EPSTEINBECKERGREEN

EpsteinBeckerGreen, the Bank of China, and China Chamber of Commerce in U.S.A Present a Special Program for Chinese Companies Doing Business In The United States:

Successfully Navigating Your Business In The U.S. During Challenging Economic Times

Presented by EpsteinBeckerGreen Attorneys:

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Adrian Zuckerman, Esq. (New York)

Wednesday April 13, 2011 8:15 am-12:30 pm

The Yale Club of New York, 50 Vanderbilt Avenue, NY, NY 10017

This course is accredited for 3.5 New York CLE Credit in the area of Professional Practice

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EPSTEIN BECKER & GREEN, P.C.

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April 13, 2011
8:00 a.m. - 12:15 p.m.
The Yale Club of New York
50 Vanderbilt Avenue
New York, New York

Agenda

8:00 a.m. – 8:15 a.m. ..... Registration
8:15 a.m. – 12:00 p.m. ..... Presentation
12:00 p.m. – 12:15 p.m. ..... Question & Answer
12:45 p.m. – 2:00 p.m. ..... Lunch

Introduction — Dean L. Silverberg, EpsteinBeckerGreen

Morning Session Part One

Robert S. Groban, Jr., Esq.	**Immigration Developments**
Allen B. Roberts, Esq.	**Whistleblowing and Reducing Corporate Risks**
Dean L. Silverberg Esq.	**Employment and Wage and Hour Updates**
Gretchen Harders, Esq.	**Employee Benefits**

BREAK (time approximate) 10:30 a.m.

Morning Session Part Two

Steven E. Fox Robert D. Reif, Esq. Adrian Zuckerman, Esq.	**Structuring Foreign Investments in the U.S.**
Frank C. Morris, Jr., Esq.	**Non-Competition and Confidentiality Agreements** **Preventing and Succeeding in Litigation in the U.S.**

Luncheon Keynote Speech
Sino-U.S. Economic Relations and Business Opportunities, *Haiyan Li, Counselor for Economic Affairs Embassy of the People's Republic of China*

3.5 New York CLE Credit Hours in Professional Practice

EPSTEIN BECKER & GREEN P.C.

How To Successfully Chart Your Course In Accordance With U.S. Law:

Hiring And Firing Employees In the U.S.

Table of Contents

EFFECTIVE SCREENING METHODS

A. The Application Process

1. Application Forms

Employment applications are useful to employers as a means of gathering important background information and the employment history of prospective employees. Employers must bear in mind, however, that employment applications are subject to federal, state and local nondiscrimination laws and all questions asked on the application must be job-related and nondiscriminatory in nature. It is essential therefore that employers draft employment applications carefully so as to avoid exposing the Company to legal liability both before and after an applicant is hired.

For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of an individual's race, color, religion, sex or national origin. Additionally, many state and local anti-discrimination statutes, including New York, include marital status and sexual orientation as protected categories. Thus, asking an applicant to identify how they wish to be addressed (Mr., Mrs., Ms., Miss) directly violates the law. Similarly, a question asking how an individual acquired the ability to speak a foreign language might be construed as an illegal inquiry into the individual's national origin.

Likewise, questions that may elicit an individual's age may be found to violate the Age Discrimination in Employment Act and any inquiry which might inadvertently require an individual to reveal his or her age should be eliminated. In addition, improperly phrased inquiries which could reveal an individual's status as a disabled person are violative of the Americans with Disabilities Act and must be carefully drafted to avoid potential liability.

In addition, state and local laws vary in this area, and certain jurisdictions have established laws requiring that specific language be included on application forms. For instance, some jurisdictions have particular laws regarding questions that may be asked on topics such as criminal convictions, military service records and consumer credit information.

Therefore, it is important for employers to be sensitive to the various nondiscrimination laws as they draft employment applications. While variations in the form of applications for employment and types of specific inquiries vary according to the needs of the Company, certain basic topics are usually included in employment applications, as discussed in further detail below.

- **Date of the application**. This is relevant so that employers who keep application files "open" for a certain period of time may know how long to retain a particular application. Additionally, in the event that an applicant who is not hired later files a claim of discrimination against the employer, the date of the application serves as the date on which the statute of limitations commences for filing such a claim.

- **Age of minors**. This is a rare exception to the general prohibition concerning age-related inquiries. This is a permissible inquiry, since under federal and state labor laws, employers must obtain working papers authorizing minors to work.

- **Ability to perform job**. In light of the Americans with Disabilities Act, employers cannot ask whether an individual is a disabled person, but may inquire only as to whether the person can perform the duties of the job for which the application is being submitted.

- **Criminal convictions**. Generally, federal and state laws permit questions regarding criminal convictions. However, caution must be exercised since inquiries about arrests are not permissible in many jurisdictions and some jurisdictions also limit questions about convictions to certain types of convictions. A statement concerning the employer's anticipated job-related use of such information is often required.

- **Ability to work and remain legally in the United States**. Under the Immigration Reform and Control Act, employers must verify a person's identity and eligibility for employment in the United States. However, inquiry as to the person's national origin or citizenship is not permissible as this could violate Title VII of the Civil Rights Act, which prohibits discrimination on the basis of national origin or citizenship.

- **Educational background**. Inquiry into the dates of graduation is not permissible, since this may be interpreted as evidence of discrimination on the basis of age, which is prohibited by the Age Discrimination in Employment Act ("ADEA"). However, it is generally permissible to request dates of attendance, but not for elementary and high school. An inquiry addressing "number of years completed" may be a sufficient alternative, with minimal risk.

- **Military record**. Many jurisdictions limit the types of questions that may be asked regarding the reason for discharge from the military. Additionally, employers should be careful about inquiring as to a person's status in the military as it pertains to current or potential required reserve duty, as discrimination on this basis is prohibited by the Uniformed Services Employment and Reemployment Act.

- **Personal references**. Inquiries for personal references and documented follow-up contact with such references may minimize risk to the employer of claims for negligent hiring.

- **Employment-at-will disclaimer**. It is important to include an employment-at-will disclaimer in the employment application in order to establish that the applicant understands that employment with the Company is not guaranteed for any specific duration and may be terminated by either the employer or the employee at any time for any reason. This disclaimer should be placed immediately above the area where the employee is asked to sign the application.

- **Attestation as to truth and accuracy**. The application should include a statement concerning the truth and accuracy of the responsive information provided by the applicant and the right of the Company to reject any applicant or terminate any employee for making any misrepresentations or omissions of fact.

- **Applicant's signature**. The signature of all applicants, including those in high-level professional or managerial positions, must be obtained. This is especially important in connection with the employment-at-will disclaimer, as well as the attestation as to truth and accuracy.

2. Background Checks

As a result of recent developments in the law pertaining to employers' legal responsibility for so-called "negligent hiring," it is important that employers, in order to avoid liability conduct background checks on applicants. These background checks help (1) verify all prior employment and other information listed on the application, such as education; and (2) while speaking with references, attempt to determine that the applicant did not commit, or threaten to commit, any acts of violence. While these recent cases impose onerous burdens on large employers, we recommend that employers verify the information applicants provide to the maximum extent possible. In addition, if an employer conducts background checks with the utilization of a third party, the employer must comply with the authorization and notice requirements of the Federal Fair Credit Reporting Act ("FCRA") and any applicable state law.

II. OFFERS OF EMPLOYMENT

A. What Your Offer SHOULD and SHOULD NOT include

Offers of employment may be made verbally or in writing. Normally, however, even verbal offers are followed up in writing. It is imperative that any written offer or confirmation of a verbal offer be cautiously drafted so as not to accidentally establish a contract of employment with the recipient of the letter.

It is most important to avoid any language that might convey the impression that the offer is for any guaranteed period of time. Additionally, nothing in the letter should imply that termination from employment may be for just cause only. While it is a good idea to extend the employment offer in writing in order to convey a positive welcome to

the prospective employee and to advise him or her of notable information such as starting date, starting salary, and deadline for accepting offer, the manner in which this information is conveyed is quite significant.

For example, it is recommended that the offer letter state the employee's salary in terms of the Company's normal payroll cycle, and not in yearly terms. Some courts have held that a statement that an employee's salary is a particular amount per year implies a year-long employment contract. As such, it is best to inform the employee of his or her salary in terms of how much they will receive on a semi-monthly, monthly or weekly basis, depending upon the Company's payroll.

Additionally, if the Company does not include an employment-at-will disclaimer in its handbook or application form, it would be advisable to include such a disclaimer in the offer letter. Moreover, even if the Company's handbook or application does contain such a disclaimer, it is recommended that the offer letter make reference to the handbook and/or application.

FIRING: HOW TO REDUCE THE RISK OF A LAWSUIT WHEN TERMINATING AN EMPLOYEE

III. DISCIPLINE AND DISCHARGE

Until the past decade, in the absence of a statute or written contract, courts have been reluctant to limit an employer's right to discharge employees. The traditional rule regarding the relationship between employer and employee has been that a hiring for an indefinite term represents "employment-at-will," that is, unless an agreement or a statute limiting an employer's rights exists, either party may terminate the employment relationship at any time.

However, the employment-at-will rule has been increasingly eroded by legislative enactment of federal, state and local protective laws (e.g. race, age, sex, and disability discrimination), judicial enforcement of public policy (whistle blowing protection), tort and express and implied contract theories under which employees may be considered to have an enforceable employment contract, and not to be at-will employees.

A. How To Help Reduce The Risk Of A Lawsuit When Terminating An Employee

One of the inevitable consequences of managing a business is having to discharge employees from time to time. The decision to terminate an employee may result from a variety of factors including poor performance, inadequate productivity, excessive absenteeism or lateness, dishonesty, insubordination, substance abuse or illegal conduct. However, the employer must always be careful to ensure that its decision to terminate an employee is for job-related and nondiscriminatory reasons. Moreover, the employer must be sure that the employee's termination does not violate any contractual commitments and that the termination complies with applicable federal, state and local laws, and of course Company policies and procedures.

Unfortunately, even the most careful employer that terminates employees for all the right reasons may get sued. There are, however, various precautions an employer can take to minimize the number of suits that will be brought by its former employees, and to minimize its exposure if suits are brought.

Involuntary terminations typically fall into two categories. First are terminations resulting from employee performance problems such as unsatisfactory work effort, excessive absenteeism or tardiness, or poor attitude. Employees with such problems are typically not terminated by employers without being given a warning of their performance deficiencies and an opportunity to improve.

A second category of terminations results from more serious types of employee offenses, such as insubordination, dishonesty, misconduct, theft, unethical practices, fraud, and falsification of records. Employees who have committed such offenses generally can be discharged immediately and without warning or a period of time in which to take corrective action.

For any involuntary termination, it is always easier to defend against a claim of wrongdoing when good cause exists for the action. Good cause for termination of employment can be most easily defined as a behavioral situation that any reasonable person agrees would warrant discharge.

1. Documentation - The "Silent Witness" Employers May Eventually Need

Although there are no laws requiring employers to document their dealings with employees, employment lawsuits often focus on the reasons for an employee's termination. The employer's records can be important evidence in its defense of a termination decision. Indeed, there is typically far greater deference and weight given to contemporaneous writings than to testimony based on memory. Therefore, documentation of the termination decision should normally begin well before the employee is discharged, and should include the following: the employer's disciplinary policies and performance standards; any eyewitness accounts of serious employee misconduct; the supervisor's memos in which performance deficiencies are recorded in objective terms; performance evaluations; and warning memos to the employee.

If the employee was terminated for unsatisfactory performance, documentation showing that the employer counseled the employee and made an effort to improve his/her performance is also important.

Termination documentation should show that:

- The employer had a standard or policy governing the behavior in question;

- The employee knew of the standard or policy and of the consequences for violating it (dissemination of a policy to all employees, including new hires, should be assured);

- Performance problems were clearly communicated and the chance for corrective action existed;

- The employer applied the standard and policy consistently and uniformly (documentation of performance related situations should not be ad hoc or selective as to a person or an event. Uniformity is very important to dispel notions of setting someone up or singling them out); and

- The employee violated the policy or failed to meet the standard or take corrective action.

2. Reviewing a Proposed Termination

Because of the potential for legal challenge by the discharged employee, it is generally a good idea for employers to establish review policies for all termination decisions. The goal of a review policy is not so much to restrict the authority of supervisors to make decisions as to ensure that those decisions are legally defensible.

Generally, it should be the responsibility of the human resources manager (or equivalent person) to review termination decisions. If, however, no such position exists in an organization, termination decisions should be reviewed by a higher-level manager or by the employer's counsel. Calling in an attorney may have several benefits. First, an attorney is best qualified to assess what is lawful with respect to termination. Second, an attorney's statements about a proposed action are generally protected by the attorney-client privilege and, therefore, would not be discoverable by the plaintiff in a subsequent lawsuit -- unlike a similar statement by a manager or human resources representative. Third, an attorney may be helpful in structuring and/or negotiating a release arrangement/agreement in which the terminating employee agrees to depart without suing in exchange for monetary consideration or other benefits.

3. Steps for Reviewing a Proposed Termination

Regardless of who undertakes the termination review procedure, the following steps should be taken:

a. Determine whether there is a valid, job-related reason for terminating the employee, such as a violation of Company policy, poor job performance, poor attendance, excessive tardiness, or a problem with the employee's conduct, attitude, or demeanor.

b. If the termination recommendation is due to a specific incident, determine whether the incident has been properly investigated and documented in writing. Determine whether there are any questions that remain unanswered about the incident.

c. Ensure that the employee was made aware that his behavior or job performance was unacceptable.

d. Ensure that the employee's overall work record has been reviewed.

e. Look into whether there are extenuating circumstances (such as abusive or unfair treatment by a supervisor) that may have contributed to the employee's unsatisfactory performance.

f. Look for any evidence of sexual harassment, racial harassment, or illegal retaliation for an employee's exercise of legal rights such as reporting wrongdoing or health or safety violations.

g. Be sure that the discharge recommendation is not merely the result of a personality conflict with the supervisor or a result of exercising of a protected right.

h. Determine whether the termination recommendation is consistent with prior actions where the factual circumstances are similar.

i. If Step 8 reveals that there are some inconsistencies, check to see whether the supervisor making the recommendation to terminate the employee has job-related reasons why the decision to terminate should be different under these circumstances.

j. Have the recommendation to terminate reviewed by an individual familiar with employment discrimination laws, unjust dismissal theories (such as outside employment counsel) to ensure that there is no legal problem.

k. Ensure that the employee has received all rights conferred by Company policy, such as a progressive disciplinary procedure.

l. Explore alternatives to termination such as transfer, counseling, or demotion before making the final decision.

4. Communicating the Termination Decision

Terminating an employee can be the most difficult task a supervisor faces. Unfortunately, some supervisors feel such emotional conflict about firing a subordinate that they handle the matter badly. This can cause problems for a number of reasons, but most notably because an employee whose termination has been poorly managed is more likely to take legal action against the employer. The termination meeting is critical because it often dictates the employee's course of action. It is wise, therefore, for the employer to invest in a careful, concerned approach, which could include offering the employee, counseling services, outplacement assistance and even an agreement with a release.

One of the most important steps an employer can take to prevent misunderstandings during the termination process is to formulate and disseminate to all employees a clear, written termination policy. Such a policy should be unambiguous and make it clear to employees that the employment relationship is on an at-will basis and as such can be terminated by either the employee or employer at any time with or without notice or cause.

Clear communication of a termination decision begins well before the employee is actually terminated (unless the employee is being terminated for improper or illegal conduct such as theft or assault). Firing an employee who has been repeatedly warned to improve his/her performance is generally much easier for both employee and employer than firing an employee who was totally unaware that his/her job might be in jeopardy. A well-drafted termination policy, honest performance evaluations, and written warnings about inadequate performance are all-important components of communicating the termination decision. The termination communication should also be confidential and made with a third person present. Employers should additionally be cautious in having guards present to escort the employee out to avoid defamation, false arrest, assault, battery and invasion of privacy claims. Guards should be used only as a last resort and after other precautions are taken (discussed below in Point VI).

Some of the basic steps employers should take to ensure that the termination decision is communicated clearly and fairly are set forth below.

5. Steps to Avoid Termination Disputes

To the extent possible, employers should guard against surprising employees with a notice of termination. An employee who has received satisfactory performance appraisals and then is terminated for inadequate job performance or laid off due to forced ranking will have a much better chance of winning a wrongful discharge or discrimination suit than one who has been made aware of the shortcomings in his/her job performance on a regular basis.

In addition to drafting and disseminating a termination policy, which makes clear that employees are hired on an at-will basis, employers should also follow a policy of providing written warnings of misconduct (for correctable offenses) or poor job performance. If an employee is suspected of serious misconduct that necessitates his/her immediate removal from the workplace, the employee should be suspended from employment (with or without pay). The suspension will allow management to review the termination decision before permanently terminating the employee.

6. Avoiding Liability in Explaining the Reasons for Discharge

Employers must be extremely cautious when communicating the reasons for terminations to employees who are being involuntarily discharged. There is an emerging doctrine known as "compelled self-publication" which has now been accepted by a number of courts. According to this doctrine, the plaintiff, typically

a terminated employee, "defames" himself by repeating the reasons given to him/her by the employer for termination in his/her prior job. Typically, the plaintiff alleges that he/she was "compelled" to repeat the statement in answer to the question, "Why did you leave your last job?"

In light of this emerging doctrine, it is important for employers to assume that statements made to a terminated employee will be repeated by the employee to prospective employers in future job interviews. Thus, employers must ensure that factually accurate and provable reasons are communicated to discharged employees.

a. **When to Answer an Employee's Demand to Know Why He/She Was Fired**

Some attorneys advise employers to say nothing, or as little as possible, to an employee who demands to know why he/she is being fired. The rationale is that one cannot get into trouble for what one does not say. There may be occasions, however, when a response is desirable or necessary.

For instance, some states, such as Missouri, Montana, and Minnesota, have statutes that require an employer to give an employee reasons for discharge when requested. These statutes are known as "service letter laws" because they generally require employers to furnish the information in a letter to former employees. In the absence of such statutes, there is no legal requirement to answer an employee's demand for a written explanation of his discharge.

If an employer is required to give an employee a service letter, the letter should contain all reasons for the discharge, in statements that are true and provable, and should not contain any extraneous or irrelevant material.

b. **Telling Coworkers**

As a general rule, the less said to coworkers about another's termination, the better. Coworkers should never be told in advance, thus allowing an employee to learn of his/her dismissal through the grapevine.

If asked about an ex-employee's departure, the supervisor may say that the individual has decided to look for other employment, or that the employer and the former employee agreed to part Company, if the former employee accepted the dismissal.

7. Post-Termination Issues

Occasionally, an employee who has been terminated will refuse to leave the premises or will continue to report to work. The question then arises: what steps can the employer take to get the employee out, without leaving itself open to a false arrest, assault, battery, invasion of privacy, or defamation by action claim? These problems can be avoided entirely or at least minimized by taking various

precautions, depending on the situation, including giving the former employee written notice; allowing a reasonable time for departure; notifying the former employee that the police may be called; refraining from touching the departing person; evacuating other personnel from the immediate area if it appears that the dismissed employee will leave only under escort; and using security or police as a last resort.

Whatever steps are taken, it is best to warn the employee in advance what the next move will be before making it. This is a very important step because it gives the employee time to make up his/her mind to leave of his/her own accord; it demonstrates professionalism on the employer's part; it conveys the message that the employer knows what to do and is in charge of the situation; and it may actually spare the Company some effort, since the mere warning of intent to take a subsequent step may be sufficient to accomplish its purpose. Even in the most taxing circumstances, however, the employer must always be patient. The disruption caused by a dismissed employee's temporary refusal to leave is a lesser evil than the liability that can attach as a result of any physical force used on the employee, especially if coworkers are present to observe it.

Termination of employment, especially of long service employees, is typically highly traumatic, and employers should treat it as such. Anger is a prime motivation for vindictive litigation.

B. Progressive Corrective Action:

Where, in the sole judgment of management, the violation or problem does not warrant immediate dismissal, and where management has determined that the employee should be given the opportunity to correct the violation or improve his/her performance to an acceptable level, a progressive correction action procedure may be invoked.

Examples of actions that may lead to the corrective action process include:

1. Failure to meet job performance or standards.

2. Excessive absenteeism or lateness.

3. Violation of Company rules and policies.

The usual steps within the corrective action process are:

1. Verbal warning - Advising the employee orally of the violation or problem, and the need to correct same (a memo concerning the warning should be placed in the employee's personnel file).

2. Written warning - Advising the employee in writing of the violation or problem. The written warning should include guidelines and time tables for acceptable performance and should notify the employee that further discipline will result if the standards are not met within the prescribed time limits. The employee should be asked to sign a copy of the warning. That copy should be placed in his/her personnel file. If the employee

refuses to sign, a note to that effect should be made on the copy prior to placement in the personnel file.

3. Dismissal - Corrective action steps may be varied, depending upon the individual circumstances and nature of the offense. For example, in some instances there may be more than one verbal or written warning. On the other hand, the failure of an employee to respond positively to progressive discipline may lead to immediate dismissal. Exceptions or deviations from any normal or customary practice or procedure may occur when management, in its sole judgment, deems it appropriate.

IV. SPECIFIC GROUNDS FOR DISCIPLINE AND DISCHARGE

A. Absenteeism/Tardiness

Primary Questions

1. Was there a definite plan outlining the Company policy regarding attendance and punctuality?

2. Was the employee informed of the policy?

3. Were there definite progressive discipline guidelines for violations of attendance or tardiness rules? Were the consequences of each violation clearly outlined?

4. Was the employee informed of the discipline guidelines?

5. Was the employee subjected to discipline for each violation in accordance with the guidelines? Was the appropriate discipline applied for every violation? Was discipline applied uniformly and without discrimination?

6. Does the employee have an excuse or are there mitigating factors? Were the excuses investigated?

Summary Questions

1. Are there definite attendance guidelines?

2. Is there a progressive discipline plan for violation of the guidelines?

3. Is the employee aware of the guidelines and the consequences of violations?

4. Was discipline applied for every violation in a uniform manner in accordance with the guidelines?

B. Insubordination

Probably no other disciplinary offense carries as much potential for anger and hostility as insubordination. It is critically important that the supervisor remain quiet and rational throughout the incident.

1. Types of Insubordination

Three kinds of employee action fall under the category of insubordination:

a. Direct refusal to do an assigned job or obey an order;

b. Willful failure to do an assigned job or obey an order;

c. Cases where employees challenge, criticize, obstruct, abuse or interfere with management's supervision.

Example -- Direct Refusal

Harry Leavitt, an evening supervisor, noticed a lot of paper on the floor around the copying machine. He told an employee, Betty, who was standing there, to clean it up." That's a janitor's job," she replied. Leavitt again instructed her to clean it up and she replied, "Not me, that's not part of my job. You can find a janitor or do it yourself!"

Example -- Willful Failure

Harry Leavitt, an evening supervisor, noticed a lot of paper on the floor around the copying machine. He told Betty, an employee who was standing there, to clean it up. "Ok, but that's not my job -- sweeping is a janitor's job." When he checked back an hour later, he found that she had not swept the floor.

2. Factors in Discipline

Primary Questions

1. Were the supervisor's instructions or orders clear?

2. Was the supervisor or other individual authorized to give the questioned "orders," "directions," or "instructions," and did the involved employee understand that this individual was so authorized?

3. Did the affected employee understand that it was an order and not just a mere suggestion, request, or similar comment?

4. Was the employee clearly instructed by the person giving the "order" about the penalty or the possible and probable consequences for failing to comply?

5. Was there a clear refusal to perform the requested task or was there merely a protesting, discussion or disrespectful attitude manifested?

Secondary Questions

1. Were other employees present when the incident transpired?

2. Did the "order" require the affected employee to do an unlawful act, place the employee in immediate danger, or constitute a violation of a union contract?

3. Was it unusual or unnecessary for this employee to be assigned that particular task?

4. Did the employee offer any excuses or justification for his or her action?

5. Was the employee's excuse or justification reasonable (i.e., conflicting orders)?

6. Was the employee's excuse or justification investigated?

Summary Questions

1. Did a supervisor give a clear and lawful order?

2. Was it followed?

3. Did the employee know the consequences of not following this order?

C. Negligence/Carelessness

1. Factors of Discipline

Primary Questions

1. Was there a negligent act? By what standards was the act considered to be negligent?

2. Were the required procedures published?

3. Were the employees given instruction in the proper procedures so as to comply with the rules?

4. Was discipline applied uniformly and consistently for every known violation of these rules?

5. Was there a plan for progressive discipline for violation of the rules? Was the plan known to the employee? Was it always adhered to? Was it applied without discrimination?

6. Did the employee have a past record of careless-ness? Were past infractions recorded and disciplined?

Secondary Questions

1. Was the negligence attributable solely to this employee or were other factors or employees involved (i.e., improper maintenance of equipment, failure of equipment)?

2. What was the result from the careless act? (Was anyone hurt? Seriously? Was property damaged?)

3. Were there any other mitigating factors? (Was the employee ill? Had the employee worked a great deal of overtime?)

4. Were employee's excuses or justifications investigated?

Summary Questions

1. Did management promulgate and publish clear safety rules and procedures?

2. Was the employee informed of the rules and trained to comply with them?

3. Was the employee made aware of the consequences of violations of the rules?

4. Was discipline uniformly applied for each violation?

D. Below Standard Performance

1. Factors of Discipline

Primary Questions

1. What was the standard of performance? (Was it reasonable? What was the facility average? Can all departments be measured? Is individual performance measured or is it by department?)

2. Do the employees know what is expected? (How do they know it? Is it written? Posted daily? Weekly? Monthly?)

3. Was this employee's previous work record satisfactory? (Was this employee competent at another job? Has the employee been counseled about below normal performance?)

4. Can the below normal performance be attributed to other factors? (Quality of materials, unusually low staffing, disruptions, etc., i.e., was this employee responsible?)

5. Was it possible to transfer this employee to another job? (Was it necessary to keep this employee assigned to this particular task? Did the employee request a transfer? Have others been transferred? Are there slower departments? Are there openings? Have any such transfers taken place before?)

6. How was below normal performance handled in the past? (Is it common or uncommon to disciplinefor below normal performance? What type of discipline has been administered in the past? Written? Verbal? Suspension? Discharge?)

Secondary Questions

1. Were there any extenuating circumstances special to this employee? (Little or no training, poor eyesight, poor coordination, depression, can't work with this supervisor or co-worker, temporary or permanent disability, etc.)

2. Did management know about any extenuating circumstances? (Was the job too much for one person or the number of employees assigned to it? Was this ever raised in the past? Did the supervisor know that this employee couldn't handle the job? Or should the supervisor have known?)

3. In group endeavors, was this employee responsible for the below normal performance? Were others?

4. How long was this employee in this job (i.e., was the evaluation fair as encompassing a representative time period)?

5. Was seniority considered?

6. How does the productivity of this employee's department compare with others within the facility? (Are all departments experiencing a decline?)

Summary Questions

1. Was there a reasonable standard employees knew about?

2. Did this employee "in fact" have below normal performance?

3. Was the employee at fault for his/her below normal performance?

4. Was it really necessary to discipline this employee?

This is a brief summary of the immigration issues that employers are most likely to encounter. The precise legal contours of these issues, however, may be complex. This summary, therefore, does not address all aspects of these issues and should not be considered as a substitute for competent legal advice.

I. GENERAL BACKGROUND

The immigration laws of the United States regulate the admission of all foreign nationals into this country. To enter, foreign nationals must satisfy certain visa requirements. These requirements differ for intending immigrants (persons seeking permanent residence) and for nonimmigrants (persons seeking only temporary stays). The specific requirements depend on the particular visa classification that the foreign national seeks to satisfy.

The immigration laws make it illegal for employers to hire foreign nationals whose immigration status does not permit them to work and impose on employers the responsibility for verifying the legal authority of all employees (regardless of citizenship) hired since November 6, 1986. These laws also prohibit intentional discrimination in employment based on an individual's national origin or citizenship status. Civil and criminal penalties may result from violations of these provisions.

II. IMMIGRANTS

All foreign nationals seeking admission to the United States are considered to be immigrants unless they can prove they are eligible for a nonimmigrant visa. Generally, immigrants fall within four broad classes: Investors, Employment- or Family-Based Preference immigrants, Special Immigrants and Refugees. Most employers are likely to be concerned with

foreign nationals seeking permanent residence on the basis of Employment- or Family-Based Preferences.

A. Employment-Based Preferences

There are three broad categories of Employment-Based Preferences available to foreign nationals who seek to immigrate. The first concerns so-called Priority Workers. This category includes foreign nationals who can demonstrate that they: (a) have "extraordinary" ability in the arts, sciences, education, business or athletics; (b) are "outstanding" professors or researchers; or (c) are executives or managers of multi-national companies.

A second Employment-Based Preference relates to Special Professionals. These are foreign nationals who: (a) are professionals with advanced degrees or the equivalent; or (b) have "exceptional" abilities in the sciences, arts or business. The final Preference category for Employment-Based immigrants relates to Other Employees. These are foreign nationals who are: (a) skilled workers with at least two years' training or experience; (b) professionals with baccalaureate degrees; or (c) unskilled workers (subject to stricter numerical limits).

To obtain permanent residence in the Second and Third Employment-Based Preference visa categories, an employer generally first must secure alien employment certification ("Labor Certification") from the Department of Labor ("DOL") attesting to the need for foreign workers in the position the employer seeks to fill due to the documented absence of qualified U.S. workers. At the present time, this is done via the DOL's Program Electronic Review Management ("PERM") system. PERM is an electronic filing, attestation and audit procedure that contains tougher eligibility requirements but promises faster and more predictable adjudications.

Priority Workers, including executives and managers of multi-national companies, and Special Professionals whose work is in the "National Interest," do not require Labor Certification before proceeding. Employers submitting these cases first secure from the U.S. Citizenship and Immigration Services ("USCIS"), formerly the Immigration and Naturalization Service, an approved Preference visa petition. As a result of changes in the USCIS rules, foreign nationals seeking permanent residence in the United States now can file their permanent residence applications (Form I-485) at the same time that their employers file the Preference petitions (Form I-140) if there is an immigrant visa number available.[1] Those foreign nationals who intend to apply for an immigrant visa at an American embassy or consulate abroad, however, still must await approval of their employer's Preference petition and have an immigrant visa number available before they can initiate the immigrant visa application process.

B. Family-Based Preferences

Permanent residence applications also can be predicated on specific family relationships to U.S. citizens or permanent residents. "Immediate Relatives" of U.S. citizens (parent, spouse and certain children over 21) generally may apply without regard for quota restrictions. Otherwise, Family-Based Preferences are available for the married and unmarried children of U.S. citizens and for the spouses, children and siblings of permanent residents. None of these categories require labor certification but all must be supported by a Preference visa petition (Form I-130), approved by the USCIS, which demonstrates the requisite family relationship.

[1] There is a world wide quota for the number of permanent residence applications that can be approved annually. To submit an application for permanent residence, there must be an immigrant visa number immediately available under this quota. There also must be an immigrant visa number available at the time the permanent residence application is approved.

The availability of immigrant visas for Employment and Family-Based Preferences is limited by the quota system applicable to most United States immigration. Extensive delays of many years are not uncommon for some Preference applicants under existing law. Therefore, if an employer wants to hire foreign nationals more promptly, it should consider whether they are eligible to receive nonimmigrant visas.

III. NONIMMIGRANTS

There currently are more than 40 distinct categories of nonimmigrant visas. Each category is identified by a different letter designation and many of those categories also have subcategories with numerical references (e.g., H-1B, L-1A). There are specific requirements and limitations applicable to each nonimmigrant visa category.

A. Business Nonimmigrant Categories

Eight of these nonimmigrant categories are used most commonly by businesses. These can be summarized as follows:

1. Visitors (B): Available to foreign nationals who maintain a residence abroad to which they will return and seek admission for relatively brief periods for specific, appropriate purposes. A B-1 visa is issued to foreign nationals coming here for business purposes, and a B-2 visa is issued to those visiting for pleasure. Under certain circumstances, B-1 business visitors may work for or train at local branches of foreign employers if they are not paid by a domestic employer. These visas can be obtained directly from the appropriate American embassy or consulate. Duration: Approximately 30 days, unless the employee can demonstrate that additional time, up to six (6) months, is necessary to complete the purpose of the trip. An extension of up to six (6) months is possible. Spouses and children may not work.

   Visa Waiver Visitors (B): The United States permits nationals of certain "low fraud" countries to enter as visitors for up to 90 days under the Visa Waiver Program ("VWP"). This allows eligible foreign nationals to come to the United States without first securing a B nonimmigrant visa if they satisfy all of the other requirements for a visitor for business or pleasure. Visitors entering under the VWP may not stay longer than 90 days,

generally may not change status in the United States to another nonimmigrant status, and are subject to summary removal in the event that the USCIS concludes they previously have violated limitations on the VWP or are coming to engage in activities that are inconsistent with those for which visitors are permitted.

Foreign nationals seeking to use the VWP must have machine-readable passports, and must have biometric identifiers in their passports. They also must first obtain security clearance under ESTA, the Electronic System for Travel Authorization. Foreign travelers who fail to satisfy these passport and ESTA requirements will have to apply for and obtain a visitor's visa to secure admission to the United States.

2. Treaty Traders or Investors (E): Available to foreign nationals from countries that have treaties of commerce with the United States. E-1 Treaty Trader visas are issued to foreign-owned companies with offices in the United States that do more than 50% of their business with the applicant's country. E-2 Treaty Investor visas are issued to individuals or companies who are nationals of the treaty country and who own or control United States businesses in which they have a "substantial" investment. Employees who are nationals of the treaty country and who perform executive, managerial or essential skill responsibilities also may obtain treaty visas if their employer qualifies.

   It can take several months to qualify as a treaty employer. Once an employer is found eligible, however, qualifying employees can obtain E visas directly from the appropriate American embassy or consulate. Duration: Up to five (5) years but renewable indefinitely as long as the employer continues to qualify for E status, and the treaty employee remains engaged in the approved treaty activities. Spouses but not children may work.

3. E-3 Treaty Classification for Australians: To qualify, the employer must demonstrate that the prospective employee is an Australian citizen, that s/he will engage in the type of "specialty occupation" that satisfies the H-1B requirements, that a labor condition application has been approved for the position, and that there is a quota number available. Unlike the more traditional E nonimmigrant classifications, there is no requirement that the employer be primarily Australian owned or that it satisfy the other treaty investor or treaty trader requirements. Spouses, but not children, may work.

4. Temporary Workers (H): Available to foreign nationals who seek admission to work temporarily in the United States. H-1A visas

refer to qualified registered nurses but this category is no longer available. H-1B visas are for so-called "specialty occupations," which the USCIS defines to include professional positions that require a specialized degree, and prominent fashion models. H-2A visas refer to temporary or seasonal agricultural workers who maintain a foreign residence. H-2B visas relate to workers, with a foreign residence, who seek to fill temporary nonagricultural jobs after the DOL has certified that no U.S. workers are available for the position. H-3 visas are issued to trainees with a foreign residence who will receive training (other than medical training) that is not available in their home countries and that they will use abroad.

To secure an H-1B nonimmigrant visa, an employer first must secure acceptance of a Labor Condition Application by the DOL. An H-1B petition then must be approved by the USCIS and forwarded to the appropriate American embassy or consulate to support the employee's visa application. The entire process usually takes from 4-6 months.[2] Currently, there is an annual cap for new H-1B petitions of 85,000 (20,000 for those with master's degrees or higher from U.S. universities). Duration: three years, but renewable for an additional three years. Spouses and children may not work.

5. NAFTA Professionals (TN): The North American Free Trade Act between the United States, Mexico and Canada ("NAFTA") created additional options for Mexican and Canadian citizens who seek work in the United States. To qualify for "TN" status under NAFTA, the employee must have a foreign residence to which they will return, and be coming to the United States to work in an occupational classification listed in NAFTA Appendix 1603.D.1. Canadians are visa exempt and can enter as NAFTA professionals by applying for TN classification at any border crossing that has a Free Trade Officer. Mexicans seeking TN status must secure a TN nonimmigrant visa from an American embassy or consulate. Duration: Up to three years, but renewable indefinitely if the foreign national maintains a foreign residence to which he or she will return.

6. Exchange Programs (J): Available to foreign nationals who maintain a residence abroad and who seek admission to work temporarily as part of an exchange program approved by the Department of State ("DOS"). Several nonprofit organizations

[2] The USCIS now permits "premium processing" of most nonimmigrant visa petitions, including the "E-1/E-2", H-1B," "L", "O" and "TN" petitions. For an additional filing fee of $1,225, the USCIS agrees to adjudicate the petition in 15 days.

have been designated by the DOS as sponsors for J programs, and can be used by those employers who lack designation as a J-1 sponsor to support employee applications. Once an approved J-1 sponsor is located, the sponsor issues the trainee a Form DS-2019, which can be used to apply for a J-1 nonimmigrant visa at the appropriate American embassy or consulate. Duration: Maximum 18 months. Spouse and children may work with USCIS authorization.

Many employees who participate in J-1 training programs are subject to a two-year foreign residence requirement. This results if the program receives any government funding or involves activities that are included on the "skills list" for the employee's home country. J-1 trainees who are subject to the two-year foreign residence requirement cannot secure H, K or L nonimmigrant status or apply for permanent residence until they first have resided continuously for at least two years in their home country. Waivers of this requirement are possible but may be difficult to obtain. Individuals or companies that contemplate using the J-1 category thus must determine first whether the two-year foreign residence requirement applies.

7. Intracompany Transfers (L):

a. Individual: Available to foreign nationals seeking to transfer to the United States from the parent, branch, subsidiary or affiliate of the American employer. To qualify, the foreign nationals must have worked outside the United States for a related foreign employer in an executive, managerial or specialized knowledge capacity for at least one of the previous three years, and must be coming to this country to work in a similar capacity. Individual intracompany visa applications first must be supported by a nonimmigrant visa petition approved by USCIS. The eligible employee then can apply for an L visa at the nearest American embassy or consulate. Duration: three (3) years but can be renewed for two (2) years (specialized knowledge) or four (4) years (executives and managers). Spouses may work but children may not.

b. Blanket: Available to any employer who: (a) is engaged in a commercial trade or service; (b) has an office in the United States that has been doing business for at least one year; (c) has three or more domestic and foreign branches, subsidiaries, or affiliates; and (d) has obtained at least ten (10) individual "L" visas for executives, managers or specialized knowledge professionals during the past 12 months, has United States subsidiaries or affiliates with combined annual sales of at least $25 million, or has

an American workforce of at least 1,000 employees. Blanket "L" petitions are secured by the employer from USCIS. Eligible employees (i.e., executives, managers or specialized knowledge professionals who worked for the foreign employer for at least one year) then may obtain L visas directly from the nearest American embassy or consulate based on the approved "Blanket Petition" as long as it remains effective.

c. L-1 Reform Act: This legislation prohibits L-1B "specialized knowledge" personnel from working primarily at a worksite, other than the petitioning employer's, if the work will be controlled and supervised by a different employer or if the offsite arrangement is essentially to provide labor for hire, rather than services related to the specialized knowledge functions for the petitioning employer.

8. Extraordinary Ability (O):

Permits the admission of foreign nationals who have "extraordinary ability," or who have an extraordinary level of achievement in the sciences, arts, education, business or athletics. To secure an O nonimmigrant visa, an employer first generally must consult with a "peer group" in the applicant's occupation, or the appropriate collective bargaining representative, regarding the position to be filled and the applicant's qualifications. The employer then must obtain approval from the USCIS of an O nonimmigrant visa petition. Duration: three (3) years with possible one (1) year extensions. Spouse and children may not work.

B. New Security Requirements

The tragic events of September 11, 2001 have resulted in significant changes in the processing procedures at American embassies and consulates abroad, as well as screening procedures used at United States' ports-of-entry. New security measures are in place at most American embassies and consulates and this, combined with the new requirement for a personal interview for most applicants, has led to substantial delays in visa processing. Applicants should contact the American embassy or consulate before submitting a visa application to confirm the current procedures. This information usually is available at: *http://usembassy.state.gov*. Foreign nationals who are males, between the ages of 16-45, and are citizens or nationals of selected

countries from the Middle East also are subject to additional 20+-day delays to permit enhanced security checks on their backgrounds.

Among the most important security measures now being enforced by American embassies and consulates are the export controls reflected in our "deemed" export laws and the DOS's Technology Alert List ("TAL"). These define controlled technology or technical data that may not be displayed to a foreign national without an export license or enumerate certain computer, scientific and other activities that may pose significant security risks if foreign nationals are permitted to perform them in the United States. Foreign nationals seeking admission to this country to work with controlled technology or engage in possible TAL activities can expect significant delays in processing their visa applications and, in certain cases, may be barred from the United States if the required export license is not secured or the DOS concludes that their activities present an unacceptable security risk.

The USCIS also requires foreign nationals seeking admission to the United States from Iraq, Iran, Syria, Libya and the Sudan must be photographed and fingerprinted before they will be allowed to enter the United States and, if they plan to spend more than 30 days in this country, will be required to register regularly with the local USCIS district office. These new registration requirements also will apply to any foreign national seeking admission in nonimmigrant status that either the DOS or USCIS believes fits a secret security profile.

Finally, the Department of Homeland Security, which now oversees the USCIS, has implemented a computerized "USVISIT" system at most ports-of-entry. This requires USCIS officers to scan the fingerprints and take digital photographs of all arriving nonimmigrants, and to place self-serve kiosks at all exit-ports for departing nonimmigrants to scan visas or passports and provide scanned fingerprints. All applicants for admission should be familiar with these new

procedures to avoid unnecessary delays.

C. Change of Nonimmigrant Status

To enter the United States as a nonimmigrant, foreign nationals (except Canadians) generally require a passport and a visa. Nonimmigrant "B", "E-1/E-2/E-3", "J" and Blanket "L" visas can be secured directly from an American embassy or consulate. If an employer seeks "H", individual "L" or "O" nonimmigrant classification, it first must secure approval of a nonimmigrant visa petition from USCIS before a visa can be obtained by the prospective employee from an American embassy or consulate abroad.

Where an employee who is eligible for nonimmigrant classification is already in the United States in lawful nonimmigrant status (except VWP), the employer may apply to have the employee's status changed to a new nonimmigrant category that permits the employee to work for the new employer.[3] This can save the cost and dislocation of a trip home for employees who intend to stay here and work. Employees who secure such an extension and/or change of nonimmigrant status may still have to obtain a new nonimmigrant visa abroad if they leave the United States and wish to return.

D. Relationship of Nonimmigrant Categories To Priority Worker Preference

Two nonimmigrant categories mirror classifications in the Employment-Based Priority Worker Preference group. Most L-1A managers and executives should qualify as multinational employees. Extraordinary (O) temporary employees also may satisfy the Extraordinary Ability standard. This congruence between the immigrant and nonimmigrant

[3] Under the "portability" rules, an employee who is working for another cap-subject employer in H-1B status may start work with a new employer as soon as the new employer files its H-1B petition for that employee with the USCIS. New employees changing from any other nonimmigrant status cannot start work until the new employer's nonimmigrant petition and change of status application have been approved.

classifications should be considered before an employer decides which nonimmigrant visa classification is most appropriate for a prospective employee.

E. Consequences of Inadvertent Status Violation(s) Under the 1996 Immigration Act

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "1996 Act") made a number of restrictive changes in the immigration laws. One significant change is the addition of a three (3) or ten (10) year bar to residence for those who are "unlawfully present" in the United States for longer than 180 or 365 days, respectively. There is no requirement that the "unlawful presence" be intentional. It can apply to families who inadvertently fail to extend their status, or to executives who switch positions without securing the proper USCIS approvals. These changes in the law make it imperative for companies to ensure that their employees (and their employees' families) remain in lawful status.

IV. EMPLOYER RESPONSIBILITIES

The Immigration Reform and Control Act of 1986 ("IRCA") applies to all employees hired after November 6, 1986. IRCA's sanctions basically fall within three categories: (1) employment of unauthorized aliens; (2) recordkeeping; and (3) discrimination.

Under IRCA, employers have the responsibility to knowingly not hire unauthorized aliens or to maintain them as employees once their employment authorization expires. Employers also must verify on Form I-9 the identity and authority to work of all employees. Finally, IRCA prohibits intentional discrimination in employment because of an applicant's national origin or citizenship status.

Under IRCA's definition of unfair-immigration-related employment practices has been expanded to include: (a) any request for more or different documents evidencing identity or work authorization than are required by the USCIS regulations; (b) any refusal of facially valid

identity or work authorization documents; and (c) any attempt to intimidate and/or retaliate against employees for exercising rights protected by IRCA.

Civil fines and cease-and-desist orders can be imposed upon employers for violating IRCA. Under the 1996 Act, however, employers who are found to have "technical or procedural" violations will be given ten (10) days to cure them. Criminal penalties and asset forfeitures are possible for employers who engage in persistent violations. The Department of Homeland Security, through the Immigration and Customs Enforcement agency ("ICE"), has stepped up worksite enforcement efforts under IRCA. This has included raids of large facilities suspected of employing undocumented workers, arrests of any undocumented workers, and criminal forfeitures and charges against the companies and management responsible for the employment of these undocumented workers. Several states also have passed immigration-related laws that impose further requirements on employers in their jurisdictions or seeking to do business with the respective states. For these reasons, all employers now should be careful not only to maintain compliance with IRCA, but also to check the state law where they operate to ensure compliance with its provisions.

If you have any questions, please contact any of the following individuals:

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China – Law Firms

Mentors To Chinese Companies

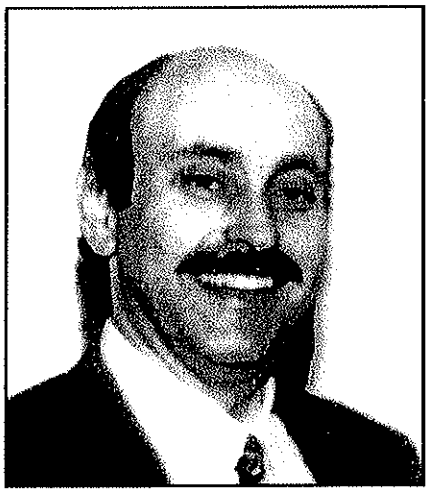
The Editor interviews ***Dean L. Silverberg, and Frank C. Morris Jr.****, Members, Epstein Becker & Green P.C.*

Editor: Please tell our readers about your background and professional experience.

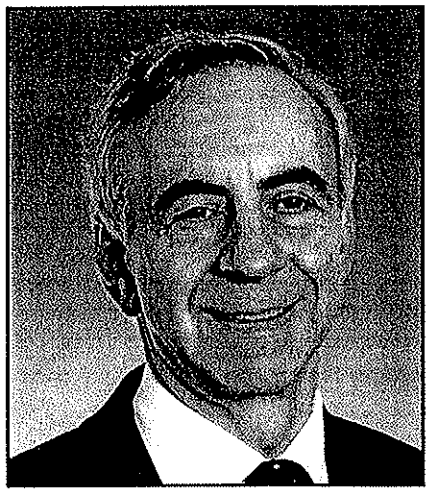
Silverberg: I graduated with a B.A. (with honors) in 1974 from Binghamton University, part of the State University system in New York, received my J.D. in 1977 from Brooklyn Law School and my LL.M. degree (with honors) in Labor Law from New York University School of Law in 1986. After graduating from law school in 1977, I was an Assistant Corporation Counsel with the City of New York in the General Litigation Division where I worked on general litigation matters, discrimination litigation and related lawsuits in state and federal court, and labor relations and personnel matters. In late 1980 I was employed by the New York City Health and Hospitals Corporation, specifically Bellevue Hospital Center, where I was Director of Labor Relations for a facility with approximately 5,000 employees and 1,200 beds. I was thereafter asked to join the then New York City Mayor Ed Koch as Deputy Counsel from 1983 until 1986.

In the spring of 1986 I came to the New York office of Epstein Becker & Green, and became a shareholder in 1989. I am in the labor and employment law department of the firm. I practice in the area of employment litigation, collective bargaining, and human resource consulting and training. Besides consulting and advising clients and designing personnel policies and protocols for them, I also do a fair amount of training and speaking to clients in all industries regarding best practices in human resource and personnel management.

Morris: My undergraduate education was a B.S. from Northwestern University where I graduated with honors. I then went to the University of Virginia Law School and received my J.D. and was awarded the Shawe Labor Law award. After law school, I became an enforcement attorney in the Appellate Court Branch of the National Labor Relations Board. While there, I had the opportunity to litigate in every U.S. Circuit Court of Appeals as well as the U.S. Supreme Court.



Dean L. Silverberg



Frank C. Morris Jr.,

I was recruited by Ron Green from a Washington labor and employment firm in 1978. I head EB&G's labor and employment practice in Washington and co-chair our national disability practice group. My practice covers counseling and litigation and the full range of employment, benefits, and traditional labor matters, as well as disability litigation that extends into the public accommodation area under Title III of the Americans With Disabilities Act and the Fair Housing Act.

In the last several years I also have been advising on, investigating and litigating Sarbanes-Oxley and other whistleblower matters. We have had the opportunity to litigate some precedent setting SOX cases. I've had the distinct honor of speaking at federal circuit Judicial Conferences for about half of all of the federal trial and appellate judges on disability and employment law developments.

Editor: How did the firm become involved with the Bank of China in designing the special program for Chinese companies?

Silverberg: We have been working with the Bank of China as its labor counsel for approximately five years, representing them in their two New York branches as well as in their Los Angeles office. As we have seen, we felt a need to be more involved with the Chinese companies, to assist them as they entered the U.S. markets, and we planned a series of seminar programs in the U.S., co-hosted and jointly presented with the Bank of China. We believe we have the experience and expertise to put on these presentations in order to assist the Chinese companies to act in full conformity with applicable U.S. laws, as well as any state or local laws in the jurisdictions where they are operating. We targeted Chinese businesses doing business in the markets where we saw the greatest concentration of Chinese business – New York, Los Angeles and San Francisco.

Editor: Please tell us about what you did in China in talking with companies thinking about coming to the U.S.

Morris: Most recently we had the opportunity in conjunction with a leading Chinese law firm, Zhong Lun, to present our program to approximately 80 Chinese business men and business women in Shanghai and to another 50

Please email the interviewees at dsilverberg@ebglaw.com or fmorris@ebglaw.com with questions about this interview.

in Beijing. The programs dealt with labor and employment law and litigation in the U.S. to provide Chinese businesses with an understanding of the issues they need to address to operate successfully in a quite different legal environment. The U.S. is a litigation prone society, unlike China. China also has a mandatory arbitration requirement before formal litigation proceeds versus possible voluntary alternative dispute resolution in the U.S.

We were able to see a number of the largest companies in China which have both substantial and nascent U.S. operations and those that are exploring U.S. operations. We made presentations and answered questions on how to construct a U.S. business that would use the best corporate structure, be highly productive and in compliance with U.S. laws and follow best practices in connection with both labor and employment and corporate governance matters.

Silverberg: Our return trip to China this October also had as its purpose meeting with several of the businesses we had previously met in June when we had put on a number of presentations and seminars. They wanted to talk about doing business in the U.S.

Editor: What materials did you develop for your presentations?

Silverberg: We put together a formal program using a power point presentation in Chinese which we e-mailed to the participants. We also took with us materials from our labor and employment department here which were translated into Chinese. Two other shareholders from the firm also joined us on this trip, Bob Groban, who is head of our immigration department, and Sharon Ferko, who is with our corporate group specializing in mergers and acquisitions and international work. She also counsels clients in the area of best practices for compliance.

This past August we hired a Chinese attorney who had practiced in Beijing for two years before attending law school in the U.S. and is now admitted to practice law in New York. He has been instrumental in helping our firm in the China Initiative, translating all the materials. He was also very helpful in assisting us in understanding the Chinese business and social cultures, and working with our law firm counterparts in China to make sure everything was running smoothly for the seminars and our other appointments. He affords our Chinese clients the ability to communicate with us in Mandarin or English.

Editor: How did you handle the issue of U.S. immigration laws?

Silverberg: Mr. Groban is a former assistant U.S. attorney who was responsible for immigration matters. He is able to counsel companies on the types of visas required and the manner in which someone would acquire a permanent residence or appropriate work authorization permit. Mr. Groban runs the immigration department from our New York office, a sizeable practice for the firm. He advises on what the alternatives for individuals are, in what capacity they can come to the U.S. and how to ensure strict compliance with all of the immigration laws and regulations. With Mr. Groban's assistance, Chinese companies who want to bring people to the U.S. can do so, in full compliance with American immigration laws, and as expeditiously as possible.

Morris: Even the timelines for starting operations can be affected by immigration issues. We advised on the time needed to complete the immigration process to avoid delays in their start-up plans. If Chinese companies are acquiring businesses in the U.S., that, too, can pose immigration issues because certain visas are specific to one employer. Immigration clearance for working at the new entity is required so Chinese companies which would acquire or might merge operations with a U.S. company need to perform due diligence on these immigration issues.

Editor: Do you get the sense that the Chinese government is promoting Chinese investment abroad?

Silverberg: Yes, we do. We see it in terms of the large turnout we had in our two primary seminars in Beijing and Shanghai. We had attendance of approximately 130 people, including representatives of the biggest companies in China in financial services as well as high-end IT, manufacturing, healthcare and service industries. A number of individuals, who were the senior leadership of trade organizations, were there on behalf of another several hundred companies to whom they indicated they intended to distribute the information we were providing. We were also invited to speak before an association of the private petroleum industry companies in China.

Editor: Do you see a greater understanding on the part of Chinese companies in terms of protecting intellectual property rights since they, too, have rights that need protecting?

Morris: During our presentations I addressed the fact that if you are going to operate in the U.S., you should have agreements that protect your trade secrets and proprietary information. We also discussed how those agreements are enforced in the various states. In addition, we explained how non-competition agreements may be used with respect to key employees. Our observation was that the development of the Chinese economy is creating valuable intellectual property. The fact that the Chinese will increasingly have valuable IP should engender more uniform protection for all IP owners.

Editor: My understanding is that the Chinese have laws against piracy that are being enforced to a degree.

Morris: Yes, but you have to put in context that the litigation that you might commence in the U.S. against piracy is not so common in China and there is not such a developed body of precedents. Once laws are in place, then enforcement follows. It can take time to develop the law in any area including enforcement of anti-piracy regulations.

Editor: The Whistleblower provision of Sarbanes must be a difficult concept for Chinese to grapple with.

Morris: Yes, that is why we specifically addressed that issue during our programs and meetings. I explained that Sarbanes-Oxley imposes specific requirements which cover those Chinese companies that are listed on a U.S. stock exchange and others that will have to file reports under Section 15(d) of the Securities Exchange Act. It is fair to say that Sarbanes-Oxley has engendered both study of and concern with those standards in other nations. Transparency in Chinese business has not been the same as in the U.S. We emphasized the importance of setting up an appropriate compliance program, pointing out it is good business that would enhance their ability to be active in the capital markets here. It would also enhance their ability to have a business that would be attractive to partners and joint ventures as Ms. Ferko explained.

Silverberg: We set up a roadmap in our materials which includes the issues that might arise for any business thinking of moving into the U.S., providing suggestions as to how a company can adopt best practices and try to ensure good compliance.

Morris: In the program and materials I covered litigation and discovery – topics that were of great interest because, e.g., a Chinese subsidiary litigating in the U.S. may have discovery extend back to the parent in China. It is also possible that the decision makers in China will be called to testify in the U.S. These topics had been of interest on our prior trip to China and we were able to expand our discussion of them.

That was also true in June when I was invited with a small group of American lawyers on behalf of the American Law Institute-American Bar Association (ALI-ABA) to speak at the Shanghai Jiaotong Law School with regard to American law and litigation and Chinese commercial development. I was extremely impressed by the legal knowledge of Chinese law students about the U.S. system. They have an outward approach to their studies and interests which bodes well for their future as part of the global economy.

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Telling tales

By BRIAN MOORE
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When folks think of whistleblowers, they often picture Jeffrey Wigand.

The ex-tobacco exec blew the proverbial whistle on his employer, Brown & Williamson, accusing the firm of manipulating nicotine levels in cigarettes. And now he's famous, profiled in "Vanity Fair," probed on "60 Minutes" and portrayed by Russell Crowe in "The Insider."

Like Wigand, plenty of workers have occasion to consider whether to out wrongdoing by their company or by their colleagues. In a recent survey by the Ethics Resource Center, fully half of workers reported that they'd witnessed misconduct on the job.

But workers considering calling an organization out on its misdeeds need to think things through, say experts. Though plenty of people would be tickled pink to chat it up with Mike Wallace, Wigand did so after losing a $300,000 job and, eventually, his family, among other woes.

"An employee who is not willing to commit to the campaign necessary to win a no-prisoners conflict has no business going public with his or her dissent," says Tom Devine, legal director of the Government Accountability Project, an advocacy group for whistleblowers.

While doing the right thing may be its own reward, the consequences that follow can run the gamut from unjust to catastrophic if not handled wisely.

"There is a good bit of research out there that suggests that whistleblowing can be a very costly endeavor," says management consultant and former Harvard business professor Mary Gentile, author of "Giving Voice to Values: How to Speak Your Mind When You Know What's Right."

"Often these processes drag along for quite a while, so there's an emotional stress, there's financial stress, there's physical stress," she says.

Professionally, workplace Dudley Do-Rights could be fired, demoted, disciplined or lose a promotion.

"Any kind of loss of opportunity" could result from blowing the whistle, says Epstein Becker & Green attorney Allen Roberts, who represents management in labor disputes. "It could be any sort of disadvantage relative to either prior treatment or treatment of any comparable employee."

In addition, whistleblowers are often isolated from their co-workers and "investigated" by management, says Devine, who adds that they're often cited for every infraction in the company handbook to make them miserable.

And that could be a best-case scenario for some, since whistleblowers can be blackballed from their careers forever, according to Devine, who's co-authored a new book called "The Corporate Whistleblowers Survival Guide."

Outside the office, whistleblowers can face social ostracism and even physical threats — to themselves and their families, he says.

All this may have you thinking that your boss could bludgeon baby seals during a department meeting and you'd look the other way. But if whistleblowing is done with foresight, it doesn't have to be a life-shattering event, experts say. If you're thinking of speaking up about workday malfeasance, consider the following:

* Think it through. Among other considerations, "consult your loved ones," says Devine. "It's a decision the whole family should make, not just the nobly heroic breadwinner."

* Lawyer up. A potential justice-seeker should also get a good lawyer, says Devine.

"This is a life's crossroads decision. A lawyer can do the necessary research to help a whistleblower from stepping in legal quicksand," says Devine. "Get a good seasoned lawyer with subject matter expertise."

There's an array of federal and state laws providing some protection for whistleblowers, notes Roberts, including recent federal legislation such as health care reform, the Dodd-Frank Wall Street reform act and the Food Safety Modernization Act.

State laws are varied and complicated. For instance, New Jersey's whistleblower protections are wider than New York's, which "are rooted in public safety and health," he says.

* Keep it real. A whistleblower shouldn't need Perry Mason to advise him that when describing wrongdoing, don't exaggerate.

"It's much better to only disclose 80 percent of the problem rather than 101 percent because that 1 percent will become the whole controversy," says Devine.

* Start small. Most important, a whistleblower needs to give the company the opportunity to solve the problem before mouthing off on "60 Minutes," experts say.

"Whistleblowing does not have to be an adversarial process," Roberts says. "In its best form, a whistleblower is somebody who comes to the boss and says, 'You and I care about the same things. I have seen something that you may not know about and if you knew what I knew, you would care, too, and you would want to fix it.'"

"Give the organization a chance to do the right thing," adds Devine. "A whistleblower has to be very careful not to expose him or herself as a threat to the company, but blindsiding the organization almost certainly will backfire."

* Be shrewd, not shrill. The trouble is many workers don't know how to handle those conversations effectively, notes Gentile.

"We get sort of stuck on 'This is wrong,' but if you really want to persuade people to behave in a different way, we should see this as just like trying to persuade them to do anything else in business," she says.

* Prepare. Rather than delivering a sermon, a whistleblower should tackle unethical behavior as if promoting a new product.

Do research. Gather data. Monetize the issue, if possible. Look at case studies of what happened to other companies that did the wrong thing. And before rolling into a boss' office, rehearse the presentation and prepare for all possible replies.

"You can literally anticipate and practice responses, which means that you can bring the emotion level down," says Gentile. "It means you don't have to address the person you're trying to convince as if he or she is somehow evil."

* Don't wait too long. There's a natural inclination to let things slide and hope the problem goes away. But it's a whole lot easier to act sooner and nip problems in the bud before they get out of hand.

"Just think about advantage of being able to address these things often and early with lower stakes," Gentile says.

Blowin' in the whistle

* Frank Serpico, New York City Police Department. The Brooklyn-born cop exposed widespread corruption in the NYPD during the early 1970s. In testimony before the Knapp Commission investigating the department, Serpico said wrongdoing was so pervasive that "the honest officer fears the dishonest officer, not the other way around."

Serpico's heroic and dangerous exploits — he was shot in the face during a drug bust that some allege was a set-up by colleagues — were later chronicled in book form by Peter Maas and on film starring Al Pacino in the titular role.

* Cynthia Cooper, WorldCom. In 2002, Cooper, the telecommunications firm's internal auditor, and others uncovered what was then the biggest accounting scandal in US history. Working after hours, Cooper's team found $3.8 billion in phantom expenses and dicey balance sheet entries.

After they reported their findings to the company's board of directors, chief financial officer Scott Sullivan was canned and later pleaded guilty to securities fraud and other crimes. Four other WorldCom big shots saw the inside of the clink, but justice came down hardest on the company's founder, Bernard J. Ebbers, who was sentenced to 25 years of hard time.

Business ethics expert Mary Gentile gives Cooper props for doing due diligence before pointing any fingers.

"When she figured out something was going on, she really did a lot of work before she came forward so they could both be very clear and sure about what they were saying," says Gentile. Cooper also had "some ideas about what they needed to do so the organization could survive."

* Marc Hodler, International Olympic Committee. Proving you're never too old to expose corruption, the then-70-year-old Swiss lawyer and IOC member shocked curling fans around the world with his claim that fellow committee members had taken bribes from Salt Lake City Olympic boosters in exchange for granting the city the 2002 Winter Olympics. Ten committee members were given the boot or quit as a result of Hodler's whistleblowing.

* Christoph Meili, UBS. The UBS night guard discovered that the Swiss financial services giant was destroying Holocaust-era asset records of deceased Jews whose heirs could not be found, among other illegal activities. He turned some of the remaining documents over to a Zurich-based Jewish organization, leading to a civil suit by heirs of Holocaust victims against Swiss banks that was settled for $1.25 billion in 1998.

For his troubles, Meili was fired from his job, received death threats and was investigated by Swiss prosecutors for violating banking secrecy laws. He was granted political asylum in the United States in 1997, but returned to Switzerland in 2009.

* Sherron Watkins, Enron. In a famous example of in-house whistleblowing, Enron exec Watkins warned the Houston conglomerate's CEO, Ken Lay (inset), in 2001 of the firm's shady accounting practices. Lay paid little mind, and was rewarded by becoming the poster boy for corporate malfeasance when those practices exploded into a national scandal soon after.

Continuing Prominence Seen for Whistleblowers,

as Appeared in The New York Law Journal's Regulatory Reform Special Section

1/11/2010
Allen B. Roberts

As appeared in New York Law Journal's Regulatory Reform Special Section, Jan. 11, 2010.

Across industry lines, in both the public and private sector, businesses and other organizations looking for signals of the new year's tone are likely to see whistleblowing as a continuing factor.

Last year's bailouts and stimulus, and the events leading to them, have altered expectations and perceptions of security, risk and opportunity, and who the stakeholders are. A mood of populism emerged, accompanied by an enhanced regard for whistleblowers, as both market and regulatory failures were faulted for economic and other ills. The Fraud Enforcement and Recovery Act of 2009 (FERA)[1] amendments to the False Claims Act (FCA)[2] and the stimulus package whistleblower provisions of the American Recovery and Reinvestment Act of 2009 (ARRA)[3] assure continuing whistleblower prominence as programs funded by the federal government advance.

The focus of the FCA, as invigorated by FERA, is false records and fraudulent or false claims having a nexus to federal funding, and whistleblower protection is available for lawful acts done in furtherance of efforts to stop an FCA violation.)[4] ARRA broadly protects disclosures that need not rise to the level of fraud or falsehoods; protection is available for disclosures by individuals performing services for recipients of stimulus package covered funds of important, but less extreme, matters going to gross mismanagement, gross waste, substantial and specific danger to public health or safety, abuse of authority, or violation of a law, rule or regulation related to an agency contract or grant.)[5]

Laws like FERA and ARRA were enacted to assure that an earnest whistleblower could carry the compliance message without employment reprisal as government funding expanded. In theory and practice, whistleblowing can be a natural, beneficial extension of internal corporate compliance, or it can be a calculated maneuver for personal advantage.

Ideally, a whistleblower altruistically identifies a matter of significance to an organization that has gone astray and acts appropriately to have the matter addressed so it may receive an appropriate response. However, some are motivated by windfall gain or statutory protection to cloak unacceptable performance when legitimate, known factors put continuing employment in jeopardy.

For organizations charged with whistleblower violations, the stakes can be high, not merely because of legal issues and potential liability, but because of the reputational risk in the marketplace. A whistleblower complaint generally goes to the heart of whether an organization has adhered to an established standard of conduct by exposing corporate information otherwise shielded from view by the public, the media, competitors and business associates. And who better to know such restricted information than insiders in key operating, strategic, financial and legal positions?)[6]

Who the Whistleblowers Are

Whistleblowers tend to fall into either of two categories: qui tam relators, who stand to participate in the government's economic recovery for false or fraudulent billing or contract performance, and those seeking redress for unfavorable employment-related personnel action alleged to be in retaliation for some statutorily protected activity.

The lead statutory vehicle for the qui tam relator is the federal FCA, amended in 2009 by FERA, which allows for a potentially enormous award amounting to a 15 percent to 30 percent share of the U.S. government's total recovery, subject to various factors used to value the relator's contribution and entitlement.)[7]

Unlike the qui tam relator, the whistleblower claiming an adverse employment action typically seeks a conventional "make whole" remedy, likely to include elements of reinstatement and back pay, with a possibility of compensatory damages and recovery of attorneys' fees, although there are variations depending upon the statute invoked.

Employee-whistleblowers are not like others potentially making claims against their employers. They are distinguished not only by their unique access to non-public information that tends to be the predicate of their statutory protection, but also by the nature of the issue they raise. A whistleblower raises issues different from those whose protected status is rooted in a personal characteristic statutorily recognized among relatively universal federal and state equal employment opportunity (EEO) protections: age, race, sex, national origin, religion, disability.

Even where EEO claims raise common issues, similar and typical among employees and subject to consideration as class or collective actions, they are inherently personal. The individual or group of individuals feels targeted for some element over which there is no control and that cannot be avoided or changed by an employee or the employer. Rather than raising a personal "me" issue, the whistleblower raises a corporate "us" issue; the whistleblower asserts that the protected issue raised pertains not to any characteristic about him or her, but, instead, to compliance by the employing organization.

The Claims

One obstacle that continues to be encountered by those asserting whistleblower claims is that legislated protection does not always mirror compliance standards or keep pace with them.

A clear example is the whistleblower protection enacted as part of the Sarbanes-Oxley Act of 2002 reforms responsive to certain corporate scandals and intended to promote governance, transparency, accountability, internal controls and best practices. Sarbanes-Oxley embedded in the compliance archetype a hotline feature, required for companies with publicly traded securities, but soon adopted by all manner of organizations as a best practice.

Under Sarbanes-Oxley, the audit committees of listed issuers are required to establish procedures for the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.)[8]

It might have been expected that Sarbanes-Oxley would provide whistleblower protections coextensive with the

hotline disclosures it encourages. It does not; activity is protected only if the employee acts lawfully to address wrongs within a category of express unlawful activity or matters subject to securities regulation. To win statutory protection, the activity must relate to mail frauds and swindles (18 U.S.C. §1341), fraud by wire, radio or television (18 U.S.C. §1343), bank fraud (18 U.S.C. §1344) or securities fraud (18 U.S.C. §1348), or to any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders. [9]

Relative to the prominence of their claims within organizations and in the media, whistleblowers have experienced a low rate of litigation success, notably under Sarbanes-Oxley, where published reports show litigated outcomes favorable to claimants in single digits.[10] To some, a low rate of success indicates that existing legislative protections are working well and attaining compliance. Organizations that have prevailed in the defense of whistleblower claims are more likely to attribute their successful defense to sound policies and controls; a compliance program that worked, with business, operations and human resources functions each performing appropriately in its role.

Critics perceive fundamental flaws in the statutory scope of protection or in the process or mechanisms for redressing wrongs. Not surprisingly, the whistleblower advocacy bar has tended towards the latter, seeking "corrective" legislation that would reform laws that have been literally or narrowly construed.

With the recorded success of whistleblower claims in litigation falling short of some expectations, legislative initiatives have been underway, and more can be anticipated. In a recently published report, the Internal Revenue Service specifically notes the value of whistleblowers and their concern for confidentiality, including in its recommendations new legislation "to ensure that informants are protected against retaliation by their employers and to provide specific relief to informants who are retaliated against."[11]

Protections Vary Widely

Despite their common core elements, whistleblower protections vary widely, and success or frustration in whistleblower litigation continues to be the product of definitions of protections and procedures for advancing claims rooted in diverse statutes. For the most part, existing federal legislation does not currently confer the sort of broad whistleblower protections available in New Jersey,[12] Connecticut[13] and several other states[14] that expansively include within their protections violation generally of laws, rules, regulations and/or ordinances.[15]

While some federal whistleblower protections also refer broadly to violation of a "law, rule or regulation," the reach is limited to the purposes of the statute, as with stimulus package covered funds under ARRA. The 2008 Consumer Product Safety Improvement Act similarly extended protections for whistleblowing about laws and related orders, rules, regulations, standards and bans, but restricted those protections to the realm of federal consumer product safety.[16] And even without fruition of ongoing efforts to expand its reach by amendment, the Whistleblower Protection Act of 1989 protects federal employees from adverse personnel action with respect to certain types of disclosures, including information reasonably believed to evidence a violation of a law, rule or regulation.[17]

A unified body of whistleblower law is not likely to emerge, and each statute needs to be assessed for what it does and does not say, as well as the administrative and judicial interpretations that follow. Fourteen diverse statutes assign responsibility to the Secretary of Labor for protecting whistleblowers from retaliation, with the Occupational Safety

and Health Administration (OSHA) designated to receive and investigate complaints and make determinations of merit, and Department of Labor administrative law judges empowered to conduct hearings, followed by discretionary review by the Secretary of Labor.

A Final Rule published in 1996 delegates authority and assigns responsibility to an Administrative Review Board (ARB) to act for the Secretary of Labor in issuing final agency decisions on questions of law and fact arising in review or on appeal of decisions and recommended decisions of administrative law judges charged to hear and determine whistleblower claims under an array of statutes.[18] Notwithstanding the appointment of ARB members to two-year terms, the Secretary of Labor retains the sole discretion to remove any ARB member at any time,[19] so shifts may come if incumbents are replaced to better reflect the interpretive and enforcement objectives of a new Secretary. A keynote of change to come may have been sounded when Secretary of Labor Hilda Solis declared in her first speech following confirmation, "There is a new sheriff in town."[20]

Even with the potential for change coming from new Department of Labor appointees, matters tried before administrative law judges and subject to ARB review may be more likely to be construed with consistency than ARRA claims that could be decided differently by heads of the 28 federal departments and agencies distributing stimulus package covered funds, each acting upon the investigation and report of that agency's inspector general.[21] Furthermore, some whistleblower claims, such as those under the FCA, are not designated for agency consideration at all, and construction comes entirely from court interpretations of statutory protection.[22]

The Organizational Impact

To some, the patchwork of whistleblower protections is being stretched at its seams; others believe the fabric is sound.

Whatever one's perspective, it is clear that organizations are increasingly aware of the role of whistleblowers in their corporate compliance. As FERA and ARRA show, the opportunity to expand business horizons, particularly through government programs or funding, brings the potential of increased regulation, accompanied by internal and external scrutiny and protection of whistleblowers.

Congressional initiatives in 2009, realized in enactment of FERA and ARRA, show that the American populace is increasingly invested in how government funds are managed relative to their intended purposes. With that type of commitment, whistleblowing that faults recipients of government funds for wrongdoing that violates a legislated standard of conduct has become more mainstream than ever before.

Current and future schemes of protection may channel disclosures to a regulatory, enforcement, legislative or judicial body, or to some individual or committee within the organization having authority to investigate, discover and/or terminate misconduct. But, whatever the impetus or the enforcement mechanism, at the end of the day, whistleblowing hits home, and that is where it is addressed best.

Because whistleblowing implicates two distinct issues, corporate compliance and individual rights to not suffer employment reprisals, it creates a duality that invites consideration of the best composition of in-house or outside designees to fulfill the separate investigative and decision-making functions with respect to the corporate issue

raised by the whistleblower, as well as the personnel issue that attends protected activity.

If internal mechanisms are not trusted to detect and prevent compliance lapses and to monitor and correct noncompliance, a new wave of outward-directed whistleblowing may emerge. In some measure, this could be accomplished by invoking existing laws and facilitated by more receptive agencies, courts and juries. But the impact of new legislation, amending prior law and creating new standing, is likely to be a factor, as well. The start of 2010 is a good time for all types of organizations to catalogue whistleblower laws applicable to current and foreseeably expanded activity, directly or as a subcontractor or secondary recipient of government funding.

The ascendency of whistleblowing, together with initiatives to expand and energize whistleblower protections, should not be surprising in today's political, legislative, economic and legal environment, and there are no indicators that 2010 will show declining interest.

Pipelines may be long and processes viscous, but the amounts of federal dollars that will be spent and the interest funding programs attract combine to suggest that whistleblowing will have increasing prominence on the compliance stage. If organizations were to disregard their own compliance responsibilities, others could be incentivized to step in and fill any void, possibly relying on pieces in the mosaic of whistleblower protections.

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[1] Pub. L. No. 111-21, 123 Stat. 1617 (2009).

[2] 31 U.S.C. § 3729, et seq.

[3] Pub. L. No. 111-5, 123 Stat. 115, 297 (2009).

[4] 31 U.S.C. § 3730(h)(1).

[5]See Pub. L. No. 111-5, 123 Stat. 115, 297 (2009).

[6] See, e.g., Van Asdale v. Int'l Game Tech., 577 F.3d 989, 994-96 (9th Cir. 2009) (Sarbanes-Oxley claims by former in-house attorneys survive summary judgment, despite confidentiality concerns of attorney-client privilege).

[7] See 31 U.S.C. § 3730(d)(1) and (2).

[8] 15 U.S.C. §78f (m)(4).

[9] See 18 U.S.C. § 1514A(a).

[10] Jennifer Levitz, Shielding the Whistleblower, Wall Street Journal, December 1, 2009; Richard Moberly, Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win, 49 Wm. & Mary L. Rev. 65 (2007).

[11]Final Audit Report – Deficiencies Exist in the Control and Timely Resolution of Whistleblower Claims (Reference Number: 2009-30-114), at 3 (August 20, 2009).

[12]See N.J. Stat. Ann. 34:19-1, et seq.

[13] See Conn. Gen. Stat. § 31-51m, et seq.

[14] See e.g. Cal. Lab. Code § 1102.5(a)-(d).

[15] New York law has similarly broad language, but it is applicable only to matters that create and present a substantial and specific danger to the public health or safety. See N.Y. Lab. Law § 740(2); see also Reddington v. Staten Island Univ. Hosp., 11 N.Y.3d 80 (2008).

[16] See 15 U.S.C. § 2087(a).

[17] See 5 U.S.C. § 2302(b)(8).

[18] Establishment of the Administrative Review Board, 61 Fed. Reg. 87, 19982 (May 3, 1996).

[19] Authorities and Responsibilities of the Administrative Review Board, 61 Fed. Reg. 87, 19978-79, (May 3, 1996).

[20] Steven Greenhouse, At Labor Gathering, Luxury, Jockeying and Applause for Secretary, N.Y. Times, March 8, 2009, at A22.

[21] A listing is available at: http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/STATUTES/WHISTLEBLOWER_STATUTES.HTM.

[22] See 31 U.S.C. § 3730(h)(2).

EPSTEIN BECKER GREEN | LABOR AND EMPLOYMENT PRACTICE

ACT NOW ADVISORY

They're Here – New York State Department of Labor Issues Updated 195.1 Templates and WTPA Frequently Asked Questions!

April 4, 2011

By Jeffrey M. Landes, William J. Milani, Jennifer A. Goldman, Susan Gross Sholinsky, and Dean L. Silverberg

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Just in time for April 9, 2011, the effective date of the Wage Theft Prevention Act ("WTPA"), the New York State Department of Labor ("NYSDOL") has issued templates for employers to use in order to comply with the WTPA. Also available on the NYSDOL's website is a document, entitled Frequently Asked Questions ("FAQ"), addressing common employer questions about compliance with Sections 195.1 (notice of pay rates and pay dates), 195.3 (wage statements), and the anti-retaliation provisions of the New York State Labor Law (the "Labor Law").

As we reported last December (see "*Act Now* Advisory: Governor Paterson Signs Overhaul of New York State Labor Law"), in addition to increasing the amount and scope of information that must be provided to employees pursuant to Section 195.1 of the Labor Law, the WTPA now requires employers to provide written notices *both* in English and in the language identified by each employee as his or her "primary language," with certain exceptions, as described in this Advisory. Further, employers must provide written notice not only to all *new* employees, but also to *all* employees on or before February 1 of each year, starting in 2012. Under Section 195.3 of the Labor Law, rules pertaining to the contents of wage statements (pay stubs) have also been modified.

Frequently Asked Questions

The FAQ document clarifies certain aspects of the Labor Law, and makes some changes from the NYSDOL's prior rules in its Guidelines and Instructions documents. Most significantly, the FAQ document states that:

Section 195.1 of the Labor Law

- Employers are no longer required to identify which exemption(s) from applicable overtime rules apply to their exempt employees – this information is now optional;

- Under the new annual notification rule, notices *must* be provided to employees between January 1 and February 1 of each year, and not at any other time of the year;

- Templates for compliance with Section 195.1 of the Labor Law will be provided in English, Spanish, Chinese, Korean, Creole, Polish, and Russian (however, for now, templates are available in English, Spanish, Chinese, and Korean only);

- Employers need not use the NYSDOL's forms in order to comply with Section 195.1 of the Labor Law;

- If employers use their own forms, however, the information must be provided in a stand-alone document – if the required information is simply included within the offer letter, the NYSDOL will not consider this to be compliant with Section 195.1;

- Notice can be provided electronically, but there must be a system where the employee can acknowledge receipt of the notice and print out a copy of it;

- If an employee refuses to sign the notice, the employer will comply with the requirements of Section 195.1 if it notes the refusal on the notice and then provides the employee with a copy;

- For employers outside the hospitality industry, no notice need be provided in case of a wage increase, so long as the pay raise is noted in the next wage statement, but notice *must* be provided in case of a wage decrease;

- Employers in the hospitality industry must provide notices in case of any change to the wage rate (increase or decrease);

- Employees who work in states outside New York are not covered by the WTPA;

- For commissioned salespersons, a copy of their commission agreement should be attached to the notice; and

- Notice requirements *do* apply to employees covered by a collective bargaining agreement.

Section 195.3 of the Labor Law

- If an employer has multiple pay rates, all pay rates must be included on the wage statement (pay stub), but only the rates actually used to determine the employee's pay need be shown on the pay stub for that period; and

- The NYSDOL will provide a model wage statement (pay stub) that demonstrates the types of entries that may be necessary.

Templates

Templates are available for: hourly rate employees (LS 54); multiple rate employees (LS 55); employees paid a weekly rate or salary for a fixed number of hours (40 or less in a week) (LS 56); employees paid a salary for varying hours, day rate, piece rate, flat rate or other non-hourly pay (LS 57); prevailing rate and other jobs (LS 58); and exempt employees (LS 59).

In addition to the items required by the WTPA, these templates have spaces for certain optional information, such as a federal employer identification number ("FEIN") and the applicable exemption (for exempt employees). In addition, and similar to the prior forms, these templates also provide a space for the employer to identify the name and title of the person who prepared the form.

Foreign Language Templates

In order to comply with its "primary language" rules, the WTPA requires the NYSDOL to issue templates both in English and in certain other languages, based on the number of New York State residents who speak such languages, among other factors. As stated above, templates are currently available in Spanish, Chinese, and Korean, and will be available in Creole, Polish, and Russian.

Importantly, to the extent that the NYSDOL does not provide a template in a particular primary language, the employer will satisfy the requirements of Section 195.1 by providing the notice to the applicable employee in English only.

Employers must receive signed acknowledgments from employees indicating that (1) the employee has received the notice, (2) the employee identified his or her primary language to the employer, and (3) the notice was provided in that primary language (unless the employee's primary language is other than one of the languages for which a template is available).

Effective Date

Despite an earlier press release from then-Governor David Paterson's office regarding the effective date of the WTPA, we have confirmed that the actual effective date is April 9, 2011 – three days earlier than originally reported.

Notice Requirements

Prior to the effective date of the WTPA, Section 195.1 of the Labor Law required employers to provide new employees with a written notice containing the following information:

- The regular payday designated by the employer;
- The employee's regular rate of pay;
- For non-exempt employees, their hourly overtime pay rates; and
- For exempt employees, which exemption(s) the employee falls under (this rule was never included in the law, but comes from Guidelines and Instructions published by the NYSDOL).

As of April 9, 2011, however, with the effectiveness of the WTPA, only the first three items above are required, and the fourth (identifying the specific exemption(s) under which exempt employees fall) is now optional, and not required. Further, in addition to

those three required items, employers must now include the following information in 195.1 notices:

- The basis of the applicable pay rate (*i.e.*, whether paid by the hour, shift, day, week, salary, piece, or by commission);
- Allowances, if any, claimed as part of the minimum wage (including tip, meal, or lodging allowances);
- The name of the employer and any "doing business as" names used by the employer;
- The physical address of the employer's main office or physical place of business, and a mailing address, if different;
- The employer's telephone number; and
- "Such other information as the Commissioner deems material and necessary."

The WTPA provides that, not only must *new* employees receive 195.1 notices, but, beginning in 2012, *all* New York employees must receive 195.1 notices on or before February 1 of each year. As stated above, the NYSDOL has confirmed that this requirement means that such annual forms must be provided between January 1 and February 1 of each year, and not at any other time.

Wage Statement Requirements

Prior to the effective date of the WTPA, Section 195.3 of the Labor Law required employers to provide employees with wage statements (pay stubs) accompanying every payment of wages that included the following information:

- Gross wages;
- Deductions; and
- Net wages.

Pursuant to the WTPA, in addition to the above information, the wage statement must also now include the following information:

- The name of the employee;
- The name of the employer;
- The number of regular hours worked;
- The number of overtime hours worked;

- The address and telephone number of the employer;
- The dates of work covered by the payment of wages;
- The rate(s) of pay and the basis thereof (*i.e.,* whether paid by the hour, shift, day, week, piece, commission, etc.);
- For non-exempt employees:
    - The regular hourly rate(s) of pay and overtime rate(s) of pay;
    - The number of regular hours worked; and
    - The number of overtime hours worked;
- Allowances, if any, claimed as part of the minimum wage (*e.g.,* tips, meal, or lodging); and
- For all employees paid a piece rate, the applicable piece rate(s) and number of pieces completed at each piece rate.

As stated above, the NYSDOL will be providing a model pay stub to demonstrate the types of information that may be required on a pay stub.

Conclusion

Notwithstanding the assistance the NYSDOL has provided in the form of the FAQ document, compliance with the WTPA will be challenging. How will an employer discern the "primary language" of its incoming employees so that it can provide 195.1 notices at or before the time of hiring? Will this process change when the employer needs to obtain "primary language" information from its entire workforce (on or before February 1, 2012)? Will doing so put the employer at risk of national origin discrimination claims? Employers will need to be careful when navigating these and other thorny issues.

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ACT NOW ADVISORY

New York State Department of Labor Issues Opinion Letter on Internships

January 14, 2011

By William J. Milani, Dean L. Silverberg, Jeffrey M. Landes, and Susan Gross Sholinsky

The new year has only just begun, but many employers have started to think about their 2011 summer internship programs. New York employers should be aware that on December 21, 2010, the New York State Department of Labor ("NYSDOL") published a detailed opinion letter on whether an internship (including, but not limited to, a summer internship) may qualify for an exception to New York State's minimum wage law.

Are Interns Exempt From the State Minimum Wage Law?

The New York State Minimum Wage Act, New York State Labor Law §§ 650-665 (the "Minimum Wage Act" or the "Act"), applies to all individuals who meet the statutory definition of "employee" codified at Section 651(5) of the Act. The Act carves out 15 categories where individuals are excluded from coverage and, therefore, are not considered "employees." A worker or individual who is not in an employment relationship is excluded from coverage under the Act. To determine the existence of an employment relationship with respect to interns or trainees, the NYSDOL reviews the totality of the circumstances, primarily using the six criteria relied upon by the U.S. Department of Labor, as well as five *additional* factors. In order to be exempt from the protections of the Minimum Wage Act, an internship must satisfy all 11 criteria. The rigorous test is designed to ensure that interns are protected from minimum wage law violations.

Intern/Trainee Exception Test

The following 11 factors make up the NYSDOL's test:

1. **The training, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment.**

This criterion does not require that the internship be directly administered by an educational or vocational institution. Rather, it will likely be satisfied when the internship is structured around classroom instruction, and provides skills that would be applicable in multiple employer settings. Offering academic credit also will demonstrate training similar to training provided in an educational environment.

For example, an internship program that would require participants to attend weekly classroom sessions with extensive job shadowing and a great deal of supervision will likely satisfy this requirement. The more the internship provides participants with skills that can be

used in multiple employment settings (rather than specifically for one company), the more likely the internship will satisfy this criterion.

2. The training is for the benefit of the intern.

Any benefit conferred upon the company providing the internship must be merely incidental to the benefits provided to the intern. The receipt of academic credit for participating in the training program, for example, demonstrates evidence of the beneficial nature of the program to the intern.

3. The interns do not displace regular employees and any work they may do is under close supervision.

Interns must not be used in lieu of hiring new employees. This criterion may be satisfied through an internship program that maintains close and constant supervision by regular employees, where the intern performs minimal or no productive work, emphasizing the educational nature of such a program.

4. The employer who provides the training derives no immediate advantage from the activities of the trainees or students and, on occasion, operations may actually be impeded.

This criterion helps to ensure the beneficial nature of the program to the intern. Any advantage that an employer may derive from the intern's participation in an internship program should be purely incidental to the supervision and training provided.

5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period and are free to take employment elsewhere in the same field.

The internship program should be of a fixed duration (which is communicated to the intern prior to the internship) and not connected with any offer of employment or promise of a permanent position at the conclusion of the internship. The purpose of this criterion is to ensure that employers are not utilizing unpaid internships as a trial period to test out individuals seeking employment. The NYSDOL advises that if an intern is placed with the employer for a trial period with the expectation that he or she will be hired on a permanent basis, that individual would generally be considered an employee.

6. The trainees or students have been notified, in writing, that they will not receive any wages for such training and are not considered employees for minimum wage purposes.

This written notice must be clear and provided to the intern prior to the commencement of the internship.

* * * * *

The following five criteria are used by the NYSDOL in addition to the prior six factors utilized by the U.S. Department of Labor. As previously mentioned, New York has more rigorous

requirements, and all 11 exclusionary criteria must be met in order for an intern to be exempt from minimum wage requirements.

7. Any clinical training is performed under the supervision and direction of individuals knowledgeable and experienced in the activities being performed.

The NYSDOL will deem an individual to have sufficient knowledge and experience in the industry if "he or she is proficient in the area and in all activities to be performed by the trainee, and has adequate background, education and experience to fulfill the educational goals and requirements of the training program." Additionally, the trainer must be sufficiently competent in providing training as demonstrated by previous experience training employees or students. Thus, an individual who supervises the intern must have previous supervisory experience.

8. The trainees or students do not receive employee benefits.

The receipt of employee benefits conclusively demonstrates that an employment relationship exists, and those who receive employee benefits cannot be considered interns. Examples of such benefits include health and dental insurance, pension or retirement credit, employer-sponsored trips or parties, and discounted or free employer-provided goods and services.

9. The training is general, so as to qualify the trainees or students to work in any similar business, rather than designed specifically for a job with the employer offering the program.

The skills offered in the internship program must be useful and transferable to any employer in the field, and not specific to the company offering the internship program. Any training that is specific to the company and its operation will be considered conclusive evidence of an employment relationship.

10. The screening process for the internship is not the same as for employment, and does not appear to be for that purpose, but involves only criteria relevant for admission to an independent educational program.

This criterion helps to ensure that the employment process is separate and distinct from the internship selection process and that interns are not under the impression that the internship program will conclude with a job position. (See criterion #5.) The internship application should appear more similar to that of an educational program rather than an employment application.

11. Advertisements for the program are couched clearly in terms of education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.

The purpose of this criterion is to avoid an intern's misunderstanding of the nature of the internship program and/or an employer's misrepresentation of the program. The NYSDOL advises that advertisements should not describe internship programs as employment opportunities, or state that the employer will provide stipends or wages. However, employers may indicate that qualified graduates of the internship programs may be considered for employment.

What Employers Should Do Now

Since both the U.S. Department of Labor and the NYSDOL have ramped up their efforts in the investigation and enforcement of minimum wage laws, including the intern/trainee exception, employers must determine whether their internship programs meet the preceding 11 criteria. Otherwise, interns will need to be paid at least the minimum wage.

In particular, in order to meet the Minimum Wage Act exception, an employer should make sure that:

1. The program:
    i. benefits the intern, not the employer;
    ii. is general to the industry, not particular to the employer;
    iii. is similar to what would be provided in an educational environment;
    iv. does not have requirements or a screening process similar to those of employees at the company; and
    v. is advertised as an educational experience, not as employment.
2. The intern:
    i. does not displace any employees; and
    ii. works under the close supervision of individuals who are knowledgeable and experienced in the activities being performed.
3. The employer:
    i. does not gain a benefit from the internship;
    ii. does not guarantee employment at the conclusion of the internship;
    iii. does not provide an intern with employee benefits; and
    iv. informs the intern, in writing, that he or she is not an employee and will not receive compensation due to the internship.

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REPORT

Challenges Facing Benefits and Compensation in the Obama Era: 16 Questions on Employers' Minds for 2011 and Beyond



BY JOAN A. DISLER, GRETCHEN HARDERS, AND MICHELLE CAPEZZA

During the past two years, we have seen legislative and regulatory actions taken that significantly impact employer-provided benefits and compensation. Three main areas of benefits have been targeted: health plans, retirement plans, and executive compensation.

As President Obama took office, the Emergency Economic Stabilization Act ("the bailout legislation") had recently been passed, followed by the American Recovery and Reinvestment Act ("the stimulus bill"), the Patient Protection and Affordable Care Act ("health reform" or "PPACA"), the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), and numerous actions intended to increase transparency and disclosure to participants in ERISA plans. Many current proposals seek to attack various deductions and credits available to employers that sponsor benefit plans.

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We have developed 16 questions (and answers) that reflect where we are now and what we believe employers need to know to prepare for the possible changes to benefits and compensation yet to come during the remainder of the Obama administration.

Health Reform

In a recent survey co-sponsored by the National Business Coalition on Health and the publication *Business Insurance*, 74 percent of employers responded that they expect the health reform law will further increase their health care costs. Over the last few months, several tac-

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tics have been used to delay the implementation of the law and challenge its survival.

1. What are some of the key provisions under PPACA that were recently delayed?

Certain provisions of PPACA were effective for plan years beginning after Sept. 23, 2010, affecting most employers with calendar-year plans beginning on Jan. 1, 2011. The government has issued some additional guidance, with a limited opportunity for public comment. Given this fast time track, certain regulatory changes and delays were made in late 2010. For instance, grandfathering rules were expanded to allow a change in the insurance provider. Additionally, automatic enrollment requirements for group health plans of employers with 200 or more employees have been delayed until regulations are issued. Certain requirements relating to changes to internal review and external claims review procedures and reporting and disclosure requirements were also delayed.

2. Since several lawsuits have challenged the constitutionality of PPACA, can employers stop implementing the new law?

No, PPACA is still the law of the land. However, since PPACA's passage, more than 20 states have filed lawsuits challenging the law's (and, particularly, the individual mandate's) constitutionality. Judge Hudson in Virginia found the law unconstitutional as exceeding Congress's commerce clause power. There, the judge ruled that the federal government cannot compel individuals to buy health insurance and penalize them for not doing so, which the individual mandate seeks to do. This was also the view of Judge Vinson in Florida who found the individual mandate unconstitutional and that PPACA has no severability clause. However, another district court held that the individual mandate was constitutional under a "rational basis" test—*i.e.*, it is rational "for Congress to conclude that individuals' decisions about how and when to pay for health care are activities that in the aggregate substantially affect the interstate health care market." It remains to be seen what the higher courts decide. Many argue that without the individual mandate, the law has no teeth.

3. Besides lawsuits, will deficit reduction proposals impact whether employers offer group health coverage at all on or after 2014?

The National Commission on Fiscal Responsibility and Reform, and other proposals, recommend phasing out the tax exclusion of employer-provided health care. This means that, beginning in 2014, employees would be taxed on employer health care contributions. The Deficit Reduction Task Force ("DRTF") has also discussed a phase-out of the tax exemption for employer-provided health insurance. Beginning in 2018, PPACA will impose the so-called Cadillac tax on health insurance plans costing more than $27,500 annually for family coverage. The DRTF would go one step further by limiting the tax exemption to the 75th premiums percentile in 2014, freezing it until 2018, and eliminating it altogether by 2038. We expect that employers will do a significant cost-benefit analysis to determine whether they are better off paying the penalties and having their employees go to a state-based American Health Benefit Exchanges ("Exchange") to purchase their coverage. Any deficit reduction proposals limiting the tax exclusion for employees and employers will factor into this determination.

4. Will delay tactics dramatically hinder the implementation of the new law?

There will be delays by the nature of the regulatory process. For example, the House of Representatives recently passed the "Repeal the Job-Killing Healthcare Law Act." We cannot make predictions, but we do think that the repeal of PPACA is unlikely. Despite the uncertainty as to implementation, employers must be aware that many of the laws are in effect **today**, and compliance is required **now**.

5. Another important issue in health reform is the nondiscrimination provision under 105(h) of the tax code for insured medical plans. What does it mean for severance arrangements and employers making COBRA premium payments?

PPACA's nondiscrimination provision states that insured group health plans may not discriminate in favor of highly compensated employees regarding eligibility or benefits. On Dec. 22, 2010, the IRS announced that this provision will not take effect until regulations are issued.

Nondiscrimination rules have existed for self-insured plans. The biggest impact of PPACA's nondiscrimination rules will be on COBRA and retiree medical subsidies. Employers often provide COBRA subsidies to terminated employees as part of a severance pay plan, or to an individual who separately negotiated a severance package. If it is too difficult or unnecessarily risky for employers to provide COBRA subsidies, they may decide to eliminate the benefit altogether. There is an exception for retiree plans; however, it is very limited as it restricts participation exclusively to retirees and not actives.

6. The Obama administration is moving toward making individuals responsible for their own care rather than waiting for employers to pay all health care costs. What will be the impact of this on the design of wellness programs?

Under PPACA, there are increased incentives for employer-offered wellness programs that are part of a group health plan and require individuals to satisfy a standard related to a health factor in order to obtain a reward—*e.g.*, programs that require attainment of certain results on biometric screenings. These types of programs must satisfy the nondiscrimination requirements of the Health Insurance Portability and Accountability Act (HIPAA). Other types of wellness programs that are designed, for example, to provide fitness center reimbursement or reimbursements for costs to stop smoking, regardless of whether the employee quits smoking, do not have to comply with HIPAA nondiscrimination regulations. Currently, where the wellness program must comply with HIPAA nondiscrimination regulations, the total reward to the individual is limited to 20 percent of the total cost of coverage under the plan. PPACA increases this percentage to 30 percent, effective 2014; this may be raised prior to 2014 through regulation. And, where the Department of Health and Human Services ("HHS"), Department of Labor ("DOL"), and Department of the Treasury ("Treasury") deem appropriate, that amount could increase to 50 percent. More guidance on these programs is expected soon. By

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2013, the government will begin periodically surveying workplace wellness and health promotion programs to measure and improve their effectiveness.

7. How does the Obama administration's position on wellness and individual responsibility reconcile with some of the other provisions of PPACA that may impact an individual's access to health coverage?

It seems there are two parallel schemes running at the same time: encouragement of valuable employer-provided health benefits, and increased individual responsibility to obtain minimum coverage. Under PPACA, most individuals will be responsible for obtaining coverage from an Exchange or their employer, or risk paying a penalty. Employers are faced with penalties, too, if they fail to provide minimum essential coverage. If employers also lose a tax incentive to provide a group health plan to their employees, individuals will be forced to shop for insurance on their own and handle their own selection of services.

Retirement Plans

As baby-boomer retirements increase, there is a real concern over retirement security and employer retirement programs, which supplement the government-sponsored Social Security system. Yet, because of the economic downturn, ensuring sufficient retirement income is a serious challenge for the Obama administration.

8. How would deficit reduction proposals affect the cap on contributions?

The DRTF recommends capping contributions to defined contribution plans to the lower of $20,000 or 20 percent of income. Currently, the cap is $49,000 or 100 percent of income. The proposal would cap elective deferrals at $16,500 and limit an employer's ability to provide matching contributions to about $3,500 annually. Defined contribution plans are the principal employer-provided retirement plans. This cap on contributions goes directly to the heart of these plans. When tax incentives to provide 401(k) plans are reduced, employers are less likely to sponsor retirement plans, shifting responsibility for retirement saving to the individual. The American Society of Pension Professionals and Actuaries ("ASPPA") opposes the proposals. According to the ASPPA, when an employer 401(k) plan is offered, 70 percent of employees with income between $30,000 and $50,000 save for retirement, compared with 5 percent of employees who save for retirement on their own.

9. How would deficit reduction proposals affect Pension Benefit Guaranty Corporation ("PBGC") premiums?

The PBGC insures defined benefit retirement plans in the event a plan is terminated and does not have sufficient assets to pay plan benefits. The PBGC is currently at a deficit of around $21 billion. One proposal would increase the premiums that employers pay to the PBGC to insure those benefits in order to help close the PBGC's deficit.

There is also new regulatory guidance relating to the funding status of defined benefit pension plans, including collectively bargained, multiemployer pension plans. The guidance includes requirements for providing annual notices of the funding status of the plan and supplies certain funding relief for multiemployer plans.

10. With the number of pension plans dwindling, 401(k) plans are becoming the sole retirement income that many individuals will have available. Because of this, there is a heightened emphasis on making plan fees and expenses transparent so that employees will have all the information they need to make investment decisions. What information on fees, expenses, and investments must be provided, and when is this requirement effective?

The DOL has focused on fee disclosure rules under its "fee transparency" initiatives. On July 16, 2010, the DOL issued new rules (originally effective July 16, 2011, but now postponed until Jan. 1, 2012) on fee disclosures and potential conflicts of interest. The new rules require service providers to disclose certain information to plan sponsors relating to hidden or indirect fees.

The purpose of these rules is to improve transparency of indirect fees that are passed along to plan sponsors and participants, including fees in connection with the "bundling" of services, revenue sharing, brokers' fees, 12b-1 fees, and similar fees. Disclosures of those fees will give plan fiduciaries an understanding of the cost of investments offered to plan beneficiaries. The DOL also applies these fee transparency rules to group health plans, such as services provided by pharmacy benefit managers, but it has requested public comment on how to develop standards that make sense for group health plan service providers. The real issues are whether service providers will be able to adequately disclose this information, and whether plan fiduciaries will be able to disseminate the information in an effective way.

11. What disclosures must a plan sponsor make to the employee-participants, and when are they due?

New regulations passed last October will take effect for plan years on or after Nov. 1, 2011. Plan administrators must provide enhanced and uniform disclosures about retirement plan fees and expenses, investment information, and general plan information. These disclosures must be made regardless of whether the plan is designed as a 404c participant-directed plan under ERISA. There are disclosure requirements upon initial plan eligibility and in annual notices. Also, quarterly plan statements must list amounts charged to the participants' accounts during the preceding quarter and descriptions of these charges. The DOL has issued a model chart containing guidance on how to organize this comparative information on investments and fees.

Additionally, proposed regulations were issued last November regarding enhanced disclosures on target-date funds. These regulations would add further requirements to the participant-level disclosures discussed above and require additional provisions in initial and annual qualified default investment alternative ("QDIA") notices. These rules require more disclosure on how the target fund works, its investment objectives, clarifications on how its asset allocations will change over time, and when it will reach its most conservative position, fees, and expenses. More guidance may arrive soon. With the focus on individual responsibility, it is unclear how much information is too much and whether employees will actually take the time to understand the information and use it to their benefit.

12. What are some key considerations for employers in light of the government's mixed messages concerning deficit reduction proposals to cap contributions and the inclusion of annuity options in 401(k) plans?

There are definitely many confusing messages being transmitted, including increased disclosure obligations that will be very time consuming, enhanced fiduciary obligations, and proposals to cap contributions to 401(k) plans that hinder participants' ability to save for retirement. These messages also leave employers wondering why they are doing all of this work if participants will be prohibited from saving enough. Also, the annuity issue for 401(k) plans raises many concerns. The Treasury and DOL have been analyzing whether and, if so, how they could enhance retirement security of participants by facilitating access to, and use of, arrangements designed to provide a lifetime stream of income after retirement or by requiring annuity distribution options. In light of the renewed interest in annuities in the 401(k) arena, many new lifetime income products are being introduced. But many employers are leery to add these options to plans because of the potential disclosure and fiduciary obligations.

Executive Compensation

13. What is the impact of Dodd-Frank's new "say on pay" rules on executive compensation?

Dodd-Frank adds Section 14A to the Securities Exchange Act of 1934 ("Exchange Act"), effective Jan. 21, 2011, which applies to all public companies that file periodic reports with the Securities and Exchange Commission (SEC). Three "say on pay" requirements are added: (i) *periodic say-on-pay* rules requiring that, at least once every three years, the company include in its proxy statement a separate resolution subject to shareholder vote to approve the compensation of the named executive officers; (ii) *say-on-pay frequency* rules requiring that, at least once every six years, the company include in its proxy statement a separate resolution subject to shareholder vote to determine whether the periodic say-on-pay vote will occur every one, two, or three years; and (iii) *golden parachute say-on-pay* rules requiring disclosure of any compensation agreements the issuer has with its named executive officers that relates to the transaction and compensation to be received in the transaction. Each of these say-on-pay votes is advisory; none is binding on a company or its board of directors. These votes can neither overrule a decision made by the company or its board nor create or change any fiduciary duties applicable to the company or its board. As public companies prepare for their 2011 annual shareholder meetings, they need to determine the scope and language of their say-on-pay resolutions and anticipate say-on-pay vote issues.

It is unclear how say-on-pay votes will influence voting on the proxy. Institutional investors have looked to Institutional Shareholder Services ("ISS") (previously Riskmetrics) for guidance on voting as to compensation recommendations. A positive recommendation from ISS is a good indicator of how large institutional shareholders will vote. The ISS applies fairly stringent rules on evaluating executive pay. At the end of the day, an individual shareholder will have little influence on the voting.

14. The public is outraged over the size of executive bonuses as jobs have been lost and pension earnings have fallen. How does Wall Street reform address bonus compensation?

Dodd-Frank imposes new disclosure requirements regarding executive pay, such as the disclosure of: (i) pay versus performance, including the company's financial performance, taking into account stock prices, dividends, and any distributions; and (ii) the ratio of the CEO's total annual compensation compared to the median total annual compensation of all other employees. Certainly, these disclosures can serve as a check to hinder excessive pay practices.

Also, Dodd-Frank creates new limits on compensation at both public and private "covered financial institutions," including banks and registered broker-dealers with $1 billion or more in assets. Under these rules, effective April 21, 2011, the covered financial institutions must disclose to their applicable regulator, such as the Federal Reserve, FDIC, and SEC, all incentive compensation plans (and not just those of executive officers) so that the regulator can determine whether the covered financial institution's incentive plans encourage "inappropriate risk taking" by providing excessive compensation, fees, or benefits or could lead to a material financial loss for the covered financial institution. On Feb. 4, 2011, the regulators issued joint proposed rules that, among other things, would require a portion of an employee's incentive compensation to be mandatorily deferred.

15. What are the challenges for employers in implementing clawbacks under Wall Street reform?

Dodd-Frank adds Section 10D of the Exchange Act, which requires listed public companies to develop and implement policies to recapture—or claw back—compensation that is erroneously awarded to executives before a restatement of the company's financial statements. This requirement is mandatory and covers all present and former executive officers. It does not make misconduct by the company or any officer a condition to invoking the clawback. Private companies are not subject to this requirement but look to these rules as best practices and, oftentimes, adopt these policies.

The concept of clawbacks has been around for some time. But the idea of recouping or clawing back incentive compensation enhanced by the financial misstatement without regard to the executive officer's participation in the misstatement is new. It is unclear whether recoupment or clawback is feasible or even lawful in many instances. Many states have stringent wage laws that protect employees from unlawful deductions of their wages, and enforcing a clawback may be viewed as violating these laws. A court may find that federal law preempts state wage laws on this issue, but that remains to be seen.

16. Do you foresee any surprises happening in the next two years?

A full-scale repeal of PPACA would be a surprise, as would be the issuance of all the required guidance and regulations by 2014. It would also be surprising if another major law affecting employee benefits is passed in 2011. We do not see employers turning to a "zero benefit" structure, but we would not be surprised to see a further scale-down of employer-provided benefits.

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Conclusion

Employers must stay abreast of the changing landscape affecting employee benefits and executive compensation. Only time will tell what the long-term impact will be of these increasing obligations on employer-provided benefits.

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ACT NOW ADVISORY

ADA Amendments Act: Final EEOC Regulations – What Employers Need to Know

April 1, 2011

By Frank C. Morris, Jr.

More than two years after the January 1, 2009, effective date of the ADA Amendments Act of 2008 ("ADAAA"), the Equal Employment Opportunity Commission ("EEOC") published final regulations ("Regulations") on March 25, 2011. The Regulations are effective May 24, 2011 – 60 days after publication. Employers, however, should immediately take the Regulations into account in employment decision making, as they will certainly guide EEOC enforcement activities and employee expectations even before May 24.

The ADAAA and the Regulations are designed to change the focus of inquiries under the American with Disabilities Act of 1990 ("ADA") from whether an individual's impairment meets the definition of a "substantial impairment" that constitutes a disability, to issues of discrimination, qualifications, and reasonable accommodation.

The ADAAA did not change the ADA's three-pronged definition of "disability":

1) A physical or mental impairment that substantially limits one or more major life activities;
2) A record (or previous history) of such an impairment; or
3) Being "regarded as" having a disability (and, under the ADAAA, being subject to an adverse action because of an actual or perceived impairment that is not transitory and minor).

What the ADAAA and the Regulations do change is how the first and third prongs are evaluated. Both the ADAAA and the Regulations provide that the definition of "disability" is to be interpreted in favor of broad coverage and that, in most cases, the issue of "disability" should be easily resolved to find coverage. The Regulations provide nine rules of construction for determining whether an individual has a covered disability. At the same time, it is important to note that the ADAAA and the Regulations have not changed many key ADA issues. Neither the ADAAA nor the Regulations change the ADA definitions and existing case law on the meaning of "qualified," "essential functions," "reasonable accommodation," "undue hardship," or "direct threat," or the burden of proof in demonstrating any of these requirements. (See the EEOC's

Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008 ("Q&A") #29.)

Among the key points for employers under the Regulations are the following:

1) The Regulations define "physical or mental impairment" as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more bodily systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor urinary, immune, circulatory, hemic, lymphatic, skin, and endocrine. In addition, "physical or mental impairment" also covers any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities. The definition of "impairment" in the Regulations closely tracks the original regulations, except for the addition of the immune and circulatory systems. (Q&A #7.)

2) The Regulations require a "broad scope of protection" by requiring an expansive interpretation of the term "substantially limits."

3) The Regulations drop the bar for finding a "substantial limitation," as an impairment no longer must prevent or severely or significantly restrict a "major life activity" ("MLA") to qualify as "substantially limiting." (Q&A #9.) The Regulations also take the position that an impairment need not last a particular length of time to qualify under the ADAAA and that the effects of an impairment lasting less than six months *can* still be "substantially limiting." (Q&A #10, Section 1630.2(j)(1)(ix).) The EEOC premises this position on the fact that the ADAAA has an exception to the "regarded as" coverage for transitory impairments, that is, ones that last less than six months and are minor, and on some parts of the legislative history. It is worth considering whether that is a sufficient basis to overrule prior case law, which usually found actual impairments lasting six months or less not to be disabilities. Taken to its extreme, the question becomes whether Congress made the ADA and the Family and Medical Leave Act ("FMLA") essentially coextensive as to coverage, without ever saying so, directly or indirectly. Put differently, must an employer consider accommodations beyond giving FMLA leave for substantially limiting, but short duration, conditions?

4) The Regulations address the scope of MLAs by providing a non-exhaustive list of examples, starting with previously recognized ones, such as performing manual tasks, seeing, hearing, standing, speaking, learning, concentrating, communicating, interacting with others, and working. There is a second and new category of MLAs under the Regulations, which contains major bodily functions (*e.g.,* immune system, normal cell growth, digestive, bladder, neurological, brain, cardiovascular, endocrine, and others), including the operation of an individual organ within a body system (*e.g.,* the operation of a kidney, liver, or pancreas). (Q&A #8.)

5) The Regulations require that the determination of substantial limitation on a MLA be made without regard to the ameliorative or positive effects of mitigating measures (*e.g.,* prosthetic devices, medications, etc.), except that ordinary eye glasses or contact lenses may be considered. Expanding on the proposed regulations that were published on September 23, 2009, the Regulations add psychotherapy, behavioral, and physical therapy as examples of mitigating measures. (Q&A #12, 13.) The Regulations do not establish a specific level of visual acuity for determining whether eye glasses or contact lenses should be considered "ordinary." They state that such determinations should be made on a case-by-case basis "in light of current and objective medical evidence." (Q&A #14, Section 1630.2(j)(1)(vi) and (j)(6).) Mitigating affects may be considered, however, for purposes other than determining whether the impairment is substantially limiting (*e.g.,* in addressing qualifications, reasonable accommodation or direct threat issues). (Q&A #15, 16.)

6) The Regulations track the ADAAA and expressly state that impairments that are episodic or in remission are covered disabilities if the impairment would be substantially limiting when present or active. (Q&A #11.)

7) The Regulations depart from the approach of the proposed regulations which had listed what essentially amounted to a per se or categorical list of impairments that would qualify as disabilities. The new approach is to give examples of specific impairments that generally "should easily be concluded to be disabilities" (*e.g.,* deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring use of a wheel chair, cancer, bipolar disorder, post traumatic stress disorder, etc.). This change may not alter the likely EEOC position where the impairment was on the proposed categorical list. (Q&A #19.)

8) The Regulations again depart from the proposed regulations in providing that the "condition, manner, or duration" under which a MLA can be performed may be considered in determining whether an impairment is a disability. The EEOC opines, however, that it should not be necessary to use these concepts as to many impairments that "should easily be concluded to be disabilities." (Q&A #20.)

9) The Regulations and the Appendix to the Regulations, unlike the proposed regulations, provide that the assessment of substantial limitation in the MLA of working will be made with reference to difficulty performing either a "class or broad range of jobs in various classes" rather than merely "a type of work." In an important reference, the EEOC states that "demonstrating a substantial limitation in performing the unique aspects of a single, specific job is not sufficient to establish that a person is substantially limited in a major life activity of working." (Q&A #21.) This is a positive change for employers.

10) The Regulations reaffirm that the ADA continues to exclude individuals who are currently using drugs. They note, however, that the ADA continues to provide

potential coverage for individuals who have successfully completed, or are participating in, a rehab program.

11) The Regulations track the ADAAA with regard to the third prong of coverage for individuals who assert "regarded as" claims. Under the ADAAA and the Regulations, an individual would show an employer acted on its belief that the individual's impairment, or perceived impairment, substantially limited performance of a MLA. The Regulations now place the focus in a "regarded as" case on how the individual is treated due to an actual or perceived impairment rather than the employer's belief regarding the impairment, as under prior case law. The Regulations also track the ADAAA in providing that an individual whose only claim is a "regarded as" claim is *not* entitled to a reasonable accommodation. (Q&A #25-27.)

12) Following the language of the ADAAA, the Regulations no longer refer to a "qualified individual with a disability," rather, they refer to an "individual with a disability" and a "qualified individual" as separate terms. The focus of the inquiry on whether discrimination occurred is now whether the employer acted "on the basis of disability" rather than "against a qualified individual with a disability because of the disability of such individual." The Regulations seek to make the primary focus on whether discrimination occurred, not whether the individual meets the definition of "disability." Employers should note, however, that an individual still must establish that he or she is qualified for the job in question. (Q&A #30.)

The rapidly escalating number of disability discrimination claims made since the enactment of the ADAAA, and the further attention that promulgation of the Regulations will draw, means that employers should promptly address key aspects of the Regulations. The Regulations, the Q&A about the Regulations, and the Appendix to the Regulations provide a virtual GPS guide as to how the EEOC will enforce the ADAAA. Thus, employers should promptly take steps to assure compliance with the ADAAA and the Regulations.

What Employers Should Do Now

1) Understand that most ADA claims will now focus on whether the applicant or employee is qualified for the job, whether a reasonable accommodation was offered, whether the employer engaged in the interactive process to discuss possible accommodations in good faith, and whether any employer action was caused by an individual's disability, record of disability, or being regarded as disabled. In most cases, a focus on whether the person is disabled would be misplaced.

2) Review all job descriptions to assure that they accurately and fully capture all "essential functions" of the job. Properly prepared job descriptions should be afforded considerable weight by the EEOC and the courts. Having a properly prepared job description will be much more important when cases are being

decided on the merits instead of on whether the individual had a disability that substantially limits a MLA.

3) Train supervisors on the new broad coverage of the ADA and require them to enlist the assistance of Human Resources in the "interactive process" to determine whether a reasonable accommodation can be made. The training should also sensitize supervisors to recognize accommodation requests if the applicant or employee is not extremely literate or crystal clear in making a request.

4) Always engage in the interactive process when there is an accommodation request and fully document your organization's efforts in the interactive process. Try to secure the employee's signature on a document memorializing any agreements reached in the process. If the employee should refuse to sign, make sure the employer's participants in the process do sign and note, if true, that the employee did not dispute the content of the memo, but simply refused to sign it.

5) Review language in any policies and employee handbook to make sure it is consistent with the ADAAA.

6) Review your applications and any inquiries that might elicit information about an applicant's disability, and determine if they are appropriate.

7) Contemporaneously document all employment actions, decisions, and corrective action involving an employee who is an individual with a disability or has a record of a disability.

If you have any questions about this Advisory or other ADA employment or public accommodation issues, please contact:

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Supreme Court Lets Cat's Paw 'Claw' Employers

March 4, 2011

By Frank C. Morris, Jr. and Peter M. Panken

The U.S. Supreme Court has now decided *Staub v. Proctor Hospital*, resolving a split in the appeals courts concerning the so-called Cat's Paw Doctrine and whether an employer can be held liable based on the discriminatory intent of lower level officials who caused or influenced – but did not make – an ultimate employment decision. The Cat's Paw Doctrine was named for a 17th century French fable by Jean de La Fontaine about a monkey who convinces a cat to steal chestnuts from a fire. The cat suffers burnt paws while the monkey then takes the benefits of her efforts and eats the chestnuts. Under *Staub*, it's employers who may get burned.

The *Staub* case involved a claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which bars employers from discriminating against any person because of his or her membership in, or obligations to perform, uniformed services. Under USERRA, liability may be established "if the person's membership is a motivating factor in the employer's action." Staub was a military reservist who asserted that his immediate supervisor was hostile to his military obligations. The supervisor ultimately reported to the HR vice president that Staub had violated a warning, at which point the vice president decided to fire Staub.

Staub alleged that his first-level supervisor had fabricated the incident underlying the warning due to his hostility toward Staub's military obligation. Staub did not indicate that the decision maker had knowledge of the hostility of the immediate supervisor. The 7th Circuit held that Proctor Hospital could only be held liable if the discriminatorily motivated subordinate had "singular influence" over the decision maker.

In an opinion by Justice Scalia, the Court held that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." The Court indicated that the requisite intent "denotes that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."

The decision is particularly important because, although it arose in a USERRA case, Justice Scalia noted USERRA's similarity to Title VII (and presumably other employment discrimination laws, as well as anti-retaliation and whistleblower laws). The Court's decision is based on general tort and agency law. Justice Scalia reasoned that, under tort law, "the exercise of judgment by the decision maker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm."

The difficulty for employers from *Staub* is that it does not provide any guidance as to when an employer who investigates the basis for an adverse employment action could be shielded from liability. The opinion does state that "if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action . . . then the employer will not be

liable. But the supervisor's biased report may remain the causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified."

The decision will likely make it harder for employers to win summary judgment in cases based on claims that more than one person participated in a decision, and that at least one of them had discriminatory motives that infected the decision making.

Staub makes it much more difficult for employers to create a decision making system that can insulate them from potential liability for discrimination claims. Nonetheless, there are steps which employers should consider to maximize their ability to defeat claims of discriminatory adverse employment actions. The overall goal should be to implement policies to prevent a subordinate's possible bias from influencing employment decisions. Among these steps are the following potential best practices for employers.

What Employers Should Consider after *Staub*:

1. Be sure to specify the reasons for taking adverse employment action and carefully investigate the facts before acting. Specifically identify any parts of the record which are not being considered. Be sure to limit the rationale for the adverse employment action to reasons that are defensible.

2. Ensure, to the extent feasible, that the supervisors who are reporting the "facts" are not harboring any illegal prejudice. Ask them if the employee has ever made allegations of discriminatory treatment and check with HR as to any complaints the employee may have made.

3. Particularly for termination decisions, establish a mandatory and meaningful review process, so that a termination decision cannot occur essentially based solely on a first-level supervisor's recommendation or with a mere rubber stamping of such a recommendation. Consider establishing a small termination review committee that might consist of, *e.g.*, HR, a senior manager, counsel and any other appropriate officials in a particular situation to verify the truth of the reasons asserted for the termination.

4. Train supervisors as to: their nondiscrimination obligations; how to conduct appropriate performance appraisals; how to engage in nondiscriminatory decision making; and how to preserve evidence supporting warnings or discipline.

5. Provide a meaningful internal complaint procedure to ensure that a process exists for employees to report alleged supervisory bias or discriminatory warnings with as much confidentiality as is practical under the circumstances. The procedures that all prudent employers have established to receive complaints of sexual or other harassment should serve as a good model or could potentially be expanded to include complaints of supervisory bias. As with sex harassment lawsuits, the failure of an employee to use such an internal mechanism, so long as it is a *bona fide* process, can have great benefits for the employer in any litigation.

6. Consider a "last chance" agreement in an appropriate instance as a step before termination, including a statement that the employee acknowledges the accuracy of the prior warnings and does not contest them.

7. When writing warnings or performance improvement plans, if there is no immediate adverse employment action, be clear that the warning is an opportunity for the employee to fulfill the requirements of the job. The warning or improvement plan may expressly state that "if the employee improves his/her performance and does not repeat the violation, the employee's wages, working conditions and advancement will not be adversely affected."

For questions about best practices after the *Staub* decision or other employment or labor issues, please contact:

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ACT NOW ADVISORY

Supreme Court Rules that Fiancé of Protester Is Protected from Retaliation

January 31, 2011

By Peter M. Panken; Frank C. Morris, Jr.; Peter A. Steinmeyer; and Michael S. Kun

On January 24, 2011, the U.S. Supreme Court issued yet another sweeping expansion of employee protections against retaliation by employers. In *Thompson v. North American Stainless, LP*, __ U.S. __ (Jan. 24, 2011), the Court held that protection from retaliation extends not only to those employees who themselves oppose alleged discrimination or file a charge or otherwise participate in a proceeding, but also to the fiancé of an employee who filed a charge of discrimination against their common employer. This case is simply the latest in a long series of Supreme Court decisions expanding protection for whistleblowers, litigants, and those who oppose or protest against alleged discrimination or other violations of laws.

Title VII of the Civil Rights Act ("Title VII) makes it "an unlawful employment practice for an employer to discriminate against any of his employees … because he has opposed an unlawful employment practice or because he has made a charge under Title VII" (42 U.S.C. § 2000e-3). In *Thompson v. North American Stainless*, the Supreme Court held that an adverse employment action against the fiancé of an employee who filed a charge against her employer gave rise to a cause of action for Title VII retaliation by the fiancé, in part because by hurting her fiancé, the employer was hurting the employee. Justice Scalia, with no dissent, reasoned that:

> Title VII's antiretaliation provision prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.' … We think it obvious that a reasonable worker might well have been dissuaded from engaging in protected activity if she knew that her fiancé would be fired.

The Court refused to provide guidance to employers and the lower courts by identifying which specific relationships would raise the retaliation specter. The Court would only elaborate that "firing a close family member will almost always" trigger retaliation liability potential, but "inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize."

This ruling will potentially expose employers to claims when they take adverse employment action against an employee who never filed a charge, or protested or opposed an allegedly illegal act, so long as the employee can establish some sort of close relationship with another employee who is protected by Title VII. Employers can expect much litigation on this issue in the coming years.

What Employers Should Do to Avoid Litigation

1. Train managers as to the broad reach of anti-retaliation rules, or include the subject of anti-retaliation in any existing management training seminars.

2. Remind all managers and others accused of discrimination or harassment that they may not retaliate against anyone because of the accusation. Explain that retaliation includes any action that might dissuade a reasonable worker from making or supporting a charge of discrimination.

3. Consider adopting an anti-retaliation policy if one is not already in place.

4. Before taking any adverse employment action against someone closely associated with an individual who has opposed an allegedly discriminatory practice or filed a charge, consider the grounds to be sure you have fair and legitimate business reasons for the contemplated action.

5. Create a reviewing committee that includes, for example, counsel, human resources officials, and operating management to make sure the fair and legitimate business reasons for the adverse employment will withstand scrutiny by a judge or jury, should litigation ensue.

6. Consider adopting, enforcing, or strengthening a no-nepotism policy to limit potential exposure. (Nepotism can lead to other problems in the workplace, but this decision simply highlights one more potential problem that can arise from such situations.)

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ACT NOW ADVISORY

Oral Discomfort: Supreme Court Holds That Verbal FLSA Complaints Suffice

March 25, 2011

By Frank C. Morris, Jr.

In a 6-2 decision, the Supreme Court of the United States held in *Kasten vs. Saint-Gobain Performance Plastics Corp.*, __ U.S. __ (March 22, 2011), that an employee's oral complaint of a violation of the Fair Labor Standards Act ("FLSA") constitutes protected conduct under the FLSA's anti-retaliation provision.

The case involved a complaint by Kevin Kasten alleging that he was discharged in retaliation for repeated verbal complaints to his supervisors concerning the employer's placement of time clocks. Kasten complained that the location of the time clocks prevented employees from getting paid for the time they spent changing into and out of their protective gear (commonly referred to as "donning and doffing") in violation of the FLSA. After being fired, allegedly for repeated failures to use the time clock properly, Kasten sued for retaliatory discharge. The employer, Saint-Gobain, argued that his complaint failed because the FLSA's anti-retaliation provision prohibits retaliation against an employee "because such employee has filed any complaint . . ." 29 U.S.C. § 215(a)(3), and Kasten had not "filed" a complaint, but had only complained orally. The district court agreed with Saint-Gobain and granted summary judgment. The U.S. Court of Appeals for the Seventh Circuit affirmed.

In an opinion by Justice Breyer, the Supreme Court held that an oral complaint is protected under the FLSA when it is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." The Court relied upon prior interpretations of the FLSA and Equal Pay Act by the Department of Labor ("DOL") and the Equal Employment Opportunity Commission, as well as the anti-retaliation language of the National Labor Relations Act.

Justice Breyer did note that an employer could not retaliate against an employee "because of" a complaint unless the employer was put on notice of the complaint.

The Supreme Court did not resolve an argument by Saint-Gobain that the FLSA anti-retaliation provision applies only to complaints filed by an employee with the government but not those made only to the employer. The lower courts had rejected this argument, but the Supreme Court said the argument had not been timely raised.

In light of the fact that the *Kasten* decision is merely the latest in an ever-growing series of cases where the Supreme Court has broadly interpreted protections against retaliation and for whistleblowers – *e.g., Thompson vs. North American Stainless* (fiancé of complainer protected from retaliation; for more information, see EpsteinBeckerGreen's *Act Now* Advisory entitled "Supreme Court Rules That Fiancé of Protester Is Protected from Retaliation"), and *Staub vs. Proctor Hospital* (employer liable under "cat's paw" theory for discriminatory intent of subordinate; for more information, see EpsteinBeckerGreen's *Act Now* Advisory entitled "Supreme Court Lets Cat's Paw 'Claw' Employers") – employers should not be optimistic that the courts would find internal complaints to be unprotected. To the contrary, the safer course is for employers to assume that internal complaints will be protected.

The *Kasten* decision is clearly important outside the FLSA context and strongly suggests support for oral complaints as protected under *any* employment or whistleblower statute. Indeed, the DOL said in a statement that the *Kasten* decision is important because it will "protect workers who make oral complaints under a variety of other whistleblower statutes administered by the Department of Labor."

The difficulty for employers after *Kasten* is that the Supreme Court gave very little guidance about the level of formality and clarity that would be necessary to put an employer on notice that an employee had made a "complaint," bringing her or him within the anti-retaliation protections of a statute. The only guidance provided by Justice Breyer was his comment that "the phrase 'filed any complaint' contemplates some degree of formality, certainly to the point where the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns." Determining the requisite degree of formality that constitutes fair notice will be a fact-intensive inquiry about which employers, judges, and juries may well have differing views.

The *Kasten* decision emphasizes again that employers should be on notice that the Supreme Court and, therefore, the lower courts are extremely receptive to retaliation claims and unlikely to dismiss them on technical grounds. In this context, it is not at all surprising that retaliation claims are now the most commonly pursued claims. Further increases in retaliation and whistleblowing cases should be expected.

What Employers Should Do Now

1. Review and update, as necessary, your organization's anti-retaliation policies.

2. Train supervisors in the evolving specifics of retaliation law.

    a. Any such training should include sensitizing supervisors to recognizing complaints that may involve statutory rights (and, therefore, trigger retaliation protections), even when the employee's oral statement does not expressly (i) allege that your organization is violating a particular law, or (ii) threaten a claim.

    b. Train supervisors to make Human Resources and more senior management aware when employees complain about any allegedly

illegal activities or engage in whistleblowing, as such action may be the basis for a lawsuit or union organizing activity.

c. The training should also include advising supervisors not to engage in retaliatory acts (such as targeted or technical enforcement of your organization's rules) against a complaining employee.

3. Review any internal complaint procedure to make sure it encourages individuals with bona fide complaints to use the procedure, rather than making ambiguous oral complaints that may not be recognized by a supervisor or manager as an "official" complaint.

   a. Make sure that employees are aware of your organization's internal complaint procedure. Use email, employer intranets, and other vehicles to publicize it.

   b. Ensure that the complaint procedure expressly prohibits retaliation against anyone who makes a bona fide complaint or participates in the investigation of a complaint.

   c. Require appropriate documentation of the receipt and handling of complaints under the complaint procedure.

4. Remind supervisors of the importance of accurate and timely documentation of deficient performance or violation of your organization's policies.

   a. Tell supervisors that such documentation is particularly important with respect to any employee who has made a complaint in order to defend against any potential retaliation or whistleblower claim.

   b. Have Human Resources and/or legal counsel review such documentation to assure that it is properly prepared and supportive of your organization's position.

5. Confirm with decision-makers that there is no connection between any whistleblowing or complaints of illegality by an employee and any proposed adverse employment action against the employee.

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