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MESSAGE FROM THE CHAIR

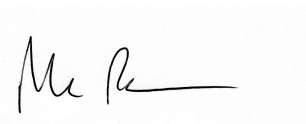
Our Summer 2011 Labor and Employment Law Observer covers topics of interest to in-house counsel, human resources professionals and corporate management. The articles in this issue discuss:

- Several employed-related decisions from the Supreme Court's 2010–2011 term;
- An analysis of the differences between the federal FLSA and state wage and hour laws in several key areas;
- Two recently enacted Philadelphia ordinances regarding the conduct of criminal background checks during the employment process and an expansion of the Philadelphia Fair Practice Ordinance to include several additional groups/categories;
- New federal immigration requirements for employers; and
- The Department of Labor's new venture into the world of social media.

You can read about these and other recent labor and employment developments in this issue of the Observer.

We welcome your inquiries on the articles in this Observer, other matters of interest to you and suggestions for future topics.

Finally, as many of you know, we welcome the addition of our new Houston labor and employment colleagues, led by Marty Wickliff, Jr. We are excited to have such a talented and experienced group of lawyers join our Team and hope that you will have the opportunity to work with them in the future.



Mark J. Foley
Chair, Labor & Employment

The confidence to proceed.

Employers Beware: When State Wage & Hour Laws Don't Intersect With Federal Law

Two recent settlements in wage and hour class actions highlight the risks employers face if they are unaware of differences between federal law and state wage and hour laws. In *Turner v. Mercy Health System*, Pa.Ct. C.P. 2008 No. 3670, and *Vanston v. Maxis Health System*, Pa.Ct.C.P. 2008 No. 5155, a Pennsylvania trial court recently approved class action settlements totaling \$2.75 million, including more than \$700,000 in plaintiffs' attorneys' fees, to be paid to approximately 3,200 employees of two health systems, both part of Catholic Health East. The hospital employers in these cases followed a practice, which is lawful for health care facilities under the federal Fair Labor Standards Act (FLSA), of paying employees time-and-a-half for overtime hours in excess of eight hours in a work day or 80 hours in a two-week pay period. Federal law permits this practice, known as the "8-and-80" rule, for health care institutions, because it is sometimes useful to have an employee work one short week and one long week within a pay period in order to facilitate scheduling for night and weekend coverage.

However, this Pennsylvania trial court held that the Pennsylvania Minimum Wage Act has no exception to the requirement that employees be paid time-and-a-half for overtime worked in excess of 40 hours in a work week. In March 2010, the Pennsylvania judge overseeing both cases had ruled in favor of the plaintiffs, finding that Pennsylvania's law was clear and unambiguous, and did not allow for the 8-and-80 exception. Thereafter, it was just a question of calculating how much these hospital employers owed their Pennsylvania employees who had been paid under the 8-and-80 method.

Employers must comply with federal, state, and local wage and hour laws, and if state or local laws are more favorable to employees, the FLSA specifically provides that those more favorable provisions must be followed. So what are some of the issues about which employers should be cautious? Here is a nonexhaustive list:

1. 8-and-80 Rule: Under the FLSA, this practice can only be used by health care facilities. But many state wage and hour statutes do not permit this practice at all.
2. Fluctuating Work Week Method: Federal regulations under the FLSA permit an employer, in certain circumstances, to pay an employee a fixed weekly rate for fluctuating hours, and, if the employee works more than 40 hours in a work week, to pay the employee only a half-time overtime premium for the overtime hours, because the employee's fixed weekly salary was intended to cover the base hourly rate for all hours worked in the week. This fluctuating work week method is not recognized by many states. In Pennsylvania, for example, this method cannot be applied to nonexempt employees who are paid a fixed weekly salary; it may be applied only to day-rate or job-rate employees.
3. Minimum Wage Differences: Many states, and some municipalities, have minimum wages that are higher than the federal minimum wage.
4. Timing of Wage Payments: Federal law generally requires that employees be paid for regular and overtime hours in the regular payday for the pay period in which the regular and overtime hours are worked, but in some circumstances permits overtime hours to be paid on the next regular payday. Some states have stricter payment requirements, particularly for payment on termination of employment.
5. Promises of Paid Breaks. Federal law generally does not require that employees be provided with "break" time, although there is a presumption under federal law that, if an employer permits breaks, short breaks of up to 20 minutes are "compensable time." Some states do require employers to provide breaks of varying durations during shifts of various lengths, and laws vary from state-to-state as to whether these breaks must be treated as paid time. Employers often get into trouble, even in states which do not mandate breaks, by providing in employee handbooks or otherwise that employees may take breaks and then failing to allow employees time away from work for the break. Wal-Mart faced substantial verdicts because of this practice, even in Pennsylvania, a state which does not mandate paid breaks.

Finding violations, even though they may seem to be minor and technical, in employers' wage payment practices has become a cottage industry in the plaintiffs' employment

law bar. Even seemingly minor violations, when multiplied by hundreds of employees who have been subjected to the practice over the several-year-long period during which recovery is permitted, can yield multimillion dollar verdicts or settlements. If your company has not had its wage and hour and wage payment practices reviewed recently by an employment lawyer, these two settlements should serve as a cautionary tale.

For more information on wage and hour issues, contact Sarah A. Kelly in our Philadelphia office at 215.665.5536 or skelly@cozen.com.

Employment-Related Decisions From The U.S. Supreme Court's 2010-2011 Term

Much publicity has been given to the *Wal-Mart Stores v. Dukes* case, which challenges the Rule 23 class certification of the largest class action and largest employment case in history. On December 6, 2010, the U.S. Supreme Court granted certiorari and oral arguments were heard on March 29, 2011 on a narrow question involving a class of 1.5 million women alleging that Walmart systematically discriminated against women in its promotion and compensation practices. The landmark and most-recently issued *Dukes* decision is highlighted below. The Court, however, has issued multiple decisions throughout its term of which labor and employment lawyers should be aware.

RULE 23 CLASS CERTIFICATION OF DISPARATE TREATMENT CLAIM

On June 20, 2011, the U.S. Supreme Court issued its decision in the long-anticipated *Wal-Mart Stores, Inc. v. Dukes* case, which garnered enormous attention as the company faced billions of dollars of potential liability if the Court upheld certification of the class. No. 10-277, slip op. (U.S. June 20, 2011). In a divided ruling, the Court reversed a 9th Circuit Court of Appeals decision that certified the massive Title VII sex discrimination class action and it ruled that the female plaintiffs failed to satisfy the Federal Rule of Civil Procedure's Rule 23(a) requirements.

Justice Scalia, writing for five members of the Court, emphasized that the plaintiffs failed to show that Wal-Mart's corporate policy of giving local supervisors discretion regarding pay and promotion decisions produced common factual or legal issues that could be best addressed in a class action rather than in individual suits. He wrote "[i]n a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common discretion." The majority further found that the plaintiffs' "attempt to make that showing by means of statistical and anecdotal evidence ... falls well short."

Justice Ginsburg, however, in a partial dissent joined by Justices Breyer, Sotomayor, and Kagan, wrote that the plaintiffs satisfied Rule 23(a)'s requirement to make a preliminary showing of common questions of law or fact. The dissenting judges would have remanded the issue of whether the specific requirements of Rule 23(b)(3) had been met – which permits certification if common questions "predominate" over issues affecting individuals and if a class action is a "superior" mode of adjudication – rather than "disqualify[ing] the class at the gate." The Court unanimously agreed that the plaintiffs' claims for potentially billions as back pay were improperly certified and all agreed that the appellate court erred in certifying the class under Rule 23(b)(2).

Employers, particularly large, multinational corporations, may breathe a sigh of relief in light of *Dukes*. *Dukes* shows that enormous class actions alleging wide-spread and systemic discrimination must be narrowly tied to specific policies or practices and the best defense against such a massive class action might be a policy that directs decision makers to follow the law. Of course, employers should remain prepared to defend smaller class actions and individual suits and should anticipate that plaintiffs' lawyers will focus on disparate impact class actions or other methods to distinguish *Dukes* in years to come.

BACKGROUND INVESTIGATIONS

In *NASA v. Nelson*, 131 S.Ct. 746 (Jan. 19, 2011), the Supreme Court addressed whether the federal government violates an employee's constitutional right to informational privacy when it asks questions during the course of a background

investigation regarding whether the employee received counseling or treatment for illegal drug use within the past year and whether the employee's references have any adverse information that may have a bearing on his or her suitability for employment. The Supreme Court unanimously held such background investigation questions did not violate an employee's constitutional right to privacy. Rather, the Court reasoned that the federal government has an interest in conducting basic background checks to ensure the security of its facilities and to employ a competent, reliable work force. The Court rejected the argument that the federal government has a burden to demonstrate that its questions are "necessary" to further its interests.

Although the *NASA* case focused on the extent to which background investigations may be conducted by the federal government, private sector employers are also well-served in evaluating their background check policies and ensuring that they have a clear nexus with their security and/or legitimate business interests.

RETALIATION BY THIRD PARTY

In another unanimous decision, the Supreme Court held that the fiancé of an employee had a viable cause of action and standing to sue for retaliation under Title VII. *Thompson v. North American Stainless*, 131 S.Ct. 863 (Jan. 24, 2011) (Justice Kagan not participating).¹ Both Thompson and his fiancé were employed by North American Stainless. Shortly after Thompson's fiancé filed a gender discrimination claim with the EEOC, Thompson was discharged. Thompson then filed his own EEOC charge alleging his termination was direct retaliation for his fiancée's protected activity under Title VII. Although the lower courts dismissed the lawsuit on the ground that Thompson did not personally engage in the protected activity, the Supreme Court disagreed. The Court reasoned that it was "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew her fiancée would be fired." The Court further explained that a "close family member will almost always" be within the zone of interests protected by Title VII, and thus, is a "person aggrieved" under the statute.

Employers should be aware that retaliation charges may now be filed by not only an employee who complains of discrimination, but also by another who has some close relationship with a complaining employee. Now, more than ever, employers should ensure that they can articulate legitimate, credible reasons for any adverse employment action.

EFFECT OF "CAT'S PAW"

In a unanimous decision, the U.S. Supreme Court issued its long-anticipated opinion in a "cat's paw" case. *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (March 1, 2011).² The Court held that, in certain circumstances, an employer could be held liable for unlawful discrimination based upon the bias of a supervisor who influenced, but did not make, the ultimate adverse employment decision. In *Staub*, the Court struck down a narrow version of this so-called "cat's paw" argument, under which the employer could be held liable only if the biased supervisor exerted a "singular influence" over the disputed employment decision.

Vincent Staub was a member of the Army Reserve and was required to attend military training one weekend per month and two to three weeks per year. The record reflected that his immediate supervisor, and that supervisor's immediate supervisor, were hostile to Staub's military obligations. After receiving disciplinary warnings relating to his work performance, the company's vice president of human resources made the decision to terminate Staub's employment. Staub sued the employer under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and claimed that his supervisors' hostility toward his military obligations influenced the company's decision to terminate his employment. A jury found in favor of the plaintiff, but the 7th Circuit Court of Appeals reversed, holding the company was entitled to judgment as a matter of law because the ultimate decision maker did not depend solely on Staub's supervisors' advice in making her decision.

The Supreme Court reversed and held that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under

¹ For a more complete discussion of *Thompson*, please see our [January 26, 2011 Alert](#).

² For a more complete discussion of *Staub*, please see our [March 4, 2011 Alert](#).

USERRA.” (Emphasis supplied.) While the case addresses a claim under USERRA, the Court’s decision makes it clear that the same analysis is likely to apply to other federal laws prohibiting discrimination and retaliation in employment. In light of *Staub*, employers should understand that having human resources or a higher-level manager review an employment decision will not necessarily absolve an employer of liability for the bias of a subordinate. Meaningful review of employment decisions is even more vital after this decision and the best way to ensure that supervisors’ recommendations are well-supported and questionable actions are reversed or postponed until they can be adequately supported.

ORAL COMPLAINTS AND RETALIATION

In a 6-2 ruling, the Supreme Court held that oral complaints are included in the anti-retaliation provision of the Fair Labor Standards Act (FLSA). *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325 (March 22, 2011) (Justice Kagan not participating). During Kasten’s employment, Saint-Gobain located its time clocks between the area where employees changed into and out of their work-related protective gear and the area where they worked. The time clock location prevented employees from receiving credit for the time spent putting on and removing their protective gear. Kasten verbally complained about the location of the time clocks and believed that his repeated complaints resulted in his termination.

The Court held that the term “any complaint” included oral complaints and that limiting the FLSA’s coverage to written complaints would undermine the Act’s basic objectives. Interestingly, however, although the Court discussed the validity of oral complaints at length, it declined to address whether the FLSA covers oral complaints made solely to a private employer instead of a government agency.

Notably, the decision did not resolve the issue of whether an oral complaint must be “filed” with the government in order to be protected under the FLSA. Nonetheless, employers should proceed cautiously when confronted with a possible oral complaint relating to wage and hour issues. As the second employee-friendly retaliation decision issued this term (see *Thompson v. North American Stainless*

above), employers should take steps to ensure that they are documenting the legitimate reasons for any adverse employment decisions.

CLASS ACTION WAIVER

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that an arbitration agreement in a consumer contract that prohibited classwide arbitration was enforceable. 131 S.Ct. 1740 (April 27, 2011). The case involved an arbitration clause that was contained in a contract for cell phone services between AT&T and two customers. The clause provided for arbitration of all disputes between the parties, but required that claims be brought in the parties’ “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”

The 5-4 ruling clarified that the Federal Arbitration Act (FAA) preempts states from conditioning enforcement of an arbitration agreement on the availability of classwide arbitration because such a condition stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The Court emphasized that the FAA embodies the strong federal policy favoring arbitration agreements in accordance with their terms and it further explained that requiring the availability of classwide arbitrations would make arbitration more formal, slower, and more costly — which is inconsistent with the underlying goals of the FAA.

The case is a strong indication that an arbitration agreement that includes a class action waiver would also be enforceable in an employment context. Employers, particularly large employers and those with operations in various states, might consider such a class action waiver in an effort to reduce the exposure and costs associated with employment-related litigation.

UNAUTHORIZED WORKERS

Recently, the Supreme Court issued a 5-3 decision upholding Arizona’s Legal Workers Act (Act). *Chamber of Commerce v. Whiting*, 563 U.S. ___ (May 26, 2011) (Justice Kagan did not participate). The Act provides that the business licenses of employers who knowingly or intentionally employ unauthorized aliens may be, and in certain cases must

be, suspended or revoked. The Act also requires that all Arizona employers use E-Verify – an Internet-based system employers can use to check the work authorization status of employees. The Supreme Court held that neither of these provisions was preempted by federal immigration law.

The Court specifically found that the Act's licensing provisions fell within the authority that Congress chose to leave to the states in the Immigration Reform and Control Act (IRCA). The Court found that while the IRCA prohibits states from imposing "civil or criminal sanctions" against employers of unauthorized aliens, it preserves state authority to impose sanctions "through licensing and similar laws." The Court further held that the Act's E-Verify provision was not preempted by the Immigration Reform and Immigrant Responsibility Act (IRIRA). Although IRIRA does limit the federal government's ability to mandate the use of E-Verify, it contains no language so limiting states.

The Supreme Court's recent approval of state E-Verify mandates and stricter laws prohibiting the employment of unauthorized aliens underscores the importance of employers taking all legally required steps to ensure that they are properly verifying the ability of their employees to work in the United States. Employers should carefully track legislative activity in the states in which they operate and review existing policies to ensure compliance with applicable laws.

CONCLUSION

The U.S. Supreme Court has issued multiple employment-related rulings during its 2010-2011 term that could dramatically impact companies' hiring, termination, manager-training, human resources, and complaint investigation processes and that could dictate how such companies account for associated risks. Employers should remain well informed about these and other recent Supreme Court decisions and/or consult outside legal counsel as we continue to monitor, advise, and adjust to ever-evolving case law.

For more information, contact Kimya S.P. Johnson in our Philadelphia office at 215.665.2735 or kjohnson@cozen.com.

An App-le A Day Keeps A Lawsuit Away?

What do you get when you cross the ease and informality of social media with a smarter workforce?

Sorry, but it is not a joke. The U.S. Department of Labor (DOL) has just made it a little easier for today's educated workforce to do their own recordkeeping; at the same time possibly increasing the number of wage and hour lawsuits that will be filed.

In 2011 we have an application (or, "app") for just about everything. Sports apps, weather apps, and apps to help you find other useful apps. Navigation apps to tell me where I am, and where is the nearest restaurant or gas station. And various tracking apps that allow you to track in real time such things as your airline flight or the bus you are waiting to catch.

Much ink has been spilled over the impact that social networking and other forms of social media have had on our lives, and that is particularly true in the area of employer-employee relations. Indeed, past editions of our "Observer" have reviewed the recent decisions and actions taken by all branches of government concerning employment-related decisions that are made based on employee use of social media.

It is also an indisputable truism that the workplace continues to get smarter and more versed on its rights. The World Wide Web allows employees to Google all kinds of legal inquiries, and various state and federal agencies have created websites that contain volumes of information about employee rights and obligations in and out of the workplace. It seems that employees have potential counsel everywhere these days – an attorney on every block and around the Thanksgiving table. Social media and the Internet generally (often through affirmative government initiatives) have also made it easier for employees to learn about and understand their rights in the workplace.

So it is not surprising that we now see the marriage of social media apps and workplace issues. The DOL has just made available a free app for smartphones that allows employees to record the hours they work for an employer, to calculate the amount of money they may be owed, and to even determine the amount of overtime pay to which they may

be entitled. The free app is currently compatible only with the iPhone and iPod Touch, although the DOL is expected to develop versions for other platforms soon. (You can view the new app by going to the DOL's website at www.dol.gov/whd/.)

The DOL is touting the significance of this new technology, noting that employees can now keep their own records instead of having to rely on their employers' records. Which begs the question: When were employees forced to rely solely on an employer's records? In other words, when were employees prohibited from keeping track themselves – on that draconian writing tablet known as “paper” – of their own work hours?

Presumably, the DOL's new app will make it easier for the DOL to investigate wage and hour issues by allowing it to look at and rely on the information contained in the form that it has now created for employees to use Yet, the new app raises some concerns as well. One problem is that this new wage and hour calculator has the potential to only tell half the story, since it does not appear to allow for the possibility of “calculating” whether one is properly classified as “exempt” from certain wage and hour obligations. In other words, a greater number of lawsuits may be filed by employees who believe they are owed additional (or premium) compensation for certain hours worked, without knowing that they have been properly classified as exempt from receiving that compensation. In addition, there is a likelihood that these new lawsuits will spawn from an employee's own calculations and assumptions that are simply wrong, or perhaps more cynically, that are false in the first instance.

So what should you as an employer take away from this development? The latest example of technology infiltrating the workplace serves to highlight two important points for employers to remember. First, the mere fact that employees may be keeping track of their hours illustrates the difficulty that employers now have in controlling or keeping track of employee work time when the employees no longer work within the boundaries of a traditional work day or office space. Efforts should be made to conduct internal audits to make sure that employees are properly classified under applicable law. Second, the law continues to place

the burden on *employers* to document and retain evidence showing the hours worked by their employees. In light of that, it is critical that employers develop policies and usable forms to keep track of employee working time. Particularly now that your employees can do it so much easier themselves.

For more information, contact Michael C. Schmidt in our New York office at 212.453.3937 or 631.694.8004 or mschmidt@cozen.com.

Philadelphia Expands Discrimination Protection

On March 23, 2011 Philadelphia expanded the protections afforded by its Fair Practice Ordinance (Ordinance) to include victims of domestic and sexual violence, genetic information, familial status, and life partnership. The Ordinance is applicable to virtually all employers in Philadelphia. Companies with one or more employees, exclusive of immediate family, are required to abide by the Ordinance. All agencies and departments of the Commonwealth of Pennsylvania and the City of Philadelphia also are required to abide by the Ordinance.

The Ordinance provides protection in employment, disability and public accommodations, and housing. Under the Ordinance, individuals may not be discriminated against on the basis of certain protected characteristics. The protections afforded by the Ordinance prior to March 23, 2011 included: gender, gender identity, sex, sexual orientation, race, religion, national origin, ancestry, age, and handicap.¹ The recent changes approved by Mayor Nutter expanded the class of individuals against whom discrimination is prohibited to include: (1) victims of domestic and sexual violence; (2) genetic information; (3) familial status; and (4) life partnership.

¹ The updates to the Ordinance added the term “disability” to its list of protected characteristics. The Ordinance defines the term “disability” identically to the term “handicap”: “a physical or mental impairment that substantially limits one or more of his or her major life activities, a record of such an impairment, or being regarded as having such an impairment.”

The definition of a victim of domestic and sexual violence is expansive. An individual is a victim of domestic or sexual violence, as defined by the statute, if he or she was sexually assaulted or raped, sexually abused as a child, or subject to indecent assault.

The Ordinance also protects individuals with certain genetic characteristics, including genetic diseases, genetic disorders, and information gleaned from genetic tests of individuals and their family members. This additional protection is consistent with the recent enactment of the federal Genetic Information Non-Discrimination Act (GINA). Effective May 21, 2008, GINA prohibits employers from discriminating against individuals on the basis of family medical history and a genetic predisposition to certain diseases.

The Ordinance also prohibits discrimination on the basis of familial status, protecting individuals who are "a provider of care or support to a family member." Family members include an individual's spouse, life partner, parents, grandparents, siblings, in-laws, children, grandchildren, nieces, and nephews. Further, those with adoptive and custodial relationships qualify as family members under the Ordinance.

Finally, the Ordinance now prohibits discrimination against two unmarried individuals of the same gender that are in a long-term, committed relationship and share at least one joint residence. To be protected by the Ordinance, the two individuals must be residents of Philadelphia. Alternatively, two individuals in a life partnership qualify for protection if one of the individuals is employed in Philadelphia, owns real property in Philadelphia, or owns or operates a business in Philadelphia.

In addition to expanding the groups of protected individuals, the new legislation increases the penalties against those individuals and entities that violate the law. New penalties include injunctive and monetary relief. The available injunctive relief now includes the ability to require an employer to hire, reinstate, or upgrade the position of the aggrieved individual. Available monetary damages now include compensatory damages, punitive damages (not greater than \$2,000 per violation), reasonable attorneys' fees, and costs and expenses.

In order to be in compliance with the new legislation, employers should update their non-discrimination policies to include the above-referenced classes. Employers also should inform key personnel of the changes to the Ordinance. The legislation becomes effective on June 21, 2011.

For more information, contact Rachel S. Fendell in our Philadelphia office at 215.665.5548 or rfendell@cozen.com.

Philadelphia Enacts Ban The Box Legislation Limiting Inquiries Into The Criminal Backgrounds Of Job Applicants

On April 13, 2011, Philadelphia Mayor Michael Nutter signed Bill No. 110111-A into law (the "Ban the Box" legislation). The law amends the Philadelphia Code by enacting a new chapter, Chapter 9-3000, entitled "Fair Criminal Record Screening Standards." The law, which goes into effect 90 days after enactment, on July 12, 2011, regulates the ability of employers to conduct criminal background checks in the employment process.

The new law applies to city agencies and private employers employing 10 or more persons within the City of Philadelphia. Under the new law:

- Employers are precluded from inquiring about arrests that did not result in convictions, unless required or permitted by another law; and
- Employers are precluded from making any inquiry regarding criminal convictions before and during the application process and initial interview process, or from requiring that applicants disclose any such information.

Thus, the new legislation prohibits employers from asking about prior criminal convictions on employment applications, which many employers currently ask as a check box on their applications.

Presumably, once an employer conducts the initial interview of an applicant, the employer is free to conduct a criminal background check, subject to other applicable laws (*i.e.* Pennsylvania law and the Fair Credit Reporting Act).

The prohibitions contained in the legislation would not apply if the inquiries or adverse actions are specifically authorized by another applicable law. Violation of the law constitute a Class II violation, which carries a fine.

PRACTICAL ADVICE:

- Employers who operate in Philadelphia should review their current Employment Applications and remove all questions related to criminal convictions from their employment applications;
- Employers should train their Human Resource personnel, and any other individuals who may conduct interviews, not to make any inquiries regarding an applicant's criminal conviction or arrest history before or during the first interview.

For more information on conducting background checks, contact Carrie B. Rosen in our Philadelphia office at 215.665.6919 or crozen@cozen.com.

New Requirements for Employees Filing Form I-129

FORM I-129 REVISION

As of February 20, 2011, U. S. Citizen and Immigration Services (USCIS) requires employees filing Form I-129, a nonimmigrant visa petition used for H-1B, L-1, and O1A workers, to certify their company's compliance with the "deemed export" regulations enumerated by the U.S. Department of Commerce and the U.S. Department of State. The revised form includes Part 6, "Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States." "Deemed export" rules interpret the release of controlled technology to a foreign national within the United States as equivalent to the export of technical data or information to that individual's country. Employers, therefore, must certify whether or not the technology to which foreign national beneficiaries have access has sensitive military, trade, or national security applications, and if so, follow the appropriate licensing steps. While companies that hire foreign nationals have always been subject to export control laws, the updated Form I-129 obliges them to evaluate compliance procedures, and apply them earlier in the hiring process.

EMPLOYEES SUBJECT TO THE "DEEMED EXPORT" REGULATIONS

U.S. citizen employees are not subject to the "deemed export" regulations. The provisions apply to all foreign nationals, be they scholars, students, tourists, technicians, diplomats, salespeople, etc., with the exception of (1) permanent residents, or green card holders, and (2) "protected persons," or political refugees and asylees. For individuals who hold dual citizenship in two foreign countries, or who have citizenship in one foreign country and permanent residency in another, the status most recently obtained determines the restrictions applicable. It is important to note that the requirement of an export control license may be prompted not only by sensitive technology, but also by its export destination as determined by the residency status of the participating employee. Currently, embargoed nations and those accused of harboring terrorists, such as Cuba, Iran, North Korea, Sudan, and Syria, carry the highest level of restriction.

RELEASE OF CONTROLLED TECHNOLOGY OR TECHNICAL DATA

The U.S. Department of Commerce's Export Administration Regulations (EAR) manage the release of dual-use materials catalogued on the Commerce Control List, which are applicable for both commercial and security purposes. The U.S. Department of State's International Traffic in Arms Regulations (ITAR) govern technical, military-related data enumerated on the U.S. Munitions List. Both EAR and ITAR broadly define what constitutes the release of controlled technology to include oral, visual, and use-based disclosure. Exempted from export controls are those technologies readily available to the public, or developed via fundamental research. While only a small percentage of the companies filing Form I-129 for foreign national beneficiaries handle technology controlled by EAR or ITAR, all are required to sign Part 6 confirming compliance with the regulations. Employers should be diligent in scrutinizing their technologies with respect to the control lists, as careless assumptions carry the risk of false I-129 certification.

THE CONSEQUENCES OF NONCOMPLIANCE

While it is not yet clear how USCIS intends to verify petitioner accuracy in completing the attestation, the I-129

revision emerged as one of many measures undertaken by the Obama administration to overhaul the export control system, and might thus be accompanied by enhanced enforcement. On November 9, 2010, the president issued an executive order to establish an Export Enforcement Coordination Center within DHS, tasked with facilitating information-sharing among the federal agencies that investigate and penalize violators of U.S. export controls. Additionally, USCIS could ensure compliance through audits and worksite investigations. Whatever the enforcement efforts implemented, Part 6 does entail a confirmation of compliance with “deemed export” rules under penalty of perjury, and the consequences of erroneous certification are significant. Penalties include civil fines of up to \$500,000, criminal fines of up to \$1 million, and up to 10 years in prison, restricted export privileges, and suspension of government contracts.

BEST PRACTICES FOR I-129 COMPLIANCE

The revisions to Form I-129 place significant responsibility on the signatories of the petition — usually human resources personnel — and will impact companies to varying degrees, depending upon the field, size, departmental cooperation, and review procedures already in place. Export license determinations are not straightforward; they require an in-depth understanding of how technology is used, how accessible it is to foreign national employees, whether it is controlled, and for which countries. While large companies, especially those that regularly handle sensitive technology, might already possess an export control office devoted to the classification and management of controlled information, many smaller institutions will not be equipped to handle the review process required. Suggestions include appraisal of the compliance procedures already in place; arrangement of coordination between the hiring department, export control administrators, and human resources personnel; and consultation with export counsel or establishment of an export control office. Documenting the review process may additionally be beneficial in evidencing the steps taken to ensure accurate attestation.

For more information on this or other immigration issues, contact Marcy Stras in our Washington, D.C. office at 202.912.4875 or mstras@cozen.com.

New Jersey Bans Discrimination Against The Unemployed

New Jersey recently became the first state to prohibit the practice of excluding unemployed individuals in job advertisements. Specifically, New Jersey’s new law prohibits employers from “knowingly or purposefully” publishing a job advertisement that requires an individual to be currently employed or that states that an employer will not consider applications by unemployed individuals. Employers who violate the law may be subject to monetary penalties in the amounts of \$1,000 for initial violations, \$5,000 for second violations, and \$10,000 for each subsequent violation thereafter. The law became effective on June 1, 2011.

New Jersey’s new law does not preclude employers from publishing job advertisements that require current and/or valid occupational licenses, certifications or other credentials, or a minimum level of education, training or professional experience.

Similar legislation has been introduced on the federal level – The Fair Employment Act of 2011 – although that bill remains in committee.

PRACTICAL ADVICE:

- Employers should review current job advertisements and ensure that the advertisements do not preclude unemployed individuals from applying for open positions;
- Employers should ensure that job advertisements do not require current employment and that the qualifications for specific jobs do not require current employment; and
- Employers should review hiring procedures to ensure equal treatment of unemployed applicants.

For more information, contact Carrie B. Rosen in our Philadelphia office at 215.665.6919 or crosen@cozen.com.

Cozen O'Connor Welcomes New Attorneys to the Houston Office

We are pleased to announce the arrival of 12 labor and employment and commercial litigation lawyers to our Houston office led by A. Martin Wickliff, Jr. and Alton J. Hall, Jr.

The team of Labor and Employment attorneys is highly skilled and experienced and will allow us to better serve our clients in labor and employment matters, as well as in the energy and public utility industries in the geographic heart of this vital economic sector.

Senior lawyers joining us are:

- Martin Wickliff, Jr., veteran trial lawyer with more than 37 years of experience devoted to the representation of management in all phases of labor and employment law, with a trial and appellate practice that is national in scope.
- Alton J. Hall, Jr., more than 27 years experience, represents both public and private sector clients in complex commercial cases, environmental, and toxic tort litigation. His clients represent such diverse industries as energy, petrochemical, automotive, banking, and other sectors. He also has extensive

litigation experience in the energy field, including a wide variety of matters relating to electric utility deregulation.

- David L. Barron, board certified in Labor and Employment law and providing companies and organizations with employment-related counseling and litigation.
- Terrence Bouvier Robinson, an experienced litigator who is board certified in Labor and Employment law and concentrates on the litigation of complex employment matters.
- Charles H. Wilson, a board certified Labor and Employment lawyer who has litigated on behalf of employers in more than 20 states.

Eight additional lawyers, all focusing in the areas of labor and employment, energy and environmental, and public utility law, including litigation and trials, are also joining Cozen O'Connor as part of the Wickliff-Hall team. They are Jennifer Joy Cooper, Nelsy C. Gómez, O. Darcele Holley, Michelle Rebecca Moore, Daniel J. Schuch, Tammy R. Shea, and Norasha L. Williams. The full team is also accompanied by a number of skilled support staff members.



Pictured above, left to right, Terrence Robinson, Norasha Williams, Alton Hall, Jr., A. Martin Wickliff, Jr., O. Darcele Holley, Jennifer Cooper. Seated (from left to right) Tammy Shea, Nelsy Gomez, Daniel Schuch. Missing from the photo are David Barron, Michelle Moore, and Charles Wilson.

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