BV-SHRM NEWSLETTER

CHAPTER NO. 0330 ◆ AUGUST 2014

MONTHLY PROGRAM & LUNCHEON

TOPIC: **Employment Authorization Hot Issues: Form I-9, E-Verify, ICE Subpoenas, and Discrimination Claims**

WHEN: **August 7, 2014**

TIME: 11:30: Lunch, Networking, & Announcements
12:00 Program

WHERE: **Hilton Garden Inn**
3081 University Dr. (east side of Highway 6, across from Veteran's Park)

COST: $12/ BV-SHRM member
$15/ non-members
Note: The guest price is now $15

SPEAKER: **Justin Estep**, Attorney, FosterQuan

RSVP: Please ***RSVP by noon, Friday, August 1*** to rsvpprograms@gmail.com.

MENU: Sliced honey ham, roasted potatoes, salad, rolls, tea, and water

PROGRAM DETAILS

"Employment Authorization Hot Issues: Form I-9, E-Verify, ICE Subpoenas, and Discrimination Claims"

Description: Our presentation will examine several issues that are currently affecting employment authorization compliance. It will cover Form I-9 completion, common issues with exotic employment documents, trends in discriminatory labor suits related to employment authorization, and ICE initiated Form I-9 audits. Finally, we will explore the nuances of E-Verify and future development and implementation schedule. Specifically, how to prevent E-Verify compliance problems and determining whether a company should register for the E-Verify program voluntarily.

Learning Objectives:

1. How to properly complete the latest Form I-9;
2. How to avoid costly mistakes during Form I-9 completion and ICE audits; and
3. How to use, and what to expect next from, E-Verify.

SPEAKERS BIO

Justin Estep is an attorney with FosterQuan. He holds a BBA from George Washington University and a JD from the University of Miami School of Law. He is a member of the Austin Bar Association, the American Immigration Lawyers Association, and the Austin Young Lawyers Association. He has published articles on I-9 Compliance and E-Verify.

August's Program and Luncheon proudly sponsored by:

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Contact Diana Dean about sponsorship opportunities at ddean@tamuds.tamu.edu

Business Seminar

For more information, visit our website: bv-shrm.shrm.org

Click here to go directly to the registration form.

Tuesday, September 16
8:00 am – 4:30 pm
Hilton Garden Inn, College Station
$100 / $50 Students
Early bird discount deadline Aug. 15
bv-shrm.shrm.org

The 2014 BV-SHRM Business Seminar is made possible by a generous donation by
St. Joseph Hospital

Labor and Employment Law Update: What Business and HR Need to Know in 2014
Alexis C. Knapp, Attorney At Law
Littler

This program, geared at the non-lawyer audience—HR professionals, managers, business owners and the like, will cover the hottest topics in labor and employment law for 2014 and beyond. Topics include, but are not limited to, trends in litigation and claims by employees against the companies they work for, what the federal agencies (DOL, EEOC, etc.) are expecting from employers and how they are enforcing those expectations, addressing social media and other employee conduct issues, managing employees with medical conditions, and the most dangerous pitfalls surrounding how we pay our employees. This will be a fast-paced, interactive program, designed to help employers identify current areas of risk, and future opportunities for prevention.

Legislative Update
Tommy Simmons, Sr. Legal Counsel to Commissioner Hope Andrade
Texas Workforce Commission

A survey of the most significant employment-related Texas legislation from 2013, an update on recent Texas state agency employment law-related actions, a run-down of increased federal agency enforcement activities in the area of employment law, and a summary of the most important lawsuits.

Hiring and Firing in 2014 – Cuz Management 101 is Not Enough!
Joe Bontke – EEOC Outreach Manager
Equal Employment Opportunity Commission

This program includes hiring and recruiting practices geared to business success and avoidance of an EEOC charge/litigation and tips on how to successfully effectuate a termination, including info on delivering the decision, documentation, and the aftermath.

Cyber Threats to Your Business
James Morrison
Federal Bureau of Investigation

In today's world of interconnection, more businesses are becoming involved in the virtual marketplace. Along with the potential for increased revenue, this also increases the possibility of a company being a victim of computer intrusions. Recent cyber-attacks against major retailers have shown how a vulnerable company can be exploited with the resultant loss of consumer confidence. Learning how a network can be exploited and how to protect your network are crucial skills in today's environment. This presentation will attempt to fulfill those two needs and provide valuable information that can make your corporate network a harder target and possibly avoid becoming a victim.

Multiple Generations in the Workplace
Dr. Michael Wesson
Mays Business School/Texas A&M University

This presentation will discuss the differences between generations in the workplace and ways in which companies and managers can deal with them. Which differences are real? Which are overblown? Which don't actually exist? How can managers and leaders take advantage of these unique differences while at the same time minimizing the seemingly large conflicts between these groups of individuals. What are the "best practices" for managers when needing to manage employees from each group at the same time? We'll also take a sneak peek at Generation Z…they're coming!

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NEWS flash!

Please notify Krystal Broussard of any changes to your contact information.
krystal@boydreadymix.com

Upcoming Events

MARK YOUR CALENDARS

Chamber After Hours
August 14, 2014, 5:30-7:00 p.m.
Atkinson Toyota

BV-SHRM Business Seminar
September 16, 2014
Hilton Garden Inn, College Station
http://bv-shrm.shrm.org/events/2014/09/2014-business-seminar

HR Southwest
October 5-8, 2014
Ft. Worth, TX
Registration opens Mar. 3

2014 Workplace Diversity Conference & Exposition
October 13-15, 2014
New Orleans, LA
Sheraton New Orleans

DIVERSITY MATTERS

This morning, Wednesday, July 23, 2014, President Obama signed an Executive Order that would prohibit discrimination based on sexual orientation and gender identity in federal hiring and for federal contractors. Executive Order 11478 amends previous executive orders addressing equal employment opportunity in the federal government and for government contractor and subcontractors. The Order does not create new religious exemptions but incorporates existing exemptions of Section 204 (d) of EO 11246 regarding federal contractors.

In June, the SHRM Board of Directors approved an updated public policy statement supporting equal opportunity employment practices "for all individuals without regard to race, religion, color, national origin, sex, age, disability, veteran status, genetic information, sexual orientation or gender identity, or any other status under applicable law." The statement also cautions that policy efforts should be narrowly drafted to avoid unintended consequences for employers and employees.

According to the Executive Order, the U.S. Department of Labor (DOL) is required to prepare regulations implementing Section 2 of the Order, relating to federal contractor responsibilities, within 90 days. The Order is immediately effective for federal hiring and the provisions applicable to federal contractors shall apply to contracts entered into on or after the effective date of the final rules. SHRM will review the proposed implementation regulations and provide comments to DOL when they are issued.

Diversity Dates for August

August 4-5	Fast of Tish'a B'Av (Jewish)
August 9	International Day of the World's Indigenous People
August 18	Krishna Janmashtami (Hindu)
August 26	Women's Equality Day (USA)

Are you in? BV-SHRM is.

LinkedIn

BV-SHRM has created a LinkedIn account and we encourage members to connect with us through this social media.

Visit us and become a Fan of BV-SHRM on facebook

Be on the lookout for the above logo!

It will be a featured symbol this year as we expand the marketing of our chapter!

Share Your Ideas

The Board always welcomes your comments and suggestions. See an interesting article online or have a process that could benefit other members? Share it with your BV-SHRM Chapter.

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

PRESIDENT'S PIECE

Howdy!

I hope you all are staying cool (but how about that 80-degree weather in mid-July?). Speaking of cool…we have some very cool people behind the scenes of BV-SHRM that deserve a shout-out!

If you are reading this note, it is because Lisa Villalobos so kindly put it together in our newsletter. If you enjoy your lunch, it is because Kimberly Williamson coordinated it all with the Hilton Garden Inn. If you enjoy the speaker (and got HRCI credits), it is because Sarah Tobola recruited the speaker and submitted it for accreditation. If you have an active membership, it is because Krystal Broussard processed your payment (for the last who knows how many years). If you found out information about our organization on the BV-SHRM.SHRM.org web site, it is because Bob Hensz updated that site. If you are excited about our upcoming Business Seminar, it is because Diana Dean recruited awesome speakers to donate their time to educate all of us. And this just scratches the surface…Tami Overby does an amazing job with our student chapter. Windelan Johnson shares legislative updates. Jennifer Cabezas coordinates our workforce readiness programs. Thom Holt keeps us updated on the SHRM Foundation. Stacy Overby took on a new role to increase our PR efforts and our group's visibility. Lee Felder welcomed new members with an excellent New Member Orientation. Dwayne Walters has been our spirited note-taker. Max Anne Jones will help us navigate the new waters of SHRM/HRCI certification. Cheryl Young will be our chapter ambassador at the HR Southwest conference. Liz Galvan understands diversity matters in our chapter and our individual organizations. And Retha Youell has been my right hand!

Our board members make our organization tick and they are some pretty amazing folks, but deservedly some of them will want a break, so I'm here to say "WE WANT YOU!" I know it seems early, but Retha is already planning for the 2015 year and I know she would love to hear from you if you have an interest in a leadership position within BV-SHRM. You can email her directly at ryouell@cstx.gov.

Please do not forget to RSVP for the August meeting by Friday, August 1 so that we can accommodate the Hilton Garden Inn's catering timeline.

We look forward to seeing you on August 7.

Sincerely,

Katherine

BV-SHRM BENEFIT

Why come to BV-SHRM monthly meetings?

Well, last time, Katrina Grinder spoke to us about Leave issues. Things we were surprised to learn:

- She recommends against allowing Alternate Work Locations for people on leave
- She talked a bit about using a return-to-work program for new mothers
- She can talk about this subject in the dark as the temperature slowly increases (yes, the power went out!)

Consider coming! You never know what you might learn!

MEMBER NEWSLETTER

LEGAL BRIEFS

Welcome to Legal Briefs for HR, an update on employment issues sent to over 5000 individual HR professionals, in-house counsel and business owners plus HR and legal professional organizations (who have been given permission to republish content via their newsletters and websites), to help them stay in the know about employment issues. Anyone is welcome to join the email group . . . just let me know you'd like to be added to the list and you're in! Back issues are posted at www.munckwilson.com under Media Center/Legal Briefs and you can also join the group by clicking on "Subscribe."

Declare your independence from employment errors by learning from others' mistakes:

1. **Noncompete Noose Tightening** – Just last month, I wrote about noncompetes that were unenforceable because they were either too broad (an AR case) or for lack of consideration when the employer imposed a new noncompete on current employees while superseding the "old" enforceable noncompete (a PA case). Now Texas joins the chorus, by monetarily punishing an employer with an overbroad covenant who waited until after the jury ruled, to ask for reformation. The Texas statute allows the fact-finder (judge or jury) to award attorneys' fees if they found that the employer knew the covenant was unreasonable when it was executed by the parties and the employer then seeks to enforce the covenant to an extent greater than necessary to protect its interests. *Sentinel Integrity Solutions, Inc. v. Mistras Group, Inc.* (Tex. App. – Houston 2014). The plaintiff in this case is trying to overturn or pare back the roughly $900,000 award to Mistras for attorneys' fees Mistras paid in defending the attempt to enforce the covenant. If your strategy in writing noncompetes has been to "go broad" with the intent to use a court's ability to reform an overbroad noncompete if the need arises, you may want to rethink that. Reformation is not an option in some states and it may not work 100% of the time in states, like Texas, where it is an option.

2. **Supreme Court** – True to form, the Court waited until the end of the term to reveal their musings on several cases that will have tongues wagging all summer long:

    1. **Obama's Recess Appointments to NLRB Were Unconstitutional (*NLRB v. Noel Canning*)** – The five-member National Labor Relations Board (NLRB) needs a quorum of at least three members to issue decisions and take action. NLRB nominations by the President require Senate approval. President Obama made three nominations during 2011, none of which had been approved when the Senate announced it would take a series of short recesses beginning on December 18, 2011. *A pro forma* session was held each Tuesday and Friday, until the full Senate returned to business on January 23, 2012. On January 3, the term of one NLRB member expired, leaving only two board members (and no quorum). On January 4, President Obama relied on the Recess Appointment Clause of the Constitution to appoint his three nominations (Sharon Block, Terence Flynn & Richard Griffin) to the NLRB. On February 8, a three-member panel of the NLRB (including Block & Flynn) found against a Pepsi-Cola distributor, Noel Canning. Noel Canning appealed to the D.C. Circuit, arguing that the decision was not binding because two of the Board members who heard their case were unconstitutionally appointed and the Board lacked the quorum necessary to do business. In January 2013, the D.C. Circuit agreed with Noel Canning and opined that the appointments failed under the Recess Appointments Clause because [1] the Senate was in an intra-session recess (occurs within a session of Congress) and was not in an inter-session recess (occurs between two sessions of Congress), as required in the Clause; and [2] the vacancies were already existing when the Senate took the intra-session recess and did not "happen" during the recess. The Board appealed to the Supreme Court in April 2013 and the Court heard oral arguments in January 2014. In its June 2014 decision, the Court affirmed the D.C. Circuit's holding that the appointments were unconstitutional, however, they did not agree with the Circuit Court's reasoning. The Court decided that the President does have the authority to make intra-session appointments, but only when the recess lasts for more than ten days . . . which had not happened in 2011 and early 2012. They also decided that it made no difference whether the vacancy to be filled was pre-existing or arose during the Senate recess. The final question was whether the type of *pro forma* sessions used twice-weekly in 2011/2012 could be excluded when calculating if the recess had lasted at least ten days. To this the Court said "no." Justice Scalia, in his concurrence, stated his preference for the D.C. Circuit's approach, which would've further narrowed the President's ability to make recess appointments, to strictly inter-session recesses and only when the vacancy arose during such recess. What's next? The unconstitutional appointments mean that over 700 Board decisions and Regional Director appointments occurring between January 4, 2012 and August 2, 2013 are probably invalid and many should be reconsidered, including cases dealing with termination of employment due to employee's social media activity, employer rules dealing with employee courtesy, employer rules requiring confidentiality during investigations and more. The NLRB will need to devote considerable resources to untangling this mess which means other initiatives will likely falter.

    2. **Closely Held Private Company Can Dodge ACA Mandate via RFRA (*Burwell, Secretary of Health and Human Services et al v. Hobby Lobby Stores, Inc.*)** – This decision examined the collision of two statutes, the Religious Freedom Restoration Act (RFRA) and the Patient Protection and Affordable Care Act (ACA aka Obamacare). Three closely-held corporations did not want to provide certain types of contraceptives via their employee health plan, as required under the Department of Health and Human Services (HHS) regulations which implement ACA. The corporations cited their religious belief that these methods were tantamount to abortions and that RFRA provides that the government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability (like the ACA). The Court found that [1] certain corporations could be a "person" under the RFRA; [2] no one was disputing the business owners' sincerely held religious beliefs; [3] the HHS mandates substantially burdened the businesses due to the monetary penalties for noncompliance) and [4] while the ACA's mandate was compelling and worthy of protection; [5] the ACA, as written was not the least restrictive means of furthering the compelling interest. The majority briefly mused that that government could step in and provide the contraceptive methods that the women might want, then swiftly noted there was no need to go to the trouble because a solution was already in place. The ACA has built-in exemptions for religious entities and some religious nonprofit corporations who do not want to provide all FDA-approved contraceptives via their employee health plan. The organization could simply self-certify that it opposes providing certain contraceptive methods for religious reasons and then its health insurance company must exclude that coverage from the group plan but otherwise provide those products to the employees (and their dependents) who want them without imposing cost-sharing on the company, the group health plan, the plan participants or their beneficiaries.

1. **Update** – Hobby Lobby was announced on June 30. On July 3, the Court signed an interlocutory appeal allowing Wheaton College, a small evangelical school in Illinois, to disregard the ACA requirements on providing all FDA-contraceptive methods because it objects to signing the self-certification form that would allow its health insurance company to provide the objectionable contraceptive methods to women on the health plan. The three female Justices on the Court issued a scathing rebuke, saying that the Court's action casts doubt on the very accommodation the court's majority seemed to endorse on Monday. Justices Sonia Sotomayor, Ruth Bader Ginsburg and Elena Kagan wrote "Those who are bound by our decisions usually believe they can take us at our word. Not so today." Justice Sotomayor further remarked that the new order "evinces disregard for even the newest of this court's precedents and undermines confidence in this institution."

3. **Certain Home Health Care Workers Can't be Compelled to Pay Union Dues (*Harris v. Quinn*)** – The plaintiffs were home health care workers who provided care at home to Medicaid recipients and who were paid, in part, by the state using Medicaid funds. Illinois and many other states require government employees to pay at least "fair share" fees to the labor union, even when they choose not to join as union members. These workers disagreed with the SEIU's positions and did not want to pay the fees. The court sided with the workers, noting that they are "partial public employees" who are hired and fired by the patients they care for, not the state, and they should not be treated the same way as public school teachers and police officers who work directly for the state government.

3. **Order Up** – President Obama is poised to sign an executive order which will ban employment discrimination on the basis of sexual orientation or gender identity among federal contractors. There is presently no broad federal requirement providing lesbian/gay/bisexual/transgender (LBGT) individuals with such protection and only scattered protection via state law and local ordinance. Depending on where the trigger for the executive order is set, based on the dollar size of the federal contract, as much as 22% of private sector employees may have this new protection. And if supporters of the Employment Non-Discrimination Act (ENDA) can parlay their Senate victory into passage in the House, the impact will be broader.

4. **Federal Contractor FAQs** – For those of you who are federal contractors subject to VEVRAA and the Rehab Act and who are struggling with the new reporting requirements, OFCCP continues to address these concerns via new FAQ postings on their website. Go to http://www.dol.gov/ofccp/regs/compliance/faqs/503_faq.htm (Section 503 of Rehab Act) and http://www.dol.gov/ofccp/regs/compliance/faqs/VEVRAA_faq.htm (VEVRAA) for a little help and check back regularly for more of the same.

5. **Facebook Follies** – Here is cautionary tale to share with staff who handle workers' comp and other medical claims on behalf of an organization's employees. George Shoun fell and injured his shoulder at work. Jane Stewart prepared an accident report, processed the workers' comp paperwork, notified the company's insurer, and monitored the claim through months of recovery. Mr. Shoun sued his former employer and five days later, Ms. Stewart posted this to her Facebook page – "Isn't [it] amazing how Jimmy experienced a 5 way heart bypass just one month ago and is back to work, especially when you consider George Shoun's shoulder injury kept him away from work for 11 months and now he is trying to sue us." Mr. Shoun filed a second lawsuit against his former employer, this time under the ADA, claiming the company wrongfully disclosed confidential medical information that caused loss of employment (by other employers who read Ms. Stewart's Facebook page and would not hire him), impairment of earnings capacity, emotional distress, humiliation, pain and suffering. The employer moved to dismiss, saying that Mr. Shoun had voluntarily disclosed his medical condition in the lawsuit made public before the Facebook post and that he suffered no tangible injury. The court denied the motion, noting the fact issue of where Ms. Stewart gained her knowledge of Mr. Shoun's medical condition (via her job or via the public lawsuit) and dismissing the idea that he had not suffered an injury. *Shoun v. Best Formed Plastics, Inc.* (N.D. Ind. June 2014). While employers are mindful of the NLRB's stance which protects a broad swath of employees' social media discussion of their terms and conditions of employment, that protection would not apply here. A person tasked with HR duties who publicly discloses two co-workers' confidential medical information in order to make a snarky point, in a way that could foreseeably cause harm to one of them, may create employer liability for those actions.

6. **Fixing FLSA?** – In response to the President's call to make more workers nonexempt from the FLSA's minimum wage and overtime requirements, Senate Democrats unveiled a new bill called the Restoring Overtime Pay for Working Americans (S. 2486) Act on June 18. The Act, if passed, would eventually increase the minimum salary needed to qualify for a "white collar" exemption (from $455 to $1090/week), raise the "highly compensated employee" threshold from $100K to $125K, and require that individuals who qualify for the white collar exemptions cannot spend more than 50% of their work hours performing nonexempt tasks. For full text of bill and to follow its progress check out https://www.govtrack.us/congress/bills/113/s2486/text.

7. **Fixing EEOC?** – It's no secret that the EEOC has taken it on the chin lately, with cases being tossed and severe sanctions being levied against it for failing to do a complete investigation of charges and resorting to litigation too soon. Following several high profile and costly smackdowns, including a $4.7 million sanction against the agency in the *EEOC v. CRST Van Expedited Inc.* case, a Congressional subcommittee held a hearing on June 10 called "The Regulatory and Enforcement Priorities of the EEOC: Examining the Concerns of Stakeholders." On June 25, a committee member introduced a bill called the Equal Employment Opportunity Commission (EEOC) Transparency and Accountability Act (H.R. 4959). The bill, if passed, would require the EEOC to post more detail on its website and in its annual report, including reports of when it was made to pay fees or costs of court or when it was subject to sanctions levied by a court. It would also require the EEOC's Inspector General to notify Congress within 14 days of sanctions being ordered by a court against the EEOC, investigate why the EEOC pursued the litigation, submit a report to Congress within 90 days explaining the basis for the sanctions and submit a second report within 60 days of steps the EEOC is taking to avoid that mistake. All noted deadlines are as of the date of the court's decision. The bill would also make the EEOC conciliation process subject to judicial review. For a complete copy of the bill and follow its progress, go to https://www.govtrack.us/congress/bills/113/hr4959/text.

1. **Fixing EEOC, Part Two** – In addition to the legislative approach to employers' concerns about EEOC overreach, the Supreme Court is also willing to weigh in by accepting cert on June 30 in *EEOC v. Mach Mining LLC* (7th Cir. Dec. 2013). In the *Mach Mining* case, the 7th Circuit became the first circuit to decide that the EEOC's conciliation process is not subject to judicial review and a failure in that process cannot be used by a dissatisfied employer as an affirmative defense. In its decision, the 7th Circuit noted that the 2nd, 5th and 11th Circuits evaluate conciliation under a searching three-party inquiry while the 4th, 6th and 10th Circuits require that the EEOC's efforts meet a minimal level of good faith, practically inviting the Supreme Court to resolve the split of opinion.

8. **Fuss Over a Flag** – Conduct that can support claims of a racially hostile environment, in violation of Title VII, includes racial slurs, racial graffiti and display of the Confederate flag in the workplace. *Adams v. Austal USA LLC* (11th Cir. June 2014). In this case, which involved workers in a shipyard, display of the flag was part of the "totality of circumstances" which caused the 11th Circuit to reverse the lower court's grant of summary judgment for the employer, at least as to the plaintiffs who were personally exposed to the slurs, graffiti and the flag display. In case you were wondering, an argument that the Confederate flag is protected under Title VII as both an indicator of national origin (as a Confederate Southern-American) and religion (because the design incorporates the cross of Saint Andrew which is in the Scottish flag and can be interpreted as the Greek letter "x" which is an ancient symbol for Christ)

has already been tried and failed in *Storey v. Burns International Security Services* (3rd Cir. Dec. 2004)(see LB4HR #12 – 2004 for more details of the *Storey* case). In the *Storey* case, the flag was displayed on a worker's truck and his lunch box, so you may want to review your workplace décor.

9. **More Fun With FMLA** – On June 20, the U.S. DOL posted a proposed regulation to update the FMLA's definition of "spouse." The current reg says a spouse is "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." The new version will require employers to treat as a "spouse" same sex partners and common law marriages formed in any U.S. state when the state of the employee's residence does not recognize such marriages (and also marriages performed in other countries, so long as the terms of the marriage are legal in at least one U.S. state). This reg will be finalized, so go ahead and start rejiggering your FMLA policies, as they apply to same sex partners and common law marriages.

10. **Whistle While You Work** – The Dodd Frank Act of 2010 gave the Securities and Exchange Commission (SEC) new powers to ferret out wrongdoing including the payment of cash bounties to whistleblowers and the ability to sue employers who discharge, demote, suspend, threaten, harass or otherwise discriminate against a whistleblower for his or her lawful acts, including reports to the SEC. There have been eleven whistleblower bounties paid since late 2011 but the first retaliation lawsuit happened in June. SEC charged Paradigm Capital Management and its owner with retaliating against a head trader who reported certain trades to the SEC. Upon learning of the report to the SEC, the employer demoted the head trader to compliance assistant, removed his supervisory responsibilities and put him in charge of investigating the conduct he had reported. The matter was settled for $2.2 million. If you think or you know you have a whistleblower employee on your hands, don't make it worse by getting mad and getting even.

11. **Stated Differently** – Here are some hot topics for you multi-state employers:

    1. **California** – The CA Supreme Court opened the door to a class action for newspaper carriers who claim they should've been treated as employees and not independent contractors. The trial court would not certify the class, stating that variations in type of work done, meal periods and more undercut the required predominance. The circuit court agreed but said there were other issues, like right of control, that could be certified. The Supreme Court had the last word by saying that the variations in treatment did not matter because the issue is not how the company actually exerted control . . . the issue is that it had the right to control. *Ayala v. Antelope Valley Newspapers, Inc.* (Cal. June 2014).

    2. **California (San Francisco)** – Employers of 50+ full-time employees (defined as normally working at least 30 hours/week) within the Bay Area counties (Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara and parts of Solano and Sonoma) must provide commuter benefits to employees who work at least 20 hours/week, by September 30, 2014. This three-year pilot program offers four options for employers to comply including [1] employee's individual transit or van pooling costs are excluded from taxable income; [2] employer provides a subsidy to cover or reduce employee's transit or van pooling costs; [3] employer provides low-cost or free transit to/from work; or [4] alternative that is as effective in reducing solo commuters and/or vehicle emissions. For more info, go to https://commuterbenefits.511.org/.

    3. **Florida** – Effective July 1, 2014 FL beefed up its data breach notification law by [1] changing the definition of a breach from "unauthorized acquisition" to "unauthorized access;" [2] expanding the definition of protected personal information (PI); [3] requiring notice of a breach be provided to the FL Department of Legal Affairs within 30 days if more than 500 FL residents are affected; [4] tightening requirements relating to content of breach notice letters and shortening the timeframe for such notice from 45 to 30 days; [5] adding new data security measures for businesses that have PI, including proper disposal of paper and electronic PI; [6] requiring third party data managers to notify the data owner(s) of a breach within ten days; and [7] increasing penalties by treating violations as an unfair or deceptive trade practice which can entail civil penalties up to $500K. Notice to affected individuals may not be required if after investigation and consultation with law enforcement, the business reasonably believes that breach has not and is not likely to result in ID theft or similar harm to the persons whose PI was accessed.

    4. **Massachusetts** – An employer's attempt to enforce noncompetes against three former employees failed because one had not signed a noncompete and the other two had experienced "material change" in their job duties, job titles, authority and pay since signing their noncompetes. *Rent-A-PC, Inc. dba SmartSource Computer & Audio Visuals v. March* (D. Mass May 2013). Employers who want a better chance of protecting their interests should consider entering into a new noncompete with each "material change" in the employee's job and/or add language to the initial noncompete indicating the parties' intent that it will remain in force despite future "material changes" in the employment relationship.

    5. **Minnesota** – Former employee sues former employer for the tort of appropriation (a type of invasion of privacy) because the employer failed to update a reference to the former employee on the company website. The offending website reference said the plaintiff is "a principal of Gallup." The court dismissed the claim noting that the employee had consented to the posting at the time it was made, there was no evidence that the employer's failure to remove or modify the reference was intentional and there was no evidence of damages. *Wagner v. Gallup Inc.* (D. Minn. June 2014).

    6. **Missouri** – Aggrieved employees will now find it easier to bring workers' compensation retaliation claims. The prior standard required the employee to show that the exclusive reason for an adverse employment action was his or her exercise of rights under the workers' comp statute. The new standard is a showing that such exercise of rights was a "contributing factor." *Templemire v. W&M Welding Inc.* (Mo. April 2014).

    7. **New Jersey** – In 2011, NJ enacted a law prohibiting employers from publishing job ads or postings that state current employment is required in order for the job application to be reviewed, considered or accepted by the employer. One employer who included that requirement (of being currently employed) in a job ad was fined $1000 by the NJ Dept. of Labor and Workforce Development. The employer sued NJ, saying the statute's prohibitions "are improper content-based infringements upon their rights of free speech under the federal and state constitutions." The appellate court found the law was not broader than necessary to accomplish the state's substantial interest is supporting the job searches of unemployed individuals. On June 25, the NJ Supreme Court agreed to hear this case. Several other state and local jurisdictions (e.g., OR, DC, NY City, Chicago) have similar laws, so this review will be worth watching.

    8. **New York** – The governor is expected to sign a bill that eliminates required annual wage notices for employees under the NY Wage Theft Prevention Act. Employers must still provide a wage notice to new employees at the time of hire and whenever there is a change in compensation, although the latter may be done via a compliant paystub. The bill also increases penalties for noncompliance from $50/week to $50/day for NY DOL actions and moves the damages in private actions from $100/week to $250/day with a cap on damages per employee moving from $2500 to $12,500. This bill takes effect 60 days after the governor signs it.

12. **Last Call** – I hope to see you at one or more of my upcoming presentations at the TAB/SHRM Texas State Council Employment Law Symposium (July 17 & 18 in San Antonio), the North Texas Compensation Association meeting (August 21 in Dallas) and the North Texas SHRM conference (September 5 in Denton).

13. **For the Birds** – If you like being tweeted and want breaking news on employment law changes (and the occasional random cheer for K-State), follow me on Twitter. I'm at @amross.

Until next time,

Audrey E. Mross
Labor & Employment Attorney
Munck Wilson Mandala LLP
600 Banner Place
12770 Coit Road
Dallas, TX 75251

972.628.3661 (direct)
972.628.3616 (fax)
214.868.3033 (iPhone)
amross@munckwilson.com
www.munckwilson.com

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