CLEVELAND METROPOLITAN
Bar Journal
MAY 2016

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Anne Owings Ford

Let's Not Be Knaves

Abraham Lincoln Got It Right, Even Without Model Rules.

I listened to a message left on my home answering machine the other day. It was from someone who identified himself as "Kevin," explaining that he had been reviewing my mortgage, and offering to discuss with me various products to bring down my interest rate. There was one primary problem with this scenario: I don't have a mortgage.

This message made me really angry, because I have a "thing" about lies. I don't like to tell them; I don't like to hear them; and I have very little patience with people who lie. Kevin, plainly, was lying. He hadn't been reviewing my mortgage, since it didn't exist, and there is no interest rate that is below "none."

I bet his name wasn't even Kevin.

Some would say I am being too hard on "Kevin." He's just reading a script, they might say; he is working to capture business for the company for which he works, which is a legitimate goal. My response is that if I have to lie to get business, then I'd rather find something else to do.

Abraham Lincoln agreed, although with greater eloquence:

> There is a vague popular belief that lawyers are necessarily dishonest — I say *vague,* because when we consider to what extent *confidence,* and *honors* are reposed in, and conferred upon lawyers by the people, it appears improbable that their *impression* of dishonesty, is very distinct and vivid. Yet the expression, is common — almost universal — Let no young man, choosing the law for a calling, for a moment yield to this popular belief — Resolve to be honest at all events; and if, in your own judgment, you can not be an honest lawyer, resolve to be honest without being a lawyer — Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.

Abraham Lincoln Papers, Library of Congress (notes of a speech delivered to law students; date and school unknown).

Many years ago, I found this statement reprinted in a newspaper and I cut it out. I kept the clipping close to me as I finished college and then plowed through law school. It seemed a fine personal credo, and a worthy goal to which to aspire. I've learned nothing in the intervening 30 years to change that conviction.

It's not just state rules governing attorneys that require lawyers to remain on the straight and narrow path of honesty. Lawyers are obligated by their role in our society as a whole to be honest and trustworthy, and they owe a duty to the court and their clients to always keep this obligation in sight. I have repeated this credo to myself many times when I was slogging through difficult tasks, reminding myself that the obligation to be fair and honest in my dealings with all, not just my own client, was a beacon by which I could navigate any issue that came along. At times when I've said more or less exactly that, I have been called naïve, clichéd or even Pollyanna-ish. That's okay. For me, whether a concept can be reduced to a bumper sticker has never been an argument either for or against its validity. Come to think of it, "Be honest and don't cheat people" would make a dandy bumper sticker.

The Kevins of the world, of course, are not bound in their work to the same high standard as lawyers; neither do they face the same significant consequences of violating this basic precept. But at least sometimes don't you wish they were?

Lincoln's timely advice doesn't end with honesty. He also spoke to a lawyer's obligation to dissuade potential clients from pursuing a dispute when a peaceful resolution might be possible:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

The Collected Works of Abraham Lincoln edited by Roy P. Basler, Volume II, "Notes for a Law Lecture" (July 1, 1850?), p. 81.

This statement is so fresh, so current, it is hard to believe it was written over 200 years ago. We have formalized a number of structures to aid in this goal, from Alternative Dispute Resolution fora to professionalism panels to facilitate reconciliation among warring lawyers. But we *still* struggle with stopping litigation before it starts, dispute resolution processes and (where possible) acting as a peacemaker, not a rabble rouser.

At the end of the day, every signatory to the social contract — and that means everybody — is obligated to act and speak with honesty. The supervening duty of lawyers to pursue their profession in a spirit of honesty and peacemaking merely gilds the lily. But Lincoln's ultimate point should resonate with every one of us: if for some reason you can't be an honest lawyer, then go be an honest something else.

Anne Owings Ford has over 25 years' experience in the world of litigation, from her first judicial clerkship to, most recently, her partner status at a national law firm. She has been a CMBA member since 1991. Anne currently is a litigation consultant, and she can be reached at aoford@roadrunner.com.

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The Scoop?

CMBA Member Q&A

Shaun Young

Firm/Company: **Keis George LLP**
Title: **Partner**
CMBA Join Date: **2008**
Undergrad: **Baldwin-Wallace College**
Law School: **Cleveland-Marshall College of Law**

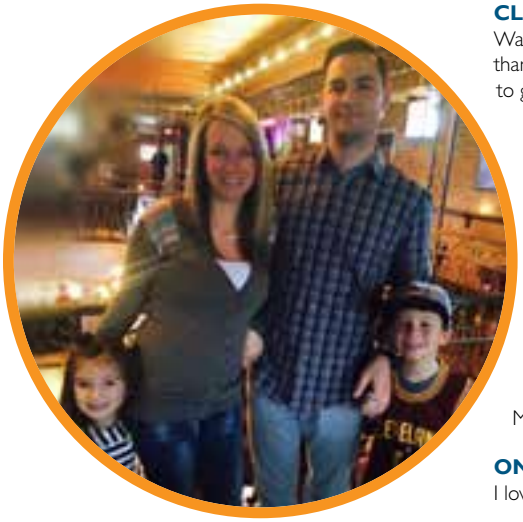
FAVORITE CLEVELAND HOT SPOT
Browns, Cavaliers or Indians games and the Flats East Bank

TELL US ABOUT YOUR PET(S) IF YOU HAVE ANY.
I have a 9-year-old Schnau-tzu with bright white hair named Bailey.

HOW DID YOU MEET YOUR SPOUSE?
At Baldwin-Wallace

TELL US ABOUT YOUR FAMILY.
My wife Tara and I have been married for 10 years this August and we have two children. Trey is 7 and Elle is 5.

IN WHAT CITY DO YOU LIVE, AND WHAT DO YOU LIKE ABOUT IT?
Rocky River; a family-friendly community with many great restaurants, excellent schools, wonderful parks, access to Lake Erie and close to downtown.



Carrie Cravener

Firm/Company: **CMBA**
Title: **Legal Coordinator**
CMBA Join Date: **December 2011**

MOST MEMORABLE CMBA MOMENT
Volunteering at the Cleveland Food Bank. Go Team CMBA!

FAVORITE THING TO DO IN CLEVELAND?
Wade Oval Wednesdays — there is nothing better than sitting outside with a group of friends listening to great music on a summer night.

EAST SIDE OR WEST SIDE?
I have always been a Westsider. West is best!

WHO HAS INFLUENCED YOU THE MOST IN LIFE?
My Daddy. The best man ever! He inspired me to be the person I am today.

WHAT WOULD REALLY SURPRISE PEOPLE ABOUT YOU?
I'm a grandma to four beautiful kids: Mason, Mehki, Ashton, and Chasity.

ONE FUN FACT ABOUT YOU?
I love, love, love to dance. Did I say I love to dance?

Joanna N. López

Firm/Company: **Cuyahoga County Prosecutor's Office – Juvenile Division**
Title: **Prosecuting Attorney**
CMBA Join Date: **2014**
Undergrad: **Case Western Reserve University**
Law School: **Cleveland-Marshall College of Law**

IF YOU WERE NOT PRACTICING LAW, WHAT WOULD YOUR PROFESSION BE?
If I were not practicing law, I would probably be a teacher. For most of my childhood, that's what I wanted to be. I truly enjoy every opportunity I get to work with kids. In college, I was always volunteering to tutor elementary students. In law school, I had a "little sister" through Big Brothers Big Sisters, and I was an instructor for the Law and Leadership Institute. Post-bar exam, I worked at the Horizon After-School Program at North Olmsted Middle School. I've volunteered for 3Rs since the beginning, and I enjoy watching students in Mock Trial competitions. I'm pretty sure interacting with the kids keeps me young.

TELL US ABOUT YOUR PET.
Lola the Pooch is my fox-terrier Yorkie. She has way too much personality. She loves when I take her out for a run, except for when she no longer feels like running.

YOUR MOST EMBARRASSING PROFESSIONAL MOMENT?
My most embarrassing professional moment was when I received an e-mail from a lawyer at Calfee, informing me that they received my MOTHER'S e-mail, and they wanted to set up an appointment/informational interview. My heart dropped. I thought my legal career was over before it started. But luckily they were very understanding because one of the lawyers was a mom too with a recent graduate child seeking employment so although, I'm positive they thought this was hysterical, they understood my mom had the best of intentions and I had nothing to do with her going rogue.

IN WHAT NEIGHBORHOOD DO YOU LIVE, AND WHAT DO YOU LIKE ABOUT IT?
I live in Ohio City, and I love how convenient it is. With easy freeway access, no part of Cleveland or its suburbs are off limits. I can drive to work on the Eastside in 15 minutes. Mitchell's, the home of the best ice-cream, is on West 25th along with Westside Market and restaurants I adore. Plus it is close to downtown, Tremont, Gordon Square, and Edgewater Park.

ONE FUN FACT ABOUT YOU?
Last summer I DJ'd a real life wedding reception. My mom said her friend needed someone to play music at her wedding and I JOKED that I could do that. My mom thought I was serious and volunteered my services. It was a success despite being my first time! They're still friends, and nobody is being sued.

This year's outing will include lunch, 18 holes of golf and a post-round reception — making the event an experience not to be missed.

Sponsorship opportunities available. Call (216) 696-3525 for info.

Online Registration & More Info
CleMetroBar.org/Golf

2016 Golf Outing Registration

Monday, June 27, 2016 • Registration: 10 a.m. • Tee time: 12 p.m.
Westwood Country Club – 22625 Detroit Road, Rocky River, Ohio 44116

Name _____ Company _____

Phone _____ Email _____

❑ Individual Tickets ($200 each) #_____ ❑ Foursome ($800 each) #_____

❑ I need a pairing ❑ I do not need a pairing

Golfers: 1._____ 2._____

3._____ 4._____

❑ Lunch-only guests ($25) #_____ ❑ Reception-only guests ($50) #_____

Payment Total: _____

❑ Check enclosed (payable to the CMBA) ❑ Visa ❑ Mastercard ❑ American Express ❑ Discover

Credit Card # _____ Exp Date _____

Signature _____

Register early — limited space available. The event will take place rain or shine.

Complete this form and return to Sarah Charlton, CMBA, 1375 East 9th Street, Floor 2, Cleveland, Ohio 44114-1785

scharlton@clemetrobar.org • fax (216) 696-2413

Rebecca Ruppert McMahon

30 Ways in 30 Days

So you might have heard we have an **Annual Meeting** and **Membership Expo** coming up on **June 3** at the newly-renamed Huntington Convention Center. The details of the luncheon are falling into place — from the installation of our new Association and Foundation officers and trustees, to recognition of the newest class of 50/65 Year Honorees, the "you-must-inform-AND-entertain-the-crowd" speeches to be given and the selection of recipients for this year's President's, Justice For All and Professionalism Awards.

We are also finalizing the fun that we hope will cause you to come early and stay late. During our first ever Membership Expo, you will have the chance to better connect with Section, Committee and Program leaders, as well as Cleveland Businesses to learn about opportunities for engagement, volunteering, and business development. The Expo will feature **live music** — before lunch the Rocky River High School Jazz Band will entertain us and afterwards, Transportation Boulevard will kick us into high gear — as well as **giveaways, refreshments, a cash bar, and other surprises**.

Current members — and anyone who becomes a member during the Expo — will also have the opportunity to have **a professional headshot taken on us**. (You will receive an electronic version of your photo at no cost. Prints may be ordered for a fee.)

More than 20 organizations and segments of our Bar will be vying for "**Best Booth**" bragging rights. Some of those who will be rolling out their opportunities for engagement and volunteering will be:

- AllCovered
- Cleveland Association of Paralegals
- Cleveland Law Library
- Fastcase
- Hennes Communications
- The Legal Aid Society of Cleveland
- Maloney + Novotny
- PNC Bank
- Toshiba Business Solutions

PLUS some of our homegrown groups including:

- **The Bar Foundation** – check out the Fellows Program and get entered into a drawing for free tickets to Rock the Foundation 12
- **Diversity and Inclusion Committee** – pick up the 2015-16 Benchmarking Report
- **3Rs, Volunteer Lawyers for the Arts, and Justice for All Community Programs** — volunteer now!
- **Guardian ad Litem Project** – register for upcoming training and learn about the new CASA project
- **Labor and Employment Section** – see what the Section has planned for the upcoming year
- **Legal and Ethics Committees** – find out what WIP is and why you need it
- **Legal Technology Committee** – learn how to move your "data processing" into the 21st Century
- **LGBT & Allies Committee** – we're all in this together
- **Membership Committee** – renew your membership and qualify for a variety of great giveaways
- **Small Firm & Solo Practitioner Section** – check out the details regarding the upcoming 2nd Annual Small & Solo Expo

The Annual Meeting and Membership Expo represent just the beginning of our month-long celebration of what is best about our Bar: **our members**! Throughout June, we will be saying thank you for all that you have done to help us make this year such a success. From member spotlights, raffles and other giveaways, we will be showing you 30 Ways in 30 Days**. That's 30 Ways the CMBA can say THANK YOU in 30 Days —** no strings attached or fine print. We simply want you to know that we've had a great Bar year because of you.

So, what might these thank yous look like?

How about the chance for a **free lunch** with our in-coming presidents — **Association President Rick Manoloff and Foundation President Drew Parobek?**

Looking for a sugar rush and caffeine in the morning? Stop by the CMBA any morning between 8:30 a.m. and 10 a.m. the week of June 13th for **coffee and doughnuts on us.**

Attend any CLE during the month of June, and you will automatically be entered to win a **free Member Spotlight on our website**.

Maybe an occasional workday diversion is more your speed? Spend a few minutes during the month of June **surfing our social media outlets** — Facebook, Twitter, Instagram, and Youtube — and find spontaneous specials and giveaways for only our members.

Planning on renewing your CMBA membership for another incredible year of engagement and benefits beginning July 1, 2016? If you renew on or before June 30, you will be entered in a drawing for a **free 2017–18 CMBA membership.**

So you see, April showers can bring May flowers, but June brings membership appreciation at the CMBA. Let us show you our thanks again and again!

Rebecca Ruppert McMahon is the Executive Director of the CMBA and the CMBF. She has been a CMBA member since 1995. She can be reached at (216) 696-3525 or rmcmahon@clemetrobar.org.

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Spring

SALE

EARLY BIRD

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NEW 2016–17 Legal Directory is now available for pre-orders!

Order now through May 31 and save $10 on the print edition. Your bottom line will thank you!
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❑ **Print Format** with **Shipping** _____ # of books @ $33.45 ea = _____ *(Regular price $43.95)*

Non-Members

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❑ **Print Format** with **Shipping** _____ # of books @ $53.45 ea = _____ *(Regular price $63.45)*

All prices include appropriate Ohio sales tax.

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Address _____ City _____ State _____ Zip _____

Phone _____ E-Mail _____

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Credit Card No. _____ Exp.Date _____

Signature (if paying by credit card) _____

Complete this form and mail to: Cleveland Metropolitan Bar Association, 2016 Legal Directory, P.O. Box 931852, Cleveland, Ohio 44193 Or fax to: (216) 696-2413

9th ANNUAL MEETING

Campaigning for Cleveland

Friday, June 3rd

Manoloff FOR PRESIDENT 2016–2017

Ramp up for the 2016–2017 Bar year and the RNC!

Huntington Convention Center of Cleveland

Doors open at 11a.m. ★ Lunch at 11:45 a.m.

Join us for the installation of the 2016–2017 CMBA President Richard D. Manoloff of Squire Patton Boggs and our new officers and trustees. In addition, we will celebrate the newest class of 50- and 65-year Honorary Life Members and the recipients of this year's Association awards.

NEW IN 2016
EXPO

Meet CMBA Section, Committee, and Program leaders as well as Cleveland businesses to learn about opportunities for engagement, volunteering, and business development.

☐ **INDIVIDUAL TICKET ($55)**

☐ **REDUCED RATE TICKET ($40)**
Honorary Members and Judges

☐ **TABLE SPONSORSHIP ($650)**
Includes Prominent Visual Recognition at Event

Sponsorship Opportunities

Visit CleMetroBar.org/AnnualMeeting to download the full sponsorship form which includes additional levels offering more benefits like advertising in the event program, expo participation, and more. Or call Krista Munger at (216) 696-3525 x 2224 to inquire.

I wish to reserve _____ seat(s) or _____ table(s) for the 9th Annual Meeting.

Name (please print) _____

Firm/Company _____

Address _____

City _____ State _____ Zip _____

Phone _____ E-mail _____

Special Food Requests or Allergies (Vegetarian, Gluten Free, etc.) _____

❑ Check enclosed made payable to Cleveland Metropolitan Bar Association ❑ Visa ❑ Mastercard ❑ American Express ❑ Discover

Credit Card No. _____ Exp. Date _____

Signature (needed only if using Credit Card) _____

Mail to P.O. Box 931891, Cleveland, Ohio 44193 or fax to (216) 696-2413

Section & Committee Spotlight

WORKERS' COMPENSATION SECTION

Chair
Sandra J. Lisowski
Attorney and Counselor at Law
sandrajlisowskilaw@att.net

Staff Liaison
Samantha Pringle
springle@clemetrobar.org

Regular Meeting
Our Section meets the 2nd Wednesday of each month at 11:45 a.m. in the State Office Building, Second Floor Auditorium, 615 West Superior Ave. General business is discussed until 12 p.m., at which time a 1.00-hour CLE is offered on a current workers' compensation topic. The cost to attend is $20 for Section members and $25 for non-members.

What is your goal?
The Section includes attorneys representing injured workers and employers as well as the government. The goal is to stay current on the case law and medical topics. Additionally, it is an opportunity to meet in a non-adversarial setting.

Upcoming Events
Monthly CLE Programs; Friday, December 2, 2016, Medical-Legal CLE (6.00 CLE hours); Section Socials to be announced.

LABOR & EMPLOYMENT LAW SECTION

Chair
Patrick Peters
Jackson Lewis P.C.
Patrick.Peters@JacksonLewis.com

Staff Liaison
Samantha Pringle
springle@clemetrobar.org

Regular Meeting
Third Wednesday of each month at noon at the CMBA Conference Center

What is your goal?
To provide a collegial environment for monthly continuing education meetings, an annual conference, and networking among the Northeast Ohio labor and employment law bar.

What can members expect?
Monthly meetings featuring dynamic speakers from the Section and an annual two-day conference.

Upcoming Events
May 18, 2016 – Lunch & CLE Presentation: "Psychology of Collective Bargaining" presented by Susan Hastings, Squire Patton Boggs (US) LLP and Carolyn Brommer, Federal Mediation and Conciliation

June 15, 2016 – Lunch & CLE Presentation: "FMCS Mission, Services & Trends, Plus Maximizing Mediation Outcomes" presented by Mike Franczak, Federal Mediation and Conciliation Service and Tim Viskocil, Federal Mediation and Conciliation Service

Recent Event
Our recently concluded two-day conference, held April 20 and 21, 2016, featuring 13 hours of CLE on a wide-range of labor and employment law topics culminating with a networking happy hour.

INTERNATIONAL & IMMIGRATION LAW SECTION

Chair
Pingshan Li
Ulmer & Berne LLP
pli@ulmer.com

Regular Meeting
Monthly at CMBA Conference Center

What is your goal?
Reach out to more local lawyers to make them aware of the expertise that the International Law Section has to offer. My goal is to make the International law section one of the largest and most active sections of CMBA.

What can members expect?
We will bring in more practical and world-class CLE resources to Cleveland.

Upcoming Events
Upcoming Monthly seminar on May 26: "Taking a Pulse of Current EB-5 Finance – a roundtable discussion with Cleveland International Fund"

Recent Event
April 2016 Monthly Seminar: "What's Broken in Employment-Based Immigration Law" and March 2016 Monthly Seminar: "U.S. Offshore Tax Enforcement And the Foreign Account Tax Compliance Act"

Section and Committee membership is a great way to get plugged in at your local Bar!

For information on how to join a section or committee, contact Samantha Pringle, Director of CLE & Sections, at (216) 696-3525 x 2008 or springle@clemetrobar.org.

BAR SEEN

our members seen
out & about

APRIL 28, 2016

CMBA Movie Night

In February, the CMBA launched its new Movie Night series on the last Thursday of each month in our auditorium. Movies included *My Cousin Vinny, To Kill a Mockingbird,* and *A Few Good Men.* Each event included a pre-show mixer and remarks from movie buff Warren Rosman. Movie Nights will kick off again in Fall.

APRIL 20 – 21, 2016

16th Annual Northern Ohio Labor & Employment Law Conference

The Labor & Employment Section presented the 16th Annual Northern Ohio Labor & Employment Conference on April 20 and 21. After two full days of CLE, we wrapped up the Conference with a networking social sponsored by the Cefaratti Group. Thanks to Pat Peters of Jackson Lewis and Lauren Tompkins of Giffen & Kaminski for co-chairing this year's Conference.

The Cleveland Metropolitan Bar Foundation presents

70th Annual Franklin A. Polk PUBLIC SERVANTS Merit Awards

Friday, September 4, 2016

The Westin Cleveland Downtown

June 1st & 2nd

CMBA Conference Center

2016

William J. O'Neill Great Lakes Regional Bankruptcy Institute

BANKRUPTCY TOOLBOX

DO YOU HAVE WHAT YOU NEED?

Visit CleMetroBar.org/ONeill or call (216) 696-2404.

Volunteering á la Carte

The Justice For All (JFA) programs of the CMBA offer volunteers a true variety of opportunities to give back to their community, with such an extensive range of commitment levels and experience requirements that everyone – attorneys, judges, law students, paralegals, and other legal professionals – can find something to match their interests and availability.

For more about volunteering, please visit **CleMetroBar.org/ProBono** or contact Jessica Paine, Assistant Director of Community Programs, at (216) 696-3525 or jpaine@clemetrobar.org.

THE 3RS – RIGHTS • RESPONSIBILITIES • REALITIES

Volunteers provide law-related education in the high school classroom.

Each volunteer serves on a team that visits an assigned classroom in a Cleveland or East Cleveland public high school to present six lessons on the U.S. Constitution and career counseling. Curriculum and volunteer orientation are provided.

Volunteer Schedule: Sept. 2016 – April 2017 (typically one classroom visit per month)

CleMetroBar.org/3Rs

3RS+

Volunteers provide college and career counseling, tutoring, and mentoring services to 11th and 12th graders in the Cleveland and East Cleveland schools, upon request.

Volunteer Schedule: During school year, Sept. 2016 – May 2017

CleMetroBar.org/3Rs

CLEVELAND HOMELESS LEGAL ASSISTANCE PROGRAM (CHLAP)

Volunteers can provide service in two ways: (1) providing brief advice and counsel at intake sessions at homeless shelters and social service providers, or (2) providing follow-up service on legal matters needing further attention.

Volunteer Schedule: Sessions scheduled regularly throughout the year

CleMetroBar.org/CHLAP

CLEVELAND MOCK TRIAL COMPETITION & MIDDLE SCHOOL MOCK TRIAL

Volunteer attorneys and law students serve as team legal advisors to Cleveland high school and middle school students for competition before a panel of volunteer judges in the spring.

Volunteer Schedule: Coaching Feb. – May 2017; Competition in May

CleMetroBar.org/ClevelandMockTrial

OHIO MOCK TRIAL COMPETITIONS

Volunteers serve as judicial panelists for teams of high school students from public, private, and home schools across the region. Volunteers can also serve as team legal advisors.

Volunteer Schedule: Cuyahoga District Competition January 2017; Cuyahoga Regional Competition February 2017

CleMetroBar.org/OhioMockTrial

PRO SE DIVORCE CLINICS

Volunteers guide participants through the paperwork and process of securing a simple divorce pro se.

Volunteer Schedule: 3rd Friday monthly unless otherwise noted

REACH OUT: LEGAL ASSISTANCE FOR NONPROFITS

Reach Out seminars held quarterly feature free presentations on the law for both nonprofit leaders and volunteer attorneys, followed by brief advice sessions. Volunteers assist by presenting at clinics, participating in teams at brief advice sessions, and/or agreeing to take on further representation as needed.

Volunteer Schedule: May 26, August 25, and October 27, 2016

CleMetroBar.org/ReachOut

SPEAKERS BUREAU

Volunteers address groups from throughout the community on a wide variety of legal topics.

Volunteer Schedule: As needed throughout the year

VOLUNTEER LAWYERS FOR THE ARTS (VLA)

Volunteers provide pro bono assistance and advice for legal issues faced by artists, and a series of free law-related education events held in Cleveland's many unique arts venues.

Volunteer Schedule: Committee meets monthly, other services TBD throughout the year

CleMetroBar.org/VLA

Coming Soon!

May 26, 2016
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"Ban the Box" Has Hit Ohio

New Law Restricts Inquiries About Applicants' Criminal Histories

BY BRIAN J. KELLY & ANDREW M. SZILAGYI

The days of asking job applicants about their criminal histories may soon be a thing of the past now that Ohio has joined the growing "ban the box" movement. Effective March 23, 2016, Ohio's Fair Hiring Act prohibits certain Ohio employers from using employment applications that ask about prior criminal convictions, even if the convictions involved felonies or other serious crimes. Employers doing business in Ohio should be aware of this new law and should evaluate whether changes to their hiring practices are necessary.

A Brief History of the Events Leading to Ohio's "Ban the Box" Law

The "ban the box" movement has been gaining steam for several years, driven in large part by legal challenges to the use of criminal history information during the hiring process. The U.S. Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing certain anti-discrimination laws, has been very active on this front. The EEOC began taking this active role due to its concern that the use of criminal history information was having a discriminatory effect on particular minority groups.

The "ban the box" movement against pre-employment criminal history inquiries has its origin in federal anti-discrimination laws. The irony, however, is that those laws do not specifically prohibit such inquiries. The EEOC nonetheless took the position years ago that even if the laws do not prohibit these inquiries, they do prohibit using facially neutral hiring practices (such as a practice of screening out applicants with prior convictions) if the practices adversely impact a disproportionate number of individuals in particular protected classes. The EEOC updated its position in a recent formal enforcement guidance publication that discussed the adverse impact that using conviction histories has on the employment opportunities of Hispanic and African American individuals. Based on this impact, the EEOC made it clear that it would aggressively pursue claims against employers who made hiring decisions based on criminal histories unless those employers complied with strict limitations.

Separate and apart from the EEOC's efforts, the "ban the box" movement has been underway for more than a decade as part of a grassroots initiative seeking legislation at the local, state, and federal levels. The legislative efforts have varied but have generally focused on passing laws prohibiting employers from asking job applicants to check a box on employment applications indicating whether the applicant has ever been arrested for, convicted of, or pleaded guilty to a crime. The "ban the box" movement initially targeted public sector employment applications but has since expanded to private sector employment and housing applications.

According to "ban the box" advocates, employers use checkboxes as an easy way to screen out job applicants with criminal histories, who employers rashly assume are undesirable candidates. Advocates contend that when job applicants with criminal histories are summarily removed from consideration without the benefit of an interview, many qualified candidates are overlooked. Advocates further contend that many of these applicants have been rehabilitated, while others have convictions that do not actually impact their ability to safely and effectively perform the jobs for which they are applying. The box, however, effectively excludes these applicants from a significant portion of the job market because consideration is only given to the check in the box and not to their particular qualifications or circumstances. The "ban the box" movement seeks to remove these barriers to workforce access. Notably, the "ban the box" movement does not seek to prohibit employers from ever inquiring about criminal histories; instead, it seeks to delay such inquiries until later in the hiring process so that applicants

with convictions will not be summarily screened out. The "ban the box" movement has achieved wide success, and more than 20 states across the U.S. and many cities and counties now have some legislation on the books.

The "ban the box" movement first arrived in Ohio through legislation enacted at the local level. For example, major metropolitan areas in Ohio such as Cleveland and Cincinnati enacted "ban the box" legislation prohibiting criminal history questions from appearing on applications for municipal public employment. In June 2015, the legislation went statewide when Governor John R. Kasich issued an executive order removing questions concerning prior criminal convictions from Ohio civil service applications. Like the Ohio municipalities that had previously enacted "ban the box" legislation, Governor Kasich's executive order did not dispense with criminal background checks and did not preclude the use of criminal history information — it just delayed employers' gathering of job applicants' criminal history information until further along in the hiring process.

"Ban the Box" Expands its Reach In Ohio

On December 22, 2015, Governor Kasich signed into law House Bill 56, known as the Ohio Fair Hiring Act. The enactment of H.B. 56 expands Governor Kasich's prior executive order by prohibiting all non-federal, public sector employers in Ohio from including questions about job applicants' criminal histories on employment applications. H.B. 56 applies to all Ohio county, city, village, township, and public school employers (some municipalities, however, have explored the possibility of challenging the new law under the home rule authority found within the Ohio Constitution). Under H.B. 56, the covered public sector employers can still use job applicants' criminal history information later in the hiring process, as long as the use of this information does not run afoul of any local, state, or federal employment discrimination laws. The law went into effect beginning on March 23, 2016.

Significantly, H.B. 56 does ***not*** apply to private sector employers. Its legislative history, however, suggests that similar legislation might be coming soon for private sector employers. H.B. 56 was overwhelmingly approved by the Ohio legislature on a bipartisan basis. The Ohio General Assembly passed the bill by a vote of 89 to 1. The Ohio Senate passed the bill by a vote of 32 to 1. Given this broad, bipartisan support in both the legislative and executive branches, and given the increasing national support for the "ban the box" movement, the next logical step would be to provide similar protections to private sector job applicants in Ohio.

Considerations for Private Sector Employers

Although H.B. 56 does not apply to private sector employers, there are several reasons why private sector employers might consider proactively removing criminal history questions from their employment applications. First, it appears inevitable that "ban the box" legislation will eventually be proposed for private sector employers for the reasons explained above. Private sector employers can head off compliance concerns with such legislation by gradually phasing in changes to both their employment applications and their hiring practices now. Second, removing criminal history questions from applications will help keep employers from running afoul of the EEOC's enforcement guidance regarding the use of criminal history information. Third, since the "ban the box" movement is expanding in patchwork fashion, removing criminal history inquiries from applications will help employers avoid having to maintain different applications in different cities and states. Several national employers — including, Bed Bath & Beyond, Home Depot, Target, and Walmart — have taken this approach and have dropped questions about criminal history from their employment applications altogether.

Based on the current reach of H.B. 56 and the likely reach of similar legislation in the private sector soon, employers throughout Ohio should consider reevaluating their hiring practices and employment applications. Simple measures can ensure compliance with "ban the box" legislation and keep the focus on hiring good employees, not fighting unnecessary litigation.

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Risky Business

Trading with Cuba in a Changing Regulatory Environment

BY MARY EDQUIST

United States policy toward trade with Cuba is undeniably shifting, illustrated by the reopening of the U.S. embassy in Havana, bilateral peace talks, the removal of Cuba's status as a state sponsor of terrorism, and President Barack Obama's landmark visit to Cuba. Since the administration's December 17, 2014, announcement of its intent to chart a new course in U.S.-Cuba relations, significant regulatory changes have been implemented, opening a door to U.S. companies that had been firmly closed for over 50 years. Many in the business community are both excited by the potential opportunities for profit and wary of the potential danger of embracing this new market. Such caution is warranted: while regulatory amendments have expanded the scope of authorized U.S. person travel to and business with Cuba, the broader embargo on trade not only remains in place, but continues to be firmly enforced.

WHAT HAS CHANGED?

Over the past year and a half, the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) and the U.S. Commerce Department's Bureau of Industry and Security (BIS) have announced new amendments to existing U.S. sanctions on Cuba, including OFAC's Cuban Assets Control Regulations (CACR) and BIS's Export Administration Regulations. These changes allow certain categories of businesses to establish offices in Cuba, allow a number of industry sectors to export to Cuba, expand permitted commercial financing, and loosen travel restrictions. These new regulatory amendments may represent the furthest extent of the President's power to liberalize trade and travel with Cuba in the absence of congressional legislation to lift the embargo.

Offices in Cuba

Under the new rules, a limited set of U.S. businesses may establish offices, warehouses, or retail outlets in Cuba to engage in transactions authorized by or exempt from the CACR, including, among others:

- Entities engaging in non-commercial activities designed to provide "support for the Cuban people" (defined as including recognized human rights organizations, independent organizations designed to promote a rapid, peaceful transition to democracy, and individuals and non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba);
- Entities engaging in a limited set of "humanitarian projects" (defined to include, among others, projects in the fields of medicine, health, construction, environment, small business development, agricultural and rural development, and microfinance);
- Exporters of authorized goods;
- Entities providing mail or parcel transmission services;
- Providers of telecommunications or internet-based services;
- Entities organizing or conducting educational activities; and
- Providers of carrier and travel services.

Businesses in these categories are allowed to employ Cuban nationals and persons subject to U.S. jurisdiction (e.g. U.S. citizens and permanent residents as well as U.S. based companies and their domestic and foreign subsidiaries). Companies that fall within these categories may also open and maintain bank accounts in Cuba to facilitate authorized transactions.

Exports to Cuba

The type of goods that may be exported to Cuba from the U.S. or by a person subject to U.S. jurisdiction has also expanded. Instead of presumptively denying applications for export licenses to Cuba, BIS will now consider, on a case-by-case basis, applications to export items intended to meet the needs of the Cuban people. Such items include those intended for agricultural production, artistic endeavors, education, food processing, disaster preparedness/relief, public health and sanitation, residential construction and renovation, public transportation, and the construction of infrastructure that directly benefits the Cuban people (e.g., water treatment plants, facilities that supply energy to the general public, and sports and recreation facilities). BIS has indicated that it will generally approve license applications for the export and reexport of medicines and medical devices, as well as certain devices related to telecommunications, aircraft safety, and environmental protection (including items related to renewable energy or energy efficiency). In addition, a license exception has been created authorizing exports to Cuba intended to improve living conditions, support independent economic activity, strengthen civil society, improve the free flow of information, and facilitate travel and commerce. A limited set of agricultural commodities — including food, animal feed, alcohol, livestock, textile fibers, tobacco, wood products, seeds, and fertilizer — may also be exported to Cuba under a license exception.

Imports from Cuba

The new regulations likewise loosen restrictions on the importations of items from Cuba. Persons subject to U.S. jurisdiction authorized to travel to Cuba may import up to $400 of merchandise acquired in Cuba, including no more than $100 of alcohol and tobacco products, as accompanied baggage. In addition, persons subject to U.S. jurisdiction are permitted to import an unlimited amount of certain goods produced by independent Cuban entrepreneurs and approved by the State Department. Imports of information, informational materials, and Cuban-origin software are also exempt from U.S. sanctions prohibitions.

Financing

The sanctions regulations have been amended to remove restrictions on financing for most types of exports to Cuba from the U.S. and reexports of 100% U.S-origin items from a third country to Cuba (excluding agriculture commodities, whose export and reexport continues to be limited by statute). OFAC has issued a general license authorizing depository institutions — in connection with such authorized exports — to issue, advise, negotiate, pay, or confirm letters of credit; accept collateral for issuing or confirming letters of credit; and process documentary collections. Permissible payment and financing terms for authorized non-agricultural exports and reexports now include payment of cash in advance, sales on open account, and financing by third-country or U.S. financial institutions.

In addition, persons subject to U.S. jurisdiction are now authorized under an OFAC general license to send remittances to individuals and independent non-governmental entities in Cuba to, among other things, support the development of private businesses, including small farms. Subject to record keeping and reporting requirements, U.S. financial institutions are permitted to process authorized remittances to or from Cuba without having to obtain a specific license. Depository institutions have also been permitted to open correspondent accounts at banks in Cuba.

Travel to Cuba

While tourism activity by U.S. persons remains prohibited under the Trade Sanctions Reform and Export Enhancement Act of 2000, OFAC has amended its regulations to create general licenses for 12 categories of authorized travel to, from, or within Cuba, including travel related to professional research and meetings, public clinics, workshops, and exhibitions, support for the Cuban people, humanitarian projects, and certain authorized export transactions. In connection with the latter category, OFAC has authorized travel-related transactions directly related to market research, commercial marketing, sales or contract negotiation, accompanied delivery, installation, leasing, or servicing in Cuba of items

consistent with BIS export licensing policy. OFAC has also issued a general license authorizing the provision of aircraft, maritime, and land-based carrier services to, from, or within Cuba, in connection with authorized travel.

WHAT REMAINS THE SAME

Despite the policy shift, most transactions continue to be prohibited by both statute and regulation. Persons subject to U.S. jurisdiction are forbidden from doing business or investing in Cuba unless licensed by OFAC. In addition, any item exported from the U.S. (or any 100% U.S.-origin item exported from a third country) to Cuba continues to require a license unless a particular license exception applies. Even as the executive has indicated its willingness to relax regulatory and policy restrictions on trade with Cuba, the administrative agencies have not hesitated to enforce those sanctions that remain.

Recent Enforcement Actions

Over the past year, the U.S. government has subjected a variety of companies that have violated the sanctions on Cuba to significant penalties.

- Oct. 27, 2015 – A travel agency out of Philadelphia agreed to pay $43,875 to settle an enforcement action stemming from its 2009-2010 provision of Cuba travel-related services to 191 individuals without OFAC authorization.
- Jan. 22, 2016 – OFAC announced a $140,400 settlement by a Californian architectural firm and its British subsidiary related to an architectural and design contract for a Cuban hotel in 2009 – 2010.
- Feb. 22, 2016 – A French company involved in oil and gas exploration and its U.S. and Venezuelan affiliates agreed to a $614,250 settlement resulting from the companies' 2010-2011 exportation of spare parts and equipment to vessels operating in Cuba's territorial waters and processing of data from Cuban seismic surveys.
- Feb. 25, 2016 – Two subsidiaries of a U.S. energy company agreed to a $304,706 settlement relating to the companies' 2011 transactions with an Angolan oil and gas production consortium in which Cuba Petroleo held a 5% interest.

Several of these enforcement actions resulted from voluntary disclosures that may have been made in the hope of taking advantage of a more lenient policy climate in order to cheaply resolve outstanding sanctions liabilities. However, others were the result of independent investigations by OFAC. Thus, companies would be wise not to interpret the recent policy changes as a sign that the Obama administration will take a hands-off approach to enforcing sanctions against Cuba.

CONCLUSION

Changes to the regulations have created new market opportunities for U.S. businesses looking to enter the Cuban market. Still, the embargo remains in place, and continues to be stringently enforced. Given the upcoming presidential and congressional elections, it remains unclear whether the amendments to sanctions laws will be sustained or expanded. U.S. businesses should be aware that while regulatory amendments and exceptions permit certain activities in Cuba, ascertaining the scope of permissible activity under the various license requirements and exceptions can be complicated. U.S. companies should proceed carefully to ensure full compliance with all existing U.S. sanctions laws.

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Preparing For the Anticipated Amendments to the "White Collar" Overtime Regulations

BY NATALIE M. STEVENS & AMANDA T. QUAN

The Fair Labor Standards Act (FLSA) prescribes standards for minimum wage and overtime pay for most public and private employees. The FLSA requires employers to pay covered employees who are not otherwise exempt at least the federal minimum wage (currently $7.25 per hour) and overtime pay of one-and-one-half-times the regular rate of pay for all hours worked over 40 hours per work week. Section 13(a)(1) of the FLSA provides an exemption from minimum wage and overtime pay for individuals employed in a bona fide executive, administrative, professional, and outside sales capacity, as well as certain highly compensated employees. To qualify for one of the "white collar" exemptions, employees generally must meet three tests regarding their job duties and salary: (1) the "salary basis test," i.e. the employee must be paid a predetermined and fixed salary, which cannot be decreased based on the quality or quantity of work performed; (2) the "salary level test," i.e. the employee must be paid a minimum salary as set by the regulations; and (3) the "duties test," i.e. the employee must primarily perform executive, administrative, or professional duties, as defined by the regulations.

Anticipated amendments to the FLSA, specifically with respect to criteria for the Part 541 "white collar" exemptions, will have widespread implications making it more difficult for employers to classify employees as exempt going forward, which may result in increased overtime payment obligations.

History Behind the Proposed Revisions

The Department of Labor (DOL) last updated the regulations governing the Part 541 exemptions in 2004. In March 2014, President Obama issued a presidential memorandum directing the Secretary of Labor to modernize and streamline the existing overtime regulations. In May 2015, the DOL sent proposed revisions to the Part 541 exemptions to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) for review.

In July 2015, the Notice of Proposed Rulemaking was published in the Federal Register (80 FR 38515), inviting interested parties to submit written comments by September 4, 2015.

The proposed rule contemplates: (1) a significant increase to the minimum salary requirements for the white collar exemptions from $455 per week ($23,660 per year) to the 40th percentile of weekly earnings for full-time salaried workers, or approximately $970 per week ($50,440 per year) in 2016;[1] (2) a substantial increase in the minimum compensation required to qualify for the highly compensated employee exemption from $100,000 to the 90th percentile of earnings for full-time salaried workers, or $122,148 per year in 2016; and (3) annual adjustments to these minimums tied to changes in the Consumer Price Index. The DOL also sought comments as to whether changes should be made to the "duties tests" for the exemptions, and whether employers should be allowed to use nondiscretionary bonuses to satisfy a portion of the minimum salary requirements for the executive, administrative, and professional exemptions.

> The changes will impact business operations, finances, and employee morale.

Current Status of the Proposed Changes and Anticipated Timeline

Originally, the anticipated publication date for the final revisions to the regulations was July 2016. However, on March 15, 2016, proposed final revisions were delivered to the OIRA for review, which generally takes 30 days. This early delivery signals that publication of the final regulation could occur much earlier than July 2016. Under the Congressional Review Act (CRA), Congress has 60 legislative days from receipt of a final rule to pass a resolution disapproving the final rule and preventing it from taking effect. Congress may initiate a CRA disapproval motion as a strategy to delay or outright block a final rule. The push by the DOL to publish a final rule before July 2016 may be an indication that the Obama administration wants to be in a position to veto any possible resolution that Congress may pass under the CRA. The proposed changes have sparked a widespread response given the anticipated scale of impact. For example, on March 23, 2016, 66 members of Congress signed and submitted a letter to the Subcommittee on Labor, Health and Human Services, Education and Related Agencies requesting that, as the Subcommittee begins

to craft the FY 2017 Appropriations Act, it consider including language that would prohibit the DOL from using appropriated funds to implement or enforce its proposed changes to the federal overtime rules.

How to Best Prepare for the Upcoming Changes

Although the timing of the anticipated changes is not altogether clear, what is clear is that the changes will have a significant impact on employers. The DOL estimates that nearly five million "white collar" employees currently earn below the anticipated new minimum salary. The changes will impact business operations, finances, and employee morale. Morale may suffer as employees previously classified as exempt who are reclassified as nonexempt will need to track their time and may feel they have been demoted to less prestigious positions. The potential changes in minimum salaries may also create a compression effect between the wages of employees and their managers in a wide array of industries. The changes may also impact other areas, such as employee benefits, as some employers choose to offer more generous health benefits and/or certain bonus structures and profit-sharing plans to exempt employees.

In order to prepare for the anticipated changes, employers can begin by identifying which exempt employees do not currently meet the anticipated new minimum salary ($50,440 per year). Once identified, employers should evaluate whether to increase salaries in order to meet the anticipated new minimum salary, or whether to reclassify employees as nonexempt. Once a determination is made, employers should also consider evaluating whether an increase in the salaries of exempt employees at or above $50,440 would be appropriate to avoid a compression effect. In addition, employers should also ensure that they have clear written policies and procedures regarding time-keeping and overtime, that these policies are properly communicated to all employees, and that their time-keeping systems are updated to accurately reflect exempt vs. nonexempt status so that employees reclassified from exempt to nonexempt are properly paid for overtime. Employers should also review staffing levels to eliminate unnecessary overtime in an effort to reduce the financial impact from a budgeting perspective. Employers may also want to review the job descriptions for their exempt employees to ensure that they accurately reflect job duties and responsibilities performed on a regular and routine basis.

We anticipate the final regulations will be issued shortly. At that time, there will be many decisions for employers to make and likely significant impacts on employees across the country.

[1] Addendum as of April 30, 2016: Based on the Bureau of Labor Statistics' recently published first quarter statistics for 2016, the new minimum salary threshold will likely be $972 per week, or $50,544 per year, which is the current 40th percentile of earnings for full-time salaried workers, and the annual compensation requirement for highly compensated employees will likely be $131,196.

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Marijuana Legalization and Employer Defenses to Comp Claims

Up in Smoke

BY CHRISTOPHER A. GRAY

In November 2015, Ohio voters soundly rejected Ohio Issue 3, which would have created a constitutional amendment legalizing the sale and use of marijuana. Despite the loss, multiple groups are spearheading new efforts to legalize marijuana use via amendment to the Ohio Constitution. The Attorney General has already certified ballot language from one group who wishes to legalize medical marijuana; other groups also intend to submit language for the legalization of both medical and industrial use of marijuana. (See www.cleveland.com/open/index.ssf/2016/03/current_status_of_ohios_2016_m.htm.) The resilience of the issue in Ohio and other states should cause employers to brace for challenges to their ability to take adverse action against employees and traditional defenses against workers' compensation claims and requests for benefits.

Adverse Employment Action for Legalized Marijuana Use

In an environment where marijuana use is legal and an employee tests positive in violation of a company policy, the first questions employers will have to find answers to are when and why an employee used the drug. An employee who tests positive for marijuana use while on the clock in violation of company policy can likely be terminated "for cause" in most contexts. As with company policies that prohibit the use of alcohol or tobacco on employer premises or during working hours, a company policy prohibiting the use of marijuana or from being under the influence of marijuana during work hours will likely be enforceable. In situations where an employee is a recreational marijuana user, the employee will likely have no defense to their marijuana use or working under the influence during working hours.

A more complex analysis is necessary, however, if an employee has been using marijuana for medical purposes pursuant to a doctor's prescription. A case from Colorado, where medical marijuana use has been legal since 2000, provides what may become the dominant framework in Ohio and other states. In *Coats v. Dish Network, LLC*, the employee, Brandon Coats, was a quadriplegic who possessed a state-issued license for the use of medical marijuana. 2015 CO 44, ¶5. Coats consumed marijuana at home and in accordance with Colorado's medical marijuana statutes. *Id.* In May 2010, Dish required Coats to take a random drug test which unsurprisingly revealed Coats' drug use. *Id.* at ¶6. Dish found the positive test to be a violation of the company's drug policy and terminated Coats' employment as a result. *Id.*

Coats filed a wrongful termination claim against Dish, alleging he was terminated in violation of a Colorado statute that prohibits employers from terminating employees who engage in "lawful activities" during non-working hours and off of the employer's premises. *Id.* at ¶7. He argued that because Colorado authorized the use of medical marijuana, and he only used the drug while he was off-duty, Dish had wrongfully terminated him. *Id.* The trial court dismissed Coats' complaint, finding that the medical marijuana statutes only provided a defense to state criminal prosecution. *Id.* at ¶9. Coats appealed, but the Colorado Court of Appeals affirmed the decision, finding that as marijuana use was still illegal under federal law, Coats' use was not a "lawful activity" under the off-duty conduct statute. *Id.* at ¶11.

Coats appealed to the Colorado Supreme Court. The Colorado Supreme Court noted that the wrongful termination statute did not define "lawful" and so applied a commonly accepted meaning. *Id.* at ¶¶17-18. In reviewing the wrongful termination statute, the Colorado Supreme Court found that the statute did not restrict "lawful activities" to mean only activities permitted under state law, but activities permitted under federal law as well. *Id.* As such, the Colorado Supreme Court affirmed the lower court's ruling and denied Coats the opportunity to pursue his claim. *Id.* at 19.

At present, Ohio does not have an off-duty conduct statue or law similar to the one in dispute in *Coats*. As such, the dismissal of an employee for off-duty medical marijuana use should not likely trigger any claims for wrongful termination. Further, given that marijuana use is still illegal under federal law, employers may be able to establish that such termination is just cause for the purpose of defeating unemployment claims.

A similar analysis holds for the defense of workers' compensation claims and requests for benefits. O.R.C. 4123.54(B) provides employers with a defense to workers' compensation claims if the employee tests positive for drug or alcohol use following an accident. Even if Ohio voters were to approve the legalization of marijuana use, to nothing in the proposed amendment would nullify the provisions within the drug testing statute. As such, if the status quo holds, the legalization of marijuana use would not frustrate an employer's ability to defend against workers' compensation claims.

S.B. 180 May Unintentionally Protect Marijuana Users

An interesting wrinkle may develop and turn the analysis on its head, as the Ohio General Assembly may take up proposed legislation creating something akin to an off-duty conduct statute. In June 2015, seven Ohio state senators introduced Senate Bill 180. (See www.legislature.ohio.gov/legislation/legislation-summary?id=GA131-SB-180.) S.B. 180 would

revise the O.R.C. to "prohibit an employer from discharging or otherwise discriminating against a person who exercises a constitutional or statutory right within the person's private real property or motor vehicle." As currently drafted, S.B. 180 defines "constitutional or statutory right" as any right prescribed by the United States Constitution, Ohio Constitution, U.S. Statute or Ohio Revised Code. An adverse job action taken against an employee for off-duty activities would trigger a cause of action for the employee under the Ohio Civil Rights Act. As of the present date, S.B. 180 has been referred to committee for review.

Gun lobby groups are prominent backers of S.B.180. (See, e.g., www.nraila.org/articles/20150527/ohio-employer-parking-lot-legislation-circulating-legislature.) Their reason for backing the bill is a desire to prevent employers from taking adverse employment action against employees who either engage in gun-related activities off the clock or who store firearms in their personal automobiles parked on employer's premises. If S.B. 180 is enacted and marijuana use is legalized, the unintended consequence is that employers would be prohibited from terminating employees who use marijuana while off-duty as the use of marijuana would then be a protected activity under Ohio law. The possibility of both marijuana legalization and S.B. 180 being enacted creates a number of potential issues.

First, there would be a devastating effect on the ability of employers to take adverse employment action against an employee for testing positive for marijuana. Because marijuana cannabinoids can remain in a system for several hours post-consumption, employers would no longer be able to rely on a mere positive test administered during working hours as justification for termination. Instead, employers will be forced to pay for more extensive testing and reporting that can establish when the marijuana was consumed relative to the remaining cannabinoids in an employee's system, and thereby prove when the employee was actually under the influence. Further, in support of wrongful action claims or workers' compensation claims, employees may be able to hire their own doctors to provide competing analysis of when the marijuana was consumed. As such, the use of a violation of a drug free workplace policy as cause for termination will be much more complicated in the future.

Second, there is a question of whether or not an employer would be able to use an employee's positive marijuana test to defend against an injured workers' request for temporary total disability benefits. Under current Ohio law, an employer can institute a written drug-free workplace policy that calls for the termination of any employee who tests positive for drug use and that calls for drug testing after any work-related accident. If an employee tests positive following a work-related accident, the employer can choose to terminate the employee. If properly asserted, the termination will likely constitute a defense of voluntary abandonment of employment and bar the employee from receiving temporary total disability benefits.

However, if both S.B. 180 and marijuana legalization were to pass, the employer would be prohibited from terminating the employee if the employer could not establish that the marijuana use occurred during working hours. There is also a plausible argument that if medical marijuana use is a Constitutionally-protected right, then employers will be prohibited from terminating employees for the use of medical marijuana, even if the use or effect of marijuana occurred during working hours as any such employee would have been engaged in a constitutionally protected activity. In either event, Ohio employers would incur significant costs in establishing when employee drug use occurs, and risk losing a valuable defense to both claims and claim costs.

Conclusion

Clearly some of these issues are not yet ripe as it is not yet clear whether legalization will succeed this year or if the General Assembly will pass S.B. 180 as it is currently written. However, employers should not dismiss these matters so easily. In the past two decades 23 states and the District of Columbia have passed laws allowing for the use of medical marijuana. Since 2012, four of those states and the District of Columbia have begun permitting the recreational use of marijuana. The question is when Ohio will legalize the use of marijuana, and employers should begin to take steps to not only ensure their own policies comply with Ohio law, but to consider how best to protect their right to defend themselves from the actions of employees who engage in marijuana use.

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Time To Be Bullish To Buy Brazilian Businesses?

BY SANJIV K. KAPUR

In March of 2016, the Brazilian Ibovespa stock market index had its best monthly performance since October of 2002 and posted a 17% increase. During the same month, the Real appreciated by 10% against the Dollar. Fueled by the impending impeachment of President Dilma Rousseff, Brazilians are optimistic that they will be freed of her disastrous economic and legal policies. Should this sudden euphoria be a signal to international companies to buy businesses in Brazil, especially as asset values have fallen with the recent economic downturn and the Real has devalued in the last five years relative to the United States Dollar by more than 100%?

Impeachment by itself will not improve Brazil's "ease of doing business" ranking of 120 out of 189 countries by the World Bank and the International Finance Corporation — a ranking that makes the M&A process particularly challenging. To get rid of the added cost of doing business in Brazil or the *"Custo Brasileiro"* will require more than a change in the President. In addition, foreigners looking to invest in Brazil need to take into account some of the peculiarities of Brazilian law and custom.

Transparency

Corruption is an important element of the *Custo Brasileiro* that makes the M&A process formidable. The diligence process, especially those involving privately held companies, often uncovers inappropriate payments made by the target to governmental authorities, often in connection with tax, labor, governmental permitting or customs matters. In light of the mandates of the United States Foreign Corrupt Practices Act and other relevant laws, before consummating any transaction, an investor needs to identify such practices and implement controls and training systems to ensure that such practices do not continue post-acquisition. In addition to hiring an auditing firm to examine accounting records, retaining a private investigator to do background checks on the target company and its executives and shareholders is common.

The Clean Companies Act, which went into force in January of 2014, has imposed requirements similar to those of the United States Foreign Corrupt Practices Act. In the case of an entity acquired through merger, the law makes the successor entity liable for restitutions and fines up to the value of the assets transferred in the transaction. In addition to the decrease in illicit practices as a result of the new law, investors can take some comfort that Brazilian executives, unlike their counterparts in Asia, often will when queried usually come clean and admit to their past infidelities.

The lack of transparency also affects trust in judicial authorities. Arbitration is the preferred dispute resolution mechanism in M&A agreements. If arbitration decisions will have to be enforced in Brazil (because a party only has assets in Brazil), the arbitration should be conducted on Brazilian soil; those rendered outside of Brazil must be "homologated" before Brazilian courts will enforce them. Arbitration in Brazil can be in the English language using international rules.

Labor Laws

Another part of the *Custo Brasileiro* are complicated labor laws. They dictate the provision of various fringe benefits and terms of employment, including severance obligations upon termination. At will employment is a concept that does not exist in Brazil.

All employees in Brazilian companies are automatically members of the union that represents their industry or profession; the employer must comply with the requirements of the relevant collective bargaining agreements. Most companies have a large number of pending labor lawsuits (for example, a well-known international company with 18,000 employees in Brazil has 2,000 pending labor litigation matters).

Salaries for qualified executives can often be higher in Brazil than those for comparably situated executives in the United States, given the high cost of living and relative scarcity of educated professionals. If key executives are to be retained in management roles (particularly in the administrator role of a limitada), *"pro-labore agreements"* can be used to avoid the mandates of Brazilian labor laws. Post-employment non-competition obligations, however, are difficult to enforce, and require payment of compensation during the non-compete period (non-competition obligations imposed upon sellers of a business, in contrast, do not require payment of separate consideration).

Many companies avoid labor laws mandates by using independent contractors and sales representatives who may later challenge their status in employee-friendly labor courts.

Moreover, the Brazilian sales agency law requires payments upon termination equal to one twelfth of all consideration paid to the sales representative during the lifetime of the relationship.

Taxation

A third contributor to the *Custo Brasileiro* is the convoluted tax regime with a myriad of taxes imposed at the national, state and local levels. The difficulty in complying with the complicated tax system is compounded by aggressive tax planning. Many of these tax positions may be challenged years later, and can be subject to high interest and penalty charges. Even if the likelihood of discovery and challenge of the tax position is remote, FIN 48 of the U.S. GAAP accounting standards require U.S. companies to prepare financial statements where tax contingencies are accrued based on the assumption that all tax positions will in fact be examined by the appropriate taxing authority.

Tax planning is an important part of the Brazilian M&A process. To obtain partnership ("check the box") tax treatment for United States tax purposes, the entity acquired should be a *limitada* (limited liability company) and not a *sociedade anonima* (corporation). Acquisitions are often structured by creating an entity in Brazil that acquires the shares of a target company that a few months after the acquisition merges into the target company to obtain certain tax write offs.

Civil Law Mandates

The civil law tradition of Brazil also limits flexibility in structuring transactions. Buying the assets of a business as opposed to the equity interest of the company does not avoid successor liability for labor, tax and other contingent liabilities. In fact, the acquiring company can be ensnared with group-wide liability for tax, labor and environmental matters. As such there is a heightened focus on applicable statutes of limitations. For tax contingencies, there is a five-year statute of limitations and for labor contingencies the statute of limitations is five years for a current employee and two years from the date of termination for a prior employee.

To guarantee repatriation of the original investment and dividends, an investment should be made by funds that are brought into Brazil and registered with the Brazilian Central Bank. Licensing transactions which result in payments of royalties on trademarks, patents and know-how outside of Brazil must be registered with the INPI, the Brazilian patent and trademark office. Royalties between related parties on trademarks and other rights are often limited by the INPI. Under Brazilian law, know-how is not licensed but rather deemed to be transferred by the party possessing the know-how.

Antitrust Considerations

Brazil now requires prior approval by the antitrust authority (CADE) of acquisitions surpassing certain statutory thresholds (revenues in Brazil by one economic group in excess of 750 million Reais and revenues of the other economic group in excess of 75 million Reais). Transactions in which the combined operations will result in a market share of more than 20% in the relevant market require the filing of a laborious "long form statement," which allows the authority more time to review the filing. From an operational and diligence perspective, buyers need to take into account that there is greater scrutiny of anti-competitive behavior including price fixing.

Public Company Issues

Investment in publicly traded companies is impacted by the rules of the CVM, the Brazilian securities and exchange commission, and the listing rules of the BMF Bovespa. Acquisition of a controlling interest can require that mandatory tender offers be commenced for the free float of the publicly traded company. The bylaws of publicly traded companies often contain "poison pill" provisions that extend such tender offer requirements to where only a 10 or 20% interest is acquired. In acquisitions where the target will remain publicly traded, the transfer agent of a publicly traded company may require certain information or other actions in order to register the shares in the name of the purchasing entity. Transfer agents sometimes also impose limitations and restrictions upon future transfers of shares.

M&A Customs and Practices

The customs that surround M&A agreements can be helpful to buyers. For example, asset or stock purchase agreements, unlike in the United States, often contain pro-buyer provisions indemnifying for all pre-closing liabilities, with no cap or one equal to the purchase price, with baskets or less than 1% of the purchase price and with indemnification time periods that range from three to five years. Escrows of between 15 to 30% of the purchase price for the indemnification term are not uncommon. The limited caps and time periods for indemnification and baskets that one sees in United States indemnification agreements, however, are gaining favor in Brazil.

To avoid some of the complications that might result from fluctuating exchange rates, it is advisable to fix the purchase price in the Brazilian currency. Fixing the price in local currency is consistent with a valuation that is based on revenues and costs in local currency and simplifies the process of introducing the correct amount of funds for Central Bank registration purposes.

A final important matter that cannot be gainsaid is that negotiating transactions in Brazil often becomes a process where counterparties get to know each other. As such, the process necessarily is longer than one would see in the United States. Getting down to business immediately or aggressive negotiating tactics with "take it or leave it" stances are usually counterproductive and do not facilitate getting the deal done.[1]

[1] This article is adapted from an article he published in Bloomberg BNA's Mergers & Acquisitions Law Report, Vol. 19, No. 13, pp. 490-491" (March 28, 2016). Copyright 2016. The views and opinions expressed herein are the personal views or opinions of the author; they do not necessarily reflect the views or opinions of the law firm of which he is a partner.

Sanjiv K. Kapur, a partner in the Jones Day offices of Sao Paulo and Cleveland, practices U.S. and international corporate and commercial law and has extensive experience in mergers and acquisitions and joint ventures in the U.S., Latin America, Europe, and Asia. He regularly conducts compliance investigations and training in Portuguese and Spanish. He has been a CMBA member since 1993. He can be reached at (216) 586-7114 or skapur@jonesday.com.

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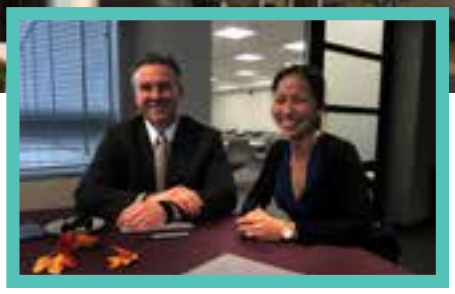

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Your CLE MetroBar

Each month, these pages will be dedicated to highlighting just some of the activities and programs of your Cleveland Metro Bar.

MEMBERS-ONLY EVENT & CELEBRATION

It's a great time to ask those in your circle of influence to be CMBA members. On May 25, we will host our annual, members-only Greet the Judges & GCs event at the CMBA. It's for members only, and is the perfect opportunity to invite a friend to join and sign up before or at the event.

This reception also welcomes and celebrates the newly sworn in attorneys in our area. Welcome to the profession! Join us May 25 as we bring the legal community together, help you make more connections and have some fun. Newly admitted attorneys also get a special membership rate if they join before May 25, just call for details.

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MORE WEBSITE TIPS

We hope you are exploring and using the new site to stay engaged. Here are just a few quick tips and reminders to help you easily navigate and register for upcoming activities.

1. Log in. This will ensure you have full member access and get member pricing.
2. Look for the red button on the home page to easily access the CMBA calendar in month or list format.
3. Use the search feature in the upper right of the website to locate events by name.
4. Once you select an event to attend (and have logged in), click on the **Register Myself** button to start the process. Next, you'll **Add** the program elements you want. Keep in mind some programs only have one option, but some of our programs have multiple options (morning session, lunch only, etc.), so add what you need and then **Proceed to Checkout.**
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For all calendar events, click here

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Fastcase is a comprehensive online law library created by lawyers for lawyers and it's free for attorney and affiliate members of the CMBA. Plus, you can use it on the go with its mobile accessibility for new searches, favorites or your history. Familiarize yourself with Fastcase by using the FREE monthly webinars. Here are some upcoming dates, but you can get all the dates and more info at CleMetroBar.org/Fastcase.

- May 19 (1–2 p.m.)
- May 26 (1–2 p.m.)
- June 2 (1–2 p.m.)
- June 16 (1–2 p.m.)
- June 23 (1–2 p.m.)

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Secure Your Ad: Highlight your expertise in this go-to resource. Learn more on page 54.

CMBA SPOTLIGHTS

There is great buzz at the CMBA and so much happening. In case you missed some of it, here are some things highlighted in this issue worthy of your attention.

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What Do Background Checks Have to Do with Fair Credit Reporting?!

And Other Burning Questions About the Un-Employment Law that Has Employers on Edge

BY HELENA OROZ

The Fair Credit Reporting Act, or FCRA (15 U.S.C. § 1681 et seq.), is a federal law that governs the collection, assembly, and use of information about people — "consumers" in statutory talk.

FCRA is funny: it doesn't sound like an employment law, because it's not; it sounds like an arcane consumer protection law (which it is). It applies to employers, but it's not written for employers. Its name is confusing because it uses the term "credit reporting" while the law itself is all about "consumer reports," both of which feed misperceptions about what the law covers.

And those misperceptions abound:

- "FCRA is about *credit reports*. We don't care if our job applicants have bad credit. We just don't want any criminals around the office. So we're good, right?"
- "We don't really deal with 'consumer' reports. Just applicant reports. And then sometimes employee reports. So that's different."
- "Of course we disclose to applicants that we're requesting consumer reports. Just read our employment application."
- "I already know all about this FCRA stuff. Our 10-page packet includes everything we're supposed to have, plus our release of liability, permission for third parties to disclose information to us, state-specific information..."
- "Adverse action notices? *Two* of them? Is that a new thing?"
- "This guy's background check was hilarious. Public intox and indecency?! I can't believe he applied here. And that's exactly what I told him when he called asking about the status of his application."
- "My background check company handles all of my company's FCRA compliance. I can count on them."

Okay, full disclosure: these are not real quotes. But they do represent real misunderstandings and confusion about employer obligations under FCRA.

Quick and Dirty: FCRA History

FCRA has been around since 1970, but its look has changed over the years. The law was originally enacted for objectively good reasons: to prevent misuse of consumer information, to improve the accuracy of consumer reports, and to promote the efficiency of the nation's banking and consumer credit systems.

In enacting FCRA, Congress found that consumer reporting agencies, or CRAs — the companies that compile the information into a "consumer report" and sell it — had "assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. §1681(a)(3). As a result, CRAs have been on the government's hot seat for years, first under the enforcement authority of the Federal Trade Commission (FTC) and since 2010 under the joint enforcement authority of the FTC and Consumer Financial Protection Bureau (CFPB).

In 1996, things got interesting for employers that used consumer reports for employment purposes. Up to that point, employers had limited responsibilities as users of consumer reports. FCRA's 1996 amendments upped the ante, adding the employer disclosure, authorization, and pre-adverse action requirements that we all (should) know about these days.

Why Employers Are on Their Own When It Comes to Fcra Compliance

These days, FCRA — the actual statute — seems deceptively simple. Even using the statutorily-required notices may not be enough. Those notices still may not be *technically* compliant if, for example, they contain extraneous language, like a release of liability, or too much information.

But — says who? Explanatory regulations? Model forms? The FTC or CFPB? That would be nice, but the first two don't exist, and the second two are mute. The only existing interpretive guidance consists of stale FTC Informal Staff Opinion Letters that do not have the force of law.

The Consumer Financial Protection Bureau has been the primary agency responsible for interpreting FCRA for more than five years, yet it has not issued a single piece of guidance regarding employer FCRA obligations during that time. I actually tried to hit the CFPB up for some information via email, and most recently, on Twitter, to no avail. As for recent FTC activity, if this blog post (www.ftc.gov/news-events/blogs/business-blog/2015/09/are-you-ok-f-c-r) is any indication, don't look to government agencies to fill the guidance vacuum anytime soon.

Instead, that vacuum is being filled, slowly but surely, with court decisions from the deluge of recent FCRA class actions across the country. From Whole Foods to Michaels Stores to Amazon, to recently Sprint, even the giants are getting hit for alleged FCRA violations. In Sprint's case (and many others just like it), a job applicant claims the company's "Authorization for Background Investigation" violates FCRA because "it contains extraneous information," including third party authorizations, state specific information, and other statements. *Rodriguez v. Sprint/United Mgmt. Co.*, N.D. Illinois No. 1:15-cv-10641, ECF 1-1. The plaintiff claims that FCRA's "unambiguous language" and that old FTC guidance provide support for his claims.

Even if that's true, think about this: if the CFPB simply issued a model Disclosure and Authorization Form, use of which would constitute compliance with FCRA, this entire conversation would be moot.

Quick and Dirty: FCRA Requirements

In the meantime, we have to work with what we have. Knowing even a little about FCRA may help clients or others who don't. (P.S.: Some special rules, not discussed here, apply to the transportation industry.)

1. **If an employer uses a third party to obtain virtually any kind of background information, FCRA applies.** If an employer requests any information about an applicant (or current employee) from a third party in order to make an employment decision, the employer has requested a "consumer report" and must comply with FCRA's disclosure, authorization, and adverse action notice requirements. If an employer uses its own employees to vet its applicants, for example, FCRA would not apply.
2. **For all intents and purposes, "background check" means the same thing as "consumer report."** Common "consumer reports" that employers use to vet applicants include criminal history reports, education records, employment history, and credit history.
3. **An employer must provide a disclosure and obtain authorization before requesting a background check.** Before requesting a consumer report, an employer always must do two things: (a) make a clear, conspicuous written disclosure to each applicant/employee that a consumer report may be obtained about them for employment purposes; and (b) obtain each applicant's/employee's written authorization to obtain a consumer report.
4. **The disclosure and authorization must be FCRA-compliant.** Both items may be combined into one document, but the document cannot contain any other information. Currently, this is an area of great controversy. FCRA says only that the disclosure must be made "in a document that consists solely of the disclosure," although the authorization may appear on the same document. 15 U.S.C. §1681b(b)(2)(A). According to that old FTC guidance, this means that a disclosure and authorization may include only minor additional items and cannot be part of an employment application.

5. **Employers taking "adverse action" against an applicant/employee based on information in a consumer report must follow a two-step process.** This process is intended to give the person an opportunity to review the information and dispute it with the CRA reporting it if the information is incorrect (which can and does happen). "Adverse action" means any decision that adversely affects a current or prospective employee, including not hiring or firing someone, but also disciplinary action, denial of a promotion, or the like.

First, before taking adverse action, the employer must provide the applicant/employee with a copy of the report at issue and a summary of their FCRA rights (available on the CFPB website). Most employers provide this "pre-adverse action notice" in the form of a letter (not technically required by statute, but makes sense) that includes these required enclosures.

Second, after taking adverse action, the employer must provide the applicant/employee with notice of the adverse action that also includes: contact information for the CRA that provided the report; a statement that the CRA did not make the decision to take the adverse action; notice of the applicant/employee's right to obtain a free copy of the consumer report from the CRA within 60 days; and notice of the applicant/employee's right to dispute the accuracy or completeness of any information in the report. Again, most employers provide this "post-adverse action notice" in the form of a letter.

FCRA is silent on how much time should elapse between these two steps, but that old FTC guidance says five business days might be reasonable, depending on the circumstances.

Employers can take a number of steps in the right direction toward FCRA compliance, even in this murky landscape:

- Employers who use third parties for background checks should ensure that they are using FCRA-compliant disclosures and authorizations and completing the two-step adverse action process.
- Employers who think they are already FCRA-compliant should review their disclosures, authorizations, and adverse action notices. Including extra information in a disclosure, particularly release language, could jeopardize their compliance efforts. Additionally, employers who use "investigative reports" (reports based on personal interviews concerning a person's character, general reputation, personal characteristics, and lifestyle) have additional obligations under FCRA.
- Employers who operate in more than one state should be aware that a number of states have "mini-FCRAs" with separate disclosure, authorization, and/or adverse action requirements.
- Finally, employers should not rely exclusively on background check providers for FCRA compliance. They may offer 100% compliance, but the employer retains ultimate responsibility for FCRA violations. Chances are the provider's service contract specifically denies any liability for such violations. Employers should ask questions and ensure they understand what is being done on their behalf.

So what does FCRA have to do with employer background checks? Everything!

Helena Oroz is an attorney with Zashin & Rich Co., L.P.A., where she practices in all areas of employment law litigation and counseling, including FCRA and state fair credit reporting and background check law compliance. Helena is an OSBA Certified Specialist in Labor and Employment Law. She has been a CMBA member since 2011. She can be reached at (216) 696-4441 or hot@zrlaw.com.

2016 Great Lakes Symposium
Challenges & Opportunities

BY TAMAR GONTOVNIK

The Environmental Law Section is excited to present the 2016 Great Lakes Symposium, co-sponsored by the City Club of Cleveland. The Symposium will take place at the City Club, on June 10, 2016 from 8:30 a.m. to 4:30 p.m., with a reception and fundraiser to benefit the Environmental Law Scholarship immediately following. This full day Symposium will cover a variety of topics affecting the Great Lakes. Ohio EPA Director Craig Butler will begin the Symposium with a keynote address about the state of the Great Lakes. Director Butler will be followed by a panel on Navigation on the Great Lakes. Panel members will discuss Lake Erie dredged materials management, economic development and the success of the Cleveland-Europe Express. The City Club is presenting Rear Admiral June Ryan, senior Coast Guard Commander for the Great Lakes and St. Lawrence Seaway, for a lunchtime forum on the safety, security and stewardship of the Great Lakes. U.S. EPA Great Lakes National Program Office Director Chris Korleski and Alliance for the Great Lakes CEO Joel Brammeier will join the Symposium at the end of the day for the Great Lakes Restoration and Recreation Panel where they will discuss the delisting of the Cuyahoga, the U.S.-Canada water quality agreement, and other issues affecting the health of Great Lakes Ecosystems.

Combined Sewer Overflows

Representatives of the Northeast Ohio Regional Sewer District and U.S. EPA will meet on a panel to discuss the ongoing work to minimize Combined Sewer Overflows (CSOs) in the Great Lakes, and will highlight the path forward, which includes integrated planning, green infrastructure and ongoing compliance with the Consent Decree that is the basis for much of the work to improve water quality in the region. Minimizing the amount of untreated sanitary sewage that flows directly to rivers and lakes is a major challenge facing Great Lakes communities. Combined sewers carry raw sewage, industrial waste and stormwater in a single pipe. In dry weather and light rain, the system functions well, and all the water goes to a wastewater treatment plant. However, during periods of heavy rainfall or snowmelt, the wastewater volume in a combined sewer system can exceed the capacity of the sewer system or treatment plant. Combined sewer systems are designed to overflow occasionally and may discharge excess wastewater directly to nearby streams, rivers, or other water bodies. These overflows, called CSOs, contain not only stormwater but also untreated human and industrial waste, oils, and debris, and are a major water pollution concern for the approximately 772 cities in the U.S. that have combined sewer systems.

Although cities have made significant progress in reducing combined and sanitary sewer overflows, the cost to communities and ratepayers for the investments in infrastructure to reduce

these overflows is significant. The Northeast Ohio Regional Sewer District is under a $3 billion federal consent decree to reduce pollutants to the Cuyahoga River and Lake Erie by significantly reducing combined sewer overflows over the next 25 years. Other communities are in the process of negotiating their consent decrees, reducing their CSOs and protecting the Lakes in various ways. Panelists from the Northeast Ohio Regional Sewer District and U.S. EPA will address the issues posed by CSOs and the ongoing efforts to minimize them and protect our water resources.

Harmful Algal Blooms

Harmful Algal Blooms (HABs) are a large and growing problem that threaten the Lakes as a source of drinking water and recreation. In 2014, HABs left more than 400,000 people in Toledo and southeastern Michigan unable to consume tap water for two days because of the toxin produced by the algae. HABs, caused in part by excess nutrients entering the Lakes, have been increasing both in extent and intensity in the last several years. Though there is widespread agreement within the scientific community that the incidence of HABs is increasing both in the U.S. and worldwide, the major causes and contributing factors continue to be disputed in the legal and policy arenas.

While point sources contribute discrete and measurable quantities of nutrients to watersheds, non-point sources continue to be a major contributing factor to HABs. A March 2016 study from the Graham Sustainability Institute at the University of Michigan, *Informing Lake Erie Agriculture Nutrient Management via Scenario Evaluation*, identified agricultural sources as the largest contributors of nutrients to the Maumee River watershed. The study identified the main driver of Lake Erie HABs as high phosphorus loading from agricultural watersheds draining to the western basin, particularly the Maumee River watershed. While nutrients from point sources can be controlled via permit limits, regulation of the nutrient contribution from non-point sources presents far more regulatory, legal and political challenges. A panel of experts, including Ohio EPA Deputy Director for Water Resources Karl Gebhardt and OSU Stone Lab Ohio Sea Grant College Program Assistant Director Dr. Chris Winslow, will address the complex issues underlying the algal bloom problem in the Great Lakes.

As threats to the Great Lakes change, so must the way we protect them. Laws and policies must evolve to protect the Great Lakes while still providing for development of opportunities. Join us at the 2016 Great Lakes Symposium for an in-depth discussion on the state of the Great Lakes. See page 35 for details.

Tamar Gontovnik is chair of the CMBA's Environmental Law Section. She is Assistant General Counsel at the Northeast Ohio Regional Sewer District. She has been a CMBA member since 2012. She can be reached at (216) 881-6600, ext. 6017 or gontovnikt@neorsd.org.

All events held at the CMBA Conference Center unless otherwise noted.

Veterans as Clients: Understanding the Military Experience and Veterans' Rights

Presented by the CMBA and the Ohio Military/Veterans Legal Assistance Project

Tuesday, May 24

CREDITS 3.00 CLE

REGISTRATION 12:30 p.m.

PROGRAM 1 – 4:15 p.m.

The Military Experience and What to Expect in an Attorney/Client Relationship with a Veteran as a Client

David Borell, Anapach, Meeks & Ellenberger, Toledo

Federal Law Regarding the Rights of Deployed and Active Duty Servicemembers

Steve Lynch, U.S. Coast Guard

Overview of the VA Benefits System

Michael Renner, Executive Director, Ohio Military/Veterans Legal Assistance Project

William J. O'Neill Great Lakes Regional Bankruptcy Institute 2016

Bankruptcy Toolbox: Do You Have What You Need?

Presented by the CMBA's Bankruptcy and Commercial Law Section

Wednesday & Thursday, June 1 & 2

CREDITS Up to 14.50 CLE & 16 CPE hours

Wednesday, June 1 – 6.75 CLE

Plus 0.50 optional lunch presentation

Bankruptcy in the U.S. Supreme Court & *Stern* Update

Hon. Mary Ann Whipple, Judge, U.S. Bankruptcy Court, Northern District of Ohio

John A.E. Pottow, Professor, University of Michigan Law School

Consumer Breakout Session: Recent Developments in Chapter 13: Cases, Issues and Trends

Hon. Keith M. Lundin, Judge, U.S. Bankruptcy Court, Middle District of Tennessee

Henry E. Hildebrand, III, Chapter 13 Trustee, Nashville, Tennessee

Commercial Breakout Session: Oil & Gas: A Distressed Industry

Tom Pratt, Applied Business Strategy LLC

Christopher B. Wick, Hahn Loeser & Parks LLP

Richard A. Zytkowicz, Managing Director, LM+Co Capital

Commercial Breakout Session: Chapter 11 Exit Strategies (Structured Dismissals and Other Options)

Sarah L. Fowler, Ice Miller LLP

Scott N. Opincar, McDonald Hopkins LLC

Bradford Sandler, Pachulski Stang Ziehl & Jones LLP

Luncheon Presentation (0.50 CLE optional)

Samuel J. Gerdano, Executive Director, American Bankruptcy Institute

Update from the Office of the U.S. Trustee

Clifford White, Director, U.S. Trustee Office

Consumer Breakout Session: Dischargeability and Exceptions (including student loans): Chapter 7 vs. Chapter 13 Issues

Hon. Pat E. Morgenstern-Clarren, U.S. Bankruptcy Court, Northern District of Ohio, Moderator

Philip D. Lamos, Office of the Chapter 13 Trustee

Frederick S. Coombs III, Harrington, Hoppe & Mitchell, Ltd.

Jon Ginter, Law Offices of Jon Ginter, LLC

Paul S. Kuzmickas, Luftman, Heck & Associates, LLP

Commercial Breakout Session: Restructuring: Maximizing Value and the Rights of Secured Creditors

Hon. Alan M. Koschik, U.S. Bankruptcy Court, Northern District of Ohio, Moderator

Hon. Robert D. Drain, U.S. Bankruptcy Court, Southern District of New York

Angela M. Allen, Jenner & Block LLP

Heather Lennox, Jones Day

Michael H. Torkin, Sullivan & Cromwell LLP

Consumer Breakout Session: Lightning Round: Real Estate Surrender, Domestic Relations, Tax Certificates and More

Hon. John P. Gustafson, Judge, U.S. Bankruptcy Court, Northern District of Ohio, Moderator

Edward A. Bailey, Reimer, Arnovitz, Chernek & Jeffrey Co., LPA

Sheldon Stein, Attorney at Law

Phyllis A. Ulrich, Carlisle, McNellie, Rini, Kramer & Ulrich Co., LPA

A. Jacob Zurbrugg, Debra Booher & Associates Co., LPA

Mediation: An Effective Settlement Tool

Hon. Jessica E. Price Smith, U.S. Bankruptcy Court, Northern District of Ohio

Richard G. Hardy, Ulmer & Berne LLP

Ronald H. Isroff, Isroff Mediation Services, LLC

IWIRC Reception to Follow

Thursday, June 2 – 6.75 CLE

Plus 0.50 optional lunch presentation

The U.S. Consumer Financial Protection Bureau: Looking to 2016 and Beyond

Richard A. Freshwater, Thompson Hine LLP

Kelly Lipinski, McGlinchey Stafford PLLC

Case Law and Rules Update

Hon. Russ Kendig, Chief Judge, U.S. Bankruptcy Court, Northern District of Ohio

Hon. Arthur I. Harris, U.S. Bankruptcy Court, Northern District of Ohio

E-Discovery

Karin Scholz Jenson, BakerHostetler LLP

Scott A. Kane, Squire Patton Boggs (US) LLP

Kevin F. Brady, Redgrave LLP

Timothy M. Opsitnick, General Counsel of JurInnov Ltd

A Funny Thing Happened on the Way to the RNC (0.50 CLE optional)

Joseph D. Roman, Greater Cleveland Partnership

Article 9 Update

Cassandra G. Mott, Thompson & Knight LLP

Kelsey M. Toulouse, Vorys, Sater, Seymour and Pease LLP

James J. White, Robert A. Sullivan Professor of Law Emeritus, University of Michigan

Preference and Fraudulent Transfer Updates (With a Few Unusual Asset Issues Thrown In)

Richard A. Baumgart, Dettelbach, Sicherman & Baumgart

Marc B. Merklin, Brouse McDowell

Jeffrey C. Toole, Buckley King

Taxes & Bankruptcy: We're From the Government & Here to Help (You Not Mess This Up!)

Anita A. Gill, Internal Revenue Service, Office of Chief Counsel

Trish D. Lazich, Ohio Attorney General's Office

Bankruptcy Fraud

Suzana K. Koch, U.S. Attorney's Office, Moderator

John Aske, Special Agent, Federal Bureau of Investigation

Adam Hollingsworth, U.S. Attorney's Office
Lenore Kleinman, U.S. Trustee's Office
Robert J. Patton, U.S. Attorney's Office

Hot Topics in Commercial General Liability (CGL) Insurance

Presented by the CMBA's Insurance Law Section

Tuesday, June 7

CREDITS 5.75 CLE

REGISTRATION 8:30 a.m.

PROGRAM 9 a.m. – 4:30 p.m.

Understanding and Interpreting the "Insured Contract" Definition under a CGL Policy

George V. Pilat, Mazanec, Raskin & Ryder Co., L.P.A.

Allocation and Apportionment Issues in CGL Policy Litigation

Myra Barsoum Stockett, Reminger Co., L.P.A.
Michelle J. Sheehan, Reminger Co., L.P.A.

Maximizing Coverage: Current Concepts for Policyholder Counsel

Keven Drummond Eiber, Brouse McDowell

A View from the Bench in Insurance Coverage Cases

Hon. Richard J. McMonagle, Cuyahoga County Court of Common Pleas
Hon. John P. O'Donnell, Cuyahoga County Court of Common Pleas
Hon. Nancy A. Fuerst, Cuyahoga County Court of Common Pleas

Cyber Risk

Daniel F. Gourash, Seeley, Savidge, Ebert & Gourash Co., LPA

Food Contamination and Coverage Issues

Karl A. Bekeny, Tucker Ellis LLP
Jennifer L. Mesko, Tucker Ellis LLP

The Tripartite Relationship Between the Insured, Counsel and the Insurer

Clifford C. Masch, Reminger Co., L.P.A.

Beyond Our Borders: Emerging Trends and Arguments in Bad Faith Cases Outside of Ohio

John G. Farnan, Weston Hurd LLP
Monica L. Frantz, Weston Hurd LLP

The Code of Kryptonite: Ethical Limitations on Lawyers' Superpowers

Wednesday, June 8

CREDITS 2.50 CLE

REGISTRATION 9 a.m.

Did the drafters of our ethics code believe that lawyers are superheroes?

It seems so. In this unique program, Stuart Teicher, (the "CLE Performer") weaves together talk of superpowers, superheroes, and other fun stuff to explain important ethics rules and explore both the breadth and limitations on a lawyer's power.

PRESENTER

Stuart I. Teicher is a professional legal educator who focuses on ethics law and writing instruction. A practicing attorney for over two decades, Stuart's career is now dedicated to helping fellow attorneys survive the practice of law and thrive in the profession. Mr. Teicher teaches seminars, provides in-house training to law firms/legal departments, and gives keynote speeches at conventions and association meetings. Stuart helps attorneys get better at what they do (and enjoy the process) through his entertaining and educational CLE Performances. His expertise is in "Technethics," a term Stuart coined that refers to the ethical issues in social networking and other technology. Stuart also speaks about "Practical Ethics" — those lessons hidden in the ethics rules that enhance a lawyer's practice.

Mr. Teicher is a Supreme Court appointee to the New Jersey District Ethics Committee where he investigates and prosecutes grievances filed against attorneys, an adjunct Professor of Law at Rutgers Law School in Camden, New Jersey where he teaches Professional Responsibility, and an adjunct Professor at Rutgers University in New Brunswick where he teaches undergraduate writing courses.

TOPICS

- The Perils of Pursuing Superhero Status – Personal Conflict and Rule 1.8
- Allocation of Decision Making Authority Between Lawyer and Client – Rule 1.2
- The Possible Need to Withdraw – Rule 1.16
- The Need to Keep Our Big Mouths Shut – Rule 1.6
- "Assertive Advocacy" – Understanding the Limitations on our Superpowers
- Misrepresentation – Rule 4.1
- Candor and the Duty to Be Truthful to the Tribunal (and How That Can Get Tricky for GC's)
- Things to Watch Out For When Supervising Outside Counsel – Rule 3.3
- Misrepresentation Issues When Using LinkedIn – Rules 7.1 and 7.3
- The "Anti-Bullying Rules" like 3.4 and 4.4 and What It Really Means to Be a Zealous Advocate

2016 Litigation Institute: Trial Basics

Thursday, June 9

CREDITS 3.00 CLE hours and New Lawyer Training requested

REGISTRATION 1:30 p.m.

PROGRAM 2 – 5:30 p.m (Reception to follow sponsored by Cady Reporting Service, Inc.)

Haven't been in the courtroom in awhile — or ever? Join the CMBA's Litigation Section for a half-day program designed to give you an introduction to (or refresher on) basic trial skills.

We'll kick off the afternoon with a Judge's Panel to provide insight on hits and misses in the courtroom. We'll move on to reviews of opening and closing statements and direct and cross examinations.

Welcome and Introduction

Amanda T. Quan, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.; Litigation Section Chair

Judge's Panel: Professionalism at Trial and Behavior in the Courtroom (0.75 Professional Conduct credit)

Hon. Joan C. Synenberg, Cuyahoga County Court of Common Pleas, Moderator

Opening Statement

Dana K. Cole, Associate Professor of Law, University of Akron School of Law

Direct Examination

Dennis R. Lansdowne, Spangenberg, Shibley & Liber LLP

Cross Examination

Rita A. Maimbourg, Tucker Ellis LLP

Closing Argument

J. Anthony Rich, J. Anthony Rich Law Company LLC

The 2016 Great Lakes Symposium

Presented by the CMBA's Environmental Law Section

Friday, June 10

CREDITS 5.75 CLE hours requested

REGISTRATION 8:00 a.m.

PROGRAM 8:30 a.m.

NETWORKING RECEPTION 4:30 p.m.

LOCATION The City Club of Cleveland, 850 Euclid Avenue, Cleveland, OH 44114

Welcome & Introductions
Keely O'Bryan, McMahon DeGulis LLP, Seminar Chair

Tamar Gontovnik, NEORSD, Section Chair

Progress on the Great Lakes
Craig Butler, Director, Ohio EPA

Navigation on the Great Lakes
James Weakley, Lake Carriers Association

Jade Davis, Cuyahoga County Port Authority

Mike Piskur, Conference of Great Lakes and St. Lawrence Governors and Premiers

Betty Sutton, St. Lawrence Seaway Development Corporation

Dan Moulthrop, Cleveland City Club, Moderator

Choice of Breakout Sessions:

(1) Clean Water Act – Integrated Planning
Mark Pollins, Director, Water Enforcement Division Office of Civil Enforcement, U.S. EPA HQ

Kyle Dreyfuss-Wells, Deputy Director of Watershed Program, NEORSD

Kellie Rotunno, Chief Operating Officer, NEORSD

Louis McMahon, McMahon DeGulis LLP, Moderator

(2) Update on Ballast Water and Invasive Species
Tom Rayburn, Lake Carriers Association

Emily Huggins Jones, Thompson Hine LLP

City Club State of the Great Lakes Program Luncheon (included)
Admiral June Ryan, U.S. Coast Guard Commander, Ninth Coast Guard District

Choice of Breakout Sessions:

(1) Protecting the Great Lakes as a Drinking Water Source
Karl Gebhardt, Deputy Director of Water Resources, Ohio EPA

Chris Winslow, The Ohio State University Stone Lab

Andrew Etter, Squire Patton Boggs (US) LLP

(2) Great Lakes Water Law 101
Louis McMahon, McMahon DeGulis LLP

Mark Madras, Gowling WLG, Toronto, ON

Great Lakes Restoration and Recreation
Chris Korleski, Director, Great Lakes National Program Office, U.S. EPA

Joel Brammeier, President & CEO, Alliance for the Great Lakes

Rose Fini, Chief Legal and Ethics Officer, Cleveland Metroparks

Heidi G. Robertson, Cleveland-Marshall College of Law, Moderator

Networking Social and Fundraiser for the Section's Environmental Law Internship Fund

Police Use of Force and Officer Liability

Presented by the CMBA's Criminal Law Section

Tuesday, June 14

CREDITS 3.00 CLE

REGISTRATION 12:30 p.m.

PROGRAM 1 – 4:15 p.m.

The police use of deadly force is a hot topic in the national news. According to the Washington Post, in 2015 there were 965 people shot by police officers. Whether the police officer is a hero or villain can depend on the angle of a camera capturing the shooting. Here in Northeast Ohio, we have had several high profile cases involving the police use of deadly force. Come to the CMBA on June 14 for a lively and interactive presentation on the police use of deadly force, where we will review use of force cases, decisions from the U.S. Supreme Court that determine whether a police officer is charged with a crime, and the use of force continuum that police officers use to determine the force necessary to make an arrest. We will also discuss civil liability of police officers and the defense of qualified immunity. The goal of this program is for attorneys to understand this very complex legal and social issue.

TOPICS

- Police Use of Non-Lethal Force and the Use of Force Continuum
- Police Use of Deadly Force and Officer Liability

INSTRUCTORS

Philip Bogdanoff became an assistant Summit County prosecutor in 1981 after passing the Ohio Bar. He acted as a police legal advisor to numerous law enforcement agencies reviewing search warrants and providing legal advice on various issues. He retired from that office in 2008 and is currently a frequent presenter of continuing legal education to attorneys, prosecutors, and police officers on various topics including police use of force. He is the author of an article on police use of force that was published by the Municipal Lawyer's Association and was a special consultant for the Cuyahoga County Prosecutors Office in the shooting deaths of Malissa Williams and Timothy Russell, writing a 67-page report examining the lethal use of force by 13 Cleveland police officers.

J. Dean Carro, Of Counsel, Baker, Dublikar, Beck, Wiley & Mathew. Dean was the Dean's Club Professor of Law, Professor of Clinical Education, Director of the Appellate Review Office and Director of the Legal Clinic at the University of Akron School of Law. He received his B.A., cum laude, from State University of New York at New Paltz. He is admitted to practice in Ohio and before the U.S. Supreme Court; the U.S. District Court for the Northern District of Ohio; and the U.S. Court of Appeals for the 6th Circuit.

Appellate Practice 2016

Sponsored by the Appellate Courts Committee

Thursday, June 16

CREDITS 3.75 CLE hours and advanced specialization credit in appellate law approved

REGISTRATION 11:45 a.m.

PROGRAM 12 – 4:30 p.m. (with lunch)

The Art of Oral Advocacy
Justice Terrence O'Donnell, The Supreme Court of Ohio

The Appealing Brief: Tips for Effective Brief Writing
Benjamin C. Sassé, Tucker Ellis LLP

Appellate Issues and Interlocutory Appeals in Criminal Matters
Erika Cunliffe, Cuyahoga County Office of the Public Defender, Appellate Div.

Katherine E. Mullin, Associate Assistant Attorney General, Office of Ohio Attorney General Mike DeWine

Stemming the Tide of Discovery Appeals, Smith v. Chen and Beyond
Paul W. Flowers, Paul W. Flowers Co. L.P.A.

Making and Preserving the Record in the Digital Age: Never Assume Your Record is Complete
Mary Jane Trapp, Thrasher Dinsmore & Dolan

Pryor v. Director, et al, (Case No. 2015-0770): How an Akron Law Student Created a 6–1 Circuit Split and Ended Up In Front of the Supreme Court of Ohio
Marcus H. Pryor II, Tucker Ellis LLP

Adjournment
Timothy J. Fitzgerald, Koehler Fitzgerald LLC, Seminar Chair

QuickBites

Meet us at the Bar for lunch, networking, and CLE. Check out these one-hour CLEs, sponsored by our Sections.

All programs are held at noon at the CMBA Conference Center, unless otherwise noted.

May 17

Estate Planning, Probate & Trust Law
Legacy Trusts and Ohio Asset Protection Statute

May 18

Labor & Employment Section
Psychology of Collective Bargaining

May 26

International Law Section
Taking a Pulse of Current EB-5 Finance – A Roundtable Discussion with Cleveland International Fund

June 1

Women in Law Section (No CLE)

Fundamentals of Practice in the Northern District of Ohio: Federal Court Training Program

Friday, June 17

CREDITS 3.50 CLE and NLT hours requested, with 0.50 Professional Conduct

REGISTRATION 8:30 a.m.

PROGRAM 1 – 4:15 p.m.

Pursuant to District Court Local Rule 83.5, attorneys who wish to be admitted to practice before the U.S. District Court, Northern District of Ohio, must attend an approved seminar on Federal Practice. Attendance at this seminar satisfies the requirement of Rule 83.5. Further information regarding admission to practice before the U.S. District Court can be obtained from the office of the Clerk at (216) 357-7000.

Welcome & Introductions
Joseph P. Dunson, Dunson Law, LLC, Seminar Chair

Federal Practice Overview, Standing Orders and Early Case Resolution
Hon. Solomon Oliver, Jr., U.S. District Court, Northern District of Ohio

Anatomy of a Federal Criminal Prosecution from Indictment to Sentencing
Ian N. Friedman, Friedman & Nemecek, L.L.C.
Joseph N. Pinjuh, U.S. Attorney's Office

Perspectives from the Clerk's Office: E-Filing, ADR and Corporate Disclosure
Vicky Mizell, Chief Deputy, U.S. District Court Clerk's Office

Early Civil Case Obligations: Initial Disclosure, Meet and Confer and E-Discovery
Amy Ryder Wentz, Littler Mendelson, P.C.

Personal Jurisdiction and Venue in the 6th Circuit
Gregory P. Amend, Buckingham, Doolittle & Burroughs, LLC

Conduct in Court and Depositions (0.50 hour Professional Conduct)
Diane E. Citrino, Giffen & Kaminski, LLC

Hot Topics for Estate Planners

Presented by the CMBA's Estate Planning, Probate & Trust Law Section

Tuesday, June 21

CREDITS 3.00 CLE and specialization hours

REGISTRATION 8 a.m.

PROGRAM 8:30 – 11:45 a.m., Section Annual Lunch Meeting to follow (free for Section Members and Seminar Participants)

Welcome & Introductions
Cristin R. Snodgrass, KeyBank Family Wealth, Section Chair
Franklin C. Malemud, Reminger Co., L.P.A., Section Vice Chair

Top Creative Charitable and Tax Strategies You May Not Have Heard Of
Edwin P. Morrow III, Key Private Bank Family Wealth Advisory Services

Toolkit for Broken Trusts
Lisa Babish Forbes, Vorys, Sater, Seymour and Pease LLP
Emily S. Pan, Vorys, Sater, Seymour and Pease LLP

Bitcoin: Tax and Estate Planning Considerations
Matthew F. Kadish, Kadish, Hinkel & Weibel

Section Annual Lunch Meeting (Free for Section Members and Seminar Participants)

Got Drones? Fly By Night or Here to Stay?

Wednesday, June 22

CREDITS 3.00 CLE

REGISTRATION 8:30 a.m.

PROGRAM 9 a.m. – 12:15 p.m.

Invasion of the Drones: Overview of Drones and FAA Update
Matt Mishak, City of Elyria Law Department and Co-Founder, DroneWerx

Come Fly with Me: State and Local Update
Jessica Knopp Cunning, Vorys, Sater, Seymour and Pease LLP

I Always Feel Like Somebody's Watching Me: Privacy Concerns and Drone Use
Darrell A. Clay, Walter | Haverfield LLP

Attack of the Drones: Insurance Coverage and Liability Issues Stemming from Drone Use
Jason T. Lorenzon, DeCola & Lorenzon LLC

Register at CleMetroBar.org/CLE!

For questions or to register over the phone, call (216) 696-2404.

A Comprehensive Review of the NLRB's New Joint Employer Standard

How Far Does it Reach?

BY DANIEL L. MESSELOFF & KATHLEEN M. TINNERELLO

Reverberations from the National Labor Relations Board's landmark decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (August 27, 2015) still resound within the labor community and for practitioners interacting with not only the Board, but with the Department of Labor, the U.S. Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs.

In the wake of *Browning-Ferris,* each agency has expanded its view of what constitutes a joint employer and broadened attendant liability for employers who use contracted labor. Due to the broad and significant impact of the NLRB's New Joint Employer Standard, this article will highlight key changes that have come to pass over the past seven months and provide practical insight on how those changes have or may impact the scope of civil litigation.

RECAP OF THE BROWNING-FERRIS DECISION AND THE NLRB'S NEW JOINT EMPLOYER STANDARD

Browning-Ferris Industries of California, Inc. (BFI) operates a waste recycling facility and subcontracts employees from Leadpoint Business Services ("Leadpoint") to sort recyclable items and to perform basic housekeeping functions. The Teamsters filed a petition to represent these employees under the theory that BFI and Leadpoint were joint employers.

Under the Board's previous joint employer standard, which had been in effect for over 30 years, joint employer status only existed where "two separate entities share or codetermine those matters governing the essential terms and conditions of employment." The level of control asserted by the potential joint employer needed to be "direct and immediate" as to employment actions such as hiring, firing, discipline, supervision, and direction.

On August 27, 2015, the Board transformed the joint employer standard into a two-part test that now considers (1) whether a common law employment relationship exists; and (2) whether the potential joint employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining." The critical distinction is that "control" can now be direct, indirect, or even a reserved right to control, whether or not that right is ever excised.

Under this new standard, the Board found BFI was a joint employer with Leadpoint. Disagreeing with the Board's determination, BFI refused the Teamsters' request to bargain. The Teamsters then filed an unfair labor practice charge and on January 12, 2016, the Board found that BFI and Leadpoint, as joint employers, had violated the National Labor Relations Act. BFI and Leadpoint have appealed to the U.S. Court of Appeals for the District of Columbia Circuit. A decision on the pending appeal is not anticipated before the fall.

IMPACT ON THE U.S. DEPARTMENT OF LABOR

It is clear that the NLRB's new standard was influenced, at least in part, by the research and writing of Wage and Hour Administrator, David Weil. Prior to Weil's appointment in 2013, Weil authored a book entitled "The Fissured Workplace" and used statistics to argue that the increased use of contract labor, like subcontracting and franchised retail operations, has created a negative impact on the health and safety of low-wage workers.

The influence of Weil's research on the NLRB's General Counsel, Richard Griffin, Jr., became apparent when Griffin cited Weil's statistics in his amicus brief in *Browning-Ferris.* Building on Weil's momentum, Griffin argued that the Board had the power to modify its interpretation of the NLRA to address changes in employment relationships and urged the NLRB to modify the joint employer standard "to take into account the economic and industrial realities" of the modernized workplace. The Board accepted Griffith's charge.

While the NLRB and the DOL's respective positions on joint employment are distinguishable — the NLRB evaluates the level of "control" asserted by a putative joint employer, while the DOL's Wage and Hour Division uses a multi-factorial economic realities test — the intentional broadening of who constitutes a "joint employer" and the rationale asserted by each agency is strikingly similar.

The Wage and Hour Division

On January 20, 2016, the Wage and Hour Division issued Administrator's Interpretation No. 2016-1 (AI), which addresses joint employer status under the Fair Labor Standards Act and the Migrant and Seasonal Agriculture Worker Protection Act.

To address the effects of Weil's "fissured workplace," the AI sets out two models for assessing joint employer relationships. Under a "horizontal joint employment" relationship, two employers can be liable where they are

sufficiently associated with or related to each other with respect to the employee. The test focuses on the association between two employers that already have an explicit employment relationship with an employee, like multiple restaurants operating under a common ownership, and which use the same management to schedule the same employees for work at all locations.

By contrast, "vertical joint employment" examines the economic realities of the relationship between the employee and the putative joint employer. This analysis applies where the employee has an employment relationship with one employer (typically a staffing agency) and the economic realities show that he/she is economically dependent on, and thus employed by, another entity involved in the work.

Despite the legal distinctions between the NLRB and Wage and Hour Joint Employer Standards, the emphasis on the relevance of indirect control over the work performed is perfectly aligned.

The Family and Medical Leave Act

The Department of Labor issued recent guidance on how joint employment should be analyzed under the Family and Medical Leave Act. In January 2016, the agency issued Fact Sheet No. 28N, which details the responsibilities for primary and secondary employers engaged in joint employment. While the Fact Sheet did not pave new ground under the FMLA, it did indicate that joint employment will become an enforcement priority, and it signaled the inevitable expansion of those entities that will be considered joint employers.

The Occupational Safety and Health Act

Shortly after the NLRB handed down *Browning-Ferris,* the Office of the Solicitor circulated a draft policy indicating that the agency was considering whether to broaden its joint employment enforcement. While the draft policy pertained primarily to the franchise model, it is clearly applicable to other contract relationships. The effect of the draft policy will be to give OSHA access to a broader range of employers that have previously escaped liability for alleged health and safety violations due to the use of contract labor.

Under the draft policy, a joint employment relationship will be found where "the corporate entity exercises direct or indirect control over working conditions, has the unexercised potential to control working conditions or [is] based on the economic realities." By all accounts, this policy falls squarely in line with the NLRB's joint employer standard and that offered by the Wage and Hour Division.

THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Historically, joint employment concerns have been less prominent in the discrimination and harassment contexts. However, in the EEOC's amicus brief in *Browning-Ferris*, the agency encouraged the NLRB to abandon its prior standard and to adopt the common-law agency test used by the EEOC under Title VII.

While the EEOC's test is notably broader than the previous NLRB standard, both tests focus on who actually controls the essential terms and conditions of employment. Moreover, now that the NLRB has broadened its standard to include indirect, or a reserved right to control, whether or not that right is ever exercised, the EEOC will almost certainly see it as an opportunity to expand its own definition of joint employment and to take a more aggressive enforcement stance against potential

joint employers. This would translate to significant expansion of investigations. It could also mean new EEOC-initiated and class/collective actions against employers that exercise little or no control over their contracted workforce.

THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

The OFCCP has expressed an interest, in light of *Browning-Ferris*, to expand its reach over organizations that provide services or supplies to federal contractors, even if that entity itself holds no federal contracts. The OFCCP plans to accomplish this expansion through the broadening of its "single entity" test.

To determine whether the agency has jurisdiction over a company without a federal contract, the OFCCP applies a five-factor test the "single entity test" focusing on whether the ownership, management and operations of the contracting and non-contracting entities are sufficiently related to warrant treating them as a single entity. The test looks primarily to whether the ownership, management, and operations of the separate entities are, in fact, sufficiently interrelated to warrant treating them as an integrated enterprise or a single entity. A business or organization need not meet all five factors to be considered a single entity with a covered Federal contractor.

Looking specifically at *Browning-Ferris,* the NLRB's ruling will allow a broader interpretation of whether one entity exercises day-to-day control over the other through the management or supervision of the entity's operations; whether the personnel policies of the entities emanate from a common or centralized source; and whether the operations of the entities are dependent on each other.

This transition is critical because federal contractors can have numerous relationships with subcontractors, suppliers, and vendors, all of whom may now find themselves at increased risk of being classified a "single entity" with federal contractors and liable for complex and onerous compliance mandates like affirmative action requirements, data collection, reporting, auditing and more.

As demonstrated above, reverberations from *Browning-Ferris* continue to abound; however, the fate of the new standard, and potentially its downstream effects, is not necessarily set in stone. Aside from a pending circuit court appeal, the NLRB's composition could change as a result of the 2016 Presidential Election. If so, the decision could be overturned and the downstream effects tempered. However, for now, employers utilizing contract labor must plan for increased scrutiny and a greater potential for joint employer liability.

Daniel L. Messeloff is Of Counsel in the Cleveland, OH office of Jackson Lewis P.C. Mr. Messeloff works with clients to address, manage, and resolve legal issues they may have with their employees, with the goal of minimizing potential legal liability and contributing to his clients' overall business success. He has been a CMBA member since 2005. He can be reached at (216) 750-0404 or daniel.messeloff@jacksonlewis.com.

Kathleen M. Tinnerello is an Associate in the Cleveland, OH office of Jackson Lewis P.C. Ms. Tinnerello brings a common sense approach to the practice of law, giving thoughtful advice that promotes her clients' goals and protects her clients' interests. She has been a CMBA member since 2009. She can be reached at (216) 750-4335 or kathleen.tinnerello@jacksonlewis.com.

The Pressing Need for Consistency in the Voluntary Abandonment Doctrine

BY DARYL GAGLIARDI

Voluntary abandonment is a judicially created doctrine that may prevent workers' compensation claimants from receiving Temporary Total Disability. TTD is the most common form of compensation available to claimants who are unable to return to their job due to an injury.

Cases involving voluntary abandonment can arguably be divided into two categories: abandonment of a specific job and abandonment of the entire workforce. In both situations the claimant will be prohibited from receiving TTD. A claimant voluntarily abandons a specific job when he quits or is fired for violating a written work rule. A claimant voluntarily abandons the entire workforce when he demonstrates an intent to retire for reasons unrelated to the injury. Voluntary abandonment does not apply when a claimant abandons either a specific job or the entire workforce due to the injury.

As the volume of cases expounding the voluntary abandonment doctrine expands it has become increasingly difficult to predict how courts will apply it to any given fact pattern. Pivotal cases have been given inconsistent interpretations over the years. One especially troublesome example is the Ohio Supreme Court case *State ex rel. Eckerly v. Indus. Comm.*, 2005-Ohio-2587. To understand the procedural mechanism by which such cases can reach the court, it is important to note that TTD is first granted or denied by the Ohio Industrial Commission. The IC's decision may be appealed via an action in mandamus. Most mandamus actions are filed with the Tenth District Court of Appeals, which allows for an appeal to the Supreme Court of Ohio.

In February 2001, Eckerly had a workers' compensation claim allowed when he broke his hand working for Tech II. In May 2001, Tech II fired Eckerly for absenteeism. Following his termination, Eckerly was "almost entirely unemployed" for several years. However, Eckerly did present evidence that he was paid $800 in 2002 by a courier service, presumably for employment. Following his injury Eckerly had developed chronic problems with his hand that he asserted prevented him from maintaining or seeking further employment. In February 2003, his injury significantly worsened and he requested TTD. The IC held that Eckerly's termination by Tech II was a voluntary abandonment of his employment and therefore denied TTD. The Ohio Supreme Court upheld the decision to deny TTD because Eckerly had voluntarily abandoned his employment with Tech II. The Court stated:

> [Eckerly] appears to believe that so long as he establishes that he obtained another job – if even for a day — at some point after his departure from Tech II, TTD eligibility is forever after reestablished. Unfortunately, this belief overlooks the tenet that is key to [*State ex rel. McCoy v. Dedicated Transp., Inc.*, 2002-Ohio-5305] and all other TTD cases before and after: that the industrial injury must remove the claimant from his or her job. This requirement obviously cannot be satisfied if claimant had no job at the time of the alleged disability.

With respect to Eckerly's claim that the injury to his hand prevented him from finding employment, the Court stated that Eckerly should then "be seeking wage-loss compensation under R.C. 4123.56(B), not TTD." Wage-loss benefits are available to injured workers who are unable to find work within their medical restrictions following an injury. They are typically granted to claimants who are no longer receiving TTD because their medical condition has plateaued.

The Court's holding in *Eckerly* appears straightforward. However, cases to follow have generated confusing results. For example, in *State ex rel. MedAmerica Health Sys., Corp. v. Brammer*, 2012-Ohio-4416 (10th Dist.) Brammer suffered a serious

shoulder injury in May 2008 while working for MedAmerica. She returned to work with a five-pound lifting restriction and was terminated in March 2009 for excessive absenteeism caused by a worsening of her shoulder condition. In November 2009, Brammer began working for a new employer. She left the new job in February 2010 because of an unrelated back injury. Brammer sought, but was unable to find, subsequent employment. In June 2010, she had shoulder surgery and requested TTD.

The IC granted TTD and MedAmerica filed an appeal with the Tenth District. The court upheld TTD and distinguished *Eckerly* on the grounds that Brammer's termination from MedAmerica was not a voluntary abandonment because it was due to her shoulder injury. However, the court went on to characterize Brammer's departure from her second employer as voluntary. Nonetheless, Brammer's voluntary abandonment of the second job did not bar TTD. The court explained that a denial of TTD can not be premised solely on a voluntary abandonment of a subsequent job with a different employer. Brammer was still eligible for TTD because she did not abandon the job she had at the time she injured her shoulder.

The Tenth District upheld TTD compensation even though Brammer was unemployed at the time TTD was requested. The court distinguished *Eckerly* by characterizing it as a case involving abandonment of the entire workforce, rather than a single job. The court rejected the interpretation that "*Eckerly* stands for the proposition that no claim for TTD can be allowed if the claimant is unemployed at the time of the alleged disability."

In *State ex rel. German v. Provider Servs. Holdings, L.L.C.*, 2014-Ohio-3336 (10th Dist.), German suffered a serious injury to her lower back in October 2008 while working at a nursing home. She returned to work under a restriction that she not lift more than five pounds. In March 2009, German resigned from the nursing home for several reasons: she was missing a lot of work due to pain, she felt bad because coworkers had to perform tasks for her, and she was preparing to get married and move an hour away.

In September 2009, German began working at a plant buffing car parts that weighed a few pounds each. In March 2010 German left this job. German testified that she left the job because it became too strenuous on her back when her shifts increased from eight to twelve hours. However, medical records indicated that she told her physician she had been fired. Several months later her marriage ended and she again moved.

German remained unemployed thereafter. She testified that she was experiencing lower back pain and did not believe she could work. German had surgery on her lower back in August 2011, and requested TTD. The IC held that German's departure from the nursing home was "unrelated to the allowed injury and was voluntary." With respect to her job at the plant, the IC stated that there was "no contemporaneous evidence from a physician that she left this job due to physical difficulties stemming from the allowed conditions."

Welcome New Members

Get Involved at CleMetroBar.org.

Kelly G. Adelman
Adelman Law Office LLC

Devin A. Barry
Thompson Hine LLP

Mark Wilson Biggerman
Mark W. Biggerman, Attorney At Law

Sydney Lynn Brunecz
Thompson Hine LLP

Olivia Marie Buller

Andrew Taylor Call
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Finally, the IC concluded that German "has abandoned the work force since that time."

German filed an action in mandamus with the Tenth District, which explained that the IC's order should be interpreted as holding that German had voluntarily abandoned both jobs. Citing *Eckerly*, the court's magistrate stated the following: "Presumably, if [German] can show that her departure from employment at [the plant] was injury induced, she can preserve her eligibility for TTD compensation that was undisputedly reestablished during the time of her employment at [the plant.]" The Tenth District upheld the finding of voluntary abandonment and denied TTD.

When *MedAmerica* and *German* are considered together, it appears that a voluntary abandonment of a subsequent position will only act as a bar to TTD where the claimant also abandoned the original employment. This rule is consistent with *Eckerly* if one assumes Eckerly reestablished TTD eligibility while employed for the courier service, then subsequently abandoned the workforce. However, these interpretations are difficult to square with *State ex rel. Collins v. Plageman*, 2015-Ohio-736 (10th Dist.).

Collins suffered a serious injury to his lower back in 1993 while working for a tile company. He eventually recovered and returned to work. Subsequently the tile company went out of business. Collins' layoff was not a voluntary abandonment. Collins required several back surgeries, then reentered the work force in 1999. He began working for a real estate company in 2005. In October 2011, Collins was terminated by the real estate company for theft. In December 2011 Collins requested TTD.

TTD was denied by the IC and Collins filed an appeal to the Tenth District. The court denied TTD, finding that Collins' termination from the real estate company was a voluntary abandonment, and therefore a bar to TTD. Despite the lack of a written work rule, the court held that there was sufficient evidence to establish voluntary abandonment because Collins admitted at a hearing that he had been videotaped taking items from a work site. The court denied TTD even though Collins did not abandon his original job at the tile company. Finally, the magistrate's decision cited *Eckerly* for the proposition that Collins could not be granted TTD because he had no job at the time he requested TTD.

The cases discussed above are just a small sampling of the confusing, contradictory and growing body of case law governing the voluntary abandonment doctrine. In part because most abandonment cases are factually complex, it is difficult to predict how the doctrine will be applied in any given scenario. Often, it will simply come down to which case the IC or court finds most analogous. As such, the best strategy for attorneys faced with the possibility of a voluntary abandonment is to be aware of existing decisions, and stay abreast of new ones.

As a claimants' attorney, one hopes the Ohio Supreme Court will soon clarify when the doctrine applies so clients requesting TTD, who are by definition out of work, can be accurately advised whether they are eligible for benefits.

Daryl Gagliardi is an associate with Wincek & DeRosa Co., LPA. He focuses his practice on representing those who have been injured at work or by another person's negligence. He also represents employees and small businesses in employment matters. He has been a CMBA member since 2011. He can be reached at (216) 621-8700 or daryl.gagliardi@wincekderosa.com.

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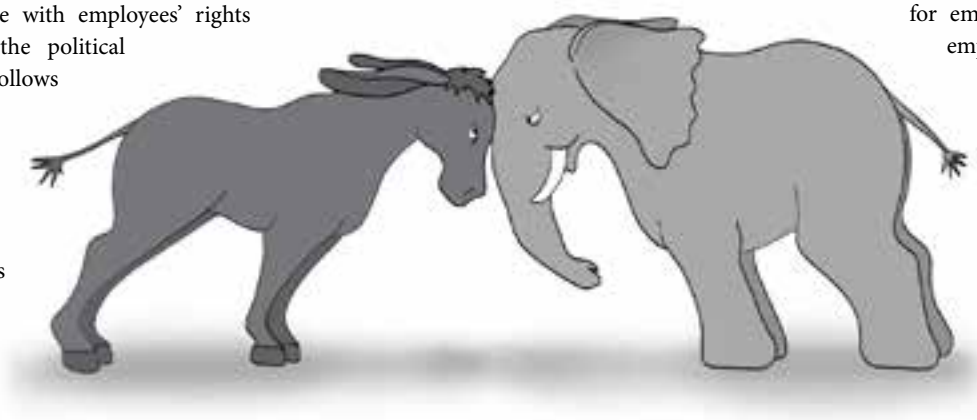
Talking Politics at Work

What Employers Should Know This Election Season

BY THOMAS R. SIMMONS & CHRISTINE M. SNYDER

As Cleveland braces for the influx of GOP Convention delegates this July, the 2016 presidential campaign has been dominating the national collective consciousness for months. Fueled by non-stop media coverage, discussions of the candidates' policy positions and political antics have no doubt popped up around the water coolers of America's workplaces. So, what does this heightened political focus mean for employers? Well, in addition to the inevitable loss of productivity from employees' countless time spent rehashing the previous night's debate performances or state election results, there can also be real legal consequences for employers who fail to address inappropriate political discourse in the workplace or who improperly interfere with employees' rights to participate in the political process. What follows are just a few of the issues that employers should keep in mind this election season and tips on how to avoid trouble before it starts.



Free Speech in the Workplace: What do you mean I can't say that? Isn't this a free country?

A common misconception among employees and employers alike is that employees' First Amendment rights to free expression extend into the workplace. In fact, the First Amendment only applies to *governmental* action that censors speech based on its content or viewpoint. *Private* employers, therefore, are generally free to restrict their employees' speech — political or otherwise — and discipline or terminate employees based on the content of that speech without violating their employees' First Amendment rights. To paraphrase Judge Oliver Wendell Holmes in an 1892 opinion, a person may have a constitutional right to talk politics, but a person does not have a constitutional right to a job. While a handful of states have passed legislation prohibiting employer retaliation for employees' political speech and activities, even in those states, employers still maintain a legitimate business interest in controlling their employees' political speech and conduct in the workplace.

Public employees, on the other hand, enjoy more First Amendment protections than private employees. But, over the years the Supreme Court has carved out significant exceptions to the First Amendment's application to public employees' speech, stressing that "even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees." *Waters v. Churchill*, 511 U.S. 661, 672, 114 S.Ct. 1878, 1886, 128 L.Ed.2d 686 (1994). As a result, public employers are generally free to restrict their employees' speech unless that speech relates to issues of "public concern" and does not detrimentally impact the efficient operation of the government.

This is not to say that employers face no legal risk when they prohibit or restrict their employees' political speech. Depending on the circumstances, an employer may still run into trouble if an employee's political expression also falls under the protection of other federal or state laws. For example, the National Labor Relations Act, which applies to most private employers, protects employees' rights to engage in concerted activity for their "mutual aid and protection." Generally, this prohibits employers from restricting employees' discussions on employment-related topics or on issues related to the "terms and conditions of their employment." Therefore, depending on the circumstances, employees' political discourse regarding, for example, the candidates' views on equal pay legislation, a proposed increase in the minimum wage, or even immigration reform have the potential to fall under the protections of the NLRA.

Another potential risk area for employers is when their employees' political speech may be protected under federal and state anti-discrimination laws. For example, the candidates' religious beliefs and affiliations have been front and center this election season. Title VII of the Civil Rights Act of 1964 and its analogous state laws require employers to accommodate their employees' sincerely held religious beliefs by permitting them to engage in religious expression in the workplace to the extent that it does not create an "undue hardship" for the employer. Therefore, an employee's expression of support for a particular candidate as a result of their shared religious beliefs or views on issues connected to religion, depending on the circumstances, could be protected by Title VII. For this same reason, any unequal treatment of employees based on their political views or speech could

result in a discrimination claim to the extent that the employer's disparate treatment of its employees is related to the employee's views on issues connected to religion or any other protected characteristic (i.e. race, gender, religion, national origin, etc.).

When Political Speech Creates a Hostile Work Environment: Help, I am feeling harassed!

There has been no shortage of hot button issues this campaign season. Some candidates have taken controversial and divisive positions on issues of race, religion, national origin, gender, and gay rights, and their debate of these issues has, at times, pushed the bounds of civil discourse. It should come as no surprise, then, that employees' discussions of these issues can become quite heated and some employees may feel uncomfortable, offended, or under attack. As a result, political speech in the workplace can increase the risk of an employee making a hostile work environment claim under state or federal anti-discrimination laws.

For example, a Muslim employee may feel harassed and threatened when his or her co-workers are very vocal in their support of Donald Trump and his positions related to the Muslim community. Similarly, employees' discussions related to abortion, the Black Lives Matter movement, and even Bernie Sanders' age could potentially spawn hostile work environment claims based on religion, race, or age discrimination. Depending on the frequency or severity of the comments and actions directed toward an employee, his or her employer could face legal liability for failing to prevent and address these situations.

So what should employers do? Employers should diligently monitor their employees' political discussions and promptly address those conversations that stray to topics centered on the characteristics protected by federal and state anti-discrimination laws. When employees' political discourse focuses on legally protected characteristics, employers should instruct them to refrain from discussing such topics or other sensitive and controversial subjects while in the workplace. Often, it is simply enough to remind the employees involved that while they may feel strongly on a particular issues, others may not share their views and may feel uncomfortable, but, depending on the circumstances and the nature of the employees' speech, more serious corrective action may be required.

It is equally important that employers promptly investigate and address any complaints made by employees related to the political speech of others, just as the employer would treat any other complaint of discrimination or harassment. Employers should also consider whether the current political discourse creates the perfect excuse to conduct that refresher anti-discrimination and harassment training session that is often sidelined by more pressing business matters. As the saying goes, an ounce of prevention is worth a pound of cure. With months remaining until November's general election, and the national political discourse likely to only intensify in the meantime, an "ounce" of anti-discrimination and harassment training now could stave off several "pounds" of legal heartache in the long run.

Employees' Rights to Engage in the Political Process: It's election day. Can I leave work to go vote?

The ultimate form of political expression takes place in the voting booth, not at work. But what happens when an employee's work obligations hinder his or her ability to vote? Many states have enacted laws requiring employers to provide their employees with time off from work to vote. Some states, like Alaska, California, and Nebraska, also require employers to pay their employees for this time.

In Ohio, an employer is prohibited from terminating or threatening to terminate an employee for taking "a reasonable amount of time to vote on election day." O.R.C. §3599.06. Employers who fail to adhere to Ohio's voting law face fines of $50 to $500 for each violation. Ohio's law does not require an employer to pay employees for the time they take off to vote. It is important to remember, however, that an employer may not deduct these voting hours from exempt employees' salary without violating state and federal wage and hour laws.

Unlike several other states, Ohio's voting law does not require employees to provide advance notice to employers of the need to take time off to vote, nor does it designate that the hours off need to be at the start or end of an employees' shift. To minimize the impact to business operations, Ohio employers should consider establishing voting leave policies that define how employees should request time off to vote and that gives the employer discretion to designate when during an employee's shift the voting leave will be provided.

At the end of the day, employers cannot realistically prevent employees from engaging in political discussions at work — nor should they want to. A healthy work environment in which employees feel engaged and connected with their co-workers and free to share their thoughts, views, and experiences in a thoughtful, respectful way can increase job satisfaction, loyalty, and productivity. And, most political discussions by employees pose little to no risk of legal liability for employers. Employers should simply remain cognizant of the rare circumstances when employees' political speech can go too far, and be diligent in promptly and appropriately addressing issues as they arise.

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Darci L. Deltorto &
Christopher D. Caspary

To Settle or Not to Settle? That Is the Question.

Workers' compensation claims can be difficult to settle once they have reached the trial court level. Queen Gertrude, Hamlet's mother, might even remark: "the parties doth protest too much, methinks." Sometimes, this protestation is due to a questionable connection between the injury sustained and the work performed by the employee. Many other times though, the difficulty lies in the complexity of the workers' compensation premium system. The standards employed by the Workers' Compensation Board of Directors and the Administrator (BWC) vary based upon the type of employer involved.

Background on the Workers' Compensation System

The workers' compensation system was created by the General Assembly to replace a patchwork common law system. The system is a compromise between "public-policy trade-offs" that provide workers with "a certain and speedy recovery in exchange for granting a more limited liability to the employer." *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 1071-1072. The system creates virtual immunity for employers related to workplace injuries, with limited exceptions such as intentional torts or bad faith claim administration. *See Rudisill v. Ford Motor Co.*, 709 F.3d 595 (6th Cir. 2013); *see also, Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 652 N.E.2d 671 (1995).

The BWC experience system is geared toward "ensuring that each employer participating in the workers' compensation system pays an amount in premiums that reasonably corresponds with the risk that employer presents to the system." *San Allen v. Buehrer,* 8th Dist. Cuyahoga No. 99786, 2014-Ohio-2071, ¶ 102.

To Settle or Not to Settle?

All workers' compensation claims must be initiated before the Industrial Commission. Pursuant to R.C. 4123.512, parties to a workers' compensation claim may invoke the common pleas court's jurisdiction only after the Administrator's "order grants or denies the claimant's right to participate. Determinations as to the extent of a claimant's disability, on the other hand, are not appealable and must be challenged in mandamus." *State ex rel. Liposchak v. Industrial Comm'n,* 90 Ohio St.3d 276, 278-279, 737 N.E.2d 519 (2000).

The Administrator is charged with "safeguard[ing] and maintain[ing] the solvency of the…fund." R.C. 4123.34. The statute authorizes application of a "rating system that the administrator finds is best calculated to merit rate or individually rate the risk more equitably, predicated upon the basis of its individual industrial accident and occupational disease experience, and may encourage and stimulate accident prevention." *Id.* at 4123.34(C). To accomplish this goal, the BWC has implemented an experience rating system applicable to certain employers (i.e. state-fund employers with an "expected loss" of $2,000 or more), which calculates and assesses premiums based upon claim prevalence during a measured period.

And When to Settle?

Employers should consider the legal and financial impact of a settlement. Parties to a workers' compensation claim may reach settlement during the administrative proceedings or during the litigation phase. R.C. 4123.65 sets guidelines and parameters for those settlements, such as discretionary approval by the Administrator, required signatures by the parties, and a 30-day cooling off period. However, R.C. 4123.65(F) states that "[a] settlement entered into under this section is not appealable" to the trial court. Courts have interpreted this to mean that settlements reached at the Industrial Commission level do not concern an appealable right-to-participate question. *Compare with Jones v. Action Coupling & Equip.*, 98 Ohio St.3d 330, 2003-Ohio-1099, 784 N.E.2d 1172 ("the parties entered into a settlement during court litigation initiated under R.C. 4123.512. Under these circumstances, we find that R.C. 4123.65 does not apply * * *").

Employers should also consider whether settling the claim will positively impact their workers' compensation budget. For example, if settlement of a claim impacts an employer's current experience calculation, the employer should compare the net impact of the settlement (reserve amount versus settlement amount) on experience premiums, among other factors. Unfortunately, this impact on the employer may at times discourage settlement, much to the chagrin of court officials.

Conclusion

Lord Polonius once famously said of Hamlet: "[t]hough this be madness, yet there is method in't." Though the issue presented may vary and settlement discussions may focus on medical or financial analysis, there is an underlying framework applicable to workers' compensation claims. The medical analysis and applicable legal standards are more straightforward and typically rely upon medical experts. Though a claim settlement's precise financial impact may not be easily calculable, third party consultants are available to help employers and attorneys understand the likely budgetary consequences. Regardless, a realistic projection of the likely impact of a claim settlement will lead to much more productive settlement discussions.

Darci L. Deltorto serves as a Judicial Attorney to Judge Patricia A. Blackmon in the Eighth District Court of Appeals of Ohio. She has been a CMBA member since 2014. Christopher D. Caspary serves as the Staff Attorney to Judge Nancy A. Fuerst in the Cuyahoga County Court of Common Pleas. He has been a CMBA member since 2012 and can be reached at (216) 443-5963 or ccaspary@cuyahogacounty.us.

Terminating an Injured Worker

BY ELIZABETH (LIZ) A. CROSBY

It may come as a surprise to learn that a work absence occasioned by an on-the-job injury does not necessarily protect an employee from termination. In fact, the Ohio Workers' Compensation Act as set forth in ORC 4123 *et seq.* contains no provision requiring an employer to protect an injured employee from termination during his or her absence caused by a work injury or disease. However, before relying on "at-will" as the basis for terminating an injured worker, there are a few other laws that may protect an employee from being summarily dismissed following injury.

ORC 4123.90

ORC 4123.90 prohibits an employer from taking action to "discharge, demote, reassign, or take any punitive action against any employee ***because*** the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer." [Emphasis added.]

However, if the employer has a neutral leave of absence policy that limits employee absences (which in some cases could be none), and if the employer bases termination on violation of that policy, the termination does not likely violate ORC 4123.90. However, if the leave of absence policy is not neutral (meaning it does not apply to all employees for all absences) or if that policy violates other state of federal workplace laws, the employer cannot safely rely on it in terminating the employee.

Requiring Employees to Utilize Paid Time Off (PTO) for Injury-Related Absences

Many Leave of Absence policies require employees to utilize paid time off before being eligible for an unpaid leave of absence. This type of policy is considered a "*best practice*" for human resource management and in most cases is permissible under state and federal employment laws. However, if an employee is entitled to lost time benefits for a workers' compensation claim, an employer cannot *substitute* earned but unused paid leave for compensable lost time. By utilizing an employee's PTO bank as a means of avoiding the payment of lost time compensation, an employer exposes itself to an allegation of "punitive action" contemplated in ORC 4123.90. Moreover, this strategy is largely unsuccessful as the Industrial Commission of Ohio can and will order payment of compensation based solely on medical support — notwithstanding the employer's payment of "sick pay."

Payment for accrued but unused PTO may provide a benefit to an employee, particularly where the lost time due to injury is less than 15 days. Since workers' compensation does not cover the first seven days of disability,[1] permitting an employee to utilize earned PTO may help the employee bridge that gap of unpaid leave time.

THE FAMILY MEDICAL LEAVE ACT

The Family Medical Leave Act (FMLA) was enacted to protect employees suffering from serious medical conditions, with the birth or adoption of a child, or the care of an immediate family member, from termination during their time away from work.[2] A "serious health condition" generally results when an individual misses three consecutive days of work AND has received medical care from a physician or other licensed medical practitioner. A "serious health condition" can also mean a chronic health condition for which the employee receives ongoing medical care for an illness or injury.

Eligible employees (those who have been employed by the organization for one year and worked at least 1250 hours in the 12 months preceding the leave) are entitled to up to 12 weeks of unpaid time away during which time the employer (any company with at least 50 active, full-time equivalent employees within a 75-mile radius) must protect the employee's job. The employee's job means the job the employee held at the time s/he commenced the leave.

Workers' compensation injuries can qualify for FML. Therefore, if the employer meets the threshold number of employees subjecting it to compliance with the FMLA and if the employee is eligible, the injured employee cannot be terminated during the 12-week leave

period[3] and in most cases it is logical to count days off due to workers' compensation injuries as part of the 12 weeks of available leave. However, there are important requirements that must be met when running workers' compensation leave concurrent with available family medical leave:

1. The employer must have a policy in place confirming that leave occasioned by a workplace injury will be treated as family medical leave.
2. The policy should identify the consequences if an employee does not comply with the reporting requirements or does not return at the end of the leave period.
3. The employer must comply with all notice provisions during the leave and ensure that the employee is properly notified when his/her leave is about to expire, along with their employment.
4. If the medical provider indicates that leave may only briefly extend beyond the 12-week period and return to work is imminent, employers should consider extending the leave to accommodate the extra days, unless to do so would be unreasonable or impossible.
5. If the employer provides light duty, it cannot enforce a termination provision in the light duty policy if the employee elects to take available leave. FAMILY MEDICAL LEAVE IS A RIGHT.
6. If the employee returns to light duty, the light duty hours worked cannot count toward used leave.

THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA) prohibits discrimination against and ensures equal employment opportunities for individuals with disabilities. The Act defines a disability as a physical or mental condition that affects a major life activity, such as walking, talking, seeing, hearing, learning, etc. Protection also extends to individuals with a history of the defined disability as well as individuals who are *perceived* to have a disability.

Whether a work injury is also a "disability" cannot be answered simply. Certainly, conditions which are expected to resolve quickly (six months or less) would not be considered a "disability." However, loss of limbs, sight or hearing would likely qualify the individual for protection.

Protected employees are entitled to "reasonable accommodation" of their disability if they are otherwise capable of performing the essential functions of the job. For example, if a forklift driver can continue to safely operate a forklift following amputation of a leg but only if the forklift can accommodate his crutches, it may be reasonable for the employer to modify the forklift for that purpose.

Reasonable accommodations are not limited to physical modifications. Extended time away from work or a modified work day or work hours may be a reasonable accommodation. The important point is that, *if* an industrial injury qualifies as a disability, an employer's obligations will be to "reasonably accommodate" that disability, which may include job protection for extended time away. Each case must be evaluated on its own merits and should include an analysis of the essential functions of the job, the employee's ability to accomplish that job, post-injury and the economical and logistical ability of an employer to make the necessary modifications.

EMPLOYMENT & LABOR CONTRACTS

In Ohio, every employee is "at-will" unless their employment terms are set forth in a formal agreement or contract. This is not to suggest that the employment agreement cannot identify the employee as "at-will," but in most instances, the terms of separation, including the reasons and manner of separation, are clearly set forth in the employment or labor agreement. This is particularly true of employees who are members of a labor union and are thereby bound by the terms of a collective bargaining agreement.

It is unlikely that any collective bargaining permits an employer to unilaterally and sua sponte terminate a member because that individual is absent due to a work-related injury. It is far more likely that the labor agreement provides for employment protection so long as the employee remains disabled due to the allowed conditions in this claim. This is not to suggest that a union member cannot be terminated "for cause." However, it is unlikely that absence due to a work injury will not be considered "for cause."

AT-WILL

A final note on "at-will" employment terminations — as stated in Merz, "either the employer or the employee can terminate the employment relationship at any time, for any reason, with or without notice."

It would be interesting to find a case where either the employer or employee didn't have a reason for terminating the employment relationship. There is always a reason. If that reason is one that doesn't violate state or federal employment laws, it is always a better choice to articulate the reason instead of relying on "at-will."[4]

[1] In cases where an employee misses more than 14 days, compensation will be paid for the first seven days.

[2] Special provisions are also in place to protect those affected by the deployment of a service member or care of an injured service member returning from service.

[3] There are some exceptions to this. Where the physician estimates a return to work that is well beyond the 12 weeks, leave must not be provided. Additionally, if the employee is the subject of disciplinary action that would result in termination, the employer is not required to protect the leave. This could be important in a workers' compensation case resulting in a serious health condition (such as amputation) where the injured worker tested positive for illegal substances on a post-injury drug screen. While the employee may have a valid workers' compensation claim, the employer is entitled to terminate the employee for violation of its substance abuse policy and the FMLA would not serve to protect that employment.

[4] Disclaimer: This article is meant to provide general information only and is not a substitute for legal advice. Readers should seek the advice of their attorney or contact Liz Crosby directly. This article may not be reprinted without the express permission of Buckley King. ©2016

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May

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
16	17 **Estate Planning Section Lunch & CLE** **Grievance Committee Mtg.** **Minority Clerkship Program** – 4 p.m.	18 **CMBA Board of Trustees Mtg.** **Labor & Employment Section Lunch & CLE**	19 **Domestic Relations Full Day CLE** – 8 a.m. **O'Neill Committee Mtg.** – 11:30 a.m.	20 **Diversity & Inclusion Conference** – 8 a.m.
23 **Green Initiative Mtg.**	24 **Membership Committee Mtg.** **Veterans as Clients CLE** – 1 p.m.	25 **Greet the Judges & GCs** – 4 p.m. **3Rs Committee Mtg.**	26 **PLI** – 8:30 a.m. **Court Rules Committee Mtg.** **Reach Out for Nonprofits** – 4:30 p.m.	27
30	31			

June

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
		1 **O'Neill Institute** – 8:30 a.m. **WIL Section** **Diversity & Inclusion Committee** – 3:30 p.m.	2 **O'Neill Institute** - 8:30 a.m. **YLS Council Mtg.**	3 **CMBA 9th Annual Meeting** – 11 a.m. (Huntington Convention Center of Cleveland)
6 **PLI** – 8:30 a.m. **Stokes Scholars Orientation** – 8:30 a.m.	7 **Insurance Law Section Spring Seminar** – 8 a.m. **CMBF Executive Committee Mtg.** – 8:15 a.m. **PLI** – 8:30 a.m. **Insurance Law Section** **Grievance Committee Mtg.**	8 **PLI** – 8:30am **The Code of Kryptonite Professional Conduct CLE** – 9 a.m. **UPL Committee Mtg.** **Workers' Comp Section Mtg. & CLE** **Bankruptcy & Commercial Law Section EC Mtg.** **Fellows/3Rs Reception** – 4:30 p.m. (Music Box Supper Club)	9 **PLI** – 8:30am **LRS Annual Mtg.** **Ethics Committee Mtg.** **VLA Committee Mtg.** **Litigation Institute** – 2 p.m. **LRS Annual Meeting** – 3 – 4:30 p.m.	10 **Great Lakes Symposium** – 8:30 a.m. (The City Club of Cleveland) **PLI** – 9:30 a.m.
13 **PLI** – 8:30 a.m.	14 **Police Use of Force and Officer Liability CLE** – 1 p.m. **PLI** – 8:30 a.m. **Insurance Law Section** **CMBF Board of Trustees Mtg.** – 4:30 p.m.	15 **Labor & Employment and ADR Sections Lunch & CLE**	16 **Family Law Section Lunch & CLE** **Appellate Practice CLE** – 12:30 p.m.	17 **Pro Se Divorce Clinic** – 10 a.m. **Pro Se "Plus" Divorce Clinic** – 1 p.m.
20	21 **Hot Topics for Estate Planners** – 8:30 a.m. **PLI** – 9:30 a.m. **Pillars Program** – 10 a.m. **Estate Planning Section Luncheon** – 11:45 **Grievance Committee Mtg.**	22 **Got Drones? CLE** – 9 a.m.	23 **PLI** – 8:30am **Court Rules Committee Mtg.** **Small/Solo Section Mtg.** (Shula's 2) **YLS Summer Social** – 5 p.m.	24
27 **PLI** – 9 a.m. **CMBA Golf Outing** – 10 a.m. (Westwood Country Club)	28	29 **3Rs Committee Mtg.**	30	

All events are held at the CMBA Conference Center at noon unless otherwise noted. Information is current as of publication date.

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55 Public Square Building – Large corner office, 17th floor, Beautiful Lake Views, Secretary Space Available, Call Jim or Kevin at (216) 696-0600.

55 Public Square – Office available in nicely decorated suite with receptionist, fax and copier. (216) 771-8084.

Avon – New office space with multiple professionals. Great for networking. Desirable location across from Avon Commons on Detroit Road. Many included amenities. Contact Doug: (440) 937-1551.

Beachwood – Office Available. Possible work sharing. Renovated Suite. Garage available. (216) 244-3423

Beachwood – Green Road near Chagrin. Prime office space. Also small to large office suites in Class A building. Receptionist, Westlaw, conference room, office furniture included. Up to 6 offices available. $500 –$750 per office inclusive. Possible legal referrals. (216) 514-6400, ext. 324.

Beachwood – Office for lease, either fully furnished or vacant (216) 856-5600

Beachwood – Office in gorgeous suite on Chagrin. Copier, fax, conference room and other amenities provided. Possible litigation referrals. Contact Craig W. Relman. (216) 514-4981.

Beachwood – LaPlace Mall, corner of Cedar and Richmond near Beachwood Place and Legacy Village. Upper level, sunny office space available with the usual amenities. Separate area for assistant. Free underground parking. Call (216) 292-4666 or email limlaw@sbcglobal.net.

Bedford – Law Offices available with conference room/library, kitchen, receptionist, and mentoring from CJM grad with 40+ years legal experience. (440) 439-5959

Brecksville – Conference room and mailing services available in the Ganley Building for $50 or $150 per month. Possible legal referrals. (440) 526-6411, ask for Laurie.

Chagrin Falls – Furnished office available with other attorneys in eastside law firm. Chagrin Falls location with parking. $500/month includes office, WiFi, kitchen and conference room. Contact lawfirmchagrinfalls@gmail.com.

Downtown Cleveland – Rockefeller Bldg. @ W. 6th & Superior. Exceptional office space, exceptional value. All window space, no interior offices. Contact Ben Cappadora or Therese Manos at (216) 696-3929.

Fairview Park Office Space – Beautifully remodeled. Many amenities included. As low as $475 per month. Call (440) 895-1234 to schedule a visit.

Highland Heights – Fantastic offices available. Includes receptionist, waiting area, conference room, kitchen, phone, printer/copier/fax, Internet. Space available for paralegal/secretary. Contact Annette at (440) 720-0379 or asamber@hendersonschmidlin.com.

IMG Center – E. 9th and St. Clair – Office space available in suite with several other attorneys. Telephone, receptionist, fax, copier, secretarial available. Referrals possible. Contact Ty Fazio at (216) 589-5622.

Lakewood – Office Space – Comfortable revitalized century law office building on Madison Avenue with free parking. Large conference room. Contact Kenneth J. Knabe (216) 228-7200 or knabe@brownandszaller.com.

Leader Building – Office space available in elegant suite with several other attorneys, receptionist, optional secretarial space, library/conference room, fax, copier, telephone system, kitchen. (216) 861-1070 for information.

Mayfield Heights – Beautiful office space available with conference room, receptionist, all necessary law firm amenities, complementary practices. Rent negotiable. (440) 473-5262.

Mentor – Two offices available at Carrabine & Reardon. Expense sharing arrangement is negotiable. Great location! Contact Jim Carrabine at (440) 974-9911.

Parma/North Royalton – Office spaces in modern suite available now. Contact Paul T. Kirner at (440) 884-4300.

Rocky River – Office in nicely decorated suite. Cost effective for attorney practicing in western suburbs. Conference room/library, copier, fax, reception area. Call Patrick Talty at (440) 356-9400.

Superior Building – Offices available in professionally decorated suite. Congenial environment with possible referrals. Will also consider barter arrangement for younger attorney seeking to establish own practice. Jack Abel or Lori Zocolo at (216) 621-6138.

Terminal Tower – Law offices available in prime location with reception area, secretarial space, conference room, copier, fax and kitchen. Reasonable rent. Call (216) 241-2022.

Unique Cleveland Warehouse District Executive and Associate Offices with available full services, amenities, and referrals. Convenient to court houses, restaurants, and parking. Call Pam MacAdams (216) 621-4244.

For Sale

Nice Office Furniture – desk, credenza, chair, bookcases, filing cabinet, storage for case files, leather couch, computer desk, modern marble work table (216) 856-5600

Sligh Mahogany Leather – Top Desk and Matching 4-Drawer Credenza – Tower East Office in Shaker Heights. Madelon Sprague at (216) 310-2512 or MadiSprague@gmail.com

Services

Appraiser – Personal Property, Art, Antiques, Residential Contents. 15 years experience providing USPAP compliant personal property appraisals – divorce, estate/probate, family division. Gabrielle Goodman, ISA (216) 501-0666 – www.clevelandappraisalconsultants.com

Experienced Attorney willing to co-counsel cases in Cleveland and all municipal courts – Contact Joe at (216) 363-6050.

Experienced Attorney – Retired litigator, trial and appellate court judge, and law school professor available for litigation consultation. No charge. (440) 356-2728. rmmarkus1@cs.com

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Experienced Process Server – Super competitive prices – flat rate $50/address within Cuyahoga County. First attempt within 24 hours. Pente Legal Solutions (216) 548-7608 or lisa.vaccariello@pentellc.com

JD / Banking / CRE – Brown Gibbons Lang Real Estate Partners – Highly-experienced dealmakers in Healthcare, Hospitality, Industrial, Multifamily. Brian Lenahan (216) 920-6656 or blenahan@bglco.com.

Looking to slow down or starting to think about retirement? Attorney with established probate/estate planning/small business practice looking to expand current practice; (216) 245-8861

MarcoAuction.com – Court: Estate and Probate, Divorce, Power of Attorney; Real Estate: Residential and Commercial; Appraisals: Insurance, Jewelry and Antiques; and Chattle Items: Farming equipment – Marco Marinucci, Auctioneer – (440) 487-1878 or RealEstateAuctions39@yahoo.com

Premise Security Expert Witness and Consultant – 35 years experience – 6 years providing expert services to attorneys – Thomas J. Lekan, (440) 223-5730 or tlekan@gmail.com – ww.w.Thomas-J-Lekan-Security-Consulting.com

Trial Attorney – Experienced trial attorney in business litigation, personal injury, and complex family law. (25+ trials). Federal and State. stephen@neebittinger.com; (440) 782-7825.

Video Conference, Deposition Facility – Plaza West Conference Center, Rocky River offers conferencing and remote video, "smart" whiteboard conference facilities for 5–33 participants. plazawestcc.com (440) 333-5484.

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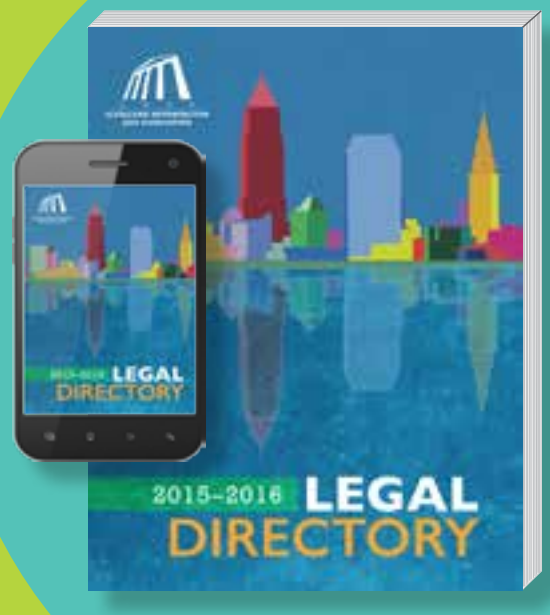

Did your miss having your ad or listing in the 2015 Legal Directory?

Deadline for advertising is June 10, 2016!

New Associations & Promotions

Roetzel & Andress LPA announced that **Robert E. Blackham,** Partner-in-Charge of the Cleveland office and National Practice Group Chair, has been elected as the firm's President.

Thrasher, Dinsmore & Dolan L.P.A. is pleased to announce that **Victor D. Radel** has joined the firm as a partner.

Taft is pleased to announce that **Eugene Roytberg** has joined Taft's Cleveland office as associates in the Business & Finance group.

Fisher & Phillips LLP announced that **Andrew Moses** has joined the firm as an associate. He will focus his practice on labor and employment law.

The law firm of Buckley King is pleased to welcome **Gregory S. Costabile** as a partner in its Litigation Practice Group.

Ulmer & Berne announces that business litigator **Stephen H. Jett** has joined the firm as partner.

The law firm of Gallagher Sharp is pleased to announce that **R. Scott Heasley** has joined the firm as an Associate in the firm's Business and Employment and General Litigation Practice Groups.

Honors

BTI Consulting Group has named **Ulmer & Berne** to the Honor Roll of Most Recommended Firms in its newly released BTI Brand Elite 2016: Client Perceptions of the Best-Branded Law Firms.

Fisher & Phillips LLP announced that **Sarah Moore** was recently selected as a 2016 Distinguished Legal Writing Award winner as a result of her "Employers: Prepare to Enter the 'Drone Zone'" article. She is the only Ohio recipient of this year's Burton Awards, and is one of only 35 authors chosen from nominations submitted by the nation's top 1,000 law firms.

Michael D. Goler and **Kenneth M. Lapine** of Miller Goler Faeges Lapine LLP have again been selected for inclusion in the 6th Edition of "Best Law Firms" by U.S. News and Best Lawyers. Mr. Goler is included for his work in Real Estate, and Mr. Lapine for his work in Banking and Real Estate.

Giffen & Kaminski LLC is pleased to announce its inclusion in this year's "Best Law Firms" list, as reported by U.S. News & World Report and Best Lawyers.

Elections & Appointments

Gregory P. Stein, Vice Chair of Ulmer & Berne's Data Privacy & Information Security Practice, has earned the designation of Certified Information Privacy Professional for the U.S. through the International Association of Privacy Professionals.

Eddie Chyun was recently selected by Littler to participate in the LCLD Fellows program, which identifies high-potential attorneys to pursue leadership paths through networking and peer-group projects. Eddie's selection follows his recent elevation to shareholder of the firm and appointment to co-chair of the National Asian Pacific American Bar Association's Labor and Employment Committee.

The following are new board leadership of the Legal Aid Society of Cleveland: **Elizabeth "Betsy" Rader** – Vice President (Thorman Petrov Group), **Karen Giffen,** (Giffen & Kaminski) – Vice President, and **Frank R. DeSantis** (Thompson Hine) – President Emeritus. **Barbara Roman** (Meyers, Roman Friedberg & Lewis) is a new board member.

Buzz Rosenfeld, now residing in Georgetown, Texas, is pleased to announce that he has been appointed to the panel of arbitrators for FINRA, the financial industry regulatory authority.

Karen L. Giffen and **Kerin Lyn Kaminski** of Giffen & Kaminski LLC received invitations to join the Fellowship of the Litigation Counsel of America™.

Announcements

Tucker Ellis LLP is pleased to announce the opening of an office in Chicago, IL, expanding its national litigation practice. Through this initiative the firm's footprint grows to seven offices and 200 attorneys.

Kaufman & Company LLC, a national trial and business litigation law firm, has opened a Washington, DC office – **Kaufman Schwartz & Company PLLC.**

Gary Lieberman, David Dvorin and **Darren Dowd** along with their staff are pleased to announce the formation of **Lieberman, Dvorin & Dowd, LLC.** A full service real estate, business, and litigation law firm formed with a solution oriented focus.

Hugh Berkson of McCarthy, Lebit, Crystal & Liffman Co., LPA, in his current role as president of the Public Investors Arbitration Bar Association, recently authored a report on unpaid arbitration awards that gained press coverage and the attention of Senator Elizabeth Warren during a recent hearing on Regulatory Reforms.

Diane Citrino of Giffen & Kaminski LLC was one of three Northeast Ohio Attorneys recognized for their pro bono work in the John Ettorre article entitled, "Giving Credit Where It's Due."

Something To Share?

Send brief member news and notices for the Briefcase to Jackie Baraona at jbaraona@clemetrobar.org. Please send announcements by the 1st of the month prior to publication to guarantee inclusion.

Cleveland Metropolitan Bar Association
1375 East 9th Street, Floor 2, Cleveland, Ohio 44114-1785

May 2016

CMBA

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