Knoxville Bar Association

# THE CONSIGLIERE

SPRING 2010 Vol. 5, No. 2

*"No man is above the law and no man is below it; nor do we ask any man's permission when we ask him to obey it."*
*-- Theodore D. Roosevelt (1858 - 1919)*

Let us know your ideas and suggestions for *THE CONSIGLIORE:*

- Call or e-mail Nick McCall at 632-4161 or nick.mccall@gmail.com or Marsha Wilson at 522-6522 or mwilson@knoxbar.org.
- Submit an article for consideration.
- Give us your feedback on this newsletter.
- Tell us about CLE topics or networking events you would like the Section to sponsor.

## FROM THE CO-CHAIRS

Springtime in Knoxville is always a busy time of year! With an array of events ranging from the Knoxville Marathon to the Dogwood Arts Festival to the Orange and White Game, there's usually some event that folks around here can put on their calendar. Well, go ahead and get out your calendar because the Corporate Counsel Section has an event that you will certainly want to attend. On May 6th, please join the Section at Altruda's Italian Restaurant for a fun and informative meeting that will involve a social gathering from 5:30 – 6:00 p.m. (I hear that there's some special drink prices in the works), followed by a roundtable discussion on the top 10 employment issues facing corporate counsel in 2010. Section member Stephanie Daniel, Vice President and Legal Counsel of Fifth Third Bank, has graciously volunteered to lead the roundtable. I have had a sneak peak at her list and, trust me, you don't want to miss this!

Another reason that my Co-Chair, David Headrick, and I would like to see you at Altruda's on May 6th is because we need your input. The "roundtable discussion" meeting format is new for our Section, with the first such meeting being held last November on alternative billing arrangements. We want to get a feel for whether you prefer to get CLE credit for attending these meetings or whether you prefer the more informal format. So, come check it out and let us know your preference! If CLE is the preference, we will want to get to work on the next roundtable meeting, which is scheduled for November 9, 2010 (location TBD).

While you still have your calendar open, be sure to block off the afternoon of August 19th for the Section's annual CLE event at The Peerless. The general theme of this year's event will be the Obama administration's impact on corporations. The Section's CLE committee, led by Tracy Edmundson and John Arnold, has developed an interesting program agenda for the event and are working to bring in an impressive group of guest speakers. Keep an eye out for the final details later this spring.

Finally, following up on the success of our "sushi social" at Sobu, we thought that we would give Nama a try for the August 31st social meeting. The manager at Nama in Bearden has agreed to have drink specials and ½ price appetizers for Section members until 7:00 p.m. See you there around 5:30!

Now that your calendar is up-to-date, I hope to see you at one, if not all four, of these events. If you have any questions about any of these events, or ideas for a future event, please do not hesitate to give me or David a call.--*Marcia A. Kilby*

# UPCOMING SECTION EVENTS
## (AND, HOLD THE DATE FOR OUR CLE)

*Upcoming Section Meetings and Schedule for 2010*

Your KBA Corporate Counsel Section has set its quarterly meeting dates for 2010. The quarterly meetings usually serve one of two purposes. Sometimes, our meetings are more formal, with a speaker(s) addressing topics relevant to most corporate counsel. But, because the offices of corporate counsel are spread throughout the greater Knoxville area and beyond, at other times the quarterly meetings are simply social gatherings which bring together members and guests in an informal setting.

**Thursday, May 6, 2010**

5:30 - 7:30 p.m.
Altruda's Italian Restaurant
125 North Peters Road
(865) 690-6144

**Future dates:**

**Thursday, August 19—THE SECTION'S ANNUAL CLE EVENT**
12 noon - 4:30 p.m.
The Peerless Restaurant
318 North Peters Road
(865) 691-4699
**www.peerlesseatout.com**

**Tuesday, August 31**
Nama in Bearden
5130 Kingston Pike
(865) 588-9811

**Tuesday, November 9 (*location to be announced*)**

If you have specific questions about any of these meetings, feel free to contact our Membership Chair, Leo Beale, at 988-6063.For more information in general about the Section, please contact Co-Chairs Marcia Kilby at 362-1391 or David Headrick at 531-6440.

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# TAX TIDBIT
## Tax Aspects of the Recently Enacted HIRE Act

By Darsi N. Sirknen, Woolf, McClane, Bright, Allen & Carpenter, PLLC

President Obama signed the Hiring Incentives to Restore Employment (HIRE)

*TAX TIDBIT:*

*Tax Aspects of the HIRE Act*

Act into law on March 18, 2010. Its provisions have been largely ignored due to its passage shortly before the health care reform legislation that instantly attracted all headlines and commentary. The purpose of the HIRE Act is to provide incentives for employers to hire and retain unemployed workers. It accomplishes that purpose through the use of a "payroll tax holiday" for employers who hire unemployed workers and an employer tax credit if the newly-hired workers are retained for at least one year.

As a bit of background, the Federal Insurance Contributions Act imposes both the Old Age, Survivors and Disability Insurance (OASDI) tax and the Medicare Hospital Insurance (HI) tax on wages paid with respect to employment. The OASDI tax rate is 6.2% of wages up to the "wage base," which is $106,800 for 2010. The HI rate is 1.45% of all wages. A like amount of tax is also imposed on the employee and withdrawn from the employee's pay; however, the employer must pay its portion of the tax from its own funds.

Under the HIRE Act, the OASDI tax on employers does not apply to wages paid by a "qualified employer" to a "qualified individual" beginning on or after March 19, 2010 and continuing through December 31, 2010. "Qualified employers" are those in the private and non-profit sectors; the payroll tax holiday is not available to governments or government instrumentalities other than public colleges and universities. A "qualified individual" is a person who (1) begins employment with a qualified employer after February 3, 2010 and before January 1, 2011; (2) swears in a signed affidavit that he or she has not been employed for more than 40 hours during the 60-day period ending on his or her hire date with the qualifying employer; (3) is not employed to replace another employee of the qualified employer unless the previous employee left his or her employment voluntarily or was fired for cause; and (4) is not related (as defined in Code § 51(i)(1) to the qualifying employer. An employee need not work a minimum number of hours in order for the employer to qualify for the payroll tax holiday.

Unless the qualified employer "elects out" of the payroll tax holiday, it will automatically apply. Some employers may wish to elect out of the payroll tax holiday because, if the payroll tax holiday applies, wages paid to a qualified individual will not qualify for the Work Opportunity Tax Credit ("WOTC") (available to taxpayers hiring certified members of certain "target groups") during the one-year period beginning on the qualified individual's hire date. Thus, if an employee's wages would qualify for both the payroll tax holiday and the WOTC, the employer should determine whether it would be more advantageous for it to take the payroll tax holiday or the WOTC. The election out of the payroll tax holiday may be made on an employee-by-employee basis.

In addition to the payroll tax holiday, the HIRE Act provides for a credit of up to $1,000 for "retained workers" for any tax year ending after the Act's effective date. A "retained worker" is a qualified individual (as defined above) (1) who was employed by the taxpayer on any date during the tax year; (2) whose employment with the taxpayer lasted for at least 52 consecutive weeks; and (3) whose wages for such employment during the last 26 weeks of the employment period equaled at least 80% of his or her wages during the first 26 weeks of the employment period. The credit increases the employer's "current year business credit" determined under Code § 38(b) by the *lesser* of (1) $1,000; or (2) 6.2% of the wages paid to the retained worker during the 52-consecutive-week period. The credit applies only once to each retained employee and is properly taken only with respect to the tax year in which the 52-consecutive-week test is first satisfied.

# OUR FEATURE ARTICLES

## Baseball and OSHA: Back to Fundamentals

### By M. LeAnn Mynatt, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

One of the funniest lines in the 1988 hit movie “Bull Durham” occurs when upstart pitcher Crash Davis' manager explains to his struggling baseball team, "This is a very simple game. You throw the ball, you catch the ball, you hit the ball. Sometimes you win, sometimes you lose, sometimes it rains. Think about that for a while." As the boys of summer return to fields across America, this is a good time for employers to get back to the basics of workplace health and safety, the OSHA 300 Injury and Illness Log. Beneath its apparent simplicity lie hidden challenges that make it a top citation issued by the federal Occupational Safety and Health Administration (OSHA) every year.

**The Basics**

OSHA requires that employers (with some exceptions) maintain a log of all recordable injuries and illnesses in the workplace throughout the calendar year. This log (called the 300 log) is then used to compile a summary, which must be posted in the workplace from February 1 until April 30 each year. Sounds so simple. So why is the recordkeeping regulation repeatedly one of the most-frequently cited standards among all industries? And why does OSHA require yet another form in the first place?

**The Background**

TOSHA stresses that having to record an injury/illness on the log doesn't mean that the employer has done anything wrong. Indeed, this missive is actually in the regulation itself: "Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers' compensation or other benefits." So... why bother?

OSHA requires that this information be gathered, first, because the federal statute requires it. But also, the log is meant to be an informational tool for both the employer and OSHA. The employer can evaluate certain areas of the workplace where similar injuries have occurred, indicating a trend, and take proactive steps to prevent recurring injuries. This information is also valuable to OSHA. OSHA promulgates new safety and health regulations where a need has been indicated. When many employers across the country have injuries or illnesses on their logs, OSHA can study them to determine if a regulation is needed to address the hazard. Currently OSHA is considering regulating the chemical diacetyl, or microwave popcorn flavoring. When OSHA was established in 1970, microwave popcorn and its flavoring weren't around. So OSHA has a sound statutory and logical basis for requiring employers to gather workplace injuries and illnesses on the log as new workplace hazards

*FEATURE ARTICLES:*

*Baseball and OSHA: Back to the Fundamentals*

come into play and as our recognition of them evolves. But it doesn't make it any easier when I have to explain to a client that the employee's broken arm must be recorded on the 300 log, even though he just slipped on an icy patch in the parking lot as he was coming into work.

**The Latest**

OSHA issued a proposed regulation on January 29, 2010, in which the log itself would have a new column to record musculoskeletal disorders (MSDs). In defense of this proposal, OSHA reminded us that employers have been required to record MSDs all along, and that this column is just a new location on the form to record them. And that's true. However, many companies are concerned that OSHA is attempting, again, to promulgate an ergonomics regulation. The MSD data has historically been required to be recorded under the catch-all "Illness" column, making it difficult for employers and OSHA to segregate MSD data from any other workplace illness. And gathering data to show a sufficient need for a new regulation is the first step. Stay tuned on this development at OSHA. If the rule is finalized, employers will begin recording on the new form effective January 1, 2011.

**The Pitfalls**

Congress is taking a renewed look at the workplace log and whether employers are underreporting injuries and illnesses. Recent studies provided to Congress indicate that this is, in fact, the case. As a result, OSHA issued a National Emphasis Program on February 19, 2010, directing inspectors to focus on employers with low incidents recorded on the logs (called DART rates) in industries that traditionally have high incidents. This emphasis applies to employers in all industries, except for those employers who are not required to maintain logs at all. A violation for failing to record a workplace injury or illness is generally characterized as Non-Serious, with a penalty of $1,000. But most inspectors don't stop with a review of the logs. Usually, that's just the first question that's asked. I have represented many clients with recordkeeping citations, but never one in which that was the only citation issued.

**The Details**

Most companies delegate OSHA log maintenance to the HR manager, safety or compliance manager, plant nurse, or foreman. This is fine, as long as that person has been properly trained. There are as many nuances in complying with this regulation as there are in the much more complex respiratory protection, confined space entry, or process safety management regulations. And, as is always the case, building a good defense in an enforcement scenario always starts with a well thought-out program up front. So what are some of the more common citations I see related to the 300 log?

1. Confusion related to working with employees of other companies. This could be a subcontractor on a construction site. It could be a staff augmentation company. It could be a service vendor repairing equipment at a plant. It could be an independent consultant. Or a hundred other relationships. OSHA requires that you record workplace injuries and illnesses on your log if you supervise those people on a day-to-day basis. If you use a temp service, employee leasing service, or personnel supply service, their workplace injuries and illnesses go on your log. This is a recurring source of citations, enforcement, and billable work for me. Establish up front who is going to record those injuries and illnesses.

2. Using workers' compensation forms as a template. Many companies jot the basics down on the log, based on the worker compensation forms. But remember that an injury or illness can be recordable and not compensable. Different criteria and statutory schemes are at play. Make sure that you provide sufficient information in each column on the 300 log, as described in the instructions provided by OSHA. Remember, the data is gathered in part so that the employer can make smart decisions in evaluating trends in the workplace.

3. Failure to comply with details. For example, many companies fail to post the summary during the regulatory timeframe, from February 1 until April 30.

4. Not recording the injury or illness at all. Many companies will refuse to record a workplace injury or illness that they believe was not work related. OSHA and its Tennessee equivalent, TOSHA, provide for the circumstances when something is not work related, when it may be both work- and non-work related (such as a back injury or a hearing loss), or when it was work related but non-work activities exacerbate the condition. It's important to remember that recording something on the log doesn't necessarily mean that a violation has occurred.

5. Failure to maintain records. Many companies fail to maintain the logs and summaries for the requisite five-year period.

**Back to Basics**

OSHA's recordkeeping regulation is fairly short and prescriptive. However, without proper training of the nits and picks, without an appreciation of the underlying philosophy, and without a healthy respect for just how seriously OSHA takes the form, an employer can be faced with inspections, enforcement, and a bureaucratic headache.

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## Health Care and Contracts: Tennessee Court of Appeals Holds $1.3 Million Contract Unenforceable

### By Ian P. Hennessey, London & Amburn, P.C.

A recent case decided by the Tennessee Court of Appeals highlights the importance of verifying the legality of complex contractual arrangements. The case, *Cookeville Regional Medical Center Authority v. Cardiac Anesthesia Services, PLLC*, 2009 WL 4113586 (Tenn. Ct. App. Nov. 24, 2009), involved a wrongful termination claim under a contract between the hospital and an anesthesia group for cardiac anesthesia services. When sued by the anesthesia group for wrongful termination of the contract, the hospital asserted, and the Court held, that the contract was unenforceable under Tennessee law for violation of the fee splitting statute. Permission to appeal to the Tennessee Supreme Court is pending, and if upheld, this case may have far-reaching implications for health care contracts.

*Health Care and Contract Law: TCA Holds a $1.3 Million Contract To Be Unenforceable (Yikes!!!)*

Cardiac Anesthesia Services, PLLC, ("CAS") and Cookeville Regional Medical Center Authority ("the Hospital") entered into a contract under which CAS agreed to provide cardiac anesthesia services at the Hospital. The contract included a creative arrangement regarding the assignment of fees and compensation for collection. Under the contract, CAS agreed to assign to the Hospital all of its gross fees in exchange for a monthly fee paid by the Hospital to CAS. However, CAS was permitted to retain 20% of its gross fees as compensation for its collection efforts. In effect, the hospital paid the anesthesia group a significant monthly fee in exchange for the collections turned over to the hospital (which acted as an income guarantee or subsidy for the anesthesia group).

The Hospital terminated the contract for cause and alleged breach by CAS. In 2006, the Hospital brought suit against CAS seeking damages for breach of contract by CAS. Subsequently, CAS brought its own counterclaim seeking damages for breach of contract by the Hospital. The trial court granted partial summary judgment to CAS, holding that CAS did not breach the contract and that, as a result, termination of the contract by the Hospital was wrongful. The trial court also denied a motion filed by the Hospital asserting that the contract was void under Tenn. Code Ann. § 63-6-225 (the fee-splitting statute).

Following the rulings by the trial court, the sole issue remaining at trial was the amount of lost profit due CAS resulting from the Hospital's wrongful termination. The jury awarded CAS $1.3 million in lost profits. The Hospital subsequently appealed on the grounds that the trial court erred in its ruling that the contract was valid and enforceable under the fee-splitting statute and its ruling that CAS did not breach the contract.

On appeal, the Court of Appeals focused its analysis on whether the provisions of the contract related to the assignment and retention of fees by CAS violated the fee-splitting statute. Under the fee-splitting statute, it is a Class B misdemeanor "for any licensed physician or surgeon to divide or to agree to divide any fee or compensation of any sort received or charged in the practice of medicine or surgery with any person, without the knowledge and consent of the person paying the fee or compensation, or against whom the fee may be charged." Tenn. Code Ann. § 63-6-225(a). However, a physician may split his fee as compensation to an "independent contractor that provides goods or services to the physician on the basis of a percentage of the physician's fees generated in the practice of medicine" as long as percentage paid is "reasonably related to the value of the goods or services provided." Tenn. Code Ann. § 63-6-225(b).

The Court of Appeals held that the requirement that the anesthesia group remit 80% of its collections to the hospital constituted impermissible fee splitting under Tenn. Code Ann. § 63-6-225. Furthermore, the Court found that the fee arrangement did not fall under either of the statutory exceptions to the general prohibition against fee splitting. The Court noted that, "far from obtaining the proper consent from the patient, the parties to the Contract agreed …that their financial arrangement was 'highly confidential.'" *Cookeville Regional Medical Center Authority v. Cardiac Anesthesia Services, PLLC*, 2009 WL 4113586 *5 (Tenn. Ct. App. Nov. 24, 2009). In addition, the Court noted that CAS made no argument that the fee "was reasonably related to goods or services provided by the Hospital, since it is clear on its face that there is no relationship between the fee arrangement and the cost of goods or services provided to CAS." *Id*. Consequently, the Court held the contract between the anesthesia group and the hospital was unenforceable.

As of the date of this article, it is unclear whether the Tennessee Supreme Court will hear the case on appeal. As it presently stands, *Cookeville Regional Medical Center Authority v. Cardiac Anesthesia Services, PLLC,* reinvigorates the Tennessee fee splitting statute, which may now be used defensively in contractual disputes. In addition, physicians risk potential criminal charges for violation of the statute. Therefore, physician groups and hospitals should carefully review their contracts to ensure that their financial arrangements do not violate the fee splitting statute. If necessary, contracts should be amended or renegotiated so that their terms are consistent with Tennessee law.

More broadly, this case highlights the importance of referring to statutory and regulatory authority when drafting contracts with complex or creative fee arrangements, especially in situations in which the subject matter of the contract is heavily regulated, such as health care. While the offending provisions in this case were undoubtedly seen by the parties as an efficient mechanism for establishing their financial arrangements under the contract, the resulting unenforceability of the contract led to lost profits measured in millions of dollars, not to mention fees for the ensuing legal battle. Therefore, be sure to check relevant legal authorities when drafting complex contracts. As my mentor is always quick to say: "An ounce of prevention is worth a pound of cure."

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# RANDOM NOTES

## Compiled and Collected from Various Sources and Reports

### Transactional Law: Third Party Closing Opinion Practices in Tennessee Undergoing Review

*RANDOM NOTES:*

*Discussion Draft of Report on Tennessee Opinion Letter Practice*

Virtually everyone who practices business law, whether in-house or with a law firm, has to contend sooner or later with a significant transaction—be it real estate, lending, or securities-related—in which, as a matter of course, legal opinions of counsel are required as a precondition of closing. Whether one believes opinions practice to be a case of the angels--or the Devil?--being in the details, the nuances and customs of opinion letter practice are quite often as belabored and heavily negotiated as the deal documents themselves, and a ritual that is so complex that many law firms create their own opinion manuals and set up opinion committees with rigorous internal review processes to govern their opinions practices and alleviate the risks of malpractice.

In addition to 1991's Legal Opinion Accord, the Guidelines for the Preparation of Closing Opinions promulgated by the ABA's Committee on Legal Opinions--*see* 57 BUS. LAW. 875 et seq. (2002) and the so-called "TriBar Report" of 1998, among numerous other resources and guidelines—Tennessee's business lawyers could also, since 1995, turn to the Report of the Special Committee on Opinion Standards of the Tennessee Bar Association for guidance and advice. It being 15 years since that last effort, a joint committee of the TBA's Business Law and Real Estate Law Sections has been preparing a significantly updated version of the 1995 report.

A discussion draft of the committee's efforts is available for review; lawyers and law firm opinion committees are encouraged to provide their feedback on the draft Report to Pete Ezell of the Baker Donelson firm at **pezell@bakerdonelson.com.**

***Download the discussion draft at:***
**http://www.tba2.org/tbatoday/news/2010/3rdparty_draft_042610.pdf**

## Transactional Law: Significant New Changes to "Good Standing"/Qualifications Statutes for Business Entities in Tennessee (Tenn. Code Titles 48 and 61 Affected)

*Brand-New Legislative Changes Affecting "Good Standing" of Tennessee Business Entities*

*( HINT, HINT: Don't Issue That Next Opinion Letter Without Reading This First!!!)*

Business lawyers also know that quite typically, as a part of legal opinions (see above), they must often opine as to formation, organization and "good standing" with state Secretary of State and tax authorities of business entities like corporations, limited partnerships and LLCs.

Certificates known as "good standing certificates" are typically provided by State authorities; these are frequently relied upon to document the factual basis for any such legal opinions expressed in the aforementioned opinion letters. While an entity's failure to be in good standing with the Secretary of State is usually easily remedied, no lawyer wants to hold up a costly and time-sensitive deal closing to fix such a glitch--but, potentially far worse from a malpractice perspective are the possible consequences of issuing an opinion letter premised on an incorrect belief that a corporation, LP, LLP or LLC is in good standing when, in fact, it is not.

Hot off the presses: Tennessee business law practitioners need to know that several prior gaps in the qualifications/good standing statutes of Tennessee have been recently enacted by the General Assembly and signed into law by Governor Bredesen on April 9, 2010. The two companion bills so enacted, Public Acts, 2010, Chapters 741 and 742, were in large part the product of efforts by the Secretary of State to better fill those gaps.

Without getting into the "bug dust"/minutiae, these enactments spell out in detail, among other things, a host of changes relating to qualification of business entities; the Secretary of State's duties as to articles of dissolution/termination; certificates of withdrawal; confirmations of good standing for foreign (i.e., not incorporated in Tennessee) corporations, and of having validly paid all required taxes and penalties in Tennessee; and updating/"tweaking" similar mechanisms for domestic and foreign LLCs, LPs and LLPs.

**Practical Advice**: **Before ordering your next batch of Tennessee good standing certificates or issuing your next opinion letter as to a Tennessee business entity's qualification, good standing and/or tax clearance, you owe it to your client—and, moreover, to yourself and your practice—to read and update yourself thoroughly with these new changes to Tennessee Code Titles 48 and 61.**

***Read the statutes at:***

***and at***

http://state.tn.us/sos/acts/106/pub/pc0742.pdf

And—as a task force is now underway to look at potential revisions to the

Knoxville Bar Association
505 Main Street
Suite 50
Knoxville, TN 37902

Phone:
(865) 522-6522

Fax:
(865) 523-5662

E-mail Addresses:
dheadrick@terryadamslaw.com
**mkilby@deroyal.com**
nick.mccall@gmail.com
mwilson@knoxbar.org

We're on the Web!
*http://www.knoxbar.org*

Tennessee Business Corporation Act (Tenn. Code Ann. §§ 48-11-101 *et seq*.)—be on the lookout for even more possible future updates and changes to come down the road in the near future as to our State's business entity laws.

## NEWS AND NOTES

**Thanks to Our Authors!**

Thanks to all those who contributed to this issue of *THE CONSIGLIERE.* A very special note of appreciation is due to our authors Darsi Sirknen of Woolf, McClane, Bright, Allen & Carpenter, PLLC for her latest "Tax Tidbits" contribution; to LeAnn Mynatt of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, for her article with always-timely advice on OSHA and workplace log essentials; and to Ian Hennessey of London & Amburn, P.C., for his article on the Tennessee Court of Appeals' significant recent case with potentially far-reaching impacts on health care contracts across our State.

## CONTACT INFORMATION

See the contact information on the left-hand margin of this page. Use the hyperlinks to contact our Co-Chairs, David Headrick and Marcia Kilby; the Editor, Nick McCall; or the KBA's Executive Director, Marsha Wilson.

See the web site address at the bottom of the left-hand margin on this page to access the official Knoxville Bar Association web site by the hyperlink.

**Don't forget the Corporate Counsel Section's next quarterly meeting for this year, to be held at 5:30 p.m. on Thursday, May 6, 2010 at Altruda's. See you there!**