

Hearsay

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If you have any questions about the newsletter or would like to submit an article for a future issue, please contact one of the editors.

MSBA



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Greetings from the Chair

Get ready to have fun with your colleagues *and* put a big smile on hundreds of young faces! I am excited to announce that the MSBA New Lawyers Section (NLS) has again teamed up with the HCBA-NLS to host the **3rd Annual Toys for Tots Happy Hour** on Thursday December 6th in downtown Minneapolis. Look for details on the NLS website. We expect another huge turnout. The NLS will give the donated toys and cash to the Toys For Tots organization on the KARE 11 news broadcast the following day. I look forward to your participation.

The Toys For Tots Happy Hour is just one way that the NLS is bringing lawyers together to help the community and to elevate the standing of lawyers in the eyes of the public. We all decided to become lawyers to promote worthy causes or ideas. Some were even “called” to the profession. No matter where your legal career has taken you since the day you decided to become a lawyer, I urge you not to forget the causes and ideas that first led you to law school. The NLS is often referred to as the public service arm of the MSBA -- and rightly so. When massive flooding destroyed hundreds of homes in southern Minnesota this year, NLS members rose to the occasion by providing free legal advice and guidance to those in need. The devastated residents had lost much, but were genuinely happy that someone (in addition to FEMA) was on their side. I applaud those of you that took (and continue to take) time from your schedule to help those in need because you are, at the same time, improving the standing of lawyers in the eyes of the public.

The NLS welcomes your input and ideas. Please get involved. We are especially interested in lawyers that want to encourage children of diverse backgrounds to “Choose Law” as a profession and/or that want to assist in drafting simple wills for firefighters, EMTs, and police as a part of the MSBA “Wills for Heroes” program. I look forward to seeing you at the Toys For Tots Happy Hour and at the upcoming NLS Council meetings.

UPCOMING EVENTS:

- * Fall Happy Hour/Toys for Tots Fundraiser: Dec. 6th
Downtown, Minneapolis (see web site for details)
- * NLS Council Meeting: Dec. 20th, 5:30 MSBA Offices
- * NLS Council Meeting: Jan 17th, 5:30 MSBA Offices
- * Free Financial Planning for Lawyers Presentation:
Jan 17th, 5:45 MSBA Offices



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Beware New Minnesota Employment Law Practitioners:

When assisting a client with an employment law question in neighboring Wisconsin, do not assume that the states' similarities extend to employment policy.

By: Nicole J. Druckrey

After practicing employment law in Minneapolis for several years, I recently relocated to Milwaukee. While in Minneapolis, I occasionally assisted clients with employment law issues they faced in Wisconsin. I found Wisconsin law to be fairly similar to that of Minnesota (at least in the areas I was confronted with). As I have settled into my Wisconsin practice, however, I have discovered that there are some significant differences. So for those of you assisting a client with an employment law issue in Wisconsin, make note of the following:

It is difficult for an employer to enforce a non-compete in Wisconsin.

Wisconsin will not blue-pencil a non-compete agreement. When drafting a non-compete agreement for a Wisconsin employer, you must ensure that the restriction is no more than is "reasonably necessary for the protection of the employer[.]" Wis. Stat. § 103.465. Failure to do so will render the entire agreement void and unenforceable. *See id.* You should push the employer with which you work to articulate the interest it is trying to protect and give serious thought as to the extent of the restriction necessary. Some key cases to consider when dealing with a non-compete agreement in Wisconsin include *Sysco Food Services of Eastern Wisconsin, LLC v. Ziccarelli*, 445 F. Supp. 2d 1039 (E.D. Wis. 2006) and *Heyde Companies, Inc. v. Dove Healthcare, LLC*, 654 N.W.2d 830 (Wis. 2002).

Charges of discrimination are handled at the administrative level.

The Equal Rights Division of the Wisconsin Department of Workforce Development not only investigates *but hears* claims of violations of Wisconsin's Fair Employment Act ("WFEA"), which prohibits discrimination on the basis of age, race, disability (discussed further below), marital status, sex, sexual orientation, national origin, arrest and conviction record (discussed further below), and military service (among other categories). *See* Wis. Stat. §§ 111.321, 111.36. Even if you receive a finding of no probable cause, you could find yourself conducting a trial in front of an administrative law judge since claimants have an automatic right to a hearing if they choose to appeal the finding.

Consideration of an applicant's arrest or conviction record is limited.

An employer in Wisconsin cannot discriminate against an applicant or employee because of a conviction unless the circumstances of the crime "substantially relate" to the circumstances of the particular job. Wis. Stat. § 111.335. Similarly, an employer cannot refuse to hire an applicant or suspend an employee because of an *arrest* unless the charge is pending and the circumstances of the charge "substantially relate" to the circumstances of the particular job. Wis. Stat. § 111.335. Thus, if an employer

discovers that an employee or applicant has an arrest or conviction record, be sure to inquire as to the status of the arrest and whether the charge or conviction relates to the position held or sought by the individual.

Wisconsin affords broader protection to persons with disabilities.

As noted above, the WFEA prohibits discrimination on the basis of disability. While the Americans with Disabilities Act ("ADA") defines "disability" as a physical or mental impairment that substantially limits one or more major life activities, *see* 42 U.S.C.A. § 12102, WFEA defines disability as "a physical or mental impairment which *makes achievement unusually difficult or limits the capacity to work.*" Wis. Stat. § 111.32 (emphasis added). Thus, in Wisconsin, an employee is considered disabled if they cannot perform their own job; in other words, they do not have to show an inability to perform a broad range of jobs as would be required under the ADA. Wisconsin also offers a broad range of accommodations to employees. For example, in *Crystal Lake Cheese Factory v. Labor & Industry Review*, the Wisconsin Supreme Court held that modification of the complainant's *essential* job duties constituted a reasonable accommodation. 664 N.W.2d 651 (Wis. 2003). Thus, disabled applicants and employees in Wisconsin receive broad protection.

Wisconsin's Family & Medical Leave Act is more liberal than its federal counterpart.

Unlike the federal Family Medical Leave Act, which requires an employee to have worked 1,250 hours in the year preceding any request for leave, Wisconsin law requires that an employee work just 1,000

hours during the year prior. Wis. Stat. § 103.10(2)(c). Moreover, a Wisconsin employee does not need an absence of three or more days before they are considered to have a serious health condition. Finally, while a Wisconsin employee can substitute any accrued paid time off to cover their medical leave, Wisconsin law prohibits an employer from *requiring* an employee to do so. *See* Wis. Admin. Code § DWD 225.03(3); *Milwaukee Transp. Servs., Inc. v. DWD*, 624 N.W.2d 895 (Wis. App. 2001). The employee can even use sick leave to cover absences that would not ordinarily qualify for sick leave (such as leave for the adoption of a child).

Obviously this list is not intended to be exhaustive of the differences between Minnesota and Wisconsin employment law. Rather, it is intended to be a warning: when assisting a client with an employment law issue in Wisconsin, do not assume that Wisconsin and Minnesota law are similar.

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Goals Are the Key to Success

By: *Bill Gschwind*

You finished the last exam in law school. Graduation was a relief. After sweating the bar exam, you actually passed – the first time! You’ve always been an achiever so you headed out into the world with a fresh law degree and a bright, exciting expectation of life as a lawyer.

It’s a couple of years later. You wake up and drag yourself into the bathroom. You look in the mirror and wonder who is staring back at you. The fast-track you expected for your career isn’t working out. You’re working 14 hour days, 6 days a week. Your spouse complains that he never sees you. You’re tired and irritable all the time. Sure, you still love the law and most of the time you can handle the practice. But what happened to your career ambitions? Why isn’t your practice resulting in the rewards you expected? You feel like you’ve lost control of your life and don’t know where you’re headed.

In the last issue, we began the discussion of how to achieve success, however you define it. The first step is to develop a compelling, motivating vision. Do you have a written vision of your future? Whether your destination is personal or professional, create a clear, concise statement of where you’ll be 3 to 5 years from now. Successful people have a clear vision of where they want to be, and they make life give it to them.

The next step successful people take is to set goals. Why are written goals important? Goals give us meaning and

purpose. They focus our efforts and give us a yardstick against which to measure our progress. A vacation, a visit to friends, or a business trip each carry with them a purpose. You plan your date of departure, what to wear, an itinerary, and the cost. As the departure date approaches your enthusiasm grows and you are drawn to the goal. Goal setting is absolutely necessary for a successful trip.

The other trip – your continuous journey through time – is often less well planned and less well organized by comparison. Yet for you, it is the most important journey of all – you will only make it once. Ask yourself: what are you doing now? Is this where you *planned* to be? Are you achieving *your* goals, or are they goals established for you by others? The majority of people spend fifty weeks of the year planning a two-week vacation but they fail to devote any time in planning the remaining fifty weeks.

Criteria for Personal Goal Setting

As you build your Action Plan based on your vision and your goals, remember that the process is the same regardless of whether your destination is the clear blue waters and warm breezes of the Caribbean or a \$1 million law practice.

Step One: Make Sure That the Goals Are Your Own

You are most apt to achieve goals that you have set for yourself and which fulfill

personal needs. In our fast-paced world, other people constantly vie for your time, energy and talent. They will tell you what *they* think you ought to be doing. Are you pursuing the career goals you had when you graduated? With everything you've learned since entering practice, are your goals still motivating? Make your goals your own; you will be more motivated to reach goals that are yours.

Step Two: State Your Goals Positively and Specifically

It's difficult to achieve a goal to "quit being an absentee spouse/parent." How do you visualize yourself *not* neglecting your family? It's impossible to convert a negative into measurable action steps. But when you state the goal positively and specifically – "I will spend a minimum of twenty hours a week of quality time with my family" – these limitations go away. To be motivated by your goal, you must be able to see a mental picture of yourself *doing* what it is you want to do. Goals need to be specific and positive.

Step Three: Your Goals Must Be Realistic, Attainable, and Measurable

Don't confuse "realistic" with "mediocre." Realistic goals are goals that you are willing to work toward because you honestly believe you can achieve them. Your vision of a \$1 million practice in the first year might be unrealistic – and demotivating – for a new solo practice. This doesn't mean forgetting about the million-dollar target. If the goal is still worthwhile, reset the target date. Break the goal into a series of smaller, shorter-term targets on the way to the million dollar goal so you can celebrate successes along the way to your ultimate destination.

Step Four: Incorporate Personality Changes Into Your Goals

A law practice provides a good backdrop to illustrate the need for personality change. As you gain experience, you take a greater degree of responsibility for your own work. You may specialize or take on more complex cases. You may take supervisory responsibility for clerical staff or associates. Supervisory responsibilities force you to become more "people-oriented" and less "task-oriented." To develop the skills necessary for professional growth, it may be necessary to obtain additional education. In order to "have" the title on the door, one must "become" the person that the position demands.

Different Types of Goals

Many of us have set goals and not achieved them. Done too often, failure to reach goals becomes demotivating. Care must be taken to create goals that are achievable, and different types of goals will provide different degrees of motivation. A hazy long-term goal won't excite you to take action as quickly as a clear, short-term goal. Tangible goals, like a new house or a boat, are more motivating than intangible goals, like "building self-confidence" or "becoming a better litigator." The success of your goals program will rest heavily on how well you master the use of each type of goal.

Short-term goals are the building blocks of success. Whether you are a novice or a master at goal setting, you must realize that every great journey begins with one small step. You can't begin an exercise program by running a marathon. Each progressive step in your goals program builds your self-confidence. Don't let the "short" in short-

term fool you. It only refers to time – not to the importance of the accomplishment.

Long-term goals are more difficult to see. Like walking into a dark room, seeing clearly into the distant future requires that you keep your eyes open long enough to accurately focus on what is ahead. If you have some long-term goals, list them in your Action Plan. Then break the long-term goals down into a series of short-term goals and action steps which, when accomplished one by one, will enable you to hit your long-term goal. Mountain climbers don't look to the summit at the beginning of the climb. They plan their assault in a series of steps.

Nothing in the goal setting process needs more clarification than the distinction between tangible and intangible goals. Both are vital to the development of leadership ability and personal achievement.

Tangible *wants* include everything you've ever thought about having. Some of these may seem unrealistic now, but don't worry about it; write them down and look at them often. If they have any meaning for you, you will unconsciously move toward acquiring them. Tangible *needs* refer to anything that will help you reach another step toward a goal or will assist in the development of new attitudes and habits. For example, if you've struggled with legal writing throughout your career, you know that in order to achieve the judgeship you desire you must improve your use of vocabulary and spelling. You might need to take a course on technical writing before you will be able to get that position.

Intangible goals may be essential to your personal and professional growth, but they are difficult to state and measure. If your intangible goal is "to become a more effective courtroom litigator," you may need to enroll in an acting class, a tangible goal, in order to achieve the intangible one.

Setting and achieving goals motivated by a compelling vision *is* the Midas touch. Done properly, anyone can achieve their greatest dreams.

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Time Limitations for Construction Defect Claims

By: Jennifer G. Lurken

New lawyers are frequently asked to research statute of limitations issues, but are less likely to research statutes of repose. While statutes of limitation bar the right to bring an action unless it is filed within a specified period after injury occurs, a statute of repose terminates any right of action after a specific period of time has elapsed, regardless of whether there has as yet been an injury.¹ Statutes of repose eliminate stale claims, grant repose to liability that otherwise would linger on indefinitely, and permit the judicial system to husband its limited resources.² To accomplish these policies, there must be a definite time period after which claims are barred.³ Construction defect claims are subjected to both statutes of limitation and of repose, as they pertain to improvements to real property under Minnesota Statutes section 541.051.⁴ As a result of recent case law and modifications to section 541.051, however, actions for contribution and indemnity based on underlying construction defect claims are no longer subject to the statute of repose.

Statute of Limitations

Minnesota Statutes section 541.051, subdivision 1(a) states that no action in contract, tort, or otherwise to recover damages for any injury to property, real or personal, arising out of the defective and unsafe condition of an improvement to real property shall be brought more than two years after discovery of the injury. Minnesota courts have held that under this provision, the statute of limitations begins

to run when an actionable injury is discovered or, with due diligence, should have been discovered.⁵

Pursuant to the 1988 amendment of section 541.051, the focus of when the two years begins is on the discovery of the injury, not its cause.⁶ Thus the statute of limitations begins to run when the *injury* is discovered or should have been discovered, not when the discovery of the *cause* of the injury is made.⁷

Furthermore, the two-year statute of limitations begins to run when the injury is first discovered, even though the full extent of the injury may not be known at that time.⁸ Thus, if an injury is continuous and becomes more serious without appearing to be corrected, the limitations period begins to run upon the initial discovery.⁹ Minnesota courts have held various claims time-barred under this statute when a party discovered an injury more than two years before bringing suit and then continuously experienced the injury.¹⁰ In *Hyland Hill*, the appellant noticed sporadic water leaks in the roof of its building, and hired a specialist to investigate.¹¹ The specialist initially told the appellant that its roof needed repairing, but then after more leakage, determined that the damage was more extensive and required replacement of the entire roof.¹² The Supreme Court upheld the district court's determination that the statute of limitations began to run when the appellant was first aware of the roof leaks, not when appellant was told replacement was necessary.¹³

The Minnesota Court of Appeals recently addressed the issue of when a homeowner should have known an injury had occurred. In *Hoffman v. Van Hook*, the court determined that even though the time of the homeowner's earliest discovery of the injury may be disputed, it cannot be reasonably disputed that the homeowner had discovered the injury at the latest by November 2000.¹⁴ This is based on the facts that in the fall of 1998 the homeowner first noticed cracking in the stucco, in the fall of 1999 the homeowner noticed severe cracking and in November 2000 the homeowner was informed by Minnesota Lath that the cause of the cracking was the "result of a structural issue not connected to the stucco installation."¹⁵ Therefore, the court dismissed the homeowner's non-warranty claims pursuant to the statute of limitations.¹⁶

Statute of Repose

Recent legislation in response to the supreme court's decision in *Weston v. McWilliams & Associates* has changed the law with respect to the statutes of repose for contribution and indemnity actions.¹⁷ Actions for damages arising out of the defective and unsafe condition of an improvement to real property are also subject to the ten-year statute of repose contained in section 541.051, subd. 1(a).¹⁸ If an injury resulting from an improvement to real property is not discovered within ten years after substantial completion of the improvement, then no cause of action shall accrue.

The *Weston* court addressed "the proper application of the statute of repose to contribution and indemnity claims by a general contractor against subcontractors or material suppliers arising out of an

improvement to real property."¹⁹ In *Weston*, a general contractor was sued in May 2003 for damages when a home it completed in July 1993 developed water-intrusion and mold problems.²⁰ In March 2004, the general contractor brought a contribution and indemnity claim against subcontractors and a supplier who had contributed to the construction of the home.²¹ The court explained that the repose period in section 541.051, subd. 1(a), applied to contribution and indemnity claims, and also to underlying injury claim of the homeowner.²²

The court further explained that a statute of repose terminates the possibility of liability after a defined period of time, regardless of the potential plaintiff's lack of knowledge of his or her cause of action, making the potential defendant immune from liability.²³ The court held that "the repose provision of section 541.051, subd. 1(a), bars a contribution and indemnity claim that has not accrued . . . and has not been brought within the 10 years from the completion of the construction."²⁴ Because the *Weston* home was completed in July 1993, and the general contractor did not bring a claim for contribution or indemnity until March 2004, the general contractor's right of action was terminated by the ten-year statute of repose.

The *Weston* case had enormous implications for general contractors and subcontractors in construction defect cases where the plaintiff does not discover the damage until nine or ten years after substantial completion of the improvement. At that time, the statute allowed the homeowner additional time, beyond the ten years, if the injury was not discovered until the ninth or tenth years. Indeed, numerous responses to motions for summary

judgment filed after the *Weston* decision have brought up the question of the constitutionality of this law, even though the *Weston* decision addressed that very issue and expressly held otherwise.²⁵ Regardless of the *Weston* decision on constitutionality, some Minnesota district courts have held the statute unconstitutional.

In response to these issues, the Minnesota legislature passed legislation on May 21, 2007, which modified section 541.051. Specifically, the new law states that “an action for contribution and indemnity arising out of the defective and unsafe condition of an improvement to real property may be brought no later than two years after the cause of action for contribution or indemnity has accrued, regardless of whether it accrued before or after the ten-year period referenced in paragraph (a).”²⁶ Interestingly, the effective date of this new legislation is June 30, 2006, the day after the *Weston* court gave its decision.

Conclusion

The law regarding statutes of repose for contribution and indemnity claims arising out of the defective and unsafe condition of an improvement to real property appears to be settled. New lawyers need to be aware of the issues and understand how the statutes of limitations and repose affect their clients. Additionally, new lawyers need to be aware of recent changes in the areas of law that they practice, as the law is constantly changing and developing.

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Notes

¹*Koes v. Advanced Design, Inc.*, 636 N.W.2d 352 (Minn. Ct. App. 2001), *review denied*, (Minn. Feb. 19, 2002).

²*See Johnson v. Soo Line R.R. Co.*, 463 N.W.2d 894, 896 (Minn. 1990).

³*Id.*

⁴An “improvement to real property” is defined as: “[a] permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor and money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.” *Kline v. Doughboy Recreational Mfg. Co.*, 495 N.W.2d 435, 438 (Minn. Ct. App. 1993) (holding installation of a swimming pool was an improvement to real property) (citing *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 554 (Minn. 1977)).

⁵*Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458 (Minn. Ct. App. 2006), *review denied*, (Minn. Aug. 23, 2006); *Indep. Sch. Dist. No. 775 v. Holm Bros. Plumbing & Heating, Inc.*, 660 N.W.2d 146 (Minn. Ct. App. 2003).

⁶*Pamida, Inc. v. Christenson Bldg. Corp.*, 285 F.3d 701 (8th Cir. 2001); *Dakota County v. BWBR Architects, Inc.*, 645 N.W.2d 487, 492 (Minn. Ct. App. 2002) (holding “it is knowledge of the injury, not the defect, which triggers the statute of limitations”).

⁷*Id.*

⁸*Dalton v. Dow Chem. Co.*, 280 Minn. 147, 158 N.W.2d 580 (1968) (holding the statute of limitations begins to run when some damage occurs which would entitle the victim to maintain a cause of action).

⁹*Fuhr v. D.A. Smith Builders, Inc.*, No. A04-2457, 2005 WL 3371035, * 3 (Minn. Ct. App. Dec. 13, 2005).

¹⁰See e.g., *Nolan & Nolan v. City of Eagan*, 673 N.W.2d 487, 497 (Minn. Ct. App. 2003) (affirming dismissal of claim where flooding was “frequent, regular and permanent”), *review denied*, (Minn. Mar. 16, 2004); *Hyland Hill North Condo. Ass’n. v. Hyland Hill Co.*, 549 N.W.2d 617, 619 (Minn. 1996), *overruled on other grounds by Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 677 (Minn. 2004); *Metro. Life Ins. Co. v. M.A. Mortenson Cos.*, 545 N.W.2d 394, 399 (Minn. Ct. App. 1996) (affirming summary judgment where condition was observed “more or less continually”), *review denied*, (Minn. May 21, 1996).

¹¹549 N.W.2d at 619.

¹²*Id.*

¹³*Id.* at 621.

¹⁴No. A06-1213, 2007 WL 1053816, *4 (Minn. Ct. App. Apr. 10, 2007).

¹⁵*Id.*

¹⁶*Id.*

¹⁷Minn. Stat. § 541.051 (as amended May 21, 2007).

¹⁸*Brink v. Smith Cos. Constr.*, 703 N.W.2d 871, 875 (Minn. Ct. App. 2005), *review denied*, (Minn. Dec. 21, 2005).

¹⁹*Id.* at 636.

²⁰*Id.*

²¹*Id.*

²²*Id.* at 639.

²³*Id.* at 641.

²⁴*Id.* at 640.

²⁵*Id.* at 640-44.

²⁶Minn. Stat. § 541.051, subd. b (as amended May 21, 2007).

The Social Security “No Match” Regulation

*By: Sarah Peterson Stensrud*¹

In an economy that relies on foreign labor, many employers grapple with federally mandated compliance requirements created to ensure employees are authorized to work. Since the U.S. Congress failed to pass Comprehensive Immigration Reform that would have provided avenues for our undocumented workers to legalize, federal and state agencies are filling the void by creating laws intended to stop undocumented individuals from working. Thus, despite Congress’ lack of action, we will continue to see time, energy, and money directed toward workplace enforcement efforts to end the employment of undocumented workers.

On August 14, 2007, the Department of Homeland Security (hereinafter “DHS”) published a final regulation entitled “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter” that was

scheduled to take effect September 14, 2007. This regulation increases an employer’s responsibilities upon receiving notification from the Social Security Administration (hereafter “SSA”) that an employee’s Social Security Number (hereinafter “SSN”) as listed on Form W-2 does not match SSA’s records.² Although compliance is ostensibly optional, employers who do not follow these step-by-step instructions when responding to a SSA “No Match” letter face greater exposure to civil fines and criminal charges.

Because of the perceived negative impact of this regulation, a consortium of unions and business groups led by the American Federation of Labor - Congress of Industrial Organizations (hereinafter “AFL-CIO”) challenged this regulation in federal court. On October 10, 2007, the United

States District Court for the Northern District of California granted a motion for a preliminary injunction.³ Although it is not certain when this regulation will take effect, if at all, the SSA continues to send out “No Match” letters. Thus, it is instructive to review the regulation as it provides insight on what the government deems to be adequate corrective measures an employer should use when it receives a SSA “No Match” letter.⁴

I. The I-9 Form

In 1986, Congress passed the Immigration Reform and Control Act (hereinafter “IRCA”)⁵ that, in part, addresses the rise in illegal employment in the United States. IRCA was Congress’ first attempt to create employer responsibility for ensuring that employees possess legal employment authorization. Until IRCA, the government could only penalize a foreign national for working without authorization; following IRCA, employers also became liable if they failed to follow specific steps to ensure an employee had valid employment authorization.

IRCA created a two-tiered system of employer obligations. First, IRCA created the I-9 Employment Eligibility Form that requires employers to document every new employee’s legal employment eligibility.⁶ Second, IRCA created a series of penalties for employers who *knowingly* hire or continue to employ foreign nationals who are not authorized to work in the United States.⁷ Under current IRCA provisions, an employer satisfactorily documents an employee’s employment eligibility if it in good faith verifies an employee’s employment documentation that reasonably appears on its face to be genuine.⁸ Current law does not require an employer to be a

document expert; it merely requires an employer to act in good faith when reviewing employment eligibility documents.

II. Constructive Knowledge and Knowingly Employing Unauthorized Workers

IRCA prohibits any person or entity from knowingly hiring or continuing to employ an unauthorized worker.⁹ An employer can have either actual or constructive knowledge. Constructive knowledge is knowledge “that may fairly be inferred through notice of certain facts and circumstances, which would lead a person, through the exercise of reasonable care, to know about a certain condition.”¹⁰ Current law gives the following specific examples of when an employer has constructive knowledge: 1) the employer fails to complete Form I-9 or improperly completes Form I-9; 2) the employer acts in reckless and wanton disregard for the legal consequences of employing an unauthorized person; or, 3) the employer has information available to it that indicates a worker lacks employment authorization.¹¹

The “No Match” regulation adds two critical elements to the definition of constructive knowledge. An employer has constructive knowledge if it fails to take reasonable remedial steps after receiving either of the following: 1) a “No Match” letter from the SSA; or, 2) written notice from the DHS that an employee’s documentation was assigned to another person or does not exist in its database.¹²

III. “No Match” Letters

“No Match” letters are written notices that the SSA sends out when an employee’s

name and SSN provided on the W-2 form conflict with the SSA's records. Each year, the SSA sends out thousands of these notices. The SSA will first send the notice to an employee requesting an explanation for the discrepancy. Approximately two weeks later, SSA then sends the letter to the employer. The SSA generates "No Match" letters for many reasons, including: clerical errors, name changes, and information suggesting a foreign national is not authorized to work and is using a false SSN or a SSN assigned to someone else. The current SSA policy is to only send out a "No Match" letter to employers when more than 10 "No Matches" are found, and these "No Matches" represent more than 0.5% of the W-2s submitted by the employer.¹³

IV. How Should an Employer Respond to a "No Match" Letter: Current Law and How the Regulation Will Change Current Practice

Under current law, receipt of a "No Match" letter does not constitute constructive notice that an employee may lack employment authorization. Moreover, an employer is not required to take further corrective action, although it is advisable to pursue corrective steps.

The new regulation changes current policy by stipulating that receipt of a "No Match" letter serves as constructive knowledge that an employee is unauthorized to work. If an employer does not resolve the discrepancy, it faces civil fines and criminal liability. In other words, the "No Match" regulation increases an employer's burden to take affirmative steps to confirm that an employee is legally authorized to work in the U.S.

This regulation lists a series of time-sensitive steps an employer should follow upon receipt of a "No Match" letter to achieve safe harbor from a finding of constructive knowledge.¹⁴ To gain safe harbor, an employer should take the following steps:

- Within 30 days of receiving a "No Match" letter, an employer should take reasonable action to correct the information and, if applicable, should notify the SSA of what corrective steps were taken, including:
 - Checking for typographical errors, correcting the form, and notifying the SSA; and,
 - Requesting that the employee confirm the name and SSN are correct on the I-9 and, if the information is correct, having the employee directly resolve the discrepancy with the SSA.
- If an employer is unable to fix the problem within 30 days, the employer should inform the employee that it is his/her responsibility to resolve this discrepancy with the SSA within 60 additional days.
- Within three days after the 90th day, or 93 days from receiving the "No Match" letter, the employer should re-execute an I-9 as if the employee was newly hired. The employer cannot use any document referenced in the written notice, any document that contains the disputed SSN, or any document that contains the disputed alien registration number.¹⁵ The employer must retain the new I-9 with the prior I-9.
- If the employee cannot produce new documents that have a photograph and establish employment authorization, the employer should terminate the employee or the employer is presumed

to have constructive knowledge thereby subjecting it to possible civil fines and criminal charges.¹⁶

Throughout this entire process, an employer is encouraged to document telephone conversations and retain all SSA correspondence, computer-generated printouts, emails, and Social Security Number Verification System (SSNVS) screen shots that evidence the steps taken by the employer to correct the discrepancy.

If the employer fails to follow these steps, it faces a finding of constructive knowledge that it is employing an unauthorized worker. Although the “No Match” regulation allows employers to follow other reasonable procedures, the employer carries the burden to establish why these steps are adequate in light of the new regulations. Thus, unless the employer follows the safe harbor procedures it faces a significant risk of a finding of constructive knowledge and the ensuing penalties. However, even if an employer follows these steps, it is only provided safe harbor from a finding of constructive knowledge; the government may still find that an employer had *actual knowledge* that it was employing an unauthorized worker.

V. Hiring Practices

Since the passage of IRCA, employers have faced difficulty balancing the competing responsibilities of ensuring they are employing an authorized workforce while not engaging in discriminatory employment practices. It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual in the hiring process because of national origin or citizenship status.¹⁷ Even

if the new regulation goes into effect, the mere receipt of a “No Match” letter does not give an employer the legal right to fire an employee listed on the letter. In fact, the “No Match” letter clearly states that the letter, by itself, makes no statement or judgment about an employee’s immigration status.¹⁸ Thus, an employer must consistently and rigorously abide by the steps outlined in the “No Match” regulation, or follow its alternative written policy before making a determination to fire an employee listed on a “No Match” letter. If, during the course of completing these steps, an employer gains *actual knowledge* that an employee is not authorized to work, it should immediately terminate this employee. Similarly, if an employer reaches the 93rd day and is unable to re-verify an employee’s employment authorization, it should terminate employment. If, however, by the 93rd day an employer is able to either fix the error or re-verify that an employee is authorized to work, it should continue to employ the employee knowing that it is protected against a future finding of constructive knowledge of employing an unauthorized worker for this particular “No Match” letter.

VI. Civil and Criminal Penalties for I-9 Violations

An employer found to have engaged in a pattern and practice of unlawful hiring of unauthorized workers faces civil fines ranging from \$110 to \$1,100 for each paperwork violation and \$275 to \$11,000 for each hiring violation.¹⁹ In assessing civil penalties, the government considers five statutory factors: 1) the size of the employer, 2) the good faith of the employer, 3) the seriousness of the violation, 4) whether or not the individual was an unauthorized worker, and 5) any history of previous violations.²⁰

Employers also face possible criminal charges with penalties ranging from \$3,000 to six months in prison.²¹ Generally, the government looks at the company's policies, patterns, and numbers of violations in assessing penalties.²² The government can also impose criminal penalties for identity theft, harboring, or other federal crimes. An employer who conducts regular internal audits can claim a good faith defense against findings of I-9 violations.²³

VII. Conclusion

The future of the "No Match" regulation is uncertain: the DHS will either withdraw the regulation and redraft it to address the issues highlighted by the AFL-CIO lawsuit, or, DHS will continue to pursue the implementation of this regulation through the federal court of appeals. If this regulation takes effect, employers will face overwhelming difficulties because "No Match" letters are sent to over 140,000 employers, identifying 8 million individuals. This means that employers who want to gain the safe harbor protections must create and implement new human resources systems and train their staff, all the while ensuring their conduct avoids charges of discrimination. In the meantime, DHS has stated that even without this "No Match" regulation, it has all of the tools necessary to continue to enforce worksite compliance. This means that even without implementation of this regulation, we will likely continue to see worksite raids and audits that force employers to take responsibility for ensuring their workforce is authorized to work. Thus, it is imperative that employers continue to monitor the status of this regulation, and, take affirmative steps to ensure that it has a strong internal compliance policy.

BEST PRACTICES

What follows is a list of suggestions employers can currently follow to prepare for the receipt of a SSA "No Match" letter:

1. Designate one central person, or a few key individuals, for I-9 review and retention, complaints, and hiring policies.
2. Create a written policy for I-9 completion and retention. This includes the level of review before filing, a system for reverification, document retention and removal, and a consistent process for handling complaints.
3. Consistently implement written policy. Employers should commit to ongoing training on I-9 laws, immigration laws, and employment laws.
4. Despite the temporary injunction, become familiar with the "No Match" regulation. Create a written policy that outlines how to remedy a SSA "No Match" letter in a consistent and non-discriminatory manner.

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Notes

¹The information in this article is of a general nature and is provided as a courtesy. It should not be relied on as legal advice for specific cases. Receiving or reading this article does not create an attorney-client relationship between the reader(s) and Aronson & Associates, P.A. or between the authors and foreign national. As the information herein presented should make amply clear, sound immigration advice can only be provided after careful review of a potential client's facts and the creation of a formal attorney-client relationship. Copyright © by the author. All rights reserved.

²8 C.F.R. § 274a, Fed. Reg., Vol. 72, No. 157 (Aug. 15, 2007).

³*AFL-CIO v. Chertoff*, No. C 07 4472 CRB (N.D. Cal.).

⁴8 C.F.R. § 274a, Fed. Reg., Vol. 72, No. 157 (Aug. 15, 2007).

⁵Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986).

⁶*Id.*

⁷*Id.*

⁸INA § 274A(b)(1)(A).

⁹INA § 274A(a).

¹⁰8 C.F.R. § 274a.1(l)(1).

¹¹8 C.F.R. § 274a.1(l)(1)(i)-(iii).

¹²8 C.F.R. § 274a, Fed. Reg., Vol. 72, No. 157 (Aug. 15, 2007).

¹³www.ssa.gov, last visited Aug. 23, 2007.

¹⁴8 CFR. § 274a, Fed. Reg., Vol. 72, No. 157 (Aug. 15, 2007).

¹⁵The USCIS assigns each foreign national applying for permanent resident status an alien registration number.

¹⁶*Id.*

¹⁷*See* INA § 274B(a)(1)(A).

¹⁸For a sample letter, *see* <http://www.ssa.gov/legislation/FINAL%20TY2006%20EDCOR%20Code%20V%2008202007.htm>, last visited Aug. 27, 2007.

¹⁹8 C.F.R. § 274a.10(b).

²⁰INA § 274A(e)(5).

²¹INA § 274A(f)(1); 8 C.F.R. 274a.10(a). The term “pattern” or “practice” means regular, repeated, and intentional activities, but does not include isolated, sporadic, or accidental acts. 8 C.F.R. § 274a.1(k).

²²INA § 274A(b)(6)(C).

²³INA § 274A(b)(6)(A); 8 C.F.R. § 274

Hennepin County Affiliate News

By: Cyrenthia Jordan

The Hennepin County New Lawyers Section is in full swing this fall with its October activities including such events as a lunchtime CLE regarding tax tips for new lawyers, a Recess with Judges event on motion practice at Judge Denise Reilly's chambers, attendance at the Multicultural Student Welcome Reception at the University of Minnesota, serving food to homeless adults and children at People Serving People, attendance at the new lawyer's swearing-in ceremony, and a Happy Hour at Palomino. NLS November events included sponsorship of two attorneys to the Children's Law Center training for pro bono representation of youth in foster care, a Recess with Judges at the HCBA office on general tips every new lawyer should know presented by Judge Jay Quam, a Happy Hour at Martini Blu, and a volunteer project preparing a meal for the Jeremiah Program. December events are already set and all new lawyers are welcome to participate, just check out the Hennepin County Bar Association website.

Cyrenthia Jordan is the Chair of the Hennepin County Bar Association New Lawyers Section. She can be reached at cjordan@mansfieldtanick.com or (612) 339-4295.

11th District Affiliate News

By: Stephanie Balmer

On October 18, the Duluth area New Lawyers Section participated in the first-ever New Lawyers Office Crawl. We started at the St. Louis County Courthouse, stopped off at Legal Aid, and also visited four private law firms. It was an excellent opportunity to see each other's work spaces and socialize with some of the more experienced lawyers in town.

On November 6, we sponsored two Kids Voting stations in Duluth. The mayoral race has been a major issue in Duluth politics for quite some time, and it was entertaining to hear what some of the children in the area had to say about the two major contenders as well as the several other political candidates on the ballot.

We are also planning the second annual Safe Haven Holiday Party that will take place in December. Right now we are organizing several fundraiser activities so that we can put on a celebration for the Safe Haven shelter that will include crafts, food, music, and gift packages for the women and children.

Stephanie Balmer is the Chair of the 11th District New Lawyers Section. She can be reached at smbalmer@duluthtriallawyers.com.

Rochester Area Affiliate News

By: Kenton P. Marino

The Rochester Area New Lawyers Group continues to plan a Trial Practice CLE. The CLE will address topics including jury selection, examination of witnesses, common evidentiary issues, entering exhibits into evidence, opening and closing arguments, objections and courtroom decorum. A group of local trial experts will present the material by way of demonstration, lecture, and through panel discussion. Due to delays in planning, we now plan to hold the CLE in January 2008.

The Rochester Area New Lawyers Group will continue to meet on a monthly basis for an enjoyable lunch. The New Lawyers Group is also organizing regular social gatherings. If you are interested in participating, please call Kenton Marino.

Kenton Marino is the Chair of the Rochester Area New Lawyers Section. He can be reached at (507) 529-4406 or kenton.marino@smithbarney.com.

Ramsey County Affiliate News

No report submitted.

6th District Affiliate News

No report submitted.

2007-2008 NLS Liaisons

Administrative Law Section
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Alternative Dispute Resolution (ADR) Section
Chris Bradley

Animal Law Section
Jennifer Lewis Kannegieter

Antitrust Law Section
Grant Fairbairn

Bankruptcy
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- «Convention Committee
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- «Criminal Law Section
- «Employee Benefits Section
- «Food & Drug Law Section
- «General Practice, Solo & Small Firm Section
- «Immigration Law Section
- «Practice Management & Marketing Technology Section
- «Tax Law Section

New Lawyers can become liaisons to various committees and sections in the MSBA. This is a great opportunity to get involved with a substantive or procedural area of law. If you are interested in becoming a liaison, please contact Erika Donner, the New Lawyers Vice Chair, at erikadonner@yahoo.com.

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