# insights

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A Newsletter from Shumaker, Loop & Kendrick, LLP | December 2016



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## SHINING LIGHT INTO THE HEART OF DARKNESS:

# An Update on the Cuban Embargo

### I. Executive Summary

Sixty years after the imposition of the Cuban Embargo, the orthodoxy and ideology that caused it to persist are no longer relevant from the standpoint of the affected parties. From Cuba's point of view there is little chance that the United States will compromise the sovereignty of Cuba by means of invasion or annexation. Further, given the pressures imposed by globalization, specifically social media, the economic deprivation facing Cubans is a ticking time bomb which will ultimately undo the current regime unless it adapts to the new realities. On the other hand, the United States stands to benefit both economically and diplomatically from an economically resurgent Cuba. The recent loosening of the Cuban Embargo and the parallel establishment of diplomatic relations between Cuba and the United States is but a tentative first step, a shadowy glimmer of light into the heart of darkness. According to conversations the author has had with knowledgeable sources that have traveled to Cuba, there will be no significant progress in economic relations between the United States and Cuba so long as the Cuban Embargo remains in effect. So, while the Cuban Embargo no longer has a substantive geopolitical underpinning, it remains very much alive. While "Fidel" has only nominally been in power, his influence is still strongly felt and there is no appetite in Cuba to move forward with increased economic ties with the United States until the Cuban Embargo is lifted. Whether this will change given Fidel's death remains to be seen; however, it is inevitable that at some point, in one way or another, economic relations between the United States and Cuba will be normalized. It behooves individuals and businesses to take advantage of the current opportunities presented by the softening of the impact of the Cuban Embargo and the establishment of diplomatic relations between the United States and Cuba to commence lawful activities in Cuba. Those who establish business and social connections now will be in a position to be the first to take advantage of the economic opportunities in Cuba once the Cuban Embargo is lifted.

By Moses Luski

### II. Historical Background

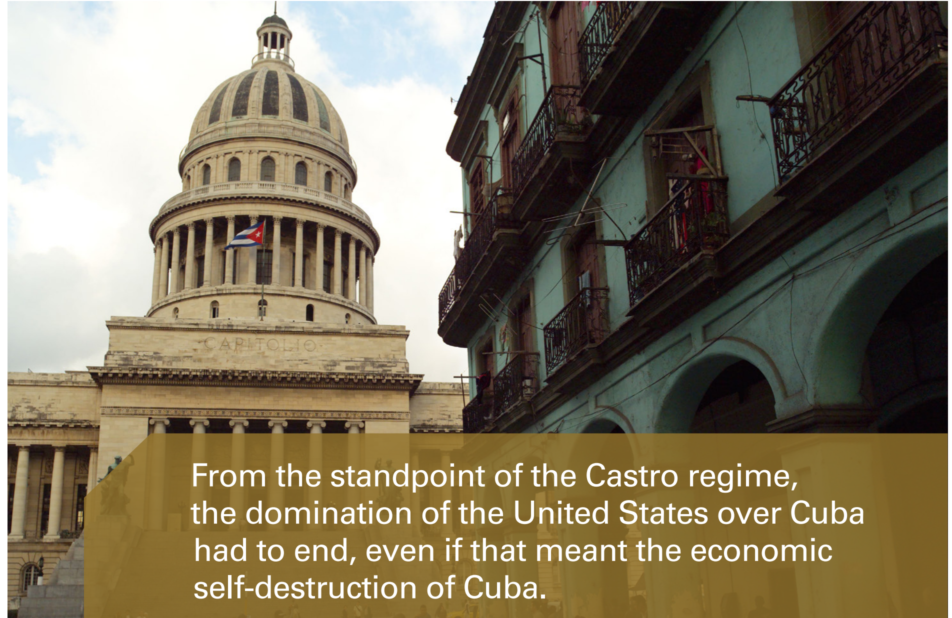
Any review of the Cuban Embargo imposed upon Cuba by the United States must take note of the ferocity of its persistence over sixty years even after it served no geopolitical purpose or advantage to either side. It is certain that the failings of the Cuban government are legion and inexcusable and that the United States, despite its many flaws, is a bastion of liberty and individual rights. Yet, the standing of the United States as a paragon of liberty has not kept it since imposition of the Cuban Embargo from negotiating or trading with China, Vietnam, Iran and any number of reprehensible or ideologically incompatible regimes. It makes absolutely no sense for the United States to curtail economic activity with Cuba. From Cuba's point of view it is certain that the past behavior of the United States toward it has not been admirable. But is the cost of maintaining its morally


Nationwide preliminary injunction issued against DOL overtime rule. See page 8.

based vendetta against the United States really worth the extreme toll it has taken on the country and its citizens? A cynic could surmise that this vendetta is a convenient ruse for keeping the current regime in power.

What then lies within this heart of darkness that is the Cuban Embargo? A brief look at history is instructive. As the Spanish retreated from the Caribbean in the 18th and 19th centuries, Cuba, most especially due to its proximity and ample natural resources, inescapably fell under the political and economic dominance of the United States. In 1820, former President Thomas Jefferson, writing to Secretary of War John C. Calhoun, stated that Cuba was "the most interesting addition which could ever be made to our system of states" (Schlesinger, Arthur, Jr., *The American Empire? Not So Fast*, 22 World Policy Journal, 43, 44 (2005)). Later in a letter to the United States Minister to Spain, Secretary of State John Quincy Adams predicted the ultimate United States annexation of Cuba: "But there are laws of political as well as of physical gravitation; and if an apple severed by the tempest from its native tree cannot choose but fall to the ground, Cuba, forcibly disjoined from its own unnatural connection with Spain, and incapable of self-support, can gravitate only towards the North American Union . . ." (Jane Franklin, Cuba and the U.S. Empire: A Chronological History, 3 (NYU Press, 2016)).

It should come as no surprise, then, that during the 19th and 20th centuries, regardless of the status of Cuban sovereignty, the United States dominated the economy of Cuba, and, in essence, Cuba was a protectorate of the United States and at times actually a legal protectorate.




From the standpoint of the Castro regime, the domination of the United States over Cuba had to end, even if that meant the economic self-destruction of Cuba.

By the 1950s, Cuba was controlled by a dictator friendly toward the United States, Fulgencio Batista. Unfortunately, Batista's behaviors became so unacceptable that the United States tacitly supported the emergence of Fidel Castro, who it was thought would be a more socially benevolent dictator. Needless to say, the emergence of Castro did not quite work out the way the United States had planned. In the blink of an eye the United States was faced with a repressive Stalinist state ninety miles from its borders which early on posed an existential threat to the mainland due to the presence of Soviet nuclear missiles. Quite a turn of events!

The darkness that is inherent in the heart of the Cuban Embargo then is the unyielding determination by the United States to get rid of the Castro regime which had betrayed the United States and made Cuba into a Soviet forward base and the unstinting determination of the Castro regime to stand up to the United States at all costs. From the viewpoint of the United States, Castro's adoption of a Marxist/Leninist form of government was an unforgiveable act of betrayal and defiance which made Castro into an irredeemable pariah. From the standpoint of the Castro regime, the domination of the United States over Cuba had to end, even if that meant the economic self-destruction of Cuba. There are many other subplots within this impasse, not the least of which was the suppression of individual liberty in Cuba; another subplot being the use of the existence of the Cuban Embargo as a propaganda tool by both sides.

## III. Basic Framework of the Cuban Embargo

While there have been layers upon layers of legislation and regulation enacted since the early 1960s that have formed what is known as the "Cuban Embargo," the specifics of the Cuban Embargo are mostly found in the Cuban Assets Control Regulations (CACR) and the Export Administration Regulations (EAR).

Passed in 1963 under the authority of both the Trading with the Enemy Act and the Foreign Assistance Act, the CACR provides detailed regulations controlling all trade and commerce with Cuba. Over time, amendments to the CACR have been made and, most recently, amendments made in 2015 and 2016 under President Obama's encouragement have liberalized relations between the two countries. Similarly, the EAR provides the framework for the regulation of all exports from the United States. Under the EAR, all items subject to its regulation must receive a license from the Bureau of Industry and Security prior to exportation, unless authorized by a specific license exception. While recent amendments to the CACR have allowed for some increased travel and commercial activities, the EAR still largely restricts all exports from the United States to Cuba.

## IV. Recent Amendments to the Cuban Assets Control Regulations (CACR)

Since President Obama's announcement of a resumption of diplomatic relations between the United States and Cuba in 2014, the CACR has been amended four times and interactions between the two countries have increased significantly. First, in January of 2015, the CACR was amended to relax restrictions on travel, financial services, remittances, and general support for the Cuban people.[1] Ultimately, the January 2015 amendments to the CACR were the beginning of an effort to liberalize social, political, and economic relations between the countries and have since been followed by three subsequent amendments that have followed this liberalizing trend. In September 2015, the Department of the Treasury and the Department of Commerce issued additional regulations to the CACR that affected three main areas: physical presence and operations in Cuba, remittances, and legal services.[2] In January and March 2016, the CACR was further liberalized through amendments regarding the financing of exports, the financial services industries, and travel between the two countries.[3]

### A. Restrictions on Travel and the Purchase/Sale of Cultural Commodities.

Prior to the January 2015 amendments, travel was only authorized to Cuba under a specific license for one of 12 purposes.[4] Post-amendments, an individual is no longer required to apply for a specific license for one of the 12 purposes and instead may travel under a general license to Cuba for one of the purposes. Travel for any other purpose still requires the issuance of a specific license by the Office of Foreign Asset Control (OFAC). In addition to expanded travel purposes, travel agents and airlines may now provide services without seeking a license from the OFAC. The 2016 amendments also significantly expanded the abilities of individuals to travel to Cuba by increasing the number of authorized purposes for travel and the range of transactions available to individuals during authorized travel.

By far the biggest impact on United States–Cuba relations, the 2015 and 2016 amendments to the CACR allowed for increased travel opportunities and cultural exchange between the two countries. Prior to the amendments, travel was permitted to Cuba only under a specific license issued by the OFAC. There were limited reasons to obtain a specific license and the OFAC was reluctant to grant them. Post-amendments, individuals may travel to Cuba under one of 12 general licenses or alternately apply to the OFAC for a specific license for travelling for another purpose. The shift from specific to general license has allowed for much easier travel because the OFAC generally approves all travel under a general license, while requiring a much stricter review process for specific licenses.

One of the most important new general licenses issued is that for travel for the express purpose of exporting, importing and transmitting informational materials. Informational materials are defined as "publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, CDs, CD-Roms, artworks, news wire feeds and other informational materials." However, all informational materials must be originals and not reproductions. Additionally, they may not be commissioned or alterations of originals. Prior to the recent amendments to the CACR, travel for the express purpose of exchanging informational materials was prohibited and monetary restrictions on items transported to or from Cuba were in place. Now, travel may be made for the express purpose of purchasing/selling informational materials and all payment restrictions have been removed. Thus, there are now significant opportunities for cultural exchange between the two countries.

### B. Restrictions on the Provision of Financial Services.

In regard to financial services, the January 2015 amendments to the CACR allow the financial services industry to participate in two new areas in Cuba. First, they allow United States financial institutions to issue and process debit and credit card transactions related to travel to Cuba. Second, financial institutions may now open and maintain accounts with Cuban banks to facilitate the processing of authorized transactions. These amendments will allow for the United States and Cuban nationals to participate more easily and efficiently in commercial activity between the two countries. The 2016 amendments also allow the United States financial system greater access to Cuba and Cuban nationals. These amendments provide three gains for the United States financial system: (1) United States banking institutions are now able to process U-turn transactions in which Cuba or a Cuban national has an interest;[5] (2) United States banking institutions are now able to process United States dollar monetary instruments, including cash and travelers' checks, presented indirectly by Cuban financial institutions; and, (3) United States banking institutions are now able to open and maintain bank accounts in the United States for Cuban nationals in Cuba to receive payments in the United States for authorized or exempt transactions and to remit such payments back to Cuba. These amendments, combined with the 2015 amendments, further facilitate economic relations between the two countries and allow for easier payment for goods and services.

### C. Restrictions on Importation/ Exportation of Commodities.

The January 2015 amendments to CACR authorized exports and re-exports (these are items that are allowed to be exported under a general license or specific license issued by the Office of Foreign Asset Control) to Cuba to provide support for the Cuban people in three areas: improving living conditions and supporting independent economic activity, strengthening civil society, and improving communications. In order to accomplish these goals, the amendments allow for the export of certain materials to private corporations and individuals, as long as they are not supported by the Cuban government. Under the January 2016 amendments, financing restrictions on authorized exports and re-exports, other than agricultural commodities and agricultural items, were removed. Previously, all authorized exports and re-exports to Cuba must have been paid for in cash in advance or through third-country financing. These amendments now allow for payment of authorized exports by payment of cash in advance, sales on an open account, and financing by third-country financial institutions or United States financial institutions. However, all payment for exports of agricultural commodities and agricultural items are still restricted to cash-in-advance or third-country financing. These payment restrictions severely limit the ability of United States businesses to compete against other countries for agricultural sales to Cuba, as exporters in those countries are able to leverage their sales to Cuba by extending credit and favorable payment terms, while United States exporters are prohibited from doing so. It is also important to note that while authorized exports may be made and financed in an increasingly liberalized manner, all exports and re-exports of items for use by any Cuban organization that primarily generates revenue for the Cuban state is still subject to a general policy of denial.

While the recent amendments to the CACR have increased travel and cultural exchange opportunities, the EAR still largely restricts commercial activity between the two countries. First, only accompanied baggage merchandise, certain goods produced by independent Cuban entrepreneurs, Cuban-origin software, and informational materials from Cuba may be imported into the United States. Second, the export or re-export of all items subject to the EAR to Cuba is not permitted without a license or applicable license exception. However, the following items are subject to a general policy of approval for export under an EAR license: items for safety of civil aviation, items for safety of commercial aviation, certain telecommunications and agricultural items, items to human rights organizations or individuals and non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba, and items for use by United States news bureaus. While these limited exceptions have opened up some commercial relations between the two countries, commercial activity is still severely restricted and all U.S investment in Cuba is prohibited, unless provided for in a specific license.

### D. Restrictions on Establishing and Maintaining a Physical Presence in Cuba.

Pursuant to the September 2015 amendments, individuals subject to United States jurisdiction can now establish and maintain a physical presence in Cuba for an authorized purpose. This purpose includes maintaining a location for the exportation of certain authorized goods, for news-gathering, for entities conducting educational, religious, or charitable activities, and several other purposes.[6]

### E. Restrictions on Donative Remittances.

The limit on remittances, previously set at $500 per quarter, was raised to $2,000 per quarter under the January 2015 amendments. Under the September 2015 amendments individuals are now able to make donative remittances in an unlimited amount to Cuban nationals other than remittances to the Cuban government or Cuban officials, which are still prohibited. Previously, the limit on donative remittances was set at $2,000 per quarter. As well as removing the limit on donative remittances that may be sent to Cuba, the $10,000 limit on authorized remittances that individuals may carry to Cuba was removed entirely.[7]

### F. Restrictions on United States Attorney's Provision of Legal Services.

Finally, the September 2015 amendments expanded the ability of United States individuals to provide and receive payment for providing legal services to Cuban nationals.[8] These amendments broadly allowed the provision of legal services for one of five authorized purposes and established the manner in which individuals may be compensated for providing these services.

Although the recent amendments to the CACR have liberated relations between the two countries, they did not provide much change to the provision of legal services. OFAC's existing general license authorizing the provision of one or more of five categories of legal services to Cuban nationals remains in place. These categories largely revolve around the provision of legal services to a Cuban national involved in the United States legal system and do not allow legal services to Cubans involving Cuban state issues. However, the amendments to the CACR did make one important change in legal services. The recent amendments now allow United States Attorneys to receive payment for legal services directly from Cuban sources, which was previously prohibited. Additionally, a new general license created by the amendments will authorize persons subject to United States jurisdiction to receive, and make payments for, certain legal services provided by Cuban nationals. These two amendments will facilitate the provision of legal services which is a fundamental building block to establishment of normalized relations.

## V. Cuban Expropriations of Property

There have been no recent changes to the United States' policy toward Cuba on the expropriation of United States nationals' property. A full lifting of the Embargo is still tied to the compensation by Cuba of all United States expropriated property.

## VI. Presidential Authority under The Trading with the Enemy Act (TWEA)

The Trading with the Enemy Act (TWEA) was originally legislated in 1917 against Germany during World War I. The TWEA gives the President the power to oversee or restrict any and all trade and travel between the United States and its enemies in times of war or perceived national security threat. The TWEA has to be renewed annually by the sitting President and Cuba remains the only country to which the TWEA still applies.

The TWEA gives the President the power to oversee or restrict any and all trade and travel between the United States and the country it is used against and to determine how forcefully those measures should be implemented. The TWEA grants considerable flexibility to the President and since the historic December 2014 announcement by Presidents Obama and Castro announcing a new course in relations between the United States and Cuba, President Obama has used his presidential authority to weaken the Embargo and travel restrictions, made possible only under the provisions of the TWEA.

In 1977, Section 5(b) of the TWEA was amended to limit the President's power to times of war, but at the same time the International Emergency Economic Powers Act (IEEPA) was enacted to cover the President's exercise of emergency economic powers in response to peacetime crises (§203 of the IEEPA granted essentially the same authorities to the President as those in § 5(b) of the TWEA). However, rather than requiring the President to declare a new national emergency in order to continue existing economic embargoes, such as

that against Cuba, Congress enacted a grandfather clause providing that notwithstanding the amendment to the TWEA, the "authorities conferred upon the President" by § 5(b), which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, "may continue to be exercised."

By re-signing the TWEA and extending the Embargo for another year, President Obama was able to maintain and accelerate the normalization process with Cuba. The President's re-signing of the TWEA guarantees he is able to sustain his authority to weaken the Embargo and travel restrictions for another year. If he had not re-signed the TWEA, then all of the legislation that covers the Embargo and travel restrictions would devolve completely under the control of Congress, where President Clinton placed it in 1996 when he re-signed the Helms-Burton Act.

The Helms-Burton Act was enacted in response to a 1996 incident in which the Cuban air force shot down two civilian planes belonging to the Miami-based anti-Castro initiative, Brothers to the Rescue. Congress passed the Helms-Burton Act in an attempt to place a stranglehold on Cuba's economy in order to facilitate its long-term goal of expelling Castro from office. The Act codified the economic sanctions against Cuba and established a framework for ending the economic embargo of Cuba.[9] The Helms-Burton Act mandates that the Embargo will remain in effect until two events occur. First, the President must determine with the approval of Congress that Cuba is moving toward a free and democratically elected government. The applicable section reads:

> Upon submitting a determination to the appropriate congressional committees under section 203(c)(1) that a transition government in Cuba is in power, the President, after consultation with the Congress, is authorized to take steps to suspend the economic embargo of Cuba and to suspend the right of action created in section 302 with respect to actions thereafter filed against the Cuban Government, to the extent that such steps contribute to a stable foundation for a democratically elected government in Cuba.[10]

For purposes of this section, the "economic embargo of Cuba" is defined to include all restrictions on trade, travel, and transactions involving property in which Cuba or a Cuban national has an interest found under provision of law.[11] Second, there must be a procedure in place for the settlement of all claims with regard to the Cuban expropriation of United States nationals' and businesses' property.[12] Congressional legislation does not provide any flexibility to alter or diminish the embargo without further legislative action. The provisions in the Helms-Burton Act will remain in effect until repealed by Congress. However, the vast majority of the restrictions on Cuba are found in the TWEA, which only the President can alter. Thus, the President can significantly relax or tighten relations between Cuba and the United States without Congressional action. If the anti-Cuba legislation in Congress is repealed, the President will no longer need to re-sign the TWEA to maintain control over the specifics of the Embargo.

In a sense, the Helms-Burton Act serves as a check against Presidential authority under the TWEA by stating the sense of Congress as to the conditions that must exist for the Cuban Embargo to lift. Yet, rather than repealing the TWEA and directly codifying the provisions of the Cuban Embargo, Congress let the TWEA stand, thus preserving the considerable power of the President to regulate the Cuban Embargo, provided he renews the TWEA annually. It's a curious standoff that essentially acts as an indirect check on Presidential authority, which leaves the author with these questions: What if the President were to repeal the entire Cuban Embargo, but continue to renew the TWEA? Presumably the Cuban Embargo would disappear, to the outrage of Congress. What if a future president, after the aforementioned hypothetical repeal of the Cuban Embargo regulations promulgated under the TWEA let the TWEA lapse? The Cuban Embargo as it existed in 1996 would automatically be recodified under the provisions of the Helms-Burton Act. While legally plausible, neither of these actions would seem to be politically plausible. The "bi-polar" nature of the interplay between TWEA and the Helms-Burton Act reflects the implacable emotion and hostility that darkens relations between the United States and Cuba and prevents the two countries from dealing with each other in terms of rational self interest as most countries do.

### VII. Conclusion

The Cuban Embargo is like a permanent eclipse which has darkened relations between the United States and Cuba for sixty plus years. As a result, two generations of Americans and Cubans have been profoundly affected by this lack of contact. The recent actions of

President Obama are a shining and welcome light into this darkness. Realistically, though, it will take at least one generation for relations between the two countries to normalize.

### Postscript: The Trump Effect

The best way to handicap the effect of Donald J. Trump's surprise election as President is to paraphrase a famous Churchill dictum: "I cannot forecast to you the actions of President Trump. It is a riddle wrapped in a mystery, inside an enigma; but perhaps there is a key. That key is Trump's self-interest as a business man." As reported by the BBC, during the campaign Mr. Trump famously zigzagged around the issue of Cuba relations. Early in the campaign during a CNN televised debate he stated "Fifty years is enough time, folks." Later in the campaign when Florida hung in the balance, he promised to roll back the Obama détente. Ultimately, as reported by the BBC, "63% of Cuban-Americans in Miami want to see the Embargo lifted." Given Mr. Trump's business background and the strong public support behind the lifting of the Embargo, it is reasonable to calculate that the relaxation of the Embargo will continue to move forward, albeit at a slower pace.

President-elect Trump's recent pronouncements after Castro's death that the United States would reverse course on its Cuba policy unless its demands were met is consistent with the foregoing analysis. Trump's statements seem to be more about striking a negotiating posture than annunciating a substantive shift in policy.

## VIII. Acknowledgment

The author would like to acknowledge the outstanding contributions to this Article made by Giles D. Beal, IV, a Summer Associate with Shumaker, who enthusiastically took on the task of analyzing in depth the law of the Cuban Embargo. Opinions expressed in this Article are those of the Author and not Shumaker, Loop & Kendrick, LLP.

## IX. Table of Authorities

**Statutes & Regulations**

Helms–Burton Act, Pub.L. 104–114, 110 Stat. 785, 22 U.S.C. §§ 6021–6091 (1996)

Helms-Burton Act, 22 U.S.C. § 6064(a) (1996)

Helms-Burton Act, 22 U.S.C. § 6023(7)(A) (1996)

Helms-Burton Act, 22. U.S.C. § 6067(d) (1996)

31 CFR § 515.573 2015

31 CFR § 515.570 2015

31 CFR § 515.512 2015

**Press Releases**

U.S. Department of the Treasury, Press Center, FACT SHEET: *Treasury and Commerce Announce Regulatory Amendments to the Cuba Sanctions,* (Jan. 15, 2015) https://www.treasury.gov./press-center/press-release/Pages/j19740.aspx

U.S. Department of the Treasury, Press Center, *Treasury and Commerce Announce Further Amendments to the Cuba Sanctions Regulations,* (Sept. 18, 2015) https://www.treasury.gov/press-center/press-release/Pages/j10169.aspx

U.S. Department of the Treasury, Press Center, *Treasury and Commerce Announce Further Amendments to the Cuba Sanctions Regulations,* (Jan. 27, 2016) https://www.treasury.gov/press-center/press-releases/Pages/jl0328.aspx

U.S. Department of the Treasury, Press Center, *Treasury and Commerce Announce Significant Amendments to the Cuba Sanctions Regulations Ahead of President Obama's Historic Trip to Cuba,* (Mar. 15, 2016) https://www.treasury.gov/press-center/press-releases/Pages/jl0379.aspx

## X. Footnotes:

[1] U.S. Department of the Treasury, Press Center, FACT SHEET: *Treasury and Commerce Announce Regulatory Amendments to the Cuba Sanctions,* (Jan. 15, 2015) https://www.treasury.gov./press-center/press-release/Pages/j19740.aspx.

[2] U.S. Department of the Treasury, Press Center, *Treasury and Commerce Announce Further Amendments to the Cuba Sanctions Regulations,* (Sept. 18, 2015) https://www.treasury.gov/press-center/press-release/Pages/j10169.aspx.

[3] U.S. Department of the Treasury, Press Center, *Treasury and Commerce Announce Further Amendments to the Cuba Sanctions Regulations,* (Jan. 27, 2016); U.S. Department of the Treasury, Press Center, *Treasury and Commerce Announce Significant Amendments to the Cuba Sanctions Regulations Ahead of President Obama's Historic Trip to Cuba,* (Mar. 15, 2016).

[4] These categories are: family visits; official business of the United States government, foreign governments, and certain intergovernmental organizations; journalistic activity; professional research and professional meetings; educational activities; religious activities; public performances, clinics, workshops, athletic and other competitions;

support for the Cuban people; humanitarian projects; activities of private foundations or research or educational institutes; exportation, importation, or **transmission of information or informational materials**; and certain authorized export transactions.

[5] A "U-turn" transaction between the United States and Cuba occurs where a United States financial institution processes certain funds transfers for the direct or indirect benefit of Cuban banks, other persons in Cuba or the Government of Cuba, provided such payments were initiated offshore by a non-Cuban, non-United States financial institution and only passed through the United States financial system en route to another offshore, non-Cuban, non-United States financial institution.

[6] 31 CFR § 515.573.

[7] 31 CFR § 515.570

[8] 31 CFR § 515.512

[9] Pub. L. 104-114 (1996); 22 U.S.C. §§ 6021-6091.

[10] 22 U.S.C. § 6064(a).

***For additional information, contact Moses Luski at mluski@slk-law.com or 1-800-797-9646, ext. 2161.***

## Federal Court Temporarily Blocks Implementation of Amendments to Overtime Rule for Employers Nationwide

On November 22, 2016, Judge Amos L. Mazzant of the United States District Court for the Eastern District of Texas issued a nationwide preliminary injunction against the Department of Labor's ("DOL") updated white collar exemption overtime regulations (the "Final Rule"), which were to go into effect on December 1, 2016. As a result, employers nationwide are no longer required to meet this deadline, and the Final Rule did not go into effect on December 1. The Final Rule, which would have expanded overtime eligibility to an estimated 4.2 million white collar workers, would have increased the minimum salary level of exempt executive, administrative, and professional employees from $455 per week ($23,660 annually) to $913 per week ($47,476 annually). It would also, among other things, establish a mechanism pursuant to which the salary levels would automatically update every three years, with the first increase to occur on January 1, 2020.

Finding that Congress intended the white collar exemptions to depend on an employee's duties rather than his or her salary, the Court held that the Final Rule is unlawful because the DOL, through the Final Rule, "exceed[ed] its delegated authority and ignore[d] Congress's intent by raising the minimum salary level such that it supplants the duties test." Due to the unlawfulness of the Final Rule, the Court also concluded that the DOL lacked the authority to implement the automatic updating mechanism.

Although the preliminary injunction afforded employers nationwide a reprieve from the Final Rule's December 1st effective date, the fate of the Final Rule will remain unsettled until the Court ultimately rules on the validity of the Final Rule or the DOL successfully appeals to the Fifth Circuit Court of Appeals. Given this uncertainty, employers should continue to finalize their compliance plans to ensure that any necessary employee reclassifications and/or policy revisions are ready for implementation should the Final Rule later become effective. We will continue to update you as the case progresses so that you can keep your workforce well-informed and make all necessary changes in a timely manner.

***For additional details on the scope of the DOL's final rule, see "Employers Should Begin Preparing for New Overtime Rules" in the Spring 2016 edition of INSIGHTS and "Evaluating Your FLSA Compliance in Advance of the 2016 Updates: A Checklist for Employers" in the Autumn 2015 edition of INSIGHTS.***

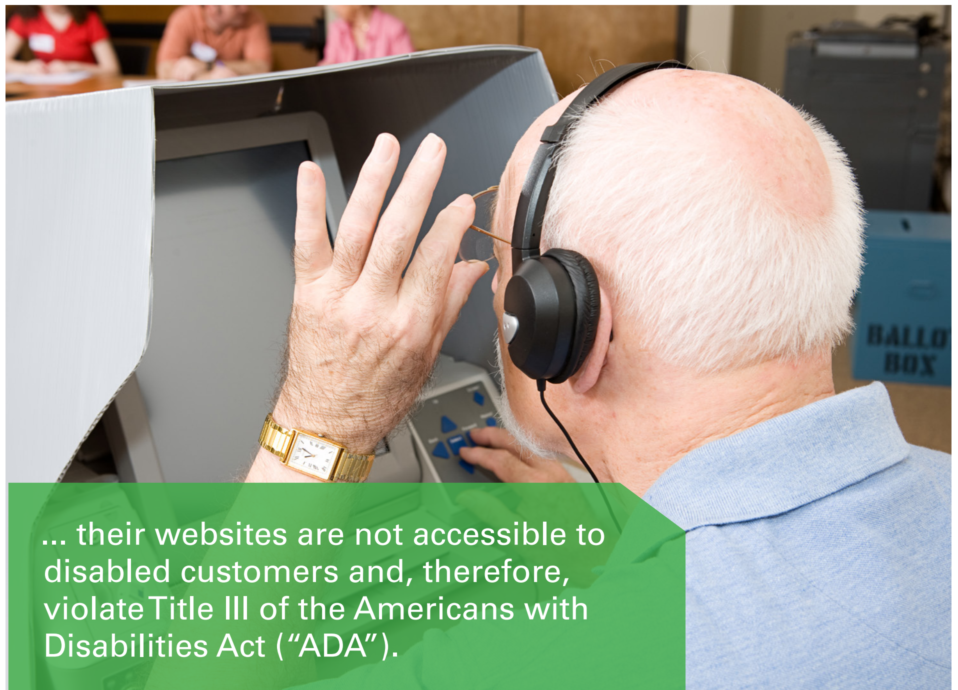
***For additional information contact Mechelle Zarou at mzarou@slk-law.com, 800-444-6659 ext. 1460 or Kate Decker at kdecker@slk-law.com, ext. 1452.***

# Disabled Users' Access to your Website: A New Litigation Threat

By Robert A. Koenig

Over the last year, demand letters have been received by a diverse group of Shumaker clients asserting that their websites are not accessible to disabled customers and, therefore, violate Title III of the Americans with Disabilities Act ("ADA").

Certain members of the Plaintiff's bar appear to have created a cottage industry which fishes for any and all businesses that have websites offering any kind of "products or services" and proposes negotiating "on an expedited basis" a settlement agreement related to ADA accessibility to the business' website. The draft settlement agreement requires injunctive relief (and, of course, payment of "reasonable attorney's fees" and costs), initiation of a needs assessment on the website, monthly third-party testing and monitoring, as well as initiation of new ADA accessibility policies and staff training.




... their websites are not accessible to disabled customers and, therefore, violate Title III of the Americans with Disabilities Act ("ADA").

Entering into such a settlement agreement would **not,** however, protect your business from other disabled claimants or class actions suits brought by other disabled customers (the draft settlement agreement expressly states that the release of claims **is only from "Claimant's claims"**) or an enforcement suit brought by the Department of Justice ("DOJ"). There is a provision in the draft agreement that appears to provide indemnification from other ADA claims but in reality it is only a commitment for the claimant's law firm to "use best efforts" to assist in preventing additional potential website claims from being brought against your company.

The draft settlement agreement would require 18 months of continued monitoring of the website and paying fees to third-party web monitors, as well as claimant's "reasonable attorney's fees." The draft agreement demands "**Confidentiality**" as to the terms of the agreement, the negotiations leading up to the agreement, and any disputes related to the agreement. Obviously,

the confidentiality provision is focused on preventing companies from comparing the terms of their individual agreements. The demand letter lists 18 cases filed by the claimant's attorneys in U.S. District Courts asserting violations of the ADA for access limitations on websites against companies such as Sears, Toys "R" Us, Brooks Brothers, and Adidas. Note that 16 of these cases were settled as part of a single mediation in February 2016 and the other two were settled within 6 months of filing and before answers were filed.

Unfortunately, there is little clarity today as to what standard of ADA accessibility actually applies to the websites of private businesses and non-profit organizations. We can however make recommendations to reduce the potential exposure of defending against individual or class action ADA claims or enforcement actions brought by the DOJ.

### Websites, the ADA and Available Accessibility Standards

The Americans with Disabilities Act provides that"[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns . . . a place of public accommodation." See 42 U.S.C. § 12182. To date, few courts have concluded that the ADA applies to private commercial websites, however, several have denied motions to dismiss finding that: **"In a society in which business is increasingly conducted online, excluding businesses that sell services through the Internet from the ADA would 'run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.'"** [*National Association of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass 2012)]. Such courts have concluded that websites **could** be considered a public accommodation because of the ever expanding role of the internet in our business and social lives.

Under the ADA, individuals can bring private actions under Title III for injunctive relief and if an injunction is issued, the court can award attorney's fees. See 42 U.S.C. § 12188(a)(2). Also the DOJ can initiate an enforcement action under the ADA to obtain monetary damages and/or equitable relief. See 42 U.S.C. § 12188(a)(1).

Most of the uncertainty as to what standard of ADA accessibility actually applies to the websites is the result of the DOJ's inaction in issuing regulations identifying website accessibility obligations in the private sector under Title III. Back in 2010, the DOJ issued an advance Notice of Proposed Rulemaking that it would issue new regulations under Title III of the ADA to address the accessibility of public accommodations websites. However, no rules were forthcoming. Instead, in November 2015, the DOJ announced that such rulemaking will be further **delayed until fiscal year 2018.** Without express regulatory guidance from the DOJ, the Level AA standards which are a part of the Web Content Accessibility Guidelines ("WCAG2.0"), published by the World Wide Web Consortium ("W3C") are the best set of standards to work with to achieve ADA compliance based upon information and statements made by the DOJ.

The W3C is an international community that develops open accessibility standards and is the main international standards organization for the internet. The W3C created guidelines for making content accessible, primarily for people with disabilities, but also for all software operating systems, including mobile phones. The current version of the Guidelines, WCAG 2.0, was published in December 2008.

Primarily, these Guidelines require that information and its user interface components be presented in ways they can perceive regardless of individual disabilities. Therefore, the guidelines require that websites: (1) Provide text alternatives for any non-text content so that it can be changed into other form such a large print, braille, speech or simpler language; (2) Make all functionality available from a keyboard; and (3) Make text content readable and understandable. The WCAG 2.0 Guidelines have been adopted by the legislatures or courts as creating "legal standards" in the United Kingdom, Canada, and Israel. In the US, the DOJ has used these Guidelines as the minimal standard that must be met under the ADA in settlement agreements with private entities.

### What Can Be Done to Limit Exposure?

With the DOJ pushing back the date for issuance of regulations setting the accessibility standards for websites until 2018, we recommend the following steps be taken to position your business or non-profit to limit exposure to ADA accessibility challenges:

a) Review primary web pages and make sure they are consistent with the Level AA accessibility guidelines (standards) of the WCAG2.0;

b) Identify and offer accessible alternatives, such as a staffed telephone line, or on-line chat function, for disabled users to access the goods and services on your website;

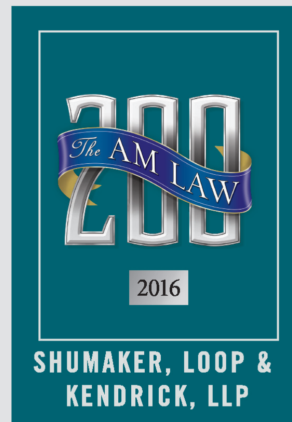
c) Create an Accessibility Policy for your website, outlining your plan to address the accessibility issues and monitor your website monthly for issues or errors;

d) As website pages are revised and new pages developed, make certain that your web-developer is contracted to provide pages that are compliant with Level AA of the WCAG-2.0; and

e) Conduct annual accessibility audits to determine failure to conform with the Level AA of the WCAG-2.0 standards.

***For additional information, contact Robert A. Koenig at rkoenig@slk-law.com or 1-800-444-6659, ext. 1305.***


Shumaker is an Am Law 200 and *National Law Journal* Top 500 Firm.



# insights

### ATTACKS AGAINST LOW LEVEL NON-COMPETE AGREEMENTS

# What Employers Need to Know

Non-competition agreements are commonplace for many employers. Employers have traditionally utilized such agreements for a variety of legitimate reasons, including the preservation of client relationships, retention of employees, prevention of unfair competition, and the protection of trade secrets. However, a recent increase in government attention and court action surrounding non-competes suggests that a new wave of challenges may be on the horizon for employers, particularly with respect to non-competes for low-level employees.

By Rebecca E. Shope

In March 2016, the Office of Economic Policy of the United States Department of Treasury ("Treasury") issued a report titled *Non-Compete Contracts: Economic Effects and Policy Implications*[1]. In its 26-page report, the Treasury examines with skepticism the effect of non-competes on worker mobility and economic growth. Specifically, the report highlights what the Treasury perceives as burdens faced by workers who execute these agreements, such as a lack of understanding as to terms, reduced bargaining power, and forced withdrawal from job opportunities in a particular occupation. The report also seriously questions the relationship between non-competes and the protection of trade secrets, noting that "less than half of workers who have non-competes … report possessing trade secrets"[2]. It concludes with three recommendations: greater transparency and communication with employees when presenting non-compete agreements; encouraging the use of enforceable non-compete contracts; and providing financial consideration in exchange for executing and complying with non-compete agreements.

...many state legislatures have recently proposed and/or enacted legislation to reform the scope and reach of non-compete agreements.

A mere two months later, in May 2016, the White House issued its own report on the topic styled *Non-Compete Agreements: Analysis of Usage, Potential Issues, and State Responses*.[3] This report is likewise critical and explicitly questions the rationale behind non-competes, specifically, with respect to lower level employees, which it defines as 14% of workers earning less than $40,000. In challenging the justification of non-competes, the report notes that these workers are unlikely to ever access or be exposed to actual company trade secrets. The report also highlights these workers' lack of bargaining power, stating that 37% of employees were asked to sign non-competes only after accepting job offers and 90% of workers never negotiated their terms. The transparent disdain for non-competes is evident in the report, which further

emphasizes that "non-competes can reduce the welfare of workers and hamper the efficiency of the economy as a whole by depressing wages, limiting mobility, and inhibiting innovation."[4] In conclusion, the White House states that reform must come from the individual states and state legislatures, and further vows to continue to work with the Treasury and the Department of Labor to "facilitate discussion" on non-compete issues.[5]

Taking this cue, many state legislatures have recently proposed and/or enacted legislation to reform the scope and reach of non-compete agreements. For example, Illinois enacted the *Illinois Freedom to Work Act*, which expressly prohibits employers from entering into non-competes on or after January 1, 2017 with low-level employees earning $13 per hour or less.[6] In March 2016, Utah passed the *Post-Employment Restrictions Act*, which prohibits non-competes from exceeding one year and requires an employer to pay all litigation costs incurred by an employee for non-competes found unenforceable.[7] The Massachusetts House of Representatives and Senate similarly attempted to pass legislation to severely limit the scope of non-competes, but were unable to reach agreement before the end of the legislative session in August 2016.[8] New Jersey and Maryland proposed legislation that would prohibit enforcement of non-compete agreements for anyone receiving unemployment, but the bills did not make it out of committee.[9] Washington and Idaho also introduced bills limiting the reach of non-compete agreements to only "key employees" with inside knowledge and/or trade secrets.[10]

Several companies have also reacted to the increased scrutiny surrounding non-compete agreements. For example, Amazon withdrew its policy of having hourly and seasonal workers sign non-compete agreements after negative media attention.[11] Law360, a subscription based legal news service, agreed to discontinue use of mandatory, one-year non-compete agreements, except for top editorial executive and senior non-editorial employees.[12] This occurred after New York Attorney General Eric T. Schneiderman conducted an investigation into Law360, concluding the non-compete agreements were too broad.[13]

Perhaps the most notable example of a company backing away from non-competes for low-wage employees is Jimmy John's, the fast-food sandwich franchisor. Jimmy John's required employees to sign non-compete agreements banning them from working for competitors for two years.[14] Competitors included any business that sold submarine, deli-style, pita, or wrapped sandwiches within two miles of any Jimmy John's in the United States.[15] After an investigation by Schneiderman, Jimmy John's agreed to not enforce the non-compete agreements and to cease making employees sign the agreements.[16]

What does this all mean for employers? To the extent that reform is not already underway in your state, you should expect to see increased lobbying efforts and possible legislation mirroring that which has been implemented or proposed in other states. Such increased attention toward non-competes also serves as an important reminder to review your company's existing non-compete agreement and analyze the implication of any proposed or recently implemented state laws. While the recent election of Donald Trump may alter the federal government's view of non-compete agreements with low wage workers, the states are likely to continue legislating in this arena.

***For additional information, contact Rebecca E. Shope at rshope@slk-law.com or 1-800-444-6659, ext. 1453.***

[1] https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf

[2] Id.

[3] https://www.whitehouse.gov/sites/default/files/non-competes_report_final2.pdf

[4] Id.

[5] Id.

[6] http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0860

[7] http://le.utah.gov/~2016/bills/static/hb0251.html

[8] http://www.massachusettsnoncompetelaw.com/2016/08/ma-legislative-session-ends-without-noncompete-compromise/

[9] White House Report at 8-9.

[10] Id.

[11] http://www.cbsnews.com/news/should-low-wage-workers-have-to-sign-non-compete-agreements/.

[12] http://www.law360.com/articles/807290/law360-reaches-noncompete-settlement-with-ny-ag.

[13] Id.

[14] http://www.law360.com/articles/809676/jimmy-john-s-nixes-ny-noncompetes-in-agreement-with-ag?article_related_content=1.

[15] http://fortune.com/2016/06/22/jimmy-johns-non-compete-agreements/.

[16] Id.

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# DUI Arrests May Result in the Prudential Revocation of a Validly Issued Nonimmigrant Visa

Contrary to popular opinion, there are serious immigration consequences for nonimmigrants who are arrested for driving under the influence (DUI) or a related offense. According to recently released guidance found in the Department of State's Foreign Affairs Manual, the Department of State (DOS) is authorized to prudentially revoke a visa based on a potential ineligibility for health related reasons when it is notified that a visa holder with a still valid visa was arrested or convicted of a DUI or related offense. Depending on the nature of the arrest, a consular post can choose to revoke the foreign national's visa by simply sending an email with the following notification:

By Maria C. Ramos

> *Your nonimmigrant visa (F1, H-1B, L-1A), issued by the United States Embassy in [ ], has been revoked because additional information became available after the visa was issued. You will not be able to travel to the United States with this visa. If you wish to travel to the U.S., you will be required to reappear before a U.S. consular officer to establish your eligibility for a visa before being permitted to apply for entry to the United States.*

Important to note here is that DOS may revoke the visa simply on the basis of an arrest. Determination of guilt is not required.

Consequently, if a foreign national's visa is revoked, he or she cannot use the visa to enter the U.S. without first reappearing before a U.S. consular officer and re-establishing his or her visa eligibility. Indeed, if a foreign national attempts to enter the U.S. with a revoked visa, he or she will be flagged prior to boarding a flight, or denied entry into the U.S. upon landing.

If the foreign national is already within the U.S., however, a foreign national may stay until his or her visa expires. DOS has stated that a prudential revocation does not automatically invalidate that person's status in the U.S. After all, once a person enters the U.S., his or her immigration status is governed by the I-94 record. DOS, however, has issued notices to foreign nationals arrested for DUI related offenses requiring them to depart the U.S. immediately and report to their consular post abroad. Don't forget: a visa revocation

can be grounds for court-ordered removal by Immigration and Customs Enforcement (ICE).

Without a doubt, DOS's prudential revocation policy raises significant concerns for foreign nationals. What happens if a foreign national no longer uses the email address provided to DOS when he or she applied for his or her nonimmigrant visa? What if the foreign national was mistakenly arrested but the consular post was notified of the arrest anyway? Remember, a determination of guilt is not required by DOS in order to be able to revoke a visa. Continue to check back with us for updates on this policy, how it is being enforced, and the potential repercussions for our clients.

*For additional information, contact Maria del Carmen Ramos at mramos@slk-law.com or 1-813-227-2252.*

# Shumaker Advisors Has Expanded

Shumaker Advisors, LLC has joined forces with The Craig Group, Inc., allowing Advisors to diversify and deepen its portfolio of government relations services.

Shumaker Advisors is a government relations consulting firm that was formed in 2013 by Shumaker, Loop & Kendrick, LLP. Shumaker Advisors works closely with clients in the food and beverage, health care, retirement planning and related industries to provide a bridge to government, government agencies and legislators that shape the future of business in these highly regulated markets.

The Craig Group was founded by Philip A Craig almost 40 years ago as a full-service political consulting firm helping clients in government affairs and political campaign management, grassroots and grasstops coalition building, public relations and association management services for a wide range of clients including those in the retail grocery industry, alcohol beverage producers, distributors and retailers, travel and tourism, commercial developers, and health care affiliates.

Andy Herf will continue to lead Shumaker Advisors in his new role as President and Craig is Vice President. Molly Hunter serves as Director of Operations.

In addition to Herf, Craig and Hunter, long-time member of the Ohio State House of Representatives and Ohio State Senate Lynn Wachtmann also works with Shumaker Advisors as Senior Government Relations Director.

# There is No Such Thing as a Free Horse

As a horse owner, I was excited to see on September 24, 2016, *The Wall Street Journal* published an article "The Need for Steed" in which it stated "the horse business is trotting ahead," as women who rode as children are returning to the barn in droves. I know this feeling well. "[M]ore than 75% of horse owners are women," according to the United States Equestrian Federation, and I have found that the horse barn is the equivalent of the golf course for many women professionals. *The Wall Street Journal* article outlines the basic costs of engaging in the hobby, which can get quite expensive depending on how far one wishes to pursue the dream. *The Wall Street Journal* article does not, however, address contractual woes that can be associated with buying a horse. For those that are thinking about returning to their childhood hobby, there are some things to consider.

By Cheri A. Budzynski

...the horse barn is the equivalent of the golf course for many women professionals.

## Consider Leasing

You may be asking if you read that right. You did and you can. If buying a horse seems like too much of a commitment but a lesson once a week is too little, then consider a lease or a half-lease option. Many horse owners who board and find themselves too busy to ride six days a week look for someone to half-lease their horse. Typically, a half-lease is half the price of board. So in a barn where board is $500 a month, for $250 a month, a "half" lessee gets to ride the horse three times a week (this may include one lesson per week depending on the barn). In a half-lease arrangement, the owner covers the veterinarian costs as well as any maintenance costs such as farrier services (hoof trimming or shoeing) or diet supplements.

Keep in mind that whether you lease or buy a horse, make sure there is a contract! The contract for a lease should be clear on the terms of the agreement. The terms should, at a minimum, include: (1) the price of the lease; (2) the extent of riding the lessee is allowed per week; and (3) who is responsible for any veterinarian fees or other incidental costs.

## Buying a Horse

For individuals intent on buying a horse, there are considerations above the costs of owning a horse, which can easily reach $10,000 to $20,000 per year. The buying process itself can be daunting. Here are some considerations in making this life-changing purchase.

**Horse Brokers.** Many people look to a more experienced person to help them buy a horse. This is a perfectly normal way to purchase a horse but the terms of the agreement should be in writing and clear. For example, horse brokers are business people so it is standard that they get paid for their services. It is not unusual for them to charge 10% of the price of the horse and the cost of any travel expenses. Be sure to ask the broker fee for helping you find that perfect horse. If they suggest importing your "first" horse from Europe, the costs go way up and frankly, if it is your first horse, walk away.

In addition, be very clear what you are looking for. It is not an uncommon practice in the horse world for trainers to upsell their clients. Rather than finding a $5,000 safe and reliable horse for their client, they may talk them into a "flashier" horse with great bloodlines for $20,000 to $50,000. Once the client brings the horse home and realizes that the horse is "too much horse," the trainer recommends paying him or her for professional rides on the horse to be more manageable. While this may work for some clients, most people should settle on the $5,000 horse.

**Pre-Purchase Exams.** So you found that perfect horse!!! Now what? Before signing any contract, the next step is arranging a pre-purchase exam or PPE. This is a due diligence test to ensure that your perfect horse is really a perfect horse and not a lame horse. A PPE can range anywhere from $500 to $2,500 depending on the extent of the exam. While there are no 100% guarantees when buying a living animal, in my opinion, this step is critical when buying any horse over $5,000. It will also give you a baseline of health and may provide an idea of any future medical treatment the horse may need. In addition, minor health issues can be a negotiating point on the price.

The potential buyer is responsible for setting up and paying for the PPE and there are a few things to consider. First, ask the seller for the name of the horse's current veterinarian and whether the horse has had any health issues. Ask for veterinarian records. If the seller is hesitant to provide this information, walk away. Second, find an independent veterinarian to conduct the PPE as he or she will be acting on behalf of you and not the seller. If the horse is not in your state, call the local horse association and ask for a list of veterinarians that conduct PPEs in that area. Finally, discuss the extent of the exam that you are looking for with the veterinarian and if you are not savvy on equine health, include a person who is, such as your riding instructor. The test may include basic flexion tests and radiographs to scoping the respiratory pathway and drug testing (Yes - drug testing!!! And if you are a timid rider, definitely drug test - the horse industry can include disreputable sellers that mask physical and psychological issues with a horse when you test ride them).

**Contracts for Purchase.** Most people would not think twice to have a contract for any purchase over $1,000. It is the same for purchasing a horse. Make sure there is a contract and make sure you read it. The contract may be anywhere from a one page contract to an extensive multiple page contract. While equine purchase contracts can be very similar to standard contracts, there are issues that are specific to purchasing a living animal. For example, ask for a trial period. Most people that purchase horses ride them once and determine if they want to buy the horse. A horse on one day is not necessarily the same horse on a different day. It is not inappropriate to ask for a trial of seven to 10 days. Keep in mind that if the seller refuses, it should not be a deal breaker but it should give you pause to consider if this is the right horse. Not every horse owner is going to let just anyone take their horse for a period, especially if the contract is between strangers. Offering some type of consideration for a trial may help seal a trial. Offer a sum of money above the purchase price and agree to have mortality insurance during the trial.

If purchasing a horse over $5,000, it may be worthwhile to have an attorney review the contract. The cost to review a contract is likely to be minimal compared to any legal challenges that could happen should the purchase be problematic.

**Insurance for Horses?** Yes, you read it right again. Insure your horse for mortality! As with any insurance, the cost increases depending on the extent of the coverage. Typically, most owners purchase mortality insurance for the purchase price of the horse. There is a colloquial saying in the horse world that "horses will try to commit suicide in direct proportion to their value." While not true, it would be not only emotionally devastating but financially devastating if one purchased a horse for $20,000 and it died six months later. While the insurance will not heal your broken heart, at least it covered the price of purchase.

### Conclusion

Owning a horse can be a rewarding outlet and a great hobby. But before diving into the horse world, be aware that any agreement, whether lease or sale, should be in writing and does not come without the cautions of any other purchase or sale agreement. Do not think twice to ask an attorney familiar with equine laws and practices for guidance in this fulfilling journey.

***For additional information, contact Cheri A. Budzynski at cbudzynski@slk-law.com or 1-800-444-6659, ext. 1332.***

# Diversity at Shumaker

Shumaker's Diversity and Inclusion Committee created the Shumaker Diversity Scholarship program available to students who are members of minority groups. Eligibility for the $7500 scholarship requires that the recipient participate in and complete the firm's summer associate program following their first or second year at an American Bar Association (ABA) accredited law school. The scholarship will be paid upon the student's completion of the firm's summer associate program.

Applicants must have outstanding undergraduate and law school academic credentials, exhibit leadership abilities and community involvement and demonstrate a commitment to practice law after graduation in the geographic area of Shumaker's offices.

Shumaker is committed to fostering diversity and inclusion among its attorneys and other professionals, and believe that including attorneys and staff members from diverse backgrounds is a critically important element in providing quality legal services to clients and a productive working environment for team members.

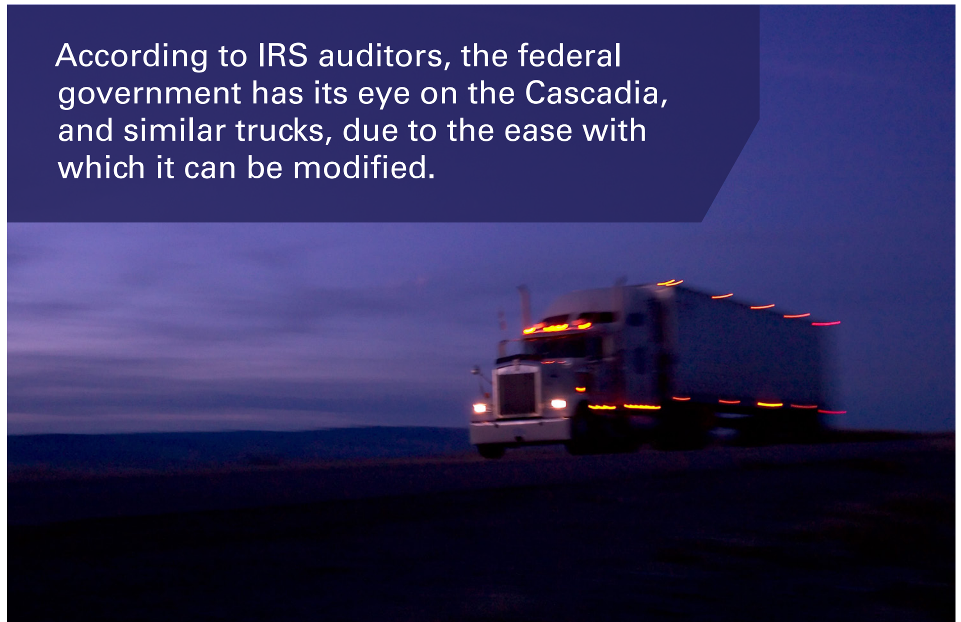
The Diversity and Inclusion Committee is made up of partners, associates and administrative personnel that are dedicated to establishing and implementing a variety of diversity and inclusion measures.

## IRS COMPLIANCE FOCUS:

# The Excise Tax on Heavy Trucks

There is no steering around the Federal Excise Tax ("FET") on heavy trucks and trailers, and some companies are finding that out in the most unpleasant way possible – through an IRS audit. Similar to states' sales taxes, the federal government imposes a 12% tax on the sale of trucks with a gross vehicle weight ("GVW") above 33,000 pounds, trailers above 26,000 pounds, and tractors above 19,500 pounds. Although trucks sold with a GVW of 33,000 pounds or less are exempt from the tax, if that same truck is later modified to exceed the 33,000 pound threshold, whoever owns the truck at that time becomes liable for the tax (same goes for modifications of tractors and trailers). Enter the Cascadia by Freightliner™ and the Internal Revenue Service's ("IRS") focus on those who purchase it.

By John P. Dombrowski



According to IRS auditors, the federal government has its eye on the Cascadia, and similar trucks, due to the ease with which it can be modified.

The Cascadia has become a popular truck, in part due to the fact it can be easily modified after purchase. For example, a company can purchase a Cascadia with a GVW under 33,000 pounds, and if business demands, it can subsequently add an axle to increase the GVW. Once that truck is modified to have a GVW over 33,000 pounds, however, the FET kicks in and the company is on the hook for 12% of the cost to purchase the truck and any subsequent modifications.

According to IRS auditors, the federal government has its eye on the Cascadia, and similar trucks, due to the ease with which it can be modified. The IRS is using state databases to identify owners of the Cascadia that have their trucks registered over the 33,000 GVW threshold. It then uses the vehicle identification number ("VIN") to determine if the excise tax has ever been paid on that truck, and if not, an audit is initiated causing the truck's owner to open its books.

The consequences of an audit can make or break a company. For example, one client came to us after receiving a request from the IRS for information on 13 different Cascadia trucks it had purchased. Considering the cost of the initial sale and after-market modifications, each truck's assessable value was approximately $234,000. If forced to pay the tax, the client would have to pay $28,080 for the unpaid FET, in addition to penalties that can exceed 50% of that amount, and interest. Facing a potential bill for over $450,000 for back-taxes, penalties, and interest, the client came to our firm after it determined it was facing a battle with the IRS that could potentially put it out of business.

We have heard the same story from several clients. The client goes into the dealership to purchase a new truck, and the salesman introduces them to the Cascadia with a GVW under 33,000 pounds. The client tells the salesman they need a truck with a GVW over 33,000 pounds, so the salesman brings the client into an office and calls up a modification company down the street to make arrangements to add an axle and increase the GVW over the threshold. The client pays the dealer for the truck and pays the modification company over the phone with a credit card. The client leaves the office, and once the dealer receives the truck from Freightliner, it sends it to the modification company. Once the modifications are complete, the truck is sent back to the dealer where the client picks it up.

The dealer does not believe it is liable for the tax because it sold a truck to the client that was originally under the 33,000 pound threshold, and it was the client who paid for the modifications. The client was unaware the tax even existed; however, the IRS has correctly determined the tax is owed, so the only question remaining is "who owes the tax?"

Under IRS regulations, the person who owns the truck at the time the modifications are made owes the tax. Unfortunately, the question of "who" owes the tax is a fact-intensive determination based on a complicated mix of federal and local law. The IRS requires a company under audit to specify the facts surrounding the purchase and modification of each truck, including invoices for purchase and modification, amounts paid on those invoices, title certificates, registration certificates and depreciation schedules. Depending on the facts surrounding the purchase and modification of each truck, either the trucking company or the dealer will be liable for the tax.

As our client base has grown in this area, we have refined our method of analysis to determine if the FET is owed and by whom.

***For additional information, contact John Dombrowski at jdombrowski@slk-law.com or 1-800-444-6659, ext. 1411.***

If you'd like to receive an electronic copy of Shumaker's *insights* Newsletter, or if you have a suggestion for topics you would like to see in future issues, send us an email at newsletters@slk-law.com.

# Shippers Beware:

## The Proposed New Motor Carrier Standard Bill of Lading Form

There has always been a "battle" between motor carriers and shippers around the issue of applicable bill of lading ("BOL") forms. With primarily respect to less-than truckload ("LTL") carriers who participate in the National Motor Freight Classification ("NMFC") tariff, many such carriers attempt to use the standard NMFC BOL which incorporates by reference the published tariff which contains specific (and often severe) limitations on the cargo damage and loss claims liability of the motor carriers. Since shippers rarely actually receive or read the substantial NMFC tariff itself, by agreeing to a carrier BOL they often find themselves subject to severe claims limitations, much to their surprise and chagrin. The NMFC tariff is written by the NMF Conference which is, of course, dominated by carriers with a desire to downwardly limit their exposure to claims for cargo damage and loss. The standard form BOL is part of the NMFC and several changes to the form have been recently proposed by the Transportation and Logistics Council and will be adopted or rejected by the Surface Transportation Board ("STB").

By Michael M. Briley

Up until now, it has always been up to the carrier to disprove negligence when carrier negligence is an issue.

The most significant proposed change is the proposal that absent a written, bi-lateral shipper/carrier contract to the contrary, all NMFC carriers (i.e., most LTL carriers) will haul only under the standard form BOL. That means that even if shipper uses its own BOL, absent a bilateral transportation contract between the carrier and the shipper that says otherwise, the NMFC standard form will apply and it will override the shipper BOL. Bad news for shippers.

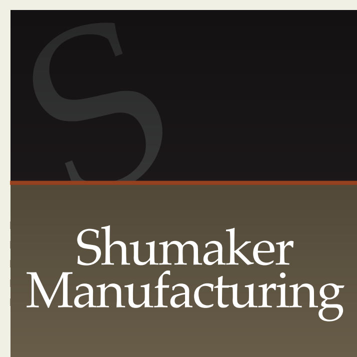
The next most significant proposed change has to do with carrier liability for negligence resulting in cargo claims. Up until now, it has always been up to the carrier to disprove negligence when carrier negligence is an issue. The carrier has the burden of proof to show that it was not negligent in causing the loss. It is important to recognize that negligence is admittedly not an issue in most cargo claim situations. Pursuant to the Carmack Amendment (USC 514706 et. seq.), carriers are liable for loss, damage or delay of

loads in their care in most cases, regardless of whether or not they are negligent. However, under both the old and proposed new BOL forms carrier liability is limited to proof of carrier negligence (1) if the cargo is stopped and held in transit upon the request of the shipper (or owner of the cargo) or, (2) when the loss results from a faulty or impassible highway, lack of capacity (failure) of a bridge, highway or barge or is due to a defect or vice in the cargo itself. This would also include, for example, cases where the cargo was loaded or secured by the shipper in an allegedly improper manner causing the loss. In such cases, the carrier is liable under the current BOL form unless the carrier can produce evidence that it was not at fault. The new form, however, shifts the burden of proof of carrier negligence to the shipper in such cases. Albeit not common, such claims do occur and this shifting of the burden of proof to the shipper is extremely important from a claims prosecution and settlement perspective. Also bad news for shippers.

Regardless of the ultimate decision of the STB, once again this issue cries out loudly in support of the admonition that we have always made to shippers. You need to have a written, bilateral transportation contract with all of your carriers–especially LTL carriers. Only such a contract can protect a shipper from being subjected to the NMFC cargo damages limitation, but also against things like the proposed change to the uniform BOL that diminish the standard for carrier liability in negligence situations.

***For additional information, contact Michael M. Briley at mbriley@slk-law.com or 1-800-444-6659, ext. 1325.***


# Announcing New Shumaker Blogs




As capital markets, the global economy, and industries evolve and change, the manufacturing and industrial sector remains vital to economies worldwide. The goal of *Shumaker Manufacturing: A Legal & Industry Review* is to provide updates and news on the manufacturing industry with a legal focus.

Visit https://shumakermanufacturing.com/ to sign up!

As solar power claims an ever-growing share of electric power-generation, the commercial and regulatory landscape surrounding this industry is continually changing. *Shumaker's Solar Law Update* provides insights into the legal and market trends that are shaping the solar industry.

Visit https://solarlawupdate.com/ to sign up!

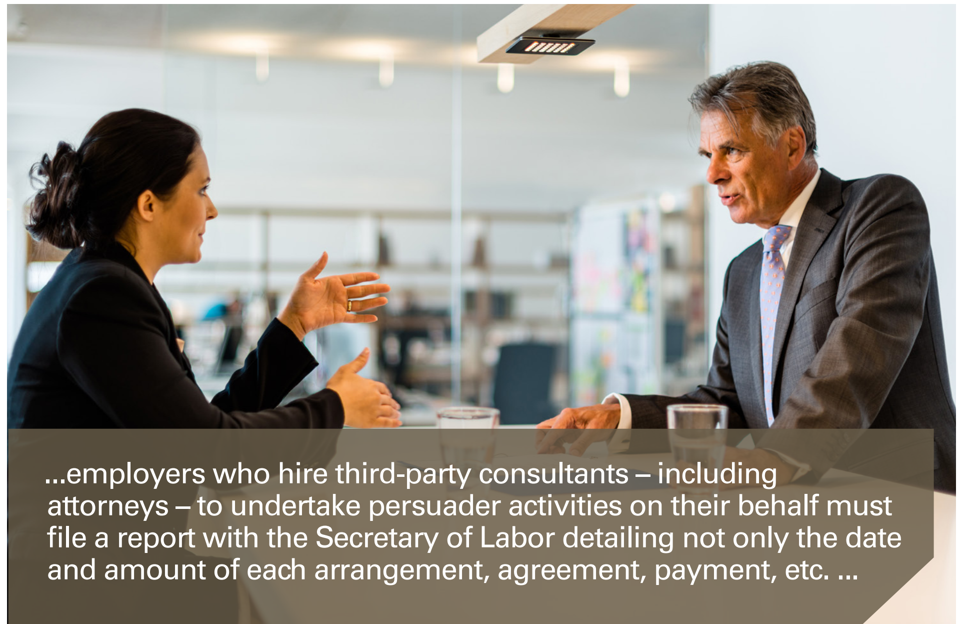
# Closing the Loophole:

## How the Department of Labor's Persuader Rule Effectively Eviscerates the Advice Exemption of the Labor-Management Reporting and Disclosure Act

On March 24, 2016, the Department of Labor's ("DOL") Office of Labor-Management Services published a final rule concerning its updated interpretation of the "advice" exemption of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401, et seq. This revised interpretation, known as the "Persuader Rule," significantly expands the types of persuader-related activities and communications that an employer and its advisors, including its attorneys, must disclose pursuant to the LMRDA. This article provides a brief background of the LMRDA as well as the DOL's prior interpretation of the "advice" exemption, a discussion of the changes set forth in the Persuader Rule, and an update regarding its current status.

By Kate Decker

and Mechelle Zarou



...employers who hire third-party consultants – including attorneys – to undertake persuader activities on their behalf must file a report with the Secretary of Labor detailing not only the date and amount of each arrangement, agreement, payment, etc. ...

### A. What is the LMRDA?

Following a public outcry against corruption in the labor movement, Congress enacted the LMRDA, also known as the Landrum-Griffin Act, in 1959. The LMRDA provides certain rights to union members and establishes democratic procedures within labor organizations to protect those rights. Included among the LMRDA's provisions are reporting requirements for labor organizations, consultants, and employers regarding persuader activities (i.e., activities "with an object, explicitly or implicitly, directly or indirectly, to affect an employee's decision regarding his or her representation or collective bargaining rights") and expenditures related thereto.

Section 203 of the statute, 29 U.S.C. § 433, sets forth the reporting requirements for employers and their consultants. Section 203(a) mandates that employers who hire third-party consultants – including attorneys – to undertake persuader activities on their behalf must file a report with the Secretary of Labor detailing not only the date and amount of each arrangement, agreement, payment, etc. and "the name, address, and position, if any, in any firm or labor organization of the person to whom it was made," but also **"a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made."**[1] This report is known as a Form LM-10 and is due

ninety days after the end of the employer's fiscal year.[2]

Section 203(b) contains similar requirements for consultants (and attorneys) who undertake persuader activities on behalf of an employer. Specifically, Section 203(b) requires that these consultants file a report with the Secretary of Labor containing the details of the terms and conditions of their arrangement with the employer.[3] This report is known as a Form LM-20 and is due thirty days after entering into the agreement or arrangement.[4] Section 203(b) further provides that consultants must file an additional report, known as Form LM-21, which contains a statement of both "its receipts of any kind from employers on account of labor relations advice or services," as well as "its disbursements of any kind, in connection with such services and the purposes thereof."[5] Form LM-21 reports are due ninety days after the consultant's fiscal year.[6]

Despite these broad provisions, the LMRDA expressly limits the scope of the requirements in two ways. First, Section 203(c) contains an "advice" exemption that excludes from the reporting requirements arrangements or agreements pursuant to which a consultant provides only advice to the employer.[7] Second, Section 204 provides for an exemption of attorney-client communications. Specifically, the statute provides that the LMRDA does not "require an attorney…to include in any report required to be filed pursuant to the provisions of [the LMRDA] any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship."[8] It is the "advice" exemption that the Persuader Rule significantly alters.

### B. How Did the DOL Previously Interpret the Advice Exemption?

Although Section 203 of the LMRDA references both direct and indirect persuader activities, the DOL's prior guidance defined "advice" to include indirect persuader activities, thereby mandating disclosure only when employers hired consultants to engage in direct persuader activities, that is, activities involving direct contact with employees. Thus, pursuant to this interpretation, employers could engage consultants, including attorneys, for purposes of responding to a unionization campaign without having to report such arrangements as long as the consultants did not have any direct contact with the employees and the employers maintained the ability to accept or reject the consultants' recommendations.

### C. How Does the Persuader Rule Differ from the DOL's Prior Interpretation?

According to the DOL, its prior guidance "created a huge loophole," which employers have unfairly taken advantage of to the detriment of employees who "weren't getting important information about who was behind the messages that they were receiving."[9] In an attempt to close the loophole, the DOL published the Persuader Rule, which stands in stark contrast to the DOL's prior regulations. In the new Rule, the DOL redefines "advice" as "recommendations regarding a decision or course of conduct" and specifically excludes persuader activities. "If the consultant engages in both advice and persuader activities, however, the entire agreement or arrangement must be reported."[10] Thus, pursuant to the new Rule, "advice" and "persuader activities" are mutually exclusive categories.

Consistent with the DOL's revision of the definition of "advice," the Persuader Rule further provides that employers and consultants must now file reports when the consultants engage in direct persuader activities **or** indirect persuader activities that fall within one of the following four categories:

1. Plan, direct, or coordinate managers to persuade workers;
2. Provide persuader materials to employers to disseminate to workers;
3. Conduct union avoidance seminars; and,
4. Develop or implement personnel policies or actions to persuade workers. [11]

Examples of reportable activities include: "planning or conducting employee meetings; training supervisors or employer representatives to conduct meetings; coordinating or directing the activities of supervisors or employer representatives; establishing or facilitating employee committees; drafting, revising or providing speeches; developing employer personnel policies designed to persuade employees; and identifying employees for disciplinary action, reward, or other targeting."[12]

### D. What Does This Mean for Employers?

It should come as no surprise that advice relating to an employer's response to a unionization campaign is not a black or white issue. As the DOL's prior guidance recognized, a purpose of a recommendation regarding a labor relations decision or course of conduct, *i.e.*, labor relations advice, very well could be

to affect an employee's unionization decision. Given the DOL's sudden departure from this long-standing and reasoned approach, various groups have criticized the Persuader Rule. Among other things, its opponents argue that the Rule's treatment of "advice" and "persuader activities" as mutually exclusive categories will effectively eviscerate the advice exemption of the LMRDA and, further, that its expansive reporting requirements will force attorneys to violate their ethical duties of attorney-client confidentiality. Consequently, plaintiffs in three separate lawsuits filed in federal district courts located in Little Rock, Arkansas,[13] Minneapolis, Minnesota,[14] and Lubbock, Texas[15] have challenged the validity of the Persuader Rule and sought to enjoin the DOL from implementing it.

On June 27, 2016, the United States District Court for the Northern District of Texas in *National Federation of Independent Business, et al v. Thomas E. Perez, et al.* granted the plaintiffs' and intervenor-plaintiffs' motion for a preliminary injunction Order, finding that (1) the DOL lacked the statutory authority to promulgate and enforce the Persuader Rule because it was contrary to, and effectively eliminated, the express, unambiguous language of the advice exemption in Section 203(c) of the LMRDA; (2) the Persuader Rule was arbitrary and capricious because, among other reasons, it conflicted with the LMRDA's attorney-client privilege exemption as well as state rules governing the practice of law; (3) the Persuader Rule violated First Amendment free speech and association rights; (4) the Persuader Rule was unconstitutionally vague; and (5) the Rule violated the Regulatory Flexibility Act, which requires that an agency proposing a rule either prepare and make available for comment an initial and final regulatory flexibility analysis or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.[16]

The preliminary injunction Order, which the Court entered on a nationwide basis, prohibits the DOL from implementing the Persuader Rule until the sooner of the DOL's successful appeal of the Order, or the trial court's finding for the DOL after a trial on the merits.[17] The DOL filed a Notice of Interlocutory Appeal with the Fifth Circuit Court of Appeals on August 25, 2016, which, as of November 16, 2016, is still pending.[18]

On November 16, 2016, the Court denied the DOL's motion for summary judgment and granted the plaintiffs' and the intervenor-plaintiffs' summary judgment motions, finding that the DOL's Persuader Rule "should be held unlawful and set aside pursuant to 5 U.S.C. § 706(2), and the Court's preliminary injunction preventing the implementation of that Rule should be converted into a permanent injunction with nationwide effect."[19] Therefore, absent a reversal of the Court's decision by the Fifth Circuit Court of Appeals or the United States Supreme Court, the DOL's Persuader Rule will not become effective.

After the Court issued its preliminary injunction Order, the DOL revised its website to inform the public that the revised 2016 Forms LM-10 and LM-20 "[would] not be applicable until further notice from the Department. Instead, consultants should continue to apply the pre-2016 [Forms LM-10 and LM-20] and instructions."[20] Given the Court's most recent decision, the revised forms will likely continue to remain inapplicable and the Persuader Rule, without effect. Consequently, employers now have a potentially indefinite window of time to seek advice from their attorneys regarding how best to address unionization campaigns. Until the DOL successfully appeals the Court's November 16, 2016 Order, employers and their attorneys can confidently engage in indirect persuader activities, such as manager training, personnel policy development, or speech preparation, without having to worry about the new reporting under the Persuader Rule.

*__For additional information, contact Kate Decker at kdecker@slk-law.com or 1-800-444-6659, ext. 1452 or Mechelle Zarou at mzarou@slk-law.com or 1-800-444-6659, ext. 1460.__*

[1] 29 U.S.C. § 433(a) (emphasis added).

[2] *See* https://www.dol.gov/olms/regs/compliance/ecr.htm.

[3] *See* 29 U.S.C. § 433(b).

[4] *See* https://www.dol.gov/olms/regs/compliance/ecr.htm.

[5] *See* 29 U.S.C. § 433(b).

[6] *See* https://www.dol.gov/olms/regs/compliance/ecr.htm.

[7] *See* 29 U.S.C. § 433(c).

[8] 29 U.S.C. § 434.

[9] *See* https://www.dol.gov/olms/regs/compliance/ecr/Persuader_OverviewSum_508_2.pdf.

[10] Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 FR 15924-01.

[11] *See* https://www.dol.gov/olms/regs/compliance/ecr/Persuader_OverviewSum_508_2.pdf.

[12] Id.

[13] *Associated Builders and Contractors of Arkansas, et al. v. Thomas E. Perez, et al.*, Case No. 4:16cv169-KGB (E.D. Ark. Mar. 30, 2016).

[14] *Labnet, Inc. d/b/a Worklaw Network, et al. v. United States Department of Labor, et al.*, Case No. 16-cv-00844 (D. Minn. Mar. 31, 2016).

[15] *National Federation of Independent Business, et al v. Thomas E. Perez, et al.*, Case No. 5:16-cv-00066-C (N.D. Tex. Mar. 31, 2016).

[16] *Id.*, Doc. No.85.

[17] *Id.*

[18] *Id.*, Doc. No. 95.

[19] *Id.*, Doc. No. 135.

[20] https://www.dol.gov/olms/regs/compliance/ecr.htm.

# welcome

**Andrea M. Ackley**
Sarasota
*Trusts & Estates; Corporate; Taxation*

**Jaide L. Beverly**
Tampa
*Healthcare*

**Zachary A. Cheslock**
Toledo
*Corporate*

**Christopher M. Delp**
Tampa
*Solar; Real Estate*

**Robert H. Eddy**
Toledo
*Litigation*

**Dipawali (Dipa) Shah**
Tampa
*Healthcare*

**David J. Slenn**
Tampa
*Taxation; Trusts & Estates*

**Maris K.V. Snell**
Sarasota
*Broker-Dealer; Litigation*

**Dominic J. Spinazze**
Toledo
*Trusts & Estates*

**Jessica Smith West**
Tampa
*Healthcare*

**April L. Zinober**
Tampa
*Litigation*

# EPA Initiates Development Processes for TSCA Amendments

On June 22, 2016, President Obama signed into law the Frank R. Lautenberg Chemical Safety for the 21st Century Act. This legislation amended the Toxic Substances Control Act of 1976 (TSCA) for the first time since its original enactment and was designed to implement major changes and improvements in the federal law that gives EPA authority to evaluate and regulate the importation, production, distribution, use and disposal of chemicals and chemical products.

By Douglas G. Haynam

The goal of TSCA remains to regulate chemical substances that present an "unreasonable" risk of injury to human health or the environment, but the amended TSCA will do so much more aggressively and provide EPA with tools and deadlines that will change the way businesses introduce and market both existing and new chemicals into the economy.

> The goal of TSCA remains to regulate chemical substances that present an "unreasonable" risk of injury to human health or the environment...

Included among the changes to TSCA by these amendments are the following:

- creates a mandatory duty on EPA to evaluate existing chemicals and establishes clear and enforceable deadlines for completion of the process;
- chemicals will be assessed against a risk-based safety standard without the benefit of risk-benefit balancing in the original TSCA;
- unreasonable risks identified in the risk evaluation must be eliminated without regard to cost/benefit balancing;
- expands EPA authority to require by order development of chemical information by manufacturers to assist EPA in its evaluation process;
- mandates that EPA make an affirmative determination on the safety of new chemicals or new uses of chemicals prior to entry into the marketplace;
- establishes a one-year deadline for EPA to establish by rule its process to conduct risk evaluations to determine whether a chemical substance presents an unreasonable risk of injury to health and the environment and the process by which it will conduct the risk evaluation;

- requires EPA to identify 10 high priority chemical substances for risk evaluation within six months, and expand the list to 20 within 3 ½ years, and then requires as evaluations are completed that EPA continually add new chemicals to the evaluation process; and
- expands the regulation of mercury and compounds.

Additional information regarding the TSCA Amendments is available on USEPA's website. EPA's PowerPoint presentation from a webinar it conducted on June 30, 2016 is available at https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/frank-r-lautenberg-chemical-safety-21st-century-act-june

EPA has held a series of meetings and webinars designed to educate the public and secure public input on how it should conduct the activities required of it under the amended TSCA. The agency intends to pursue an aggressive implementation process to meet the deadlines imposed by the new act. EPA is presently scheduled to issue four proposed rules in mid-December addressing the chemical prioritization process, the risk evaluation process, the imposition of new TSCA fees and a rule to require industry reporting of chemicals manufactured/processed in the previous 10 years. In addition, on November 29 EPA announced the first 10 chemicals it will evaluate for potential risks to human health and the environment under the new law. The new TSCA requires EPA within six months to release a scoping document for each chemical and to complete the chemical risk evaluation within three years.

Finally, while the advent of a Trump Administration could institute obstacles to some environmental initiatives, it is highly unlikely to have much effect on the new TSCA. The Congressionally mandated deadlines in the new legislation, in conjunction with the willingness of those who are interested in seeing these changes implemented to go to court to enforce timely implementation, suggests that the new TSCA will not be detoured.

***For additional information, contact Douglas G. Haynam at dhaynam@slk-law.com or 1-800-444-6659, ext. 1354.***

# slknews

**Erin Aebel** was a member of the faculty at the 45th Global Congress of the AAGL, the leading association promoting minimally invasive gynecologic surgery among surgeons worldwide. The conference was held in November in Orlando, Florida where Erin spoke to physicians on contract negotiation.

**Erin Aebel and Rachel Goodman** presented a webinar to The Florida Bar on Important 2016 Legislative Changes to Florida Health Laws.

**Mike Briley** co-chaired the 2016 Annual Antitrust Institute, entitled: "Corporate Compliance In the New Economy" in Columbus, Ohio in November. Mike also was a presenter at the Institute, and his topic was "Innovative Approaches to Corporate Antitrust Compliance Programs." He also presented to the Toledo Trucking Association in October entitled "Independent Contractor Agreements in the Motor Carrier Industry". Mike was elected Chairman of the Antitrust Law Section of the Ohio State Bar Association (OSBA) for a one-year.

**Doug Cherry** presented "Technology, Social Media and Online Property Rights – Ethics and Competency in the Digital Era" at the Paralegal Association of Florida, Inc. 2016 Fall Conference.

**Doug Cherry and Jarrod Malone** co-presented a continuing legal education course to the Sarasota County Bar Association, Business Law Section entitled "Your Client Had a Data Breach, Now What? Advice on Mitigating the Consequences and Protecting the Brand," in September in Sarasota, Florida.

**Ron Christaldi** is the recipient of the Lions Eye Institute for Transplant and Research 2016 Light of Sight Award. The Award is given to persons who have made significant impact in the work to help those who are blind or visually impaired. Ron also chaired the Lions Eye Institute Eye Ball Gala which raises funds each year for ocular research.

**Phil Chubb** was appointed Vice-Chair of the Business Law Section of the Mecklenburg County Bar for a one-year term.

**David Conaway** presented a webcast in October to The Association of International Credit and Trade Finance Professionals on the topic of "Chapter 15 - Cross-Border Insolvency Issues for Trade Creditors."

**Ken Crooks** has joined the firm as Chief Operating Officer. Ken is located in the Toledo, Ohio office.

**Duane Daiker and Michele Leo Hintson** presented at the 27th Annual Northeast Surety & Fidelity Claims Conference held in September in Atlantic City, New Jersey. Shumaker is a co-founder and sponsor of this annual conference.

**Duane Daiker and Christopher Staine** recently won a copyright infringement lawsuit brought against their clients, Tivoli Homes of Sarasota, Inc. and Start to Finish Drafting, LLC.

**Kate Decker, Rebecca Shope and Mechelle Zarou** presented an Employment Law Update: Fall 2016 seminar in Toledo, Ohio in October.

**Andrew Fruit** has been selected to join the Advisory Board for The First Tee of Tampa Bay.

**Tim Garding and Jan Pietruszka** presented an Employment Law Update: Fall 2016 in Tampa, Florida in October.

**Jack Gillespie** spoke at an NBI seminar on "Drafting Purchase and Sale Agreements" in Worthington, Ohio in September.

**Josh Hayes** is an appointed Director and the Secretary of ArtPop for a two-year term.

**Michele Leo Hintson** served as a panelist at HR Tampa's 2016 Diversity Summit in November and was also a panelist for The Winning Edge Professionalism Panel & Networking Event at Stetson University in October.

**Michele Leo Hintson, Maria del Carmen Ramos and Mindi Richter** spoke at a Working Women of Tampa Bay luncheon in August regarding Women, Business and the Law.

**Lisa Hoffman** was selected as one of the Cystic Fibrosis Foundation's STANDOUT Charlotte 2016 honorees and was honored as this year's Hitchcock Humanitarian Award winner. This award is given to the STANDOUT Honoree who has been an outstanding contributor to the advocacy and awareness of cystic fibrosis throughout their journey as a STANDOUT.

**Warren Kean** spoke on "The New Partnership Audit Rules and Related Operating Agreement Drafting Considerations" at the 2016 American Bar Association's LLC Institute in

Washington, D.C. in October. He also presented “Using the ‘S Corp’ Election Effectively” at the 2016 Florida Bar, Tax Section Fall Meeting.

**Moses Luski** presented the Shumaker Legal Minute to the Latin American Chamber of Commerce at its bi-monthly lunch in Charlotte in September and spoke on “Employment Law By The Numbers.” He also presented at the July lunch on the topic “How Your Attorney Can Save You Money.”

**Ernie Marquart** has been appointed to a three-year term on the Board of Trustees of the Academy of the Holy Names.

**Hunter Norton** earned his Florida Bar Board Certification in Business Litigation, making him one of only 255 attorneys in the Florida Bar to hold this certification.

**Maria del Carmen Ramos** spoke at the Tampa Bay Paralegal Association’s 2016 Annual Seminar entitled “Paralegal Training Camp – The Essential Skills for the Paralegal Warrior!” in November. Maria was a panelist at the American Immigration Lawyers Association Central Florida Chapter annual conference in October and presented on “PERM Essentials and Updates.”

**Dave Slenn** spoke at the 2016 Arizona Asset Protection Symposium in October in Phoenix, Arizona. He also spoke at the Tax and Estate Planning Forum in October in San Diego, California. Dave was a panelist covering the intersection between Trusts and Creditors’ Rights in State and Federal Court.

**Dan Strader** spoke at The Greater Sarasota Chamber of Commerce in August on “New Overtime Pay Rule - What You Need to Know.”

**Bill Sturges** was a faculty member at the National Institute for Trial Advocacy’s Building Trial Skills Program at the North Carolina University School of Law. This NITA program focuses on trial and advocacy skills for practicing lawyers. Bill has been a faculty member for NITA trial advocacy programs for over 25 years.

**Derick Thurman** presented “How to Move From Ducking to Damage Control, or ‘Triage for the Non-Doctor’: Handling of U.S. Department of Labor Audits,” at the North Carolina Association of CPAs 77th Annual Symposium in Greensboro in November. He also presented “The New Overtime Rules & Regulations: How They Will Affect Your Business and What to Do About It,” a the Business over Breakfast program in Charlotte in October.

**Mark Wagoner** was a speaker at The Wholesale Beer & Wine Association of Ohio’s Fall Convention in September in Columbus, Ohio. Mark’s topic was “Antitrust for Beer Distributors: New Protections on Tap.”


# insights

A Newsletter from Shumaker, Loop & Kendrick, LLP



1000 Jackson Street
Toledo, Ohio 43604-5573

CHARLOTTE
101 South Tryon Street
Suite 2200
Charlotte, North Carolina 28280
704.375.0057

COLUMBUS
Huntington Center
41 South High Street
Suite 2400
Columbus, Ohio 43215
614.463.9441

SARASOTA
240 South Pineapple Avenue
10th Floor
Sarasota, Florida 34236
941.366.6660

TAMPA
Bank of America Plaza
101 East Kennedy Boulevard
Suite 2800
Tampa, Florida 33602
813.229.7600

TOLEDO
1000 Jackson Street
Toledo, Ohio 43604
419.241.9000



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Whether it's our commitment to clients,
or to our work in the community,
involvement lies at the core of everything we do.

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Shumaker, Loop & Kendrick, LLP

Attorneys at Law

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