Knoxville Bar Association

THE CONSIGLIERE

SUMMER 2011 Vol. 6, No. 3

"The best thing about the future is that it comes one day at a time ."

--Abraham Lincoln

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

- Call or e-mail Chris Field at 637-0203 or cfield@latlaw.com, Nick McCall at 632-4161 or jhmccall@tva.gov, 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

As another summer comes to an end, most of us will soon undergo somewhat of a lifestyle change. Our summer trips are done. The kids go back to school. The next big break will be the Holidays.

So, we have the "opportunity" to spend more time and energy on our careers. While this is good for the bottom line, we must take care to maintain a work-life balance that will allow us to soldier on through the rest of this year without too much collateral damage to our lives and families. As we have all experienced, this is easier said than done and takes some proactivity on our parts. Having recently read some articles on the subject, I want to share with you some of the more interesting tools:

1. *Schedule downtime* – We are required by the Courts to maintain a calendar, so why not use it to ensure that you have personal time. It's easy to let your calendar fill up months ahead of time with trials, tax seasons, and other matters. Scheduling breaks and family time makes sure that you are at least aware that you are cancelling family trips to prepare for depositions.

2. *Drop or streamline inefficient activities* – Avoid the chatty person that keeps you at the water cooler for fifteen minutes every day. Don't take the newspaper to work. Limit your social media activities. Of course, certain activities cannot be avoided, but a little forethought could make them more efficient. I have long threatened to take all the chairs out of the conference room where we have our weekly meetings.

3. *Outsource your personal responsibilities* – If you are not at work, and are still not having fun, consider outsourcing. Switch to a dry cleaner that delivers. Is it really worth saving $25 every two weeks for the neighborhood kid to mow your yard, when it keeps you from spending a couple of hours on Saturday with your family?

4. *Raise your energy level* – Who wouldn't want more energy? At home, instead of watching TV, take a walk around the neighborhood with the family. Limit your consumption of big, fatty meals that will slow you down for the rest of the day. At work, avoid becoming completely sedentary. Set an alarm on your computer or phone to remind you to get up and walk around. Maybe even stretch a little.

I'd also like to remind you to read the details about our upcoming annual CLE on Thursday, August 18, 2011 at Peerless. The theme this year is "Modern Risks for Corporate Counsel." Every year, we have a great program, and there are always eye-opening moments during the CLE. Hope to see you there!

Have a great Fall! -- *David W. Headrick, Co-Chair*

UPCOMING SECTION EVENTS

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. At other times, the quarterly meetings are simply social gatherings which bring together members and guests informally.

- **Thursday, August 18, 2011:** Corporate Counsel Section's 3 hour CLE will be held on August 18, 2011 at Peerless Restaurant. Lunch is served from 12 -1 with three hours of dual-credit CLE following. **(*See more below.*)**
- **Thursday, September 8, 2011:** Location to be determined
- **Thursday, November 17, 2011:** Location to be determined

If you have any specific questions about our Section's meetings, feel free to contact Membership/Social Committee Chair Ned Morgan at 403-7489 or at nmorgan@voicesheardmedia.com. For more information in general about the Section, please contact co-chairs Marcia Kilby at 362-1391 or David Headrick at 531-6440.

OUR SECTION'S ANNUAL CLE:

MODERN RISKS FOR CORPORATE COUNSEL

Thursday, August 18, 2011
12:00 noon - 4:30 p.m.
Peerless Restaurant
318 North Peters Road

Lunch will be provided and is included in the registration fee.
KBA Member Price: $90
Non-KBA Member Price: $125

$5 additional the day of the program (meal cannot be guaranteed unless reservation is received 48 hours before the program)

Approved for 3 Hours of Dual-Credit CLE Credit

Register Now!

This program is designed for any attorney who works with or wants to work with in-house corporate counsel, and for all of those who serve as corporate counsel. The presentation will use a fast-paced, interactive format and will be loaded with practical advice and ethical considerations essential for effective service to corporate clients.

1:15 - 2:15 p.m.
Insurance Traps for Corporate Counsel
Speaker: Ron Hill - Egerton, McAfee, Armistead & Davis
· Risk analysis before procuring insurance coverage
· Consultation with insurance agent to determine insurance coverage needed
· Avoiding coverage gaps
· Spotting covered claims
· Communications with the insurance company
· Ethical considerations

The Section's Annual CLE: "Modern Risks for Corporate Counsel" (Don't Miss it)

2:15 - 3:15 p.m.
Social Media Landmines: How Do You Protect Your Company
Speaker: Michael McSunas - Chambliss, Bahner & Stophel
· Social media policies
· Brand protection
· Employee issues
· Ethical obligations for attorneys using social media

3:15 - 3:30 p.m. Break

3:30 - 4:30 p.m.
Corporate Counsel Roundtable Q & A: The Slippery Slope between Legal Risk Management and Strategic Business Partner
Speakers: Charles E. Young, Jr. - Babcock & Wilcox Technical Services, Y-12, LLC, Michael McSunas - Chambliss, Bahner & Stophel, and David Morehous - Siemens Medical Solutions USA
· Social media and other current trends
· Attorney-Client privilege
· Conflicts of interest
· Balances between being a legal counselor and strategic business partner

TAX TIDBIT

Deducting Losses from Recent Storm Damage

By Bradley C. Sagraves of Woolf, McClane, Bright, Allen & Carpenter, PLLC

Many people incurred substantial damage from the recent storms that came through East Tennessee. My wife and I are among only a few people we know that sustained no damage to our house or vehicles in the recent hailstorms. With all the damage around town, I consider it a miracle. If you are one of the individuals or businesses that did sustain damage, you may be able to deduct the losses you sustained under certain provisions of the Internal Revenue Code.

Section 165 of the Internal Revenue Code allows a deduction for any loss, natural or otherwise, that is sustained during a calendar year. This deduction has an important caveat; no deduction is allowed if the loss is compensated for by "insurance or otherwise." If a person had insurance coverage but decided not to file a claim for the damage, that person would still be entitled to claim a loss under this section because he or she was not "compensated by insurance" for the damage.

An individual claiming a loss has more stringent requirements than a business. Section 165 limits losses for individuals to losses incurred in a trade or business, losses incurred in any transaction entered into for profit though not connected with a trade or business, and losses that arise from fire, storm, shipwreck or other casualty, or from theft. Most storm damage will fall under the "other casualty" provision of Section 165.

The amount of the personal casualty deduction is subject to a $100 disallowance and a ten percent (10%) floor. The $100 disallowance means that the first $100 of every loss is disallowed. The ten percent (10%) floor means that a taxpayer can only claim a casualty loss in the amount the loss

TAX TIDBIT:

Tax Deductions for Losses Incurred in Recent Storm Damage

exceeds ten percent (10%) of a taxpayer's adjusted gross income for the taxable year. Congress previously removed the ten percent (10%) floor for federally declared disaster areas for 2008 and 2009, but has not extended that relief for subsequent years. The $100 disallowance and the ten percent (10%) limitation only apply to personal casualty losses and not business casualty losses or casualty losses in transactions entered into for profit. Further, the amount of the loss is limited to the lesser of the cost of the property or the fair market value of the property before the casualty.

To claim a casualty loss, a taxpayer must itemize their deductions. The casualty loss must be reported on Form 4684 (Casualties and Thefts) and the Form 4684 must be attached to the tax return. If the loss exceeds a taxpayer's income, the excess amount may be treated as a net operating loss that can be used in future years.

An individual may need a qualified accountant or CPA to ensure that their calculation of the loss is accurate and that the loss is properly reported on their return. A taxpayer should retain any documentation supporting the amount of the loss in the event the IRS decides to audit a tax return claiming the loss.

A deduction for a casualty loss is a small consolation if a taxpayer has had major damage that is not covered by insurance. Hopefully, you will not have to take advantage of this deduction any time soon.

OUR FEATURE ARTICLES

CRIMINAL LAW

Recognizing the Legal Status of Whistleblowers and Avoding Pitfalls in the State and Federal Systems

By Loretta G. Cravens, Troy S. Weston and Shalini Bhatia (Law Clerk), Eldridge & Blakney, P.C.

Corporate criminal investigations can have a variety of genesis points. One way in which investigations can, and often do, begin is with the reporting of activity to law enforcement by a current or former employee of a corporate entity. When the person reporting activity to law enforcement is a current employee, a number of varied rights – derived from both state and federal statutes and regulations – can be triggered that operate to insulate the employee, deemed a "whistleblower," from adverse employment actions by his/her employer. In an attorney's representation of a corporate entity that is currently either under investigation or indictment based on the reporting of a whistleblower, it is important that he/she be prepared to appropriately advise their client, lest the corporate entity expose itself to additional criminal and civil liability. This article will discuss the most recent developments in whistleblower protections.

FEATURE ARTICLES:

The Legal Status of Whistleblowers and Avoiding the Federal and State Pitfalls

In 2010 the Dodd-Frank Wall Street Reform and Consumer Protection Act was signed into law, which changed the complexion of whistleblower protections for employees in the financial securities market.**1** The Securities and Exchange Commission has now published its final rules implementing the Dodd-Frank Act's whistleblower program which will go into effect on August 12, 2011. With these new SEC rules, which may alter the number and manner of whistleblower complaints filed under this new regulatory scheme, the time is ripe for Corporate Counsel to review not only these new SEC rules, but all potentially applicable whistleblower statutes and regulations to ensure that the company's internal compliance program is operating in an effective manner.

The purpose of these newly promulgated rules is to promote reporting of SEC violations while still providing companies viable alternatives to SEC intervention through the use of internal compliance programs.**2** Under these new regulations, reporting violations has become monetarily incentivized.**3** Under these new rules, a whistleblower who first reports internally, thus providing the company an opportunity to address and report the violation through the internal compliance process, where the company subsequently reports the violation to the SEC, may still be remunerated.**4**

Internal reporting is not, however, required, and is but one of the factors to be to be considered in determining the amount of the remuneration.**5** On the surface, this restructuring, permitting the whistleblower to earn a reward for first addressing a violation internally, might appear to increase the incentive for a whistleblower to bring issues to the attention of their superiors before reaching out to regulatory authority. There is however, still a major advantage for the whistleblower to go directly to the SEC – the Dodd-Frank Act's whistleblower protections apply only to those who report directly to the SEC.**6** Furthermore, when an employee does report internally, the Company now has only 120 days to conduct and complete its internal investigation, in order for the whistleblower to qualify for remuneration.**7**

Whistleblowers are generally afforded protection from retaliation by the employer as a result of their reporting of a violation. Under the new SEC rules a whistleblower reporting directly to the SEC is required only to possess a reasonable belief that the information he or she is providing relates to a possible securities law violation that has occurred, is ongoing, or is about to occur.**8** Companies are prohibited from interfering with a whistleblower's attempt to report a violation or communicate with the regulatory authority.**9** This prohibition includes any attempted enforcement of confidentiality agreements.**10**

Of course, whistleblower protections, and the criminal and civil penalties that attach to corporate entities who ignore those protections, are not limited to the Frank-Dodd Act or the attendant regulations. Accordingly, counsel should always be conscious of the protections provided to whistleblowers once an employee has reported a potential violation either to the company or to a regulatory agency that has initiated an investigation into possible illegal activity.

Under most Federal whistleblower protection provisions, employers are prohibited from taking any discriminatory action against an employee as a result of their lawful participation in a whistleblower activity.**11** Discriminatory or "adverse" action can encompass much more than the termination of an employee. An employer should not fire, lay off, "blacklist," demote, deny overtime, promotion, or benefits, discipline, refuse to hire or rehire, reassign to a position that reduces the likelihood of promotion, reduce pay or hours, make threats, or engage in intimidation of the employee.**12**

There are a variety of state and federal whistleblower protection provisions that offer protections and incentives to employees who report possible illegal activity and regulatory violations to the appropriate authorities. For example, the False Claims Act provides for the use of whistleblowers with regard to corporate fraud or false claims against the United States.**13** The False Claims act provides relief if any "employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter."**14** The remedies include: "reinstatement with the same seniority status that [the] employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees."**15**

The Occupational Safety and Health Administration (OSHA), alone, oversees the provisions of twenty-one different statutes that offer protection to whistleblowers including portions of the Dodd-Frank Act addressed above,**16** the Sarbanes-Oxley Act,**17** the Clean Air Act,**18** and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).**19** A comprehensive list of whistleblower protection acts provisions administered by OSHA is available via OSHA's Office of the Whistleblower Protection Program.**20**

Many States have regulatory agencies that mirror those of the federal system and likewise offer statutory protections to whistleblowers who report employers' violations. Tennessee provides that an employee, whether employed by a private company, government agency, or whom provides services to the federal government,**21** may not be discharged as a result of refusing to participate in or refusing to remain silent about activities that violate State or federal law or "any regulation intended to protect the public health, safety or welfare."**22** An employee discharged under these circumstances has a cause of action against the employer for retaliatory discharge and may recovery attorneys' fees and costs in addition to damages.**23**

Regardless of the precise context of the investigation, it is important that an employer and counsel advising that employer recognize that an employee who has reported a possible violation to law enforcement is cloaked with protections from adverse employment actions based on that reporting. If an employee is found to have reported information to law enforcement – even if that information is deemed by your client as inaccurate or unreliable – it is important that the employer be prepared to act appropriately.

The following tips will help you and your client navigate these perilous waters:

- Design internal protocol for the reporting of illegal actions. Consider outsourcing this responsibility to another company to add a layer of protection for the company/client.
- Immediately make the corporation's investigation response team, inclusive of in-house and outside counsel, aware of the whistleblower. This team should endeavor to become aware of the precise content of the whistleblower's reporting, as well as ensuring that no adverse employment action is taken against the employee(s).

- Communicate to all necessary persons in the corporation that no adverse action is to be taken against the employee(s) based on this reporting.
- If adverse action needs to be taken against the employee, for reasons unrelated to the reporting, document and confirm all allegations relating to that employee. Any conversations with the employee should be witnessed by multiple persons, with at least one coming from a department outside that employee's department.

These steps, when undertaken in conjunction with consultation with outside counsel, will help to ensure that your corporate client does not expose itself to additional and greater liability.

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1. U.S. Securities and Exchange Commission, *SEC Adopts Rules to Establish Whistleblower Program*, http://www.sec.gov/news/press/2011/2011-116.htm.
2. Green, Shannon, *Corporate Counsel*, "A Close Look at the New SEC Whistleblower Rules: The new SEC Whistleblower Rules: What Do They Mean?" May 27, 2011, available at http://www.law.com.
3. Under prior law, whistleblowers were entitled to a reward from the SEC only for reporting insider trading violations and the reward itself was capped at ten percent of the penalties recovered in the SEC's resulting action. U.S. Securities and Exchange Commission, *SEC Adopts Rules to Establish Whistleblower Program*.
4. U.S. Securities and Exchange Commission, *SEC Adopts Rules to Establish Whistleblower Program*, http://www.sec.gov/news/press/2011/2011-116.htm
5. *Id*.
6. *Id*.
7. Green, Shannon, *Corporate Counsel*, "Prevent Detect and Analyze Dealing with Fraud In House" July 7, 2011. Available at http://www.law.com.
8. U.S. Securities and Exchange Commission, SEC Adopts Rules to Establish Whistleblower Program, http://www.sec.gov/news/press/2011/2011-116.htm.
9. U.S. Securities and Exchange Commission, *Whistleblower Award Program*, http://www.sec.gov/complaint/info_whistleblowers.shtml
10. U.S. Securities and Exchange Commission, *SEC Adopts Rules to Establish Whistleblower Program*, http://www.sec.gov/news/press/2011/2011-116.htm.
11. Obermaier and Morvillo. See, e.g., *White Collar Crime: Business and Regulatory Offenses*, §7.02[2], Vol. I at 7-21, Law Journal Press 2010 updated edition.
12. Occupational Safety & Health Administration, Office of the Whistleblower Protection Program, *The Whistleblower Protection Program*, http://www.whistleblowers.gov/,
13. Obermaier and Morvillo. *See, e.g.,* White Collar Crime: Business and Regulatory Offenses, §7.02[2], Vol. I at 7-21, Law Journal Press 2010 updated edition.
14. 31 U.S.C. § 3730(h)(1) (2010).
15. 31 U.S.C. § 3730(h)(2) (2010).
16. 12 U.S.C. § 5567 (2010).
17. 18 U.S.C. § 1514 (2009).
18. 42 U.S.C. § 7622 (1977).
19. 42 U.S.C. § 9610 (1980).
20. *See* OSHA Office of Whistleblower Protection Program, available at http://www.whistleblowers.gov.
21. Tenn. Code Ann. § 50-1-304(a) (2009).
22. Tenn.Code Ann. § 50-1-304(b) (2009).
23. *Id*.

Health Care Law

The General Assembly Hits the Reset Button on Peer Review

By Chris Field, London & Amburn, P.C.

Introduction

Last year, the Tennessee Supreme Court handed down its decision in *Lee Medical* **1** which narrowed the class of peer and quality review activities entitled to protection under the Tennessee Peer Review Act of 1967.**2** The decision forced health care organizations to reassess their peer and quality review practices. This past April, before the dust had settled in the aftermath of *Lee Medical*, Governor Haslam signed the Tennessee Patient Safety and Quality Improvement Act**3** into law, effectively overturning *Lee Medical*. The new Act broadens the scope of quality review activities entitled to statutory protection, as well as the class of organizations entitled to enjoy the protections. Given the quick succession of the developments in Tennessee peer and quality review law, confusion as to the current state of the law is understandable. In an attempt to untangle the knots, this article will examine the state of the law before and after *Lee Medical* and the implications of the recently enacted Tennessee Patient Safety and Quality Improvement Act.

Pre-*Lee*

Internal peer review committees have long been utilized by healthcare organizations as a means to improve the quality of medical care. Over 40 years ago, the Tennessee General Assembly first sought to encourage health care organizations such as hospitals to adopt internal review practices with the passage of a law later referred to as the Tennessee Peer Review Law of 1967. Originally, the law provided immunity from civil damages arising out of a party's participation in the review process.**4** In 1975, the law was amended to create an evidentiary privilege generally covering documents created in the course of the review process.**5** Prior to *Lee Medical*, many organizations routinely operated under the presumption that the protections set forth in the Peer Review Law extended to the review of non-physician providers as well as quality reviews, such as those performed by infectious disease control committees.

Lee Medical

In 2010, the Supreme Court handed down its decision in *Lee Medical* which narrowed the pool of review activities entitled to protection under the Peer Review Law. As noted, prior to *Lee Medical*, the Peer Review Law was presumed by many to protect the activities of a peer review committee when evaluating the conduct of non-physicians as well as quality review practices. In *Lee Medical*, the Tennessee Supreme Court rejected this broad interpretation and held that the Peer Review Law protected only those committees engaged in the evaluation of a "*physician's* conduct, competence or ability to practice medicine."**6**

Tennessee Patient Safety and Quality Improvement Act of 2011

The Tennessee Patient Safety and Quality Improvement Act of 2011 ("the Act") was enacted for the express purpose of improving patient safety and quality through the creation and use of what the statute refers to as Quality Improvement Committees ("QICs"). The Act promotes this policy objective by

providing QICs with protections similar to those provided under the Peer Review Law of 1967. Namely, the Act provides immunity to members of QICs and other participants of the review process, and it protects from discovery those documents created by or at the direction of QICs, as well as testimony elicited by QICs.**7**

Complying with the New Law

In order to benefit from the Act's protections, an entity must fit within the Act's definition of a "Healthcare Organization." The definition is notably broad, setting forth a diverse list of organizations including hospitals and other healthcare facilities licensed under Title 68, hospitals licensed under title 33, related hospital systems, affiliates, patient safety organizations, certain professional assistance programs, professional healthcare foundations, HMOs, PPOs, and medical schools, among others.**8**

Next, the entity must establish or retain a qualifying QIC for the purpose of evaluating "safety, quality, processes, costs, appropriateness or necessity of healthcare services."**9** The broad spectrum of permissible review activities is a clear rebuke of *Lee Medical*'s "physicians-only" restrictions. Given the breadth of the permissible review activities and the protections set forth in the Act, healthcare organizations can once again initiate quality improvement reviews with some assurance that their own findings will not be used against them.

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1. *Lee Medical, Inc. v. Paula Beecher, et al.,* 312 S.W.3d 515 (Tenn. 2010).
2. Tenn. Code Ann. § 63-6-219.
3. Public Chapter 67.
4. *Lee Medical*, 312 S.W.3d at 528.
5. *Id*. at 529.
6. *Id*. at 526(emphasis added).
7. As with the Peer Review Law of 1967, it must be stressed that putting any document before the QIC does not cloak the document in privilege. In order to privileged, a document must be created by or at the direction of a QIC.
8. A complete list of qualifying entities is set forth in the Act's definition of "Healthcare Organizations" contained in Public Chapter 67 § 3(b)(1).
9. Public Chapter 67 § 3(b)(4) (this section further provides a non-exhaustive list of sixteen review activities which satisfy the Act's criteria).

Employment Law

Redefining Balance: EEOC Revisits The Use of Criminal Background Checks in Hiring

By Leslie Beale, The Beale Firm, PLLC

Companies are responsible for managing and protecting the profits they receive through their business. They are also responsible for ensuring the safety of their employees, and often that of the public as well. So, it only makes sense that companies are increasingly turning to the use of criminal background checks as a screening mechanism in the hiring process. The use of such checks, they argue, allows them to avoid hiring violent felons, sex offenders, and those who are most likely to commit financial crimes against

Employment Law:

EEOC Revisiting the Use of Criminal Background Checks in Hiring

the company. Currently, the use of such background checks must conform to the guidance of the U.S. Equal Employment Opportunity Commission ("EEOC"), which was issued in the 1980s. This guidance requires, among other things, that employers considering criminal convictions as part of a hiring decision also consider a specific list of factors related to those convictions, including the nature of the offense, the time since the offense occurred, and how the nature of the offense relates to the job sought or held.

As unemployment continues to hover near double digits and financial recovery remains elusive, however, the use of background checks is being revisited by the EEOC. Although part of the Commission's larger examination of workplace barriers, the concern over criminal background checks seems to have drawn particular attention. On July 26, 2011, the EEOC held a public meeting on the use of criminal background checks, the impact such checks have on employment, and the difficulties faced by employers in trying to balance the need for a safe and secure workplace against fair employment decisions. While EEOC insists that the meeting was impartial and intended as an information gathering tool only, some employers remain skeptical that the Commission is unbiased.

As part of its meeting, EEOC heard from several experts concerned about the use of criminal background checks as a screening tool. These experts are specifically troubled by what they say is often inaccurate information in criminal databases being relied upon in making hiring decisions. They are also worried that reliance on criminal backgrounds as a screening mechanism may disproportionately affect racial minorities and other protected categories. Other experts voice concern over the creation of an unemployable class of individuals – those unable to obtain employment sufficient to adequately support themselves due to a criminal conviction. This phenomenon, experts warn, could have unforeseen consequences for society as a whole, and contribute to ongoing problems such as poverty, drug addiction, and recidivism. The Commission also heard from employers who have successfully hired, trained, and employed individuals with criminal convictions. According to these companies, the key to their success is overcoming fear and bias.

The EEOC heard from several employer representatives who wholeheartedly support the use of criminal background checks, however, and say that they are critical to ensuring employees and the public are safe. They argue that criminal background checks are reliable, and in a world where employers may be held liable for the criminal acts of employees, they would be foolish not to utilize them. Still other employer representatives discussed the struggles employers face in trying to satisfy the EEOC guidelines while facing other competing business pressures. For instance, many employers who hold federal or state contracts are prohibited from employing anyone who has a criminal conviction, regardless of the factors listed in existing EEOC guidance. These employers are forced to forego such contracts or run afoul of the EEOC's recommendations and face enforcement action.

The EEOC will accept public comment on the topic of criminal background checks until August 10, 2011. Information on how to comment may be obtained from the Commission's website at **http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm**. In the meantime, employers must carefully consider whether and how to use criminal background checks in their hiring process. Assuming such checks are utilized, they should be obtained from a reputable firm and administered to all applicants, regardless of protected characteristics such as race or color. The results of background checks should be reviewed by someone knowledgeable in human resources and employment law. Before the results are used to

screen an applicant from a position, companies should be sure to carefully follow existing EEOC guidance (located at **http://www.eeoc.gov/policy/docs/arrest_records.html**) by considering factors such as the nature of the conviction, the nature of the job in question, and the length of time since the offense should be considered.

RANDOM NOTES

Compiled and Collected from Various Sources and Reports

Employment Law: Annual EEO-1 and VETs 100/100A Filings Upcoming—The Basic "Whos, Whats and Whys"

The yearly deadline for employers to file their annual EEO-1 and VETS-100/100A forms is September 30, 2011. Used by government agencies--such as the Office of Federal Contract Compliance Programs ("OFCCP")--to help select compliance evaluation targets and to track employment patterns, but also by plaintiffs in lawsuits, accuracy and timeliness in completing these forms are critical factors for corporate employers.

The EEO-1 form is an annual report that categorizes employees based on ethnicity, race and gender, as well as by job category. The EEO-1 form uses data from any pay period in July, August or September of the filing year. The VETS-100 and VETS-100A forms are annual reports that track the employment and hiring of former military service members by job category and type of veteran. The VETS-100 and VETS-100A forms use data from any pay period in July or August of the filing year. Additionally, the VETS-100 and VETS-100A forms contain a 12-month summary of information dating back 12 months from the specific pay period selected.

Those subject to the EEO-1 filing requirements are all private employers subject to Title VII of the Civil Rights Act of 1964 (as amended) with 100 or more employees, excluding, among others, state governments, Indian tribes, and institutions of higher education. Similarly, private employers with fewer than 100 employees are covered if, together with related entities, the entire single enterprise employs 100 or more employees. Among others covered are non-exempt Federal government contractors in certain specified categories, as well as certain financial institutions. .

Those subject to the VETS-100/100A filing requirements are Federal contractors and subcontractors with any contract of $25,000 or more entered into before December 1, 2003; if this contract has been modified since December 1, 2003 in the amount of $100,000 or more, the VETS-100A must be filed instead. Additionally, federal government contractors and subcontractors with a contract of $100,000 or more entered into on or after December 1, 2003, must file the VETS-100A.

A single-establishment employer must submit one EEO-1 and one VETS-100/100A report(s). Multi-establishment employers must submit multiple reports, which can be accomplished in a number of different ways, depending

in part on the number of employees at each separate facility.

Read more about these forms at:
http://www.eeoc.gov/employers/eeo1survey/index.cfm ***and***
http://www.dol.gov/vets/programs/fcp/main.htm

The SBA's New Women-Owned Small Business Program

On February 4, 2011, the U.S. Small Business Administration launched its new Women-Owned Small Business ("WOSB") Program, designed to create a set-aside structure for WOSBs similar to the Federal government's longstanding Section 8(a) programs. The overall goal of this far-reaching new program is to expand Federal contracting opportunities for women-owned small businesses within 83 different industries (identified by NAICS code) where WOSBs have traditionally been underrepresented. Some of the requirements for participation in the SBA's WOSB program are as follows: (1) the company must be "small" in its primary industry in accordance with SBA size standards; (2) the company must be at least 51 percent directly and unconditionally owned by one or more women; and (3) control and day-to-day management of the company must be in the hands of one or more women. The program rules authorize the set-aside of Federal contracts for WOSBs or economically disadvantaged women-owned small businesses as long as the anticipated contract price does not exceed $3 million ($5 million for manufacturing contracts). In the 45 industries where women have been identified as "underrepresented," competition for set-aside awards may be restricted to WOSBs that have been certified as economically disadvantaged. For contract awards in 38 industries where women are "substantially underrepresented," competition may be restricted to all certified WOSBs. Importantly, an award cannot be set aside under the WOSB program unless there is a "reasonable expectation" that two or more WOSBs will bid.

Read more at: **http://www.sba.gov/content/contracting-opportunities-women-owned-small-businesses**

Antitrust and Trade Regulation: Revised H-S-R Premerger Notification Form Now Issued by DOJ and FTC

Nearly a year after requesting comments on proposed changes to the Hart-Scott-Rodino ("H-S-R") premerger notification and report form, the Federal Trade Commission and Department of Justice have now promulgated the final version of the new form and related rules. Anyone making a premerger filing on or after Monday, August 8, 2011 will be required to use the new format, which deletes several categories of information that the agencies believe to be unnecessary for their preliminary pre-merger review. Copies of documents filed with the Securities and Exchange Commission, 2002 revenue information broken down by industry type and detailed breakdowns of voting securities to be acquired will no longer be required. New concepts have also been added, *e.g.*, reporting requirements related to "associates" of the acquiring person, defined to include entities affiliated with the acquiring person through operational or investment decision management rights. The new form also makes minor revisions to address omissions from the 2005 rules; those final rules developed from the public comments received can be found at 16 C.F.R. Sections 801, 802 and 803.

Obtain the new form at: **http://www.ftc.gov/bc/hsr/hsrform.pdf**

RANDOM NOTES (Compiled from Various Sources)

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NEWS AND NOTES

Thanks to Our Authors!

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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 Co-Editors, Chris Field and 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 annual CLE at The Peerless Restaurant on Thursday, August 18, 2011, with lunch and registration starting at 12:00 p.m. at The Peerless Restaurant. See you there!