Knoxville Bar Association

THE CONSIGLIERE

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

- Call or email Paul E. Wehmeier at 546-7000 or pwehmeier@adhknox.com

  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

By: Marcia A. Kilby
DeRoyal Industries, Inc.

Ah, March Madness! For many sports fans, myself included, this is the absolute best time of year. It's a time of completing tournament brackets, nail-biting games of survive and advance, and cheering for any number of possible Cinderella teams against college basketball's giants. However, this March, when the National Collegiate Athletic Association (NCAA) hears mention of its trademarked term "March Madness," it may take on a completely different meaning. On March 26, 2014, a regional director of the National Labor Relations Board (NLRB) issued a ruling that a group of Northwestern University football players were employees of the University and, as such, have the right to collectively bargain with the school as employees represented by a union.

Although the NCAA was not a party to the proceeding, the 24-page decision took primary aim at the organization's cornerstone concept of "student-athlete," the principle under which players receive scholarships to pay for their education in exchange for competing in athletics on behalf of the school. Not only did the decision characterize the scholarship as a contract for compensation, it also affirmatively found that the players are not primarily students. The NLRB regional director outlined a number of factors to support these findings, including the number of hours devoted to football as compared to hours devoted to study and the control over the players that is exerted by coaches. The NCAA has already stated that it disagrees with the decision, and Northwestern University has already stated it will appeal this decision to the full NLRB panel. With resolution being months (or years) away, only time will tell whether this is a development that will be a historical turning point for the NCAA and college sports as we know it.

So, you may be asking why this ruling is something to highlight for the KBA's Corporate Counsel Section? Over the last couple of years, this Section has highlighted some of the ways the NLRB is trying to stretch its influence, particularly in private sectors. This is yet another example of how the current NLRB is doing so…and it could be game-changing.

Wishing you a happy spring,

Marcia A. Kilby
Co-Chair

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UPCOMING SECTION EVENTS

Watch for more information about a June social, an extended CLE in August and a November social/CLE program.

TAX TIDBIT: THE EFFECT OF UNITED STATES V. WINDSOR ON EMPLOYEE BENEFITS

TAX TIDBIT

THE EFFECT OF THE SUPREME COURT'S *WINDSOR* DECISION ON EMPLOYEE BENEFITS.

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

As most people have heard by now, in June 2013 the United States Supreme Court issued a decision in *United States v. Windsor*, 133 S. Ct. 2675, holding that the portion of the federal Defense of Marriage Act ("DOMA") excluding same-sex couples from the definition of "marriage" was unconstitutional. That decision resulted in several federal agencies, including the Internal Revenue Service, publishing guidance as to how same-sex relationships would be handled for federal purposes on a going-forward basis.

On August 29, 2013, the IRS issued Revenue Ruling 2013-17 (the "Ruling"), which states that same-sex couples who are married in a state that legally recognizes same-sex marriage will be treated as married couples for all purposes under the Internal Revenue Code (the "Code"), regardless of the state in which the couple resides. Thus, if a same-sex couple living in Tennessee travels to New

Hampshire and gets legally married there, the couple will be treated as married for federal tax purposes regardless of the fact that Tennessee does not recognize their marriage. A same-sex couple will not, however, be treated as married if they have entered into a "civil union," "domestic partnership," or some other relationship that may be allowed by the laws of their state but that is not equivalent to legal marriage.

Allowing legally-married same-sex couples to file tax returns as "married, filing jointly" is far from the only effect of this Revenue Ruling. In fact, the Ruling notes that there are over two hundred provisions in the Code and accompanying Treasury Regulations that use the terms "spouse," "marriage," or derivatives thereof. Additionally, the couples themselves are far from the only persons (or entities) affected by the Ruling.

In December 2013, the IRS issued Notice 2014-1 (the "Notice") concerning employee benefit plans involving same-sex couples. Most employee benefit plans receive favorable tax treatment under the Code, but in order to receive that treatment, they must comply with certain requirements. Because legally-married same-sex couples are now given the same status as legally-married heterosexual couples under the Code, any requirements of the Code pertaining to spousal coverage under employee benefit plans now include coverage for a same-sex spouse.

The Notice describes a "cafeteria plan" that allows employees to choose among two or more benefits consisting of cash and tax-qualified benefits. For example, the employee could choose to receive additional cash in his paycheck each week, or he could choose to instead have the cash contributed to a Flexible Spending Arrangement ("FSA") on his behalf, or to use the cash to pay his health insurance premiums. Amounts that the employee chooses not to receive in cash and, instead, allocates to other qualified benefits, are paid on a pre-tax basis. Thus, amounts paid for accident or health insurance for an employee and his spouse and dependents are not included in the employee's income and are not subject to tax. Before the *Windsor* decision, an employee who had a same-sex spouse could still choose to have his own health insurance premiums paid under a cafeteria plan on a pre-tax basis; however, if the employer offered the same benefit for his same-sex spouse, it was provided only on an after-tax basis (i.e., the employee paid tax on the money and then used it to pay the same-sex spouse's premiums). The Notice makes it clear that, after *Windsor*, a same-sex spouse is treated the same as a heterosexual spouse under employee benefit plans, and the benefits for such spouse are not included in the employee's income. Further, in the event an employee enters into a valid same-sex marriage in the middle of the benefit plan year, such marriage is treated as a status change that would allow the employee to change his plan elections outside the open enrollment period.

Other changes that will affect administration of employee records for employers include a potential change in exemptions claimed for tax withholding purposes. It may be necessary to obtain a revised W-4 Form for employees who could not previously claim a same-sex spouse as a withholding exemption but who now wish to do so. Additionally, employees may need to revisit beneficiary designations on retirement plans. Many tax-qualified plans require that the participant's spouse be the primary beneficiary unless the spouse consents to having another person named as beneficiary. Under the Ruling, that requirement would extend to same-sex spouses who may or may not already be named in employees' beneficiary designations. Also, same-sex spouses will now have the same right to continue COBRA health insurance following termination of an employee's employment, as a spouse of the opposite sex would have. Employers should review and, if necessary, update their plan documents, payroll systems, and administrative procedures to comply with the *Windsor* ruling and subsequent guidance from the IRS, Department of Labor, and other agencies.

EMPLOYEE BENEFITS: AFFORDABLE CARE ACT UPDATE

EMPLOYEE BENEFITS

AFFORDABLE CARE ACT UPDATE-DELAY IN EMPLOYER MANDATE, EXCISE TAXES EFFECTIVE IN 2014 AND OTHER ISSUES FACING EMPLOYERS.

By: Al Holifield
Holifield & Associates, PLLC

Employer Mandate Delayed for Certain Small Employers:

The Internal Revenue Service issued final regulations under the Patient Protection and Affordable Care Act ("ACA") on February 12, 2014that, among other things, provides new transition relief that in effect delays the employer mandate for certain employers until 2016. The transition relief is contained in the Preamble to the regulations and is effective for the 2015 plan year, including non-calendar year plans beginning in 2015 and ending in 2016. This transition relief is only available to employers who meet the following conditions:

1. The employer employs on average at least 50 full-time employees (including full-time equivalents) but fewer than 100 full-time employees (including full-time equivalents) on business days during 2014.

2. Beginning February 9, 2014 and ending December 31, 2014, the employer does not reduce the size of its workforce or the overall hours of service of its employees as a way to meet condition number 1 above, unless there is a bona fide business reason for doing so. Examples of a "bona fide business reason" include reduction in workforce or hours as a result of a sale of a division, changes in economic marketplace, and terminations of employment for poor work performance.

3. During the "coverage maintenance period" (beginning February 9, 2014 and ending December 31, 2015 for calendar year plans or, for non-calendar year plans, the last day of the 2015 plan year), the employer does not eliminate or materially reduce the health coverage, if any, it offered as of February 9, 2014. To meet this requirement, an employer will be treated as maintaining such health coverage if it:

   a. continues to offer each eligible employee an employer contribution toward the cost of employee-only coverage that is either (i) at least 95% of the contribution it was offering on February 9, 2014 or (ii) is the same or a higher percentage of the cost of coverage it offered to contribute toward on February 9, 2014;

   b. in the event there is a change in benefits under the employee-only coverage, the coverage provides minimum value after the change; and

   c. the employer does not alter the terms of its group health plan(s) to narrow or reduce the class or classes of employees (or dependents) to whom coverage was offered on February 9, 2014.

4. The employer certifies that it meets the eligibility requirements of paragraphs (1) through (3) above on a prescribed form. (The IRS anticipates that this certification will can be provided as part of the reporting requirements under Section 6056).

Additionally, beginning February 9, 2014 employers are prohibited from changing the plan year of their health plan in an effort to extend the transitional relief (i.e., changing the plan year start date from January 1 to December 1).

The IRS also provided for transition relief for new employers first coming into existence in 2015 that would otherwise fall within the definition of an "applicable large employer". To be eligible for the transitional relief the employer must: (a) reasonably expect to employ and actually employ fewer than 100 full-time employees (including full-time equivalents) during 2015, (b) reasonably expect to meet and actually meet the conditions set out in paragraphs (2) and (3) above, measured from the date the employer is first in existence, and (c) make the certification described in paragraph (4) above.

<u>Excise Taxes That Could Affect Your Plan Today:</u>

As many employers are aware, the employer mandate under the ACA has received a lot of publicity. However, another ACA penalty is currently in effect which has, for the most part, gone unnoticed. Employers whose health plans do not meet the coverage mandates and prohibitions of the ACA face an excise tax of $100 per day per "individual to whom the failure relates." In other words, if an employer's plan fails to meet the ACA requirements for an entire year, the price tag is $36,500.00 per affected individual.

The excise tax is imposed under the Internal Revenue Code § 4980D. It applies to all employers regardless of its size and is in effect beginning January 1, 2014. This tax is not affected by the recent delay in the employer mandate for small employers. The excise tax can be imposed if your health plan violates any of the following ACA provisions:

- No pre-existing condition exclusions or other discrimination based on health status;
- Cost sharing (or "out of pocket") limits;
- Maximum waiting period of 90 calendar days;
- No annual or lifetime limits on essential health benefits;
- Must cover 100% of the cost (i.e., no deductibles or co-payments are permitted) of any "preventive services" (including any FDA approved contraceptive device) if the plan is not "grandfathered";
- Must offer dependent coverage to all children up to age 26;
- Must provide a Summary of Benefits and Coverage; and
- Must have adequate claims appeal and external review processes.

Unfortunately, the IRS has not provided guidance on how it will define an "affected individual." At least one court has calculated the excise tax based on the number of individuals insured under the group health plan. In the much publicized Hobby Lobby case, the Tenth Circuit Court of Appeals, as part of its decision, calculated the excise tax at $1.3 million per day (equivalent to $475 million per year) based on enrollment of 13,000 individuals (employees and dependents) in the Hobby Lobby health plan. The Tenth Circuit found the excise tax applied because Hobby Lobby failed to offer 4 of the 20 forms of contraception required under the ACA. This failure, the Tenth Circuit reasoned, triggered the excise tax under Code § 4980D.

The excise tax under Code § 4890D can be avoided if an employer can show that the failure was due to "reasonable case" and not the product of "willful neglect". Under these circumstances, if the failure is corrected within 30 days after the employer knew (or in the exercise of reasonable diligence should have known) of the failure, no excise tax is due. If, however, the failure is not corrected within 30 days, the excise tax is capped at the lesser of (i) $500,000 or (ii) 10% of the amount paid or incurred by the employer for the group health plan.

Given the potential for enormous penalties, we encourage all employers to review their plans to ensure they meet the mandates of the ACA.

<u>Things to keep an eye on:</u>

On February 7, 2014, at the American Bar Association, Labor and Employment Section, Employee Benefit Committee Mid-Winter Meeting, Phyllis Borzi, head of the Department of Labor's Employee Benefits Security Administration, described her agency's new "Prohibited Persons Project." This new pilot program will track "individuals in the service provider community" who have a history of misconduct. The goal of the project is to prevent small and medium sized businesses from hiring individuals who have already been shown to be in violation of the law. Although the project is still in the pilot phase, it is anticipated that it will expand to a nationwide project. Once established, it will provide employers with additional information to be considered in hiring service providers for their plans. Ms. Borzi also touted that the EBSA's 2013 enforcement numbers. In 2013 the agency collected $1.7 billion in civil enforcements and closed 320 criminal investigations which resulted in 88 indictments. The DOL has been aggressively auditing employee benefit plans. For instance, our firm was recently involved in a DOL audit where the DOL rejected the accounting firm's audit of a plan. The basis for the rejection was that the audit submitted with the plan's Form 5500 annual report did not meet the necessary standard of care. Given the current increase in DOL enforcement and the ever-changing regulatory environment, the potential for mistakes is present. Some of these mistakes can be avoided through periodic review of plan documents and administration. In some cases, vigilance by the employer can reduce or even negate the imposition of fines or penalties. If your plan has any concerns, we strongly suggest that you perform a self-audit to ensure compliance with all ERISA statutory and regulatory requirements.

INTELLECTUAL PROPERTY: AN OVERVIEW OF PATENT REFORM

INTELLECTUAL PROPERTY

AN OVERVIEW OF PROPOSED PATENT REFORM.

By: Ian G. McFarland,
Merchant & Gould, P.C.

A number of patent reform bills have recently been introduced in Congress, all with the express or implied goal of restraining the costs associated with patent litigation involving non-practicing entities ("NPEs"), sometimes referred to as "patent trolls." Some of the more noteworthy proposals are Representative Goodlatte's (R-VA) "Innovation Act" (H.R. 3309), Senator Hatch's (R-UT) "Patent Litigation Integrity Act" (S. 1612), and Senator Leahy's (D-VT) "Patent Transparency and Improvements Act" (S. 1720). If passed, these proposals would profoundly impact the prosecution and defense of patent infringement law suits. Among many others, the following significant provisions are at issue:

Heightened Pleading Requirements for Patent Infringement Actions: Parties asserting claims of patent infringement would have to identify in their initial pleadings each patent claim asserted to be infringed, along with an identification of each instrumentality accused of infringement and a specific description of how each accused instrumentality corresponds to the asserted patent claims. This provision would substantially elevate the requirements for pleading claims of patent infringement, which are currently governed by the basic notice pleading rules.

Presumption of Fees Awarded to Prevailing Party: The Innovation Act would switch the presumption directed to awarding fees and expenses to provide that, unless the court determines that the non-prevailing party's position was "substantially justified," the prevailing party in any action involving claims of patent infringement would be entitled to its reasonable attorney fees. Currently, fees and expenses are only awarded to a prevailing party when a court determines that the case is "exceptional." Adopting an English rule presumption in patent infringement actions would completely reverse the burdens associated with awarding attorney fees.

Limiting Discovery: The proposals also seek to limit discovery in a patent case solely to issues of claim interpretation until the court renders an order on the meaning of any disputed claim terms. Accordingly, the asserting party could not inundate its adversary with onerous discovery requests immediately after filing a complaint. Congress has apparently recognized that the vast majority of patent disputes turn on the construction of the claims and that a significant source of litigation expenses come from the discovery process. Prioritizing claim construction ahead of full-blown discovery would enable the parties to better evaluate the merits of the case prior to incurring the major costs associated with discovery and would also translate into significant cost savings for defendants who receive a favorable claim construction ruling.

Understandably, many industry groups are championing these proposals as a way to curtail out of control patent litigation. Those groups insist that the recent uptick in lawsuits filed by NPEs is harming product innovation and development in the United States. Supporters also argue that it best serves the interests of small businesses and start-ups, who are frequent targets of such suits.

By the same token, however, the proposals would apply equally to practicing and non-practicing entities. All parties – large and small – would be subject to the heightened pleading standard and the loser-pays presumption. How would this impact a start-up's ability to assert its own patents against infringers? Critics of the bill stress that regardless of any stated intentions, the provisions go too far and will have too many unintended consequences. Indeed, the Chief Judge of the Court of Appeals for the Federal Circuit has stated that legislative action in this area is unnecessary, and any reform can be effectuated through judicial discretion and oversight.

For instance, patents covering methods of manufacture are frequently infringed only within the friendly confines of the infringer's manufacturing facility. Verifying that the suspected infringer engages in each step of the patented method is often very difficult without discovery, which can only proceed after a complaint is filed. Thus, the heightened pleading standards could make the enforcement of method patents rather challenging. Moreover, due to the indiscriminate nature of the loser-pays provision, accused infringers could experience a similar leverage imbalance under these proposals depending on how the courts defined a substantially justified defense position. Under the current framework, accused infringers virtually always plead non-infringement and patent invalidity in defense to infringement claims, but that could change if doing so may result in the imposition of attorney fees.

The State of Tennessee is also considering legislation regarding accusations of patent infringement made against Tennessee residents. Proposed H.B. 2117 seeks to amend TCA Title 29 to create a cause of action against any person who makes a bad faith assertion of patent infringement. Under the bill, if a "target" of patent infringement allegations established by a reasonable likelihood that the assertion was made in bad faith, then the court would require the asserting entity to post a bond in an amount equal to an estimate of the target's costs to litigate the action plus potential damages provided by the bill. The legislation would also authorize the attorney general to conduct civil investigations and bring civil actions in enforcing the bill. As currently drafted, a "bad faith" assertion of patent infringement would be determined by several factors, including whether the assertion included the patent number, contact information for the patent owner(s) or assignee(s), and specific facts supporting how the target's instrumentalities are covered by the claims in the patent. To date, Oregon and Vermont are the only states to have passed similar legislation.

EMPLOYEE VERIFICATION: REMEMBER TO USE THE MOST CURRENT FORM I-9

EMPLOYEE VERIFICATION

REMEMBER TO USE THE MOST CURRENT FORM I-9.

By: **Kate Tucker**
Kramer Rayson LLP

One of the common mistakes employers make when completing the I-9 Employment Eligibility Verification Form is using an expired version; this is because there have been numerous version over the years. The most recent version of the form is the one dated March 08, 2013 (noting Rev. 03/08/13 N at the bottom of the form). No previous versions of the form are acceptable for use since May 7, 2013. Employers should use the newly revised Form I-9 to verify the identity and work authorization for all new hires and re-verifications. Do not complete a new Form I-9 for current employees if a properly completed Form I-9 is already on file (unless verifying expired employment authorization).

While you may have been using the new version of the form since May 7, 2013 as required, this article will set forth a summary of the revisions to Form I-9 to ensure you are also completing the new form correctly. These revisions include requests for additional information; a new layout, expanding the form from one to two pages; and revised instructions to assist in proper completion.

Section One (to be completed by the employee)

Section One of the Form I-9 must still be completed on or before the employee's first day of work, but not prior to him/her accepting the position. Employers continue to be responsible for ensuring that Section One is completed properly by the employee.

Employees must now provide any other name he/she has used (which would include maiden name, but based on the instructions appears not to include nicknames). Individuals from foreign countries often have multiple names, which tend to get entered into Department of Homeland Security (DHS) and/or Social Security Administration (SSA) records in different ways during the immigration process. Listing all names used on the Form I-9 may avoid tentative non-confirmations caused by the name not being exactly as listed in DHS/SSA records. Employees are now asked to provide a telephone number and e-mail address; however, according to the instructions this information is optional.

For lawful permanent residents, the Form I-9 requests the Alien Registration Number (A#) / USCIS Number. According to the instructions, these are currently the same number; use of the word "currently" suggests that the DHS may intend in the future to create a "USCIS Number" or use this term in place of the A#.

For foreign nationals authorized to work in the U.S. for only a specified period of time, additional information may be necessary. As previously required, the employee must provide the date his/her employment expires, as well has his/her A# / USCIS Number or I-94 Admission Number. If the individual's admission number was obtained via entering the U.S. (i.e. stamped in a passport by a CBP officer at airport immigration), the employee must provide his/her foreign passport number and country of issuance. If the admission number was obtained inside the U.S. (i.e. on an I-797 Approval Notice), the employee need simply write "N/A" in these two blanks.

Section Two (to be completed by the employer)

The new Form I-9 now specifically states that Section Two must be completed within three business days of the employee's first day of employment. It also clarifies that the first day of employment does not count (i.e. for an employee who begins work on a Monday, Section Two of the Form I-9 must be completed no later than Thursday).

The employer must now write in the employee's name at the top of the section. As previously required, the employer must fill in the employee's first date of employment. But the form also notes exemptions. This note is directed at temporary staffing agencies who may enter the first day the employee was placed in a job pool (as opposed to waiting for actual placement), and to recruiters and referrers for a fee who do not enter the employee's first date of employment.

Section Three (to be used for re-verification or rehire)

As was previously the case, if an employee is rehired within three years of his/her initial hire date, and an I-9 was properly completed, the employer may complete Section Three of a new Form I-9 (as opposed to completing an entire new Form I-9). The employer may not use Section Three of the original Form I-9 unless it is this new version.

As also is true under existing rules, when re-verifying work authorization, an employee's new work authorization must be re-verified before the previous work authorization expires. Work authorization expiration is contained in either the List A or List C document. However, a Lawful Permanent Resident Card ("Green Card"), which is a List A document with an expiration date, need not (and indeed should not) be re-verified. List B documents (i.e. driver's license) need not be re-verified.

If the employee's name has changed, it should be entered in Section Three of the new Form I-9 as indicated.

A Spanish version of Form I-9 is available for use in Puerto Rico only. Spanish-speaking employers and employees in the 50 states, Washington, D.C., and other U.S. territories may use the Spanish version for reference, but must complete the English version of Form I-9.

The revised Form I-9 can be downloaded at www.uscis.gov/i-9. You can find additional information on the USCIS's I-9 Central web page at www.uscis.gov/I-9Central or in the Handbook for Employers, also located at www.uscis.gov/i-9. The Handbook contains examples of most any document an employee may produce for I-9 verification purposes.

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

Phone:
(865) 522-6522

Fax:
(865) 523-5662

E-mail Addresses:
dheadrick@lasurveying.com
mkilby@deroyal.com
pwehmeier@adhknox.com
mwilson@knoxbar.org
http://www.knoxbar.org

Section Leadership

Section Co-Chair
David Headrick
LandAir Surveying Company, Inc.
118 N. Peters Road, #202
Knoxville, TN 37923
865.599.0148
dheadrick@lasurveying.com

Editor, The Consigliere
Paul E. Wehmeier
Arnett, Draper & Hagood, LLP
P. O. Box 300
Knoxville, TN 37901-0300
865.546.7000
pwehmeier@adhknox.com

CLE Chair
Peter L. Brewer
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
265 Brookview Centre Way
Suite 600
Knoxville, Tennessee 37919
Direct: 865.971.5102
pbrewer@bakerdonelson.com

Section Co-Chair
Marcia A. Kilby
Director of Legal Services
DeRoyal Industries, Inc.
200 DeBusk Lane
Powell, TN 37849
Direct: 865.362.1391
mkilby@deroyal.com

Membership Chair

Brittany Brent Smith
Kennerly, Montgomery & Finley, P.C.
550 Main Street, Suite 400
Knoxville, Tennessee 37902
865.546.7311
bbrent@kmfpc.com