of employee benefits matters, including designing/drafting employee pension and welfare benefit plans, consulting with plan administrators and sponsors on fiduciary compliance and fiduciary best practices, advising on HIPAA and COBRA compliance, reviewing and processing Qualified Domestic Relations Orders, and reviewing service provider contracts. Mr. Jane was recognized as a Michigan Rising Star in 2009 by *Michigan Super Lawyers* and is the recipient of the Outstanding New Lawyer Award (May 2010), for service as Co-Chair of the New Lawyers Section of the Washtenaw County Bar Association. Mr. Jane is actively involved in community bar activities. He is currently serving as Director-at-Large on the Board of Directors of the Washtenaw County Bar Association, and also serves as a District 3 representative on the State Bar of Michigan Young Lawyers Section Executive Council. Mr. Jane recently co-chaired the Washtenaw County Bar Association New Lawyers Section, and was recognized for his achievement in advancing the goals of the section. Mr. Jane is admitted to practice in California and Michigan and before the U.S. District Court for the Eastern District of Michigan. He is a graduate of the University of Michigan (B.A. with high distinction, 2002) and Loyola University Chicago School of Law (J.D., *cum laude*, 2006).

Chester E. (Terry) Kasiborski, Jr.* is Counsel to Butzel Long, based in the firm's Detroit office. He is a graduate of the University of Michigan School of Law (J.D., 1971) and the University of Michigan (B.A., 1968). Mr. Kasiborski concentrates his practice in the areas of labor and employment law, business litigation, and alternative dispute resolution. Mr. Kasiborski's litigation experience includes federal and state trial and appellate courts and commercial and labor arbitrations. He has handled traditional discrimination claims (race, age, sex, sexual harassment, and handicap), wrongful discharge, claims for severance pay, ERISA claims, unemployment compensation claims, wage and hour claims, and some workers' compensation matters. His general business civil litigation and arbitration experience includes matters under the Uniform Commercial Code, salespersons' commission agreements, general contract law, covenants not to compete, property tax assessments, condemnation, and other business related matters including Bankruptcy Court litigation. He also defended personal injury actions and tried product liability and premises liability cases. Mr. Kasiborski is an arbitrator serving on the American Arbitration Association Employment Panel and also conducts private arbitrations. He has also completed advanced mediation training, is a member of the American Arbitration Association Employment Mediation Panel, and conducts private facilitations/mediations. Mr. Kasiborski is admitted to practice in the United States District Court for the Eastern District of Michigan, the United States District Court for the Western District of Michigan, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court. Mr. Kasiborski has served as a Member of a Hearing Panel of the State of Michigan Attorney Discipline Board since 1981 and has served as a Hearing Panel

Chairperson since 1987. Mr. Kasiborski is a former President of the University of Michigan Club of Greater Detroit (1996 to 1997).

Gary W. Klotz* is a shareholder practicing in Butzel Long's Detroit office. He is a graduate of the University of Michigan Law School (J.D., *cum laude*, 1977) and Oakland University (B.A., *summa cum laude*, 1973). Mr. Klotz has represented employers in labor and employment law matters for over twenty years. He has successfully defended employers in state and federal courts, as well as before state and federal administrative agencies. He also has extensive experience representing employers in labor arbitration cases, collective bargaining negotiations, and preventive employee relations counseling. Mr. Klotz is the author of numerous articles about labor and employment law, and he regularly speaks at management education programs about labor and employment issues. Mr. Klotz's professional memberships include the Labor and Employment Section of the American Bar Association and Employment Law Section of the State Bar of Michigan.

Clara DeMatteis Mager* is a shareholder based in Butzel Long's Detroit office and the Practice Group Manager of the firm's Immigration Group. She is a graduate of Wayne State University (B.S., 1978) and of the Detroit College of Law (J.D., *cum laude*, 1987) where she was a member of Law Review. Ms. Mager focuses her practice on business and family immigration issues including all aspects of the international movement of personnel, inbound and outbound work-authorized nonimmigrant (temporary) and immigrant (permanent) status, immigration consequences of mergers, acquisitions and corporate restructuring, employer sanctions, and immigration law audits (e.g. labor condition applications and I-9). Ms. Mager serves on the Firm's Strategic Planning Committee, is the Chairperson of the Firm's Diversity and Retention Committee, and is a member of the Firm's Global Automotive Industry Group. Ms. Mager is a frequent speaker on business immigration to professional, educational and business organizations including Wayne State University Law School, International Law Section of the State Bar of Michigan, French American Chamber of Commerce, The German American Chamber of Commerce, Japan PAK, and APROMEX. She also provides training sessions to business clients on numerous topics including U.S. nonimmigrant visas, U.S. permanent resident processing and strategy building to streamline the process, Form I-9 completion and compliance training, outbound non-U.S. immigration general strategic planning, and workplace compliance related to immigration. Ms. Mager has helped organize and has presented at Butzel Long's full-day Immigration Seminar for the past 18 years. She has also participated as a speaker in Butzel Long's Annual Labor and Employment Forum. Ms. Mager has coordinated and presented numerous programs in the last 20 years. The most recent include programs for the Federal Bar Association, Genesee Area Human Resources Association, the French American Chamber of Commerce, Wayne County Family Lawyers, and the Michigan Institute for Continuing Legal Education. Ms. Mager is a member the American Immigration Lawyers Association (AILA), American Bar Association, Federal Bar Association (previous member of the Leadership Council of the Immigration Committee), State Bar of Michigan (Past Chairperson of the International Law Section and previously held positions of Chair-elect, Secretary, Treasurer, Council Member and Chairperson of the Immigration Committee), Women Lawyers Bar Association and Italian American Bar Association (Board Member). She is also active in Lex Mundi's Immigration Group (Regional Chair and former Chairperson), the J.D./L.L.B. Advisory Board, University of Detroit Mercy School of Law/University of Windsor Faculty of Law (Board Member and past Chair), and the Italian American

Alliance for Business and Technology (Board Member). Ms. Mager is a graduate of the Detroit Regional Chamber of Commerce Leadership Detroit XXII Class. She is listed in *The Best Lawyers in America* (Immigration) and *Michigan Super Lawyers* (Immigration). Ms. Mager is a *Martindale-Hubbell* featured AV Peer Review Rated Lawyer. Ms. Mager is active in the community working on pro bono immigration matters, and assisting the Michigan Chapter of AILA in activities associated with naturalization ceremonies and community based outreach programs.

Bushra A. Malik* is an attorney practicing in Butzel Long's Detroit Office. She is a graduate of the University of Michigan Law School (J.D., 1998) and Michigan State University's James Madison College (B.A. in International Relations with High Honors, 1996; and an additional major in Japanese and Certificate of Asian Studies). Ms. Malik practices in the area of immigration law, focusing her practice on the representation of multinational and domestic clients' inbound and outbound immigration needs. Ms. Malik's experience includes Employment based (Extraordinary Ability, Outstanding Researcher, Multinational Manager, and PERMs) and Family based Permanent Residence Petitions; Non-Immigrant Petitions (H-1B/Specialty Occupation, J-1/ Exchange Visitor, L-1/Intracompany Transfers, O-1/Extraordinary Ability, TN/ NAFTA); Employer Compliance (I-9 Audits and H-1B Public Access File Audits); J-1 waivers; waivers of inadmissibility for DUI/DWI for entry into Canada; Compliance under the Western Hemisphere Travel Initiate (WHTI); U.S. Passports; and complex naturalization matters. Ms. Malik has extensive experience in securing work and residence permits for numerous countries around the globe, including: China, India, Canada, Japan, Australia, the United Kingdom, Germany, Russia, and Belgium. Ms. Malik also routinely represents clients at U.S. Ports of Entry, the United States Citizenship and Immigration Services District Office, as well as various Foreign Consulates. Prior to joining Butzel Long, Ms. Malik was a Vice Consul for the United States Foreign Service, Department of State in Seoul, South Korea. She also worked with the Executive Office of Immigration Review at the Chicago Immigration Court; and had externships with the United Nations High Commissioner for Refugees in New Delhi, India, and the legacy Immigration and Naturalization Service, Office of the General Counsel in Washington, DC. Ms. Malik is a member of the State Bar of Michigan, the American Immigration Lawyers Association, the American Bar Association, the South Asian Bar Association, the Michigan Muslim Bar Association, and the Japanese Business Society of Detroit. Ms. Malik currently serves on the Steering Committee of the Global Migration Action Group, for the American Immigration Lawyers Association, and on the United States Citizenship and Immigration Service Liaison Committee for the Michigan Chapter of the American Immigration Lawyers Association. She previously served as the Treasurer and on the Executive Committee for the Michigan Chapter of the American Immigration Lawyers Association. Ms. Malik speaks Japanese and Urdu.

Lynn McGuire* is a shareholder based in Butzel Long's Ann Arbor office. She graduated from the University of Notre Dame Law School (J.D., 1997), where she was a Student Note Editor for the Journal of College and University Law, and received a degree in Business Administration from the University of Michigan – Dearborn (B.A., with Distinction, 1993). Ms. McGuire concentrates her practice in the area of employee benefits law. Before joining Butzel Long Ms. McGuire was a partner in a private practice, providing services to various fiduciaries including fringe benefit fund sponsors and Boards, creating fringe benefit trust funds, plan documents, summary plan descriptions, summaries of material modifications and other ERISA notices. She has managed complex civil litigation matters, including

ERISA-based fiduciary liability claims, prohibited transactions, and pension investment litigation. Ms. McGuire has counseled fiduciaries facing mergers, plant closings, and plan terminations. She has significant experience representing clients in Department of Labor audits and investigations. Ms. McGuire is admitted to practice in the States of Ohio and Michigan. She is a member of the International Foundation of Employee Benefit Professionals, the American Bar Association, and the State Bars of Michigan and Ohio. She is a volunteer with the Detroit Chapter of Habitat for Humanity.

Shanta S.W. McMullan* is an Associate practicing in Butzel Long's Detroit office. She concentrates her practice in labor and employment law. Ms. McMullan represents employers in judicial and administrative proceedings, and provides employment counseling regarding compliance with federal and state employment laws (including FMLA, FLSA, ADA and Title VII). She is admitted to practice in the State of Michigan, the U.S. District Court for the Eastern District of Michigan, and the U.S. Court of Appeals in the Ninth Circuit. Ms. McMullan is a graduate of Wayne State University Law School (J.D., 2007), where she was a member of the Student Board of Governors, an Executive Board Member of the Black Law Students Association, and President of the Sports and Entertainment Law Society. She was a Donald E. Barris Trial Competition winner, Chair of the school's Mock Trial team and a member of its national team. Ms. McMullan received the Women Lawyers Association of Michigan's Outstanding Woman Law Student Award. She is also a graduate of the University of Michigan – Ann Arbor (B.A., with Honors, 2000). During law school, Ms. McMullan was a law clerk at the University of Michigan's Office of the General Counsel, the Library of Congress's Office of the General Counsel, and at the National Football League's (NFL) General Counsel's Office. She also was a judicial extern for the Honorable Arthur J. Tarnow of the United States District Court for the Eastern District of Michigan. Prior to entering the legal field, she was a Coaching Staff Assistant for the Detroit Lions. Ms. McMullan is a member of the American Bar Association, the Detroit Metropolitan Bar Association, and the Wolverine Bar Association. She is also a Board Member of Student Mentor Partners, an organization that provides mentoring and tuition assistance for underprivileged Detroit high school students.

Donald B. Miller is a shareholder practicing in Butzel Long's Detroit office. He has served on the Firm's Board of Directors and as a litigation Practice Group Manager and Co-Chair of the Firm's Litigation Department. He has practiced law in Michigan with Butzel Long since 1973, following graduation from The University of Michigan, where he obtained both his undergraduate and law degrees (A.B., 1970; J.D., 1973, *cum laude*). Mr. Miller's practice consists entirely of litigation and is very diverse in terms of substantive areas, being devoted to employment discrimination defense, personal injury and products liability litigation, and commercial litigation. Mr. Miller's employment practice has included the defense of numerous cases in the civil rights area, including sex, age, race, national origin and religious discrimination cases, sex harassment actions, suits alleging implied contract rights to job security by salaried employees, and non-compete cases. He has represented many employers, including The University of Michigan, American Motors Corporation, DaimlerChrysler Corporation, Host International, The Firestone Tire & Rubber Company, United Insurance Company of America, Ford Motor Company, and McLouth Steel Products Corporation. Included among Mr. Miller's trials in the employment area are the following: *Viverito v Ford Motor Company*, *Shannon v American Motors Corporation*, *Berkopec v American Motors Corporation*, *Dodd v American Motors Corporation*, *Slayton v Host International*, and *Kolovson v The University of Michigan*. Included within Mr. Miller's products liability experience

is thorough familiarity with the Michigan personal-injury asbestos litigation. He has represented such clients as AlliedSignal Inc., now Honeywell, Inc. (refractory products), General Electric Company (turbines and wire and cable products), and other defendants, in thousands of such cases throughout the State of Michigan. Mr. Miller has handled, for the past several years, many cases alleging exposure to mold in buildings, which have elements of construction defect litigation, environmental concerns, and personal injury claims. He has also defended claims arising from exposure to lead-based paint and carbon monoxide. In addition, Mr. Miller handled a variety and volume of cases for Mobil Oil Corporation, now ExxonMobil Corporation, and Pennzoil Company, including personal injury work, gasoline pricing and supply litigation, and service station dealer and distributor litigation arising under the federal Petroleum Marketing Practices Act. He has also been involved in commercial litigation between automotive suppliers and between automotive suppliers and OEM's. Mr. Miller is admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Sixth Circuit, and the United States District Courts for the Eastern and Western Districts of Michigan. He is a member of the State Bar of Michigan (Labor and Employment Law Section, Negligence Section) and the American Bar Association (Section of Labor and Employment Law, Section of Litigation, and the Trial, Tort and Insurance Practice Section).

Mark T. Nelson is a shareholder based in Butzel Long's Ann Arbor office. He is a seasoned litigator specializing in employment litigation and trust and estate litigation. Mr. Nelson is listed in *Best Lawyers* and *Michigan Super Lawyers*. He has served on the Firm's Board of Directors as well as managed the Employment Litigation Practice Group. He is an honors graduate of Detroit College of Law (J.D. 1976) and The University of Michigan (B.A. 1973). Since joining Butzel Long in 1979, Mr. Nelson has represented a multitude of clients in both the public and private sector. He has extensive trial experience in both Federal and State of Michigan courts. In the employment area, Mr. Nelson has successfully tried contract and discrimination claims to jury verdict; he has also defended employers in cases involving ADA, FMLA, COBRA, ERISA (retiree healthcare class actions) and severance pay plans. Mr. Nelson also has extensive trial experience in several Michigan Probate Courts. He has successfully tried will contests in bench and jury trials. He has defended as well as challenged the validity of trust and estate documents, the mental capacity of the settlor and/or testator and the accounts of fiduciaries. His probate litigation experience also includes actions to remove and surcharge trustees and personal representatives for their malfeasance and breaches of fiduciary duty. Mr. Nelson is also active in community organizations and has served on several boards: Holy Family (formerly Boysville of Michigan), the Livonia Hockey Association, the Michigan Cougars AAU Girls' Basketball Club and Walnut Creek Country Club (President 2007). He served as a law clerk to the Honorable James Harvey, United States District Judge for the Eastern District of Michigan, 1977-1979. He is a member of the Litigation and Probate Sections of the American Bar Association and State Bar of Michigan.

Marc W. Oswald* is an associate based in Butzel Long's Detroit office. He concentrates his practice in the area of labor and employment law. Mr. Oswald is a graduate of Wayne State University Law School (J.D., *cum laude*, 2010) where he was Managing Editor (2009-2010) and Assistant Editor (2008-2009) of the *The Wayne Law Review*. He is a published author of *Michigan Road-Ends: Protecting Private Property While Preserving Public Access to Inland Lakes*, 55 Wayne L. Rev. 1565 (2009). During law school, his honors included: Best Appellate Brief Merit Award; Patrick J. Burkett Memorial Endowed

Scholarship; Dean's Scholar; Bronze Key Certificate (2008-2009); Lombard Fellow; and a Barrister Scholarship. His memberships included the American Bar Association (Law Student Division) and State Bar of Michigan (Law Student Section). He served as Captain of the Wayne State Law School Hockey Club. Mr. Oswald is also a graduate of Michigan State University (B.A., *Finance with Honors*, 2005). Prior to joining Butzel Long, Mr. Oswald served as a judicial intern for the Hon. Helene White of the United States Court of Appeals, Sixth Circuit, and was a research assistant for Professor Linda M. Beale, Associate Professor at Wayne State University Law School. He also worked at Merrill Lynch Business Financial Services, Inc. as an Associate Portfolio Officer where he performed financial analysis, risk assessment, and monitored credit exposure. In addition, Mr. Oswald co-underwrote commercial credit transactions from $100 thousand to $3 million.

Reginald A. Pacis* is a shareholder practicing in Butzel Long's Detroit office. He concentrates his practice in immigration law and has handled a variety of immigration matters including H-1B specialty occupation cases, L-1 Intracompany transfers, Labor Certification matters, Immigrant Visa Petitions/ Adjustment of Status applications and interviews, TN Free trade cases, H-1B Department of Labor Investigations, I-9 employer verification compliance, and U.S. Port of Entry airport and land port interviews. Mr. Pacis is listed in *The Best Lawyers in America* (Immigration Law). Mr. Pacis is a member of the American Bar Association, the American Immigration Lawyers Association (AILA), and the Samahang Pilipino Ng Oakland Filipino organization. He served two consecutive terms from 2003 to 2004 and 2004 to 2005 as Chairperson of the Michigan Chapter of AILA and was a member of the AILA National Board of Governors for those terms. He previously served as Secretary (2001 to 2003) and Membership Chairperson of the Michigan Chapter of AILA (1998 to 2003). Mr. Pacis has been a speaker on immigration topics at many business, Hispanic, and Filipino presentations. He is a frequent presenter in the Annual Butzel Long Immigration Seminar. He was a presenter and member of the faculty for the 2004 AILA National Conference in Philadelphia, Pennsylvania and published in the 2004 AILA National Conference materials with an article discussing Special Registration of certain classes of immigrants. He was a presenter and discussion leader at the 2006 AILA National Conference in San Antonio, Texas. As part of a panel of immigration lawyers in 2007, Mr. Pacis spoke on immigration employer compliance issues for an immigration seminar sponsored by the Governor's Advisory Council on Asian Pacific American Affairs in Lansing, Michigan. He was also a presenter at the 2008 AILA National Conference in Vancouver, British Columbia Canada and published in the 2008 AILA National Conference materials with an article discussing border immigration issues. He testified on June 18, 2010 during the open session at the Michigan Advisory Committee to the U.S. Commission on Civil Rights public meeting examining the proposed immigration bill similar to the recently enacted Arizona bill. Mr. Pacis' article, "Changes Involving the Visa Waiver Program and the Michigan Driver's License Application Process" appeared in the Winter/Spring 2009 issue of the *Michigan International Lawyer* published by the State Bar of Michigan. Mr. Pacis has served in a variety of committees in the Filipino community and is a member of the Philippine Chamber of Commerce of Michigan. He completed an appointment by Governor Granholm for service on the Advisory Committee for Asian Pacific American Affairs (ACAPAA). He served on the Michigan AILA Advocacy Committee from 2007 to 2010. Mr. Pacis previously served as Chairperson of the Michigan AILA Committee responsible for liaison with the Michigan Customs and Border Protection ("CBP") Agency, a division of the U.S. Department of Homeland Security presiding over inspections and security of the U.S. border, from 2005 to 2007. His service expanded to the

AILA National CBP liaison Committee as a member and Vice Chair. He now serves as Chair of the AILA National CBP liaison Committee. Mr. Pacis received his J.D. from the Detroit College of Law at Michigan State University in 1996 and his B.A. from James Madison College at Michigan State University in 1992. He joined the State Bar of Michigan in 1997.

Scott T. Patterson* is a shareholder based in Butzel Long's Bloomfield Hills office. Mr. Patterson is a graduate of the Detroit College of Law (J.D., *cum laude*, 1986) and the University of Virginia (B.A., 1983). Mr. Patterson represents employers in labor and employment law and business-related immigration matters. He has extensive experience representing employers in state and federal courts and before government agencies in defense of employment-related claims such as those involving allegations of sexual harassment, race, age, gender and disability discrimination, wrongful discharge and alleged violations of various state and federal statutes. Mr. Patterson also represents employers in arbitration proceedings and collective bargaining negotiations. In addition to litigating employment-based lawsuits, Mr. Patterson is actively involved in advising clients on compliance with federal, state and local laws affecting the employment relationship and assisting employers in developing employment policies and practices designed to comply with applicable laws and avoid employment claims. He also represents employers and employees in business-related immigration matters such as temporary employment visas, including H-2B visas for seasonal workers in the hospitality and construction industries, and in obtaining permanent residency status for employees. Mr. Patterson is a frequent lecturer on employment-related matters and conducts training for employers on various issues including sexual harassment prevention, avoiding discharged-related claims, and Family Medical Leave Act compliance. Mr. Patterson is a member of the Labor Law Section of the American Bar Association, the State Bar of Michigan, and the American Immigration Lawyers Association, Michigan Chapter.

Elissa Noujaim Pinto* is an associate in Butzel Long's Detroit office, with the Immigration and Foreign Employment Practice. She is a member of the firm's Foreign Internship Committee and has presented at Butzel Long's annual full-day Immigration Seminar. Ms. Pinto has extensive experience representing local, national and international companies in obtaining authorization for foreign national employees to work temporarily (non-immigrant) and permanently (immigrant) in the United States, through various work authorized visa classifications (including H-1B, TN, L-1 and O-1) and employment-based permanent residence processes (including PERM Labor Certification, Multinational Manager/Executive, Extraordinary Ability Alien and Outstanding Researcher). Ms. Pinto also has experience with J-1 Internships and H-3 Trainees. She has assisted companies and their employees with business travels or transfers to related entities in other countries, with the applicable outbound visa processes. Ms. Pinto regularly provides guidance to business clients with respect to their foreign national workforce, including long-term strategy and planning and immigration compliance (such as I-9s and H-1B Public Access Files), as well as immigration-related issues that arise on a daily basis. She has experience in providing training on various immigration processes and has conducted presentations for clients that are tailored to their workforce and foreign employment policies and practices. Ms. Pinto also represents individuals who are seeking family-based permanent residence in the United States (including I-751 removal of conditions on permanent residency). She also assists individuals in the citizenship and naturalization process. Ms. Pinto regularly accompanies clients to the Detroit-Windsor

Tunnel Immigration Office and the United States Citizenship and Immigration Service – Detroit District Office for immigration interviews and applications. Prior to joining Butzel Long, Ms. Pinto worked as an attorney for other large law firms based in Detroit concentrating on employment-based immigration and a boutique law firm specializing in all areas of immigration law. Ms. Pinto also worked as a Dean of Students in the Upper School of the Academy of the Sacred Heart in Bloomfield Hills, Michigan where she is now a member of the Alumnae Board. She is a graduate of Wayne State University Law School (J.D., 2001) and the University of Michigan (B.A., 1998). While attending law school, she interned at the Department of Justice, Executive Office for Immigration Review at the Immigration Court in Detroit, was a member of Moot Court and served at Wayne State Law School's Free Legal Aid clinic. During her undergraduate studies, Ms. Pinto studied international law and French in Paris, France. She is proficient in French and Spanish and fluent in Portuguese. Ms. Pinto is a member of the American Immigration Lawyers Association (AILA), the Federal Bar Association and the State Bar of Michigan (International Law Section and Labor and Employment Section.)

Claudia Rast* is a shareholder based in Butzel Long's Ann Arbor office. She has extensive experience counseling both start-up and well-established clients on emerging legal issues related to business and technology, particularly online and web-based companies. She blends the study of law, business, and technology to assist companies in their choice and use of technology to maintain a competitive edge. As a Board member for Ann Arbor's New Enterprise Forum, she coaches technology start-ups in their efforts to connect with management expertise, venture capital, and business partners. Ms. Rast is also an experienced environmental lawyer, focusing on alternative energy and sustainability practices, including work on the development of a global Rule of Law Index for environment and energy with the World Justice Project, an offshoot of the American Bar Association. Locally, she is a Board Member of the Clean Energy Coalition (CEC), where she developed the legal framework for the DOE's $15M grant to the CEC for the Michigan Green Fleets project and the Michigan Public Service Commission's $4.5M grant for the Cities of Promise program. In addition, Ms. Rast has substantial experience in other federal and state regulatory issues, including the removal of vast underground storage tank farms in the 1990's; Superfund remediation and litigation; Clean Water Act permitting and litigation; Solid Waste permitting and compliance; and SWAP grant permitting. Ms. Rast is a frequent speaker on matters ranging from Electronic Discovery, Online Advertising, Privacy, Identity Theft, Environmental Sustainability in the Law Office to Data Security Breaches for the Michigan Institute of Continuing Legal Education (ICLE). Most recently, she moderated a panel on "Hot Topics in Environmental Law" at the American Bar Association's Annual Meeting in San Francisco. Ms. Rast's publications include articles for *Environmental Compliance and Litigation Strategy* (August 1998) and the Institute of Management Consultants USA (March 1999). She was a contributor to ICLE's *Michigan Environmental Law Deskbook*, Vols. I-II (1994), and co-authored the annual update on Environmental Law for *The Wayne Law Review* in 1990. On the business and technology side, she has written articles for *Michigan Banker Magazine* (April 1997), *Detroiter* (June 1998), *Environmental Compliance and Litigation Strategy* (August 1998), the *Institute of Management Consultants USA* (March 1999), and the Michigan Chamber of Commerce magazine, *Michigan Forward* (February 2000). She is also a contributing author to ICLE's *Advising eBusiness Startups* (June 2001), and *The Internet & Technology Guide for Michigan Lawyers* (ICLE 1996-1999), with licensed editions in California, Pennsylvania, Tennessee, Massachusetts, and Illinois. Ms. Rast also co-authored an online course for CPE credit, *Trust Services Privacy* (IdentiRISK 2004) and

CPA's *Guide to Privacy* (Bisk Education 2006 & 2011). Ms. Rast's memberships include the American Bar Association's Section of Environment, Energy, and Resources, where she has been involved in the leadership of the Section since 1999, including Chair of the Section in 2008-2009, AnnArbor's New Enterprise Forum, the Michigan League of Conservation Voters Board of Directors, ICLE's Technology Training Advisory Board, and the Information Technology Council of the State Bar of Michigan. In 2001, she was the only lawyer named as a Technology Industry Leader in Crain's Detroit Business, and in 2003 the Ann Arbor Chapter of American Women in Computing named her as one of twenty "Top Michigan Women in Computing." Ms. Rast is a graduate of the University of Michigan (B.S., Natural Resources, 1975) and *cum laude* graduate of the University of Detroit School of Law (1986) where she served as Editor-in-Chief of the University of Detroit Law Review (1985-1986).

James S. Rosenfeld* is a shareholder practicing in Butzel Long's Detroit office. He practices in the area of labor and employment law and he serves as the manager of Butzel Long's Labor and Employment Practice Group. He has extensive experience in litigating a wide variety of labor and employment cases, including trial and appellate work in both state and federal court. He also has experience negotiating collective bargaining agreements, and handling labor arbitrations and hearings before the National Labor Relations Board. Mr. Rosenfeld is a graduate of Georgetown University Law Center (J.D., 1986) and Harvard College (A.B., 1981, *magna cum laude*). Mr. Rosenfeld is a Fellow of the College of Labor and Employment Lawyers, is listed in *The Best Lawyers in America* in Labor and Employment and has been ranked by *Chambers USA*. In 2009, Mr. Rosenfeld served as a member of Detroit Mayor Dave Bing's Crisis Turnaround team, focusing on labor relations and human resource issues. Mr. Rosenfeld is a Life Member in the Sixth Circuit Judicial Conference and a Fellow of the State Bar of Michigan Foundation. He is a member of the Labor and Employment Law and the Alternative Dispute Resolution Sections of the State Bar and the Labor and Employment Relations Sections of the Federal and American Bar Associations, as well as the ABA's ADR in Labor and Employment Law Committee. He has previously served as a member of the State Bar of Michigan Representative Assembly and President of the Barristers of the Detroit Metropolitan Bar Association and is currently a Member of the latter's Board of Directors. Mr. Rosenfeld has completed 40-hour General Civil Case Mediator Training and has been a mediator on the American Arbitration Association Mediation Panel. He has served as an adjunct professor at Wayne State University Law School teaching alternative dispute resolution and frequently lectures and conducts training for employers and supervisors on various employment issues. He has been a speaker and author on panels for the ABA's ADR in Labor and Employment Law Committee, in 2007 and 2008 and co-authored "Expert Witness Testimony: A Litigation Issue for Discharge and Discrimination Cases," February, 1993, 72 *Michigan Bar Journal*, No. 2, 146 and "Sex Harassment Decisions: Take Your Statute as You Find It," October 1998, 77 *Michigan Bar Journal*, No. 10, 1098.

William M. Saxton is Counsel, a Director Emeritus and former Chairman and CEO of Butzel Long practicing in the firm's Detroit office. With more than fifty years experience as a litigator, negotiator and counselor, he enjoys national preeminence as an expert in the labor and employment law field. He is a graduate of The University of Michigan (B.A., 1949; J.D., 1952). Mr. Saxton has been elected a Fellow of the American College of Trial Lawyers, a Fellow Emeritus of the College of Labor and Employment Lawyers, a Life Fellow of the American Bar Foundation, a Life Fellow of the Michigan Bar Foundation and a member of the American Law Institute. In September, 2003, the State Bar of

Michigan presented him the Champion of Justice Award for integrity and adherence to the highest principles and traditions of the legal profession and professional accomplishments. In 1998 he received the Distinguished Service Award from the State Bar of Michigan Labor and Employment Law Section in recognition of his "long established commitment to excellence, highest ethical principles and major contributions to the practice of labor and employment law." In 1996, Saxton was awarded the Nathan B. Goodnow Award by the Detroit Bar Association in recognition of a career that exemplifies the highest standard of the legal profession and significantly impacted the law and life of the community. He is a Life Member of the U.S. Sixth Circuit Court of Appeals Judicial Conference and he is also a member of the Bar of the Michigan Supreme Court, United States Supreme Court, Sixth Circuit Court of Appeals, Fifth Circuit Court of Appeals, Fourth Circuit Court of Appeals and Court of Appeals for the District of Columbia. Mr. Saxton is a member of the State Bar of Michigan, Detroit Bar Association, Oakland County Bar Association, American Bar Association, Federal Bar Association, American Trial Lawyers Association and Association of Defense Trial Counsel. Other memberships include the Detroit Industrial Relations Research Association where he was President from 1984-1985. He was Chairman of the State Bar of Michigan, Junior Bar Section from 1955-1956 and was Director of the Detroit Bar Association from 1975-1979. He has been a Member of the Attorney Discipline Board Hearing Panel since 1972 and is a member of the Mediation Tribunal Hearing Panels for the Third Judicial Circuit and Sixth Judicial Circuit of Michigan. Mr. Saxton is a past Trustee of the Detroit Music Hall Center for the Performing Arts and past President and Trustee of the Historical Society for the U.S. District Court for the Eastern District of Michigan. He has authored several legal articles and been a guest lecturer at The University of Michigan Law School, University of Detroit Law School, University of Indiana Law School, Wayne State University Law School, Michigan State University, National Academy of Arbitrators, American Arbitration Association, Institute for Continuing Legal Education, Federal Bar Association, State Bar of Michigan, Industrial Relations Association of Detroit and The Michigan Municipal League. Mr. Saxton is a member of the Panel of Arbitrators, American Arbitration Association. He is a Master of the Bench Emeritus of the American Inn of Court. Mr. Saxton was the recipient of Michigan Road Builders "Distinguished Award" in 1987. He has been listed in The Best Lawyers In America, in the business litigation and in the labor and employment discrimination law categories and is also listed in Who's Who In American Law and Who's Who In America.

Jordan Schreier* is a shareholder in Butzel Long's Ann Arbor, Michigan office. He is a Vice-President of the Firm, serves on the firm's Board of Directors and was the Practice Group Leader for the Employee Benefits Practice Group from 1995-2010. He represents clients primarily in the area of ERISA, employee benefits and compensation. He is a graduate of The University of Michigan (B.A. with high distinction, 1983; J.D., *cum laude*, 1987). Mr. Schreier is listed in the *Best Lawyers in America* (Employee Benefits Law; Labor and Employment Law), *Chambers USA* (Employee Benefits and Executive Compensation), Super Lawyers (Employee Benefits), and *DBusiness* magazine's Top Lawyers list.
Mr. Schreier's practice primarily involves advising profit and nonprofit employers on planning and compliance issues involving all aspects of employee benefits, including welfare benefits, qualified retirement and other deferred compensation plans. His experience includes counseling on executive compensation programs, controlled group planning, multiemployer benefits plans, consumer directed health care, ERISA reporting and disclosure issues, prohibited transactions, fiduciary compliance and best practices, flexible benefits, COBRA, FMLA, ADA, HIPAA and other benefits issues. He serves as legal

counsel to numerous pension and 401(k) investment and administrative committees. Mr. Schreier is a member of the State Bar of Michigan (Labor and Employment and Taxation Sections), the Washtenaw County Bar Association (Labor and Employment and Tax Law Sections) and the American Bar Association (Labor and Employment Section). He teaches a regular class on COBRA compliance for the American Society of Employers, has been an instructor for the Institute of Continuing Legal Education and is a frequent speaker on pension and benefit issues.

Craig S. Schwartz* is a shareholder based in Butzel Long's Bloomfield Hills office. He is a graduate of Boston University (B.A., 1977) and Georgetown University Law Center (J.D., 1980). Mr. Schwartz practices in the areas of labor relations and employment-related litigation. He has broad experience in collective bargaining for employers in many industries, labor arbitration and union representation proceedings, and has represented employers in over one hundred fifty labor arbitrations. Mr. Schwartz also has extensive experience representing clients in administrative proceedings and litigation before the National Labor Relations Board, Michigan Employment Relations Commission, Equal Employment Opportunity Commission, Michigan Department of Civil Rights, and in state and federal courts. Some of the significant published decisions in which he has represented management clients include: *Gourmet Foods, Inc*., 270 NLRB 578 (1984) (NLRB may not issue a bargaining order without a finding of union majority status); *Pattern Makers League of North American* (*Rite Industrial Models, Inc*.), 310 NLRB 928 (1993) (NLRB establishes rule for timeliness of resignations from union membership during strikes); *Neubacher v. Globe Furniture Rentals, Inc*., 205 Mich. App. 418 (1994) (elimination of plaintiff's position precludes continuing economic damage claims in employment discrimination cases); *Cole v. West Side Auto Employees Federal Credit Union*, 229 Mich. App. 638 (1998) (arbitration award has preclusive effect on subsequent employment discrimination action); *Stradner v. Borman's, Inc*., 10 BNA ADA Cases 1319 (E.D. MI, 1999); *Petzold v. Borman's, Inc*., 241 Mich. App. 707 (2000) (job-related misconduct caused by an alleged disability is not protected conduct under the Michigan Persons With Disabilities Act); *Oakland County*, 2001 MPER (LRP) Lexis 81 (Michigan public employees do not have a right to use employer e-mail systems for union or protected activities unless access is permitted for other non-business purposes); *Dean & Deluca New York, Inc*., 338 NLRB No. 159 (2003) (voters in classifications included in NLRB election stipulation cannot subsequently be challenged by a union as statutory supervisors); *Hollingsworth Management Services*, 342 NLRB No. 50 (2004) (employer entitled to second NLRB election based upon electioneering and coercion of voters by pro-union employees in the polling area); *Young v. Oakland County*, 2006 U.S. Dist. Lexis 51467 (E.D. MI, July 27, 2006); *Michigan Technological University*, 2007 MPER (LRP) LEXIS 36; *University of Detroit Mercy*, Case No. 7-UC-616 (2008) (Union cannot seek to add historically excluded classifications in unit clarification proceedings; university buyers are managerial employees not subject to the NLRA). Mr. Schwartz is admitted to practice in the States of Michigan and Minnesota, as well as several federal district and circuit courts. He is also admitted to practice before the U.S. District Court for the Northern District of Illinois. He is a member of the Labor and Employment Section of the American Bar Association and the Employment Law Section of the State Bar of Michigan. Mr. Schwartz was an Adjunct Professor of Law at the Ave Maria School of Law teaching collective bargaining from 2006-2009. In 2009, Mr. Schwartz served as a member of Detroit Mayor Dave Bing's Crisis Turnaround team, focusing on labor relations and human resource issues. He has been named one of the top lawyers in Metro Detroit by dbusiness magazine.

Thomas L. Shaevsky is a shareholder based in Butzel Long's Bloomfield Hills office. He is a graduate of the University of Michigan Law School (J.D., 1992, *magna cum laude*, The Order of the Coif; Michigan Law Review: Contributing Editor), and the University of Michigan (B.A., with high distinction, Angell Scholar, 1989). Immediately following law school graduation, Mr. Shaevsky served as a law clerk to the Honorable John Feikens of the United States District Court for the Eastern District of Michigan. Mr. Shaevsky practices in the area of employee benefits and he has been selected by his peers for inclusion in *The Best Lawyers in America* (Employee Benefits Law). He advises large multinational corporations, physicians and other professional practices, hospitals and other nonprofit employers, as well as individuals, on compliance and planning issues pertaining to a wide range of retirement, pension, and welfare plan issues. His experience includes counseling on fiduciary duty compliance, prohibited transaction avoidance and correction, reporting and disclosure issues, mergers and acquisitions due diligence, QDROs, as well as COBRA, HIPAA, and other benefits issues. Mr. Shaevsky represents clients undergoing IRS and U.S. Department of Labor audits. Mr. Shaevsky is the Chair of the Employee Benefits Committee of the Taxation Section of the State Bar of Michigan. He is the immediate past Chair of the Employee Benefits Committee of the Oakland County Bar Association and a past member of the Board of Directors of the Michigan Employee Benefits Conference (2008-2009). He served as an appointed member of the West Bloomfield Township Wetland Review Board (2007-2009). Mr. Shaevsky is also a member of the American Bar Association (taxation section). Prior to joining Butzel Long, Mr. Shaevsky was engaged as in-house counsel to Comerica Bank's Institutional Trust Department, counseling and advising business owners and managers with regard to retirement plan issues and general compliance issues. He has assisted with the formulation of a multitude of business decisions and policies. Mr. Shaevsky also has experience counseling public entities on Open Meetings Act, Freedom of Information Act, and conflict of interest issues.

Francyne B. Stacey* is a shareholder practicing in Butzel Long's Ann Arbor office, counseling clients in the areas of employment and immigration law. She earned her undergraduate degree from the University of Michigan (B.A. Ed., 1977, with distinction) and her law degree from Wayne State University (J.D., 1981). Since completing law school, Ms. Stacey has devoted her practice, almost exclusively, to employment law including litigation before various state and federal courts and administrative agencies and providing day to day counsel to clients (both profit and not-for profit organizations on issues such as personnel policies, FMLA compliance, Fair Labor Standards Act (FLSA), disability and work-related injuries, non-compete and confidentiality agreements, HIPAA , affirmative action and federal and state contract and grant compliance and employee discipline. Ms. Stacey's expertise in immigration law includes both business and individual immigration matters, from obtaining non-immigrant visas through citizenship for her clients. She also has successfully obtained asylum for her clients and litigates matters in Immigration Court. In addition to practicing law, Ms. Stacey is a dedicated community volunteer. She currently sits on the board of the Washtenaw County Chapter of the American Red Cross and, for many years, served on the Board of the Michigan Theater Foundation. Ms. Stacey served on the executive committee of both of these organizations and has contributed her services and energy to a number of other non-profit groups and political causes.

Bethany Steffke Sweeny* is a shareholder based in Butzel Long's Ann Arbor office. She is a graduate of The University of Michigan School of Law (J.D., 2001), The University of Michigan School of Social Work

(M.S.W., 1994), and Kalamazoo College (B.A., *magna cum laude*, Phi Beta Kappa 1992). Ms. Sweeny concentrates her practice in the area of labor and employment law, focusing on employment litigation involving state and federal claims of harassment, retaliation and discrimination, as well as FMLA and whistleblower claims. She has represented employers in front of various administrative agencies, including the Equal Employment Opportunity Commission, the Michigan Department of Civil Rights and other state agencies. Ms. Sweeny also provides employers with general advice regarding employment law issues and litigation avoidance. Prior to joining Butzel Long, Ms. Sweeny had an extensive career in higher education, including work as a foundation fundraiser at Yale University, a corporate and foundation fundraiser at the University of Michigan and as the program manager for an international multidisciplinary program for graduate students at the University of Michigan Business School. Ms. Sweeny also served as the Assistant to the Vice President for Student Affairs at the University of Michigan. Ms. Sweeny is a member of the State Bar of Michigan, the Federal Bar Association, the American Bar Association and the Washtenaw County Bar Association.

Louis Theros* concentrates his legal practice in the areas of employment litigation, labor, advising and counseling clients on statutory employment compliance and gaming law. He is a shareholder with Butzel Long, located in the firm's Detroit office. Mr. Theros is a graduate of Vanderbilt University School of Law (J.D., 1989), and received his undergraduate degree from the University of Michigan (B.A., 1985). Mr. Theros has over twenty years experience, including first chair trial and appellate responsibilities, in employment discrimination and harassment matters and large class action law suits, throughout Michigan and the Midwest. He also has extensive experience in handling arbitrations arising from collective bargaining disputes and unfair labor practice complaints, and in alternate dispute resolution. He has served as counsel on various traditional labor issues, including organizational campaigns and collective bargaining agreement negotiations and implementation. Mr. Theros serves as counsel to several mid-sized entrepreneurial and institutional clients on day-to-day human resource and employment-related issues. He has handled various employment dispute resolution matters, including the resolution of claims filed with state or federal Departments of Labor and Civil Rights. Mr. Theros has published a number of scholarly articles on various aspects of labor and employment law. He was co-author of *Risk Management Magazine's* June 1998 article titled, "The Arbitration Alternative," and was also author and co-author of several articles on Illinois employment law and the ADA. Mr. Theros is a frequent lecturer on a wide range of employment and labor issues. He discussed the topics of FMLA and ADA at the Education in Management Seminars, and was also a speaker at the ORGPRO Conference for the Michigan Society of Association Executives where he spoke on employment issues facing association executives. Mr. Theros is listed in *Best Lawyers in America* and is named in *Michigan Super Lawyers*, both since 2007. He has received an "AV" rating from Martindale-Hubbell. Committed to his community, Mr. Theros actively participates in a variety of organizations. He currently serves on the Grosse Pointe Farms City Council (2001-present), where he was Mayor Pro Tem from 2005-2007. He also is vice president of the Michigan Ice Hawks Youth Hockey Club, and the treasurer of the Senior Citizen Housing Development Committee for the American Hellenic Educational Progressive Association (AHEPA). Mr. Theros formerly served on the Board of Governors for the University of Michigan Club of Greater Detroit. Mr. Theros is a former president of the Detroit Metropolitan Bar Association (2005-2006), and currently serves as a Trustee of the Association's charitable arm, the Detroit Metropolitan Bar Foundation (2006-present).

Daniel B. Tukel* is a shareholder practicing in Butzel Long's Detroit office and serves as Chair of the firm's Labor and Employment Law Department. He is an honors graduate of the University of Michigan Law School (J.D., *cum laude*, 1982), and also received his undergraduate degree from the University of Michigan (A.B. with high honors and high distinction, 1979). Mr. Tukel's practice is devoted to representing both public and private employers in state and federal discrimination and wrongful discharge litigation, as well as traditional labor matters such as collective bargaining and union organizational drives. He regularly counsels employers in all aspects of labor and employment law, in statutory compliance and in creating, implementing and administering employee handbooks and other personnel policies and practices. He has represented employers before state and federal trial and appellate courts, and various administrative agencies including: the National Labor Relations Board; National Mediation Board; Equal Employment Opportunity Commission; Occupational Safety and Health Administration; Michigan Department of Civil Rights; Michigan Department of Labor; Michigan Employment Relations Commission; and Michigan Employment Security Commission. Mr. Tukel has published a number of scholarly articles on various aspects of labor and employment law, including: "The Best Defense Or A Good Offense? Are The Damage Caps In 42 U.S.C. § 1981a Waivable Affirmative Defenses?", *The Labor Lawyer* (publication of the American Bar Association Labor and Employment Law Section), Vol. 24, No. 3, Winter/Spring 2009; "Testing Accommodation: Is a 'Level Playing Field' Unfair?" *The Labor Lawyer*, Vol. 23 No. 1, November, 2007; "Binding Employee Arbitration, Not So Final and Binding After All," July, 2002, *Michigan Bar Journal*, (publication of the State Bar of Michigan), Volume 81, No. 7; "To Arbitrate or Not to Arbitrate Discrimination Claims: That is Now the Question for Michigan Employers," September, 2000, *Michigan Bar Journal*, Volume 79, No. 9; "Don't Ask, Don't Tell: Amendment To Michigan Handicap Act Prohibits Use of Genetic Information in Employment," Summer, 2000, *Labor and Employment Lawnotes* (publication of the Labor and Employment Law Section - State Bar of Michigan), Volume 10, No. 2; "Sticks and Stones May Break Your Bones, But That May Not Constitute a 'Disability'," Fall, 1999, *Labor and Employment Lawnotes*, Volume 9, No. 3; "Student Versus Student: School District Liability for Peer Sexual Harassment," November, 1996, *Michigan Bar Journal*, Volume 75, No. 11. Mr. Tukel has lectured on a wide range of employment and labor issues, has served on the faculty of the Institute of Continuing Legal Education, and has served as a private arbitrator and private facilitator in employment matters. He is a Fellow of the College of Labor and Employment Lawyers. He is listed in *Chambers USA* for Labor and Employment Law, in *Best Lawyers in America* for Labor and Employment Law, and is named a *Michigan Super Lawyer* for employment litigation defense. Mr. Tukel is a member of the National Association of College and University Attorneys, the American Employment Law Council, the Michigan Council of School Attorneys, the American Bar Association (Labor and Employment, and Litigation sections), the State Bar of Michigan (Labor and Employment, and Litigation sections), the Detroit Metropolitan Bar Association, the Oakland County Bar Association, and is a Fellow of the State Bar of Michigan Foundation.

Dr. Lee E. Meadows, Ph.D

Lee E. Meadows, Ph.D is a Professor of Management at Walsh College and Consultant with over 30 years of experience working for and consulting with leading organizations on a variety of management issues. He is the author of the business leadership fable: *Take the Lull by the Horns: Closing the Leadership Gap.*

Dr. Meadows was the Chairman of the Management Department at Davenport University's Dearborn Campus. He teaches management courses for both the undergraduate, MBA and Doctoral program at Walsh. He also conducts seminars for the Business Leadership Institute of Walsh College and does independent consulting on management and organizational issues. He teaches seminars, based on his book, 'Take the Lull By the Horns: Closing the Leadership Gap'.

In addition to his teaching and consulting responsibilities at Walsh College, Dr. Meadows is also a contributing Business Columnist for the *Michigan Front Page,* the *Novi News,* the *Northville Record,* the *Michigan Chronicle* and *The Heritage Newspapers*.

Dr. Meadows also writes a Detroit-based private investigator mystery series featuring private investigator, Lincoln Keller. The book titles are *Silent Conspiracy* and *Silent Suspicion*.

He earned his undergraduate and graduate degrees at Michigan State University while working as both a university administrator in the University Housing Program and an adjunct professor in the College of Education. He earned his Doctorate in Higher Education Administration with a concentration in management and organizational behavior.

Dr. Meadows has worked in training and organizational change for a variety of companies. As an independent consultant specializing in *Change Management*, *Core Management Skills*, *Team building*, *Diversity Training* and *Corporate Motivational Speaking*, has consulted with numerous small, mid-size and large companies, police agencies, state and local government agencies, several k – 12 school districts as well as mid-size and large universities.

Dr. Meadows' practical experiences include having worked at Michigan State University, General Motors, the Kellogg Foundation, EDS/A.T. Kearney Consulting Services and Con-Way Transportation Services.

Dr. Lee E. Meadows, Ph.D.

Clients served:	Intervention	Delivered
ACRO LLC,	Teambuilding	2010
CVS Pharmacy	Teambuilding	2010
Communicating Arts CU	Time Management	2009
Institute of Professional Psychology	Teambuilding	2008
Sinai-Grace Hospital	Teambuilding	2008
Detroit Receiving Hospital	Management Development	2008
Social Security Administration	Leadership Seminar	2007
Wayne County Community College	Leadership Seminar	2007
Northwood University	Diversity Training	2007
Chrysler Financial Services	Diversity Training	2007
IKON Documents	Good-to-Great Seminar	2007
Quicken Loans	Ethics Coaching	2007
City of Novi High School Staff	Cultural Diversity Training	2006
City of Novi Police Department	Cultural Diversity Training	2006
Pittsfield Charter Township	Sexual Harassment Training	2006
Battle Creek Public Schools	Customer Service Training	2005
Battle Creek Public Schools	Customer Service Training	2004
Edwards Brothers Publishers	Customer Service Training	2004
Quicken Loans	Human Resource Recruiting	2003
Visteon Automotive	Presentation Skills	2002
Esperion Therapeutics	Supervision	2002
State of Mich, Dept of Commerce	Employee Development	2001
Visteon Automotive	Communications	2001
Ford/Atlanta Assembly Plant	ISO 9000	2000
Kellogg Research Institute	Teambuilding	2000
Grand Rapids Foundation	Teambuilding	1999
Mercy Continuing Care	Teambuilding	1999
Michigan State University	Diversity	1999
Detroit Piston Foundation	Diversity	1999
Ford Educational Services	Marketing	1998
Thyssen Steel	Teambuilding	1998
Cummins Engines	Org Change	1998
National Car Rental	Org Change	1997
Families for Kids	Diversity	1997
Western Michigan University	Teambuilding	1997
Minority Vendors Association	Org Change	1997

Contact Details
http://www.thelulldoctor.com
http://www.facebook.com/MeadowsConsulting
http://www.leemeadows.biz

Welcome

Daniel Tukel
313.225.7047
tukel@butzel.com

General Housekeeping

Our group continues to grow.

New faces at Butzel. We have added five new attorneys since last year.

Marc Oswald

Shanta McMullan

Rebecca Davies

Francyne Stacey

Ed Copeland

Individual Recognitions

Rob Boonin

Best Lawyers' 2012 Ann Arbor Litigation - Labor & Employment Lawyer of the Year

Katie Donohue

Michigan Lawyers Weekly "up and coming lawyer"

New Developments

New EEOC Regulations

Genetic Information Nondiscrimination Act

- EEOC issued final regs for GINA
- Regs now in effect
- New expanded definitions, limitations, prohibitions and exceptions to collecting genetic information

GINA generally prohibits employers from:

- Requesting, requiring or purchasing genetic information on employees or family members
- Discriminating based on genetic information
- Retaliating for opposing any prohibited act

Clarifies some exceptions

ADA

- EEOC issued final regulations and interpretive guidance to implement the ADA Amendments Act
- Regs now in effect
- Regs intended to simplify determination of who has a "disability" and make it easier for employees to establish that they are protected by the ADA

- Regs add number of "major life activities" to the list of activities which, if substantially limited, could be deemed a disability.
- Added reading, bending, communicating and operation of major bodily function.
- Includes conditions which are episodic or in remission, if the impairment would substantially limit a major life activity when active.

- Provide specific impairments that should "easily" be concluded to be disabilities.
- Deafness, blindness, intellectual disability, missing limbs, use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, MS, muscular dystrophy, bipolar disorder, PTSD, OCD, schizophrenia.
- Temporary impairments may be substantially limiting, and disabling. No durational minimum.

New Court Decisions

"Cat's Paw" Theory Upheld

Staub v. Proctor Hospital

- Supreme Court held employer may be liable when a biased employee influenced, but did not make, employment decision

Third Party Retaliation Claim Is Actionable

Thompson v. North American Stainless

- Supreme Court held that an individual who has not engaged in protected activity can bring retaliation claim based on protected activity of third party

- Fiancé who worked for same employer filed EEOC charge, after which plaintiff was fired
- Retaliation when "any employer action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination"

How close must relationship be?

- Not well defined
- Firing a "close family member" almost always sufficient
- Adverse employment action against "mere acquaintance" usually not
- Must be determined based on particular circumstances

FLSA Retaliation Extends To Oral Complaints

Kasten v. Saint-Gobain Performance

- Plaintiff made repeated oral complaints about not being paid appropriately
- FLSA prohibits retaliation against employee who "files" complaint
- Court held that protection applies to employees who make either written or oral complaints

Arbitration of Class Actions

AT&T Mobility v. Concepcion

- Supreme Court considered whether a state law could invalidate an arbitration provision which permitted only individual claims, precluding arbitration of class actions

- Court found that FAA preempted the state law, thereby upholding the enforceability of the arbitration provision
- Employers will need to draft arbitration provisions accordingly, and determine whether they wish to preclude arbitration of class claims

Thank You

Daniel Tukel
313.225.7047
tukel@butzel.com

Capitol Hills Update: What's on the Agenda of Our Legislators and Regulators?

Robert A. Boonin
Butzel Long
734.213.3601
boonin@butzel.com

MISHRM Reception
SHRM Annual Conference

Las Vegas, Nevada

This outline highlights some of the key proposed changes pending before Congress and various regulatory agencies, as well as the Michigan Legislature, on issues relevant to human resources professionals and employment law counsel. Some of these initiatives may become law, but many will not. Nonetheless, it is instructive, if not informative, to keep track of the types of issues the government and its policymakers are considering on the employment law front.[1]

I. From Washington, D.C. . . .

The 111th Congress is over, as is its ambitious legislative agenda on employment law matters. The 112th Congress has convened this past January, but its legislative agenda on employment law matters appears less ambitious. For instance, it is unlikely that either the Employee Free Choice Act (EFCA) (certifying unions on the basis of card-check) or the Employee Non-Discrimination Act (ENDA) (prohibiting discrimination on the basis of sexual preference) will be on the "front burner" during the new congressional term. That is not to say that changes in employment law matters are not anticipated, at least from Washington. Some legislative initiatives are beginning to percolate, though their prospects of passage in the near future may be faint. Perhaps more significantly, there are some proposed changes in regulations and even administrative law doctrine on the forefront of which employers should be aware.

Proposed EEO-Related Regulations and Legislation

GINA Recordkeeping Regulations

While the final rules implementing GINA were finalized on November 9, 2010, the EEOC is now considering updating its regulations under both Title VII and the ADA with respect to an employer's recordkeeping requirements under GINA.

ADEA Disparate Impact

Following the Supreme Court's decisions in *Smith v. City of Jackson*, 544 U.S. 228 (2005), and *Meacham v. Knolls Atomic Laboratory*, 128 S. Ct. 2395 (2008), which recognized a disparate impact claim under ADEA and that the employer bore the burden of proving the "reasonable factor other than age" (RFOA) defense (and that that the defense was not "business necessity"), the EEOC is about to publish more regulations to elaborate upon the RFOA defense. It is expected that under the regulation, employers will have to take age into account while relying on the defense by conducting disparate impact review and assessing age impact of alternative employment practices. The proposed regulation also requires that employers prove that their entire course of conduct was reasonable, not just their use of the questionable factor. On January 4, 2011, the final regulations were sent to the OMB for interagency review. Final action is anticipated this summer.

Affirmative Action

In July 2010, the Labor Department published an advanced notice of proposed rulemaking to strengthen the affirmative action requirements of federal contractors and subcontractors under Section 503 of the Rehabilitation Act. The Department's goal is to require these employers to increase linkages and conduct more substantive analyses of recruitment and placement actions taken under the act, and to also revise the recordkeeping requirements. In December 2010, the Department announced similar intentions regarding the recruitment and placement of veterans under the VEVRAA.

Pay Discrimination

On January 3, 2011, the OFCCP published a notice of proposed rulemaking to rescind guidance issued under the Bush administration relating to systemic compensation discrimination. The current guidance rejects the use of pay-banding (the "DuBray method) in determining whether discrimination occurred, and favored other approaches such as multivariable regression. It is unclear whether this means that the DuBray method will be redeployed, though it was harshly criticized by the OFCCP when it was abandoned.

Equal Pay/Comparable Worth

On April 12, 2011, the "**Fair Pay Act of 2011**" (S 788; HR 1493) was re-introduced by Senator Harkin to amend the Equal Pay Act to require equal pay for equivalent jobs without regard to sex, race or national origin, but allows payment of different wages under seniority systems, merit systems, systems that measure earnings by quantity or quality of production, or differentials based on bona fide factors that the employer demonstrates are job-related or further legitimate business interests. If so, though, the employer would have to prove that the factor is job-related with respect to the position in question, or furthers a legitimate business purpose, except that this defense will not apply if the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing the pay differential and that the employer has refused to adopt such alternative practice, and the employer actually applied and used the factor reasonably in light of the asserted justification. If the employer meets these standards, the employer may still be held liable if the employee proves that the differential produced by the reliance of the employer on the factor is itself the result of discrimination on the basis of sex, race, or national origin by the employer. The bill also sought to allow the awarding of expert fees and the use of class actions. This bill has been introduced in both the last two congressional sessions, but never left committee.

Fair Pay

The "**Paycheck Fairness Act**" (HR 1519, with 167 co-sponsors; S 797, with 28 co-sponsors) was re-introduced in on April 12, 2011. Last congressional term, a similar bill passed the House just three days after being introduced (along with the Ledbetter Act). The bill was un-linked to the Ledbetter Act in the Senate, however, and did not leave committee. Therefore, it has been reintroduced. The revised bill, if enacted, would significantly limit defenses to Equal Pay Act claims; permit unlimited punitive and compensatory damages for strict liability violations of the law; and would make it easier to bring class action suits by using an opt-out method. The bill provides that employers asserting that a pay differential between male and female employees is "based on factors other than sex" must prove those factors are "job-related" and "consistent with business necessity."

Unemployment Discrimination

On March 16, 2011, the "**Fair Employment Act of 2011**" (HR 1113) was introduced to amends Title VII of the Civil Rights Act of 1964 to add unemployment status to the categories of prohibited discrimination. The bill defines "unemployment status" as being unemployed, having actively looked for employment during the then most recent four-week period, and currently being available for employment.

Sexual Preference Discrimination

On April 15, 2011, Representative Frank re-introduced the "**Employment Non-Discrimination Act**" ("ENDA" – HR 1397, with 133 cosponsors; S 811, with 39 cosponsors) to prohibit employment discrimination on the basis of actual or perceived sexual orientation or gender identity by employers, employment agencies, labor organizations, or joint labor-management committees, other than with respect to religious organizations or the military. The bill would also prohibit preferential treatment or quotas and would only disparate treatment claims.

Credit Histories

On January 19, 2011, the "**Equal Employment for All Act**" (HR 321) was introduced to amends the Fair Credit Reporting Act to prohibit a current or prospective employer from using a consumer report or an investigative consumer report, or from causing one to be procured, for either employment purposes or for making an adverse action, if the report contains information that bears upon the consumer's creditworthiness, credit standing, or credit capacity. The bill would except the used of this information in the employment context when it is required for the purpose of national security or for Federal Deposit Insurance Corporation (FDIC) clearance, or by a state or local government agency, or with respect to a supervisory, managerial, professional, or executive position at a financial institution.

Proposed FMLA-Related Changes

Military Leaves

New regulations were published in January 2009 implementing amendments making certain leaves available to military personnel and their families. The DOL has indicated that it is revieing these new military family leave amendments and other revisions made by the prior administration. It is anticipated that the proposed revisions will be announced in 2011.

Leaves Relating to Hate Crimes

The "**David Ray Ritcheson Hate Crime Prevention Act (David's Law)**" (HR 224, with one co-sponsor) would provide various protections to victims of hate crimes including the right to take FMLA leave "because an employee is addressing a hate crime and its consequences... [and] is unable to perform the functions of the position of such employee." A hate crime is defined as "a criminal offense in which the prosecutor has determined that the defendant intentionally selected a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." The phrase "addressing a hate crime and its consequences" means "(A) seeking medical attention for or recovering from injuries caused by being a victim of a hate crime; (B) seeking legal assistance or remedies, including communicating with the police or an attorney, or participating in any legal proceeding related to being a victim of a hate crime; (C) attending support groups for victims of hate crimes; and (D) obtaining psychological counseling related to the experience of being a victim of a hate crime." Benefits include various uses of FMLA leave and unemployment compensation. Versions of this bill were also introduced in 2007 and 2009.

School Activities and Routine Medical Care

The "**Family and Medical Leave Enhancement Act of 2011**" (HR 1440) was introduced on April 8, 2011. Under the bill, the FMLA would be amended to allow employees to take FMLA leave to attend programs or activities in which their children are involved at a school or community organization, and to also allow them to use FMLA leave for dealing with routine medical care and physician visits, as well as nursing home visits. No more than 4 hours of leave for these reasons could be used within a 30 day period, and no more than 24 hours of such leave could be used during a 12 month period. Also under the bill, paid leave may be substituted for such uses, at the employee's option.

Proposed FLSA-Related Rulemaking and Bills

Plan /Prevent/Protect Initiative

In the Spring of 2010, the DOL announced a plan to establish a comprehensive set of regulations requiring employers to establish formal compliance plans with respect to the various laws administered by the Department, to document training with respect to those plans, and to document how they are complying with their legal obligations. Failure to have such a plan and properly administering it will be deemed to be a penalty. The DOL indicated that it intends to require employers to be more proactive in their compliance, in lieu of what it perceives to be a "catch me if you can" mind-set.

Recordkeeping

The DOL has announced its intent to greatly alter the recordkeeping required under the FLSA. This initiative was initially announced as an "FLSA Recordkeeping" proposal, but it has since been relabeled "Right to Know Under the Fair Labor Standards Act." According the Department's December 2010 Regulatory Agenda, this proposal was to be published in April 2011, but now it is not anticipated until sometime in June. Under the proposal, employers are expected to be required to provide greater disclosure for each pay on how each employee's pay is computed (including deductions), and also to require that employers create, maintain and make available to the DOL a "classification analysis" for each person classified as an exempt employee under the FLSA or an independent contractor.

Break Time for Nursing Mothers

On December 21, 2010, the Wage and Hour Division of the U.S. Department of Labor published a request for information ("RFI") from the public regarding the recent amendment to the Fair Labor Standards Act which requires employers to "provide reasonable break time and a place for nursing mothers to express breast milk for one year after their child's birth." The new amendment and break time requirement for nursing mothers is set forth in Section 4207 of the Patient Protection and Affordable Care Act, P.L. 111-148, and became effective on March 23, 2010. The RFI

is the first step in rulemaking, and employers can expect DOL to issue new regulations perhaps as early as later this year. The key issues to be addressed by regulation include: should nursing mothers receive compensation for break time of 20 minutes or less; what is considered a "reasonable break time"; what "space provided to the nursing mother for expressing breast milk" is adequate and meets the requirements of the statute; and what would be considered "reasonable notice" to the employer of an employee's intent to take breaks to express milk?

Veterans Day Off Act

On January 19, 2011, the "**Veterans Day Off Act**" (HR 319) was introduced to require employers of veterans who worked for the employer at least one year to take off Veterans Day. The veteran may take the day without pay, or use accrued paid time off for the absence. The employer may only deny the leave in the interest of public safety or if the leave would cause the employer significant or operational disruption.

Independent Contractors

On April 8, 2011, the "**Payroll Fraud Prevention Act**" (S 770) was introduced. The Act would expand current FLSA recordkeeping requirements to all workers, including non-employees. Also, employers that misclassify employees would be subject to a civil penalty, not to exceed $1,100 per employee who was the subject of such a violation, with higher penalties for repeat violators. The bill would also require employers to give the following notice to employees and nonemployees: "Your rights to wage, hour, and other labor protections depend upon your proper classification as an employee or non-employee. If you have any questions or concerns about how you have been classified or suspect that you may have been misclassified, contact the U.S.

Department of Labor." In addition, the bill would require the Secretary of Labor to establish a single webpage on the Labor Department's website that "summarizes in plain language the rights of employees and non-employees under the Fair Labor Standards Act." The bill would also require states to investigate and audit employers who may be misclassifying employees, in order for those states to continue to receive federal unemployment insurance grants.

Minimum Wage

On January 12, 2011, the "**Living American Wage (LAW) Act of 2011**" was re-introduced. Under this bill, the federal minimum wage would be adjusted every four years to be equal to "the minimum hourly wage sufficient for a person working for . . . 40 hours per week, 52 weeks per year, to earn an annual income in an amount that is 15 percent higher than the Federal poverty threshold for a family of 2, with one child under the age of 18, and living in the 48 contiguous States, as published for each such year by the Census Bureau." Similar bills have been introduced since 2006.

On February 10, 2011, the "**Working for Adequate Gains for Employment in Services Act**," or "WAGES Act" (HR 632), was introduced to amends the Fair Labor Standards Act to establish a base minimum wage for tipped employees of at least: (1) $3.75 an hour beginning 90 days after the Act's enactment; (2) $5.00 an hour one year thereafter; and (3) for every year thereafter, to be the greater of 70% of the minimum wage and $5.50 an hour.

On January 5, 2011, the "**Health Care Incentive Act**" (HR 42) was introduced H.R. 42. The bill would require that the Secretary of Labor promulgate a rule that for any employer engaged in interstate commerce that is required by Federal of State law to pay a minimum wage at a rate set higher than the minimum ceiling as in effect on September 1, 1997, to receive a credit towards the wage for "any creditable health care benefits."

Government Contractors

Successor Service Contractors

The DOL announced in the Spring of 2010 that it was proposing regulations requiring successor contractors to federal service contracts to offer the displaced employees of the predecessor contractor a first right of refusal to employment per one of President Obama's first Executive Orders, No. 13,495. On December 13, 2010, these regulations were submitted to OMB for final approval, which was to occur by March 2011, but to date, it has not been finalized.

Non-Reimbursement of Labor Relations Costs

On January 30, 2009, President Obama signed Executive Order 13,497 that prohibits federal contractors from seeking reimbursement for certain labor relations costs, for example, communicating with employees during a union organizing campaign. The FAR Councils proposed regulations on April 14, 2010 to implement the Executive Order. The rules have yet to be finalized.

Davis-Bacon Repeal

On February 16, 2011, the "**Davis-Bacon Repeal Act**" was introduced (HR 745 - with 60 co-sponsors, and HR 746 – with 17 cosponsors), which would eliminate the minimum "prevailing wage" requirements under the Davis-Bacon Act. A number of other bills to repeal or have a limited repeal of the Davis Bacon Act and its prevailing wage requirements have been introduced, as well. See HR 408/S 178, S 223, HR 658 and HR 746.

Proposed NLRA Related Regulations and Bills

Notice of Employee Rights under Labor Laws

On December 22, 2010, the NLRB published proposed regulations to require all covered employers to post a notice of employee rights under the NLRA. The proposed posting requirement is similar to that promulgated on May 20, 2010 by the Department of Labor pursuant to Executive Order 13,496, which applies to federal contractors. Under the proposed regulation, the posting would state:

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten you that you will lose your job unless you support the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take other adverse action against you based on whether you have joined or support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's website: **www.nlrb.gov**.

You can also contact the NLRB by calling toll-free:

1-866-667-NLRB (6572) or

(TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

Failure to post the notice as required will be considered an unfair labor practice.

Non-Reimbursement of Labor Relations Costs to Federal Contractors

To implement Executive Order 13,497, on April 14, 2010 the FAR councils published proposed regulations prohibiting federal contractors from seeking reimbursement for certain labor relations costs, such as communicating with employees during a union organizing campaign.

LMRDA's Persuader Reporting Regulations

The Department of Labor is considering changes to employer reporting obligations under the LMRDA which would narrow the "advice exception" and the exception for the conduct of the employer's employees, which would result in increasing the regulation of communications employers have with their attorneys and trade associations regarding union issues. The general rule, which would be expanded by narrowing these exceptions, requires employers and consultants to report any agreement or arrangement with a third party consultant to persuade employees as to their collective bargaining rights or to obtain certain information concerning the activities of employees or a labor organization in connection with a labor dispute involving the employer. A proposed regulation was distributed for interagency review on November 2, 2010 and is anticipated to be published for comment this summer. The proposal is similar to that which was considered for promulgation near the end of President Clinton's administration.

EFCA-Related Legislation

On January 5, 2011, the "**Labor Relations First Contract Negotiations Act of 2011**" (HR 129) was re-introduced. This bill was offered in the prior Congress, but did not leave committee. Under the bill, the NLRA would be amended to require the arbitration of initial collective bargaining agreements if an agreement, is not reached after 60 days of bargaining and 30 days of mediation. Versions of this bill date back to 1993 (S 1568).

On January 27, 2011, the "**Secret Ballot Protection Act**" (S 217) was introduced (and its companion bill was introduced on March 9, 2011 as HR 972). Under the bill, it would be an unfair labor practice for: (1) an employer to recognize or bargain collectively with a labor organization that has not been selected by a majority of the employees in a unit appropriate for such purposes in a secret ballot election conducted by the NLRB; and (2) a union to cause or attempt to cause an employer to recognize or bargain collectively with a representative that has not been selected in such manner. See also the "State Right to Vote Act" (HR 1047) which would amend the NLRA to declare that nothing in the Act shall be construed to authorize or recognize a union as the representative of employees in a state where recognition of the union is prohibited, unless the union has been selected by a majority of such employees in a secret ballot election conducted by the NLRB. The bill would also prohibit the government from bringing a challenge against a state statute or constitutional provision which protects the right of employees to choose labor organization representatives through secret ballot elections.

On March 8, 2011, the "**National Right to Work Act**" (S 504) was introduced. Under the bill, both the National Labor Relations Act and the Railway Labor Act would be amended to repeal the employers' ability to agree to union security agreements requiring employees to join a union as a condition of employment, and requiring union dues or fees to be subject to payroll deduction as a condition of employment.

On March 11, 2011, the "**State Right to Vote Act**" (HR 1047) was introduced. Under the bill, the National Labor Relations Act would be amended to protect state requirements for a secret ballot election of labor organizations. The legislation would codify the amendments to state Constitutions in Arizona, South Carolina, South Dakota and Utah that only permit the use of secret ballot elections in union organizing campaigns. The bill would also forbid the federal government from bringing any challenges against a state statute or constitutional provision which would require the use of a secret-ballot election.

Pre-Dispute Arbitration

On January 31, 2011, the "**Non-Federal Employee Whistleblower Protection Act of 2011**" (S 241) was introduced. The legislation would make any pre-dispute arbitration involving whistleblower protections between federal contractors or those organizations that receive funds from the federal government and their employees' invalid, except those agreed to in the course of collective bargaining.

On May 12, 2011, the "**Arbitration Fairness Act of 2011**" (S 989) was re-introduced by Senator Franken. Under the Act, all pre-dispute arbitration agreements of employment, civil rights and consumer disputes would be declared invalid, and the issue of arbitrability and the enforceability of any arbitration agreement would be reserved to the courts (and not arbitrators) to decide.

Job Protection

On April 4, 2011, the "**American Jobs Matter Act of 2011"** (HR 1354) was introduced. The legislation would amend the Federal Property and Administrative Services Act of 1949 and title 10, United States Code to provide that in issuing a solicitation for competitive proposal, an executive agency shall state in the solicitation that the offeror may submit information known as a "job impact statement" with the application, describing the effects on employment within the United States of the contract, if it is awarded to the offeror.

On April 5, 2011, H.R. 1378, the "**Fighting for American Jobs Act of 2011**" (HR 1378) was introduced. The legislation would impose a new recordkeeping requirement that would require employers receiving "contracts, grants, loans or loan guarantees" by a federal agency to report on the "number of individuals employed by the business enterprise in the United States; the number of individuals employed by the business enterprise outside the United States; and a description of the wages and benefits being provided to the employees of the business enterprise in the United States." Beginning one year after the date of enactment, the employer would also have to provide a written certification that includes "the percentage of the workforce of the business enterprise employed in the United States that has been laid off or induced to resign, and the percentage of the total workforce of the business enterprise that has been laid off or induced to resign." If the percentage of the total workforce in the United States that has been laid off or induced to resign is greater than the rest of the workforce, the employer would be blacklisted from receiving "any further assistance from the department or agency" and from "any other federal department or agency.

II. From Lansing . . .

Labor Relations

Right to Work

On January 13, 2011, Reps. Knollenberg, Jacobsen, MacMaster, McMillin, Lund, Genetski and LaFountaine introduced HB 4054 which would disallow any "all-union shop" agreements covering employees of a city, county, township, village, public school district or intermediate school district, if the applicable employer, by vote of its governing body or the adoption of a measure "initiated by the people," have made the area a "right to work zone." The proscription would apply to agreements made or renewed after the adoption of the measure. The bill is pending before the House Commerce Committee. *See also* SB 116 and SB 120.

Union Use of Public Employer Facilities

On January 13, 2011, HB 4052 was introduced, which would amend PERA to provide that a "public employee or collective bargaining organization shall not use publicly owned property, facilities, or services, including an electronic mail system, for political activities, political fund-Raising, campaigning for office of a collective bargaining organization, collective bargaining organizing activities, or solicitation of employees for membership in a collective bargaining organization." The bill further provides that the "prohibition does not limit the right of a public employee or collective bargaining organization to use, on the same terms as members of the general public, public property that is made available as a public forum." The bill is pending before

the House Committee on Oversight, Reform and Ethics.

Union Official Paid Release Time

On January 13, 2011, Reps. Knollenberg, Jacobsen, MacMaster, McMillin and Genetski introduced HB 4059 which would amend PERA to add a provision providing that, a public employer would be prohibited from entering into or renewing a collective bargaining agreement that "requires or allows [employer] paid release time for union officers or bargaining representatives to conduct union business." The bill is pending before the House Committee on Oversight, Reform and Ethics.

Union Rights in Public Construction Contracts

On February 22, 2011, HB 4287 was introduced to prohibit governmental bodies from including in a construction contract or bids for construction contracts terms which address in any manner the bidder's right or obligation to enter into, or not enter into, agreements to abide by collectively bargained terms, or discriminate against a contractor due its willingness to adhere to union rates, etc. See also SB 95 (February 1, 2011) which would repeal the state's requirement that prevailing wages be paid on state funded construction projects.

Act 312 Repeal

On February 8, 2011, HB 4205 was introduced. The bill would repeal Act 312 and the right of public safety employees to have an arbitrator set their contract terms if a collective bargaining agreement cannot be mutually reached between their unions and their employers.

Act 312 Reform

On April 12, 2011, HB 4522 was introduced. A similar bill was introduced during the prior legislative session. Under the bill, the timelines for Act 312 arbitrations would be tightened so that the normal 30 day period for holding hearings could only be extended to 120 days from when the commence. Further, the arbitration panel's decision must be issued within 30 days of the hearing's conclusion, unless it is agreed that the deadline be extended to no more than 90 days after the hearing. In addition, while considering the governmental unit's ability to pay the economic components of the panel's award, the bill would prohibit the panel from considering the unused millage or assessment capacity of the unit, but must consider the factors already required of the panel to consider in making its economic award as to each economic item, the panel must consider a) the financial impact on the community of any award made over at least the 5 years following the award, and b) all liabilities, whether or not they appear on the unit's balance sheet. Also, in addition to having to consider the pay of comparable private and public sector employees to those who are subject to the award, the panel would also have to consider the "the pay and benefits of other employees of the unit of government outside of the bargaining unit in question." The bill would also require that the panel give primary consideration to the unit of government's ability to pay, and while doing so, also give more weight to the internal comparisons over the external comparisons. Also, the award would be able to award more than the lesser of the unit's revenue increase or the CPI over the contract period.

Employees of Contractors

On January 13, 2011, Rep. Opsommer introduced HB 4003 which would amend the LMA by expanding the exclusion to the definition of a public employee, so that in addition to employees of a private entity providing services to a public body, it would also include those who receive a direct or indirect government subsidy in their private employment. It would further prohibit this exclusion from being superseded by any type of interlocal agreement. The bill would also prohibit MERC from recognizing a unit which includes individuals who are not "public employees" as redefined, and that any such bargaining unit shall be deemed void. The bill has been referred to the Commerce Committee.

Civil Rights/Discrimination

Credit Histories

On March 2, 2011, HB 4363 was introduced to prohibit employers from utilizing credit histories with respect to the making of most job-related decisions.

Comparable Worth

On April 26, 2011, SB 340 was introduced to amend the Elliott-Larsen Civil Rights Act to add amongst its proscriptions discrimination on the basis of comparable worth. Under the bill, claims could be maintained on the basis of an employer failing or refusing to "provide compensation equally for work of comparable value in terms of the composite skill, responsibility, effort, education or training, and working conditions because of religion, race,

color, national origin, age, sex, height, weight or marital status." *See also* HB 4611 (May 4, 2011).

Disclosure of Pay Information

On April 26, 2011, SB 342 was introduced to amend the Payment of Wages and Fringe Benefits Act to require employers to provide within 30 days of an employee's request "wage information of similarly situated employees covering a period of up to 3 years prior to the date of the request." The employer may redact the names of the employees listed, but must include their sex and seniority. "Similarly situated" is defined as "employees who are within the same job classification as the employee requesting the information or whose duties are comparable in skill, effort, responsibility, working conditions, and training to those of the requesting employee. *See also* HB 4614 (May 4, 2011).

Discrimination of the Basis of Health of Family Members

On January 26, 2011, the "E**mployee Family Health Privacy Act**" (SB 73) was introduced. Under the bill, employers would be prohibited from basing an employment decision on "a known or believed illness or health condition of a member of an employee's family," and inquiring "as to the physical condition or health status of a member of an employee's family." The employer would still be able to inquire as to information to obtain information necessary to verify the employee's eligibility for use of sick leave, to verify the employee's eligibility for family and medical leave, and to process an employee's health coverage claim.

Smoking

On May 3, 2011, SB 352 was introduced to amend the Public Health Code to allow smoking in certain ventilated enclosed "legal smoking rooms."

Pay and Benefits for Public Employees

Public Employee Health Plans

On January 26, 2011, HB 4140 was introduced to: "to provide for consolidation of health benefits for public employees . . .; to create a board to administer a uniform public employee health benefits program; to create the MI prescription drug plan committee; . . . to require public employers and retirement boards that provide health benefits to public employees and retirees to participate in the MI health benefits program; to provide for exceptions from the requirement to participate in the program; [and] to provide for optional participation in the program by private employers . . . ."

Health Insurance for Public Employees

On February 1, 2011, HB 4172 was introduced. Under the bill, public employers could not pay more than 80% of the health insurance premium for an employee's coverage, and not more than 75% of the premium for two-person of full-family coverage. The bill does not reach state classified employees, state troopers or sergeants, or university employees, due to constitutional limitations as to the Legislature's reach. See also HB 4530 (April 12, 2011), in which school districts which pay no more than 80% of their employee health insurance premiums will be guaranteed no reductions in their per pupil foundation allowances. SB 7 (January 19, 2011), which limits public employers to pay 80% of their employee health insurance premiums passed the Senate on May 18, 2011. The bill(s) are still pending in the House.

Public Employee Pay Reductions

On January 19, 2011, SJR B was introduced to amend the state constitution to require a 5% cut in pay for public employees for the years 2012, 2013 and 2014.

Immigration

E-Verify

On January 13, 2011, HB 4024 was introduced to require all public employers and their contractors to utilize the E-verify system to verify the documentation of employees' ability to work in the United States under the Immigration Reform and Control Act. The bill is pending before the Commerce Committee. HB 4026 was also introduced to require all individuals referred by personnel agencies to have been submitted through the E-verify system and confirmed legally able to work in the United States. *See also* SB 254 and SB 255.

[1] OSHA, benefits and immigration related developments are beyond the scope of this outline. Also, this outline is current through May 23, 2011.

We've Only Just Begun: Immigration Concerns for HR Professionals

Reginald A. Pacis
313.983.6929
pacis@butzel.com

Elissa Noujaim Pinto
313.225.7006
pinto@butzel.com

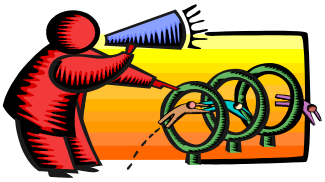
After the "Approval"

U.S. Department of Labor ("DOL")

Elissa Noujaim Pinto

Issues Associated with DOL

- DOL's Influence On H-1B Employment
- After H-1B Petition Approval by USCIS



- LCA Issues after H-1B employment commences
- H-1B Public Access File Issues after H-1B Petition Approval

DOL Influence On H-1B Employment After H-1B Petition Approval by USCIS

- LCA Issues after H-1B employment commences
  - prevailing wage
  - changes in employment - work Location changes
  - Maintaining consistency while dealing with reality of position and business/operations

- H-1B Public Access File Issues after H-1B Petition Approval
  - Maintenance of PAF
  - Maintaining consistency with H-1B petition
  - investigations

DOL Influence On H-1B Employment After H-1B Petition Approval by USCIS

LCA Issues after H-1B commences

- Overview of LCA (Labor Condition Application):
  To ensure the employer will pay the required wage, which is the greater of the prevailing wage or the actual wage paid to other employees in the same position
  - Ensures U.S. wages not depressed by hiring of foreign labor
  - Ensures foreign workers not exploited

- Upon Certification of LCA by Department of Labor, Employer must create a Public Access File - must be made available to the Public within 24 Hours of the Request

LCA Issues after H-1B commences

Overview cont'd:

- Complaints concerning misrepresentation in the LCA or failure of the employer to meet a condition specified in the application are to be filed with the administrator, wage and hour division (Administrator), of the ESA (Employment Security Administration)
- The Administrator investigates complaints, and can enforce the LCA or attestations with penalties and sanctions

Goal: H-1B worker's employment will not adversely effect working conditions of U.S. workers (U.S. Citizens or Permanent Residents)

LCA Issues after H-1B commences

- Was offered wage (as stated on LCA) paid when the obligation to pay commenced?

  - When the H-1B available to work or under control
  - Not more than 30 days after admission or 60 days after change of status/employer
  - On Effective Date of H-1B Extension Approval Notice

  Note: Cannot be delayed by lack of work, licensing, training

LCA Issues after H-1B commences

- Were only authorized deductions made?
  - Deductions ***not*** authorized:
    - As a penalty for resignation
    - To recover attorney costs of the H-1B petition process
    - To recover USCIS government filing fees

LCA Issues after H-1B commences

- Changes in Work Location

  Is the work site or physical location where work is actually performed consistent with what was stated on the LCA?

- Consider the following:
  - Offsite Training
  - Telecommuters
  - Changes in Work Location
  - Working at Different Customer Sites

LCA Issues after H-1B commences

- Changes in Work Location Cont'd
  Area of intended employment = "geographic area within normal commuting distance of the place (worksite address) of intended employment"

  If there is a change in work location and the new location is within same normal commuting distance of the place of employment AND **change is not effective yet**, only new internal posting required (**no new LCA submission to DOL required**)

Warning: DOL Rule May Be Different from USCIS Perspective

LCA Issues after H-1B commences

- Changes in Employment Cont'd

- If new location is within same geographical area but change is already effective, then **new internal postings AND new LCA submission to DOL required**
- If new location is in another geographical area, then **new internal postings AND new LCA submission to DOL required**

*If there is a change in work location and a new LCA is required, original LCA rules still apply (must be submitted with DOL on or within 30 days ***prior*** to change) – What if HR only becomes aware of change after the fact? Rely on **Good Faith** Attempt to Correct!

DOL's Influence On H-1B Employment After H-1B Petition Approval by USCIS

- H-1B Public Access File ("PAF") Issues

- Overview of what PAF must include:
  - Copy of the LCA
  - Statement of the actual wage received by the H-1B worker
  - Prevailing wage, including its source
  - Memo from the employer explaining the actual wage determination
  - Documentation that the notice requirement was satisfied
  - Benefits summary

H-1B Public Access File ("PAF") Issues

- Employer must keep other information that need not be made available to the public.

  - Payroll data for all employees in the same occupations as the H-1B worker
  - A calculation of the actual wage paid the H-1B worker
  - The raw data behind the prevailing wage determination
  - Documentation of any fringe benefits provided workers
  - Evidence that the H-1B worker has been given a copy of the LCA

H-1B Public Access File ("PAF") Issues

- Required payroll records for the H-1B employees and other employees in the occupational classification shall be retained for a period of three years from the date(s) of the creation of the record(s)
- Exception: If an enforcement action is commenced, all payroll records shall be retained until the enforcement proceeding is completed
- Public Access File must be retained at the employer's principal place of business in the U.S. or at the place of employment for a period of one year beyond the last date on which the H-1B nonimmigrant is employed under the LCA

DOL's Influence On H-1B Employment After H-1B Petition Approval by USCIS

Possible Penalties and Sanctions for Noncompliance

- Civil money penalties
- Disqualification from approval of petition ("Willful Violator")
- Other administrative remedies
  - back wages
  - any other appropriate remedy(ies) determined by the Administrator or judge including reposting, re-filing of LCA, new wage surveys

DOL Influence on PERM and Green Card Process After Approval of Labor Certification

- PERM Audit File must contain:

  - Evidence of recruitment efforts (copies of newspaper ads, on-line print-outs of job postings and requests, etc.)
  - Resumes (not usually requested by DOL in Audit)
  - Employer's recruitment report

  *Must be maintained for 5 years

After the "Approval"

U.S. Citizenship and Immigration Services ("USCIS")

Reginald Pacis

Issue in "Notice" Procedure

Approval notices to…

- Change in sending to employer's address
  - Delay of processing
  - Who receives it?
  - Requests for Evidence?
  - Copy to attorney to make sure OK?
- Change back to sending to attorney of record

Employment-Based Green Cards

Three steps generally required:

1. Alien Labor Certification ("PERM")
2. I-140 Immigrant Petition for Alien Worker
3. Adjustment of Status or Consular Processing of Immigrant Visa ("Green Card")

Employment-Based Green Cards

- Important factors to determine processing time for green card:
  - Nationality of foreign national
  - Employment-Based Preference
  - Priority date
    - date Labor Certification is filed or
    - date I-140 Immigrant Petition is filed

Employment-Based Green Cards

- Five Preferences listed in the monthly Department of State ("DOS") Visa Bulletin
  - First Preference (EB-1)
  - Second Preference (EB-2)
  - Third Preference (EB-3)
  - Fourth Preference (EB-4)
  - Fifth Preference (EB-5)

Immigrant Numbers for November 2011

	All Charge-ability Areas Except Those Listed	CHINA Mainland born	INDIA	MEXICO	PHILIPPINES
Employment-Based					
1st	C	C	C	C	C
2nd	C	01NOV07	01NOV07	C	C
3rd	22DEC05	22AUG04	22JUL02	22DEC05	22DEC05
Other Workers	15NOV05	22APR03	15JUN02	15NOV05	15NOV05
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C
Targeted Employment Areas/Regional Centers	C	C	C	C	C
5TH Pilot Programs	C	C	C	C	C

Second Preference (EB-2)

- Advanced degrees (PhD, Master's Degree or Bachelor's Degree plus five years of post baccalaureate progressively responsible experience)
- Aliens of Exceptional Ability

*Labor Certification required

*National Interest Waiver is possible

Exceptional Ability (EB-2)

- Foreign national must satisfy at least three of the following:
  - Advanced degree
  - Ten years of full time experience
  - License or certification if required
  - High salary/remuneration
  - Professional memberships
  - Achievements/significant contributions
  - Other comparable evidence

Third Preference (EB-3)

- Professional Workers: Position requires U.S. Bachelor's Degree or foreign degree equivalent
- Skilled Workers: Position requires at least two years of training or experience
- Other Workers: Position requires less than two years of training or experience

Corporate Changes: Mergers, Acquisitions and Restructuring

- Events which may trigger immigration consequences include changes in:
  - Ownership structure of the sponsoring company;
  - Employer's business activity;
  - Location or domicile of the Employer;
  - Foreign National employee's job location, title, duties; or
  - Ownership or activities of an overseas parent, subsidiary, or affiliate of the U.S. employer.

Corporate Changes: Immigrant Petitions and Permanent Residency

- **General Rule**: If new employer is a "successor in interest" to the original employer, the labor certification remains valid
- need only assume the "immigration related" duties and obligations of the original employer

American Competitiveness in the 21st Century Act (AC-21)

- AOS approval when Foreign National changes jobs if:
  - I-140 approved
  - AOS application has been pending for 180 days or more
  - Person is employed in a "same or similar classification"

To Port or Not to Port

General USCIS Procedure:

- USCIS sends a letter to the AOS applicant asking to provide evidence that job serving as basis for AOS is available to him/her;
- Applicant forwards letter from sponsoring employer confirming job availability; or
- Applicant forwards letter from new employer stating that he/she is employed in a same or similar position.
  - Watch out for what is "same or similar."

Termination of Employment

- The Employment Relationship is the foundation for the Nonimmigrant Status
- Individuals must be in a lawful status to change or extend status, or to obtain approval to work for another employer

Layoffs of Nonimmigrant Workers (H-1B, TN, L-1, O, E)

- Nonimmigrant who fails to maintain status is removable. INA §237(a)(1)(C)(i)
- Layoff means to cause worker's loss of employment, other than through poor performance, workplace violation, voluntary departure or expiration of contract. INA §212(n)(4)(D)(i)
- USCIS takes position that nonimmigrant status ends on last day of employment, not last day of severance pay
  - H-1B worker out of status on date of termination even if he/she was paid severance package
  - H-1B worker is maintaining status as long as employer-employee relationship exists and there is an identifiable tie between them
  - H-1B status ends the moment an employee is terminated from employment and no "grace period" exists in such situation

Maintaining Status During a Layoff Period

- If employee receives advance notice:
  - Transfer to another employer,
  - Change to another status, or
  - Obtain concurrent part-time employment.
- Nunc Pro Tunc extension under 8 CFR §214.a(c) or change of status under 8 CFR §248.1(c). Requirements:
  - Extraordinary circumstances beyond employee's control;
  - Employee has not otherwise violated NIV status;
  - Employee remains bona fide nonimmigrant; and
  - Employee not subject to removal proceedings.
- If employee already "terminated", see if employment relationship continues or if there are identifiable ties between employer and employee even during severance period
  - Employee may return to back when work becomes available
  - Employer maintains control over Employee
  - Employer continues to provide benefits to Employee

Labor Disputes - Strikes, Lockouts and Work Stoppages

- H-1B (Specialty Occupation) Workers
- TN Workers (NAFTA)
- Students (F-1 and M-1 nonimmigrants)
- LPR applications (Labor Certification Requests)

H-1B Workers

- "Temporary" workers in a "specialty" occupation
- No H-1B Petitions permitted while a strike, lockout, or workstoppage is in effect
- H-1B worker participation in a strike is NOT a failure to maintain status

North American Free Trade Agreement (NAFTA)

- If a labor dispute is in effect, a Canadian or Mexican may be denied entry as:
  - An Intracompany Transferee (L-1 Nonimmigrant)
  - A Treaty Trader/ Investor (E-1 or E-2 Nonimmigrant)
  - Trade NAFTA Professional (TN Nonimmigrant)

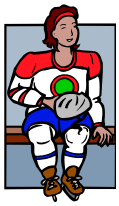
H-1B Rules for Termination of Employment Prior Expiration of Petition

- Employer must notify USCIS if the employee is terminated prior to the expiration of the H-1B
- Employer must offer H-1B worker return transportation to home country
- Department of Labor will view failure to notify USCIS of termination as suspicious and may require employer to pay the H-1B worker wages for the applicable time period
- There is no "10 day" rule, but USCIS will allow a Petition by a subsequent employer within a "reasonable time" after termination

Reduction in Salary or Hours for H-1B, H-1B1 and E-3 Workers

- Employer/ employee relationship continues to exist so scaling back hours and wages should not affect employee's maintenance of status
- LCA amendment and new I-129 required
- If change is temporary, no need to withdraw 1st LCA. Employer may have Employee return to employment under 1st LCA without having to file another H-1B amendment

Temporary Breaks in Employment (Layoffs and Shutdowns)



- **General Rule**: Nonimmigrant status is contingent on continuing the employment relationship
- **Special Rule**: H-1B worker may not be "benched"

Benching or Reduction of Hours/Wages of Other Workers (TN, L, O or E)

- Part-time permitted
- Employer/ Employee relationship continues to exist so no issue with maintenance of status
- Amendment not required to be filed unless change materially affects employee's eligibility for that visa classification

What is Material Change?

- L-1 change of employing entity within the overall organization
- H-1B substantial change of duties or corporate change
- Employer Identification Number

Corporate Changes: H-1B Nonimmigrant Workers

- Amended H-1B petitions are not required for corporate restructuring situations IF the new entity is a successor in interest
- Terms and Conditions of employment must remain the same

Corporate Changes: H-1B Nonimmigrant Workers

- The New entity must include the following documents in the H-1B Public Access File:
  - A list of the affected Labor Condition Application (LCA) numbers assigned by the Department of Labor and its date of certification
  - A description of the new entity's actual wage system

Corporate Changes: H-1B Nonimmigrant Workers

– The Employer Identification Number of the new entity

– A sworn statement by an authorized person with the new entity expressly assuming the obligations, liabilities, and undertakings from the original employer's attestations made in each LCA

Corporate Changes: L Nonimmigrant Workers (Intracompany Transferees)

- The New entity must continue to have a qualifying relationship with the preceding company's foreign entity
- A mere change in name of the employing entity does not require an amended petition as long as the federal tax I.D. number remains the same
- Parent ownership of subsidiary must not fall below 50% or lose de facto control

Corporate Changes: TN Nonimmigrants (Treaty NAFTA Professionals)

- A change in employer identification number will require a re-filing of the TN application

Corporate Changes: E Nonimmigrants (Treaty Investor or Trader)

- "Nationality" of the new entity must remain with a "treaty" country
- At least 50% or more of the ownership of the company must be vested in a country of treaty nationality

Personal Possession of Documents

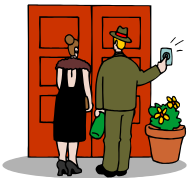
- Lawful Permanent Residents
- Non-immigrants
- Over 18 years of age
- Federal Misdemeanor
- 30 days imprisonment
- Up to $100.00 fine
- 8 U.S.C. §1304(e)

Secure Communities

- Police arrests or detentions involving fingerprinting
- Fingerprints compared with biometric prints captures when person enters the U.S.
- Detained by local, state or federal authorities to confirm immigration status
  - Extensions of Status?
  - Accurate information captured in the system (I-94 mistake, commonality of name, etc.)

Government Follow Up

- USCIS Site visits
  - Document visit (video camera, affidavit by reception person)
  - Accessibility of foreign national and appropriate Human Resources person
- DOS follow up
  - Phone calls
  - E-mail
- DOL E-mail for filed Labor Certification



After the "Approval"

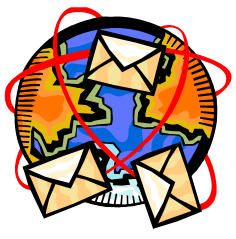
U.S. Department of State ("DOS")

Elissa Noujaim Pinto

Issues Associated with DOS

DOS Influence on Visa Application

- DS-160 Visa Application
  - Changes in Circumstances/Facts After DS-160 E-filing
- Consular Requirements
  - Documents to Present
- Consular Scrutiny
  - Visa Application History
  - 221g Requests
  - Administrative processing
  - PIMS
- Visa Issuance



DOS Influence on Visa Application

What does the U.S. Consulate do?

- Conduct personal interview of visa applicant to verify information and documentation that cannot be examined by USCIS
- Review and verify original documents
- Conduct Background/Security Checks

Issues Associated with DOS

Consular Scrutiny and Security Checks

- clearance with other consular posts
- check with CLASS (Consular Lookout and Support System) and other records
- request security advisory opinions from DOS
- review returns from fingerprint clearances
- review facial recognition checks
- certify check of automated visa lookout system (or other checks) conducted

- **221g Requests**

  DOS version of USCIS' "Request for Evidence"

  - Consular Officer has discretion and authority to request numerous additional documents in order to approve a visa application, even if those documents were not needed by USCIS to approve Petition

- **Administrative Processing**

  Process under which consulates may hold an application for an indefinite period (few days, few weeks, few months… or longer!) in order to conduct additional security related checks or further review of 221g requested documents

Issues Associated with DOS

Consular Scrutiny and Security Checks cont'd

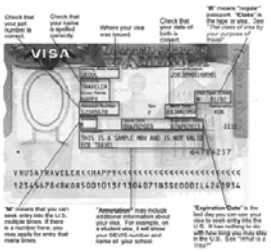
- In 2010-2011, there was an increase in 221g requests requiring extensive and burdensome additional documentation
  - Possible a reaction to a USCIS policy memo regarding employer/employee relationship and additional scrutiny required for employment involving third party/customer/client work location

- U.S. Consulates in India
  - Issues where work involves science and technology (additional documentary requirements)
  - Additional documentation required compared to most other consulates around the world

- Verify particular consulates website for most current and detailed information and documentary requirements

Issues After DOS Approval of Visa

- Visa – Issued U.S. Embassy or Consulate abroad



Issues After DOS Approval of Visa

- **Where is my Visa!?!?**
- **Is Information on Visa Accurate**
- **Annotations on Visa**

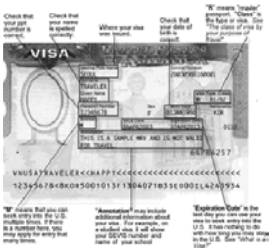
After the "Approval"

U.S. Customs and Border Protection ("CBP")

Reginald Pacis

Visa is the "key"

- Visa – Issued U.S. Embassy or Consulate abroad
- Allows admission to the U.S.



I-94 Card (Arrival Departure Record)

- Proof of status/ lawful presence
- Issued at U.S. Port of Entry
- Controls the stay in the U.S.
- TN for Canadians
- For Visa Waiver:
  - Paperless I-94 card

Terminology

- **Authorized Stay** – Generally the Period of Stay stated on the I-94 Card
- **Unlawful Presence** – Generally the time beyond the date on the I-94 Card

Things that Affect a Foreign National's Ability to Stay and Work in the U.S.

- Passport Expiration
- Visa Expiration
- Child's age
- Unlawful presence creates bars for immigration benefits
  - 180 days/ 3 years
  - 365 days/ 10 years
- Immigration rules regarding particular classification
- Petition Expiration

H-1B Employer- Employee Relationship

- Right to Control
- Manner of Supervision
- Day to Day
- Traditional vs. Off-Site employment
- Tax claims and Benefits
- History

Valid or Invalid relationship

- Traditional Employment
- Occasional Off-site employment
- Long-Term/ Permanent Off-site
- Long Term Placement at 3rd party worksite
- Self-Employed
- Independent Contractors
- Third Party Placement

Suggested Evidence to Prove Employer/ Employee Relationship

- Complete **itinerary of services or engagements** that specifies the **dates of each service or engagement**, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested;
- Signed **Employment Agreement between the petitioner and beneficiary** detailing the terms and conditions of employment;
- Copy of an **employment offer letter that clearly describes the nature of the employer-employee relationship** and the services to be performed by the beneficiary;

Suggested Evidence to Prove Employer/ Employee Relationship Cont'd

- Copy of **relevant portions of valid contracts between the petitioner and a client** (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized) that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;
- Copies of **signed contractual agreements, statements of work, work orders, service agreements, and letters between the petition and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary**, which provide information such as a **detailed description of the duties** the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;

Suggested Evidence to Prove Employer/ Employee Relationship Cont'd

- Copy of **position description** or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools needed to perform the job, the product to be developed or the service to provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the regular business of the petitioner, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;
- A description of the performance review process; and/or
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain.

Circumstances Surrounding a Laptop Search

- Search without a warrant
- Officer must have "reasonable suspicion"
- Recovery of Deleted files
- www.cbp.gov/xp/cgov/travel/admissability/labtop_inspect.xml

Travel Issues and the TSA….

- Transportation Security Administration
- http://www.tsa.gov/what_we_do/layers/tdc/index.shtm
- TSA is checking documents for all flights (DLs, visas, passports, etc.)

Michigan Drivers License Law and Immigration

Reginald Pacis

Summary of Michigan Drivers License Law Regarding Immigration

- Must be Lawfully Present
- Nonimmigrant status
- Authorized for employment
- Approved immigrant visa petition or labor certification

Michigan Secretary of State DL Implementation- 4 areas

- Social Security number *
- Legal Presence **
- Identity Verification
- Proof of Michigan Residency

Social Security Evidence

- Social Security Card
- W-2, SSA-1099 or non SSA 1099 Form
- Pay stub containing person's name and SSN
- Valid Military ID with photo
- Letter of ineligibility from SSA less than 30 days old
  - Concern for Dependents such as H-4s, L-2s, TDs

Questions?

Thank You

Reginald A. Pacis
313.983.6929
pacis@butzel.com

Elissa Noujaim Pinto
313.225.7006
pinto@butzel.com

Nice People DO Finish Last: Protecting Your Company Trade Secrets

Bernie Fuhs
313.225.7044
fuhs@butzel.com

Katie Donohue
313.225.7027
goudie@butzel.com

Presentation Highlights

- Critical steps to protect your assets and relationships
- Types of restrictive covenants (non-compete, non-solicit, confidentiality) and Trade Secret law
- Practical issues with increasingly competitive job market
- Action plan to keep the genie in the bottle

Image courtesy of Walt Disney©

Your Assets Are At Risk
Three Critical Steps to Protect Them

- Know what assets you have to protect
- Available preventive measures to protect your assets
- Immediate action/remedies when your assets are threatened

What You Are Up Against

Economic Times
Good or Bad – Same Concern

- Job hopping or looking for a better opportunity while preparing to leave when an opportunity arises
- Increased movement in 2011
- All about the Benjamin's

"It has become appallingly obvious that our technology has exceeded our humanity." **~Albert Einstein**

- 8 GB thumb drive = 10 CD-roms or 160,000 Word documents
- Only $12.99

Why Do They Feel Justified Stealing Your Assets and Relationships?

- The "justifier" (I built it, it's mine)
- The "thief" (no one will know if I take some information and contact these customers)
- The "lawyer-wanna be" (can't prevent me from doing this; those agreements I signed are not enforceable)
- The "blissfully ignorant" (I didn't know or think it was a big deal)

STEP ONE
Know What Assets and Relationships You Have to Protect

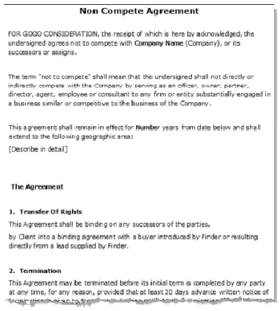
Examples

- Customer lists and information
- Engineering designs, processes, techniques
- Prices, costs, margins, mark-ups, "metrics"
- Internal weaknesses
- Marketing and strategic plans

The Relationships = The Key to Success

- Customer
- Client
- Vendor
- Supplier
- Employee
- Consultant/contractor

STEP TWO
Preventive Measures to Protect Your Assets



Non Compete Agreement

FOR GOOD CONSIDERATION, the receipt of which is here by acknowledged, the undersigned agrees not to compete with **Company Name** (Company), or its successors or assigns.

The term "not to compete" shall mean that the undersigned shall not directly or indirectly compete with the Company by serving as an officer, owner, partner, director, agent, employee or consultant to any firm or entity substantially engaged in a business similar or competitive to the business of the Company.

This agreement shall remain in effect for **Number** years from date below and shall extend to the following geographic area:

[Describe in detail]

The Agreement

1. Transfer Of Rights

This Agreement shall be binding on any successors of the parties.

by Client into a binding agreement with a buyer introduced by Finder or resulting directly from a lead supplied by Finder.

2. Termination

This Agreement may be terminated before its initial term is completed by any party at any time, for any reason, provided that at least 20 days advance written notice of

Restrictive Covenants

- Non-Competition
  - Most effective protection
  - Subject to most scrutiny
- Non-Solicitation
  - Typically easier to enforce than non-compete
  - More geared towards protecting relationships
- Confidentiality/Non-Disclosure
  - Generally easily enforceable
  - Less effective with trade-secret protection

Practical Issues in Today's Job Market

- Increased movement in 2011
- More competition for top talent
- Increased leverage for potential employees
- Less willing to sign non-compete agreements

Strategies to Deal with Practical Issues

- "Team" approach
  - "We all sign them"
  - Protects all involved

- Narrowly tailor the agreements
  - Duration
  - Geography (limited to customers and/or areas that person is responsible for and/or exposed)
  - Scope of activity (limited to types of projects, areas of responsibility, etc.)
- Communication
- Additional consideration

Enforceability of Restrictive Covenants

- Be aware of Employee location - certain states look unfavorably upon non-competition covenants (i.e. California, Oklahoma, North Dakota,)
- Some states will "blue pencil"; some will not
- Movement towards making non-competition agreements easier to enforce (i.e. Texas, Georgia)

Trade Secret Law
(works with non-compete/non-solicit agreements)

- UTSA
  - The Uniform Trade Secrets Act (UTSA) (in place in 46 states except MA, NJ, NY, and TX) defines a trade secret as:
  - information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:
    - Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
    - Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Planning/Preparation – Be Proactive

- Worry about misappropriation of your assets the day that you hire – not the day that you terminate or he resigns
- Consult with the experts – legal and business
- Engage your experts (legal and business) to conduct an audit

Planning/Preparation – Be Proactive

- Take inventory of the assets & relationships to protect
- Take inventory of what protections in place
- Understand the weapons available to you – agreements, statutes, business solutions

Available Weapons – Reasonable Steps for Protection

- Appropriate agreements (one size does not fit all)
- Information storage – locked or password-protected
- Limited, need-to-know access
- Clear marking of confidential information
- Visitor restrictions
- Third-party confidentiality agreements
- Employee policy on confidential information

Available Weapons – Reasonable Steps for Protection

- Routine verification of confidentiality procedures
- Prohibiting removal of confidential information from company premises and limiting copying
- Conducting exit interviews
- Pursuit of departing employees with access to confidential information - consistent enforcement
- Avoidance of industry wars – review of candidate's restrictive covenants
  - Reps and warranties that candidate did not take and will not use previous employer's information
  - Indemnification provisions

Deploying Your Weapons – Implementation of Asset Security Plan

- Require employees to sign your agreements
- Obtain employee buy-in and be prepared to deal with resistance
- Include appropriate language in your contracts (don't forget vendor contracts, i.e., data security laws)
- Take the steps necessary to guard the confidentiality of your information

Avoid Unnecessary Disclosures & Inconsistency

- Company brochures/product guides and websites
- Customers/clients (and information conveyed to them)
- Severance agreements superseding employment agreements void
- Prior departures by similarly-situated employees
- Resolution of prior non-compete/non-disclosure litigation
- How many employees sign/do not sign similar agreements

Exit Interview

- New employment (where, what position)
- Return of materials
- Acknowledgment form

Beware of Horizontal Non-Hire & Non-Solicitation Agreements

- Agreement with competitors not to hire or solicit each others employees is horizontal
  - Different concerns than typical employee (vertical) non-compete
  - Must be reasonably necessary to facilitate a pro-competitive agreement (ancillary)
- May violate anti-trust laws
- 2010 Silicon Valley Cases (DOJ v. Google, Apple Pixar, Adobe and Intel)
  - Alleges bilateral agreements to not "cold call" each other's skilled (technical) employees;
  - Employers immediately settle with consent decree
    - Consent decree allows non-solicitations reasonably necessary for "a legitimate collaboration agreement"
  - Follow on class action lawsuits filed

STEP THREE
Immediate Actions/Remedies When Your Assets Are Threatened

Action Plan

- Critical to have experienced attorneys and business advisors prepare an action plan
- Protocol for departing employee
- Step-by-step actions identified for potential breach

Your Assets Have Been Taken or Are at Risk – Now What?

- Move quickly and aggressively (where appropriate)
- Get your experts involved immediately
- Preserve the evidence (electronic evidence is crucial – do not attempt to play Sherlock Holmes)

Don't Diddly Do!

Image courtesy of Matt Groening and Fox©

Final Pointers

- Police confidentiality measures
- Draft enforceable non-competes
- Beware of horizontal agreements with competitors
- Have a strategy in place for practical hiring issues
- Be cautious with subsequent agreements
- Make good termination/discipline decisions
- Consistently enforce
- Act swiftly
- Preserve all documents and computer evidence

QUESTIONS?

Bernie Fuhs
313.225.7044
fuhs@butzel.com

Katie Donohue
313.225.7027
goudie@butzel.com

The Accommodating Employer: The ADAAA and Accommodation Obligations

Rebecca S. Davies
313 225 7028
davies@butzel.com

Louis Theros
313 225 7039
theros@butzel.com

Background of the ADAAA

- The ADAAA was signed into law by President George W. Bush on September 25, 2008, with an effective date of January 1, 2009.
- On September 23, 2009, the EEOC published proposed ADAAA regulations. The EEOC received more than 600 public comments from a variety of individuals and groups.
- On Friday, March 25, 2011, the EEOC published its final regulations and accompanying interpretive guidance to implement the ADAAA.

Effects of ADAAA and EEOC's ADAAA Regulations On Employers

- Increased number of "disabled" employees
- Increased reasonable accommodation requests
- Increased claims for temporary impairments that allegedly substantially limit a major life activity

Effects of ADAAA and EEOC's ADAAA Regulations On Employers (continued)

- More discrimination charges and lawsuits, including class action lawsuits
- Fewer dismissals of lawsuits on the ground that the employee is not "disabled"

Effects of ADAAA and EEOC's ADAAA Regulations On Employers (continued)

- Focus of EEOC investigation will be on interactive process and reasonable accommodations
- Defenses related to essential functions and undue hardship will be scrutinized

ADAAA: What is a Disability?

- ADAAA's primary purpose: "to make it easier for people with disabilities to obtain protection under the ADA."
- Broad construction of definition of "disability" "in favor of expansive coverage to the maximum extent permitted by the terms of the ADA."

[29 CFR 1630.1(c)(4)]

ADAAA: What is a Disability?

- A disability is still defined as:
  1) actual disability (i.e. a physical or mental impairment that substantially limits one or more major life activities of such individual);
  2) a record of such impairment; or
  3) being regarded as having such an impairment.

ADAAA: What is a Disability?

The language of ADAAA states that the focus of disability nondiscrimination law:

- *should* be on whether the covered entity has complied with its obligations to provide equal opportunity, and
- should *not* be on analyzing whether a particular individual's impairment is, or is not, a "disability."

"Virtually always" disabilities

- Deafness
- Blindness
- Intellectual disability
- Partial or completely missing limbs
- Cancer
- Autism
- Diabetes

"Virtually always" disabilities

- HIV
- MS
- Major Depressive Disorder
- Bipolar Disorder
- PTSD
- OCD
- Schizophrenia

Major Life Activities

- The amendments codify a new list of major life activities that is more exhaustive and settles the issue as to some major life activities that had been a source of dispute in the past.
- To be a major life activity, the activity does not need to be of central importance to most people's daily lives.
- The definition should not be interpreted strictly to create a demanding standard for disability.

[29 CFR 1630.2(i)]

Major Life Activities

- Operation of major bodily functions, including:
  - the immune system
  - genitourinary system
  - circulatory system
  - normal cell growth
  - operation of an individual organ within a body system (e.g., liver, bladder, pancreas, kidney)

Major Life Activities

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Learning
- Concentrating
- Communicating

Major Life Activities

- Walking
- Standing
- Lifting
- Bending
- Speaking
- Reading
- Breathing
- Thinking
- Working

What would you do?

Jack, maintenance worker, suffered a severe back injury. He has been cleared to return to work under his then current job description.

Your company has had to decrease the maintenance department. This reduction has now caused you to increase the duties for Jack, including adding more tasks involving heavy lifting. At the time the his description was modified, Jack was having no back issues. However, he has requested that he be accommodated by not having to complete the heavy lifting.

Must you comply with this accommodation request?

Episodic Conditions

- An episodic impairment or one that is in remission is a disability if it would substantially limit a major life activity when active.
- For example, cancer, epilepsy, asthma.

[29 CFR 1630.3(j)(1)(vii)]

What would you do?

Amy, your sole I.T. support, has a respiratory condition which can be triggered by the air conditioning in the computer room. When her breathing treatments and inhalers are used as prescribed, Amy has no issues with the computer room. When they are not, Amy has severe problems.

Amy has asked for an accommodation to work in the administrative offices.

Do you have to provide Amy this accommodation given her condition is not disabling when taking her prescribed medication?

Mitigating Measures

Rules of Construction: Mitigating Measures

- If an impairment would be "substantially limiting" without an "effective mitigating measure," the individual may still be "disabled" even though due to the use a mitigating measure, the individual has had no limitation or only minor limitations [EEOC's Appendix to Part 1630, Interpretative Guidance]
- Whether an impairment substantially limits a major life activity is determined without regard to the "ameliorative effects of mitigating measures," other than "ordinary eyeglasses or contact lenses" [29 CFR 1630.2(j)(1)(vi)]

Mitigating Measures

Rules of Construction: Mitigating Measures

- For an individual who does not use a mitigating measure, the availability of that measure has "no bearing on whether the impairment substantially limits a major life activity"
- But the "use or non-use" may be relevant to determining "whether the individual is qualified or poses a direct threat to safety."

[EEOC's Appendix to Part 1630, Interpretative Guidance]

Mitigating Measures

Rules of Construction: Mitigating Measures

- "Non-ameliorative effects" – negative or side effects – may be considered in determining whether an impairment is substantially limiting .
- Any effects of mitigating measures may be "relevant" to "non-coverage issue" – "whether someone is qualified, needs a reasonable accommodation, or poses a direct threat".

[EEOC's Supplementary Information]

ADA vs ADAAA: Not Everything Has Changed

- The ADAAA did not change the definitions of "qualified," "direct threat," "reasonable accommodation" or "undue hardship."
- Employers still are required to provide only reasonable accommodations to individuals who, with or without accommodations, are *qualified* to perform the essential functions of their positions.

ADA vs ADAAA: Not Everything Has Changed (continued)

- The process for providing a reasonable accommodation has not changed:
  - Generally, a person with a disability still has to make a request for an accommodation .
  - An interactive process between the person with a disability and the employer may still be necessary to determine an appropriate accommodation.
  - As part of this process, an employer may request documentation showing a disability and a need for accommodation are not obvious or already known.

ADA vs ADAAA: Not Everything Has Changed (continued)

- An employer does not have to employ a person who poses a "direct threat," meaning significant risk of substantial harm to the health or safety of the individual or others. However, this is a stringent standard requiring an individualized assessment of the risks posed by a specific person with a disability in a particular job.
- The ADAAA did not change the fact that employers do not have to provide accommodations that will result in an undue hardship.

ADA vs ADAAA: Not Everything Has Changed (continued)

- The ADAAA did not make changes to the part of the ADA that excludes from coverage a person who currently engages in the illegal use of drugs when an employer acts on the basis of such use.
- A person who no longer engages in the illegal use of drugs may be an individual with a disability if s/he:
  - has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully, or
  - is participating in a supervised rehabilitation program (e.g., Alcoholics Anonymous or Narcotics Anonymous)

No Fault Leave Policies

- The EEOC has indicated that these types of policies violate the ADAAA because they do not incorporate individualized assessments into accommodation process.
- Recommended that policies be changed to incorporate a step whereby the employer contacts the employee prior to termination to discuss possible return to work.

What would you do?

Tom has been diagnosed with cancer.

He has exhausted Family Medical Leave and has been placed on extended leave for 2 additional months while he undergoes treatment.

As the end of his 2 month extended leave approaches, Tom submits a doctor's note requesting an extension of the Extended Leave LOA. The doctor's note that indicates Tom's return to work date is "unknown."

Is Tom entitled to the requested extension of his leave of absence?

What would you do?

Suzy suffers from depression. She exhausts her Family Medical Leave and is given an additional 2 months of extended leave as an accommodation so that she can gain better control of her condition.

She returns to work without restriction on duties, but her doctor makes clear that this is a life-time condition and she will occasionally need unforeseeable time off work due to flare ups and will also need occasional time off work to attend doctor's visits for treatment of the condition.

Does the Company have to provide Suzy this additional time off work after already granting 5 months of leave?

What would you do?

Jim, your area sales manager, suffers a heart attack.

He has exhausted his Family Medical Leave and has been granted extended leave for an additional 6 months. Two months prior to the return to work date, the Company determines that it needs to fill Jim's position.

Can the Company replace Jim?

What should the Company do since Jim still has 2 more months of extended leave before he is required to return to work?

What Should Employers Do In Response To ADAAA and EEOC's ADAAA Regulations?

- Review reasonable accommodation procedure, especially the "interactive process"
- Review job descriptions to ensure that essential job functions are identified
- Review policies that may be affected by ADAAA, including, for example, automatic termination of employment at the end of a leave of absence

What Should Employers Do In Response To ADAAA and EEOC's ADAAA Regulations?

- Review employment actions to ensure the presence of legitimate, non-discriminatory reasons and the absence of discriminatory reasons
- Document interactive process, reasonable accommodation actions and employment actions – hiring, discipline, and discharge.

Questions?

Rebecca S. Davies
313 225 7028
davies@butzel.com

Louis Theros
313 225 7039
theros@butzel.com

The Labor and Employment Law Group thanks you for participating in this Butzel Long Employment Seminar

Rebecca S. Davies
313 225 7028
davies@butzel.com

Louis Theros
313 225 7039
theros@butzel.com

Look Before You Leap: The Hiring Process

James S. Rosenfeld
313.225.7062
rosenfeld@butzel.com

Recruiting to Hiring: The Best Policies and Practices

Introduction

- Job Descriptions
- Who is a "Job Applicant?"
- Interviewing Pointers
- Background Checks
- Pre-Employment Physicals
- Drug Testing
- Polygraph Testing

Job Descriptions

- Is the Job Description Up-to-Date and Accurate?
  - Essential Job Duties
  - Educational, Certification, and Training Requirements

Job Descriptions

- Hours; overtime – if required
- Location of the job and whether travel is essential
- Physical abilities required; i.e., lifting or repetitive motion
- Reporting relationships by title

The Application

- Essential items:
  - Equal Opportunity Employment Statement
  - At-Will Employment Statement
  - Active Application Period
  - False Information Statement
- Consider including:
  - Arbitration Agreement
  - Shortened Limitation Period

Who is a "Job Applicant?"

- Generally, an individual is deemed an applicant when:
  1) the employer has acted to fill a particular position;
  2) the individual has followed the employer's standard procedures for submitting applications; and
  3) the individual has indicated an interest in the particular position.

Internet Applicant

- Employer has "acted to fill the position"
- Individual "indicating an interest"
  - Filling out online application
  - E-mail to contact person
- Example
  - Lexis/Nexis website

Internet Applicant

- Resumes posted to "Job Boards"
  - Not an applicant
- Receipt of unsolicited resumes
  - Responding to unsolicited resumes could cause a non-applicant to become an applicant

Internal Job Postings

- Bulletin Board or Computer
  - Access to computer
- Internal application process
  - Same or similar to external

The Art of Interviewing

Asking the Applicant Relevant,
Yet Legally Permissible, Questions

Interview Objectives

- Obtain information on the candidate
- Provide information on the position and company
- Document the interview

Ask Legal Questions

What will you do if your children get sick?
vs.
How was your attendance record with your previous employer?

Is your spouse likely to get transferred?
vs.
Do you plan on staying in the area?

What is your maiden name?
vs.
Will any of your previous employers know you by a different name when we contact them to check on your past employment?

Ask Legal Questions

- The permissible and impermissible areas of inquiry during the hiring process under Michigan law, compiled by the Michigan Department of Civil Rights (MDCR) is available online.
- This *Pre-Employment Inquiry Guide may be viewed at: http://www.michigan.gov/documents/pre-employment_inquery_guide_13019_7.pdf*

Interview Tips:

- Use Multiple Interviewers
- Establish Rapport
- Gather Information
- Sell Company
- Close Interview
- Evaluate

Discussing the Applicant After the Interview: Email is a Friend and a Foe

- When situations call for lawyers to advise their clients: "Don't put it in writing," this means email, too! E-mails are just like written documents. And they don't disappear when you hit the "delete" key. Computer forensics experts can recover "deleted" information.
- Therefore, employers should not casually discuss their opinions or thoughts regarding an applicant via e-mail.

Formal Rejection

- Formally rejecting every applicant will avoid confusion on status of application
- Send both e-mail and regular mail rejection to Internet applicants

Rejecting Unemployed Applicants

Caution!

- In September 2011, President Obama proposed job creation bill
- Proposed law would make it unlawful to refuse to hire "because of the individual's status as unemployed"
- Proposal gives some leeway to employers; may consider work history and why the person is unemployed (relevance to job performance)

Credit Checks

Fair Credit Reporting Act

FCRA Provisions

The FCRA permits employers to request a "consumer" credit report on an applicant for the purpose of "evaluating" that person for "employment, promotion, reassignment or retention as an employee."

FCRA Requirements

- FCRA requires that you:

1) provide applicants with written notification that a consumer credit report may be used; and

2) obtain the applicant's written authorization before requesting a report.

What is an "Investigative Report?"

A consumer report based in part on personal interviews with neighbors, friends, associates, or acquaintances.

Notice of Adverse Action/ Right to Dispute

- You must provide an individual with certain information before taking any "adverse employment action," based in whole or in part on a consumer report.
- An "adverse employment action" includes any decision made that adversely affects an applicant.

Employer's Obligations After Taking Adverse Action

Whenever any adverse action is taken against an applicant, whether partly or wholly, because of information contained in a consumer report, the employer must provide the applicant with an oral, written, or electronic notice of:

1) The adverse action;
2) The name, address, and telephone number of the consumer reporting agency that furnished the report;

Employer's Obligations After Taking Adverse Action

3) Statement that the consumer reporting agency did not make the decision and is unable to explain the specifics behind the decision;

4) Right to a free copy of consumer report from consumer reporting agency within 60 days; and

5) Right to dispute accuracy or completeness of any information contained in consumer report.

Employer's Obligations After Taking Adverse Action

6) ***Effective July 21, 2011:*** the employer must also provide disclosure of the numerical credit score if used in taking any adverse action based in whole or in part on any information in a consumer report as well as other required disclosures relating to the credit score.

Credit Checks

CAUTION!

- Requiring applicants to have good credit records may have a disparate impact on minority candidates. If so, be prepared to show that having a good credit record is justified by business necessity.

Reference and Background Checks

Employee References, Social Media Checks, Criminal Records Checks, and Education Records Checks

Employee References

- Always check applicant references
- Obtain applicant's written release to prior employer for disclosure
- Verify reason for leaving and eligibility for rehire

Employee References

- Prior employers usually give minimal information
- No legal obligation to give out references
- Inform prior employers of Michigan Job Reference Immunity Act

Job Reference Immunity Act

- Employers are protected from liability for disclosing:
  - Information related to job performance
  - Documented in personnel file
- Disclosure made in good faith

Criminal Records

- Negligent hiring liability
- Would applicant's background pose concern for workplace safety?
- Unlawful for employers to make hiring decisions based upon arrest records, unless there is a business necessity.

Criminal Records

- Obtain applicant's written release for criminal records check
- Balance criminal reference with applicant's qualifications for the job
- Convictions should be cause for rejection only if their number, nature, and proximity in time causes the applicant to be unsuitable for the position

Sources for Criminal Records

- Michigan State Police Criminal History Access Tool (ICHAT).
  - $10.00 per search to retrieve all publicly accessible records.
  - http://www.michigan.gov/ichat
- Michigan Department of Corrections Offender Tracking Information System (OTIS)
  - http://www.michigan.gov/otis
- In addition, conviction records may be obtained from Michigan's local court systems.

Criminal Records

CAUTION!

- Before obtaining any criminal record information, check to see whether the individual, agency, or business from whom you are requesting the information meets the definition of a "consumer reporting agency."
- Employers must obtain authorization from the applicant before they can obtain information from consumer reporting agencies.
- You must be consistent in making criminal background checks of employees and applicants to avoid an inference of discrimination against a certain racial or ethnic group.
  - This is a current focus of the EEOC

Education Records

Family Educational Rights and Privacy Act (FERPA)

Schools cannot disclose student records without written authorization from parents or student (18+)

Education Records

Written authorization must:

1) Specify the records that may be disclosed;
2) Set forth the purpose of the disclosure;
3) Identify to whom the disclosure is to be made; and
4) Be signed and dated.

Social Media Background Checks

- Facebook, Twitter, YouTube, LinkedIn, and individual blogs; Google search
- As long as not using information discovered about protected subjects (such as a age, race or marital status, etc.), it is perfectly legal to check someone's social media pages.
- Do not access any applicant's social media profile or webpage through dishonest or deceptive means.

Social Media Background Checks

It is recommended that employers implement a procedure for social media background checks to ensure legal compliance. Consider the following:

1) Identify 5-10 conducts that would cause alarm if seen on a candidate's profile (i.e., illegal drugs, hate-promoting language or graphics, threats of violence, or negative comments about former employers or co-workers).
2) Identify 5-10 positive attributes (i.e., well-written blog; online posts relate to professional interests, demonstrates creativity; or illustrates good use of professional skills and networks).

Social Media Background Checks

3) Identify an independent researcher – someone separate from the recruitment process – to gather social media information to ensure hiring personnel has no access to protected information.

4) Provide the researcher with a checklist to document offensive and favorable findings.

5) If candidate not hired based on findings, give them a chance to explain. (With social media, mistaken identity is possible).

Testing Applicants

Employers' Rights and Limitations When Conducting Drug Tests, Medical Examinations, and Other Pre-Hire Tests

Title VII Restrictions

Title VII prohibits employers from using screening tests that:

1) Are intended to discriminate against minorities; or

2) That have an adverse (disparate) impact on minorities, and are not job-related.

Michigan Civil Rights Act Restrictions

Employers may not "limit, segregate, or classify an . . . applicant . . . in a way that deprives or tends to deprive the . . . applicant or an employment opportunity . . . because of religion, race, color, national origin, age, sex, height, weight, or marital status."

Civil Rights Restrictions

Screening test, procedure, or job requirement must be:

1) Manifestly job-related and consistent with a business necessity; or

2) Falls within a statutory exception, and validated.

Medical Examinations

Medical examinations and inquiries are prohibited during the pre-offer phase.

Exception: An employer may make pre-employment inquiries into the applicant's ability to perform job-related functions.

Post-Offer Medical Examinations

Caution! An employer may not refuse to hire an applicant based on medical test results unless:

1) Required of all employees in same job category;
2) The reason is job-related and justified by a business necessity; and
3) The employer could not reasonably accommodate the individual without undue hardship.

Physical Examinations

Physical examinations are designed to test either physical abilities or a medical condition.

Both Michigan and federal courts have generally upheld physical examinations of applicants as long as the examination is sufficiently related to the job.

Genetic Testing

Michigan's Persons with Disabilities Civil Rights Act (PDCRA)

1) Employers cannot discriminate against applicants based on genetic information that is unrelated to their ability to perform their job duties.
2) Employers cannot require an applicant to submit to a genetic test or provide genetic information as a condition of employment.

Genetic Testing

The Genetic Information Nondiscrimination Act (GINA)

1) GINA generally prohibits employers from obtaining any genetic information (which includes family medical history) from applicants or employees.

2) GINA prohibits employers from using genetic information in making decisions regarding hiring, firing, promotion, terms, conditions, and privileges of employment, or compensation. Employers may not retaliation against an employee who opposes or assists another in opposing any act unlawful under GINA.

Skills Testing

Both Michigan and federal courts have generally upheld the use of skills tests that are sufficiently related to the skills necessary to perform the job.

Drug Testing

- Clearly state on the application that the applicant will be required to submit to a drug test.
- Make sure that the applicant signs the application to acknowledge consent. Consider drafting your application so that the drug testing notice requires a separate signature to avoid any uncertainty.
- Make the applicant sign a consent-and-release form before the test is administered.

Drug Testing

- The test should be administered in a private and dignified manner.
- Testing should include both an initial screening and a confirmation test.
- Testing should be conducted by certified, reputable, and experienced laboratories with state-of-the-art equipment and protocols.

Drug Testing

- Keep the results confidential!
- Do not distribute the test results to anyone except the applicant and individuals in the company with a direct need to know.
- Keep the results separate from the rest of the applicant's application materials.

Polygraph Testing

The Federal Employee Polygraph Protection Act of 1988 (EPPA) applies to any employer who is involved in or affects interstate commerce.

Polygraph Testing

- Under the EPPA:

1) Employers may not directly or indirectly request, require, or otherwise cause an applicant to take a polygraph.

2) Employers may not use, accept, refer to, or inquire about the results of an applicant's previous polygraph test results.

Polygraph Testing

3) Employers may not threaten to or actually deny a job offer to an applicant who refuses or fails to take a polygraph.

4) Employers may not threaten or actually deny a job offer to an applicant who has or will file, testify, or otherwise exercise his or her rights under the EPPA.

Polygraph Testing

EPPA EXEMPTION: Employers who provide security services or operate within a controlled substance industry may use polygraphs if every procedural safeguard set out in the EPPA is followed.

Caution! Michigan's Polygraph Protection Act (MPPA) does not exempt security service providers or controlled substance industry employers.

Polygraph Testing

MPPA prohibits a Michigan employer or an employment agency from:

1) Requiring applicants to take a polygraph;

2) Threatening to administer a polygraph; and

3) Requiring an applicant to waive his or her right to decline a polygraph.

Psychological & Honesty Tests

- Employers are not expressly prohibited from administering written tests to gauge an applicant's honesty or psychological condition.
- Even written tests, though, are subject to other prohibitions, such as disparate impact, and may give rise to common-law torts.

Caution! Public sector employers engaging in psychological or honesty testing may violate an applicant's right to privacy under the Fourteenth Amendment.

Psychological & Honesty Tests

- Test questions should be specifically related to the applicant's job performance
- Examples:
  - Child Care
  - Law Enforcement
  - Money Handling

Psychological & Honesty Tests

- Both the EPPA and the MPPA prohibit any psychological or honesty test made by mechanical means.
- The applicant's consent, however, is generally a valid defense.
- Employers should ensure that information obtained from a lawful test is kept confidential; results should not be disclosed, except on a need-to-know basis.

Questions?

James S. Rosenfeld
313.225.7062
rosenfel@butzel.com

Social Media in the Workplace: *Exploring Dangerous Liaisons*

Claudia Rast
734.213.3431
Rast@Butzel.com

Setting the Stage

Statistics & Trends

- What do Survey Data Reveal about the Ubiquitous Presence of Social Media?
- Can IT Professionals Keep Up with the Challenge?

Realities in the Workplace

Risks, Responses & Recommendations

- Identifying the Risks Posed by Social Media
- Exploring the Tools and Policies to Protect Business
- Recommendations

Statistics

Ponemon Institute: Global Survey on Social Media Risks, September 2011

- Survey of IT Security Practitioners with 10+ years experience (42% in companies >5000 employees)
- 4640 Respondents in 12 Countries
- 63% say Social Media in Workplace Presents Risk
  - 29% say they have IT Controls
  - 50% report Increase in Malware

Statistics

Major Ponemon Survey Findings:

- Social Media in Workplace Important to Achieving Business Objectives
- Social Media Place Organizations at Risk and IT is without Security Controls and Enforceable Policies to Address Risk
- Greatest Concern: Download of Apps or Widgets, Posting Uncensored Content & Blog Entries
- Employee Use is More Often for Non-Business than Business Purposes
- Malware Infections Increasing (up 52%)
- IT Must Increase Internet Bandwidth to Accommodate Use

Statistics

Ponemon Asked: What is considered the acceptable use of social media in the workplace?

- Social networking with friends inside the Company—85%
- Social networking with friends outside the company—55%
- Use of social network as an email or texting channel—52%
- Downloading and watching videos during the workday—23%
- Posting uncensored content—11%
- Posting uncensored blog entries—11%
- Downloading apps or widgets from social media sites—8%
- None of the above is acceptable—6%

Trends: Social Media @ Work

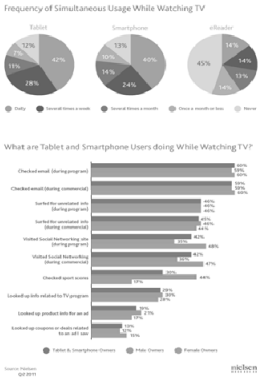
Ponemon Survey: How Much Time Spent by Employees on Social Media during Work

- SM for Business
  - 5% less than 5 minutes
  - 10% 5 to 10 minutes
  - **44% 11 to 30 minutes**
  - **19% 31 to 60 minutes**
  - **18% 1 to 2 hours**
  - 7% more than 2 hours
- SM Not for Business
  - 15% less than 5 minutes
  - 8% 5 to 10 minutes
  - **16% 11 to 30 minutes**
  - **28% 31 to 60 minutes**
  - **26% 1 to 2 hours**
  - 6% more than 2 hours

Trends: Social Media @ Work

- Who Gets Access?
- Who Does Not?
- Who Decides?
- What Devices?
  - Personal
  - Company
- Security
- Monitoring
- Enforcement

Nielsen Data 2Q 2011



Risks, Responses & Recommendations

Risks

- In a June 2010 White Paper, the Information Systems Audit and Control Association (ISACA) identified the Top Five Risks of Social Media:
  - Viruses/Malware
  - Brand Hijacking
  - Lack of Control over Content
  - Unrealistic Customer Expectations of "Internet-speed" Service
  - Non-Compliance with Record Management Regulations
- ISACA serves more than 95,000 professionals holding ISACA certifications in more than 160 countries

Responses

Ponemon Survey:

- Technologies Considered Most Important to Reducing Social Media Threats:
  - Anti- Virus/Anti-Malware Programs
  - Secure Web Gateway (SWGs must include, at a minimum, URL filtering, malicious-code detection and filtering, and application controls for Social Media)
  - Identity and Access Management
  - Mobile Device Management
  - Data Loss Prevention
  - Network Intelligence
  - Device Level Encryption

Responses

"According to Websense, the dynamic social web requires an IT security defense that goes beyond signature and fixed-policy web technologies (like anti-virus and firewalls). **New technologies such as social media, cloud services and mobility require real-time content security, which analyzes information in real-time as it is created and consumed**. Further, Websense says that traditional defenses such as anti-virus do not provide appropriate threat protection." ***Ponemon Sept 2011***

Recommendations

Gartner Group (9/21/11):

- Best Defense Is Monitoring & Education
- Blocking Access Encourages Employees to Bypass Corporate Systems (Company is then Blind to Use of Social Media)
- Companies that Block Access Are at Higher Risk of Non-Compliant Behavior
- By 2014, less than 30% of Large Companies Will Block

Ponemon Institute (9/2011):

- Conduct Risk Assessment to Understand what Practices may be putting Company at Risk
- Educate & Train Employees on Risks to Company
- Create Comprehensive IT Policy to include Social Media for Employees & Contractors
- Improve Detection & Prevention Technologies

Social Media in the Workplace

Scott Patterson
248.258.2506
patterson@Butzel.com

Potential Issues

- Employee productivity
- Blending of work and personal lives
- Possibility for harassment and discrimination
- "Too much information"

Potential Benefits

- Marketing/business development
- Recruiting
- Knowledge gathering
- Increased communication among employees

Use of Social Networking in the Hiring Process

- Proactive use as a recruiting tool
- Investigatory information gathering

Use of Social Networking in the Hiring Process

- The internet and social networking sites can be a valuable source of information on candidates
- Can also be a minefield of potential problems
- You may use it, but be careful

Use of Social Networking in the Hiring Process

- How accurate is the information?
  - Do you even have the right person?
  - Much on social networking sites may not be what it appears
  - Age of information
- Exposure to potentially protected information
  - Medical and health information
  - Disability status
  - Genetic information
  - Religion
  - Other lifestyle information

Use of Social Networking in the Hiring Process

- Traditional hiring practices are designed to avoid coming into possession of potentially protected information.
- Once the employer starts reviewing social networking sites, many of those protections can be lost.

Use of Social Networking in the Hiring Process

- Genetic Information Nondiscrimination Act (GINA)
  - Prohibits employers from intentionally acquiring genetic information regarding employees
  - Social Networking sites can have a wealth of such information:
    - Content of postings
    - Family history
    - Group memberships
  - Regulations provide exception for publicly available information

Use of Social Networking in the Hiring Process

- Fair Credit Reporting Act
  - Defines a "consumer credit report" as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living."
- The FCRA Requires That Employers:
  - Provide applicants with written notification that a consumer credit report may be used; and
  - Obtain the applicant's written authorization before requesting a report.
- Investigation of online activity may be a "consumer credit report."

Social Media at Work

- Monitoring internet use at work
  - Employers have right to control and monitor employee internet use in the workplace
  - No expectation of privacy
  - Company policy may give privacy rights
- There still are potential issues
  - Employer could be exposed to information regarding protected status
  - Information gathered could be misused

Social Media at Work

- Privacy Issues
  - Electronic Communications Privacy Act of 1986, 18 U.S.C. 2511 et seq.
    - Permits monitoring of oral and electronic communications as long as you can show legitimate business purposes.
  - The Stored Communication Act, 18 U.S.C. 2701 et seq.
    - Requires authorization from authorized user who has personal access to the site
    - This means you cannot access password protected information without permission

Social Media at Work

- Social Networking and Union Activities
  - Section 7 of the National Labor Relations Act (NLRA) protects the right to join a union and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection."
  - Section 8 of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of 'their Section 7 rights.'"

Social Media at Work

- Social networking or internet posts may be considered "other concerted activities" under the NLRA.
- Discipline for postings which complain about the company or workplace issues may violate the NLRA.
- The mere act of monitoring employees' "concerted" activities may be enough to give rise to a Section 7 charge.
- The NLRB has been very aggressive in this area.

Social Media at Work

- Employers, whether union or non union, may not maintain policies or engage in actions that "chill" § 7 rights.
- Your existing social networking policy may violate the NLRA.

Social Media at Work

- NLRB Activities:
  - Overbroad policies
  - Discipline or discharge based on social media posts

Social Media at Work

- Invasion of Privacy
  - Most states, including Michigan, recognize a right to privacy protecting a person's seclusion, solitude, or private affairs.
- The employee must show that:
  - there is an intrusion into a matter about which he or she had a right of privacy
  - by a means or method that is objectionable to a reasonable person.

Social Media at Work

- "Public" postings are generally not considered private
- But, what is public?
  - Not everything on the internet is "public"
  - Some courts have held that if an internet posting has some access limit it may be considered private.
- Examples:
  - Surreptitiously "friending" an employee to gain access to their site
  - Using monitoring software to capture login information

Social Media at Work NOT

- Off-duty conduct
  - Generally, off-duty conduct is not protected
  - Legal exceptions:
    - Protected activities or associations
    - Public employees' constitutional rights
    - Some states protect off-duty conduct
  - Practical limits
    - Nexus with the employee's job duties
    - Employee's place in the organization

Social Media at Work NOT

- Other Issues
  - Company spokesman appearance
  - FTC regulation of endorsements and testimonial in advertising
  - Supervisors "recommending" employees or otherwise saying nice things you may regret later
  - Release of confidential information
    - Not always intentional or even obvious
    - Competitive intelligence

What's Happening Out There?

- Misuses of social media by employees
  - Wasting time at work
  - Sexual harassment
  - Interfacing with employees, customers or clients in an inappropriate manner
  - Posting internal confidential information

What's Happening Out There?

- Uses of social media by employers
  - Increasing number of employers looking at the online presence of applicants
    - Not many claims or issues (yet)
  - Increasing adoption of social networking policies
  - Problem areas
    - Supervisors being too friendly with subordinates
    - Sexual harassment by supervisors and coworkers
    - NLRB Charges
  - Companies increasingly view Social Networking as a valuable tool rather than just a curse

Developing Social Networking Guidelines

- Goals need to be identified
  - Control use during work hours
  - Incorporate social networking into company marketing plans
- Even if you ban use at work, social networking will inevitably come into the workplace so you still need a policy

Developing Social Networking Guidelines

- No "one size fits all" policy
  - Every business is different
  - There may be different needs within the organization
  - You need to identify what you need and want
  - Social media policies may end up being part of marketing strategies, rather than an HR policy

Your Social Networking Guidelines

- Communicate to employees what use at work is acceptable.
- Reminder that all the other company rules still apply.
- Guidelines on appropriate use of social networking when interacting with fellow employees.
- Guidelines for interactions with third parties.
- Warning about harassment, discrimination and other inappropriate behavior on social networking sites.
- Guidelines for use of social networking to advance company business interests (if applicable).
- Warning regarding inadvertent or intentional disclosure of confidential business information.

Social Networking in the Workplace

- Be aware of the risks
- But, don't miss out on benefits

Questions?

Claudia Rast
734.213.3431
Rast@Butzel.com

Scott Patterson
248.258.2506
patterson@Butzel.com

Who's That Knocking on My Door? I-9 Investigations and Compliance

Clara DeMatteis Mager
313.225.7077
mager@butzel.com

Linda J. Armstrong
313.983.7476
armstrong@butzel.com

Francyne B. Stacey
734.213.3251
stacey@butzel.com

Background Information

- USICE issued initiative to inspect employers' hiring records
- Focus of inspection has changed from the employee to the employer
- For 2011 Fiscal Year, USICE issued 2,393 Notices of Inspection
- Government agencies are now sharing information

What should employers do to prepare for ICE Inspection?

- Establish a written compliance policy
- Appoint a compliance officer
- Provide training to hiring managers
- Conduct self-audits

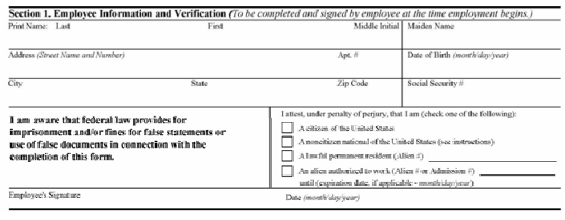
Overview: Completing Form I-9

- Employee **accepts offer** for employment
- Employee **completes Section 1** of the form no later than first day of work for pay
- Employee **gives documents and form** to employer
- Employer **completes Section 2** of the form no later than the 3rd business day employee starts work for pay
- If Employee's work authorization expires, **complete Section 3**

An I-9 is Not Required for the Following People:

- Employees hired before 11/6/1986
- Independent Contractors
- Individuals providing labor to employers who are employed by a contractor providing contract services
- Individuals not physically working on U.S. soil

Section 1



Section 1. Employee Information and Verification *(To be completed and signed by employee at the time employment begins.)*

Print Name: Last | First | Middle Initial | Maiden Name

Address *(Street Name and Number)* | Apt. # | Date of Birth *(month/day/year)*

City | State | Zip Code | Social Security #

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

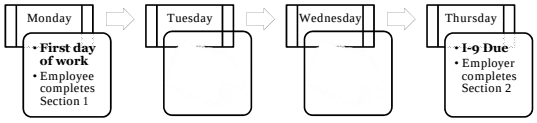
I attest, under penalty of perjury, that I am (check one of the following):

- ☐ A citizen of the United States
- ☐ A noncitizen national of the United States (see instructions)
- ☐ A lawful permanent resident (Alien #) _____
- ☐ An alien authorized to work (Alien # or Admission #) _____ until (expiration date, if applicable – *month/day/year*)

Employee's Signature | Date *(month/day/year)*

Completing Form I-9

- Section 2, Employer Review and Verification
- Must be completed within 3 business days of hire



Completing Form I-9

- Examine one document from List A
  – OR –
- Examine one document from List B and one from List C, and record the title, number and expiration date, of any, of the document(s)

- Employers CANNOT specify which document(s) they will accept from an employee

Section 2

Section 2. Employer Review and Verification *(To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number, and expiration date, if any, of the document(s).)*

List A	OR	List B	AND	List C
Document title:				
Issuing authority:				
Document #:				
Expiration Date *(if any)*:				
Document #:				
Expiration Date *(if any)*:				

CERTIFICATION: I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on *(month/day/year)* **and that to the best of my knowledge the employee is authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)**

Signature of Employer or Authorized Representative	Print Name	Title
Business or Organization Name and Address *(Street Name and Number, City, State, Zip Code)*		Date *(month/day/year)*

List A

- United States Passport or US Passport Card
- Permanent Resident Card or Alien Registration Receipt Card (I-551)
- Unexpired foreign passport with a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa
- Employment Authorization Document that contains a photo (I-766)
- Unexpired foreign passport with an unexpired Form I-94 authorizing employment and containing the foreign national's nonimmigrant status
- Passport from Federated States of Micronesia or the Republic of the Marshall Islands with Form I-94

List B

- Driver's license issued by a state or outlying U.S. possession with photo
- ID card issued by a state or outlying possession
- School ID card with photo
- Voter registration card
- U.S. Military card or draft record
- Military dependent's ID card
- U.S. Coast Guard Merchant Mariner Card
- Native American tribal document
- Canadian driver's license or ID card with a photograph

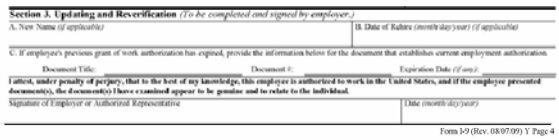
List C

- Social Security card without employment restrictions
- Certificate of Birth Abroad issued by U.S. Department of State
- Certificate of Report of Birth issued by Department of State
- U.S. Birth Certificate
- U.S. Citizen ID Card
- ID Card for Use of Resident Citizen in the US (I-179)
- Native American tribal document
- Unexpired employment authorization document issued by Department of Homeland Security

Updating and Re-verifying Form I-9

- Employers must complete Section 3 when updating and/or re-verifying the I-9 Form
- Employers must re-verify employment eligibility of their employees on or before the expiration date recorded in Section 1 (based on I-94 Card, Employment Authorization Document, etc.)
- Do not need to re-verify "Green Cards" with Expiration dates (even Conditional Permanent Residents)

Section 3



Section 3. Updating and Reverification *(To be completed and signed by employer.)*

A. New Name *(if applicable)* | B. Date of Rehire *(month/day/year) (if applicable)*

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment authorization.

Document Title: _____ Document #: _____ Expiration Date *(if any)*: _____

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative | Date *(month/day/year)*

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Special Issues in Completing I-9

- Remote Employee
  - If employee is hired at a remote location, a company agent may review the employee's documents and complete Section 2
  - Company is responsible for any errors made by the agent
- Corporate Mergers and Acquisitions
  - New employer assumes liability for previous Forms I-9
    - In order to avoid liability, have employees complete a new I-9

Special Issues in Completing I-9

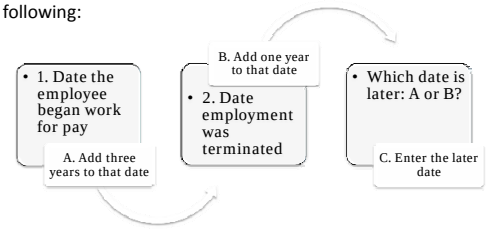
- H-1B Cap Gap
  - Period between the time an F-1 student status would end and his/her H-1B status begins
    - Complete Section 2 (or Section 3), List A
      - Expired EAD
      - New Form I-20
      - USCIS Receipt Notice for H-1B
    - Re-verify once H-1B is approved

Special Issues in Completing I-9

- F-1 Status with Curricular Practical Training (CPT)
  - Complete Section 2, List A
    - Foreign Passport
    - I-94 Card
    - Form I-20 with CPT expiration date

Retaining Form I-9

- Employers must retain completed I-9s for three (3) years after the date of hire or one (1) year after the date employment ends, whichever is later
- To calculate how long to keep an employee's Form I-9, enter the following:



Electronic Storage and Completion of I-9s Permitted

- Must have reasonable controls to ensure the following:
  - Integrity, accuracy and reliability of system
  - Prevention and detection of unauthorized creation or deletion of information
- Must also have:
  - Inspection and quality assurance program
  - Retrieval system that includes an indexing system
  - Ability to reproduce legible and readable hard copies
  - Ability to produce audit trails
  - Electronic signatures, if completed electronically

Common Problems

- Employee/employer fails to sign Form I-9
- Employer completes Section 1 for employee
- Employer fails to note document numbers and expiration dates in Section 2
- Employer fails to complete Section 2 of Form I-9 and merely attaches photocopies of acceptable documents to the form
- Form I-9 is not completed on a timely basis
- Employer requests specific documents evidencing identity and/or employment eligibility

Common Problems (continued)

- Employer fails to request original documents and accepts photocopies or faxed documents
- Employer over-documents
- Employer retains copies of documents for some, but not all employees
- Employer does not sign or date Section 2
- Form I-9 is discarded too soon
- Failure to re-verify when necessary

Summary

- Make I-9s a priority
- Provide training to hiring personnel
- Conduct a self-audit of your I-9s
- Take action to correct I-9s as soon as possible
- Make sure you are retaining I-9s as required

ICE Inspections

Clara Mager

ICE & DOL

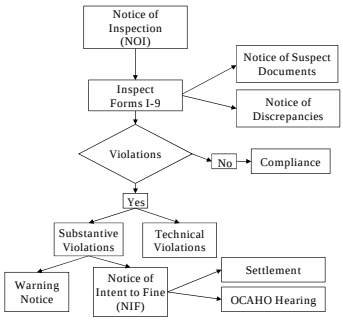
ICE Office of Investigations

- Over 7,000 employees
- 200 + field offices throughout the U.S.
- 5,000 employees are Special Agents

U.S. Department of Labor Audits

- Compliance officers from Wage & Hour Compliance Program
- Equal Opportunity Specialists, Office of Federal Contract Compliance Program

Form I-9 Inspection Process



Notice of Inspection (NOI)

- Served in person or certified mail
- Must provide at least 3 days notice
- Receipt provided by ICE for the original Form I-9s turned over to ICE
- Subpoena to produce copies of other documents:
  - Articles of Incorporation
  - Payroll
  - List of current employees including date of hire
  - List of terminated employees including date of hire and date of termination
  - Michigan Unemployment Insurance Agency Quarterly Wage Detail Reports
  - Social Security no-match letters
- ICE verifies Social Security Numbers and Alien Registration Numbers
- If in compliance ICE issues a Compliance Letter

Notice of Suspect Documents

Notice to employer that:

- Documents submitted pertain to other individuals; or
- There was no record of the alien registration number; or
- Individual's employment authorization has expired
- Requires employees to present valid ID & employment authorization documentation
- ICE will re-verify the documents or any new information provided by the employees

Technical or Procedural Violations

Notice of Technical or Procedural Violations:

- ICE provides copies of Form I-9s highlighting Technical or Procedural violations
- 10 business days to make corrections
- Initial and date the corrections
- Provide explanation for corrections which cannot be reasonably made. Examples:
  - The individual is no longer employed by the employee
  - Employee is on medical leave, leave of absence, or vacation during the time provided for correction
  - The preparer and/or translator reasonably cannot be located
  - The failure relates to timelines
- Uncorrected technical or procedural violations become substantive violations

Technical Violations

List of Technical Verification Violations:

- **Section 1 of Form I-9**:
  - Failure of the employee to list his or her maiden name, address, or birth date
  - Failure of the employee to include his or her "A" number if the box is checked indicating he or she is a permanent resident (but only if the A number is included in Sections 2 or 3 of the Form I-9 or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection)

Technical Violations

- **Section 1 of Form I-9**:
  - Failure of the employee to provide his or her Alien number or Admission number on the line “an alien authorized to work until” (but only if the Alien number or Admission number is provided in Sections 2 or 3 of Form I-9 or on a legible copy of a document retained with the I-9 and presented at the I-9 inspection)
  - Failure to ensure that the employee dates Section 1 of the Form I-9
  - Failure of an individual to date Section 1 of the Form I-9 at the time of hire if the time of hire occurred on or after September 30, 1996
  - Failure to ensure that a preparer or translator provides his or her name, address, signature or date in the preparer's certification box

Technical Violations

- **Section 2 of Form I-9**:
  - Failure of the employer to provide the document title, ID number and/or expiration date of a proper List A document or proper List B and List C documents (but only if a legible copy of the document(s) is retained with the I-9 and presented at the time of inspection)
  - Failure of the employer to provide the title, business name, and business address
  - Failure to provide the date of hire in the attestation portion
  - Failure to date Section 2 of the Form I-9
  - Failure to date Section 2 of the Form I-9 within three business days of the date the individual was hired or, if the individual is hired for three business days or less, at the time of hire if the date on which Section 2 had to be completed occurred on or after September 30, 1996

Technical Violations

- **Section 3 of Form I-9**:
  - Failure of the employer to provide the document title, ID number, or expiration date of a proper List A or proper List B and C documents when re-verification is required (but only if a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection)
  - Failure to provide the date of rehire

Substantive Violations

Substantive Violations

- Knowing hire, continuing to employ, failure to prepare and present Form I-9
- Serious paperwork violations that could have led to hiring of an unauthorized alien

Substantive Violations

Substantive Verification Violations:

- **Section 1 of Form I-9**
  - Failure of the employee to provide his or her printed name
  - Failure of the employee to check one of the boxes indicating he or she is a citizen or national of the U.S. , a Lawful Permanent Resident or an Alien authorized to work until a specific date
  - Failure of the employee to include his or her Alien number if the box is checked indicating he or she is a Lawful Permanent Resident (but only if the A number is not included in Sections 2 or 3 of the Form I-9 or a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection)

Substantive Violations

- **Section 1 of Form I-9**:
  - Failure of the employee to include his or her "A" number or Admission number if the box is checked indicating that he or she is an alien authorized to work in the U.S. (but only if the "A" number or Admission number is not included in Sections 2 or 3 of Form I-9 (or on a legible copy of a document retained with the I-9 and presented at the I-9 inspection)
  - Failure of the employee to sign the attestation
  - Failure of the employee to date Section 1 at the time of hire if the date of hire occurred before September 30, 1996

Substantive Violations

- **Section 2 of Form I-9**:
  - Failure of the employer to review and verify a proper List A document or proper List B and List C documents
  - Failure of employer to provide the documented title, identification number(s) and/or expiration date(s) of a proper List A document or proper List B and C documents, unless a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection
  - Failure to sign the attestation
  - Failure of the employer to date Section 2 within three business days of the date the employee is hired or, if the individual is hired for three business days or less, at the time of hire if the date that Section 2 was to be completed occurred before September 30, 1996

Substantive Violations

- **Section 3 of Form I-9**:
  - Failure to recertify and complete within 90 days the pertinent Section 2 information for verification with a receipt for lost or stolen documents

Substantive Violations

- **Section 3 of Form I-9**:
  - Failure of the employer to review and verify a proper List A document or proper List B and List C document
  - Failure of the employer to provide the document title, ID number(s), or expiration date(s) of a List A or List B and C list document(s) (unless a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection)

Substantive Violations

- **Section 3 of Form I-9**:
  - Failure to sign Section 3
  - Failure to date Section 3
  - Failure to date Section 3 not later than the date that the work authorization of the employee expires

Warning Notice

Warning Notice (Form I-846):

- Circumstances do not warrant penalty
- Expectation of future compliance by employer
- Follow up inspection within 6 months

Notice of Intent to Fine

Notice of Intent to Fine (NIF) (Form I-763):

- Pre-notice negotiations
- Problem areas identified
- Negotiation may lead to final settlement without issuance of NIF

Notice of Intent to Fine

Issuance of NIF:

- Employer must review the allegations
- Ascertain sections of law violated
- Determine if there is a reasonable defense
- Review merits of the case and whether to litigate
- Employer may enter into settlement agreement
- 30 day response period or to contest NIF
- Proposed fines in the NIF are maximum potential liability
- Administrative Law Judge can reduce the proposed fines but will not raise the fines

Paperwork Violations Penalties

- $110 - $1,100 per form
- Amount of fine depends on following:
  - Size of business
  - Employers good faith in completing I-9
  - Seriousness of violation
  - Employment of unauthorized aliens
  - Employer's history
- No criminal penalties

Substantive/Uncorrected Technical Violation Fine Schedule

Standard Fine Amount

Substantive Verification Violations	1st Offense $110 - $1,100	2nd Offense $110 - $1,100	3rd Offense $110 - $1,100
0%-9%	$110	$550	
10%-19%	$275	$650	
20%-29%	$440	$750	
30%-39%	$605	$850	
40%-49%	$770	$950	
50% or more	$935	$1,100	

Unauthorized Employment of Alien Penalties

- First violation $375-$3,200 per violation
- Second violation $3,200-$6,500 per violation
- Third violation $4,300-$16,000 per violation
- Criminal prosecution with $3,000 fine per employee and/or six months jail if pattern or practice established

Knowing Hire/Continuing to Employ Fine Schedule (for violations occurring on or after 3/27/2008)

Standard Fine Amount

Knowing Hire and Continuing to Employ Violations	First Tier $375-$3,200	Second Tier $3,200-$6,500	Third Tier $4,300-$16,000
0%-9%	$375	$3,200	$4,300
10%-19%	$845	$3,750	$6,250
20%-29%	$1,315	$4,300	$8,200
30%-39%	$1,785	$4,850	$10,150
40%-49%	$2,255	$5,400	$12,100
50% or more	$2,725	$5,950	$14,050

Summary

- Have counsel from the beginning of the inspection process
- Review and copy all Form I-9s and other documents provided to ICE
- Cooperate fully with ICE

I-9 and Non-Discrimination

Francyne Stacey

Prohibited Conduct

- Discrimination on the basis of Citizenship or Immigration Status
- National Origin discrimination
- Document abuse during Form I-9 process
- Retaliation

*Applies to all employers with three or more employees

Who is Protected?

- Citizens and nationals of the United States
- Lawful permanent residents
- Aliens who are authorized temporary residents
- Refugees
- Asylees

Who is Protected?

- Individuals fall out of the protected class if they fail to apply for naturalization within six months of becoming eligible to do so,

and

- Fail to complete the naturalization process within two years of filing

Citizenship or Immigrant Status Discrimination

- Employers are prohibited from discriminating on the basis of citizenship or immigration status in hiring, firing and referring or recruiting for a fee

Citizen or Immigration Status Discrimination

- Occurs when an employer treats employees or applicants differently because of their citizenship or immigration status or because the individual is perceived as looking or sounding foreign

National Origin Discrimination

- Prohibits employers from treating individuals, applicants or employees, differently because of:
  - their place of birth
  - country of origin
  - native language or accent

Document Abuse

- Employers may not request more documents than required
- Employers may not request different documents than required
- Employers may not reject documents that the employee chooses to present as long as they meet the Form I-9 requirements
- Documents that appear legitimate on their face should be accepted

Retaliation

- It is prohibited to intimidate, threaten, coerce or retaliate against an employee who engages in IRCA or Title VII conduct such as:
  - Filing a complaint or charge
  - Testifying, assisting or participating in an investigation, proceeding or hearing on citizenship or national origin discrimination

Enforcement

- By Office of Special Counsel (within Civil Rights Division, Department of Justice)
- OSC is responsible for ensuring that an employer's I-9 compliance efforts do not result in unfair employment practices
- In contrast, ICE is responsible for ensuring that employers are hiring only those individuals who are authorized to work

Penalties

- Order to cease and desist the prohibited practice and engage in one or more corrective actions
- Hire individuals who have been discriminated against
- Up to two years back pay prior to the date of filing the charge or complaint
- Education of hiring personnel

Penalties

- Removing false performance reviews
- Compiling for review information on all applicants for job openings going back for three years
- Attorney fees

Questions?

Clara DeMatteis Mager
313.225.7077
mager@butzel.com

Linda J. Armstrong
313.983.7476
armstrong@butzel.com

Francyne B. Stacey
734.213.3251
stacey@butzel.com

How to Screw Up Your Employee Benefit Plan Without Really Trying: *Common Errors and Compliance Issues*

Jordan Schreier
734.213.3616
schreier@butzel.com

Lynn McGuire
734.213.3261
mcguire@butzel.com

Electronic Communications

Issue: Employers fail to comply with IRS or DOL requirements when issuing or distributing plan-related documents and communications electronically

Electronic Communications

- Plan Administrators may provide required disclosures and elections electronically only if DOL and IRS rules ***are strictly followed***
  - Impact of noncompliance is Plan Administrator treated as never having provided disclosure or election

Electronic Communications - ERISA

- DOL safe harbor for:
  - SPDs
  - SMMs
  - SARs
  - Form 5500 annual reports
  - Individual benefit statements
  - COBRA notices
  - QDRO/QMCSO notices
  - Notice of creditable coverage
  - Participant loan information
  - Investment-related information
  - Benefit determination notices
  - and others

Electronic Communications

- General requirements under ERISA
  - Participants must:
    - Use computer as integral part of employment duties
    - Be able to access the documents at location they work
  - Alternatively, participant may provide consent after having received a "clear and conspicuous" statement explaining scope of consent
  - Receive notice describing significance of document and right to receive paper copy

Electronic Communications

- General requirements under ERISA
  - E-mail: requires reasonable and appropriate steps to protect confidentiality and ensure actual receipt
  - Website: requires prominent home webpage link to plan information, and directions on how to obtain or replace a password
- ***Tip**: Ensure procedures in place to document electronic distribution, and to keep information on website for reasonable time after posting*

Electronic Communications - IRC

- IRS safe harbor for:
  - Notice of distribution options and right to defer distribution over $1,000
  - Participant consent to distribution over $1,000
  - Rollover notices
  - Rollover elections
  - Notice of voluntary tax withholding
  - Spousal consent/waiver of QJSA
  - Beneficiary designations
  - and others

Electronic Communications

- General IRS requirements:
  - Participant must have effective ability to access electronic medium used
  - Alternatively, may obtain informed consent
- Electronic system must:
  - Preclude others from making election
  - Provide opportunity to confirm, modify or rescind election before effective
  - Provide confirmation explaining effect of election

Electronic Communications

***Tip**: New electronic disclosure rules will apply to participant fee disclosures in defined contribution plans, so it's time to revisit question of availability of electronic disclosure option*

Timely Deposit of 401(k) Contributions

Issue: Employers fail to deposit elective contributions withheld from employees' paychecks into 401(k) plan's trust within required time limit

Timely Deposit of 401(k) Contributions

- Elective deferrals and plan loan repayments withheld from wages are plan assets as of "earliest date" can reasonably be segregated from employer's general assets
  - Must actually be contributed to trust by earliest date
- Earliest date cannot be later than 15th business day of month following month in which otherwise payable
  - ***Outside limit - Not a safe harbor!***

Timely Deposit of 401(k) Contributions

- Safe harbor for small employers (<100 participants at start of plan year)
  - Regardless of earliest date, contribution to trust is timely if deposited by 7th business day following payday for period withheld

Timely Deposit of 401(k) Contributions

- How do employers violate timing rule?
  - Failure to follow process for non-standard checks (e.g., bonus checks, vacation pay, make-up checks, etc.)
  - Failure to follow standard process while person responsible for handling reconciliation and transfer is out of office (e.g., vacations, leaves)
  - Defaulting to longest payroll cycle timing when multiple payroll cycles (weekly and monthly)
  - Making deposits at employer's convenience

Timely Deposit of 401(k) Contributions

- Failure to comply is prohibited transaction under ERISA and Internal Revenue Code
- Correct through DOL Voluntary Fiduciary Compliance Program and/or by filing Form 5330 excise tax return with IRS
  - Employer must pay lost earnings on late contributions to fully correct
  - Lost earnings compound

Timely Deposit of 401(k) Contributions

***Tip**: Plan auditors must investigate timeliness of deposit of 401(k) contributions; failure can result in audit disclosure as well as plan correction*

Equivalencies

Issue: Employers report to retirement plan record keeper that salaried employees all work same number of hours every week, but reported number does not meet IRS or DOL equivalency rules

Equivalencies

- Retirement plans often count Hours of Service for eligibility, vesting, benefit accrual
- Few employers track actual hours worked by salaried employees
  - Employers frequently report hours using a rule of thumb as an approximate equivalency

Tip: *Equivalencies must be described in plan document*

Equivalencies

- Internal Revenue Code limits equivalencies employer may use for purposes of vesting
- DOL regulations permit use of certain equivalencies for purposes of participation, vesting and benefit accrual purposes

Equivalencies

- Permissible equivalencies:
  - *Hours Worked Equivalency*: Count only hours for which services are performed
    - Must treat 870 hours worked as 1,000 hours of service
    - Must treat 435 hours worked at 500 hours of service
  - *Regular Time Hours Equivalency*: Count only regular hours (not O.T., jury duty, etc.)
    - Must count 750 regular time hours as 1,000 hours of service
    - Must count 375 regular time hours as 500 hours of service

Equivalencies

- Permissible equivalencies:
  - *Days of Employment Equivalency*: Credit 10 hours of service for each day an hour of service earned
  - *Weeks of Employment Equivalency*: Credit 45 hours of service for each week an hour of service earned
  - *Semi-Monthly Equivalency*: Credit 95 hours of service for each semi-monthly period an hour of service earned
  - *Months of Employment Equivalency*: Credit 190 hours of service for each month an hour of service earned

Equivalencies

- Permissible equivalencies:
  - *Shifts of Employment Equivalency*: Credit number of hours in one shift for each shift an hour of service earned

Equivalencies

- Permissible equivalencies:
  - *Earnings-Based Equivalency*:
    - If compensation determined using hourly rate, hours of service during period = total earnings / hourly pay rate
      - Can use lowest hourly rate for employees in comparable jobs, if treat 870 hours as 1,000 hours of service and 435 hours as 500 hours of service
    - If compensation not determined by hourly rate, may:
      - Convert salary during period to hourly rate
      - Determine on fixed rate for period of time other than an hour
      - Determine using lowest hourly rate payable for same job classification, or if none, use FLSA minimum wage

Equivalencies

- Permissible equivalencies:
  - *Elapsed Time Equivalency*: Credit service based on total period of employment
  - Service counted from time employee first performs an hours of service until employee severs employment
  - A 1-year break in service occurs when employee severs employment and does not return within a 12-consecutive-month span
  - Absences less than 12 months ignored

Equivalencies

- Permissible equivalencies:
  - *Other Equivalencies*: Can devise another equivalency, provided:
    - Is credited at least as generous as an approved method
    - Does not discriminate
    - Is applied uniformly

Equivalencies

- Different equivalencies may be used for different groups of employees, provided:
  - Reasonable business justification exists
  - Applied consistently
  - Does not improperly discriminate

Automatic Enrollment

Issue: Employers fail to auto-enroll re-hired employees when 401(k) plan requires auto enrollment

Automatic Enrollment

- Employers frequently "grandfather" employees hired before date automatic enrollment feature added to plan, or who have affirmative elections on file
- If "grandfathered" employee terminates then is rehired, the rehire date, not original hire date, governs whether subject to automatic enrollment unless plan states otherwise

Automatic Enrollment

- Failure to automatically enroll rehired employees is operational error
  - Employer must correct by making corrective contribution = 50% of the missed elective deferral amount + missed employer contributions + lost earnings
  - If rehired employee still has 9 months remaining in plan year, no correction of missed deferral necessary
    - Must still correct the missed employer contribution and lost earnings

Small Employer COBRA Exemption

Issue: Employers with U.S. or foreign affiliates fail to count affiliates' employees when determining whether the COBRA small employer exception applies

Small Employer COBRA Exemption

- COBRA does not apply to group health plan if each contributing employer and affiliates combined normally employ fewer than 20 employees
- Measured using number of employees on typical business day during preceding calendar year
  - Typical business day = 50% of employer's typical business days during year
  - Part-time employees counted as fractional employees

Small Employer COBRA Exemption

- With limited exception, all employers under common control or within affiliated service group are aggregated
  - U.S. company with < 20 employees is subject to COBRA if controlled group has 20 or more employees ***worldwide***

Small Employer COBRA Exemption

Example:

- US Widgets, Inc. is a wholly owned subsidiary of Germany Widgets AG. US Widgets = 15 employees and Germany Widgets = 500 employees
- US Widgets subject to COBRA with 515 employees

Leased Employees and Discrimination Testing

Issue: Employers fail to cover leased employees under retirement plan under circumstances where leased employees cannot be excluded from coverage

Leased Employees and Discrimination Testing

- Qualified plans not required to cover all employees
  - However, a sufficiently broad cross-section of workforce must be eligible
- If high percentage of workforce is leased employees, their exclusion from retirement plan could cause minimum coverage failure

Leased Employees and Discrimination Testing

- Minimum coverage test requires qualified retirement plan to cover minimum percentage of NHCEs or provide benefits to reasonable nondiscriminatory classification of employees
  - Counts all employees (including leased employees) of plan sponsor, members of controlled group, and affiliated employers

Leased Employees and Discrimination Testing

- Minimum coverage failure avoided by retroactive amendment to plan to expand eligibility, with corresponding contributions by employer for those individuals
  - Amendment required before 15th day of 10th month after end of plan year
- Otherwise, plan subject to disqualification unless corrected through EPCRS

Leased Employees and Discrimination Testing

Tip: *Review plan document periodically to ensure accurately states eligibility status of leased employees and that impact on plan considered when changing employment practices related to leased employees*

Hiring Temporary Workers as Employees

Issue: Employers that directly hire someone who previously worked as a staffing company temporary worker fail to count temporary service for purposes of eligibility and vesting under retirement plan

Hiring Temporary Workers as Employees

- Employers sometimes use temporary workers who are employed by staffing agency, but later hire worker directly
- Retirement plan may need to credit employee for service as temporary worker
  - Cannot exclude from plan participation individual who otherwise meets plan eligibility criteria
  - Cannot require more than 1 year of service for eligibility or vesting, including time as temp worker

Hiring Temporary Workers as Employees

- Questions at issue when converting a temporary worker:
  - Was individual a common law employee of the employer or a common law employee of the staffing agency?
  - Was the individual a leased employee under the IRC?
  - If the individual was not a leased employee under the IRC, why not?

Hiring Temporary Workers as Employees

- What does this mean in practice?
  - Employer must keep records of temporary worker's start date, hours of service, and compensation even though plan excludes temporary worker from eligibility (or require staffing company to do so)
  - Employer must allow temporary worker to participate after satisfying plan's eligibility criteria, after counting hours of service while classified as temporary worker
  - Employer must count years of service as temporary worker for purposes of vesting

Non-Taxable Reimbursement of Educational Expenses

Issue: Employers fail to comply with IRS requirements for non-taxable reimbursement of educational expenses

Non-Taxable Reimbursement of Educational Expenses

Employer reimbursement of educational expenses non-taxable to employees under two Code Sections:

- §127
- §132

Non-Taxable Reimbursement of Educational Expenses

Code §127

- No limitation on course of study
- Formal written plan required
- Available to nondiscriminatory class of employees
- $5,250 annual maximum

Non-Taxable Reimbursement of Educational Expenses

Code §132

- Course must maintain or improve job skills, or
  - Improving general skills not sufficient
  - Determined by course taken, not by degree obtained
- Course must meet express requirements of employer to retain job, position or compensation, or
- Course must meet minimum requirements of law (e.g., licensing or certification) to retain job, position or compensation
- Courses to qualify for new trade or business not non-taxable
- No dollar cap or nondiscrimination rule

Plan Loan Interest Rate

Issue: Employers fail to comply with IRS rules regarding setting and monitoring interest rates for plan loans

Plan Loan Interest Rate

- Loan from 401(k) plan to participant prohibited transaction under Code and ERISA unless, among other things, interest rate is "reasonable"
- Rate must provide plan with return equal to rates charged by persons in business of making loans under similar circumstances

Plan Loan Interest Rate

- Rates must be reviewed periodically and adjusted to reflect current economic conditions, if necessary
- Keep documentation showing interest rates identified in survey
- If plan delegates duty of setting rate to Plan Administrator, Plan Administrator's records should reflect fact that discussion of rates occurred

Plan Loan Interest Rate

- Must review rate at time of loan renewal/ extension or second loan
- National or regional interest rates may be appropriate
- Not appropriate to pick interest rate based on record keeper's statement that most client plans use that rate

Plan Loan Interest Rate

- Recent IRS informal statement: Prime + 2% has not been deemed impermissible by IRS in past

409A and Post-Employment Benefits

Issue: Employers promise terminating employees post-employment benefits without complying with Code §409A rules on when termination of employment occurs

409A and Post-Employment Benefits

- Code §409A deferred compensation = Employer promise in one tax year to provide employee value (pay, services, reimbursements, in-kind benefits, etc.) to be received in future tax year
  - Rules on amounts to be paid, when payments begin, time period for payments and form of payments
  - Limitations on delaying or accelerating future payments

409A and Post-Employment Benefits

- 409A deferred compensation does not include:
  - Qualified retirement plans
  - Vacation leave
  - Sick leave
  - Compensatory time off
  - Disability pay
  - Death benefit plans
  - Certain equity compensation plans

409A and Post-Employment Benefits

Termination of employment under 409A

- Employer and employee reasonably anticipate that
  - no substantial services after specified date, or
  - level of bona fide services to be performed after that date (as employee or **independent contractor**) will permanently decrease to no more than 20% of the average level of bona fide services performed over immediately preceding 36 months

409A and Post-Employment Benefits

Example:

- Employee works 2200, 2000 and 1800 hours in the 3 consecutive 12 month periods prior to termination
  - 36 month average = 2000 hours
- If reasonably anticipate the employee will work less than 400 hours for employer in any capacity in first 12 months post termination, a termination of employment has occurred under 409A

409A and Post-Employment Benefits

- Employee presumed to terminate if level of services drops to 20% or less of 36 month average
- Employee presumed not to terminate if level of services continues at level of 50% or more of 36 month average
- No presumption if level of services drops to between 20% and 50% of 36 month average
- Employment treated as continuing if employee on a "bona fide" leave of absence of up to 6 months
  - Leave of absence not "bona fide" if no reasonable expectation employee will return to perform services for employer

Multiemployer Plan v. Union

Issue: Employers enter into side-agreements with union concerning benefits, but benefits are provided through multiemployer benefit plan that is not bound by union's agreement

Multiemployer Plan V. Union

- Multiemployer fund trustees may reject CBA or other agreement if contradicts fund provisions
- Any document expanding, clarifying, or limiting terms of fund documents must be submitted to fund trustees in advance to ensure acceptance

Multiemployer Plan V. Union

- Includes CBA, side agreement between union and employer (LOAs or MOUs), interpretation of CBA, reciprocity agreement with another fund, etc.
- Failure to comply could lead to audit or withdrawal from fund

Multiemployer Plan V. Union

Examples:

- Agreement to split bargaining unit into benefitting (existing employees) and not benefitting (new hires)
- Agreement to not contribute to fund for part time employees or during paid leaves

Multiemployer Plan V. Union

***Tip**: Employers working temporarily outside jurisdiction of CBA may owe contributions to "home" funds and "away" funds, and higher contribution rates may apply*

PPACA – Summary of Benefits and Coverage

Potential Issue: Employers making material change to group health plan must provide summary of material modifications 60 days in advance, regardless of whether change involved material reduction in benefits

PPACA – Summary of Benefits and Coverage

- Beginning March 23, 2012, group health plans must provide Summary of Benefits and Coverage ("SBC"), and make available uniform glossary of terms
- Must provide notice of any material modification to information in SBC no later than 60 days ***prior*** to date modification is effective

PPACA – Summary of Benefits and Coverage

- Prior law: HIPAA required 60 day advance notice of material change to health plan only if change was material reduction in benefits, otherwise Summary of Material Modifications to plan not due until 210 days after end of plan year change adopted

PPACA – Summary of Benefits and Coverage

- Failure to comply: fine of up to $1,000 for each participant or beneficiary who does not timely receive summary of changes

New Fee Disclosures

Potential Issue: Plan Administrator responsible for providing 401(k) plan participants with new fee disclosures regardless of whether plan service provider has agreed to (or does) provide timely fee disclosures

New Fee Disclosures

- Regulations do not protect plan administrators from fiduciary liability when service provider fails to provide relevant participant fee information
- Plan administrators should request amendment to service provider contracts
  - Contractually obligate service provider to timely provide fee information

Questions?

Jordan Schreier
734.213.3616
schreier@butzel.com

Lynn McGuire
734.213.3261
mcguire@butzel.com

Firing the Boss: Executive Terminations

Carey A. DeWitt
313.225.7056
dewitt@butzel.com

Marc W. Oswald
313.225.7096
oswald@butzel.com

Former Executive, Future Plaintiff?

Former Executives Can Be Dangerous Plaintiffs

- Well educated and well connected
- Skilled communicators/witnesses
- Know the company's operations
- Know where the skeletons are hidden (or think they do and/or will claim so)
- Potential for large damages, from high wages and benefits

Former Executives Can Be Dangerous Plaintiffs

- Higher compensation = Higher Damages claims
  - Jury verdict of $2.25 million against hotel chain for retaliating against former executive who brought age discrimination claim ($750,000 in back pay, $500,000 in front pay, and $1 million for emotional distress)
  - Former executive filed suit against Dunkin Donuts seeking $5 million in damages for breach of severance agreement
  - Former CFO making $400,000 per year filed suit against law firm seeking $10 million in damages for wrongful termination and discrimination

Getting Your Ducks in a Row: Investigating and Planning Before a Decision to Terminate

Initial Inquiries

- Proceed as confidentially as is reasonably possible
- Why is termination being considered?
  - Performance issues
  - Personality conflicts
- Who is driving the decision?
  - Board of directors/Executive team
  - Assess political will to follow through with termination

Initial Inquiries

- Who is driving the decision? (cont'd)
  - Involve counsel as to likely and potential costs and benefits as appropriate; be careful of unprivileged emails and conversations!
- Consider alternatives to termination?
  - Progressive discipline
  - Executive coaching
  - Demotion

Pre-termination Investigation

- Conducting a fair, candid, and *reasonably* careful investigation is a key to minimizing risk
- Proceed as confidentially as reasonably possible
- Review all agreements between the company and the executive
  - Termination standard - at-will, satisfaction, or just cause
  - Restrictive covenants
- Interview witnesses and gather evidence
  - First-hand vs. Second-hand knowledge
  - Hard vs. Soft evidence
  - Assess Quality of Witnesses for Employer and any for Employee
  - Any Comparatives?

Pre-termination Investigation (cont'd)

- "Challenge" alleged facts and evidence to see how well it will hold up
- Analyze potential for executive to assert claims for discrimination or retaliation
  - If any improper motive may exist, involve outside counsel
- Develop termination charges based on facts
  - Avoid "kitchen sink" approach; quality is much more important than quantity; avoid weak links in chain
  - Accusations of embezzlement, sexual harassment, and theft require higher level of proof
  - Potential liability for compelled self-publication defamation

Letting the Cat Out of the Bag: Moving From Investigation to Implementation

If Termination is Warranted, Approach Varies with the Termination

- Difference of opinions –separation may be amicable and implemented over a period of weeks; potential pitfalls to this approach
- Unsatisfactory performance – opportunity to respond and possible suspension pending a final decision may be appropriate
- Misconduct – immediate suspension/ termination may be necessary or appropriate

Informing the Executive

- Person communicating decision must be a good witness, as must be the *decisionmaker(s)*; they may be the same
  - Credible, able to withstand discovery and trial process
- Conduct meeting privately, and have another executive present; act in a decent manner
- "Script" v. No Script; counsel v. no counsel
- Executive Requests Presence of Counsel?
- Discuss charges (have examples in case questioned), listen to response, and take notes
  - Avoid arguments and wild goose chases, loose talk
- Suspend or terminate, as appropriate, but consider the executive's response, at least briefly

Suspension Before Termination

- Provides an opportunity to hear and evaluate the executive's response to the charges before reaching a termination decision
  - Again, you may assess political will to follow through with termination and any claim
- If a decision to terminate is reached, convert the suspension letter into a termination letter
- Cut off physical and electronic access to the company
- Have press response, if any, ready
- Tell those who need to know
- Remind all to keep confidential

Example Suspension Letter

Dear _____:

This letter is to inform you that your employment is suspended, effective immediately, with pay, pending a decision as to the matters identified in our meeting. We hope to reach a decision as to next steps as soon as possible.

During the period of this suspension, you are not permitted to enter [company] facilities, conduct business on behalf of the company, contact suppliers or customers, destroy, hide, or convey any [company] information or property, or contact [company]employees other than [Company representative]. If you need any personal effects that are on premises at [company] please let us know what those are and we will secure them for you and have them delivered to your home. You are specifically reminded of your confidentiality and fiduciary obligations to the company, which continue, of course, and all of the obligations set forth in your Employment Contract. (You were given a copy of the contract in our meeting.) It is also very important in your fiduciary obligations not to disparage the Company or otherwise injure the interests of the Company, both now and in the future. Please take these obligations seriously.

Again, we will make a decision as soon as we reasonably can, hopefully within the next few days.

Sincerely,

_____
[Company representative]

Severance Agreements

- Can be used to limit litigation risks, negative publicity, and hard feelings
  - Use depends on circumstances of termination
  - Must consider possibility that employee will not agree to the terms
- Amount of severance– for higher level execs, typically $10,000/month or more for several months, but depends on many variables (e.g., what the company can afford, contractual requirements, termination standards, and the existence of "ugly" evidence and other potentially embarrassing information)

Severance Agreements (cont'd)

- Release of claims
  - OWBPA
- Provides opportunity to confirm post-employment restrictions (e.g., non-compete, non-solicitation, anti-raiding, and confidentiality provisions)
- Option to include confidentiality provisions
- Don't *hope* to reach a severance agreement without the considered evidence to terminate
- What if they won't sign? Any severance at all?

An Ounce of Prevention . . .

Termination Provisions in the Employment Agreement

- At-will disclaimer preferred – provides the company greater flexibility when considering termination
  - But, must still insure termination decision is not based on an improper motive (e.g., discrimination or the now very common claim of retaliation)
- For "cause" – the definition of cause is key; narrow language favors the employee and broad language favors the employer
  - Generally, when termination is for "cause," no severance or benefits need be provided to the employee

Example of a Favorable "Cause" Definition

This contract may be terminated by the Company at any time for "cause," including violation by the Employee of any rules, regulations, directives or policies of the Company or Board, for violation of any of the terms of this contract, or for other cause, such as: misconduct; incompetence; inefficiency; insubordination; theft or other dishonesty; intoxication or otherwise being under the influence of controlled substances or non-prescribed drugs, or abuse of prescribed drugs; moral turpitude; conviction of or pleading guilty or *nolo contendere* to any crime or engaging in conduct punishable as a crime; behavior – including off-duty and off-premises behavior – that in the Board's judgment materially detracts from the reputation or image of the Company; or lack of legal qualification.

Example of an Unfavorable "Cause" Definition

'Cause' means the Executive's (i) conviction of, or plea of *nolo contendere* to, a felony; (ii) use of illegal drugs; or (iii) willful and intentional misconduct, willful neglect or gross negligence, in the performance of the Executive's duties; provided, however, that such acts or events shall constitute Cause only if the Executive is given advance written notice that the Company intends to terminate his employment for Cause, which notice shall specify the particular acts or failures to act on the basis of which the decision to so terminate employment was made.

Role of Counsel, if any

- Assess and advise in the gathering of evidence; evaluate witnesses
- Be the bearer of bad news, if necessary
- Help consider the risks of *not* terminating, even if evidence is not as strong, in a safe environment (personality, harassment, morale, e.g.)
- Predict likely costs, risks, and outcomes for Board and terminating executives--in a privileged setting
- Avoid loose emails and other communications
- Assess political will to proceed
- Draft severance, script, suspension, termination, and other documents
- Negotiate pre-suit resolution, if any

Questions?

Carey A. DeWitt
313.225.7056
dewitt@butzel.com

Marc W. Oswald
313.225.7096
oswald@butzel.com

Its Déjà Vu All Over Again: Common and Repeated Employment Law Mistakes

Daniel B. Tukel
313.225.7047
tukel@butzel.com

There are many mistaken but commonly held beliefs about employment law that have been around so long that employees – and sometimes employers – accept them as true

HR Issues

True or False ?

If an employer does not place a document in the designated official "personnel file" it is not considered part of the personnel file and does not need to be provided in response to an employee's request for his or her personnel file.

False

Whether a document is part of a "personnel record" is determined by its potential use, NOT what it is called or where it is maintained

Bullard-Plawecki Employee Right To Know Act

A personnel record includes any document that is used or may affect an employee's "qualifications for employment, promotion, transfer, additional compensation, or disciplinary action."

- Whether a document is part of a "personnel record" is determined by its potential use.
- It is NOT determined by what the file is called, where it is maintained or by whom it is maintained.

Employee rights:

- Review "personnel record"

Employee rights:

- Obtain copy
- Place written response

What Is Not Part of "Employee Record"

- References which identify the person making recommendation
- Information of personal nature about another which is unwarranted invasion of privacy
- Grievance documents kept separately

What Is Not Part of "Employee Record"

- Medical records available from the medical provider
- Materials relating to staffing planning
- Materials relating to an ongoing criminal investigation

True or False ?

"At-will" employees can be terminated for any reason at all.

False

While an at-will employee can be fired for a good reason, a bad reason or even for no reason, he or she still cannot be fired for an illegal reason.

What are Illegal Reasons?

- Membership in a Protected Category:
  - including age, race, sex, national origin, height, weight, religion, disability
- Participation in Protected Activities:
  - including whistle blowing, union activity, discrimination complaint, participating in investigation, filing workers compensation claim
- Public Policy:
  - including refusal to violate certain statutes or regulations

True or False ?

An employer cannot legally respond to reference checks about former employees

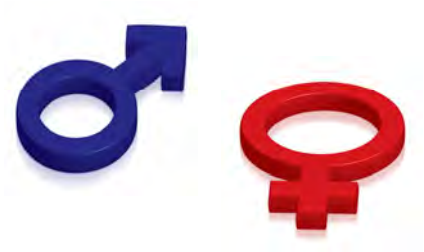
False

It is true that in most cases employers are NOT legally required to respond to reference checks or provide any information

But employers are not legally prohibited from responding truthfully to reference requests

- Job Reference Immunity Statute:
  - Employers are immune from civil liability when they disclose information in response to a request from a prospective employer, which relates to job performance that is documented in the employee's personnel file
- What Should an Employer Do?
  - Establish a consistent policy for responding to reference requests

Discrimination Issues



True or False ?

Illegal discrimination occurs whenever one employee is treated differently than another

False

It is only illegal to treat one employee differently from another based on a "protected status"

"Protected status" includes

- Race
- Gender
- Age
- "Disability"
- Religion
- Height
- Weight
- National origin

Making distinctions among employees based on factors other than "protected status" or "protected activity" is not illegal.

As a practical matter, it is easier to defend decisions which are:

- based on objective, business related distinctions;
- based on consistent and uniform application of policies and practices

True or False ?

Any employee with a physical or mental condition is entitled to have the employer provide an accommodation for that condition.

False

- Only legally required to consider workplace accommodations for protected "disability"
- Accommodation must be requested
- Requested accommodation must be reasonable and not create undue hardship

To have a legally protected "disability," one must have a physical or mental condition which both:

- substantially limits a "major life activity"

and

- is unrelated to the ability to do the job, with or without a reasonable accommodation

Individuals also have a protected "disability" if they:

- Have a record or history of a protected condition

or

- if they are "regarded as" having a protected condition

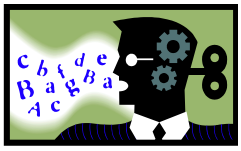
"Substantial Limitation"

- Must be either entirely prevented from activity average person could perform

or

- significantly restricted in manner or duration compared to average person

"Major Life Activities" include:



Speaking

Caring for One-Self

Breathing

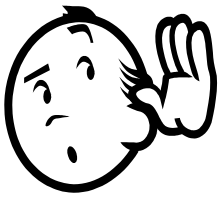
Learning

Performing manual tasks

- Walking

Seeing

- Hearing



- Working

- Concentrating and thinking

- Operation of a major bodily function

Essential Job Functions

- Primary job duties intrinsic to position
- Do not include marginal or peripheral duties
- Job descriptions are important in demonstrating what duties are intrinsic

What is a "Reasonable Accommodation"

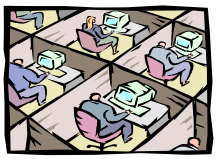
- Must be decided on a case by case basis
- Must be an interactive process with disabled individual
- Not reasonable if creates "undue hardship"

Accommodations may include:

- Physical modifications to permit accessibility
- Physical modifications to workspace
- Job restructuring
- Modification of equipment
- Acquisition of adaptive devices
- Modifying work schedules

What Constitutes an "Undue Hardship"?

- Significant difficulty or expense considering:
- Number of people involved



- Impact on operation of facility

Cost

- Financial resources of employer

- Whether violative of collective bargaining agreement.

True or False ?

Employers are permitted to require all job applicants to pass a physical before they are interviewed, to be sure he or she is able to perform the required job duties

False

Employers are permitted to require pre-employment physicals, but only after a job offer has been made. Pre-offer physicals are prohibited.

- Post-offer physicals are permissible only if all entering employees are required to take such an examination
- The examination itself must be job-related and consistent with business necessity

Wage and Hour Issues

True or False ?

An employer cannot deduct money owed by an employee to the employer from the employee's paycheck without the employee's consent.

True

The Michigan Wages and Fringe Benefits Act prohibits deductions from an employee's paycheck under most circumstances, unless the employee has provided a written consent to do so.

- Consent must be full, free, and written, and must be obtained without intimidation or fear of discharge for refusal to permit the deduction
- Blanket, advance consents are not permitted
- Consent must be executed in pay period in which deduction is to be made

True or False ?

As long as an employee is paid a salary, he or she is not entitled to overtime.

False

Unless an employee is "exempt" he or she is entitled to overtime for work in excess of 40 hours per week.

Who is "Exempt"

To be "exempt," an employee must meet 2 criteria:

1. **The Duties Test**:
   What the employee does; and
2. **The Salary Basis Test**:
   How much and how the employee is paid

Duties test:

- The employee must perform duties that are categorized as exempt under the FLSA. Typically, exempt employees are "executive", "professional", and "administrative" employees as those terms are defined by the FLSA

Salary basis test

- The employee must be paid on a salary basis. Salary is the "receipt of a predetermined amount constituting all or part of compensation, which amount is not subject to reduction because of variations in quality or quantity of work performed."

True or False ?

A non-exempt employee who works more than 8 hours in a day is not entitled to overtime.

True

Overtime is generally only required after 40 hours in a work week. The FLSA does not require an employer to pay overtime for hours worked in excess of a daily maximum or for work performed on Saturdays, Sundays, or holidays.

True or False ?

An employee who was discharged cannot collect unemployment compensation benefits

False

Unless termination occurred for reason disqualified under statute, employees are typically entitled to unemployment benefits

Disqualification:

- Voluntary quit "without good cause attributable" to the employer;
- Discharge for "assault and battery" at the workplace;

- Discharge for "theft“ at the workplace;

Discharge for "willful destruction of property“ at the workplace;

- Discharge for "misconduct"
  - Disqualifying “misconduct” is typically intentional conduct which is contrary to the employer’s interests. Mere poor performance is generally insufficient to constitute “misconduct”.
  - Someone who resigns is generally not entitled to unemployment, unless the resignation was forced or was a “constructive discharge”.

True or False ?

An employer can establish a policy prohibiting employees from disclosing their salaries.

False

Under the Wage and Fringe Benefit Act, it is impermissible for an employer in Michigan to require that employees not disclose wages.

- An employer cannot make non-disclosure of salary a condition for employment
- An employer may not require an employee to sign any document that purports to deny an employee the right to disclose his or her wages.
- An employer may not discipline, discharge, or otherwise discriminate against for job advancement an employee who discloses his or her wages.

True or False

Employers can require direct deposit of wages

True

Wage and Fringe Benefits Act was amended to allow mandatory direct deposit or payroll debit card

Questions?

Daniel B. Tukel
313.225.7047
tukel@butzel.com

Leave Me Alone: FMLA Concerns

Regan K. Dahle
734 213 3268
dahle@butzel.com

Shanta S.W. McMullan
313 225 7079
mcmullan@butzel.com

Understanding and Applying the Post-Amendment Essentials

The Family and Medical Leave Act

The Family and Medical Leave Act provides "eligible" employees up to 12-weeks of job-protected, unpaid leave in a 12-month period.

Health Benefits During FMLA Leave

- During an FMLA leave an employer must maintain the employee's coverage under any group health plan on the same conditions as coverage would have been provided had the employee been continuously employed during the leave period.
- Any share of the premiums paid by the employee prior to the leave must also be paid by the employee during the leave.

Employee Rights Upon Returning from Leave

- On return from FMLA leave, an employee is entitled to be returned to the same position that the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment.
- If the employee is unable to perform an essential function of the position because of a physical or mental condition, the employee has no right to restoration to another position under the FMLA.

12-Month Leave Entitlement Period

- Employer selects the method of calculating the 12-month period, but if it fails to select a method, then the option that provides the most beneficial outcome for the employee will be used.
- Typically, it will be either a calendar year or a rolling 12-month period.

Employee Eligibility

As long as an employee is employed by a covered employer, that employee is eligible to take leave, provided that the employee meets the following criteria:

Employee Eligibility

- The employee has been employed by the employer for at least 12-months (52 weeks);
  - The 12-months do not need to be consecutive although generally employment periods prior to breaks in service in excess of 7 years need not be counted;
- The employee has been employed for at least 1,250 hours during the 12-month period immediately proceeding the leave; and
- The employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

Employee Eligibility

Becoming Eligible While on Non-FMLA Leave

- If an employee meets the 12-month service requirement while on a non-FMLA leave, employee becomes eligible on that date.
- Leave prior to 12-month service date is non-FMLA leave and leave on or after 12-month service date is FMLA leave.

Qualifying Reasons for Leave

- The birth of a child or the placement of a child with the employee for adoption or foster care;
- To care for a family member (child, spouse or parent) with a serious health condition; or
- Because of the employee's own serious health condition that makes the employee unable to do his or her job.

Leave for the Birth of a Child

- A father, as well as a mother, can take leave for the birth of a child.
- Leave due to the birth of a healthy newborn must be concluded within 12 months of the birth and may not be taken intermittently without the employer's consent, unless the baby or mother has a serious health condition that would otherwise qualify the employee for leave.

Leave for the Birth of a Child

- Circumstances may require the FMLA leave to begin before the actual birth of the child. An expectant mother may take FMLA leave for prenatal care.
- An expectant father may take leave to care for his pregnant spouse if her condition amounts to a serious health condition as defined by the FMLA.

Leave for the Birth of a Child

- If a husband and wife work for the same employer, they are entitled to a combined total of 12 weeks of leave for the birth of a healthy newborn or for placement of child for adoption or foster care (also to care for the employee's parent with a serious health condition).
- The employees are entitled to take the balance of leave available for other qualifying reasons.

Leave for Adoption or Foster Care

- An employee may take leave before the adoption or placement if absence from work is necessary for the adoption or placement. For example, the employee may be required to attend counseling sessions, appear in court or meet with the employee's attorney.
- The source of an adopted child is not a factor in determining eligibility for leave. There is also no maximum age limit on a child being adopted or placed in foster care.

Serious Health Condition

An illness, injury, impairment or physical or mental condition that involves:

- any period of incapacity (i.e., inability to work, attend school or perform other daily activities) or treatment in connection with inpatient care (i.e., an overnight stay), or any subsequent treatment in connection with inpatient care; or

Serious Health Condition

- a period of incapacity of more than three consecutive calendar days and any subsequent treatment or period of incapacity relating to the same condition that also involves either:
  - treatment two or more times, generally within a 30-day period, by a health care provider, the first such treatment being in person and within seven days of incapacity; or
  - in-person treatment by a health care provider on at least one occasion within the first seven days of incapacity that also involves a regimen of continuing treatment under supervision of a health care provider; or

Serious Health Condition

- any period of incapacity due to pregnancy or for prenatal care, including when the employee is unable to work due to severe morning sickness; or
- any period of incapacity or treatment for a chronic serious health condition. (*A "chronic serious health condition" is one that requires visits with a health care provider at least 2 times per year, continues over an extended period of time and may cause episodic rather than continuing periods of incapacity.*); or

Serious Health Condition

- a period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective;
- a condition requiring multiple treatments and recovery for restorative surgery after an accident or injury; or
- any condition that would likely cause a period of incapacity of 3 or more days in the absence of medical intervention.

Employee Requests for Leave

- Unforeseeable
- Foreseeable

Employee Request for Foreseeable Leave

- If the leave is foreseeable, an employee must give at least 30 days advance notice, or
- Notice must be given as soon as practicable--normally the same business day or next business day.
- If timely notice is not given, the period of delay counts as non-FMLA absence.

Employee Request for Unforeseeable Leave

- If the leave is unforeseeable, the employee must request the leave as soon as practicable, or
- If the employer has a usual and customary leave of absence notification policy, within such reasonable time frame established in the employer's policy.
- If timely notice isn't given, the period of delay counts as non-FMLA absence.

How Does Employee Request Leave?

- The employee's request can be oral unless the employer has a usual and customary policy on leave notification procedures, provided that such policy does not require more advance notice than the FMLA requires.
- The employee does not need to provide written notice in the case of unforeseeable leave.
- If the employer's policy isn't followed, period of delay counts as non-FMLA absence.

What Information Must Employee Give?

- The first time the employee requests a particular FMLA leave, the employee must provide sufficient information, depending on the situation, for an employer to reasonably determine whether FMLA may apply.
    - **Calling in sick is not enough**
- When subsequently requesting leave for the same FMLA qualifying reason, the employee must specifically reference the qualifying reason or state the leave is FMLA leave.

Employer Notice Requirement

- **General Notice Posting**
- **Eligibility Notice**
- **Rights and Responsibilities Notice**
- **Designation Form**

General Posting Requirement

- DOL has a prototype **General Notice** form (WH Publication 1420) or an employer can develop one if it contains, at a minimum, all of the information in the prototype form.
- Employers must post (hard copy, **electronically**, or both) so that employees & applicants have access to the form; $110 fine for not posting.
- Employers must also distribute form to employees in handbooks or by distributing to each new employee. Distribution can be electronic.

Eligibility Notice Requirement

- **Eligibility Notice** must state:
  - Whether or not employee is eligible for leave; and
  - If not eligible, the notice must give at least one reason why the employee is not eligible.
  - DOL has a prototype **Eligibility Notice** (Part A of Form WH-381) or an employer can develop its own form if it contains, at a minimum, all of the information required by the regulations.

Eligibility Notice Requirement

- Exhaustion of 12-week FMLA entitlement is not a reason for ineligibility.
- An employer would use the Designation Notice to deny leave if the employee has exhausted all available leave time.

Rights and Responsibilities Notice

- DOL has a prototype Rights & Responsibilities Notice (Part B of Form WH-381) or employer can develop its own form. This form must be presented along with the Eligibility Notice.
- The form may be provided electronically.

Rights and Responsibilities Notice

- Rights & Responsibilities Notice must contain specific information as itemized in the regulations:
  - That the leave will count toward the employee's annual FMLA leave entitlement;
  - The applicable 12-month period for leave (i.e., rolling, calendar, etc.);
  - Whether medical certification or other documentation will be required;
  - Whether use of paid time off is required or allowed;

Rights and Responsibilities Notice

- Any requirement that employee make premium payments for health benefits during leave and arrangements for doing so;
- Whether periodic reports on status and intent to return to work are required;
- Whether employee is a "key" employee and consequences of that designation;
- Employee's right to maintenance of health benefits and to restoration to same or equivalent job;
- Employee's potential liability for employer's portion of health premiums if employee fails to return to work.

Medical Certification - Forms

- DOL has **2 medical certification forms** for regular FMLA leave:
  - One for an **employee's serious health condition** (WH-380E), and
  - A separate form for a **family member's serious health condition** (WH-380F).
- As with the other forms, an employer may use the DOL forms or develop its own forms with the same basic content.

Medical Certification

- If required by employer, medical certification must be requested by employer:
  - Within 5 business days after foreseeable leave is requested;
  - Within 5 business days after unforeseeable leave commences; or
  - At a later date, if employer has reason to question the appropriateness or duration of the leave.
- Medical certification and re-certifications must be returned within 15 days after employer's request.

Medical Certifications-Deficiencies

- If returned certification is incomplete or insufficient, which can mean information is vague, ambiguous, or non-responsive,
  - Employer must provide written notice of what specific information is still needed, and
  - Give employee 7 calendar days to cure the deficiencies, unless 7 days is not practicable under the particular circumstances despite the employee's diligent, good faith efforts.
  - Can use Designation Form for this notice to employee.

Medical Certifications-Deficiencies

Consequences for Not Submitting or Curing

- If certification is not returned at all within 15 days and employee has not provided information about his/her diligent, good faith efforts, **leave can be denied.**
- If certification is not returned at all within any required 7-day cure period (and employee has not provided info about his/her diligent, good faith efforts), or is timely returned but does not cure the deficiencies, **leave can be denied.**
- Employer has no obligation to notify an employee that a certification hasn't been received in the 15-day or 7-day periods.

Medical Certifications-Authentication/Clarification

- If certification is incomplete or insufficient, employer's HR staff, leave administrator, a management official, or health care provider may contact employee's doctor directly to authenticate and/or clarify the certification.
- The employee's immediate supervisor may not contact the employee's doctor.

Medical Certification-Statement of Essential Functions

- An employer can provide a statement of the essential functions of the employee's position for the employee's Health Care Provider to review when completing the medical certification.
- The certification must specify what job functions the employee is unable to perform so that the employer can determine whether the employee is unable to perform one or more essential functions of the employee's position.

Medical Certification - Content of Form

Employee's Medical Certification Form:

- If employee is seeking intermittent or reduced schedule leave, HCP provider asked to provide:
  - Information sufficient to establish the medical necessity for the leave;
  - Estimate the frequency and duration of the episodes of incapacity or treatment.
- If employee's leave is covered by worker's compensation, ADA, or disability benefit plan, and additional information is required to determine eligibility, information regarding the ADA or disability benefit leave can be used to determine whether a leave is FMLA-qualifying.

Medical Certifications - Duration

- Medical certification for a particular condition is in effect for duration of leave as specified on the certification.
- If certification indicates that employee needs leave for condition beyond a single leave year (e.g., intermittent or reduced schedule leave), a new certification can be required annually.

Medical Recertification-When is it Allowed?

- Generally, no more often than every 30 days in connection with an absence.
- But 2 significant exceptions:
  - If minimum period of certification is more than 30 days, employer must wait until minimum duration to seek recertification;
  - Employer can also request recertification every 6 months in connection with an absence.
- Also, if minimum duration of condition is less than 30 days, employer can request recertification on employee's request for extension.

Medical Recertification-When is it Allowed?

- When employee requests extension of leave;
- If there is a significant change in leave, such as pattern of absences before/after scheduled days off;
- If there is a longer duration of absences than specified on certification for most recent two or more episodes of incapacity; or
- If employer receives information casting doubt upon employee's stated reason for absence.

Designation Notice

- DOL has a prototype Designation Notice (Form WH-382) or an employer can develop its own form if it contains, at a minimum, all info required by the regulations.

Designation Notice

- For each FMLA-qualifying condition within the 12-month FMLA leave year, employer must give written designation whether leave qualifies as FMLA leave:
- Notice must be provided:
  - Within five business days after acquiring enough information to determine if leave qualifies. Typically this is after return of medical certification.
  - At any later time as long as the employee is not harmed.

Designation Notice

- If leave is FMLA-qualifying, Designation Notice must include:
  - Statement that leave is designated as FMLA leave;
  - Amount of leave counted as FMLA leave if known;
  - Whether paid time off benefits will be used during leave & if so that paid leave will count as FMLA leave;
  - Whether a fitness-for-duty certification (FFD) will be required; and
  - Whether a list or job description of essential duties is attached for HCP to use for FFD.

Designation Notice

- If employer can't determine that leave is FMLA-qualifying because more information is required, employer must notify employee that:
  - Medical certification is incomplete or insufficient, and provide written list of deficiencies and opportunity to cure; or
  - That second or third opinion is being required.
- The Designation Notice can be used for either of those two purposes by completing those sections on the DOL form or an employer can provide its own notice.

Designation Notice

- If leave is not FMLA-qualifying, the employer must notify the employee in writing.
- The written notice may be a simple written statement or employer may use the Designation Notice (Form WH-382), which includes section for this purpose.

Substitution of Paid Leave

- Employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy.
- If employer's policy requires the use of paid leave in a larger time increment than the amount of FMLA leave requested by the employee, then the employee must take the larger increment of leave required under the policy in order to receive pay for the leave.
- This means the entire amount of the paid time counts against the FMLA entitlement.

Substitution of Paid Leave

- Employer and employee may agree that paid leave may supplement disability plan benefits.
- Example: Employee receives STD at 60% and can agree with employer to use accrued paid leave time to supplement to full salary.

Fitness for Duty (FFD)

- Employer may require either:
  - a simple statement that employee is released to work without restrictions or able to perform all essential duties; *or*
  - a written assessment by employee's Health Care Provider that employee is able to perform all essential duties.

Fitness for Duty (FFD)

- **Notice:** Designation Notice must state FFD requirement and the consequences for not providing it.
  - If employer fails to do so, no FFD can be required and employer cannot deny or delay employee's return to work.
- **Content:** Employer may require either:
  - a simple statement that employee is released to work without restrictions or is able to perform all essential duties; *or*
  - a written assessment by employee's HCP that employee is able to perform all essential duties.
    - Based on the statement/job description of such duties provided by employer in or with the designation notice.

✓Practice Pointer: Review job descriptions & develop list of essential functions.

Fitness for Duty (FFD)

- **When**: May be required from employees:
  - **Continuous Leave**: At time employee returns to work from or within 15 days after employee would have returned to work;
  - **Intermittent:** Generally, not permitted unless the employer has a reasonable safety concern
    - Every 30 days (or longer interval) during an intermittent or reduced schedule leave if reasonable safety concerns exist based on the serious health condition for which employee took leave
- A complete and sufficient fitness-for-duty certification is required
- FFD certification can be authenticated/clarified on same conditions as the medical certification

Intermittent Leave

- Intermittent leave is leave taken in separate blocks of time due to a single qualifying reason.
- A reduced leave schedule is a leave schedule that reduces an employee's number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, usually from full-time to part-time.

Intermittent Leave

- Employee who needs intermittent leave or reduced schedule leave for planned medical treatment must "make a reasonable effort to schedule the treatment so as not to disrupt the employer's operations."
- The regulations do not define "reasonable."

Increments of Intermittent Leave

- Employer must account for leave using an increment no greater than the shortest period that the employer uses to account for use of other leave time. This amount cannot be larger than one hour.
- FMLA leave entitlement may be reduced by more than amount of leave taken.
  - Example: If employer allows vacation in ½ day increments and sick time in 30 minute increments, then FMLA must be calculated in 30 minute increments.

The New FMLA Military Leave Provisions

Overview

- What are the two types of Military Family leave?
  - **Qualifying Exigency Leave:** Available to immediate family member of servicemember who is in the national guard or reserves
  - **Care for Injured Service Member Family:** Available to certain family member & next of kin of injured servicemembers

Qualifying Exigency Leave

- **Purpose of Exigency Leave**
  To allow an employee who has a spouse, son or daughter, or parent in the National Guard or Reserves to take FMLA leave due to a qualifying exigency resulting from the covered family member's active military duty (or call to active duty status) in support of a contingency operation.

Qualifying Exigency Leave

- **Amount**: Maximum of 12 weeks during the employer's designated 12-month FMLA leave year
- **Timing**: May be taken continuously, intermittently, or on reduced schedule; employee may not be transferred to alternative job while on leave

Definition of "Qualifying Exigency"

- Includes any 1 or more of the following non-medical, non-routine activities and no others
  1. Short-notice deployment activities;
  2. Military events and related activities;
  3. Childcare and school activities;
  4. Financial and legal arrangements;
  5. Counseling activities;
  6. Rest and recuperation activities;
  7. Post-deployment activities; and/or
  8. Additional activities.

Qualifying Exigencies

- **Short-notice deployment**. To address any issue that arises from a notification to a covered military member of an impending call or order to active duty in support of a contingency operation 7 or fewer calendar days before the date of deployment.
- **Military events and related activities**. To attend to any official military event, family support or assistance program, or informational briefing that is related to the active duty or call to active duty status of the covered military member.

Qualifying Exigencies

- **Child Care and School Activities**. To arrange for alternative child care, provide for child care on an urgent, immediate need basis, enroll or transfer to a new school or day care facility, or meet with staff at a school or day care facility when the change is caused by the active duty or call to active duty status.
- **Financial and Legal Arrangements**. To make or update financial or legal arrangements regarding the covered military member's absence while on active duty or call to active duty status. To act as military member's rep for purposes of obtaining, arranging, or appealing military service benefits while the covered military member is on active duty or call to active duty status and for the 90 days after active duty status termination.

Qualifying Exigencies

- **Counseling**. To attend to counseling by a non-health care provider for the employee, the covered military member, or a covered military member's child that arises from the active duty/call to active duty status.
- **Rest And Recuperation**. Up to 5 days of leave for each instance of rest and recuperation to spend time with a covered military member who is on a short-term, temporary, rest and recuperation leave during the period of deployment.
- **Post-Deployment Activities**. To attend military events for up to 90 days after the termination of the covered military member's active duty status.

Employee Notice Requirements

- An employee must give notice of the need for exigency leave as soon as practicable, depending on the facts and circumstances.
- Same as regular FMLA leave, that is, need only be oral unless employer has a usual and customary policy on leave notification procedures.

Employer Notice Requirements

- The same employer notices required for regular FMLA leave are required for Qualifying Exigency Leave:
  - General Notice
  - Eligibility Notice
  - Rights & Responsibilities Notice
  - Designation Notice
- An employer may require certain types of certification to support a request for exigency leave.

Exigency Certification Form

- DOL has a prototype certification form for Exigency Leave (Form WH-384) or an employer can develop its own if it contains no more information than is permitted by the regulations.

Military Caregiver Leave

Purpose of Caregiver Leave

- To allow an employee who is the spouse, son or daughter, parent, or next of kin of a servicemember in the Regular Armed Forces, National Guard or Reserves (who has incurred a serious injury or illness in the line of duty while on active duty) to take FMLA leave to care for the servicemember.

Eligibility for Leave

Who can take this type of leave?

- Spouse, son or daughter, parent, or next of kin

Eligibility for Leave

- Who is the "next of kin"?
  - The nearest blood relative of a servicemember (other than his/her spouse, parent, son, daughter), in the following priority order:
    - A blood relative designated in writing by the servicemember as his/her nearest blood relative for purposes of caregiver leave
    - Blood relatives granted legal custody of the servicemember by court decree or statutory provisions;
    - Brothers and sisters;
    - Grandparents;
    - Aunts and uncles; and
    - First cousins
- Note: Multiple family members within same level of relationship can all be next of kin and each can take caregiver leave; if there is a designated next of kin, he/she is the only next of kin.

Amount of Caregiver Leave

- Maximum amount of leave is 26 weeks in a single 12-month period on a per-covered servicemember, per-injury/illness basis measured forward from the date an employee first takes caregiver leave (any unused amount is forfeited).
  - Aggravation or complication of an earlier injury/illness is still the same injury/illness.
  - However, multiple leaves may be allowed for different injuries or for injury to different relative.
- During that single 12-month period, caregiver leave is combined with regular FMLA leave and the total cannot exceed 26 weeks.

Timing and Other Terms of Leave

- May be taken continuously, intermittently, or on reduced schedule.
- Employee may be transferred to alternative job if leave is foreseeable and for planned medical treatment.
- The minimum increment rule of 1-hour or less and physical impossibility rule may be applied.
- The use of paid time off rule may be applied (required by employer, and if not, may be elected by employee).

Timing of Request

- **Foreseeable**: same as regular FMLA leave, that is, at least 30-days advance notice or as soon as practicable, normally the same business day or next business day if off work when learns of need for leave.
- **Unforeseeable**: same as regular FMLA leave, that is, as soon as practicable or, if the employer has a usual and customary leave or absence notification policy, within such reasonable time frame as is established in the employer's policy; if timely notice not given, the period of delay counts as non-FMLA absence.

Serious Health Condition

- More broadly defined than "serious health condition" under FMLA
- This means an injury or illness incurred by a service member in the line of duty that may render the member medically unfit to perform the duties of the military office, grade, rank

Employer Notices

DOL has a prototype certification form for Certification of a Serious Injury or Illness (Form WH-385) or an employer can develop its own if it contains no more information than required by DOL form.

Note: In lieu of Form WH-385, employer must accept Invitational Travel Orders or Authorizations to family member to join injured member

Questions?

Regan K. Dahle
734 213 3268
dahle@butzel.com

Shanta S.W. McMullan
313 225 7079
mcmullan@butzel.com

Going Global?
Visa Overview

Bushra A. Malik
Maria Escalante
Jim Bruno
Patricio Iturralde

Global Migration: An Overview

Bushra A. Malik
313.225.7059
malik@butzel.com

Your Employees

- U.S. citizens or foreign national employees in the U.S. travelling or relocating outside the U.S.
- Overseas employees travelling or relocating outside the U.S.

Importance of Visa Planning

- Crucial to plan travel and relocation in advance
- Processing time for citizens of certain countries can be lengthy
- Work visas can take longer to process than business travel visas
- Failure to obtain proper visa can result in
  - Inability of traveler to enter country of destination
  - Fines, deportation, difficulty of obtaining proper visas in the future

Does My Employee Need a Visa?

- Purpose of Travel : Business or Work
  - Nationality of Individual

Permissible Business Visitor Activities

- Common permitted activities include:
- ALL DEPENDS ON THE RULES OF THE FOREIGN COUNTRY
- Attending business meetings
- Sales calls
- After sales service, installation and repair if required by the contract

U.S. Citizens: Business Visitors

- May travel on business without a visa to Canada and most European countries
- Are limited in terms of the nature of business activities and the length of stay without a visa
- Business visas are recommended or required by many countries
- Do require passports to travel internationally

Non U.S. Citizens

- A business visa is required to travel to most countries
- The type of visa depends on several factors:
  - Purpose of travel
  - Nationality of the traveler
  - Destination country
  - Length of anticipated stay
  - Frequency of anticipated travel

Short Term Business Visas

Most common requirements of foreign countries:

- Passport (valid for 6 months)
- Document evidencing status in the U.S.
- Application for a visa
- Photographs
- Letter from employer
- Invitation letter from host company
- Itinerary

Example: Canada

- U.S. Citizens and Permanent Residents; and most Europeans do not require visas for travel for business or pleasure
- Citizens of other countries require visas for travel for business or pleasure

Example: Business Visa for Canada for Citizens of Other Countries

- Documentation Required:
  - Application form
  - Passport and two photographs
  - Proof of continuous legal status in U.S.
  - Proof of purpose of travel to Canada
  - Proof of current employment
  - Proof of funds
- Processing times used to be same day at Consulate in Detroit, but is no longer guaranteed.

Example: Business Visa for China

- Required for U.S. Citizens and most foreign nationals
- Business visa (F visa)
- Tourist visa (L visa)
- Documentation required for visa:
  - Application form
  - Passport
  - 1 photograph
  - Letter of invitation from China (For business visa)
  - Employer Letter (For business visa)
  - Travel itinerary (For expedited processing)
- Processing Time: 2- 6 business days

Example: Business Visa for India

- Required for U.S. Citizens and most foreign nationals
- Documentation Required:
  - Application form
  - Passport and two photographs
  - Proof of residence
  - Invitation letter
  - Employer letter
- Processing Time: 5 business days

Work Permits

Some Countries have multiple step process:

1. Apply for work permit in foreign country
   - Processing times can be lengthy
   - On the ground local assistance required
   - Rules may vary by province/city and are in constant flux
2. Apply for visa at the foreign Embassy/Consulate in the U.S.
3. For some countries, work authorization can be obtained in the U.S. at foreign Embassy/Consulate or at Port of Entry

Example: Canada

- Work Permits can be applied for at Canadian Ports of Entry for Citizens of Countries that do not require visas for Canada (e.g. U.S. or many European Countries)

- Depending on the type of work authorization:
  - Can apply at Canadian Embassy/Consulate (e.g. intra-company transfer or professional)
  - Can be applied for with Human Resources and Development Canada (others)
  - Processing time varies depending on Embassy/Consulate/ HRSDC Office from 1 to 90 days.

Example: Canada

- Intra-company Transfers:
  - Executives, Managers and Specialized Knowledge
  - NAFTA covers citizens of the U.S. and Mexico (3 years)
  - GATS covers many countries from around the world (Limited to 3 months)
- Professionals:
  - Engineers, Scientific Technicians, Management Consultants
  - NAFTA covers citizens of the U.S. and Mexico (3 years)
  - GATS covers many countries from around the world (Limited to 3 months)
- Temporary Foreign Workers –Test of the Canadian labor market and may require recruitment

Example: China

- Multiple Step Process (Varies by city in China)

1. In China obtain Employment License
2. In China obtain Z (work) visa invitation
3. Apply for Z visa at Chinese Embassy/Consulate in the U.S.
4. After arrival in China apply for Employment Permit
5. After arrival in China apply for Resident Permit

- Processing time total: 24 days
- Exception: Can use business visa if working for less than 90 days and continue to be paid in the U.S.

Example: India

- Employment Visa can obtained at Indian Embassy/Consulate in the U.S.
- Documentation Required:
  - Application form
  - Passport and two photographs
  - Proof of residence
  - Appointment letter
  - Contract
  - Resume
  - Indian organization's registration
  - Tax liability letter
  - Justification letter
- Processing time: 5 business days

International Relocation

- Expatriate Agreements
- Transportation of Household Goods/ Customs
- International Health Insurance
- Tax Issues
- Work Authorization
- Work Visa
- Residence Permit

Foreign Legal Counsel

How Has Butzel Long Managed International Transfers for than a Dozen Countries?

- Affiliate Offices Abroad
- Lex Mundi
- AILA Global Migration Attorney Referrals
- Existing Relationships with Foreign Counsel

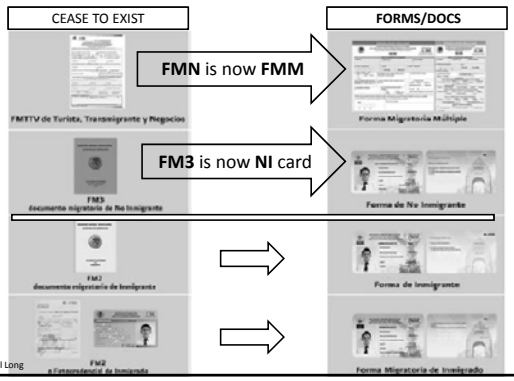
Mexican Immigration Rules

María Escalante
(55) 52 86 13 08
maria.amparo@gilya.com

No Mexican Visa Required

- Up to date: All foreign citizens (**regardless of their nationality**) that wish to enter Mexico for **tourism, business or in transit**, that hold a valid U.S. visa, may enter Mexico without a Mexican visa, presenting the U.S. visa and passport valid for at least six months.
- Visa Waiver Countries and U.S. Permanent Residents (Green Card holders) will continue to enjoy the benefit of entering Mexico without a Mexican visa regardless of their citizenship.

Since May 1st 2010



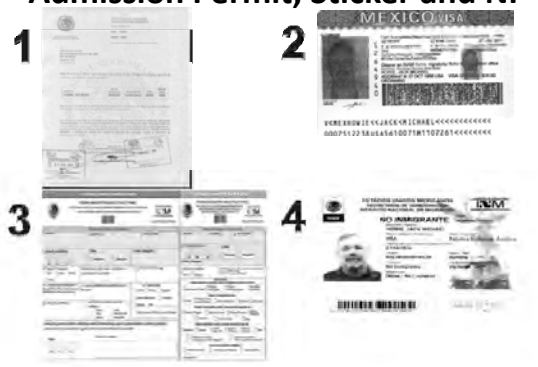
FMM

- The **FMM** (*Forma Migratoria Múltiple*), is required for every entry into Mexico (regardless of the point of entry, purpose of trip or length of stay).
- Return the **FMM** to immigration officials when leaving Mexico (air/land) to prove timely departure and/or to avoid fines,
- **OR** exchange for an appropriate immigration visa (e.g., "NO INMIGRANTE").

Visas

- Non Immigrant Visa NI
- Replaced the **FM-3**.
- **Required if staying in Mexico for more than 180 consecutive days or working in Mexico.**

Admission Permit, Sticker and NI



Immigration Process

- If the foreign national (and family if applicable) are entering Mexico to work, he/she needs to exchange the FMM at the National Immigration Institute (INM) for a "NO INMIGRANTE" visa **within 30 days** of his/her entry into Mexico.
- The processing time is (approximately) **4 WEEKS**, during which the foreigner can **NOT** leave Mexico.

Approved Activities Resolution

- The activities authorized by the INM will be described in an Official Resolution issued by INM.
- The authorized activities can be for: work related activities and/or to act as legal agent for a Mexican entity.
- NOTE: since the "NO INMIGRATE" visa does not indicate the authorized activities, it is important to carry a certified copy of their Official Resolution at all times.

Exit and Entrance Permit

- An **Exit and Entrance Permit** ("Permit") is required the foreign national needs to leave while their NI Visa is processing.
- The Permit must be requested 72 hrs before the departure from Mexico.
- The Permit is generally valid for 60 days.
- The foreign national has 10 days from the re-entry date to return the Permit for the visa process to continue.

Fines

- If the visa is not exchanged or renewed before the expiration date (except if the foreign national is out of Mexico).
- Performance of non-authorized activities.
- Lack/late notice to INM about change of (i) activity, (ii) domicile, (iii) civil status and/or (iv) nationality.
- Non-Compliance of requirements found during INM inspections and/or audits.
- Fines: $230-$3,850 USD / up to 18 months imprisonment.

New Immigration Law

- On May 25, 2011 the Mexican Government published a new Immigration Law which will take effect once the Mexican Government publishes its corresponding Rule.
- The rule is required to be published within 180 days, but we expect the Government to go beyond this date.

New Visas

- In accordance with the new Immigration Law, the new categories for visas in Mexico will be the following:

(i) Visitor Visa without authorization to render lucrative activities
(ii) Visitor Visa with authorization to render lucrative activities
(iii) Visitor Visa for Adoption purposes
(iv) Temporary Residence Visa
(v) Temporary Residence Visa for Students
(vi) Permanent Residence Visa

Note: The criteria for the above will be published in the new Rules.

Primer on Expatriate Agreements for Mexican Assignments

James C. Bruno
313.225.7024
bruno@butzel.com

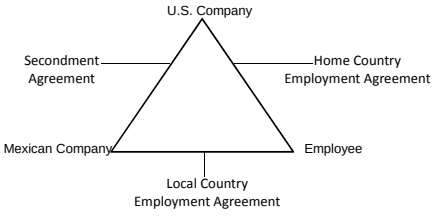
(10/21/11)

Major Issues

- Contractual Structure
- Contractual Employment Relations
- U.S. Tax Issues
- Mexican Tax Issues
- Tax Equalization

Thus, some issues overlap with what others are presenting today.

Contractual Relationships



- U.S. (or German, etc.) Company and Team
  - A. HR
  - B. Accounting
  - C. Labor, Immigration, Benefits Lawyer
  - D. US/Host Country Tax Preparer

Host Mexican Company and Team
- A. HR
- B. Accounting
- C. Tax Preparer
- D. Labor, Immigration Lawyer

Employee and Team
- A. Counsel
- B. Accountant (company furnished?)

Secondment Agreement Terms

- Establishes relationship between Host and U.S. Companies.
- Establishes responsibility and control (important for Permanent Establishment issue).
- Limitation on Employee authority.
- Responsibility for intercompany liability payment of compensation and expenses to Employee.
- Allocation of costs (visa, moves, etc.) between the Companies.
- Responsibility for withholding and paying taxes.
- Other.

Contractual Employment Issues in Home Country and Host Country Employment Agreements (Too Many Issues to Discuss)

1. *Identity of "Employer" and reporting relationship – there will be by law a dual employment relationship.
2. *Dates of Employment – match Visa dates.
3. *Title and duties – match Visa.
4. *Restrict Powers in Mexico on Behalf of Foreign Entity to avoid P.E.
5. *Compensation – Salary and Bonus (based on U.S., Mexican, worldwide, or other performance metrics). (Where Paid?)
6. Car.
7. Vacation.
8. *Holidays – local and/or U.S.
9. *Computer, telephone and other equipment services.

*Indicates specific to International Agreements.

Contractual Employment Issues (continued)

10. Life and Disability Insurance.
11. *Health Insurance – Maintain on U.S. policy or separate private Mexican policy, emergency airlift) coverage.
12. COBRA payments during waiting period.
13. *Visa costs (employee and family).
14. *Transportation in Mexico.
15. *Maintenance in U.S. 401(k) plan with matching.
16. Expense reimbursement (credit cards and policies).
17. Expenses for maintaining U.S. residence or support in selling U.S. Residence.
18. *Storage of household furniture, goods and vehicle.

*Indicates specific to International Agreements.

Contractual Employment Issues (continued)

19. *Length of Secondment.
20. *Post-Secondment employment guarantee. (Provide a minimum return.)
21. *Guaranteed period of Secondment.
22. *Pre-Secondment Familiarization Travel.
23. *Home trips for Employee and family.
24. *Temporary lodging.
25. *Foreign Service Premiums.
26. *Hardship pay.
27. *Cost of Living.
28. *Schooling.

*Indicates specific to International Agreements.

Contractual Employment Issues (continued)

29. *Separate allowance for housing.
30. *Form and location of payment.
31. Severance pay.
32. *Reimbursement of costs by Employee who leaves early.
33. *Withhold post-employment benefits until release signed in favor of U.S. and Mexican entities.
34. *Require maintenance of U.S. and/or Host Country bank account.
35. *Waive of Host Country and Host Company benefits (perhaps not effective).

*Indicates specific to International Agreements.

Contractual Employment Issues (continued)

36. Maintenance of records of Employment.
37. Confidentiality – U.S.-style provisions effective.
38. Transfer of Inventions – U.S.-style provisions effective and restates the law as to employee obligations.
39. *Non-Competition – U.S.-style provisions not generally effective without additional consideration. Place in the U.S. Employment Agreement.
40. *At time of termination waiver of or refund to local law termination remedies as a condition of post-secondment return and benefits.
41. Jurisdiction.
42. *Tax Equalization Policy.

*Indicates specific to International Agreements.

U.S. Tax Issues

- U.S. Citizens, Permanent Residents, and 183-day Residents taxed on worldwide income.
- U.S.-Mexican tax treaty provides relief from "double taxation" for income taxes.
- No U.S.-Mexican "totalization agreement" results in double employment taxes.
- U.S. Citizens and Permanent Residents want to continue to pay into U.S. Social Security and Unemployment Insurance Funds.
- W-2 and Mexican reporting (federal and state) for all monies paid by U.S. Company.

Mexican Tax Issues

- All compensation for work in Mexico subject to Mexican income tax regardless as to paymaster (U.S. or Mexican entity).
- Company cost of Mexican employment taxes are approximately equal to 25% of income and employee pays 10%.
- Withholding and employment taxes must be paid by a company registered in Mexico (i.e., the Mexican affiliate).

Tax Equalization Policy

- Estimate total taxes payable by Employer as though all Company-related income received in U.S. which is Responsibility of Employee.
- Employer pays any excess.
- Employer provides tax accounting service.
- Host Company withholds and pays taxes to Host Country on "Phantom" Host Company compensation.
- Employee pays taxes on "personal" (non-Company related) income at the higher marginal rates.
- The employee withholding by U.S. Company is only an estimate of the hypothetical tax with year and true-up.
- The Company (U.S. and/or Mexican) pays the actual tax on Company related compensation and international assignment benefits.

Simplified Tax Equalization

1. Compute tax employment income in U.S. before transfer ("Goal").
2. Compute compensation necessary to equal Goal after payment of U.S. and Mexican taxes.
3. Determine amount withheld in U.S.
4. Determine amount withheld in Mexico.
5. Company pays or provides funds to pay balance owed to Mexico and U.S. at the end of the year.
6. Company receives any tax refund if excess funds received by Mexico or U.S.

Summary
What are the Best Practices?

- Accept that it is costly.
- Complicated and requires discussion and negotiation with employee.
- Requires coordination with U.S./international tax preparer.
- Mexican and U.S. legal issues need to be cleared with U.S. and Mexican counsel.
- Goal – Reduce surprises and have a productive employee.
- Butzel Long can assist in coordinating client, employee, accountant, and host country attorney activities and drafting agreements.

[1101386.2]

Labor Issues in Mexico

Patricio Iturralde
(55) 52 86 13 08
patricio.iturralde@gilya.com

Labor Relationships

- Labor relationships are established regardless of the existence of a written labor agreement.
- Labor relationship exists when there is subordination and dependency.
- Subordination: employee follows the directions and engages in the activities of the employer.
- Dependency: existence of economic dependency on the employer.
- Once labor relationship is established the whole set of provisions of the Labor Law will apply to employer and employee, and employee may not waive them.

Labor Agreements

- Written Labor Agreements will be essential to define rights, obligations and employment terms (i.e. schedules, work place, scope of employee's activities, confidential information, overtime, etc.)
- Labor Agreements for Definite Term to test out employees are not recognized under Mexican Labor Law.
- Labor Agreements for Definite Term shall be tied to a specific task to be valid, rather to a specific time period.
- Otherwise, Labor Board will consider the labor relationship as for indefinite term.
- Most of the Labor Agreements in Mexico are set for indefinite term.

Labor Agreements (cont. 2)

- Consecutive series of Labor Agreements for definite term even if tied to specific task will be considered as an indefinite term by the Labor Board.
- Work Offer Letters by Parent Company to work in Mexican subsidiary are not recommended and can create additional liabilities for Parent Company.

Salary and Benefits

- Under Labor Law, an employee should receive at least a minimum general daily wage which currently is $59.82 Pesos (approx. $4.60 Dollars) and minimum statutory fringe benefits.
- In practice, few employers pay as low as the minimum daily wage.
- Fringe benefits include:
  - Annual vacation, at least 6 working days to be compensated at 125% of salary;
  - Annual (Christmas) bonus of at least 15 days of salary;

Salary and Benefits (cont. 2)

- Fringe benefits include (cont):
  - Profit sharing: 10% of pretax earnings to be distributed among employees other than certain high officers;
  - Variable payroll contributions for Social Security and Workers Housing.
- Social Security contributions go up to 22.6% based on payroll salary and Workers Housing are 5% on payroll salary.
- Other benefits customarily granted by employers:
  - Savings Fund
  - Car Allowance (Gas Coupons)
  - Food Coupons
  - Life and Medical Insurance

Termination and Severance

- For payment of severance, a distinction is made between (i) termination without or with fair cause and (ii) termination by mutual agreement.
- Termination without Fair Cause – The term “fair cause” is narrowly defined basically to include significant violations by employees of employment terms.
- Fair cause must be evidenced in order for employees to rely on it.
- Burden of the proof is on employer.
- If claimed, and not otherwise specified in written Labor Agreement, employee could claim up to 3 hours per day of overtime for time over corresponding shift (day, night and mixed).

Termination and Severance (cont. 2)

- Documenting termination of labor relationship: (i) Resignation or (ii) Labor Termination Agreement.
- For high rank employees recommended to ratify termination before Labor Board.
- No at-will employment (even for managers).
- Severance Payment:
  - Three months of integrated salary
  - Twenty days of integrated daily salary for each year of employment
  - Fringe Benefits
    - Proportional share of vacation
    - Proportional share of annual bonus
    - Proportional share of profit sharing
  - Salaries accrued from date of termination to date of payment of severance.

Termination and Severance (cont. 3)

- In event of termination without fair cause, the terminated employee will have the option of demanding reinstatement (n/a for confidential employees).
- If reinstatement not accepted by employer, payment of 12 days of integrated daily salary per year of employment as seniority premium.

Unions

- Unionized industrial companies are common – identify the cooperative "white" union.
- More formalized – union agreements and settlements must be recorded with Labor Board.
- If company does not have a Union, any union can challenge the rights to enter into a Collective Bargaining Agreement with the company through the Labor Board.
- The Collective Bargaining Agreement with the Union will be negotiated and revised once a year.
- Confidential employees will not belong to any union

Labor Leasing Companies

- Possible use of unrelated labor leasing companies with substantial fees (approx. 30%).
- Services Agreement must be entered into between Operating company and the labor leasing company.
- If labor leasing company does not have sufficient economic means, the Operating company will be considered as jointly liable for its obligations to its employees. (substitute employer)
- Operating company receiving services of third party's employees may be considered as employers (benefits receiver).
- An indemnity clause from labor leasing companies must be included in Services Agreement.

Expats

- Ex-Pats working in Mexico as Non Immigrant with powers and title in Mexican subsidiary can be considered as employees by Labor Board even if paid by Parent Company in US.
- Could originate labor contingency in Mexico, independently of labor relationship in US.
- Services Agreement between Mexican subsidiary and Parent Company is recommended to minimize risk of labor lawsuit by Ex-Pat in Mexico.
- Ex-Pats usually tend to file labor lawsuit in Mexico, rather than in US, since amount of Mexican severance package is higher per law.

Questions?

Bushra Malik
Maria Escalante
Jim Bruno
Patricio Iturralde

How Can A Non-Union Employer React To The NLRB's Efforts To Increase Unionization?

Craig Schwartz
248.258.2507
schwartz@butzel.com

Gary W. Klotz
313.225.7034
klotz@butzel.com

2010 Seminar Prediction

- In 2011, Obama NLRB will overrule Bush NLRB decisions, expand union and employee rights, and may administratively implement EFCA-like ideas

What Has Happened In 2011?

- Obama NLRB has overruled Bush NLRB decisions
- Obama NLRB has expanded union and employee rights
- Obama NLRB seeks to administratively implement EFCA-like ideas
- Department of Labor seeks to impose reporting burdens on employers that obtain advice and assistance to remain union-free

Today's Topics

- NLRB Decisions
- Proposed NLRB Regulations
- Proposed DOL Regulations
- How to Remain Union-Free In The Current Environment

NLRB Decisions

- *Specialty Healthcare*, 357 NLRB No. 83 (2011). NLRB will order an election in any unit sought by a union which the Board deems "appropriate," (even for employees in a single classification) even though the unit only represents a small portion of the employer's workforce.

- *The Guard Publishing Co. d/b/a The Register-Guard,* 357 NLRB No. 27 (2011). Board suggests that it will likely adopt the position that if an employer permits employee use of its e-mail system for non-business communications, it cannot restrict use of the system for union organizing and other NLRA protected activities.

- *Hyundai America Shipping Agency,* 357 NLRB No. 80 (2011). Employee handbook provision instructing employees that information or messages from the employer's e-mail, instant messaging or phone system should only be disclosed to "authorized persons" deemed unlawful.

- *Jurys Boston Hotel,* 356 NLRB No. 114 (2011). Decertification election results set aside based upon the employer's maintenance of employee handbook policies unlawfully restricting solicitation, loitering and wearing of buttons and emblems.

NLRB Regulations

- "Notification Of Employee Rights Under The National Labor Relations Act"
- Proposed "Representation Case Procedures"

Notification Of Employee Rights Under The NLRA

- Final rule – August 30, 2011
- Effective date – November 14, 2011
- Postponed effective date – January 31, 2012
- Litigation challenging regulation may result in an injunction before January 31, 2012

Notification Of Employee Rights Under The NLRA

Reason for Regulation?

- Majority – To educate employees about their NLRA rights. The "low percentage of employees who are represented by unions" is one reason why a "knowledge gap could exist"
- Dissent – The regulation seeks "to reverse the steady downward trend in union density among private sector employees"

Notification Of Employee Rights Under The NLRA

- All private sector employers – union and non-union – subject to the NLRB's jurisdiction must post it
- 11" x 17" poster
- If an employer "customarily" posts personnel rules and policies" on an "internet or intranet site," the employer also must post the NLRB notice on that site

- If 20% or more of the employees "is not proficient in English and speaks a language other than English," the employer must post the notice "in the language the employees speak"
- If the workforce "includes two or more groups constituting at least 20% of the workforce who speak different languages, the employer must provide the notice in each such language"

Notification Of Employee Rights Under The NLRA

Contents Of Notice – Employee Rights

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.

- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union
- Strike and picket, depending on the purpose or means of the strike or the picketing
- Choose not to do any of these activities, including joining or remaining a member of a union

Notification Of Employee Rights Under The NLRA

Contents Of Notice – Employer Unfair Labor Practices

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms

- Question you about your union support or activities in a manner that discourages you from engaging in that activity
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity

- Threaten to close your workplace if workers choose a union to represent them
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances
- Spy on or videotape peaceful union activities and gatherings or pretend to do so

Notification Of Employee Rights Under The NLRA

- Contents Of Notice – How To File An Unfair Labor Practice Charge

Notification Of Employee Rights Under The NLRA

Consequences Of Non-Compliance

- Failure to post the notice is an unfair labor practice
- Failure to post the notice may "toll" or suspend the 6-month statute of limitations for an employee's filing of an unfair labor practice charge
- Failure to post the notice may be evidence of an employer's illegal motive in a case in which motive is an issue

Proposed "Representation Case Procedures" Regulation

Current Election Procedures

- NLRB conducts election within 38 days (2010 median)
- Unions win 67.6% of representation elections (2010)

Proposed "Representation Case Procedures" Regulation

Reason For Changing Current Procedures?

- Majority – "Remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation"
- Dissent – "Minimize or . . . effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining"

Proposed "Representation Case Procedures" Regulation

Proposed Changes Include:

- Union can file election petition electronically
- Pre-election hearing would start 7 days after a hearing notice is served
- Employer must "immediately" post the NLRB's Initial Notice to Employees of Election

- Employer must file, by the hearing date, a Statement of Position on numerous issues about the election, the bargaining unit, and the eligible voters
- The Statement of Position must list the names, work locations, shifts, and job classifications of all employees in the proposed bargaining unit. The employer must also provide the NLRB with the employees' telephone numbers, e-mail addresses, and home addresses

Proposed "Representation Case Procedures" Regulation

- If the eligibility or the inclusion of less than 20% of the unit is in dispute, those employees shall be permitted to vote subject to challenge
- Employer must post Final Notice to Employees of Election
- Within 2 days after the direction of election, the employer must submit electronically to the NLRB and the union a list of names, home addresses, telephone numbers, e-mail addresses, work locations, shift, and job classifications of all eligible voters
- Review of pre-election rulings would not occur until after the election

Proposed "Representation Case Procedures" Regulation

Effect – "Quickie" or "ambush" elections

- Shorten the time between the filing of the election petition and the election date
- Reduce employer opportunity to educate its employees and to campaign
- Increase unions' ability to win elections

Proposed DOL Interpretation Of "Persuader" Reporting

Current:

- No obligation to report, by either employer or lawyer/consultant, advice or materials provided by lawyer or other consultant to "persuade" employees whether to unionize, as long as the lawyer/consultant has no direct contact with the employee

Proposed DOL Interpretation Of "Persuader" Reporting

DOL Proposal:

- Obligation to report, by both employer and lawyer/consultant, of activities that exceed mere advice and have a direct or indirect object to "persuade" employers whether to unionize, even without any direct contact with the employees

Proposed DOL Interpretation Of "Persuader" Reporting

DOL Proposal

- Examples of reportable "persuader" activity –
  - Drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees
  - Drafting, revising, or providing a speech for presentation to employees
  - Drafting, revising, or providing audiovisual or multi-media presentations for presentation, dissemination, or distribution to employees

- Drafting, revising, or providing website content for employees
- Planning or conducting individual or group employee meetings
- Developing or administering employee attitude surveys concerning union awareness, sympathy, or proneness
- Training supervisors or employer representatives to conduct individual or group employee meetings

- Coordinating or directing the activities of supervisors or employer representatives
- Establishing or facilitating employee committees
- Developing personnel policies or practices
- Deciding which employees to target for persuader activity or disciplinary action
- Conducting a seminar for supervisors or employer representatives

Proposed DOL Interpretation Of "Persuader" Reporting

Effects of DOL Proposal:

- Cause employers to limit their use of labor relations experts to help remain union-free, in order to avoid a reporting duty
- Cause labor relations experts to limit their services to help employers remain union-free, in order to avoid a reporting duty
- Inhibit employer efforts to persuade employees to remain union-free

How To Stay Union-Free When The NLRB Wants To Increase Unionization?

The Truth About Unionization

- What an employer does to stay union free is more important than what a union does to organize your employees
- Unions do not organize employees
- Employers cause their employees to seek or to be receptive to a union
- Employers can prevent union organizing

The Causes of Unionization

- Supervisory treatment of employees
- Job insecurity
- Poor communication
- Lack of recognition and appreciation
- Uncompetitive wages and benefits

The Prevention Of The Existence Of The Causes Of Unionization In The Workplace

- Create a positive workplace
- Treat employees so that they feel valued and secure
- Build a "One Company" team environment
- Persuade employees that a union is not needed

The Commitment To Remain Union-Free

- Staying union-free must be the company's top human resource goal
- All human resource policies and practices must help the company stay union-free
- Any human resource policies and practices and any supervisors/managers who do not help the company stay union-free should be changed or replaced

Specific Actions To Stay Union-Free

#1: Adopt A Union-Free Plan

- Implement a formal plan for staying union-free
- Audit the results annually
- Update the plan annually

Specific Actions To Stay Union-Free

#2: Oppose Unionization

- Publish a union-free policy in the employee handbook
- Review union-free policy in new employee orientation and other meetings
- Educate employees about unions

Specific Actions To Stay Union-Free

#3: Educate Your Supervisors/Managers About Unions

- Ensure that supervisors/managers understand and are committed to the union-free policy
- Enable that supervisors/managers can explain and act out the union-free policy

Specific Actions To Stay Union-Free

#4: Train Supervisors/Managers How To Provide Positive Leadership

- Supervisory skills
- Communication skills

Specific Actions To Stay Union-Free

#5: Ensure That Management Is Visible, Engaged, And Available

- Management by walking around
- Open door policy: Door is always open

Specific Actions To Stay Union-Free

#6: Communicate With And Listen To Your Employees

- Problem solving procedure
- Regular news about the business
- Periodic meetings
- Newsletter
- Suggestion box
- Exit interviews

Specific Actions To Stay Union-Free

#7: Maintain Positive Employee Morale

- Recognize positives – "Catch employees doing something right"
- Celebrate

Specific Actions To Stay Union-Free

#8: Make Your Employees Your Business Partners

- Engage employees in decisions that affect them and their work areas
- Promote a team culture, not an "us" versus "them" culture

Specific Actions To Remain Union-Free

#9: Maintain A Good Work Environment

- Provide training, supplies, equipment, and supervisory support so employees can do their jobs effectively
- Maintain cleanliness and safety

Specific Actions To Stay Union-Free

#10: Conduct Periodic Employee Opinion Surveys

- Find out what employees really think
- Provide employees with a means to communicate directly with management
- Identify and solve problems

Specific Actions To Stay Union-Free

#11: Conduct Periodic Wage And Benefit Surveys

- Determine whether compensation is competitive
- Review wages and benefits based on the survey results

Specific Actions To Stay Union-Free

#12: NLRB-Proof Your Employment Policies

- No solicitation/no distribution
- Bulletin board
- Access to property
- Work rules

Specific Actions To Stay Union-Free

#13: Review And Edit Your Employee Handbook To Ensure That It Is Consistent With The Positive, Pro-Employee, Union-Free Commitment

- Is it reader-friendly?
- Is it legalese-free?
- Is its tone positive?
- Does it convey the message that the company is a good place to work?

Specific Actions To Stay Union-Free

#14: Conduct A Human Resources/Union Vulnerability Audit

- Employment policies and practices
- Hiring policies and practices
- Discipline/discharge practices
- Wage and benefit policies and practices
- "Bargaining unit" issues

Questions?

Craig Schwartz
248.258.2507
schwartz@butzel.com

Gary W. Klotz
313.225.7034
klotz@butzel.com

The 10 Percenters: Handling The Problem Employee

John P. Hancock, Jr.
313.225.7021
hancock@butzel.com

Poor Performance is Pervasive

- *Estimates are that the U.S. is wasting over a $100 billion dollars a year because of poor performance.*
- *23% of U.S. employees believe their colleagues are incompetent.*

Lawrence Karsh, SHL
American Survey of 700 executive in seven countries

Why Worry About Problem Employees?

- 70% of your time as a supervisor or HR manager will be spent dealing with 30% of your employees.
- Coaching difficult or poorly performing employees is probably a manager's least favorite task but probably most important.

- Increasing personal productivity through successful ~~management~~ coaching of problem employees is the best result a supervisor or HR manager can have.
- The vast majority of employment discrimination lawsuits involve a problem employee.

How to Recognize a Poor Performer/Problem Employee

1. She is on a first name basis with all of your EAP counselors.
2. The employees she supervises would follow her anywhere but mostly out of morbid curiosity as to where she is going.
3. When he once showed up for work on a Friday and on time, he received a standing ovation.
4. His last performance review contained the word sucks seven times.
5. His nickname at work is Deadwood.

What is a Problem Employee?

- ❑ They are indifferent
- ❑ Frequently takes risks and makes mistakes
- ❑ Confused about their responsibilities and goals
- ❑ Does poor quality work and doesn't realize it
- ❑ Forgetful
- ❑ Poor attitude or lack of motivation
- ❑ Skills don't match their tasks
- ❑ Unclear about the vision, mission, and/or strategy of the employer
- ❑ Consistently ignores customer needs (internal or external)
- ❑ Has pattern of ignoring clear responsibilities
- ❑ Refusal to improve work processes

What is a Problem Employee

- ❑ Is not engaged
- ❑ Lack of sense of purpose
- ❑ Blames others
- ❑ Listens poorly
- ❑ Rejects others views
- ❑ Exudes negativity
- ❑ Treats others poorly

What Not to Do

- Managers come up with all manner of creative ways to avoid dealing with performance issues head on. Here is a list of many of the actual wrong methods that have been used.

What Not to Do

1. **Teambuilding.**
   Instead of dealing with the one bad apple, drag the entire work group through "teambuilding" sessions with the hope that the poor performer will be "outed" and fixed.
2. **Assessments.**
   Instead of simply confronting the employee, have the employee take a battery of assessments in the hope that they will figure it out for themselves.
3. **Call HR.**
   Hire an HR person to take care of all employee disciplinary problems so managers don't have to bother. Blame HR if individual doesn't improve.

What Not to Do

4. **Transfer the poor performer.**
   Pass the poor performer off to some other ~~sucker~~ colleague.
5. **Training.**
   Ask the training department to fix the poor performer. Blame the training department if the employee doesn't improve.
6. **Hire someone else to do their job.**
   I'm not making this up – It happens all the time. But wait, there's even a more ludicrous option, you can….
7. **Promote them, but not often.**
   Really. It happens. Shocker.

What Not to Do

8. **Delegate it to another employee.**
   Ask someone else on your team to "mentor" the problem performer. It would be a good "development opportunity", thus killing two birds with one stone. Blame the mentor if the employee doesn't improve.
9. **Delegate up.**
   Have Mom or Dad deal with it. Blame Mom and Dad if the employee doesn't improve.
10. **Work around the performance issues.**
    Otherwise known as "playing to their strengths". In other words, strip all the hard parts of the job away until the poor performer can handle it.
11. **Wait for retirement.**
    Either yours or the poor performers.

What Not to Do

And when all else fails, just stick your head in the sand and hope it all goes away. It won't, but while you're waiting, the morale and performance of your entire team will be dragged down like an anchor.

What to Do

1. Dealing with a poor performer has to be one of the hardest responsibilities of a manager.
2. Great managers confront performance issues head on realizing they are the coach of the team.
3. They provide constant feedback both positive and negative.
4. They provide support coaching, counseling and, when all else fails, a good manager fires underperformers.
5. You don't manage a poor employee you coach and engage them.
6. An employee reports to a supervisor but a coach is responsible for and supports her employees.
7. Employees do not care how much you know until they know how much you care.

Mission of a Supervisor

- The mission of a supervisor must be to make it easier for the supervised employees to achieve excellent performance of their tasks.

The Essence of Coaching

1. Allowing behavior without respectful feedback is unacceptable.
2. We teach what we allow.
3. Feedback is in person and one-on-one (not telephone and no e-mail, no-groups.
4. Feedback, to be effective, must be frequent, friendly, focused and fearless.

Motivating Your People

- To inspire your people to excel, your supervisor needs to help them find meaning and pride in their work and to feel productive on the job.

- They also have to be able to encourage and reinforce those personal qualities that enhance an employee's performance such as optimism, personal and collective responsibility and dedication to values of their own and the company.

- Managers need to make their people aware of the importance of their jobs and how their lack of performance hurts the company.
- Managers need to be readily accessible and available.
- Managers need to empower their employees to meet their standards but be flexible about how they get it done.

- Employers need to make sure supervisors have the tools, skills and support to carry out their task.
- Once you make sure your supervisors have everything they need to succeed, then you can start dealing with the problem employee.

Rehabilitation

- Put yourself in the mood
  - Acknowledge employee is an asset and worth saving
  - Commit to the project
  - Attitudes are contagious. Make sure you have the right one before your start this process.
  - Remember, you are trying to improve and motivate this employee, not simply get rid of them.

Determine What is the Problem

- Inability to perform job – lack of training - attitude
- Handicap to accommodate
- Substance abuse problem
- Personality Conflict
- Personal problems

Strategies to Follow

- Problem employees need to be coached carefully. Sometimes the issues are small and can be resolved quickly; in other instances more serious intervention may be necessary. Consider the following strategies as you think about the best way to handle what are quite typical issues in the workplace.

- **Don't allow the problem to fester.** The longer you wait before confronting the employee, the greater the possibility for serious damage. Neglecting the issue can only make it worse. It's best to deal with the problem soon after it arises.

- **Customize the discipline or action.** No two problem employees are alike, which means that the consequences for their behavior – whether it's being late to work, rude to colleagues, and/or poor performance – need to be catered to the specific issue.

- **Be clear.** Often, the problem employees are completely oblivious to their behavior. Indeed, when you do confront them they may be surprised, It is crucial that you not only have documentation that lays out the problem, but that you are also able to clearly and succinctly articulate the issues.

- **Talk about it.** Talking might seem obvious, yet it's easy to neglect one of the easiest management tools around. Sometimes the problem may be rectified after a brief conversation. In other cases, however, you might need to discuss an issue over a longer period of time. Just as no two people are the same, no two problems are identical.

- **Write it down.** Documenting problems and disciplinary issues is essential. You've heard of the "paper trail," and without it you may find it difficult to establish a history of problem behavior.

- **Consider additional training.** Many times problems arise because people simply don't know how to do their jobs. Additional training can help. But before you dole out money for a workshop make sure you know what needs correcting. Does the employee need to be more organized? Would a business writing course enhance this individual's communication skills. Perhaps a full day of computer training might minimize the problem. In any case, make sure the employee's skills are compatible with the assigned work.

- **Provide steady feedback.** Paying attention to a problem and then attending to it is the most important part of the job as a manager. It is essential to give your employees feedback. Without proper feedback an employee is unlikely to know if he or she is making progress. But don't overdo it; too much might come across as micromanagement.

- **Be prepared.** Even the most diplomatic managers will face obstacles if they are unprepared for the myriad personnel problems that typically arise in the workplace. You may be accused of being a cynic, but know your problems; it will save you time and aggravation when they do arise (and they will). Know the distinctions, too. Having a bad attitude is different -- and perhaps not as easy to fix – from delivering sloppy work.

Attitude Problems

- The only way to solve an "attitude" problem is with –
  1. A deep religious conversion
  2. Years of psychoanalysis
  3. Lobotomy

  We are trying simply to redirect the actions, not eliminate the attitude.

Dealing with Attitude Problems

- Commit to communicate with porcupines
- Identify and understand causes
- Identify actions caused by attitude
- Quantify why behavior is objectionable
- Tell employee actions are inappropriate

Employee Recognition

- Never forget an employee is more than a pair of hands. Employees have a heart and a mind. In other words, they have feelings and intelligence.

Employee Recognition

- Create a habit of meaningful recognition.
- Enhance communication.
- Foster genuine connections with your employees.
- Build a culture of positive recognition.
- What gets recognized and rewarded gets done.

Employee Recognition

- Recognize ordinary abilities
- Recognize the employee's extra efforts
- Reinforce positive behavior of employees
- Recognize that subordinate's are programmable
- Recognize the employee's feelings
- Recognize and utilize employees' intelligence
- Never insult an employee's intelligence
- Don't make comparisons

The Power of Employee Recognition

- Employees who are recognized regularly:
  - Increase their personal production
  - Maintain happier customers
  - Engage their colleagues
  - Feel more committed
  - Have a stronger sense of purpose

Turn Mistakes Into Training Opportunities

- Treat errors and mistakes as opportunities
  - For additional training
  - Not for punishment

Avoid Blind Rage

- Never act in anger
- Delay is best remedy for anger
- Give yourself time to calm down and think it over

Try Not to Humiliate Your Subordinate

- Explain the rationale for your decision face to face
- Give your employee the opportunity to correct his or her own actions

Be a Good Listener

- Develop good listening skills
  - Listen intently and with empathy
  - Recognize that everyone has a universal need to be heard and understood
  - Get details and take notes
  - Show you understand the situation
  - Openly present your position
  - Decide on specific follow-up
  - Thank employee for bringing matter up

Steps to Active Listening

- Learn to want to listen
- Develop and use receptive posture
- Stay focused on the speaker
- Ask for more information
- Do not interrupt

Steps to Active Listening

- Respond to the speaker
- Control your hot buttons
- Listen between the lines to what is unsaid

How to Receive Feedback

- Breathe
- Listen
- Increase questions
- Acknowledge valid points
- Make concessions
- Take ownership
- Commit to behavioral contract

Recognize Your "Hot Buttons"

- Don't bring your personal problems to the project
- Patience is part of the process
  - Don't be too patient
  - Patience is not inertia

Coaching Means Communication

- Make your employees aware
  - Tardiness – Employee must be on job by _____
  - Anger – "I expect no more outbursts"
  - Non-productive – "You are expected to produce _____

Coaching Means Communication

- Make your employee aware
  - Not a Team Worker – "You are expected to be cooperative and productive."

Criticizing a Subordinate's Work

1. Attitude
   Think of yourself as a teacher or coach not a judge and jury. Be willing to absorb a little anger without retaliating. It is not easy to take criticism submissively.

2. Preparation
   Make sure your list of criticisms is accurate and detailed – you don't want this to turn into a debate over facts. Have specific suggestions and advice ready to help the employee improve their performance.

Criticizing a Subordinate's Work (cont'd)

3. Timing
   It should take place as soon as possible after a problem arises so it is fresh in everyone's mind. If you can, schedule it for early in the week so the employee has a chance to act on your advice right away and won't have to dwell on it over a week-end.

Criticizing a Subordinate's Work (cont'd)

4. Behavior

   Lead off with positive comments so the meeting, hopefully, doesn't seem as if it is one-sided. If the employee won't get past his initial anger or denial, forget subtlety and make it clear their future is at stake unless they clean up their act.

Criticizing a Subordinate's Work (cont'd)

- Strategy
  1) Delivering criticism requires a delicate touch. You need to present the problem strongly enough so the employee gets the message and hopefully changes his or her behavior but not so strongly that you undermine his or her confidence or create lingering resentment.
  2) The best way to accomplish this is to start with positive comments before delivering the criticism.

Criticizing a Subordinate's Work (cont'd)

3) If the information is received openly, reaffirm your confidence and set up a future meeting.

4) If the employee disputes your perception or gets angry, give him or her a chance to get over reflexive defensiveness by offering specifics.

5) If that doesn't calm them down, stop pulling your punches and make it clear his future depends on improved performance.

Coach the Underachiever

- Describe problem in friendly manner
- Ask employee to help solve problem
- Discuss causes of the problem
- Identify and write down solutions
- Indicate consequences if no improvement
- Agree on follow-up date

Effective Follow-up Action

- Review previous discussions
- Indicate insufficient improvement
  - Discuss possible solutions
  - Indicate consequences if no improvement
  - Agree on action to be taken
  - Indicate confidence in employee

Maintain Improved Performance

- Describe improved performance
- Explain importance of improvement
- Listen to employee's comments
- Ask if there's anything you can do to make job easier
- Thank employee for improvement

Reasons Supervisors Fail

- Supervisor chosen without regard to necessary traits
- Supervisors never forget they were once not supervisors
- Supervisors get caught up in paperwork and forget their job is to supervise people
- Supervisors lack confidence and hide out to avoid conflict
- Supervisors adopt a "my way or the highway" attitude (two ways of doing this – my way and the wrong way)

Thank You!

Questions?

John P. Hancock, Jr.
313.225.7021
hancock@butzel.com

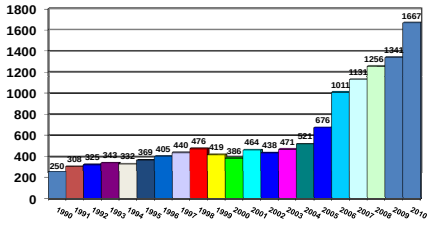
The Best Things in Life are Free:
Wage and Hour Laws Decoded

Robert A. Boonin
734.213.3601
boonin@butzel.com

Minimum Wage Update

- 14 states, including Michigan, and the District of Columbia have minimum wages greater than the current federal minimum wage of $7.25 per hour
  - Michigan's minimum wage is $7.40
  - For a chart summarizing the minimum wages and basic payroll rules of each state, see attached

Number of Reported FLSA Court Decisions (1990-2010)



FLSA Trends (cont'd)

- Until 2010, the DOL used opinion letters as an official way to provide employers with compliance guidance.
  - That system has been abandoned, and now on general "Administrator Interpretations" are occasionally provided

But…..

- Meanwhile, there are new enforcement initiatives
  - 250 New Investigators
  - Independent Contractors
    - Bills pending in Congress
    - IRS Amnesty Campaign
  - "Plan/Prepare/Prevent" Initiative
  - Media Campaigns

"We can help…."

Attacks on "Unpaid Interns"

- Unpaid interns in for-profit private sector jobs are employees subject to minimum wage and overtime rules
  - An apparent exception applies to non-profit and public employers
  - Basis of another media campaign

Interns (cont'd)…

- For a trainee or intern to be excluded from FLSA's coverage, all of the following criteria must be met:
  - The internship, even though it includes actual operation of the facilities of the employer, must be similar to training which would be given in an educational environment;
  - The internship experience is for the benefit of the intern;
  - The intern does not displace regular employees, but works under close supervision of existing staff;
  - The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
  - The intern is not necessarily entitled to a job at the conclusion of the internship; and
  - The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Newest FLSA Amendment

- Included in the new Patient Protection and Affordable Care Act (aka "Obamacare")
  - An amendment to the FLSA
  - Effective March 23, 2010
- A reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk
- A place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

The Amendment also states that…

- Employers are not required to compensate employees receiving reasonable break times for expressing milk
- It's not applicable to employers employing less than 50 employees if complying would –
  - "impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."
- It does not supersede state laws providing greater benefits or protections
  - AR, CA, CO, CT, GA, IL, ME, MN, NM, NY, OK, OR, RI, TN, VT, and the District of Columbia

Rules are forthcoming….

- Request for Information Published December 21, 2010
  - Should nursing mothers receive compensation for break time of 20 minutes or less?
  - What is considered a "reasonable break time"?
  - What "space provided to the nursing mother for expressing breast milk" is adequate and meets the requirements of the statute?
  - What would be considered "reasonable notice" to the employer of an employee's intent to take breaks to express milk?

Other wage and hour rules on the horizon….

- "Right to Know Under the Fair Labor Standards Act."
  - Proposed rules were expected to be published in April 2011.
  - Under the proposal, when it finally reaches the surface, it is anticipated that -
    - Employers will be required to provide greater disclosure for each pay on how each employee's pay is computed (including deductions); and
    - Employers will be required to create, maintain and make available to the DOL a "classification analysis" for each person classified as either
      - An exempt employee under the FLSA, or
      - An independent contractor

"Bridge to Justice"

- Collaboration between the DOL and ABA
- Launched December 10, 2010
- Referrals of cases not to be pursued by DOL

The latest DOL contribution….

Consequence of Errors

- Amount of unpaid overtime for past 2-3 years (depending on statute of limitation)
- Liquidated damages equal to the amount of unpaid overtime
- Attorneys fees for prevailing employee's attorneys
- Fines, interest and possible criminal sanctions

FLSA Overview

- Overtime pay is due
  - To all "non-exempt" employees
  - For all hours actually "worked" over 40 in a workweek
  - At the rate of 1.5 times the employee's "regular hourly rate" of pay

FLSA Overview (cont'd)

- The broadest exempt group of employees are certain "white collar" employees
  - Executives
  - Administrative employees
  - Professional employees
  - High level computer-related occupations
    - Provided they are paid a salary of at least $455 per week or a wage of at least $27.63 per hour
  - Outside sales employees

FLSA Overview (cont'd)

- Most white collar exemptions require the employee to:
  - Meet the applicable "duties tests" of the exemption
    - If white collar and paid at least $455 per week salary, and the employee's total non-discretionary compensation is at least $100,000 per year, then only one exempt "duty" needs to be met
  - Be paid at least $455 per week (the "salary level test")
  - Be paid a salary on a "salary basis" (the "salary basis" test)

Wage and Hour Compliance

Common Errors

1. Misclassifying Employees as Exempt

- Administrative Employees
  - Production vs. Staff
    - Only staff can be exempt administrative employees
  - Primary duty is performing office or nonmanual work related to the employer's management or general business operations, or those of a customer
  - As a part of their "primary duties" the employee must exercise **"independent judgment and discretion"** with respect to **"matters of significance"**

Functional areas likely to be related to management & general operations

Tax	Research
Finance	Safety and Health
Accounting	Human Resource Mgt.
Auditing	Training and Development
Quality Control	Employee Benefits
Purchasing	Labor Relations
Procurement	Public Relations
Advertising	Government Relations
Marketing	Insurance

Guidance on Discretion & Independent Judgment

- **Does the employee:**
  - Have authority to formulate, affect, interpret, or implement management policies or operating practices
  - Carry out major assignments in conducting the operations of the enterprise
  - Perform work that affects business operations to a substantial degree, even if assignments are related to operation of a particular segment of the business
  - Have authority to commit the employer in matters that have significant financial impact

Guidance on Discretion & Independent Judgment (cont'd) . . .

- **Does the employee:**
  - Have authority to waive or deviate from established policies and procedures without prior approval
  - Have authority to negotiate and bind the institution on significant matters
  - Provide consultation or expert advice to management
  - Plan long or short-term business objectives
  - Investigate and resolve matters of significance on behalf of management
  - Represent the institution in handling complaints, arbitrating disputes or resolving grievances

Misclassifying Employees (cont'd)

- Problem classifications
  - Mortgage loan originators
  - Help desk employees
  - Paralegals
  - Customer service representatives
  - Administrative assistants
  - Insurance adjusters

Misclassifying Employees (cont'd)

- Professional Employees
  - Primary duties must be in area requiring specialized higher education and the consistent exercise of discretion and judgment
    - Law
    - Medicine
    - Engineering
    - Teaching
    - Psychology
    - Science
    - Social Work
  - Problem classifications
    - Accountants
    - Stock brokers
    - Entry level engineers

Misclassifying Employees (cont'd)

- Executives
  - Problem classifications
    - Assistant managers
    - Low level supervisors
- Outside Sales Employees
  - Problem classifications
    - Pharmaceutical sales reps

2. Violating the "Salary Basis" Rule

- In order to be exempt, most white collar employees must be paid at least $455 per week on a salary basis, i.e., they must be paid a predetermined fixed amount each workweek without regard to the quantity or quality of work performed in the week.
  - Rule does not apply to:
    - Doctors
    - Lawyers
    - Teachers
    - Employees in highly skilled computer related occupations earning at least $27.63 per hour

Salary Basis Rule (cont'd)

- Permissible Deductions
  - Personal days of one day or more
  - Sick days of one day or more, if pursuant to bona fide time off plan
  - Setoffs for jury, witness or military duty
  - Suspensions for violating "safety rules of major significance"
  - Suspensions of one day or more for violating written workplace conduct rules
  - Prorations for initial or terminal weeks of employment
  - Time missed due to FMLA leave
  - Partial days missed by public employees (in certain circumstances)

Salary Basis Rule (cont'd)

- NOTE: Under the FLSA, it is permissible to dock PTO and similar leave banks for partial days missed, so long as the employee's pay is not docked for the partial day missed
  - Some states prohibit this practice as to exempt employees under state law

Salary Basis Rule (cont'd)

- **Note:** Exposure to liability for misclassifications can be significantly reduced if an employer has an adequate "safe harbor" policy
  - Must notify employees in writing as to the employer's general salary basis obligations
  - Must provide a written complaint procedure
  - Must promptly correct errors identified and promise not to repeat errors

Salary Basis Rule (cont'd)

Common question….

Due to the current economic conditions, we're reducing our production schedule from 5 to 4 days per week. We expect this to last for at least the next two calendar quarters? Without jeopardizing the exempt status of my salaried employees, can I -

A. Cut their pay by 20%?
B. Cut their pay by 20% and their workweek by one day?
C. Force them to use their PTO days for the day off per week?
D. All of the above
E. None of the above

Wage and Hour Compliance

- Ability to modify salaries prospectively
  - A bona fide reduction in an employee's salary does not preclude a salary-basis payment as long as the reduction is not designed to circumvent the requirement that the employees be paid their full salary in any week in which they perform work.
  - *Wage & Hour Opinion Letter*, February 23, 1998
    - But see, *Wage and Hour Opinion Letter*, March 6, 2009

3. Off-Clock Time

- Failure to pay for all time worked by not properly recording all work time
- Work during meal breaks and rest periods must be counted as work time

Off-Clock Time (cont'd)

The donning and doffing problem….

Employee's shift begins at 8 a.m. Her workday begins when –

A. At 7:45 when she walks into the plant and puts on safety glasses and hard hat?

B. At 7:50 when she puts on protective boots and coveralls?

C. At 8:00 when she gets to her work station?

Off-Clock Time (cont'd)

The continuous workday problem….

Employee logs in and checks emails at 7:30, then drives 1 hour to work, and gets to his desk at 8:30, his normal starting time. His workday begins:

A. At home, when he checks emails, and his commute counts as work?

B. At home, when he checks emails, but his commute does not count?

C. When he starts working at 8:30, at his desk?

Off-Clock Time (cont'd)

- The workday includes….
  - "The period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period."
  - "A principal activity is one that's *integral and indispensable* to the job."
- Pre- and post-shift activities which are integral to employee's principal job constitute compensable work time
  - These are "preparatory" and "concluding" activities
    - As distinguished from "preliminary" and "postliminary" activities, which are not compensable
- Work during meal breaks and rest periods must be counted as work time

Off-Clock Time (cont'd)

Warning!!

- Problems abound regarding compensation for employees checking e-mails or logging in from home
  - This is "work time", if not *de minimus*
  - This may also cause what would otherwise be a noncompensable commute become a compensable commute
- Bottom line….
  - Too often employers fail to pay for all time worked by not properly recording all work time

4. Compensatory Time

- Practice is to allow employees working overtime in one workweek to take 1.5 times that time off in other workweek(s)
- This practice is not permissible as to nonexempt employees in the private sector
- Comp time is permissible on a limited basis in the public sector
  - 240 hours for non-public safety employees
  - 480 hours for public safety employees

5. Miscounting Travel Time

- General rule
  - All time traveling in the course of a day of work is compensable (other than normal commute)
- Exception
  - Only applies to travel entailing an overnight stay if
    - No work is performed while traveling, and
    - The traveling occurs during non-normal work hours, even on days normally not working

6. Miscounting Training Time

- Attendance at training programs during or outside normal working hours is compensable, unless:
  - Time is outside of normal working hours;
  - Attendance is absolutely voluntary;
  - Program is not directly related to job; **and**
  - No productive work is performed during the training

7. Miscalculating the Regular Rate of Pay

- Employers must roll-into base rate most pay premiums **before** calculating overtime rate.
- Therefore, the regular rate includes extra pay such as:
  - Shift premiums
  - Lead employee premiums
  - Dirty work premiums
  - Non-discretionary bonuses
  - Commissions
  - Piece rate payments

Regular Rate of Pay (cont'd)

- Non-discretionary bonuses, commissions, and other occasional payments must be rolled-into the regular rate of pay for the period applicable to the payment, even if paid monthly, quarterly, annually, etc.
  - A bonus is "discretionary" if both the fact that a payment will be made and the amount of payment is determined at or near end of the period, in the employer's sole discretion

Regular Rate of Pay (cont'd)

– Nondiscretionary bonuses generally include:
  - Productivity bonuses
  - Attendance bonuses
  - Longevity bonuses

Regular Rate of Pay (cont'd)

- Retroactive recalculation of regular rate of pay must occur upon the making of each such payment unless the payment is a percent of **all** compensation provided during the period

Recalculation Hypothetical

$500 Bonus (or Commission) for Quarter….

Straight Time:
520 hrs. x $10 = $5,200

OT:
90 hrs. x $15 = $1,350

Total hours = 610

Total base comp = $6,550

Calculation of additional pay due:

$500 bonus (or commission) ÷ 610 hours = $0.82 increase to hourly rate for all hours worked

$0.41 is due per overtime hour: $0.41 x 90 hrs. = $36.90

Regular Rate of Pay (cont'd)

Is this a problem lurking over the horizon?

At the end of each year, we cash out all accrued but unused vacation days and sick days.

A. The employees' regular rates of pay have to recalculated for the value of the vacation days and sick days, and the employees are entitled to more overtime pay for the OT worked during the year

B. The employees' regular rates of pay have to be recalculated for the vacation days, only, and the employees are to entitle to more overtime pay for the OT worked during the year

C. The employees' regular rates of pay have to be recalculated for the sick days, only, and the employees are to entitle to more overtime pay for the OT worked during the year

D. None of the above

Thank you

Robert A. Boonin
734.213.3601
boonin@butzel.com

WAGE & HOUR DEFENSE
INSTITUTE

STATE-BY-STATE WAGE AND HOUR LAW SUMMARY

www.wagehourdefense.org

L|C|A

updated 6/1/2011

ABOUT THE WAGE & HOUR DEFENSE INSTITUTE

The Wage & Hour Defense Institute (WHDI) of the Litigation Counsel of America is comprised of highly talented and experienced wage and hour defense attorneys from across the United States.

Wage and hour litigation, and in particular class and collective actions brought under the Fair Labor Standards Act (FLSA) and companion state laws, has increased significantly in recent years. With increased frequency, litigation has been brought challenging an employee's status as exempt from the FLSA's requirements to pay overtime and minimum wage. Jury verdicts and settlements have fueled the trend, as employees have recovered large amounts of money – often millions of dollars – based on allegations that employers misclassified them as exempt from the FLSA's overtime and minimum wage requirements. So too, in recent years, there has been increased litigation by employees claiming that they were forced to work "off the clock" and to miss meal and rest breaks, engage in pre-shift or post-shift work, or even work at home without regular rate of pay for the purpose of paying overtime compensation. Employees whose pay includes tips or commissions bring a special set of problems as well. As employees often attempt to band together in class and collective actions, the exposure in these cases can be extremely significant.

The new wave of wage and hour litigation has also seen an increase in lawsuits brought alleging misclassification as independent contractors, a complex issue given to the interwoven state and federal employment and tax laws. Here too, misclassification could result in class actions with individuals seeking unpaid wages, overtime, and benefits.

The WHDI serves as a nationwide network and meeting ground for top-tier practitioners to engage in professional development in what has become a highly nuanced area of the law, and also to become an established resource for employers on wage and hour matters. Each member was selected for membership in the WHDI based on his or her individual skills and experience representing management in the defense of wage and hour litigation. WHDI members also actively counsel employers on classification determinations and payroll practices so as to proactively avoid litigation, using tools such as "audits" to examine an employees' classification as exempt or non-exempt or whether certain activities are compensable or non-compensable and whether overtime has been properly calculated.

The Institute holds periodic conferences, meetings and colloquia for purposes of advancing defense techniques, methods and approaches, and broadening its members' role and influence in wage and hour law and policy.

The WHDI is a part of the Litigation Counsel of America, and all WHDI Members are Fellows of the LCA.

For more information regarding the WDHI Members, News and Publications, and its Blog, go to www.wagehourdefense.org.

updated 6/1/2011

WHDI STATE BY STATE WAGE HOUR LAW SUMMARY

(Updated as of June 2011)

Jurisdiction	Follows Current Federal Exemption Rules	Applies Old Short Test for Exemption[3]	Applies Old Long Test for Exemption[5]	Applies Special State Tests for Exemption	Uses Special Overtime Rules	Minimum Wage Higher than Federal Minimum[16]	Acceptability of Fluctuating Work Week Method for Calculating Overtime[21]	Meal and Rest Period Rules
Alabama	♦						Yes	
Alaska	♦			♦[18]	Over 8 *(A.S. 23.10.060)*	$7.75 *(A.S. 23.10.065)*	No	None for employees age 18+
Arizona	♦					$7.35 (adj. ea. Jan. 1) (A.R.S. 23-264(A))	Not resolved	
Arkansas	♦	♦					Yes	
California				♦[6]	1.5x after 8 and for 1st 8 on 7th day; 2x over 12 and over 8 on 7th day	$8.00 $9.92 in San Francisco (adj. ea. Jan. 1)	No	10 min. rest/4 hours and near middle; 30 min. meal after 5 hours, by 6th hour and a second meal break after 10 hours[22]
Colorado				♦[13]	Over 12 per workday or over 12 consecutive	$7.36 (adj. ea. Jan. 1) *(7 CCR 1103-1)*	Yes *(Division of Labor Advisory Bulletin, section 39(I))*	10 min. rest/4 hours; 30 min. meal after 5 hours[20]
Connecticut		♦[4]			Holidays and weekends	$8.25	Not resolved	30 min. meal if over 7.5 hours, but not w/in first and last 2 hours of shift

WHDI STATE BY STATE WAGE HOUR LAW SUMMARY

(Updated as of June 2011)

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Delaware	♦ *(19 Del. Code § 901(3))*						An unsettled question; state law has provided no specific endorsement or rejection	
District of Columbia	♦[1]					Minimum wage set by the FLSA plus $1 *(DC Minimum Wage Act, 32-1003)*	Not resolved	
Florida	♦				Over 10 (for manual laborers) *(Fla. Stat. § 448. 01(1), (2))*	$7.31 *(Fla. Const. art 10, § 24)*	Yes	
Georgia	♦						Yes	

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Hawaii			♦ (FLSA covered employers must comply with higher $455/week salary) *(Haw. Admin. Code. § 12-20-2 - 5)*	♦[7,9] No state computer exemption; non-FLSA covered employers have state supervisory exemption based on $210/week salary *(Haw. Admin. Code § 12-20-4)*			Not resolved	None for employees age 16 & over
Idaho	♦ *(Id. Code Ann. § 44-1504)*						Not resolved	
Illinois	♦[15] *(820 ILCS 105/4a)*				Day of rest required each week *(820 ILCS 140/2)*	For employers with 4+ employees $8.00 (eff. 7/1/09) *(820 ILCS 105/4)* $8.25 (eff. 7/1/10)	Yes *(56 Ill. Adm. Code 210.430(f))*	20 min. meal break required after 5 hours if work day is at least 7.5 hours *(820 ILCS 140/3)*

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Indiana	♦ *(Burns Ind. Code. Ann. § 22-2-2-3(n))*				Various exceptions for statutorily prescribed wage and hour terms that can be included in CBAs or employment contracts *(Burns Ind. Code. Ann. § 22-2-2-4(m)-(w))*		Not resolved	
Iowa	♦						Yes	
Kansas	♦				Over 46 and on holidays		Yes	
Kentucky	♦ *(803 KAR 1:070; KRS 337.275, 337.285)*				All hours worked on 7th consecutive day *(KRS 337.050)*		Yes *(803 KAR 1:060(4)(c))*	10 min. rest/4 hours; reasonable meal break (30 mins.), btwn. 3rd and 5th hour *(KRS 337.365, 337.355; 803 KAR 1:065)*

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Louisiana	♦						Yes	
Maine	♦[1,2]					$7.50	Not resolved	30 min. rest/6 hours, unless nature or work allows frequent breaks
Maryland	♦				48 hour workweek applies to employees of bowling alleys and residential care facilities. Most nurses may not be required to work overtime *(R. 3-420,421)*		Not resolved	Retail employees must receive break based on shift length[23]
Massachusetts	♦[1]					$8.00	Not resolved	30 min. meal in workday of at least 6 hours
Michigan		♦[14] *(MCL § 408.384a)*				$7.40 *(MCL § 408.384)* $2.65 for tipped employees	Yes *(Fakouri v. Pizza Hut, 824 F.2d 470 (6th Cir. 1987))*	Under 18 must receive 20 min. break after 5 hours

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Minnesota		♦		*MSA 177.23 Rules 5200*	Over 48 *(MSA 177.25)*		Yes	Paid break after 4 hours; meal if work 8 hours
Mississippi	♦						Yes	
Missouri	♦ *(R.S. Mo. Stat 290.505(3))*				Seasonal & amusement / recreational employees receive overtime over 52 hours/week *(R.S. Mo Stat. §290.505(6))*		Yes *(R.S. Mo. Stat. § 290.505(3))*	
Montana		♦ *(Mont. Code Ann. § 39-3-406(1)(j); Mont Adm. R. 24.16.201-206)*				$7.35	Yes *(Mont. Adm. R. 24.16.2512)*	
Nebraska	♦ *(Neb. Rev. Stat. § 48-1202)*						Yes	30 min. meal, off premises, during normal lunch hour for certain industries (*Neb. Rev. Stat. § 48-212)*

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Nevada				♦[10]	Over 8 if employee earns less than 1.5 times minimum wage *(N.R.S. 608.018)*	$8.25[17] *(Nev. Const. art. 15, sec. 16)*	Not resolved	10 min rest/ 4 hours, near middle; 30 min. meal/ 8 hour shift
New Hampshire	♦						Not resolved	30 min. meal after 5 hours
New Jersey			♦ *(N.J.A.C. 12:56-7.1)*				Not resolved	
New Mexico				♦[11]	Holidays	$7.50	No	
New York	♦[19]						An unsettled question; but authority exists which suggests that practice is accepted	1 hour meal at normal meal time for factory workers; most other workers – 30 mins. if shift is in excess of 6 hours and meals are at designated times depending on shift worked

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North Carolina	♦ *(N.C. Gen. Stat. 95-25.14)*				Seasonal amusement or recreational establishment employees are entitled to overtime only for hours in excess of 45 per workweek *(N.C. Gen. Stat. 95-25.4)*		Yes	None for employees age 16+
North Dakota				♦[12] *(ND Admin Code 46-02-07-01)*			Not resolved	30 min. meal/ shift greater than 5 hours when employee on duty *(ND Admin Code 46-02-07-02)*
Ohio	♦ *(ORC Ann. § 4111.03(3)(d))*					$7.40 $3.70 for tipped employees *(ORC Ann. § 4111.02)*	Yes *(ORC Ann. § 4111.03(A))*	Under age 18 must receive 30 min. break after 5 hours
Oklahoma	♦						Yes	None for employees age 16+

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Oregon				♦[9]	In mfg., over 10 hours, not more than 13 hours/ day	$8.50 (adj. ea. Jan. 1)	Yes	10 min. rest/4 hours, near middle; 30 min. meal req'd if workday more than 6 hours: bw 2nd and 5th hr for workdays less than 7 hours; bw 3rd and 6th hr if workday more than 7 hrs
Pennsylvania		♦ *(34 Pa. Code § 231)*		No state computer exemption			Not resolved	
Rhode Island	♦[1]					$7.40	Not resolved	20 min. meal every 6 hours, or a 30 min. meal every 8 hours
South Carolina	♦						Yes	
South Dakota	♦						Yes	
Tennessee	♦						Yes	30 min. meal/6 hours (*TCA § 50-2-103)*

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Texas	♦						Yes	None for employees age 18+
Utah	♦						Yes	
Vermont	♦[1]					$8.15 (adj. ea. Jan. 1) and on holidays	Not resolved	Reasonable breaks required.
Virginia	♦						Not resolved	None for employees age 16+
Washington		♦ *(RCW 49.46.030(2)(a))*	♦ *(RCW 49.46.010(5)(c))*	♦ FLSA covered employers must pay $455/week & meet the more favorable test as applicable *(RCW 49.46.010(5)(c), 49.46.030(2)(a), and & Wa. Admin. Code 296-128-500 through 540))*	Hourly nurses generally can't be req. to work OT *(RCW 49.28.130 through .150)*	$8.67 (adj. ea. Jan. 1) *(RCW 49.46.020)*	Yes, under Wa. Min. Wage Act, but open question re: use as remedy in misclassification cases	10 min. rest/4 hours near middle; 30 min. meal between 2nd and 5th hour *(Wa. Admin. Code 296-126-092)*

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West Virginia				♦[9]	Various forms of premium rate compensation are not included in the regular rate as long as premium rate is at least 1 1/2 times the regular rate; such as work in excess of 8 hours/day or 40 hours/ week; work on Saturday, Sunday, or holidays; work on a regular day of rest; work on 6th or 7th days of work week. Generally employees cannot be forced to work overtime. (*W. Va. Code § 21-5C-3-7)*		Not resolved	20 min. meal/ 6 hour shift (*W. Va. Code § 21-3-10(a))*; for 24 hour shifts employer and employee can agree to unpaid meal/rest periods of up to 8 hours

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Wisconsin			♦[18] *(DWD 274.04)*				Not resolved	recommended 30 min. break near normal meal time, and employee must be able to leave premises if unpaid *(DWD 274.02(2))*
Wyoming	♦						Not resolved	

[1] These states generally follow the duties and salary basis tests under the FLSA's rules, but they have not adopted the new highly compensated method for being deemed exempt.

[2] In Maine, all exempt employees must be paid on a salary basis. Also, Maine has a separate exemption test applicable to sales employees.

[3] These jurisdictions generally apply the old federal short tests for determining exempt status. While the new standard test under the FLSA and the old short test are very similar, some employees gained exempt status under the new rules. In these jurisdictions, those employees exempt statuses should be carefully reviewed since the local rule still will control. Employees reclassified as nonexempt under the new federal rules should be treated as nonexempt.

[4] Connecticut's minimum salary level requirement is $475.00. Also, the state does not permit exempt employees to be subject to disciplinary deductions for violations of workplace conduct rules.

[5] These jurisdictions have overtime rules that follow the old federal long tests for the executive, administrative, professional and outside sales exemptions. Because the new federal regulations, like the old federal short tests, may classify some employees as exempt who would not be exempt under the old federal long tests, employees in these jurisdictions must satisfy the exemptions under both state and federal laws to be treated as exempt.

[6] Salary must be at least $2,752/month ($33,024/year), and exempt duties must constitute more than 50% of the employee's time. Highly skilled computer employees paid on an hourly basis must be paid, as of January 2010, at least $37.94 per hour, or a salary of $6,587.50 per month or 79,050.00 per year. The minimum rates for computer employees are adjusted each January 1. Physicians may be paid on an hourly basis if paid at least $69.13 per hour (a rate which adjusted each January 1). Half-time premium under a "fluctuating workweek" arrangement is not permissible.

WHDI STATE BY STATE WAGE HOUR LAW SUMMARY

(Updated as of June 2011)

[7] Under state law, executives and creative professionals must exercise independent judgment and discretion in order to be exempt. Employees who are guaranteed at least $2,000 per month, though, are not subject to the state law.

[8] Disciplinary deductions from salaried exempt employees are prohibited in Montana.

[9] State rules are similar to the old federal "long test", but the percentage of time the employee may perform non-exempt work varies from the old federal rule (as well as from state-to-state).

[10] State follows the tests in the new federal rules as to all white collar classifications other than professionals.

[11] State follows the tests in the new federal rules as to all white collar classifications other than executives and outside sales employees.

[12] North Dakota follows the new federal rules as to the executive and administrative exemption only. Otherwise, it has specialized state tests for exemptions.

[13] Colorado has very specialized state tests for exemptions. See http://www.coworkforce.com/lab. Employees must satisfy both state and federal test in order to be treated as exempt.

[14] Michigan's duties tests for executive, administrative and professional employees are similar to the old federal short tests, but they are not identical. Further, as under the FLSA, these exempt employees are required to be paid on a salary basis to be exempt, but the state rules do not allow for any deductions or other exceptions. Also, Michigan law does not exempt outside sales employees. Michigan's overtime pay and minimum wage requirements, however, do not apply to employees subject to the FLSA and who are exempt under the FLSA (other than some domestic service employees and childcare providers).

[15] Illinois applies the old federal duties tests, but the current federal salary level tests.

[16] The federal minimum wage is $7.25 per hour.

[17] Nevada allows employers to pay a lower minimum wage (but no less than the federal minimum wage) if the employer provides and pays for 90% of the premium required for health care coverage. The lower minimum wage is currently $7.25.

[18] Alaska also provides a unique list of approximately 40 occupations that qualifty for exempt status.

[19] In New York, an employee must be paid at least $543.75 per week in order to qualify for the executive and administrative exemptions.

[20] Colorado's Wage Order applies only to the following covered industries: (1) Retail and Service; (2) Commerical Support Service; (3) Food and Beverage; and (4) Health and Medical.

[21] The "Fluctuating Work Week Method for Calculating Overtime" involves payment of a fixed weekly salary for all hours worked in a work week; if the employee works more than 40 hours in the work week, the employee receives an overtime premium that is calculated by multiplying half of the effective hourly rate for that work week by the number of hours over 40 worked.

[22] The California meal period requirements do not apply to security and public utility workers if pursuant to a collective bargaining agreement.

[23] Retail employees in Maryland receive breaks based on shift length: 4-6 hours - 15 min.; 6-8 hours - 30 min.; 8+ hours - 30 min., plus 15 min. for every additional 4 hours.

The WHDI

1ST CIRCUIT

Foley Hoag
Boston, MA
(617) 832-1000

Jonathan Keselenko
jkeselenko@foleyhoag.com

2ND CIRCUIT

Wiggin and Dana
Stamford, CT
(203)363-7600

Lawrence Peikes
lpeikes@wiggin.com

Mary Gambardella
MGambardella@wiggin.com

Bond, Schoeneck & King
New York, NY
(646) 253-2320

John Ho
hoj@bsk.com

3RD CIRCUIT

Obermayer Rebmann Maxwell & Hippel
Philadelphia, PA
(215) 665-3000

Jason Reisman
jr@obermayer.com

Todd Glassman
todd.glassman@obermayer.com

4TH & DC CIRCUITS

Fortney & Scott
Washington, DC
(202) 689-1200

David Fortney
dfortney@fortneyscott.com

Leslie Stout Tabackman
lstouttabackman@fortneyscott.com

Shawe Rosenthal
Baltimore, MD
(410) 843-3457

Eric Hemmendinger
eh@shawe.com

Steptoe Johnson
Clarksburg, WV
(304) 624-8000

Larry Rector
larry.rector@steptoe-johnson.com

5TH CIRCUIT

Gardere Wynne Sewell
Dallas, TX
(214) 999-3000

Carrie Hoffman
choffman@gardere.com

6TH CIRCUIT

Butzel Long
Ann Arbor, MI
(734) 995-3110

Robert Boonin
boonin@butzel.com

Rebecca Davies
davies@butzel.com

Kiesewetter Wise Kaplan Prather
Memphis, TN
(901) 795-6695

Paul Prather
pprather@kiesewetterwise.com

R. Alex Boals
aboals@kiesewetterwise.com

Schottenstein Zox & Dunn
Columbus, OH
(614) 462-2700

Paul L. Bittner
pbittner@szd.com

7TH CIRCUIT

Meckler Bulger Tilson Marick & Pearson
Chicago, IL
(312) 474-7900

Joseph E. Tilson
joe.tilson@mbtlaw.com

Jeremy Glenn
jeremy.glenn@mbtlaw.com

8TH CIRCUIT

Leonard Street
Minneapolis, MN
(612) 335-1500

Tracey Holmes Donesky
tracey.donesky@leonard.com

Spencer Fane Britt & Browne
Kansas City, MO
(816) 474-8100

Michael Delaney
mdelaney@spencerfane.com

Eric P. Kelly
ekelly@spencerfane.com

9TH CIRCUIT

Davis Wright Tremaine
Seattle, WA
Michael Killeen
mikekilleen@dwt.com
(206) 622-3150

Portland, OR
Carol Bernick
carolbernick@dwt.com
(503) 778-5233

San Francisco, CA
Stuart Miller
stuartmiller@dwt.com
(415) 276-6584

Anchorage, AK
James H. Juliussen
jimjuliussen@dwt.com
(907) 257-5338

Paul Plevin Sullivan & Connaughton
San Diego, CA
(619) 237-5200

Fred Plevin
fplevin@paulplevin.com

Aaron Buckley
abuckley@paulplevin.com

Meckler Bulger Tilson Marick & Pearson
Phoenix, AZ
(602) 734-0852

Paul Garry
paul.garry@mbtlaw.com

Sherman & Howard
Phoenix, AZ
(480) 624-2725

Tom Kennedy
tkennedy@shermanhoward.com

10TH CIRCUIT

Sherman & Howard
Denver, CO
(303) 297-2900

W. V. Bernie Siebert
bsiebert@shermanhoward.com

Andrew Volin
avolin@shermanhoward.com

11TH CIRCUIT

Akerman Senterfitt
Miami, FL
(305) 374-5600

Susan Eisenberg
susan.eisenberg@akerman.com

Jennifer Williams
jennifer.williams@akerman.com

Ashe Rafuse and Hill
Atlanta, GA
(404) 253-6000

Nancy E. Rafuse
nancyrafuse@asherafuse.com

James J. Swartz, Jr.
jimswartz@asherafuse.com

Phelps Dunbar
Tampa, FL
(813) 472-7550

Dennis M. McClelland
dennis.mcclelland@phelps.com

Reed L. Russell
reed.russell@phelps.com

updated 6/1/2011

Retaliation: Plaintiff's New Best Friend

Chester E. Kasiborski, Jr.
313 225 7064
kasiborski@butzel.com

Bethany Steffke Sweeny
734 213 3429
sweeny@butzel.com

EEOC Statistics

- The number of retaliation charges filed with the EEOC has increased significantly - from **22,555** in FY 2006 to **36,258** in FY 2010.
- Retaliation charges accounted for 36.3% of all charges received by the EEOC in FY 2010.
- In FY 2010, retaliation charges outnumbered racial discrimination charges – which have always been the most numerous – for the first time since the EEOC started operating in 1965.

Statutory Anti-retaliation Provisions

Anti-retaliatory provisions can be found in:

- Title VII
- Michigan's Elliott-Larsen Civil Rights Act
- Michigan's Whistleblowers Protection Act
- Age Discrimination in Employment Act
- Americans With Disabilities Act Amendments Act
- Family and Medical Leave Act
- National Labor Relations Act
- OSHA

Elements of a Retaliation Claim

An employee must prove all of the following elements to prevail on a retaliation claim:

- The employee engaged in protected activity;
- The employee was subjected to an adverse employment action; and
- A causal connection exists between the protected activity and the adverse employment action.

Types of Protected Activity

- Participation
- Opposition

"Temporal Proximity"

In considering the "causal connection" element of a retaliation claim, the courts will examine and give weight to the length of time between the protected activity and the alleged adverse retaliatory act.

Retaliation Claims Are Separate and Independent

- An employee does not have to prevail on the underlying claim to prevail on a retaliation claim.
- An employee can prevail on a retaliation claim even if the underlying claim is completely without merit.

New Case Decisions

Associational Retaliation

Thompson v. North American Stainless

In January 2011, the U. S. Supreme Court unanimously held that an employee may bring a Title VII retaliation claim where s/he is subjected to an adverse employment action based on his/her association with another employee who has engaged in protected activity.

- The U.S. Supreme Court noted that the anti-retaliation provisions of Title VII must be construed broadly to encompass any employer action that might dissuade a reasonable worker from making or supporting a charge of discrimination.
- The Court declined to identify a fixed class of relationships for which third-party reprisals are unlawful. The Court did note that firing a close family member will almost always meet the requisite standard, whereas firing a "mere acquaintance" will almost never be sufficient.

Oral Complaints Protected

Kasten v. Saint-Gobain Performance Plastics Corp.

- Plaintiff alleged that he was discharged because he had orally complained about the location of company time clocks.
- The U.S. District Court for the Western District of Wisconsin entered summary judgment in favor of the defendant, finding that the plaintiff could not recover because he did not make any written complaint of an FLSA violation, and the FLSA does not afford protection for "oral" complaints.

- The U.S. Supreme Court reversed, holding that the anti-retaliation provision of the FLSA covers oral complaints.
- The Court reasoned that excluding oral complaints from the category of protected activity would inhibit the effective enforcement of the FLSA.

Participation In Internal Investigation

Crawford v. Metropolitan Government

The U.S. Supreme Court held that Title VII's prohibition of retaliation not only protects those who complain that they are victims of discrimination, but also those who have made no complaints about their own treatment but simply provide information to an employer during the course of the employer's internal investigation regarding such conduct.

Adverse Employment Action

Burlington Northern v. White

- The U.S. Supreme Court clarified what constitutes an adverse employment action in retaliation cases.
- In *Burlington*, the U.S. Supreme Court affirmed the Sixth Circuit's decision that a transfer to a less desirable position and suspension without pay for 37 days constituted adverse actions, regardless of whether the suspension was followed by reinstatement with back pay.
- The Court rejected the standards applied by some lower courts that limited actionable retaliation to so-called "ultimate employment decisions." Rather, the Court adopted the formulation that a plaintiff must show that a reasonable employee or job applicant would have found the employer's action materially adverse, which means that a reasonable employee would have been dissuaded from making or supporting a discrimination claim.

- The Court used the terms "material" and "reasonable employee" to distinguish petty slights and the like from significant harms and to make the standard for judging alleged retaliation an objective one.
- The Court noted that context was important. Schedule changes affect some employees more than others, and the slight of not inviting someone to lunch may be more significant if the lunch involved training that contributes significantly to an employee's advancement.

Co-Worker Retaliation

Hawkins v. Anheuser-Busch

- The Sixth Circuit held that Title VII permits a claim of "coworker retaliation" in appropriate circumstances.
- In *Hawkins*, after reporting a male co-worker to company management for sexual harassment, the plaintiffs alleged that he set their car and house on fire in retaliation for the complaints. Anheuser-Bush argued that it was not responsible for such retaliation by a non-supervisory co-worker.
- The Court concluded that Title VII's anti-retaliation provisions make employers liable for retaliatory actions by co-workers against employees who have engaged in protected activity, such as reporting sexual harassment.

Employee Must Prove:

- The behavior is sufficiently severe as to dissuade a reasonable person from making or supporting charge of discrimination;
- Management had actual or constructive knowledge of the retaliatory behavior; and
- Management condoned, tolerated, or encouraged the acts of retaliation, or responded to the plaintiff's complaints so inadequately that the response manifested indifference or unreasonableness.

Damages

The following damages are available:

- Economic loss, i.e., wages (front and back pay) and benefits
- Non-economic loss, i.e., mental and emotional distress
- Punitive damages (under federal law up to statutory caps)
- Attorney fees
- Reinstatement

Jury Awards

- *Shaltry v. City of Saginaw* (E.D. Mich. 2011)
  - Shaltry was an officer with Saginaw's police department. He claimed he was sexually harassed and then fired in retaliation for complaining of the harassment. A federal jury in Bay City found that no sexual harassment took place, but that the police department did terminate his employment in retaliation for his complaints.
  - **AWARD: $750,000**

- *McClain v. Pfizer, Inc.* (D. Conn. 2010)
  - Becky McClain was employed by Pfizer as a research scientist in one of the company's Connecticut facilities. She alleged that she was permanently injured after being exposed to lab fumes.
  - McClain claimed that after she complained to OSHA and spoke out against alleged safety violations, she was terminated while on medical leave.
  - A jury found that McClain's OSHA complaint was made in good faith and that Pfizer retaliated against her for making the report.
  - **AWARD: $1,370,000**

Practical Considerations

- Employers should have a clear and well-publicized anti-retaliation policy and ensure that all managers and supervisors receive training on the policy.
- Managers and supervisors should be educated that employees who complain of or oppose discrimination or other unlawful acts should not be treated differently or negatively as compared to employees who have not done so.

- In dealing with employees who have complained of perceived discrimination or filed a charge of discrimination, an employer should determine whether any actions taken can be deemed to be retaliatory.
- The *Thompson* ruling underscores the caution employers should use in taking an adverse employment action against a spouse, fiancée, or family member of an employee who has engaged in a protected activity.

- *Crawford* reminds all employers that they must frequently revisit their investigation procedures because retaliation claims may arise from poorly conducted investigations.
- Employers are advised to take care not to retaliate based on an employee's participation in an internal investigation, whether resulting from that employee's complaint or that of another employee.

- Employers are well within their rights to take action against an employee when necessary, but attention should be paid to ensure that such action is based on legitimate, non-discriminatory and non-retaliatory reasons, and discipline is consistently applied to all similarly-situated personnel.

QUESTIONS?

Chester E. Kasiborski, Jr.
313 225 7064
kasiborski@butzel.com

Bethany Steffke Sweeny
734 213 3429
sweeny@butzel.com