BV-SHRM NEWSLETTER

CHAPTER NO. 0330 ◆ OCTOBER 2015

October's Program and Luncheon proudly sponsored by:

Brown & Company

Brown & Company *offers services for all of your health insurance needs from private insurance through a Marketplace to helping businesses with a benefits plan. Contact Brown & Company today!*

For more information:

1825 Brothers Blvd.
College Station, TX 77845
979.694.6900
800.725.0345
bcsins.net

Would your organization like to be featured here?

Contact Diana Dean about sponsorship opportunities at jdeanacres@aol.com

MONTHLY PROGRAM & LUNCHEON

TOPIC: **Legal Update**

WHEN: **October 1, 2015**

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

SPEAKER: Lon Williams, Polsinelli

RSVP: Please ***RSVP by noon, Friday, September 25*** to rsvpprograms@gmail.com.

MENU: Chicken fried steak/chicken, gravy, starch, bread, salad, tea & water

PROGRAM DETAILS

A legal update is a must in every HR pro's playbook. Join us as Lon Williams discusses federal HR-related legislation, federal regulatory activity, HR-related administrative action, and recent court cases.

SPEAKERS BIO

Lon Williams is an employment and labor attorney with over 30 years' experience representing employers in every aspect of their relationship with their employees. Although Lon is experienced in employment related litigation, his practice is typically described as an advice and counsel practice. His practice includes assisting his clients at the highest levels of management, as well as within the HR Department, to determine solutions to those day-to-day challenges regarding compliance with the numerous employment related federal and state laws.
His assistance frequently extends beyond advising and counseling as he:

- drafts Executive Employment Agreements
- drafts Employee Separation Agreements
- drafts Confidentiality, Non-Competition and Non-Solicitation Agreements
- responds to EEOC, Department of Labor and OFCCP investigations
- conducts training for management regarding best HR practices, and
- drafts HR policies and Employee Handbooks

Lon represents companies of all sizes in many industries, with a particular emphasis in the health care, staffing, energy, financial services, education and defense contracting sectors.

Board Officers

President
Retha Youell, SPHR

President Elect
Lisa Villalobos, PHR

VP of Programs
Sarah Tobola, SPHR

VP of Membership
Candi Nelson

Treasurer
Krystal Broussard, PHR

Secretary
Kimberly Williamson

Past President
Katherine Kleemann

Directors & Chairs

Certification Director
Alyssa Wisnoski

College Relations Director
Tami Overby

Diversity Director
Liz Galvan, PHR

Government Affairs Director
Vacant

SHRM Foundation Director
Thom Holt, SPHR

Workforce Readiness Director
Stacy Overby, SPHR

Hospitality Chair
Wanda Boyd, PHR

HRSW Ambassador Chair
Katherine Kleemann

Newsletter Chair
Lisa Villalobos, PHR

Business Seminar Chair
Diana Dean, SPHR

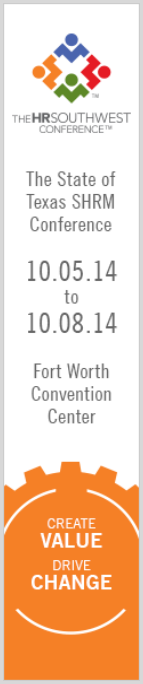
Social Engagement Chair
Jennifer Cabezas, PHR

Website Chair
Bob Hensz, SPHR

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

Upcoming Events

MARK YOUR CALENDARS



Chamber After Hours
October 8, 2015, 5:30-7:00 p.m.
Guaranty Bank & Trust

HR Southwest
October 25-28, 2015
Ft. Worth, TX
http://www.hrsouthwest.com/

BV-SHRM Program
November 5, 2015
Topic: Employment Ethics
Speaker: Rob Ghio, Law Office of R.S. Ghio

DIVERSITY MATTERS

Diversity Dates for October

National Disability Employment Awareness Month
LGBT History Month

October 12 National Indigenous People's Day
October 20 Birth of the Bab (Baha'i)
October 22 Dussehra (Hindu)
October 23 Ashura (Islam)

Are you in? BV-SHRM is.

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

BOARD MESSAGE BOARD

Holiday Luncheon

- We are still looking for auction items. Your donation goes a long way to helping our chapter as well as supporting our peers who are continuing education. Contact Lisa, Retha or another board member to donate.
- Look for more details coming soon!!

And look… pictures from our seminar!

Facebook/LinkedIn Drawing

The cut off for the drawing is **September 30th** and the prize is a free December luncheon meal/entry fee.

Drawing will be held at the October meeting.

"Like" our Facebook Page:

Brazos Valley Society for Human Resource Management

Join our Linked In Group:

BV-SHRM

Krystal Broussard Building Value with HR Excellence Award

Nomination packets will be sent out soon. Please encourage submissions. We want to recognize and reward the HR talent we have out there!

Contact Lisa Villalobos (villaloboslisab@gmail.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 under Media Center/Legal Briefs and you can also join the group by clicking on "Subscribe."

It's back to school time for the kiddos but your education never ends:

1. **To Form a More Perfect Union? NLRB "Refines" Joint Employer Definition** – Board holds a union election at a BFI recycling facility which is staffed, in part, by sorters (who work the "material streams" and keep the equipment running) supplied by a temp agency, Leadpoint. Board's regional director says Leadpoint is the employer but union objects, saying both BFI and Leadpoint are joint employers of the prospective bargaining unit workers. After mulling amici briefs and reviewing Board precedent, a Board majority (3-2) decides that it was not justified in its addition of new requirements to the "joint employer" definition in a series of cases between 1982 and now. Further, this unjustified narrowing of the definition coupled with an explosion of contingent workforce arrangements leads them to establish a new definition. The existing caveats of finding no joint employer relationship where (a) the putative employer possesses authority to control terms and conditions of employment but does not exercise it; or (b) where the control is not "direct and immediate" are gone. With those conditions gone, the door opens to find joint employer status between franchisors and franchisees, employers with leased or temp employees, contractors over subcontractors and more, depending on how you analyze the "control" issues, including reservation of certain rights (whether exercised or not) in the contract between the parties. *Browning-Ferris Industries of CA, Inc.* (Aug. 27, 2015). For context, here is a partial list of items cited to as evidence of the joint employer relationship:
    1. **Hire, Fire and Discipline** – BFI retained right to require Leadpoint to meet or exceed BFI's hiring standards, required drug tests of the workers and imposed a ban on rehire of certain former BFI employees; these findings trump language in the contract between the parties which said BFI does not participate in day-to-day hiring processes
    2. **Supervision** – Even though Leadpoint provided its own on-site supervisors, BFI retained control over the speed of the material streams and productivity standards for sorters; BFI specifies tasks to be completed and exercises "near constant oversight" albeit communicated via Leadpoint's supervisors
    3. **Wages** – BFI prevents Leadpoint from paying its assigned workers more than BFI employees who do similar work; BFI must OK any employee raises

    The press release on the NLRB website (where you can find full text of the 50-page decision) refers to this as a "refined" standard for determining joint employment. Most folks I know would call this a complete tear-down. You be the judge. https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries.

2. **Texas Two-Step** – Back in mid-June, long before NLRB decision above, Governor Abbott signed into law SB 652, which protects franchisors from employment liability arising from the actions or failure to act of their franchisees. In general, it provides that the franchisor is not an employer of the franchisee or the franchisee's workers for claims of employment discrimination, wage payment, workers' compensation and safety claims, unless the franchisor "has been found by a court of competent jurisdiction in this state to have exercised a type or degree of control over the franchisee or the franchisee's employees not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand."

3. **EEOC Getting Testy** – It's not news that the EEOC takes the position that certain employment tests and screening procedures can violate several laws they enforce, depending upon the questions asked, when they are asked and if the questions are sufficiently job-related and consistent with business necessity. The agency filed suit against one employer in July and secured a $2.8 million settlement from another in August. The filed suit is against an assisted living facility and alleges that the test at issue discriminates against African employees based on their national origin, in violation of Title VII. Stated concerns include a lack of formal job analysis before developing the exam which purports to measure job skills, questions that confuse individuals who speak English as their second language, and no credit given to African test-takers for partially correct answers (while others allegedly received such credit). In the Commissioner's charge that settled, three assessments were ID'd as screening out job seekers from exempt, professional jobs based on both race and sex, while one of those three tests was administered prior to an offer of employment, by psychologists, which makes it an improper "medical exam" under the ADA. Both cases and the time of year are reminders that employers need to be periodically re-schooled on the basics of employee and job applicant tests that are used to make employment decisions. Generally, do not be swayed by vendor statements that their tests have been validated . . . unless that validation was done specifically for your organization.

4. **DOL Gets a Home Run** – Heads' up to those who employ and compensate home health care workers . . . the D.C. Circuit reversed a lower court ruling by agreeing with the DOL's position that it had the authority to issue its Home Care Rule, which extended the FLSA's pay protection to certain companionship workers and live-in domestic workers. The dispute goes all the way back to 1974, when the FLSA was amended to give minimum wage and overtime rights to domestic service employees, even if their employer did not meet the FLSA's definition of a covered employer. The amendment carved out two key exemptions – companionship workers (who help the aged or infirm who cannot care for themselves) were exempted from both the minimum wage and overtime, while live-in domestic workers were exempted from overtime. It was not clear whether the two exemptions applied only to individuals who were directly employed by the person(s) they cared for, or if they also applied where the worker was supplied and paid by a third party, such as a home health care company. A 2007 U.S. Supreme Court decision held that workers for third parties also came within the exemption, and several Congressional attempts to revoke those exemptions failed. Even so, the DOL issued its Home Care Rule in October 2013 with an effective date of January 1, 2015. The Home Care Association and others filed suit, claiming the DOL had overreached and had no authority to enforce the Home Care Rule. While the district court agreed with the plaintiffs, holding the rule invalid and unenforceable this past December/January, the D.C. Circuit did not and was satisfied with the DOL's explanation that its shift in policy is justified by the dramatic transformation of the home care industry between 1974 and now. After the lower court setback, the DOL announced it would not enforce the Home Care rule until June 30, 2015. An August 21, 2015 press release on the DOL website touts the win but does not address when enforcement will begin.

5. **NLRB in Punt Formation** – With football season about to kick off, the Board decided on August 17 that it did not want to play with the upstart College Athletes Players Association (CAPA), which was angling to represent Northwestern University's scholarship football players. The election petition filed with the Board was dismissed and the ballots put under lock and key. Many thought the decision would admit that the student-athletes were not "employees" which would deprive the Board of jurisdiction. Instead, they cited to their discretionary power to decline jurisdiction, without answering the burning question whether they could take jurisdiction. Without deciding that threshold issue, we could see another run at organizing college sports teams (private schools only; NLRA does not apply to state-funded schools).

6. **You Don't Have to Accommodate This** – Are you thinking the ADA or analogous state law might come back to bite, if you discharge an employee diagnosed with a major depressive disorder who threatens to shoot his co-workers? Then take heart because a OR trial court and the 9th Circuit said no, you don't. In upholding the lower court decision, the 9th Circuit observed that the plaintiff could not assert a claim of disability discrimination because he was not "qualified" at time of his discharge from employment. Why? Because an "ability to appropriately handle stress and interact with others" is an essential function of nearly every job. And they put a bow on this common sense decision by saying the ADA and state law " do not require employers to play dice with the lives of their workforce." *Mayo v. PCC Structurals, Inc.* (9th Cir. July 2015).

7. **You May Have to Accommodate This** – Organizations which conduct business via website and/or mobile apps have been waiting for years, for the DOJ to issue standards on making their websites/apps accessible to the disabled under the ADA. Two April 2015 9th Circuit decisions held that a website-only business is not a place of public accommodation under Title III of the ADA, similar to earlier findings by the 3rd and 6th Circuits. They want to see nexus to a physical place, such as a website maintained by a retailer who has brick and mortar stores. But the 1st Circuit, several district courts and the DOJ beg to differ, with the DOJ regularly citing to the Web Content Accessibility Guidelines (WCAG) in their enforcement actions. For more info on WCAG 2.0, check out http://www.w3.org/WAI/WCAG20/quickref/.

8. **Your Attendance is Requested, er, Required** – Another Circuit Court agrees with the 6th Circuit's decision in *EEOC v. Ford Motor Company*, holding that being present in the workplace during working hours was an essential function of this particular job and the employee's request for an 11 a.m. start and telecommuting was not reasonable. *Doak v. Johnson* (D.C. Cir. Aug. 2015). The employee was a program analyst with duties involving budget-making, procurement requests and in-person meetings with co-workers. She suffered from hypothyroidism, depression and migraines and had exhausted available FMLA leave at the time the late start and telecommuting demand was made.

9. **HR Cocktail Party Topics . . . Discuss!**

   1. **Thanks, IRS** – If an employer's records containing employees' personal information is breached and the employer provides free ID protection services, the value of services does not need to be included in the employee's gross wages. See Announcement 2015-22.
   2. **Time Out** – If you rely on time sheets to show that an employee did not work 1250 hours in the 12 months prior to when FMLA leave was requested, to show that employee was not eligible for FMLA, you will lose the case if the employee can show that your time clocks do not always function correctly. *Barnes v. Vibrra Healthcare LLC* (D.N.J. May 2015)
   3. **Oh Really?** – The July-August edition of *Harvard Business Review* bears the cover story "It's Time to Blow Up HR And Build Something New. Here's How."
   4. **What is That Adage About Karma?** – Assuming some of those reported 32 million Ashley Madison users accessed the [insert adjective of your choice] site from work, those email addresses and names are out there and provide a conduit for phishing attacks and other intrusions into corporate computer networks. Your spouse is mad at you and now your employer is, too.
   5. **Not Even in the Ballpark** – A volunteer who worked the five-day Fan Fest at MLB's All Star Week at Javits Center in NYC failed in his FLSA claim for unpaid wages. The Fan Fest was an "establishment" which came within the FLSA's seasonal amusement or recreational establishment exemption to the minimum wage and overtime rules. So take your tee shirt, cap, draw-string backpack, water bottle and baseball and be happy! *Chen v. MLB Properties, Inc.* (2nd Cir. Aug. 2015).

10. **Gentle Reminder** – Perhaps to reinforce the guidance on employee vs. contractor classification issued by sister agency, DOL, the IRS posted its own version of "you better watch out" on August 15. The brief memorandum contains lots of links to expand upon the message, at http://www.irs.gov/uac/Newsroom/Payments-to-Independent-Contractors.

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

    1. **Illinois** – Effective January 1, 2016, employers in IL may exercise a hiring preference for U.S. military veterans without triggering liability under employment discrimination laws. Other states that do the same are AR, AZ, FL, GA, IA, ID, IN, KY, ME, MI, MN, MT, ND, NE, OK, OR, SC, UT and WA.

    2. **Louisiana (New Orleans)** – Companies which contract to do work for the city (in the amount of $25K per year or more) must pay their employees at least $10.55/hour and provide at least seven paid sick days per year, effective January 1, 2016. The paid sick days requirement does not apply, if an employee's pay is at least 30% of the $10.55/hour requirement.

    3. **New York (NYC)** – Effective September 3, 2015, employers may not request or review credit history information on job applicants, with exceptions for certain types of jobs as defined within the ordinance.

    4. **Oregon** – Effective January 1, 2016, employers of 10+ employees must provide one hour of paid sick leave for every 30 hours worked, up to a max of 40 hours per year. There are also new laws to "ban the box" (i.e., prohibit use of criminal conviction info on a job application or prior to initial interview), protect employees' discussion of their wages or the wages of another employee and cap the timeframe for post-employment noncompetes entered into beginning in 2016 at 18 months.

12. **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
www.munckwilson.com

Refer A Friend!

I would like to refer a friend to BV-SHRM.

Please send information about this organization to:

Name: _____

Address: _____

Phone:_____

Email: _____

Your Name: _____

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT