insights

SHUMAKER
Shumaker, Loop & Kendrick, LLP

A Newsletter from Shumaker, Loop & Kendrick, LLP | Autumn 2014

HOW TO RESPOND

When ICE Offers to Help

From 2009 to 2012, ICE conducted over 9,000 worksite inspections, which resulted in more than $30 million in fines over that time period.

When someone approaches you in a friendly manner, you want to oblige. When someone smiles, your natural inclination is to smile back. So it's no wonder that an employer may not understand the danger posed when a friendly Immigration and Customs Enforcement ("ICE") auditor shows up at the workplace to help the employer understand its recordkeeping obligations and ensure the employer is doing its paperwork properly, even promising to do so in a timely manner so as not to disrupt the employer's business.

By Maria C. Ramos

Unfortunately for employers, the government has been all too willing to "help" over the last few years. As you know, employers are required to verify a person's identity and authorization to work in the United States by completing an I-9 form as part of the hiring process. Employers are required to maintain the I-9 form (and supporting documentation) for all current employees and some former ones. The statute imposing that mandate (the Immigration Reform and Control Act of 1986 ("IRCA")) and the accompanying regulations, however, are a trap for the unwary. To "help" ensure employers fulfill their I-9 requirements, ICE performs administrative worksite inspections.

For immigration updates, please follow the Shumaker Blog, *The Immigration Bulletin*, at http://theimmigrationbulletin.com/. Additional information about our blogs appears on page 21.

A worksite inspection is triggered when ICE serves the employer with a Notice of Inspection ("NOI"). The NOI can be the result of an anonymous tip, or it can be part of an initiative by the Department of Homeland Security. The standard NOI advises the employer that it is obligated to verify the employment eligibility of persons hired after November 6, 1986 using the Form I-9 and notifies the employer that an auditor will be on-site on a particular date to inspect the employer's I-9 forms. ICE is only required to provide employers three days to produce their I-9 forms for inspection.

When inspecting an employer's I-9 forms, the auditor is principally checking to see whether each employee's form has been completed properly and that the employee has produced the required documentation to verify his or her eligibility to work. An auditor generally classifies I-9 violations as either technical or substantive. Technical violations can be thought of as "paperwork" violations—i.e., failure to make sure the person has provided his or her address or birth date when completing the form. By contrast, substantive violations involve the employer failing to either verify the person's identity or authorization to work. Substantive violations can occur where the employer fails to present or where the employer fails to review and verify the documentation provided by the person (e.g., driver's license, passport, social security card, etc.). In addition to inspecting forms for technical or substantive violations, though, the auditor is also checking to see whether any of the employer's workers are unauthorized.

Ultimately, the auditor will notify the employer of the audit results, which will result in a finding of compliance, a warning being issued, or a fine being imposed. Compliance means there were no paperwork violations (technical or substantive) or unauthorized workers, or if there were technical paperwork violations, they were timely cured (typically within 10 days). The auditor issues a warning where violations were found but future compliance is expected. Fines are issued where the employer has not acted in good faith and has multiple substantive paperwork violations.

The amount of the fine varies. Fines for substantive paperwork violations can range from $110 to $1,100 per violation. More significantly, fines for hiring and continuing to employ unauthorized workers range from $375 to $16,000 per violation, depending on whether the employer is a first-time or repeat offender (repeat offenders, of course, receive fines at the higher end of the range). When imposing a fine, ICE typically takes into account the size of the business, the employer's good-faith efforts to comply, the seriousness of the violation, whether the violation involves unauthorized workers, and whether the employer has a history of previous violations.

From 2009 to 2012, ICE conducted over 9,000 worksite inspections, which resulted in more than $30 million in fines over that time period. In 2012 alone, ICE made 520 criminal arrests linked to worksite enforcement, including the detention of 240 owners, managers, supervisors, and HR employees. Since 2009, Congress has appropriated over $530 million to fund a worksite enforcement strategy directed principally at employers. If that's not enough to strike fear in an employer, the employer should also be aware that the likelihood of being inspected, having a violation identified, being fined, or negotiating a fine down depends on a number of variables beyond the employer's control: the industry the employer is in, the employer's location, the ICE office conducting the audit, the ICE agent assigned to the case, and the ICE office's local rules, among other things, all come into play during the ICE audit process.

Of course, the best way to eliminate all the angst and uncertainty associated with an ICE audit is to make sure to properly complete the I-9 form in the first place. There is some truth to the old saying "an ounce of prevention is worth a pound of cure." But perfection for human resource professionals who are wearing multiple hats on a daily basis is unrealistic. Unless your HR director is perfect, the next best alternative is to be prepared to respond to a NOI well before you ever get a knock on the door from the government.

Below is a list of tips to guide employers on how to respond to a NOI:

- **Have a process in place for dealing with the receipt of a Notice of Inspection**
  Be proactive in your preparation. You could have as little as 72 hours to respond to a NOI. You don't want to wait until you receive a NOI to figure out how to respond.

- **Immediately seek counsel**
  There's an old saying among lawyers: "A lawyer who represents himself has a fool for a client." That applies to in-house counsel or HR personnel who decide to handle worksite inspections on their own. You should strongly consider retaining outside counsel. And if you do retain counsel, don't wait until the eleventh hour. Allow counsel plenty of time to assist you in the audit process.

- **Carefully Read the Notice of Inspection and/ or Accompanying Subpoena**
  As they say, "the devil is in the details." Only produce what is being required of you. Sometimes ICE will request I-9 forms beyond those that are required to be retained. Know what you are required to keep and produce.

- **Never Waive the 3 Day Notice to Produce the I-9 Forms**
  You do not get extra credit for turning your I-9 forms over early. Even if you believe your forms are perfect, take all 72 hours to review them and cross check them against your payroll records. If you find errors in one of your I-9 forms, you will have a chance (time permitting) to have the employee properly complete a new one, which could mitigate any fine for a technical violation.

- **Consider making corrections on the I-9 forms before producing**
  Take your time and conduct an internal audit with counsel's guidance before producing your I-9 forms. It may reduce your liability.

- **Extensions**
  Extensions, which are within the discretion of the ICE agent, are generally not granted. Assume you won't get one.

- **Contact the ICE Agent**
  Every ICE agent handles audits differently. Make sure that your attorney contacts the agent and knows what process the agent will follow. Have your attorney inquire about timeline, expectations, and process.

- **ICE is not your friend**
  Always be courteous and respectful. ICE auditors generally are too. But remember ICE agents are there to collect information. Being overly chatty often results in an employer inadvertently supplying adverse information. When in doubt, remember the old adage: "a fish with his mouth closed never gets caught."

- **Document everything that is turned over to ICE**
  Always keep a copy of what was produced to ICE, and request an inventory receipt from the agent. ICE audits can take months and often are done at an ICE field office or headquarters.

Ronald Reagan once said that the ten most dangerous words in the English language are "Hi, I'm from the government, and I'm here to help." The proper size and role of government will always be subject to debate by people of different political views. But one thing shouldn't be: employers should always be wary when a government agent comes knocking on the door.

No matter how good a job an employer has done with it's I-9 forms, there is always the potential for mistakes—which means a potential for fines. Make sure you have prepared well before an ICE auditor shows up at your door; otherwise, you'll be sorry you let them help.

For additional information, contact Maria Ramos at mramos@slk-law.com or 813.227.2252.

Antitrust Compliance Programs: Their Need and Operation

With the increased enforcement of competition laws (both within the U.S. as well as globally), it has become increasingly important for all companies, regardless of size, to have in place good corporate policies and programs to ensure compliance with the law. Corporate fines in the U.S. are routinely in the high eight figure range today and criminal penalties for individual violators have been increased to up to ten years in a federal penitentiary, coupled with fines for individuals up to one million dollars. Consequential civil damage actions against companies and their executives are also reaching the high eight figures range for settlements and jury awards. Millions of dollars are being spent in defense costs, for even successful defense cases. Simply stated, antitrust violations are no longer an acceptable business risk for either a company or its individual employees. Also, the government's new discovery tools and initiatives regarding "Big Data" retrieval by use of enhanced data analytics has made compliance with federal subpoenas inordinately expensive, burdensome and risky.

By Michael M. Briley

Conversely, companies with viable and federally compliant compliance policies and procedures are not only receiving substantial consideration from the enforcement agencies and courts in the event of an investigation or violation, but, moreover, studies have shown that the likelihood of violation is substantially (if not completely) reduced when employees are presented with a clear corporate policy, focused training and a useable process which offers them access to answers when they have questions, as well as attentive receptors when they have concerns. It used to be the case that antitrust compliance programs were perceived to be a necessity for only the "big guys," the leaders of industry. This is a fallacy today. The majority of federal indictments for criminal violations of the antitrust law in this country over the last ten years has been against smaller (and in some cases family owned) companies which were "drawn in" to anticompetitive behavior by larger companies or by their peers. For example, in the last two years a number of small, family owned companies have been criminally charged in the automotive parts price fixing cases and our firm has defended small, local companies in both criminal and civil antitrust cases on a number of occasions. As a consequence, no seller of goods or services today can afford to ignore this reality. Good business practice requires a good compliance program.

So what does such a program consist of?

Consistent with the requirement of the U.S. Sentencing Guidelines and Department of Justice pronouncements,

an antitrust compliance program should consist first of a clear statement by corporate leadership of a commitment to compliance with the law. The commitment by corporate leadership to not only embrace a policy of compliance, but also to the allocation of sufficient resources to support a good compliance program, as well as necessary enforcement measures, are critical to success. In addition to the adoption of a formal, written corporate policy, a successful program will also contain the following features, all of which are necessary for compliance with federal guidelines:

- operational oversights and creation of a senior management responsibility for the maintenance of training programs and necessary records;
- disciplinary measures for violations;
- training programs for the education of employees (which also affords the opportunity for questions by employees and the testing of employees of measuring their knowledge and understanding of the law);
- establishment of a "hot line" for the reporting of concerns or response to inquiries;
- periodic audit of operating units or divisions to ensure ongoing compliance;
- establishment of a good record retention policy (if one does not already exist);
- establishment of a non-retaliation policy (if one does not already exist); and
- establishment of employee instructions for special events (e.g., trade shows, trade association meetings, etc.).

A "best practices" compliance program should go beyond federal guidelines and should also include such things as employee instructions and training about how to respond to government investigations or audits (e.g., "dawn raids by the FBI"), how to respond to unlawful advances or suggestions from competitors, how to be aware of circumstances where the company itself may be a victim of anticompetitive behavior and so forth.

Why is a program needed now?

In addition to the reasons given above, during the period 2009-2013, 109 corporations and 311 individuals were indicted for criminal violation of the U.S. antitrust laws; government fines alone exceeded $2 billion in 2013.* The average sentence for individual violations has gone from eight months in 1990-1999 to 25 months in 2013.* The maximum jail sentence was changed by Congress several years ago from three to ten years. Ensuing civil suits (following criminal prosecutions) have become increasingly expensive. Some examples are $1.2 billion paid by MasterCard and Visa in 2011, $1.4 billion paid by Pilkington Glass and Asahi Glass, $1.6 billion paid by the international air cargo defendants and a $1 billion jury award last year against Dow Chemical in its participation in the urethane price fixing cartel. In the currently pending automobile parts cases, many individual defendants have been indicted and a number of small, family companies will be required to pay millions in the ensuing civil cases.

Most antitrust criminal investigations and indictments today are the result of co-conspirators applying for amnesty under the Antitrust Criminal Penalty Enhancement Reform Act (ACPERA), which offers large and attractive incentives (including complete corporate and individual executive immunity from prosecution) for price fixers to "drop the dime" on co-conspirators. A recent *U.S.A. Today* analysis of U.S. Federal Sentencing Commission data (2006-2011) revealed that with respect to convicts who get a reduced sentence in exchange for providing assistance to the government, the highest percentage (67%) is for antitrust indictees; higher than for any other crime (including for example, drug trafficking, racketeering, tax offenses, fraud, murder, firearms, robbery, drug possession, etc.). Competitors, disgruntled existing and former employees, employees in trouble with the law for something else and unhappy customers provide rich sources of information to the government concerning potential antitrust violations. Unfortunately, very often senior management is unaware of unlawful antitrust activity existing within their company. Now, more than ever, good compliance programs are essential to the protection of companies and their employees in an increasingly competitive global economic environment.

Our firm is a leader in the development and implementation of state-of-the-art compliance programs. We can work with any sized company to create or maintain a new program or to enhance any existing one. The cost depends upon the size of the company and the availability of its existing staff (e.g., legal department or outside counsel), but it is surprisingly inexpensive, especially given the risk level involved. New, state-of-the-art programs for employee training and testing are being developed to enhance the effectiveness and deliverability of such programs.

For additional information, contact Mike Briley at mbriley@slk-law.com or 419.321.1325.

Footnote

* U.S. Department of Justice data.

insights

Staffing Companies and their Clients
Face Significant Sales Tax Risk

Staffing companies offer their clients the opportunity to increase productivity and flexibility, while at the same time helping clients decrease costs. However, in some states, these benefits come at a cost in the form of a sales tax assessed on the provision of employment staffing and placement services. Ohio, New York, Texas and Pennsylvania are just a few such states. While these states typically provide statutory exemptions for certain transactions, state tax departments strictly construe those exemptions. Like other states, under Ohio law, the tax is imposed on the client, but the staffing company is charged with collecting it as trustee for the state.[1] This allows the state to go after either party for the tax, though states often concentrate their efforts on the staffing companies since they offer a bigger prize. As discussed in more detail below, in recent sales tax audits that we have handled, a lack of attention to detail has resulted in six figure assessments against staffing companies and clients.

By Michael S. McGowan

Ohio Sales Tax Basics

Under Ohio law, a transaction pursuant to which an employment service is provided is a taxable sale.[2] "Employment service" is defined as the provision of personnel to a client, on a temporary or long-term basis, to work under the supervision of another, when the provider supplies wages, compensation and other benefits to the personnel. Like other states, Ohio establishes several exemptions from this general rule, including the one that is the focus of this alert - the permanent leased employee exemption. The statute exempts transactions whereby personnel are provided "to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis."[3] In order to qualify for the exemption, the relationship between the staffing company and the client must satisfy two requirements – a contract requirement and an actual practice requirement.

The staffing services must be provided pursuant to a contract that has an initial term of at least one year and provides that all assigned personnel are provided on a permanent basis. There is case law in Ohio indicating that this

requirement can be satisfied with an oral contract. However, it is difficult to prove the existence and duration of an oral contract so the contract should always be in writing and should expressly state that the initial term is one year and all personnel supplied pursuant to the contract are provided on a permanent basis.

The second requirement for the exemption is that the personnel must in fact be provided on a permanent basis. In *H.R. Options, Inc. v. Zaino*, the Ohio Supreme Court defined "permanent basis" to mean that employees are assigned for an indefinite period, i.e., the employee's contract does not specify an ending date and the employee is not being provided either as a substitute for a current employee who is on leave or to meet seasonal or short term work load conditions. The Court also held that both the terms of the contract and the facts and circumstances of the employee's assignment are factors that must be reviewed to determine whether the employee is being assigned on a permanent basis.

What Does This Mean To You?

So what does this mean to staffing companies and their clients? Any of the following factors create a significant risk of a sales tax assessment if audited:

- There is no written contract or the contract is not for an initial term of one year.
- The written contract does not provide that all personnel are provided on a permanent basis.
- Any personnel provided pursuant to the contract are used to meet short term work demands, seasonal needs, or to fill in for employees who are on leave.
- Significant fluctuations in the number of personnel provided over a period of time.
- The staffing arrangement is used as a short term screening process for individuals who will be hired directly by the client.
- The staffing agreement provides for a specific end date.
- The staffing company has contracts with the individuals being provided indicating they are being hired for a fixed period of time, rather than indefinitely.

The Ohio Department of Taxation takes the position in Information Release ST 1993-08 that if at least one employee covered under the employment service contract is not assigned on a permanent basis, then the entire contract may be considered taxable. It is doubtful that position is supported by the statute; however, it highlights the importance of being sure that all personnel provided under a contract that is intended to qualify for the permanent leased employee exemption are provided on a permanent, indefinite basis.

Although this exemption has been around since the early 1990s, we continue to see very substantial assessments against staffing companies and their clients for failure to satisfy the requirements of the permanent leased employee exemption. We have seen staffing contracts that state that all personnel are being provided on a permanent basis but elsewhere in the contract it states that the personnel are being provided on a temporary basis. Frequently, we see situations where the contract satisfies the exemption requirement, but a review of the facts and circumstances of the actual arrangement indicates significant variations in the number of individuals provided over a period of time. For example, if the staffing company routinely provides approximately 30 individuals per week but at some point during the year the number increases to 40 or 50 individuals for a period of weeks and then returns to approximately 30 individuals, it is very likely that an auditor will assume such fluctuations indicate that personnel are being provided to fill seasonal or short term needs and do not qualify for the permanent leased employee exemption. As noted above, the Department of Taxation's position is that supplying any temporary personnel will taint the entire contract. In two recent audits, the State assessed 100% of the staffing company's charges even through it was clear that many of the individuals were assigned on an indefinite basis. The amount of the assessment in such cases will likely be reduced on appeal, but an appeal can be expensive both in terms of legal fees and internal resources. Further, a sales tax appeal in Ohio currently takes two to five years to resolve. During that period, the sales tax exposure continues to grow.

An Ohio sales tax audit usually covers a period of three years, although it can go back further if the taxpayer being audited has not filed sales or use tax returns. If you are a staffing company client that incurs average weekly charges of $10,000, over a period of three years the sales tax assessment could easily be $100,000 plus penalties and interest. If you are a staffing company that has ten customers doing that volume of business, failure to strictly comply with the requirements of the exemption could subject you to an assessment of over $1 million, plus penalties and interest.

Recommendation

If the intent is to qualify for the permanent leased employee exemption, we recommend that both parties to a staffing company contract carefully review the contract to be sure it satisfies the statutory requirements and does not include any extraneous or confusing language. Staffing companies and their clients should also review the actual flow of employees over the last few years to identify any fluctuations that could be an indication of temporary, seasonal or short term staffing. It is quite common for a staffing company to provide personnel on a permanent, indefinite basis and on a short term or temporary basis to the same client. In that case, there should be two contracts between the parties – one that satisfies the permanent leased employee exemption and another pursuant to which the temporary or short term personnel are provided. Temporary personnel should be provided only under the second agreement and sales tax should be added to the invoice for the services of those individuals. Clients should not rely on assurances from the staffing company that the arrangement is exempt. The tax is imposed on the client and it is the client's obligation to be sure that exempt arrangements are properly structured and sales tax is paid on temporary personnel.

If you have any questions or concerns regarding your existing staffing contracts or whether the personnel provided under those contracts qualify for the permanent leased employee exemption, please contact us.

For additional information, contact Mike McGowan at mmcgowan@slk law.com or 419.321.1227.

Footnotes

[1] O.R.C. 5739.03.

[2] O.R.C. 5739.01(B)(3)(k).

[3] O.R.C. 5739.01(JJ)(3).

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Shumaker earned three of the highest rankings for the Tampa Bay region by the *Tampa Bay Business Journal* – and was the only Sarasota law firm named to the top spots.

The *Tampa Bay Business Journal* ranked law firms by the number of local attorneys that specialize in these areas:

No. 3 for law firms

No. 3 for labor and employment law firms

No. 4 for intellectual property law

Florida Trend's 2014 Florida Legal Elite

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Shumaker Recognized by AHA

For the seventh year in a row, Shumaker has been recognized as a Gold Fit-Friendly Company by the American Heart Association. The American Heart Association's Fit-Friendly designation recognizes the steps Shumaker has taken in recognizing the importance of a healthy workplace for its employees and in creating a culture of physical activity in the workplace.

insights

Employment Law Update

Federal Agency Overreaching: A Trend Without an End

The Equal Employment Opportunity Commission and the National Labor Relations Board have been hard at work all year, continuing their efforts to extend their collective reach well beyond their established domains.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Disparate Impact of Blanket Criminal Background Check Policies

By Mechelle Zarou

The Equal Employment Opportunity Commission ("EEOC") has aggressively expanded its ongoing crusade to prohibit the use of pre-hire background check procedures that it believes have a disparate impact on African-American and Hispanic male job applicants, and therefore violate Title VII of the Civil Rights Act. Buoyed by a $3.1 million settlement with PepsiCo. Inc. reached in January 2012, which the EEOC had pursued based on PepsiCo's alleged policy of disqualifying all applicants with an arrest on their record, even if such arrest did not lead to a conviction, the EEOC has since expanded its legal theory to include even those employer policies that disqualify applicants solely due to convictions.

The Equal Employment Opportunity Commission ("EEOC") has aggressively expanded its ongoing crusade to prohibit the use of pre-hire background check procedures that it believes have a disparate impact on African-American and Hispanic male job applicants, and therefore violate Title VII of the Civil Rights Act.

On April 25, 2012, the EEOC issued *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm), which formally concluded that any blanket policy or practice that excludes any applicant with a criminal record from employment will not be job-related and consistent with business necessity, and will therefore violate Title VII, unless such a policy is required by federal law. The EEOC also determined that state or local laws prohibiting the employment of individuals with certain criminal records are preempted by Title VII. The EEOC believes that the only lawful policies are those in which the employer also conducts an individualized inquiry of each applicant to assess whether any such conviction is relevant to the job to be performed, thereby ensuring that any prohibition is justified by

business necessity. The State of Texas filed suit against the EEOC to block the agency's April 2012 guidance, reasoning in its complaint that "Texas and its constituent agencies have the sovereign right to impose categorical bans on the hiring of criminals, and the EEOC has no authority to say otherwise." *Texas v. Equal Emp't Opportunity Comm'n*, No. 5:13-cv-00255 (N.D. Tex.). While the District Court dismissed the case on procedural grounds, in its filings the EEOC admitted that the 2012 guidance was not legally binding, nor did it carry legal consequences, arguments that will only aid the defense of employers whose background check policies have been challenged by the EEOC.

Shumaker has addressed the EEOC's overbroad guidance in a previous edition of *insights*, describing how employers can properly conduct a criminal background screen without raising the ire of the EEOC. *See* Serena Lipski, *Criminal Background Checks and Hiring*, INSIGHTS, Spring 2012, at 19-21. Since that time, however, the EEOC has doggedly continued its attack on employer background check policies, even though to date, no court has found merit in its novel legal theory.

The EEOC's series of losses in this arena has not deterred it from continuing to aggressively litigate its position. For instance, in *EEOC v. PeopleMark, Inc.*, No. 08-cv-907, 2011 WL 1707281 (W.D. Mich. Mar. 31, 2011), the EEOC sued PeopleMark in 2008 based on its alleged blanket policy refusing to hire any applicant with a criminal background, while ignoring evidence that flatly refuted this contention. In fact, the evidence disclosed during the litigation unequivocally demonstrated that PeopleMark had actually hired many applicants with felony criminal convictions. On the basis of this evidence, the parties filed a joint motion to dismiss stipulating that PeopleMark was the prevailing party for purposes of statutory costs and attorneys' fees. The District Court judge granted the motion to dismiss and ordered the EEOC to pay over $750,000 in legal fees and costs to PeopleMark, reasoning that once "the EEOC became aware that its assertion that PeopleMark categorically refused to hire any person with a criminal record was not true, or once the EEOC should have known that, it was unreasonable for the EEOC to continue to litigate on the basis of that claim, thereby driving up defendant's costs, because it knew it would not be able to prove its case." *Id*. The EEOC then appealed the award of attorneys' fees and legal costs to the Sixth Circuit Court of Appeals, which affirmed the District Court's decision in October 2013. *See id*. 732 F.3d 584 (2013).

Similarly, in 2009, the EEOC began pursuing a lengthy lawsuit against Freeman, a live engagement marketing services provider, spending three years engaging in discovery and compiling a statistical analysis of Freeman's hiring practices to support its claims of a disparate impact on certain minority groups due to Freeman's criminal background check policy. *See EEOC v. Freeman*, No. 09-CV-2573 (D. Md. Aug. 9, 2013). In December 2010, the EEOC filed a similar lawsuit against Kaplan Higher Education Corporation and its affiliates, which are educational institutions offering financial aid to students,. *See EEOC v. Kaplan Higher Education Corp*., No. 1:10-cv-02882 (N.D. Ohio, Jan. 28, 2013).

In both lawsuits, the EEOC could not even prove that the defendant's background check policies had a disparate impact on African-American or Hispanic male employees, since the EEOC's statistical evidence was flatly rejected by each reviewing District Court. In the *Kaplan* case, which was filed after *Freeman*, but decided seven months earlier, the Northern District of Ohio dismissed the EEOC's case against Kaplan based on the faulty statistical analysis prepared by purported expert Kevin Murphy, who holds a doctorate in industrial and organizational psychology. The District Court rejected Dr. Murphy's statistical analysis, which used a team of five "race raters" who each had "experience involving multiple racial populations" to determine the race of applicants by looking at a photograph (in some cases, a photograph selected by Dr. Murphy or his staff), and determining each applicant's race by consensus. The District Court rejected this analysis because the EEOC had not demonstrated that this form of determining race rating was reliable, nor had it been tested or subject to peer review and publication. The EEOC similarly failed to present any known or potential rate of error in this method, or proof of maintenance of proper controls to ensure reliability. In fact, the District Court was "greatly concerned" with Dr. Murphy's personal involvement in selecting the photographs used by the race raters, and that Dr. Murphy sat on one of the race rating panels used to determine the race of 15 applicants, since "Dr. Murphy both determined the underlying fact of race and also analyzed the significance of his own determinations in concluding that defendants' use of credit reports disparately impacted Black applicants." *Id*. at 16.

Moreover, the *Kaplan* court noted that the EEOC itself uses credit checks to screen applicants for 84 out of 97 agency positions, running background checks largely for the same reasons that private employers use them. While the Kaplan court did not reach the issue of whether the government should be estopped from objecting to a process that it also

uses, this defense theory could become critical should the EEOC bolster the pending cases with admissible expert testimony to support its allegations of a disparate impact on minorities.

Despite the *Kaplan* court's sound rejection of the EEOC's statistical evidence, the EEOC appealed the case to the Court of Appeals for the Sixth Circuit, which, in a scathing opinion issued on April 9, 2014, affirmed the decision of the District Court, holding that the expert's methodology was unreliable in every possible way. *Equal Emp't Opportunity Comm'n v. Kaplan Higher Educ. Corp.*, No. 13-3408, slip. op. (6th Cir., 2014). The *Kaplan* court noted that the "EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself." *Id*. at 7.

Similarly, in *Freeman*, the EEOC relied on the same expert testimony and statistical analysis that was denounced in the *Kaplan* case. Dr. Murphy's analysis was rejected as unreliable by the *Freeman* court because it was, in the words of the District Court, "an egregious example of scientific dishonesty." The *Freeman* court further noted that the "mind-boggling number of errors contained in Murphy's database could alone render his disparate impact conclusions worthless . . . Murphy's continued pattern of producing a skewed database plagued by material fallacies gives this Court no choice but to entirely disregard his disparate impact analysis." *Id*. at 19 and 20. Despite these severe flaws in its expert's statistical analysis, the EEOC appealed the *Freeman* case to the Fourth Circuit Court of Appeals, where it remains pending, following oral argument on October 29, 2014.

Undeterred by the staggering attorneys' fee award in the *PeopleMark* case and the evisceration of its purported expert's statistical analysis by three federal courts in *Freeman* and *Kaplan*, the EEOC continued to file more high-profile suits against Dollar General Corp., and BMW Manufacturing Co., LLC, alleging that these employers had similarly failed to conduct an individualized inquiry of each applicant with a criminal background, or otherwise terminated (or refused to hire) a higher percentage of African-American employees who had a criminal conviction on their records than similarly situated Caucasian employees. In both lawsuits, the defendants have sought to discover evidence of the EEOC's use of criminal background checks as part of its own internal hiring processes, which the defendants allege are highly relevant to the reasonableness of their own policies. The EEOC objected to these discovery requests, disclaiming the relevance of its own agency hiring practices. Most recently, in the *BMW* case, the District Court sided with the EEOC in ruling that the EEOC's use of background checks is not relevant to BMW's defense of its own policy. The *Dollar General* and *BMW* cases both remain pending in federal district courts.

The EEOC is likely to continue to pursue these contentious cases, as it most recently joined forces on this issue with the U.S. Federal Trade Commission ("FTC"), the agency that enforces the Fair Credit Reporting Act ("FCRA"), which provides consumer protections in background check procedures. The agencies jointly issued two technical assistance documents to explain how each agencies' respective laws apply to background checks used for employment purposes. In the March 2014 guidance, the EEOC and FTC continue to assert that an individualized inquiry is required when an employer conducts pre-employment background checks. Further, the agencies again assert that the provisions of the FCRA and Title VII supersede any state laws governing background screens, noting that only federal laws requiring criminal background screens should be followed.

As the remaining cases continue to wend their way through the courts, and employers attempt to adhere to the latest joint guidance from the EEOC and FTA, there will undoubtedly be more to come on this issue and Shumaker will continue to provide regular updates.

The Chilling Effect of Employee Release Agreements

In addition to its ongoing attempts to limit the use and effectiveness of employer background check policies, the EEOC has attempted to expand the EEOC's reach even further by limiting the effectiveness of employee release agreements, such as settlement agreements, severance agreements or other agreements that contain a release of all employment claims that an employee may have against an employer. Such agreements, when well-drafted, usually contain provisions safeguarding the confidentiality of the agreements and the employer's confidential information, and limiting the employees ability to discuss the agreement or disparage the employer in the future, provisions which the EEOC now believes interferes with former employees' non-waivable protected right to file charges and participate in agency investigations.

As background, the EEOC has taken a consistent position since 1997 that agreements prohibiting the filing

of future charges or participation in agency investigations violate the federal discrimination statutes that the EEOC enforces. However, the EEOC has also recognized that an employee can validly release his or her own individual claims and right to receive individual damages, even while maintaining the right to file a charge in the future. The EEOC confirmed this position in 2006, when it entered into a consent decree with Eastman Kodak Co. requiring Kodak to use express releasing language stating that the employee released all individual claims, yet could continue to file a charge or participate in any agency investigation in the future, *provided the employee waived the right to individual monetary damages in any such charge.*

The EEOC suddenly changed this longstanding position on the recovery of individual damages in May 2013, when the EEOC sued Baker & Taylor, Inc. based on its severance agreements. Baker & Taylor's agreements contained an overbroad release prohibiting the filing of a charge with any administrative agency and a nondisparagement clause prohibiting discussions or comments about the termination of employment that would reflect negatively on the company, while specifically allowing the employee to comply with any government investigation. *See Equal Emp't Opportunity Comm'n v. Baker & Taylor, Inc.*, No. 1:13-cv-03729 (N.D. Ill. July 10, 2013). Soon after the complaint was filed, the EEOC and Baker & Taylor entered into a sweeping consent decree requiring the company to include specific language in its severance agreement confirming that employees retain the right to file a charge or claim or to communicate with the EEOC and similar agencies, and also "retain the right to participate in such any [sic] action *and recover any appropriate relief.*" *Id.* (emphasis added). The consent decree also contained language expressly stating that the right to communicate with the EEOC is not limited by any nondisparagement provision in the severance agreement.

With this language, the EEOC for the first time construed a nondisparagement provision, which is a standard release agreement term, as amounting to a prohibition on communication with the EEOC. Bolstered by this consent decree language, the EEOC filed two lawsuits in federal district court against *CVS* Pharmacy Inc. and CollegeAmerica Denver, Inc., asserting that each employer's severance agreements were overbroad and interfered with their employees' protected, non-waivable right to file a charge, testify, assist or participate in any manner in an investigation under federal discrimination laws. *See Equal Emp't Opportunity Comm'n v. CVS Pharmacy, Inc.*, No. 1:14-cv-00863 (N.D. Ill) (filed February 7, 2014); *Equal Emp't Opportunity Comm'n v. CollegeAmerica Denver Inc.*, No. 1:14-cv-01232 (D. Col.) (filed April 30, 2014). In filing these cases, the EEOC announced that "the right to communicate with the EEOC is a right that is protected by federal law. When an employer attempts to limit that communication, the employer effectively is attempting to buy employee silence about potential violations of the law. Put simply, that is a deal that employer cannot lawfully make." EEOC Press Release, February 7, 2014.

In the *CVS* case, the EEOC specifically challenged provisions that (i) require the employee to cooperate with the employer in future lawsuits by promptly notifying the company's General Counsel if contacted by an investigator, attorney or third party relating to any action against the company; (ii) prohibit the employee from disparaging the employer or its employees or principals; (iii) require the employee to maintain the confidentiality of information "concerning the Corporation's personnel, including

the skills, abilities, and duties of the Corporation's employees, wages and benefit structures, succession plans, information concerning affirmative action plans or planning"; (iv) require a release of claims including discrimination claims; and (v) confirm that the employee has not and will not file any action, lawsuit, complaint or proceeding asserting any of the released claims, including discrimination claims; and (vi) provide that the employee will reimburse the employer for any legal fees incurred as a result of a breach of the agreement.

The EEOC's complaint recognized that the *CVS* release agreement contained disclaimer language providing that the employee retained the right to participate in a proceeding before any state or federal agency enforcing discrimination laws and expressly stating that the agreement did not prohibit the employee from cooperating with any such agency. To the EEOC, such a disclaimer was insufficient, since it was "buried" in purported "legalese" in a 5-page single-spaced agreement, appeared in only one place in the agreement, and was contradicted by the much more detailed objectionable clauses.

Thus, in its complaint, the EEOC sought a permanent injunction enjoining the employer from engaging in a pattern or practice of resistance to employees' protected right to file a charge, participate and cooperate with investigations by state and federal agencies. It also sought an order (i) requiring the employer to reform its separation agreement so that it would be consistent with the provisions of Title VII; (ii) requiring the company to issue a corrective communication to the company's workforce informing all employees that they retain the right to file a charge of discrimination and to communicate with the EEOC; (iii) providing 300 days for former employees who signed the objectionable separation agreement to file a charge of discrimination with the EEOC or state agency; (iv) requiring the employer to pay the EEOC's costs for filing the action and (v) granting such additional relief as the Court deems necessary.

In response, *CVS* promptly filed a Motion to Dismiss or, in the Alternative, for Summary Judgment, which was granted on October 7, 2014. In its order granting CVS's motion for summary judgment, the District Court held that the EEOC failed to engage in mandatory pre-lawsuit conciliation procedures. Such informal methods of conference, conciliation, and persuasion are required whenever there is a reasonable belief that a person has engaged in an unlawful employment practice, even in cases, as here, alleging a pattern or practice of resistance to the full enjoyment of any right secured by Title VII. As of press time, the EEOC had not filed an appeal of this dismissal order.

In the *CollegeAmerica* lawsuit, the EEOC objected to the same provisions as alleged in the *CVS* case, as well as additional provisions prohibiting contact with governmental agencies and with those who have filed complaints against the company, a clause requiring the former employee to represent that he or she has not filed any claims to date, and a clause certifying that the former employee disclosed all non-compliance with regulatory requirements. The EEOC sought all of the same relief as in the *CVS* case, plus a permanent injunction enjoining the employer from engaging in resistance to employees' rights to file charges, including the individual former employee whose severance agreement was the basis of the suit, and barring unlawful retaliation against the former employee. In response to this complaint, CollegeAmerica filed a Motion to Dismiss in June 2014, which remains pending before the District Court as of press time.

In light of the ongoing confusion created by these pending cases as to the permissibility of certain standard provisions in employer release agreements, Shumaker recommends that employers review their severance agreement templates to ensure that they clearly state that the releasing employee maintains the right to file administrative charges and participate in agency investigations. Such a reservation of rights should be set off in a separate paragraph, preferably in bold type-face, and referenced in each of the paragraphs containing the other objectionable provisions identified by the EEOC. Further, given that the NLRB has raised similar concerns as the EEOC, this reservation of rights should also refer to the NLRB and similar state agencies.

Similarly, employers should consider the language of any release of claims and covenant not to sue, to be sure that it expressly allows for a future EEOC or similar agency action. Cooperation provisions, if included at all, should be very narrowly tailored to secure only the former employee's truthful testimony in future cases. Such clauses should only be included when an employer reasonably believes that future litigation will require the former employee's testimony.

Finally, given the EEOC's flip-flopping on an employee's right to recover individual damages in any future agency action, employers should continue to state that employees may not recover individual damages.

Without further guidance from the EEOC or the courts, it is not yet clear whether the EEOC will be bound by its position in the Kodak consent decree allowing a waiver of individual damages, and it is premature to remove this language from severance templates.

In light of this evolving area of law, Shumaker has revised its standard release agreement templates to satisfy the EEOC's concerns. Please contact any member of the Employment and Labor Department to obtain an updated severance agreement template, or for assistance in ensuring that your company's severance templates meet all of the EEOC's requirements. Shumaker will continue to provide updates on this rapidly-changing area.

In light of the ongoing confusion created by these pending cases as to the permissibility of certain standard provisions in employer release agreements, Shumaker recommends that employers review their severance agreement templates to ensure that they clearly state that the releasing employee maintains the right to file administrative charges and participate in agency investigations.

NATIONAL LABOR RELATIONS BOARD

Social Media Policies Revisited: The Facebook "Like" As Protected Activity

Like its counterpart the EEOC, the National Labor Relations Board ("NLRB") continues to expand its reach beyond its traditional role involving unionized workforces. In particular, the NLRB has continued an aggressive campaign begun in 2011 to crackdown on all employer policies governing social media, electronic forums where more and more frequently employees are engaging in informal collective activity regarding their terms and conditions of employment. The NLRB's pronouncements in this arena apply to **both** union and non-union employers. The NLRB, through its General Counsel, has concluded that employer policies prohibiting employees from discussing the terms and conditions of their employment on social media websites violate the National Labor Relations Act ("NLRA") by interfering with workers' rights to engage in protected collective activity.

As background, in a comprehensive Memorandum issued in May 2012, the Acting General Counsel commented on seven recent NLRB cases involving social media, finding in six of the cases that at least some of the provisions in employer social media policies are overbroad and unlawful under the NLRA. *See General Counsel Memorandum*, Division of Operations-Management, OM-12-59, Report of the Acting General Counsel Concerning Social Media Cases (May 30, 2012). The Acting General Counsel also found in the seventh case that WalMart's social media policy, which was revised to comply with prior decisions and opinion memoranda, was lawful under the act. The Acting General Counsel attached WalMart's complete revised Social Media Policy to the Memorandum, as an example of a policy that provides rules that "clarify and restrict their scope by providing examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity." *See id*. at 20.

Despite this explicit guidance, employers continue to struggle with overbroad and vague social media policies, and making disciplinary decisions that purportedly intrude on employees' Section 7 rights to engage in collective activity to discuss work-related issues for the purpose of collective bargaining or mutual aid or other protection. Most recently, the NRLB issued a decision in *Three D, LLC d/b/a Triple Play Sports Bar & Grille v. Sanzone* and *Three D, LLC d/b/a Triple Play Sports Bar & Grille v. Spinella*, 200 LRRM 1569, 361 NLRB No. 31 (Aug. 22, 2014) (collectively *Triple Play*), holding that an employee who "likes" a status on Facebook is engaging in protected activity. The NLRB affirmed the decision of the Administrative Law Judge ("ALJ") that Triple Play had unlawfully discharged two employees for their Facebook activity, and had also violated the NLRA by threatening employees with discharge and interrogating employees about their Facebook activity, as well as informing employees they were being discharged because of their Facebook activity. Triple Play also unlawfully threatened employees with legal action for engaging in that activity. The NLRB also reversed the ALJ's findings with regard to the employer's Internet/Blogging policy, finding that the employer violated the NLRA by maintaining the policy.

In *Triple Play*, the employer had made a tax-withholding error, which resulted in employees owing an unexpected amount of state income taxes. In the Facebook post at issue, a former

employee had posted a Facebook status stating: "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!!! Now I OWE money…Wtf!!!!" Several current Triple Play employees and customers made comments about this post, including derogatory comments about one of the owners, along with a discussion about contacting the "labor board" to investigate money owed to employees by Triple Play. The posts also discussed an upcoming employee meeting to address the tax withholding error. Employee Jillian Sanzone, a waitress/bartender, chimed in on the discussion, posting "I owe too. Such an *ssh*le." Vincent Spinella, a cook at Triple Play, did not post a comment but clicked "like" on the original post.

One of Triple Play's two co-owners found out about Sanzone's and Spinella's Facebook activity from his sister, who was Facebook friends with the former employee that made the original post. When Sanzone reported to work two days after posting her comment, Triple Play terminated her employment for "lack of loyalty" based on her Facebook post. When Spinella reported to work the next day, Triple Play's owners confronted him about his feelings toward the company and interrogated him about his clicking "like" on the post, asked for the identity of those who posted comments, and asked whether he had written anything negative about the owners. The owners then stated that the "like" option meant that Spinella stood behind the other commenters, and because he liked the disparaging and defamatory comments, it was apparent that he wanted to work somewhere else. One of the owners explained that his attorney told him to discharge anyone involved in the Facebook conversation for defamation, and discharged him. As Spinella was leaving, he was told "You'll be hearing from our lawyers." Spinella indeed received a letter threatening a defamation action from Triple Play's attorney, although no legal action was taken against him.

The ALJ concluded that the Facebook activity was concerted activity, since it involved four current employees and was part of an "ongoing sequence" of discussions that began in the workplace about the miscalculation of taxes. In the Facebook post, the employees discussed issues that they intended to raise at the staff meeting, as well as possible avenues for complaints to government entities; thus they were seeking to initiate, induce or prepare for group action. The ALJ found both Sanzone and Spinella were engaged in protected concerted activity, since Sanzone directly complained about the error and since Spinella's selection of the "like" button expressed his support for the others who were sharing their concerns. The ALJ rejected the employer's contention that because of the allegedly defamatory and disparaging comments, the Facebook posts lost the protection of the NLRA.

The ALJ found both Sanzone and Spinella were engaged in protected concerted activity, since Sanzone directly complained about the error and since Spinella's selection of the "like" button expressed his support for the others who were sharing their concerns. The ALJ rejected the employer's contention that because of the allegedly defamatory and disparaging comments, the Facebook posts lost the protection of the NLRA.

The NLRB affirmed the ALJ's conclusion that the comments were statutorily protected, but used a different line of cases to analyze the issue than the case relied upon by the ALJ. Nevertheless, the Board concluded the discharges were unlawful, because "the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection." *Id*. at 1575. Further, the derogatory comment was not defamatory, since it was not "maliciously untrue" and merely expressed Sanzone's personal opinion. *Id*. at 1576. Thus, the NLRB held that the ALJ had correctly found the discharges unlawful.

The NLRB next considered whether the employer's Internet/Blogging policy violated the NLRA. Because employees reviewing the policy could reasonably construe the policy to prohibit the type of protected Facebook posts that led to the unlawful discharges, the NLRB found the policy unlawful. Specifically, the policy provided that "when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees . . . engaging in inappropriate discussions about the company, management and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment." *Id*. at 1577. The General Counsel urged the NLRB to find that the prohibition on "inappropriate discussions" was overly broad, since employees "would reasonably construe the policy to prohibit their Section 7 activities." *Id*. at 1578. Since the policy lacked illustrative examples to employees of what the

employer considered inappropriate, the NLRB agreed with the General Counsel that the policy was unlawful.

In light of the *Triple Play* analysis, employers considering discipline due to an employee's Facebook activity should avoid knee-jerk reactions, and instead consult with counsel to fully consider whether social media activity is so disparaging and defamatory as to lose the protections of the NLRA. Further, it is even more critical for all employers to review their social media and online networking policies to ensure that they provide concrete examples of prohibited behavior such that an employee would not construe the policy as prohibiting Section 7 collective activity. Since the NLRB has not hesitated to take action against non-union employers, as well as those with a unionized workforce, all employers must abide by the NLRB rulings. Please contact any member of Shumaker's Employment and Labor Department for assistance in navigating these uncharted waters.

In light of the above governmental agenda, Shumaker will continue to monitor both the EEOC and the NLRB as they continue to test the furthest limits of their regulatory authority, continuing a trend that does not seem to have an end in sight.

For more information, contact Mechelle Zarou at mzarou@slk-law.com or 419.321.1460.

2015 Minimum Wage Increases

Ohio's Minimum Wage Will Increase on January 1, 2015

On New Year's Day, Ohio minimum wage will automatically increase to $8.10 per hour, a .15-cent increase over the 2014 rate. Tipped employees will receive a minimum wage increase to $4.05 per hour, which is a .06-cent increase over the 2014 rate.

Ohio's minimum wage increases are established by a constitutional amendment passed by voters in 2006, which calls for rate increases each year on January 1 based on the rate of inflation, according to the consumer price index. The Consumer Price Index rose 1.6% between September 2013 and August 2014, warranting the increases. Employers with annual gross receipts of less than $297,000 per year are only required to pay their employees the federal minimum wage or $7.25/hour.

The 2015 Ohio minimum wage poster can be found here: http://www.com.ohio.gov/documents/dico_2015MinimumWageposter.pdf?utm_source=Public+Affairs+Watch+10.23.14&utm_campaign=PAW+10.23.14&utm_medium=email

Florida's Minimum Wage Will Increase on January 1, 2015

The Florida minimum wage is $8.05 per hour, effective January 1, 2015. Florida law requires the Florida Department of Economic Opportunity to calculate a minimum wage rate each year. The annual calculation is based on the percentage increase in the federal Consumer Price Index for Urban Wage Earners and Clerical Workers in the South Region for the 12-month period prior to September 1, 2013.

The 2015 Florida minimum wage poster and the tip credit rate can be found here: http://www.floridajobs.org/business-growth-and-partnerships/for-employers/display-posters-and-required-notices

North Carolina

The North Carolina minimum wage remains the same, and employers should follow the federal minimum wage of $7.25 per hour.

Federal Contractor Minimum Wage

The U.S. Department of Labor issued a final rule on October 1, 2014 implementing a February 12, 2014 Executive Order raising the minimum wage for workers on federal service and construction contracts from $7.25 per hour to $10.10 per hour ($4.90 per hour for tipped workers). The minimum wage will be indexed to inflation in future years, and will be adjusted within 90 days of the first day of each year.

The final rule makes clear that the executive order minimum wage requirement applies to all contracts for construction covered by the Davis-Bacon Act; contracts for services covered by the Service Contract Act; concessions contracts, such as contracts to furnish food, lodging, automobile fuel, souvenirs, newspaper stands and recreational equipment; and contracts to provide services, such as child care or dry cleaning, on federal property for federal employees or the general public. The new minimum wage applies to new contracts awarded on or after January 1, 2015 and will affect nearly 200,000 American workers.

Diversity at Shumaker

Shumaker's Diversity & Inclusion Committee coordinates and directs all of the Firm's diversity initiatives. The committee is made up of partners, associates and administrative personnel.

Shumaker's Tampa office sponsored the University of South Florida's Women in Leadership and Philanthropy Fall Symposium on October 17, 2014. The event was a forum to celebrate women who are transformational leaders through their volunteer, professional and philanthropic contributions. In addition, the Tampa office supported the Women Reshaping the World conference on November 7, 2014 and the Hispanic Bar Association Gala on November 20, 2014 which raises money to provide scholarships to minority law students.

Shumaker participated in the 2014 Fall Diversity & Inclusion Career Fair at Cleveland State University in Cleveland, Ohio on September 23, 2014. The Career Fair was sponsored by the Cleveland Metropolitan Bar Association in partnership with Special Counsel and The Norman S. Minor Bar Association. Highlights of the fair included a panel discussion featuring prominent attorneys from a variety of industries and practice areas; a speed interviewing session, structured as an informational table-talk event; and a networking session.

Shumaker was selected as a recipient of the 2013 – 2014 "Family Friendly Award" presented by the Toledo Womens' Bar Association (TWBA). The award was presented at the TWBA's annual meeting.

This award is presented annually by the Toledo Women's Bar Association to acknowledge and commend one legal employer within the community that has distinguished itself by establishing employment policies and practices that assist lawyers in achieving balance between work and family. Any legal employer in either the public or private sector, employing three or more individuals, is eligible for consideration.

Shumaker is committed to promoting a workplace that assists attorneys in achieving the balance between work and family. Shumaker believes that one of the main differences among law firms today is how firms recognize the everyday challenges of its legal staff, in and outside the office. By affirmatively embracing and appreciating the differences within each family, it creates a supportive working environment for all individuals of the firm.

Shumaker sponsored the Tampa Museum of Art's annual Pride & Passion gala on May 27, 2014. Pride & Passion is the official kick-off of Gay Pride celebrations around the Bay with proceeds benefitting the Museum's education programs.

Impact of the Windsor Decision on Benefit Plan –

Untying the Knots

Just as men's fashion has moved away from suits and neckties in the business setting, the Supreme Court of the United States reintroduced the *Windsor* knot in an entirely different way. In July 2013, in *United States v. Windsor*, the United States Supreme Court determined that Section 3 of the Defense of Marriage Act ("DOMA") was unconstitutional. Prior to this, federal law had prohibited employers from recognizing a same-sex spouse as a "spouse" for purposes of employee benefit plans. Although the *Windsor* decision upended the long-standing framework created by DOMA, which barred employers from recognizing same-sex spouses for federal tax and employee benefits purposes, it left open many questions concerning marriage equality and employee benefits. In the 15 months since the *Windsor* case was decided, employers and their advisors have been learning more about the *Windsor* knots and how this decision affects employee retirement plans and group medical plans. In particular, the Supreme Court decision in *Windsor* has been followed by several rounds of guidance from the Internal Revenue Service ("IRS") and the Department of Labor ("DOL") on how same-sex spouses should be treated under employee benefit plans.

By James H. Culbreth, Jr.,

and Eric D. Britton

The Basics of the *Windsor* Decision

As a result of the Supreme Court's decision, the definition of "spouse" under federal law now includes a spouse of the same sex. DOMA laws no longer prevent a same sex couple from claiming all of the benefits of marriage under federal tax and benefits law. In IRS Rev. Ruling 2013-17, which became effective on September 16, 2013, the IRS confirmed that the terms "spouse" and "husband" and "wife" include persons who entered into a legal marriage in any jurisdiction that recognizes same-sex marriage, even if the couple does not live or work in that jurisdiction, and even if their employers are located in a state which applies its own DOMA statute to bar same-sex marriages. In DOL Technical Release 2013-4, the DOL reached the same conclusion concerning the definition of "spouse," and now recognizes any same-sex marriage that is legally recognized as a valid marriage under the laws of the

state, territory or federal jurisdiction in which the marriage ceremony was performed.

Retirement Plan Implications

In Rev. Ruling 2013-17, the IRS held that for plan qualification purposes, a qualified retirement plan under Internal Revenue Code § 401(a), including the common 401(k) savings plans as well as defined benefit pension plans, must treat an employee's same-sex spouse who is lawfully married to the employee in any U.S. state or territory that authorizes same-sex marriages as the employee's spouse for purposes of any tax law requirements related to the treatment of spouses. As a result, after September 16, 2013, an employee's same-sex spouse with a valid marriage from a state that recognizes same–sex marriages must be offered all of the same spousal protections available to opposite-sex marriages, including the rules requiring a spouse's consent to payout or to beneficiary designations. Failure to recognize a same-sex spouse as a spouse under the terms of a qualified retirement plan after September 16, 2013 would create a qualification failure for that retirement plan.

What to consider in 2014

The IRS guidance in Rev. Ruling 2013-17 followed by clarifying guidance in IRS Notice 2014-19 to assist employers and other plan sponsors in determining if an amendment to the terms of the retirement plan was required by the *Windsor* decision or subsequent IRS guidance.

If a retirement plan has previously defined a marital relationship by reference to the federal law (including but not limited to a reference to Section 3 of the DOMA) or if its terms are otherwise inconsistent with the ruling of *Windsor* or IRS guidance, that retirement plan must be amended to remove the inconsistency. However, a plan does not need an amendment if the plan's terms are already consistent with *Windsor* and the subsequent guidance. For example, a plan that defines the term "spouse" as a person legally or lawfully married to a plan participant should not require a plan amendment.

IRS Notice 2014-19 further provided that if an amendment is required to conform the retirement plan to *Windsor* and the IRS guidance, the deadline to adopt such an amendment is December 31, 2014, for calendar year plans (later in certain circumstances for non-calendar year plans). Governmental plans that must adopt an amendment should do so before the close of the first regular legislative session of the legislative lobby with authority to amend the plan that ends after September 31, 2014. If an amendment is required, the effective date generally must be June 26, 2013. However, a plan would not be treated as having a qualification failure if it only recognized same-sex spouses or participants located in states which recognize same-sex marriages prior to September 16, 2013.

As a result of *Windsor*, Rev. Ruling 2013-17 and other recent guidance, many retirement plans will also need to change their procedures for obtaining spousal consent for benefit elections. In particular, employers may find that they will want to obtain new beneficiary designation forms from any employees in same-sex marriages. For example, if an employer has an employee who was already in a same sex marriage, the employer and its retirement plan almost certainly did not require the employee to have his same sex spouse sign off on any beneficiary designation form filed prior to June 2013. As a result of the *Windsor* decision, that employee's beneficiary designation is no longer valid if it names any beneficiary other than the same-sex spouse. If the employee dies and the retirement plan pays out his death benefits to the beneficiary named in the outdated beneficiary designation form, it risks having to also pay the spouse, or even loss of the plan's tax qualified status.

Health Plan Implications

Using the same overall guidance and the *Windsor* decision itself, employers sponsoring cafeteria plans, health and dependent care flexible spending accounts, HSA's and medical plans need to evaluate how *Windsor* and the federal guidance has affected these employee benefits. Prior to *Windsor*, DOMA had a direct impact on same-sex unions because what would have been a tax-free health benefit for the spouse in an opposite-sex marriage was treated a *taxable benefit* in a same-sex marriage. While the new standard of "state of ceremony" does not completely solve all issues relating to same-sex marriage, it does clearly allow the same-sex spouse to receive non-taxable coverage under existing health plans. The federal guidance provided some transition relief in 2013 for individuals who should be able to claim the favorable tax treatment for a same-sex marriage after June 26, 2013, but at this time, plan sponsors should be looking at changing their procedures to make sure this is handled correctly in their medical plans.

Some things we do know from the IRS guidance on health plans include the recognition of the same-sex couple for cafeteria plan purposes. This means that a plan may allow an employee in a same-sex marriage to

enroll the employee's spouse. Plans may also permit an employee who marries a same-sex spouse to make a mid-year election change due to a change in legal marital status. Medical flexible spending accounts may cover a same-sex spouse, and qualifying medical expenses incurred by same-sex spouses are eligible for tax reimbursement through a health savings account.

It may be necessary to amend the health plan on the last day of the first plan year beginning on or after December 16, 2013, but only if the plan term is inconsistent with the *Windsor* case and the IRS guidance. The deadline typically becomes December 31, 2014, for calendar year plans, and employers should review their health plan documents now to see if a change is required.

What *Windsor* Did Not Change

Nothing in the *Windsor* decision or the federal guidance requires plans to offer group health plan coverage to same-sex spouses. However, employers should keep in mind that same-sex spouses may become automatically eligible for their group health plan as a result of the *Windsor* decision even though the plan does not intend to offer such coverage. Frequently, the health plan defines "spouse" in accordance with applicable law, in which case it does not specifically exclude same-sex spouses and would now appear to automatically include same-sex spouses without further amendment to the medical plan. Furthermore, continued medical coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") should now be offered to same-sex spouses even if it was not in prior years. The last quarter of 2014 is a good time for an employer to talk to its group health plan service provider and COBRA administrator to determine how this should be handled.

Once the dust settled, the *Windsor* decision was not the earth-shattering event many anticipated. Employers now have had time to consider the implications and should make a technical review of what the retirement plan and medical plan both intend to provide, and in fact provide, to same-sex spouses. The problem or missed opportunities from the *Windsor* decision should be part of the fourth quarter planning for any employer who offers retirement or group health benefits to eligible employees.

For additional information, contact Jim Culbreth at jculbreth@slk-law.com or 704.945.2186 or Eric Britton at ebritton@slk-law.com or 419.321.1348.

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Federal Cause of Action For Trade Secret Theft

On The Horizon

In the wake of numerous reports of cyber security threats, Congress has introduced two bills intended to create a private cause of action for trade secret misappropriation under federal law. Senators Christopher Coons (D-DE) and Orin Hatch (R-UT) introduced the Defend Trade Secrets Act of 2014 (the "2014 DTSA") in April of this year, and Representatives George Holding (R-NC), Jerrold Nadler (D-NY), Howard Coble (R-NC), Hakeem Jeffries (D-NY) Steve Chabot (R-OH) and John Conyers (D-MI) introduced the Trade Secrets Protection Act of 2014 (the "2014 TSPA") at the end of July.

By Suzette M. Marteny

The proposed legislation would supplement and expand existing state laws[1] and the federal Economic Espionage Act of 1996[2] (which criminalizes trade secret misappropriation but provides no civil remedy) and provide a unified body of law with expanded remedies under which victims of trade secret misappropriation may avail themselves. The most significant differences between the proposed legislation and the status quo are the provisions for ex parte seizure orders, the availability of treble damages and a five-year statute of limitations.

Of course, creating new remedies is not without controversy. Critics of the legislation say the bills lack specificity as currently drafted, and there is ongoing debate about the need for federal, civil remedies when there may be adequate remedies under state law. Since the House and Senate introduced the proposed legislation only a few months ago, it is unlikely that either will become law in the relatively near future.

Trade Secret Misappropriation Under The Uniform Trade Secrets Act

Trade secret law is widely misunderstood, even among seasoned practitioners, because it is often viewed out of context. At its core, trade secret law is a codification of commercial ethics that protects against using "reprehensible means of learning another's secret."[3] Viewed in this context, it makes sense that a "trade secret" can be almost anything—"a formula, pattern, compilation, program, device, technique, or process"—that has actual or potential value because it is not generally known or readily ascertainable so long the owner uses reasonable measures to maintain its secrecy. Importantly, there is no requirement that a trade secret constitute new, useful, non-obvious information or even that a trade secret be original. In fact, in the Eleventh Circuit, a unique combination of ***publicly available*** information can constitute a trade secret if the combination adds value to the information.[4] It is sufficient that the information be not generally known or readily ascertainable and that it provide the owner with a competitive advantage.

Presently, civil remedies for misappropriation of trade secrets fall under state laws, the vast majority of which have adopted the Uniform Trade Secrets Act ("UTSA")[5], and include:

- Injunctive relief, generally in the form of a preliminary injunction or temporary restraining order;
- Money damages in the forms of actual damages, unjust enrichment or a reasonable royalty;
- Exemplary damages not exceeding twice the award of money damages for wilful misappropriation;
- Attorneys' fees in certain circumstances.

Under UTSA, there is no provision for ex parte relief and claims are subject to a three-year statute of limitation.

Proposed Expansion of The Economic Espionage Act of 1996

The Economic Espionage Act of 1996, 18 U.S.C. § 1831, criminalizes the theft of trade secrets if the offense is committed with the knowledge that the information stolen is a trade secret and with the intent that the theft will benefit a foreign entity. Section 1832 provides for criminal penalties when the offender knowingly steals trade secrets with the intent to benefit anyone other than the owner.

Both the DTSA and the TPSA propose to expand on the current provisions of the Economic Espionage Act to create civil remedies for trade secret theft. As drafted, the DTSA would create a private cause of action for violations of §§ 1831-1832, and create a cause of action for misappropriations of trade secrets that related to products or services used in interstate commerce.[6] The DTSA also includes a number of equitable remedies not currently available under state law, including the ability for a plaintiff to obtain, upon submission of an affidavit or verified complaint, ex parte orders for preservation of evidence relating to the theft, including "seizure of any property, in any manner or part, to commit or facilitate the commission"[7] of the theft of trade secrets. This type of broad, equitable relief based solely on an accuser's affidavit is fraught with due process concerns, particularly in a civil action where monetary relief is available.

The TSPA contains similar language to the DTSA, except it includes some procedural safeguards with respect ex parte seizure orders not found in

A "trade secret" can be almost anything—"a formula, pattern, compilation, program, device, technique, or process"—that has actual or potential value because it is not generally known or readily ascertainable so long the owner uses reasonable measures to maintain its secrecy.

the TSPA. Specifically, section (2)(A)(i) of the TSPA provides that courts may not grant ex parte seizure orders except in instances where the "specific facts" clearly show: (1) the putative defendant would "evade, avoid or otherwise not comply with" a preliminary injunction; (2) there is immediate danger of irreparable harm unless the property used in the trade secret theft is seized; (3) the benefit to the party seeking the order outweighs any harm to the defendant; (4) there is a substantial likelihood of success on the merits; (5) the location of and the property to be seized is described with reasonable particularity; (6) the putative defendant would "destroy, move, hide or otherwise make sure matter inaccessible to the court" if provided with notice; and (7) the party seeking the order must not have publicized the request for seizure.[8]

In addition to the expanded equitable remedies, both the DTSA and the TSPA permit courts to award treble damages for wilful misappropriation (as opposed to double damages under UTSA) and sets a five-year the statute of limitations.

Conclusion

The TSPA and DTSA promise to create a civil cause of action for trade secret theft with enhanced equitable remedies, treble damages and a longer statute of limitation than is provided under state law. Critics say the bills lack specificity and procedural safeguards, and question the need for a federal remedy in light of existing protections under state law. The reality is that the proposed legislation is in its infancy, and although it is unlikely that we will see a civil remedy for trade secret theft in the near future, it is on the horizon.

For additional information, contact Suzi Marteny at smarteny@slk-law.com or 813.227.2272.

Footnotes

[1] Forty-seven states have adopted the Uniform Trade Secrets Act; the remaining states, Texas, Massachusetts and New York, have statutory or common law schemes protecting trade secrets.

[2] 18 U.S.C. § 1832.

[3] AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp., 663 F.3d 966, 973 (8th Cir. 2011).

[4] Penalty Kick Mgmt. Ltd. V, Coca Cola Co., 318 F.3d 1284, 1291 (11th Cir. 2003).

[5] Forty-seven states have adopted the Uniform Trade Secrets Act; the remaining states, Texas, Massachusetts and New York, have statutory or common law schemes protecting trade secrets.

[6] S.2267, 113th Cong. (2014).

[7] Id. at (2)(a)(2)(A).

[8] H.R. 5233, 113th Cong. § 2 (2014).

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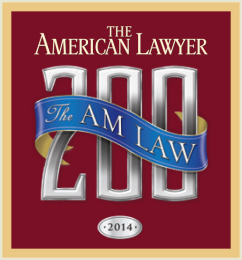

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This is the sixth consecutive year that Shumaker has appeared on The *National Law Journal's* list.

New Municipal Advisor Rules and Continuing Disclosure Initiative

In an era of increased scrutiny and regulation of the municipal market, the final rules on what constitutes, and the registration of, "municipal advisors", became effective July 1, 2014. Concurrently, the SEC initiative to encourage issuers, obligated persons, such as hospitals in conduit financings (together, "issuer" or "issuers"), and underwriters to self-report possible violations of the continuing disclosure requirements of Rule 15c2-12 of the Securities Exchange Act of 1934 (the "Exchange Act") made in prior offering documents continues to be in effect until the deadline for self-reporting, which for underwriters was September 10, 2014, and for issuers and obligors is December 1, 2014. Here is a brief summary of both.

By Sheila Kles

The SEC may also charge underwriters with violating anti-fraud provisions if they failed to exercise adequate due diligence in determining whether issuers have complied with the disclosure requirement in the final official statement.

"Tell It Like It Is"-- Municipalities Continuing Disclosure Cooperative Initiative ("MCDC")

Rule 15c2-12, which requires a continuing disclosure undertaking regarding: (i) a security, (ii) the issuer and its financial data and operations, and (iii) the occurrence of certain material events, also requires in the final official statement prepared in connection with the offering of securities the disclosure of any failure to comply with the disclosure requirements of the Rule 15c2-12 within the prior five years. MCDC solely addresses violations of such compliance assertions in the final offering statement. If such a failure occurs, the SEC may file enforcement actions against the issuer under Section 17(a) of the Securities Act of 1933 (the "Securities Act") or Section 10(b) of the Exchange Act. The SEC may also charge underwriters with violating anti-fraud provisions if they failed to exercise adequate due diligence in determining whether issuers have complied with the disclosure requirement in the final official statement. An underwriter cannot substantiate any reasonable basis for believing in the truth and accuracy of a key representation in the offering documents if the due diligence conducted was inadequate.

The advantage of participating in MCDC allows self-reporting issuers

and underwriters favorable settlement terms. The SEC Enforcement Division will recommend the acceptance of a settlement in which the issuer consents to cease and desist proceedings under Section 8A of the Securities Act, and the underwriter consents to cease and desist proceedings under Section 8A of the Securities Act and administrative proceeds under Section 15(b) of the Exchange Act. In addition, the SEC Enforcement Division will recommend a settlement in which the issuer and underwriter neither admits nor denies the findings of the SEC. As part of the settlement, issuers must establish appropriate policies, procedures and training with respect to continuing disclosure; comply with existing continuing disclosure requirements; cooperate with any subsequent SEC investigation; disclose the settlement terms in any final official statement for a five year period; and provide the SEC with a compliance certification one year later. Underwriters must retain an independent consultant to conduct a compliance review; enact that consultant's recommendations within 90 days; cooperate with any subsequent SEC investigation; and provide the SEC with a compliance certification one year later.

The Enforcement Division of the SEC will recommend no civil financial penalty for self-reporting issuers. For underwriters with 2013 reported total annual revenue of more than $100 million, the penalty will be $500,000. For underwriters with 2013 reported total annual revenue between $20 million and $100 million, the penalty will be $250,000. For underwriters with 2013 reported total annual revenue of less than $20 million, the penalty will be $100,000. Total penalties are capped at $500,000.

Issuers who do not self-report are subject to potential financial sanctions. Underwriters who do not self-report are subject to increased financial sanctions. There is no ameliorative provision in the MCDC for individuals such as municipal officers or employees of underwriters that have engaged in violations of Rule 15c2-12.

The method of reporting is through the completion of a questionnaire, which can be found at http://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml#P53_8606.

In recognition of the difficulties in identifying potential violations for periods when filings were made in the Nationally Recognized Municipal Securities Information Repository (NRMSIR) system, which pre-dated the Electronic Municipal Market Access (EMMA) system, the MCDC permits parties to use reasonably available sources of information to make good faith efforts to identify potential violations. If violations are identified by the SEC after the expiration of the initiative, the SEC will consider reasonable, good faith, and documented efforts in deciding whether to recommend enforcement action and, to the extent enforcement action is recommended, in determining relief.

"Who am I to give such advice?" -- Final Municipal Advisor Rules – Rule 15Ba1-1 through Rule 15Ba1-8, and Rule 15Bc4-1, under the Exchange Act

The final municipal advisor rules (the "Rules") are effective July 1, 2014 with a phased-in compliance period ending October 31, 2014. Municipal advisors must register within such time with the SEC and the Municipal Securities Rulemaking Board ("MSRB") using the registration forms MA, MA-I, MA-W, and MA-NR.

The final municipal advisor rules clarify the scope of who is a "municipal advisor" and what constitutes "advice" requiring registration. In broad general terms, anytime proceeds of municipal securities are involved, whether in the actual transaction, in investments, in pension accounts, in Section 529 plans, or even involving equity used to defease municipal securities, advisors to such investments, accounts or activities may be subject to registration as a municipal advisor under the final rules.

If you think you may be subject to registration or may fall under one of the exclusions or exemptions, you should consult with an attorney to determine how the Rules apply to you specifically. The following discusses some of the key points of the Rules, the Adopting Release, and the Frequently Asked Questions concerning the Rules published by the Office of Municipal Securities of the SEC. It is not intended to be a complete summary of what constitutes advice, advisory activities, or to whom the definition of municipal advisor applies, exempts or excludes.

Definitions

Generally, the Rules require the registration of and impose a fiduciary duty on municipal advisors as defined in the Exchange Act as "a person (who is not a municipal entity or an employee of a municipal entity) that provides advice to or on behalf of a municipal entity or obligated

person with respect to a municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or undertakes a solicitation of a municipal entity or an obligated person."

Municipal advisors include financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors unless such market participants qualify for an exclusion or exemption.

Excluded from the definition of "municipal advisor" are underwriters, investment advisors, commodity trading advisors, attorneys and engineers, but *only if* they fall within the parameters of such exemption, as specifically delineated in the Rules. Exempted from the definition of "municipal advisor" are accountants, public officials and employees, banks, market participants providing responses to requests for proposals or qualifications, certain swap dealers registered under the Commodity Act, independent registered municipal advisor, investment strategist, and certain solicitations, but again, *only* to the extent each such person falls within the parameters of such exemption, as specifically delineated in the Rules.

"Obligated person" means "any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person, committed by contract or other arrangement to support the payment of all or part of the obligations on the municipal securities to be sold in an offering of municipal securities" provided however that the final Rules do not include in this definition: (i) providers of bond insurance, letter of credit or other liquidity facilities, (ii) a person whose financial information or operating data is not material to a municipal securities offering, without reference to any bond insurance, letter of credit, liquidity facility, or other credit enhancement, or (iii) the federal government.

The "advice standard", for purposes of the Rule, "excludes, among other things, the provision of general information that does not involve a recommendation regarding municipal financial products or the issuance of municipal securities (including with respect to the structure, timing, terms and other similar matters concerning such financial products or issues)."

"Advisory activities", unless falling under one of the above exclusions or exemptions, means "(1) Providing advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms and other similar matters concerning such financial products or issues; or (2) the solicitation of a municipal entity or an obligated person."

Does the Rule apply to existing proceeds of municipal securities?

Investments and Proceeds of Municipal Securities. The Rules apply to proceeds of municipal securities already existing on July 1, 2014 as well as proceeds arising after that date. Under the Rules, to determine whether funds to be invested constitute proceeds of municipal securities, and thus subject the market participant to registration, the market participant may rely on written representations of a knowledgeable official of the municipal entity or obligated person regarding the nature of the funds, provided the market participant has a reasonable basis for such reliance. The market participant may use other reasonable procedures to determine whether funds to be invested constitute proceeds of municipal securities.

For a transitional period, unless a market participant actually knows or reasonably should have known that an existing account or investment contains proceeds of municipal securities, the market participant may determine that such account or investment does not contain proceeds of municipal securities. The market participant could utilize a reasonable diligence process as a transitional means for such determination.

A reasonable diligence process should include a review of relevant information within the market participant's possession. For example, if the existing account or investment is held in the name of a municipal entity or the name suggests a connection to municipal securities, such as "debt service reserve fund", the market participant reasonably could know that it contains proceeds of municipal securities. Also as part of a reasonable due diligence process, the market participant could provide written notice to a client inquiring about the nature of the funds and stating that unless otherwise notified in writing, will assume that such funds are not municipal securities. Factors to be considered under a facts and circumstances approach to due diligence, among others, would be the

quantity of existing accounts and the relative administrative burden and costs on determining whether such funds contain proceeds of municipal securities, the nature and term of existing investments and the relative potential for future advice on those investments, and an assessment of the nature of the funds, taking into account the client's business.

With respect to investment advice offered after July 1, 2014 regarding investments of newly arising proceeds of municipal securities issued on or after that date, the market participant should develop policies and procedures consistent with the Rules to determine whether the advice provided involves investments of proceeds of municipal securities. The same advice applies to escrow investments.

Pension Obligations. Proceeds of pension obligation bonds issued to finance an unfunded actuarial liability that are contributed to a municipal entity's pension plan and commingled with other pension funds for collective investment, and which are treated under state law as spent for their authorized purpose upon their contribution, cease to be considered proceeds of municipal securities. However, if a municipality segregates such proceeds and continues to account for them separately as proceeds, or retains control over the ability to use such funds for other than the exclusive benefit of pension beneficiaries, such proceeds continue their designation as proceeds of municipal securities under the Rules until such time as they are used to pay pension benefits to the beneficiaries or to carry out other authorized purposes of the pension obligation bonds.

529 Savings Plans. Monies derived from a security issued by a 529 Savings Plan are not considered proceeds of municipal securities. However, interests offered by a 529 Savings Plan are considered municipal securities and persons selling such interests must be registered as a broker, dealer or municipal securities advisor and comply with the applicable MSRB rules. Similarly, 529 Savings Plans may seek advice in connection with transactions involving municipal securities and are subject to the Municipal Advisor rules, as are third parties seeking to advise such 529 Savings Plans.

The advice standard – "When should I stop talking?"

The advice standard turns on whether a recommendation is made. Providing general information that qualifies as advice will depend on the facts and circumstances, using an objective, not subjective, standard. Factoring into this determination is content, context and manner of presentation, and whether the information would reasonably be viewed as a suggestion to take or refrain from taking action. General information would be, for example, information of a factual nature, without subjective assumptions, opinions or view; information that is not particularized to a specific municipal entity or *type of entity*; information that is widely disseminated for use by the public, clients or market participants other than municipal entities to obligated persons; or general information in the nature of educational materials. Thus, information tailored to a specific group such as school districts or hospitals, would more likely be construed to be a recommendation that constitutes advice, and the person providing such information would be required to register as a municipal advisor.

Information that is particularized in limited respects, such as the current market price or yields on a municipal entity's outstanding bonds, is not necessarily within the definition of "advice", provided that (i) the information provided is factual and does not contain subjective assumptions, opinions or views, or (ii) the information does not constitute a recommendation. However, the more particularized the information, the more likely it will be viewed as a recommendation constituting advice.

Disclaimers and disclosures such as: "this person is not recommending an action"; "this person is not acting as advisor and does not owe a fiduciary responsibility for the information and material"; "this person is acting for its own interests; and the municipal entity should consult its advisors and experts before acting on the information and material", would be a factor in making the determination of whether the information constitutes advice, but is not controlling. Similarly, an underwriter's identification of itself as such for this or future transactions and not as a financial advisor will not be controlling. All facts and circumstances, written and oral communications, and overall course of conduct are considered.

Promotional materials from underwriters seeking business are not advice if they are generalized and provide information about the firm's capabilities and experience, general market or financial information that might indicate favorable market conditions for the issuance of debt, educational materials including the

description of state law requirements, and information regarding the different types of debt financing structures available under state law.

Promotional materials of underwriters may include: (a) indications of hypothetical new issue pricing *range* that takes into consideration current market conditions and certain factual information particularized to an issuer, such as the issuer's credit rating, geographic location and market sector; (b) information regarding an issuer's outstanding municipal securities such as current market prices and yields; (c) information regarding a range of hypothetical interest rates or debt service requirements for new money debt with various maturities (e.g., level debt service for fixed rate 20 or 30 year bonds) and based on facts as described in clause (a) immediately preceding; (d) public information regarding the terms and a range of interest rates for SLGs for refunding escrows; (e) number-runs of the hypothetical debt service savings in refundings assuming the same debt structure as the outstanding bonds and based on facts as described in clause (a) immediately preceding.

However, if the sizing, maturity or structure of the debt were tailored to take into account an issuer's specific needs or objectives within the issuer's overall debt structure, such tailoring goes too far and implies a recommendation. Similarly in a refunding, changing the debt service from level to non-level or extending maturities goes beyond promotional materials and implies a recommendation, as do materials that include views as to the interest rate an underwriter expects to achieve (as opposed to a range of rates).

Absent an exclusion or exemption, a market participant providing advice to the financial advisor of a municipal entity is also required to register as a municipal advisor. Thus, advice may be direct or indirect.

An institutional buyer buying for its own account may specify the structure, timing and terms under which it would purchase from a municipal entity, without being considered a municipal advisor.

Certain exclusions, exemptions and how to determine when the "municipal advisor" designation begins.

When does the "municipal advisor" designation attach? For underwriters consulting with an "obligated person" such as a hospital or other conduit borrower, for new money issues, the process of applying to or negotiating with a municipal entity to issue conduit bonds on behalf of the obligated person is the point at which the municipal advisor designation kicks in for the market participant. If no application with a municipal entity has yet begun, consultations about financing alternatives with a market participant such as a broker-dealer do not give rise to "providing advice" to an obligated person for purposes of the Rules. However, once

the application process has begun, the municipal advisor must register whether or not the financing comes to fruition.

However, advice given on refunding an outstanding issue *either* with equity funds or refunding bonds, *does* constitute advice to an obligated person with respect to the issuance of municipal securities and does require registration, absent an exclusion or exemption fitting the transaction. The nexus here is established through the outstanding bonds, not the source of monies used to refund them. "Advice with respect to the issuance of municipal securities" is construed broadly from a timing perspective to include advice throughout the life of an issuance of such securities, from the pre-issuance planning stage for a debt transaction to the repayment stage for those securities. Consequently, absent an available exclusion or exemption, the broker-dealer's advice with respect to early refinancing or redemption of an outstanding issue would fall within the scope of the municipal advisor definition and the registration requirement of the Rules.

Qualification for the exclusion can be established through an engagement letter that follows certain prescribed rules, or it can be established by certain actions.

Any assistance given by a market participant (other than an attorney for whom the attorney exclusion would apply) in determining when an event is material for the continuing disclosure filing requirements would be considered to be municipal advisory activity. For underwriters, assistance with filing annual financial information, audited financial statements, or material event notices required by Rule 15c2-12 after an issuance has closed and after the underwriting period has terminated would generally be outside the scope of the underwriter's exclusion.

Underwriter's Exclusion. For underwriters, the exclusion only applies with respect to activities within the scope of underwriting of such municipal securities. Such underwriting period is the later of the closing of the underwriting or the sale of the last of the securities by the syndicate. However, if the underwriter discovers any material omissions in an offering document post-issuance, the underwriter's exclusion will continue to apply to advice given by the underwriter to the issuer to supplement the offering document.

The underwriter's exclusion does not apply to broker-dealers acting as placement agents for private equity funds that solicit a municipal entity or obligated person to invest in the fund. But registered broker-dealers acting as placement agents that participate in a particular issuance of municipal securities and that perform municipal advisory activities that would otherwise fall within the scope of the underwriter's exclusion, could qualify for such exclusion.

A broker-dealer acting as dealer-manager for a tender offer would not be participating in municipal advisory activity because tender offers typically involve only the purchase of municipal securities and the purchase itself is not an advisory activity. Similarly, a broker-dealer acting as dealer-manager for an exchange offer would generally involve only two transactions - the purchase of one security in the tender offer and the underwriting of a particular issuance of municipal securities in exchange for such tendered securities. The former is not advisory activity and the latter is excluded under the underwriter's exclusion.

A broker-dealer acting as remarketing agent for variable rate demand securities after the close of an issuance of municipal securities is considered to be giving advice with respect to an issuance of municipal securities. The broker-dealer in this instance is not covered under the underwriter exclusion. A remarketing that constitutes a primary offering should be examined in light of the broker-dealer's role to determine what, if any, exclusions apply. If the remarketing agent sets the rate, remarkets tendered bonds and provides factual information regarding current market conditions and regarding how the interest rate could be impacted by a change in modes, for example from a weekly to a daily rate, or a change in liquidity provider, such information may not rise to the level of advice. But, although the information can be particularized to the municipal entity, it still must be limited to factual information. Views, opinions or recommendations turn the information into advice subject to the registration requirement of the Rules, as would advice with respect to the investment of proceeds.

Registered investment advisor exclusion. The registered investment advisor exclusion, which exclusion does not include investment advisors giving advice concerning municipal derivatives, only contemplates those instances where municipal derivatives are used in connection with the issuance of municipal securities, such as swaps and other hedges,

and does not apply to cases where the investment advisor is giving investment portfolio advice to the municipal entity clients. In other words, investment advisors giving advice on derivatives with respect to a general investment portfolio of a municipality are not required to register as municipal advisors under these Rules. Registered investment advisors giving advice on municipal derivatives in connection with the issuance of municipal securities do not fall under this exclusion and are required to register.

Independent registered Investment advisor exemption. To qualify for the independent registered investment advisor exemption when there is a registered municipal advisor advising the municipal entity in the transaction, the independent advisor generally must (i) receive written representation from the municipal entity or obligated person stating that it will rely on the registered municipal advisor, (ii) provide written disclosure to the municipal entity or obligated person that it is not a municipal advisor and is not subject to the fiduciary duty applicable to municipal advisors under the Rules, (iii) provide copies of such disclosure to the municipal entity or obligated person's registered municipal advisor; and (iv) not be or have been associated with the registered municipal advisor for at least two years.

Bank exemption. Banks providing advice with respect to certain products and services such as custody accounts and trust services (other than as indenture trustee or similar capacity) would not be required to register as a municipal advisor unless such accounts contain proceeds of municipal securities or escrow investments. Banks that engage in municipal advisory activities, including those that provide advice with respect to the issuance of municipal securities or with respect to municipal derivatives to municipal entities or obligated persons are not, however, exempt, unless the bank qualifies for another exemption or exclusion such as the limited exemption for certain swap dealers.

If a bank provides municipal advice through separately identifiable departments or divisions ("SID"), the SID may register under the Rules, rather than the bank itself. The fact that directors and senior officers of the bank may from time to time set broad policy guidelines affecting the bank as a whole and which are not directly related to the day-to-day conduct of the bank's municipal advisory activities, does not disqualify the SID or require that the directors or officers be considered as part of the SID. Similarly, a bank's municipal advisory activities conducted in more than one geographical unit does not preclude a finding that the bank has a SID for purposes of the Rule, provided all such units are identifiable and that the requirements of the Rule are met with respect to each unit. The SID clarification originally in the proposed Rule is considered applicable even although it was removed from the final Rule.

Investment strategist exemption. An investment strategist is defined as a person that provides advice with respect to investment strategies that are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments. This exemption does not permit a person to avoid registering as a municipal advisor by stating its advice is isolated or incidental and not within the meaning of "plan or program". Any advice or recommendation with respect to the investment of proceeds of municipal securities not otherwise subject to an exclusion or exemption would be municipal advisory activity, even if not part of a series of investment-related actions or articulated as part of the investment plan for the proceeds at or before the time the proceeds are received.

Municipal escrow investments are defined as proceeds of municipal securities and any other funds of a municipal entity that are deposited in an escrow account to pay the principal of, premium (if any) and interest on one or more issues of municipal securities.

A pooled investment vehicle is an investment strategy, and an advisor to such a pool is a municipal advisor when the pooled investment vehicle contains proceeds of an issuance of municipal securities, regardless of whether all funds invested in the vehicle are funds of municipal entities.

Actuaries providing actuarial services to public pension plans, 403(b) plans, and 457(b) plans, governmental benefit plans and trusts such as retiree medical plans, voluntary employee benefit associations and related trusts (VEBA's) and other post-employment benefits (OPEB) plans and trusts generally would be exempt under the investment strategies exemption if the plan does not consist of proceeds of municipal securities. If the plan does contain proceeds of municipal securities, actuarial service generally does not involve advice with respect

to the investment of the proceeds, and thus would not generally constitute municipal advisory activity subject to registration.

Solicitation exemption. Advertisements or solicitations do not trigger an obligation to register provided such activity is undertaken by the broker, dealer, municipal securities dealer, municipal advisor or investment adviser on behalf of itself as opposed to on behalf of a third party. Third party endorsement arrangements, typically investment advisers, broker-dealers, and mutual fund companies endorsed by associations through a royalty arrangement, however, are not exempt from registering. An organization that receives compensation for endorsing a broker, dealer, municipal securities dealer, municipal advisor or investment advisor is soliciting a municipal entity or obligated person within the meaning of the statute. However, if such endorsement qualifies as advertising, it may not be required to register. The determination would be based on the facts and circumstances.

In the case of introductions sought by municipal entities or obligated persons, for purposes of the Rules, a solicitation determination is based on whether the person providing the introduction receives direct or indirect compensation for providing the introduction, which would trigger the registration requirement. The term "direct or indirect compensation" has been construed broadly in other contexts. For example, under the Investment Advisers Act, the staff of the SEC has taken the position that compensation generally includes receipt of any economic benefit, whether in the form of an advisor fee, some other fee relating to services rendered, a commission or some combination of the foregoing. Other regulatory agencies have interpreted indirect compensation to include non-monetary compensation.

Solicitations of obligated persons only trigger the registration requirement if the obligated person in acting in its capacity as such. The solicitor should make reasonable inquiry to a person who is in the position to know as to whether its solicitations are for services related to the issuance of municipal securities or municipal financial products and whether the person being solicited is an obligated person. The solicitor may rely on the written representation of the obligated person unless the solicitor has information that would cause a reasonable person to question the accuracy of the representation.

For more information, contact Sheila Kles at skles@slk-law.com or 419.321.1220.

Former Ohio Attorney General, **Jim Petro**, has joined the firm as Of Counsel.

Jim served as the Attorney General for the State of Ohio from 2003 to 2007. While there, Jim oversaw the work of more than 400 attorneys in the office. Prior to serving as Attorney General, Jim was elected Ohio Auditor of State in 1994 and re-elected in 1998, serving two terms. As State Auditor, Jim served as the chief inspector and supervisor of public offices in the state. The office is the largest state auditing agency in the United States, second in size only to the United States Government Accountability Office.

Coming soon...

a One Firm, One Team industry practice group, focusing our relevant expertise on the manufacturing sector, a cornerstone of Shumaker's business practice and client base.

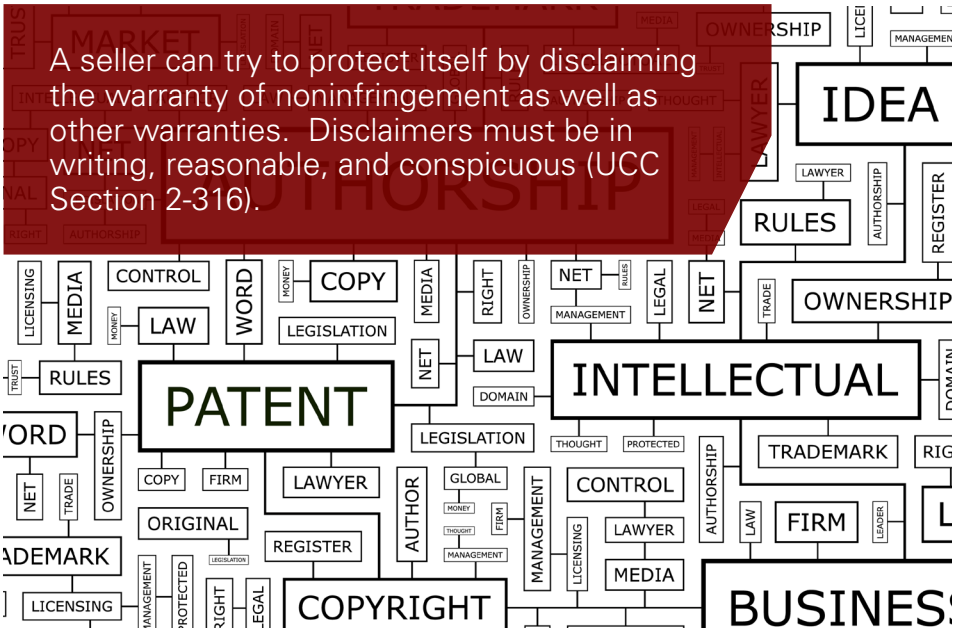
Warranties of Noninfringement and Allocation of Infringement Risk

In the electronic age, purchases move fast and often without a contract. The parties to a transaction may give little thought to allocating the risks involved. Even when the parties do enter a written agreement, with so many terms to negotiate and consider, the risk of intellectual-property infringement might seem too remote or difficult to address. Alternatively, they might choose to engage in the "battle of the forms" rather than enter expensive negotiation over entrenched terms prescribed by each party's legal department. Or, as yet another alternative, the parties enter a contract in which the seller warrants that "title conveyed shall be good, and its transfer rightful, free from any security interest or other lien or encumbrance of which the buyer has no knowledge," or something equivalent, without other disclaimers.

By Jeffrey B. Fabian

So what happens then if the buyer or seller is accused of infringing the intellectual-property rights of a third party? The answer to this question can have serious consequences. The mere threat of infringement can drive buyers to a different supplier. And the cost of litigating intellectual property disputes can be substantial. A 2013 American Intellectual Property Law Association survey reported that the average cost of litigating a patent-infringement suit through trial was $930,000 for cases where the amount of damages at stake was less than $1 million. The average cost of litigating even the smallest copyright, trademark, or trade secret disputes can range from $373,000 to $581,000.

A seller can try to protect itself by disclaiming the warranty of noninfringement as well as other warranties. Disclaimers must be in writing, reasonable, and conspicuous (UCC Section 2-316).



When the issue is not addressed by a written contract or not otherwise agreed, and the seller is a merchant regularly dealing in the goods sold, sellers are generally deemed to have sold goods subject to an implied warranty of noninfringement—that is, sellers warrant that the goods are free from any "rightful" infringement claim (UCC Section 2-312(C)). A seller might be responsible to indemnify a buyer for damages as well as the attorneys' fees and costs of defending an infringement claim. In some cases, this can be akin to writing a *carte blanche* for a buyer to defend the claim, and seller might even be on the hook for settlements entered by a buyer.

Importantly, proof of infringement is not necessary to breach the warranty, and a seller's duty to indemnify a buyer arises upon receiving notice of the infringement claim. Court opinions vary on what constitutes a "rightful" infringement claim triggering the duty to indemnify, but under the most lenient standards, a rightful claim is any nonfrivolous

claim having a significant impact on a buyer's ability to use purchased goods. In short, a seller might be on the hook to indemnify a buyer even when the claim is relatively weak, and the monetary penalties can be substantial.

A seller can try to protect itself by disclaiming the warranty of noninfringement as well as other warranties. Disclaimers must be in writing, reasonable, and conspicuous (UCC Section 2-316). It is a best practice to disclaim specific warranties by name. For obvious reasons, buyers might not accept a warranty disclaimer. And in some cases the parties exchange differing contract forms that "knock out" any warranty disclaimers.

The best way to avoid these problems is for the parties to negotiate a signed agreement specifically addressing this matter. The parties should consider their options in allocating infringement risk, such as: requiring a judgment based on a contested claim before indemnity is triggered; limiting infringement obligations to, for example, "valid U.S. patents"; adding the right to negotiate a license; refunding the purchase price or cost of a substitute product; or an option for the seller to defend infringement claims.

Negotiation can be time consuming and expensive, but it is the best way to avoid surprises and ensure an enforceable agreement.

For more information, contact Jeff Fabian at jfabian@slk-law.com or 813.676.7212.

welcome

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Sarasota
Litigation

Brian A. Coulter
Columbus
Litigation; Environmental

John P. Dombrowski
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Taxation

Janis E. Susalla Foley
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Litigation; Employment

Kyle C. Horth
Sarasota
Taxation; Trusts and Estates; Corporate

Rebecca S. House
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Corporate; Litigation; REITs

Warren P. Kean
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Taxation; Corporate

Matthew T. Kemp
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John K. Nelson
Toledo
Litigation

James M. Petro
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Litigation; Public Law & Public Finance

Kaitlyn B. Statile
Tampa
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David P. Strup
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Litigation

Jacob R. Stump
Charlotte
Litigation; Medical Malpractice

Kelly A. Thompson
Tampa
Healthcare

Thomas E. Toner
Tampa
Intellectual Property

Walter A. Trauner
Sarasota
Real Estate

A Derivative Suit by Any other Name:

Challenging Manager Actions in Alternative Entities

When the shareholders of a corporation allege that the corporation's management has committed a wrong and thereby injured the shareholders, their injuries can be direct or indirect. By way of example, if a director of a corporation wrongfully prevents a shareholder from voting his/her shares in a vote, then that shareholder has suffered a direct harm and may bring suit directly against the corporation. However, if a shareholder alleges that a director violated a fiduciary duty to the corporation, which caused harm to the corporation itself, then this harm would be indirect, and the shareholder would have to bring a derivative claim against the corporation. Therefore, if a director with a conflict of interest were to sell goods to the corporation at inflated prices, the shareholders, as owners of the corporation, would suffer a harm, which would be redressed through a derivative lawsuit. In practice, the exact line between direct and indirect harm can be difficult to define. However, the distinction between direct and derivative claims is extremely important, as the procedural requirements and available remedies are distinct. For example, an unwary plaintiff who mischaracterizes a derivative cause of action as direct bears the risk of having its claim dismissed. *E.g.*, *Marcoux v. Prim*, 04 CVS 920, 2004 NCBC 5, at ¶ 36–38 (N.C. Bus. Ct. Apr. 16, 2004).

By Joshua M. Hayes

The distinction between direct and derivative claims is extremely important, as the procedural requirements and available remedies are distinct.

Further complications arise when courts attempt to apply this framework to alternative entities, such as limited partnerships and limited liability companies, whose rights are defined principally by contract rather than statute. While courts often look to corporate law for guidance, there are important distinctions between the law of corporations and the law of alternative entities. For example, in

2010, a Delaware Chancery court held that, unlike corporate creditors, a creditor of an LLC does not have standing to assert a derivative claim against an insolvent LLC. *See CML V, LLC v. Bax*, C.A. No. 5373-VCL (Del. Ch. Nov. 3, 2010); see also *Weinstein v. Colborne Foodbotics, LLC*, 2013 CO 33, 302 P.3d 263 (Colo. 2013) (reaching the same conclusion and holding that limited liability company acts need not be strictly construed to the extent that they deviate from common law, as such deviation "indicates the legislature intended that the LLC Act, not corporation common law, would govern LLCs"). Because alternative entities such as partnerships and LLCs are creatures of contract, courts often reach divergent conclusions on the extent to which members of these entities may assert derivative claims.

Such was the legal landscape when the Delaware Court of Chancery decided *Allen v. El Paso Pipeline GP Co.*, CIV.A. 7520-VCL, 2014 WL 2819005 (Del. Ch. June 20, 2014). In *Allen*, a class of investors brought suit against an El Paso Corporation subsidiary, El Paso Pipeline Partners L.P., a publicly traded Delaware master limited partnership (the "Partnership Subsidiary"), over the Partnership Subsidiary's $895 million acquisition of a 25% stake in Southern Natural Gas Company. Because El Paso Corporation effectively maintained a controlling interest in the Partnership Subsidiary's general partner and owned the interest in Southern Natural Gas Company that the Partnership Subsidiary would acquire, the proposed transaction created a conflict of interest for the Partnership Subsidiary's general partner.

Although the Partnership Subsidiary's limited partnership agreement ("LPA") eliminated all common law fiduciary duties that the general partner owed to the Partnership Subsidiary's limited partners, the LPA provided procedures for consummating transactions that involve a conflict of interest. After the acquisition, plaintiff challenged the transaction on the grounds that the defendants breached the express terms of the LPA and that the general partner's board of directors (the "Board") aided and abetted the general partner's breach, asserting that the committee appointed by the general partner's board did not evaluate the transaction in good faith and had overpaid for the acquisition. The Board challenged these claims on the grounds that they were derivative claims and therefore inapplicable in the context of a limited partnership whose LPA had abolished common law fiduciary duties.

The Court focused on the issue of whether the claims were direct or derivative, and, relying on the standard set forth in *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), found that the claims were not exclusively derivative and could support a direct characterization because the limited partners had suffered a direct injury to their contractual rights under the LPA, specifically, the right to a good faith approval of a transaction involving a conflict of interest. The court also analogized to corporate law, noting that, as a shareholder can directly assert that a board of directors had exceeded its discretionary authority, a limited partner can directly assert that a general partner exceeded its authority. Because the court held these to be direct claims, it held that the plaintiff had standing as a party to the LPA to pursue the claim for breach of contract directly.

Ultimately, the Court found for the defendants, entering summary judgment in their favor. The Court held that the Board's actions must be evaluated based on their subjective belief that they were acting in the Partnership Subsidiary's best interests, and the evidence did not suggest that the Board subjectively believed that they were not complying with the standard of conduct outlined in the LPA.

The upshot is that *Allen* should serve as a reminder to managers of partnerships and limited liability companies that members of such entities can potentially bring claims that are similar to derivative actions in the corporate context as a result of the often blurry line between direct and derivative actions. Further, as was the case in *Allen*, the outcome of these cases is often contingent on the specific language contained in the entity's operating agreement, and so careful drafting and review of such agreements is critical, especially in the context of acquisitions or mergers. This is particularly true in North Carolina because the new North Carolina Limited Liability Company Act specifically provides that members are free to agree on the manner in which disputes related to an LLC and their interests in the LLC are to be resolved, including eliminating the right or requirement to bring a derivative action. See N.C. Gen. Stat. § 57D-2-30(b)(5).

For more information, contact Josh Hayes at jhayes@slk-law.com or 704.945.2925.

slknews

Erin Aebel was named the *Tampa Bay Business Journal's* 2014 Businesswoman of the Year in the Legal Services category, recognizing Erin's leadership and achievements within the legal community in Tampa Bay.

Jeni Belt has been appointed to the board of Ao: Advocating Opportunity. Ao provides legal advocates for human trafficking victims and gives them a voice in the legal system and in the community through advocacy and education.

Steve Berman was a featured panelist at the 22nd Annual Southwest Bankruptcy Conference on September 4 – 6, 2014 in Las Vegas, Nevada.

Mike Briley is teaching an "Antitrust Law and Economics" course at the University of Toledo College of Law this fall.

Cheri Budzynski was selected to join the 2014 – 2015 Class of the Ohio Women's Bar Foundation Leadership Institute.

John Burson was selected by the Board of Directors of the Confrérìe de la the Chaîne des Rôtísseurs, Ltd., to serve as Chairman of the Board of the 11 member Board of Trustees of the Chaîne des Rôtísseurs Foundation.

Doug Cherry was installed as President of the Sarasota County Bar Association on September 17, 2014.

Jamie Colner has been appointed Treasurer of the Ohio Chapter of The American Board of Trial Advocates ("ABOTA"). Jamie was also a presenter at the Ohio Chapter of The American Board of Trial Advocates "Masters in Trial" demonstration on September 12, 2014 at the Greater Columbus Convention Center.

Jennifer Compton was appointed Board President of Girls Inc. of Sarasota County on October 8, 2014 for a one-year term.

David Conaway was a panelist for a Turnaround Management Association Carolinas Chapter event on October 28, 2014 on the topic "Does Bankruptcy Break the Supply Chain? Best Practices for Supply Chain Financing of Troubled Companies" in Charlotte, North Carolina. On October 9, 2014, David presented to Lyon Furniture Credit Group in Myrtle Beach, South Carolina, and on September 16, 2014, David presented a webcast for the Association of International Credit and Trade Finance. David also made a presentation on "Supply Chain Financing" at The Credit Research Foundation's Credit and Accounts Receivable Open Forum and Expo in Denver, Colorado on August 19, 2014.

Tom Curran has been accepted into the Hillsborough County Bar Association's Leadership Institute Class of 2014 – 2015.

Duane Daiker has been elected Vice Chair of the Appellate Practice Section of The Florida Bar. Duane was also appointed Parliamentarian for the Florida Bar's Appellate Court Rules Committee.

Jeff Fabian and Mindi Richter have been appointed Co-Chairs of the Intellectual Property Law Section of the Hillsborough County Bar Association.

Rachel Goodman spoke to the Professional Association of Healthcare Office Management on September 17, 2014.

Michele Hintson has been certified by the Florida Supreme Court as a Circuit Court Mediator, allowing her to mediate civil disputes in the Circuit Courts throughout Florida. Michele has been named Chair of the Community Advisory Board of the Leadership Council of the Junior League of Tampa and has also been named Vice-Chair of Florida Bar's Thirteenth Circuit Grievance Committee ("B").

Regina Joseph participated in the uHeart Digital Media Conference at The University of Toledo on October 9 – 10, 2014.

Warren Kean spoke on "Estate Planning with the New North Carolina LLC Act" at the North Carolina Bar Association's 35th Annual Estate Planning and Fiduciary Law Program on July 18, 2014 in Kiawah Island, South Carolina.

Suzi Marteny recently returned from riding in the Register's Annual Great Bicycle Ride Across Iowa (RAGBRAI). In its 42nd year, RAGBRAI is the oldest, largest and longest bicycle-touring event in the world.

Erin McKenney has been accepted into the Provisional Junior League of Tampa Class for 2014 – 2015. Erin has been elected to the Board of Trustees for Keep Tampa Bay Beautiful.

insights

A Newsletter from Shumaker, Loop & Kendrick, LLP

1000 Jackson Street
Toledo, Ohio 43604-5573

Jan Pietruszka participated in a panel discussion at the Tampa Bay Executive Symposium on June 12, 2014 regarding "The Wacky World of Being an Employer – Who Knew? Labor Relations and How They Affect Your Company."

Hunter Norton and his father Roger Norton, participated in the season 8 FIREBALL RUN America's Frontier, an online reality-filmed entertainment series, throughout the U.S. from September 26, 2014 – October 5, 2014 to raise awareness for missing children.

Maria Ramos has been appointed Chair for the Immigration & Nationality Law Section of the Hillsborough County Bar Association. Maria has been selected to Volume III of the *Latino American Who's Who*, a New York based biographical publication that selects and distinguishes leading Latino professionals throughout the world who have attained a recognizable degree of success in their field of endeavor and thereby contribute to the growth of their industry and culture.

Jennifer Roeper has been elected to the Board of Directors of the Tampa Bay Technology Forum.

Rebecca Shope has been appointed by the Honorable James G. Carr, to serve on the Advisory Group for the United States District Court for the Northern District of Ohio for a three-year term.

Peter Silverman was a presenter at the 5th Annual Professional Athlete Franchise Initiative ("PAFI") Franchise Summit in Atlanta, Georgia on July 13, 2014.

Dan Strader was a guest panelist at the Florida Bar Voluntary Bar Leaders Conference, held on July 11 – 12, 2014 in Bonita Springs, Florida.

Mark Wagoner completed the American Bar Association's Antitrust Masters Course in Williamsburg, Virginia. The intensive four-day program is offered once every two years by the ABA, and is limited to 100 attorneys actively practicing antitrust law. The Master Course was taught by many of the leading scholars in antitrust law, and included extensive presentations and interactions with officials from the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice.

Brian Willis was appointed by the Hillsborough County Aviation Authority to serve as the representative on the Citizen Advisory Committee for the Hillsborough County Metropolitan Planning Organization (MPO).

Greg Yadley was acknowledged by the American Bar Association in Chicago, Illinois on September 12, 2014 for his service as Chairman for the past three years of the ABA Business Law Section Middle Market and Small Business Committee.

Mechelle Zarou was elected to the Toledo Bar Association's Board of Directors.

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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.

SHUMAKER

Shumaker, Loop & Kendrick, LLP

Attorneys at Law

CHARLOTTE | COLUMBUS | SARASOTA | TAMPA | TOLEDO

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