



# BV-SHRM NEWSLETTER

CHAPTER NO. 0330 ♦ JANUARY 2016

## MONTHLY PROGRAM & LUNCHEON

**TOPIC:** Coaching and Mentoring

**WHEN:** January 14, 2016

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

**WHERE:** Phillips Event Center  
1929 County Club Dr., Bryan

**COST:** \$15/ BV-SHRM member  
\$20/ non-members or late RSVP  
*Note: The guest price is now \$20*

**SPEAKER:** Chris Antone, Shareholder/Lawyer, Jackson Lewis PC

**RSVP:** Please **RSVP by noon, Friday, January 8** to  
[rsvpprograms@gmail.com](mailto:rsvpprograms@gmail.com).

**MENU:** TBD

*Note the date and location changes!*

## PROGRAM DETAILS

### Topic: Coaching and Mentoring

Join us as Chris Antone, recent HRSW Speakers' Hall of Fame inductee, shares his experience and knowledge in the areas of coaching and mentoring. Enjoy an engaging talk with humorous stories and find out how he has been able to develop junior lawyers to join and stay at his firm.

## SPEAKERS BIO

Chris Antone is a Shareholder in the Dallas, Texas, office of Jackson Lewis P.C. He has been with the firm for more than 32 years and is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization.



Mr. Antone has the distinction of being named one of the nation's top 100 labor lawyers by the Labor Relations Institute for five consecutive years. Recently, *Legal 500* noted Mr. Antone as an "individual with Distinction" in workplace and employment counseling.

In addition to a full labor agency litigation and labor arbitration caseload, Mr. Antone counsels human resources professionals in the development of state-of-the-art proactive policies, procedures and protocols designed to retain the best talent, exit poor performers, and create an environment that produces highly effective work teams.

Since completing law school, Mr. Antone has been exclusively engaged in the practice of labor and employment law on behalf of management. Mr. Antone has focused his practice on assisting clients in managing both a union and union-free environment.

*Would your organization like to be featured here?*

Contact Diana Dean about sponsorship opportunities at [jdeanacres@aol.com](mailto:jdeanacres@aol.com)

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# Upcoming Events

## MARK YOUR CALENDARS

### Chamber After Hours

January 21, 2016, 5:30-7:00 p.m.

Phillips Event Center



### BV-SHRM Luncheon

February 4, 2016

Speaker: Joe Bontke

Topic: What will the EEOC be focused on in 2016

...And why should the HR community care?

### HRSW

October 16-19, 2016

Fort Worth Convention Center



## DIVERSITY MATTERS

### Diversity Dates for January

- 4 World Braille Day
- 17 World Religion Day
- 27 Holocaust Memorial Day
- 18 Martin Luther King Day
- 18-22 National No Name Calling Week (anti-bullying)

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

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# BOARD MESSAGE BOARD

## President's Piece

I'm excited about this New Year for BV-SHRM. I'm consistently amazed at our ability, despite being a smaller chapter, to continually improve year over year. A lot of that is because of you, the members, who support our monthly luncheons and programs.

I hope you all have a safe and happy holiday season and we'll see you at our next luncheon!

Lisa V.

## Coming Soon! HR MIXERS

Connect with your HR colleagues to foster continued networking, information sharing and continued professional support. Above all, mix and mingle in a casual setting with other HR professionals and relax and unwind. More details will follow...

## 2015 Silent Auction

Wow! At our recent luncheon, we raised **\$540!!**

We will be sending a donation in that amount to both the **SHRM Foundation** and the **Salvation Army**.

Way to go!

## Krystal Broussard HR Award of Excellence winner

**Michelle Merritt** was our 2015 Krystal Broussard HR Award of Excellence recipient.

She received a plaque, will have \$250 donated in her name to the SHRM Foundation and she'll participate in the selection process next year.

We are proud of all of her contributions to her organization and the profession!



## New Meeting Location for 2016

Remember that we will be moving our regular monthly meetings, beginning in January, 2016, to:

**Phillips Events Center  
1929 Country Club Dr.  
Bryan, TX 77802  
<http://phillipsevents.com/>**

The luncheon cost will not change.

## Certification Corner

We will be starting a HRCI – PHR/SPHR preparation course beginning late January. It's not too late to join if you're interested or know someone who is!

Contact Alyssa Wisnoski  
([awisnoski@gessnerengineering.com](mailto:awisnoski@gessnerengineering.com)) for more information.



# MEMBER NEWSLETTER

## LEGAL BRIEFS

Welcome to Legal Briefs for HR, an update on employment issues sent to over 6000 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](http://www.munckwilson.com) under Media Center/Legal Briefs and you can also join the group by clicking on "Subscribe." A special welcome to the Lehigh Hanson HR team I had the pleasure of addressing in October . . . great questions!

I'm thankful for the opportunity to share HR news with you each month. Here is the latest, for you to gobble up before heading out for Turkey Day:

- Handbook Hiccups** - Once again, the NLRB has a problem with your employee handbook policies and this time, the D.C. Circuit agrees. The genesis for this and similar attacks on routine policy statements is the concern that they tend to infringe on employees' NLRA section 7 rights to engage in concerted activity relating to terms and conditions of employment. Crafting handbook policy requires careful word choices and what was fine in the past may not be OK anymore. In this case, three policies used by Hyundai America Shipping Agency were found to be overbroad:
  - Employees prohibited from discussing matters under investigation by the employer - problem identified as banning discussion of all investigations and not limiting the prohibition to those where there was a legitimate business reason for the requirement.
  - Employees prohibited from disclosing info from the company's electronic communications systems to non-authorized persons - problem identified as banning disclosure of all info, whether it was confidential or not.
  - Employees subjected to disciplinary action, up to discharge from employment, for performing activities other than company work during working hours - problem identified as risk of misinterpretation that employees could not engage in union activity while on a break.
- Ban the Box Trending** - A November 2 White House press release announces new executive action to "ban the box" among federal agencies, coupled with presidential support for broader Congressional mandates that could affect all federal workers and federal contractors. The announcement is short on specifics, saying only that OPM is directed to modify its rules to delay inquiries into criminal history until later in the hiring process. For more info, see <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation>.
- Wait For It** - Employers breathed a sigh of relief when the Supreme Court held, in *Integrity Staffing Solutions, Inc. v. Busk*, that the time nonexempt employees spent waiting to have their bags checked before leaving their shift at an Amazon warehouse was not compensable under the FLSA. The Supremes found that the security checks were not "integral and indispensable" to any principal activity the employee had been hired to perform. Further, the fact that the checks were primarily for the employer's benefit did not matter. A class action involving Apple retail store employees in CA who were also subject to pre-exit checks was pending when the *Busk* decision came down, resulting in dismissal of their FLSA claims. However, the judge was left to consider whether CA law, which hinged on whether the employees were subject to their employers control during the searches, provided a remedy. The judge concluded that "free choice is fatal to their claims" noting that the searches could be avoided by the employees by simply not bringing bags into the workplace. Apple's summary judgment motion was granted and the class of roughly 12,400 former and current employees went sour. The *Busk* decision is very helpful with FLSA "off the clock" claims arising from security checks, but don't forget to see if state law might provide a second bite at the apple. Sorry, Apple, could not resist.
- Not So Fine For Employers** - OSHA fines have not increased since 1990, but that is fixin' to change. Starting in August 2016, Congress has given OSHA the OK to effect a one-time "catch up" increase in their fines of up to 82%. As an example, the fine for "failure to abate" is now \$7,000/day but could jump to \$12,740 a day. After the big bump, OSHA will be authorized to trigger annual increases in amounts, tied to the amount of inflation during the prior fiscal year. Safety audit, anyone?
- OSHA Uh Oh** - Employers with employee safety incentive programs are bracing themselves for a new final rule in the final stages of consideration, at OMB, before publication. It's no secret that OSHA is not a fan of employer programs that reward employees based on the lack of reported workplace injuries or illnesses, since the prizes or bonuses (not to mention peer pressure, where group incentives

are offered) might discourage accurate reporting by affected employees and violate the employer's duty to maintain accurate records of workplace mishaps. Stay tuned.

6. **Card Trick** - On October 19, 2015, OFCCP made a card called "Requesting a Reasonable Accommodation" available via its website. The card instructs federal contractor applicants and employees how to go about asking for accommodation of a disability and provides contact info for the OFCCP, in case they do not like the answer they get. You can check it out at <http://www.dol.gov/ofccp/posters/ReasonableAccommodationPocketCard/index.htm>.
7. **Board Blesses E-Sigs** - Until recently, a 30% plus showing of interest needed to trigger a union election was accomplished with a stack of signed authorization cards. Under new rules, those expressions are now acceptable in electronic form. The process is explained in Revised Memorandum 15-08 from the General Counsel of the NLRB, which was posted on October 26, 2015. You can read the memorandum and four related examples at <https://www.nlr.gov/reports-guidance/general-counsel-memos>.
8. **Noncompete Nixed** - Judges generally are not fans of noncompetes. And they really get their backs up when the employer drafts them more broadly than necessary to protect the employers interests. In *AssuredPartners, Inc. v. William Schmitt*, an IL appellate court struck down post-employment noncompete, nonsolicit and confidentiality obligations AND refused to blue line (read: modify) the overbroad scope of the restrictions in order to make them fair and enforceable. Employers in IL should be particularly careful when drafting post-employment restrictive covenants and all employers should remember that many courts have a right but not a duty to fix a bad noncompete. Here are some of the provisions that nuked the entire agreement:
  1. Noncompete/Scope of Activity - employee was banned from working with all types of professional liability insurance and not the types he had brokered for the employer.
  2. Noncompete/Geographic Scope - scope of entire U.S. and all U.S. territories meant employee would be forced to leave the country to earn a living in his speciality.
  3. Noncompete/Temporal Scope - 28 months was too long, given that his employment was only 20 months in length.
  4. Nonsolicit - application to all actual and prospective customers and their subsidiaries was too broad; reasonable scope would be those with whom the employee had contact and who were involved in the same activity as the employee.
  5. Nondisclosure - definition of what could not be disclosed covered "virtually every fact, plan, proposal, data and opinion that he became aware of" while employed regardless of whether the info was confidential or proprietary in nature or whether the employee had obtained the info from a source outside of work.
9. **Noncompete Nixed, Part Two** - Texas-based bank bought out a bank in Oklahoma. As part of the deal, the OK-based bank VPs signed employment agreements with their new employer containing post-employment restrictive covenants. The agreements had a Texas choice of law provision. After a spell, the OK-based VPs left and were hired by another bank in OK. TX-based bank sought to enforce the covenants via an injunction against the VPs. The lower court split the baby and, on appeal, the 5<sup>th</sup> Circuit made the following calls:
  1. The TX choice of law provision is no good as to the noncompetes - the VPs lived and worked in OK, the original deal and employment agreements had been negotiated in OK and OK (which has a very tough noncompete statute) had a greater interest in protecting its residents than TX did in enforcing the covenants. When OK law was applied, the noncompetes were not enforceable.
  2. The nonsolicitation of customers covenant was remanded to the lower court to determine enforceability under Texas law.
  3. The nondisclosure covenant was enforceable under either TX or OK law, but the court upheld denial of the requested injunction because the TX-based bank provided no evidence that the VPs had, in fact, disclosed confidential info to anyone. *Cardoni v. Prosperity Bank* (5<sup>th</sup> Cir. Oct. 2015)
10. **Stated Differently** - Here are some hot topics for you multi-state employers:
  1. **California** - Effective January 1, 2016, the "kin care" statute is amended to allow employees to use up to 50% of their accrued sick leave in new ways. The definition of "kin" has been expanded to now include grandparents, grandchildren and siblings. It already includes the employee's children, spouse, domestic partner or parents. Also, the purpose for the absence now includes diagnosis, care or treatment of an existing health condition, or for preventative care AND certain absences resulting from domestic violence, sexual assault or stalking.
  2. **California** - Effective January 1, 2016 a mere request for accommodation of a disability or religious need is protected and can form the basis of a retaliation claim under the Fair Employment and Housing Act (FEHA), regardless of whether the accommodation request was granted or denied.

3. **Connecticut** - Effective October 1, 2015 a judge or jury is required to assess double damages if the employer defendant failed to (a) pay an employee's wages, accrued benefits or arbitration award; or (b) pay the state law minimum wage, overtime or both. One of the first defendants to feel the pinch of this new law was a law firm which had the \$262,903 jury verdict for back wages doubled. The law does allow an employer to avoid double damages if it can show it had a good-faith belief that its payments were correct. This is the polar opposite of the prior standard, which put the burden on aggrieved employees to prove their employers' bad faith. This statute is one example of the spreading state emphasis on "wage theft" and beefed-up penalties to deter and punish.
4. **Connecticut** - Effective October 1, 2015, electronic nicotine delivery systems and vapor systems are prohibited in ten types of locations listed in the statute, many of which will be places of employment. The new law includes a posting requirement for covered employers. For more info, see <https://www.cga.ct.gov/2015/ACT/PA/2015PA-00206-R00HB-06283-PA.htm>.
5. **New Jersey** - Effective March 2, 2016, add Elizabeth as the tenth NJ city to mandate paid sick leave for employees.
6. **New York** - The NY state law permitting employers to withhold from employee pay for itemized reasons (NY Labor Law sec. 193) was set to expire on November 6, but has been extended through November 6, 2018.
7. **Pennsylvania (Pittsburgh)** - The January 11, 2016 effective date for the Pittsburgh Paid Sick Days Act, has been pushed back 60 days, to March 10, 2016, due to a lawsuit filed against the City by the Pennsylvania Restaurant and Lodging Association and several local restaurants.
8. **Washington (Tacoma)** - Voters approved a phased-in increase in the minimum wage to \$12/hour by 2018.
11. **For the Birds** - If you like being tweeted and want breaking news on employment law changes (and the occasional random cheer for K-State & Cats in the NFL . . . go Tyler Lockett!), 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](mailto:amross@munckwilson.com)  
[www.munckwilson.com](http://www.munckwilson.com)

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