

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.

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From Wal-Mart Raids to the Bush Proposal: Immigration Law Trends that Employers Need to Know

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EXPECT AGGRESSIVE ENFORCEMENT

Over the past year, the Bureau of Immigration and Customs Enforcement (BICE), which replaced the INS in the new Department of Homeland Security, significantly increased its investigations into the employment of illegal immigrants. Wal-Mart is among the businesses under investigation: a federal grand jury is considering criminal charges against its executives and possible fines of up to \$10,000 per illegal worker. This past October, BICE officers arrested 250 alleged illegal immigrants at 621 Wal-Mart stores in 21 states, including Michigan. Most of the workers were employed by independent contractors to provide overnight cleaning services, but whether Wal-Mart hired them directly doesn't matter under federal law. Federal officials have indicated that wire-tapped conversations suggest Wal-Mart executives knew the independent contractors were using illegal immigrants.

Wal-Mart's problems may be getting worse. Nine illegal immigrants who worked at Wal-Mart until their arrest for immigration law violations have filed a lawsuit against the company and its cleaning contractors, accusing them of failing to pay for overtime, withhold taxes, and make required workers compensation contributions. The nine illegal immigrants seek more than \$200,000 in back pay, plus other damages.

Wal-Mart is not alone in defending against severe sanctions for employing illegal immigrants. A New York employer, Colinn Service Systems, Inc., was fined over \$11 million dollars, the largest penalty to date for the hiring of illegal immigrants. The company was charged with 150 violations for knowingly hiring illegal immigrants or undocumented workers, and with form I-9 violations, which included continuing to employ foreign workers after their work authorizations had expired. The fines were also based on the 2,500 instances of failing to maintain employment eligibility verification records. The Colinn Service Systems investigation was triggered by a competitor who alleged victimization and damages from Colinn Service Systems' pattern of unlawful employment activities.

These recent aggressive enforcement actions emphasize that actual and specific knowledge is not required to charge an employer with immigration law violations. Constructive knowledge may be sufficient. Employers have been found to have constructive knowledge that an employee lacks valid work authorization when a reasonable person would infer from facts known or



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Miller Johnson's Upcoming Workshops

SPRING WORKSHOPS – see article on page 7

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available to the employer that the employee is an illegal immigrant or lacks valid work authorization. An employer violates current law if it fails to properly complete and maintain I-9 forms, or if it acts with reckless disregard and permits an outside contractor to use or introduce an illegal immigrant to the work place.

NEW TEMPORARY WORKER PROGRAM

The other important current immigration issue is President Bush's recent plan addressing the problem of illegal immigration. Business groups, immigrant rights organizations, and the Mexican government pushed the Administration to tackle the problem, and in January the President proposed a new temporary worker program that would match foreign nationals with U.S. employment opportunities. The proposal includes provisions that would grant U.S. employers and the illegal immigrants they currently employ relief from sanctions. If relief from current sanctions is not afforded, the prior periods of unauthorized employment could bar any grant of future immigration benefits.

If approved by Congress, President Bush's temporary worker program would allow millions of illegal immigrants to come out of hiding and participate legally in the U.S. economy. Participants would be issued temporary worker cards allowing them to travel back and forth between their home countries and the U.S. without fear of being denied U.S. re-entry. The program would also benefit dependents of such workers as long as the worker can prove that he or she is able to support their dependents. The new legal status would last three years, with a possibility of renewal. Workers on temporary worker status would be subject to certain rules, including a return home requirement after

their legal status expires. These temporary workers would also be allowed to seek Permanent Resident Status. However, the program is not designed to expedite Permanent Resident Status or U.S. citizenship. Application and registration fees would presumably fund the program and provide additional funds to the overworked Bureau of Citizenship & Immigration Services.

To avoid the loss of job opportunities to U.S. citizens and lawful permanent residents, the administration's temporary worker program would require employers to make every reasonable effort to find a U.S. worker to fill the job before extending job offers to foreign workers. President Bush has emphasized that the temporary worker program will only give foreign workers U.S. employment rights when no U.S. workers can be found to fill the jobs. Bush also stated that the steady increase of illegal immigration in the workplace has shown that the U.S. economy needs foreign workers.

Employers should note that the Bush proposal calls for aggressive and ongoing efforts to enforce labor and immigration laws. Accordingly, I-9 compliance should be a priority. Employers have an obligation to make sure the people who work for them are legally authorized to work in the U.S. The use of independent contractors does not relieve any company from taking reasonable steps to make sure that all workers on its premises are legally authorized for U.S. employment.

For more information regarding I-9 compliance, the employment of foreign nationals, or related immigration law issues, contact your MJSC lawyer or a member of our immigration practice group: John Koryto, 269.226.2979; Mike Stroster, 616.831.1780; or Ileana McAlary, 616.831.1797.

Employee Investigations Go Undercover

Brent D. Rector

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You are in charge of your firm's investigation of a potentially serious misconduct matter – sexual harassment, discrimination, theft, violence, or substance abuse, for example. You want to handle this quietly, so the suspected employee is not aware of your investigation. Until recently, if you wanted to engage a private investigator you had a big problem, namely, the Fair Credit Reporting Act (FCRA). As interpreted by the FTC, to comply with the FCRA an employer had to notify the suspected employee for permission to investigate. In its so-called "Vail letter" issued in 1999 (see <http://www.ftc.gov/os/statutes/fcra.htm>), the FTC stated:

- "outside organizations utilized by employers to assist in their investigations of harassment claims" are "consumer reporting agencies" (CRAs) under the FCRA
- reports to the employer from the private investigator are "investigative consumer reports" under the FCRA
- an employer receiving such reports must comply with the FCRA's requirements, such as notifying the employee

of the investigation and giving the employee a copy of the report. So much for your undercover investigation!

The good news for employers is that Congress recently amended the FCRA by passing the Fair and Accurate Credit Transactions Act of 2003. Once the new law is effective, communications relating to employee investigations will be excluded from the FCRA's definition of consumer report if:

- The communication is made to an employer in connection with an investigation of (1) suspected misconduct related to employment, or (2) compliance with federal, state, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written employer policies;
- The communication is not made for the purpose of



Brent D. Rector

(INVESTIGATION cont'd on page 3)

Court Briefs

■ **Taking the summer off with your kids as FMLA leave?** The FMLA is broad enough to allow this if you have a newborn, or your child has a "serious health condition." But in a recent Sixth Circuit case, *Perry v. Jaguar of Troy*, the father of a 13-year old child with ADD did not show that his child was incapacitated from "regular daily activities," and so the father's absence for the summer months to take care of this child was not FMLA leave. The employer showed that the son was able to engage in normal summer activities such as riding bikes, swimming, playing video games, watching TV, and playing with friends. The fact that the child's condition meant he did not perform these regular daily activities "to the same level as a child of the same age without learning disabilities" did not mean that he could not engage in normal activities. The father claimed he needed FMLA leave because his son needed extraordinary supervision due to his condition. The court rejected this, stating that the "comparative amount of supervision a child needs standing alone does not address the child's ability to engage in regular daily activities."

■ **Reassignment of permanently disabled employee to a temporary position is not a reasonable accommodation.** In a 2-1 decision, *Thompson v. E.I. DuPont*, the Sixth Circuit decided that a permanently disabled employee is not entitled to take a vacant position that is

only temporary. The employee wanted to do so in order to stay employed and have time to investigate other alternatives. "Such an ongoing obligation could easily require the employer to place the permanently disabled employee in a string of temporary positions," which is not required by the ADA. "[E]mployers simply are not required to keep an employee on staff indefinitely in the hope that some position may become available some time in the future." The dissenting judge would have required the employer to provide this reassignment for the duration of the temporary position.

■ **Male employee's feminine dress is not protected from employer discipline.** In an unpublished decision, *Pound v. Lee Memorial Hospital*, the Michigan Court of Appeals held that a male doctor could be denied hospital privileges because his manner of dress and appearance – including nail polish, cosmetics, and visible female undergarments – violated hospital standards. The doctor claimed this was sex discrimination due to gender stereotyping by the hospital. The court affirmed dismissal of the doctor's lawsuit, stating: "The civil rights act does not protect a person's conduct if it does not implicate an inherent characteristic of a protected status," and that different grooming and appearance codes for men and women do not implicate such an "inherent characteristic of sex."

(INVESTIGATION cont'd from page 2)

investigating a consumer's creditworthiness, credit standing, or credit capacity; and

■ The communication is not provided to any person except (1) the employer or agent of the employer, (2) any federal or state officer, agency, or department, or any officer, agency, or department of a unit of general local government, (3) any self-regulating organization with regulatory authority over the activities of the employer or employee, (4) as otherwise required by law, or (5) pursuant to 15 U.S.C. §1681f, which deals with disclosures to governmental agencies.

A communication meeting these requirements will be subject to only one requirement: If an employer takes adverse action "based in whole or in part" on the communication, it must disclose to the employee or applicant a summary of the nature and substance of the communication. This is a lot less onerous than the old requirement under the Vail letter. Before this amendment to the FCRA, an employer had to disclose the results of the investigation before taking action, and then wait a reasonable

amount of time (i.e., five days) before taking action against the employee.

The amendment to the FCRA also does not require the employer to disclose sources of information acquired solely for use in preparing an investigative consumer report. This is an improvement over the employer's requirements under the Vail letter, which did not allow the employer to redact information.

The effective date of this amendment to the FCRA is yet to be determined. Overall, this new law will remove some of the barriers for employers using outside assistance for their investigations of potential employee misconduct. It will certainly encourage witnesses to be more candid with information, since they can be told that their identity will be shielded from the suspect.

For HR professionals, employment investigations will still be a legal minefield, but one area of concern is being removed.

Please feel free to contact the author with questions.



Miller Johnson is a member of Meritas, an association of independent law firms worldwide.

Should Johnny Take His Cell Phone to School?

Gary A. Chamberlin

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Since 1988, Michigan's Revised School Code has prohibited students from carrying to school pocket pagers, cellular telephones, beepers, walkie-talkies, or any other electronic communication devices. Local school districts' autonomy has been limited to determining disciplinary penalties for a student who violates the state law. This year, however, local school districts have been given more control than ever before over students' use of these devices. And beginning next school year, districts will be required to formulate their own local policies and rules if they want to prohibit students from carrying pagers, cell phones, and other such devices in the classroom.

In August 2003, Michigan's Governor Granholm repealed the section of Michigan's Revised School Code that prohibits electronic communication devices in schools. The current law will remain in effect only through the end of the 2003-04 school year. Starting in 2004-05, there will be no state-mandated regulation of such devices. Why did the governor repeal the law? On one hand, there has always been a concern about the disruption that the inappropriate use of such devices could cause in classrooms and at school activities. Many parents who became accustomed to their children carrying and using cell phones off school grounds and during nonschool times found it difficult or inconvenient to communicate with their children and monitor their whereabouts when the children were not allowed to carry their phones, especially when they were attending nonacademic school activities. For some

parents, the cell phone has become an accepted device for keeping tabs on their children. The governor's repeal recognized this new situation.

The repeal of this School Code provision does not mean that local districts must accept the use of electronic devices in their schools. Nevertheless, unless a local school board takes action, students will be able to bring pagers, walkie-talkies, and cell telephones into schools and classrooms. So, if a local board wants to limit the use of such devices on school premises, it must adopt a well-defined policy that sets forth the disciplinary consequences for students who violate the policy. The control is now with local school districts.

School administrators would be wise to proactively discuss and address this issue with their board of education or board policy subcommittee. School districts must define their position on this issue well before the start of the 2004-05 school year. They would be well advised to adopt a policy, and school administrators to develop administrative regulations implementing it, in time for both to be adequately communicated to parents before school starts in the fall.

School administrators who desire additional advice on this issue should contact Craig Mutch, 616.831.1735, or Gary Chamberlin, 616.831.1709, of Miller Johnson's Education Law Practice Group.



Gary A. Chamberlin

Education

Industry Center

Spring Seminars

Miller Johnson seminars are held at conference sites and are a half day in length. They are directed to a specific audience and provide timely and current information on a variety of topics.

■ Education Seminar

Date: March 16

Location: Grand Rapids, MI

For key school administrators including superintendents, business/financial

managers, human resource and curriculum professionals

■ Construction Seminar

Date: April 22

Location: Howell, MI

Date: April 28

Location: Northern IN (actual location TBD)

For management representatives only

For more information on these seminars, please contact Jennifer Jenks at 616.831.1886 or jenksj@mjsc.com

How Construction Unions Build Organizing Victories

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The numbers are in, and the construction trade unions scored high in NLRB-conducted elections during the first six months of 2003. During that period the construction unions participated in 258 NLRB-conducted elections, winning 192 of them – almost a 75 percent win rate, the highest among all industry groups.

The high win rate for construction unions is not surprising to us. In fact, it is entirely consistent with what we have been seeing in our construction practice. The construction unions are certainly the most aggressive and also among the most sophisticated unions when it comes to organizing.

We think that a major reason for their success is their commitment to secrecy. The goal of the organizer is almost always to keep the organizing under wraps until it is too late. It is not unusual for management to find out about the organizing campaign only after all the involved employees, or a significant majority, have signed authorization cards.

Of course, at that point, winning the election is a very steep uphill battle.

The successes the construction unions have enjoyed over the last few years underscore the need to be proactive about union avoidance, even when it appears that there is nothing going on.

We think the best immunization against unionization is a management team that can lawfully and effectively communicate with employees about the benefits of remaining union-free. Our attorneys regularly conduct supervisory training sessions on these topics. This is an area where we can offer an ounce of prevention that is worth more than a pound of the cure.

Please feel free to contact the author with questions.



Timothy J. Ryan

Rx for Hospital Solicitation Policies

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Two recent cases highlight the need for healthcare facilities to review their solicitation policies. This issue presents unique problems because of the public nature of many hospital areas, including hallways, lounges, and cafeterias.

In Stanford Hospital and Clinics v. NLRB, the United States Supreme Court let stand a D.C. Circuit opinion that two California hospitals violated the NLRA by banning solicitation and distribution activities in hallways and lounges and by completely banning such activities to nonemployees. The D.C. Circuit agreed with the NLRB's August 2001 decision that the hospitals had failed to show that solicitation activities in hallways and lounges were likely to disturb patients or interfere with patient care. Likewise, both the court and the NLRB held that the broad ban on activities to nonemployees was not necessary to protect patients.

In First Healthcare Corp. v. NLRB, the Sixth Circuit (the federal court with jurisdiction over Michigan) issued an opinion affecting

solicitation / distribution policies at medical centers. The court held that off-duty employees cannot necessarily be denied access to other facilities owned by the same employer for solicitation / distribution purposes.

Significantly, the court also stated that off-duty employees have the right to solicit in outdoor, nonworking areas unless the employer has a justified business reason for prohibiting them from doing so.

These cases demonstrate the pitfalls of taking a cookie-cutter approach to solicitation by adopting an overly broad solicitation policy. The solution, instead, is to draft and implement a well defined policy that addresses the circumstances and concerns of the individual healthcare facility.

Please feel free to contact the author with questions.



David M. Buday

Legal Clips

■ **Employee leasing arrangement can save taxes.** Do you know that you can achieve big savings in the Michigan Single Business Tax – potentially tens or hundreds of thousands of dollars – by transferring employees to a captive employee leasing company? The tax savings result from moving employee compensation from your organization's tax base to the captive. The tax savings can be substantial, but there are employment issues to be considered. Unlike other forms of leasing companies, captives generally do not provide relief from administrative burdens, because your former employees run the captive, usually out of your facility. A captive also does not reduce exposure for employment-related claims, because both organizations likely will be employers under most employment laws. There are also employment pitfalls with captives, such as making sure both organizations qualify as employers for workers compensation, and special considerations if the employees are unionized. Other issues may arise, involving employee benefits, employee contracts, employment policies and handbooks, insurance, licensing, apprenticeships, wage and hour law, disability law, MIOSHA, and more. A captive can be great for the bottom line – but use it only after carefully considering potential legal and practical issues. For more information regarding captive employee leasing companies, please call your regular Miller Johnson contact or Mark Rizik, 616. 831.1744, or Kristen Kroger, 616.831.1781.

■ **Michigan Department of Consumer and Industry Services (CIS) and MIOSHA reorganization.** Under Executive Order 2003-18, CIS's new name will be the Michigan Department of Labor and Economic Growth (DLEG). This new department has taken over most of the administrative agencies in the former Department of CIS. This is a major reorganization for Governor Granholm's administration. DLEG will enforce regulations on several employment matters. The Bureau of Workers' and Unemployment Compensation is being split into three divisions: the Unemployment Insurance Agency, the Workers' Compensation Agency, and the Wage & Hour Division. The W-H Division was previously part of the Bureau of Safety and Regulation. This Bureau has been renamed the Michigan Occupational Safety and Health Administration (MIOSHA). At the same time of this executive order, MIOSHA reorganized its divisions, transferring the functions of the Occupational Health Division to the other two enforcement divisions, which were renamed the General Industry Safety and Health

Division and the Construction Safety and Health Division. The new DLEG website is at www.michigan.gov/dleg.

■ **Final W-H regs to be issued soon.** The U.S. DOL announced that its long-awaited changes to the FLSA overtime regs will be ready this spring. The DOL had issued proposed changes to the salary tests for exempt status last year and had earlier promised to get the final version out by last fall. Even if the new final regs are published soon, it is unclear when they will take effect. Congressional leaders opposed to the changes can be expected to take action to block the new regs, especially in a major election year.

■ **Time to regulate camera phones in the workplace?** This latest techno-gadget should prompt employers to review their policies on privacy and confidentiality. Increasing use of camera phones, with their almost instantaneous transmission of photographic images, should be addressed in workplace policies. Especially vulnerable are private areas of an employer's premises, either because of proprietary business interests or because of personal privacy interests of other employees, customers, and so on. Because these new devices are small and easily hidden, workplace policies should anticipate that they will be used in secret ways not easily detected. This may warrant a blanket ban in some workplaces as a precautionary measure.

■ **Preparing for HIPAA privacy requirements.** April 14, 2004 is the date by which many employer health plans must comply with the HIPAA privacy regulations. If you sponsor a group health plan, now is the time to come into compliance. For assistance, call your regular Miller Johnson contact or Mary Bauman, 616.831.1704, or Brent Rector, 616.831.1743.

■ **Reposting no-solicitation clause during union organizing drive unlawful.** An employer had a valid no-solicitation policy in its employee handbook, but the rule was "dormant" because the employer had not been enforcing it. Soon after a union started an organizing drive, the employer reposted the rule but didn't have a good reason for doing so. In *City Market*, the NLRB ruled that it is up to the employer to explain why repromulgation of the rule was done for a proper reason. This case should be a wake-up call for employers who allow employees to solicit on working time. A no-solicitation rule should be enforced at all times, not just selectively.

Miller Johnson Welcomes New Associates

■ **MATTHEW K. BISHOP** joins Miller Johnson as an associate in the Grand Rapids office. His practice is in Business Counsel. Matthew received his education at University of Michigan Law School and Kalamazoo College.

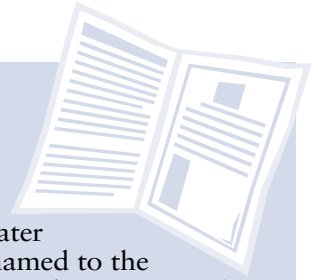
■ **MONICA L. COOK** joins Miller Johnson as an associate in the Grand Rapids office. Her practice is in litigation. Monica received her education at Michigan State

University – Detroit College of Law and Hillsdale College.

■ **ILEANA MCALARY** joins Miller Johnson as an associate in both the Grand Rapids and Kalamazoo offices. Her practice is in Business Counsel, Immigration Law and International Law. Ileana received her education at Wayne State University Law School, Grand Valley State University, Grand Rapids Community College and University of Havana Law School.

Miller Johnson in the News

- DAVID M. BUDAY and SARAH K. WILLEY will speak on "Employment Law from A to Z" at a seminar presented by Lorman Education Services on June 18 in Kalamazoo.
- GARY A. CHAMBERLIN will present "Developing and Implementing the Affirmative Action Plan" sponsored by the Michigan State University School of Labor and Industrial Relations at the Human Resources Education and Training Center in Livonia on March 11.
- On March 4, BRENT D. RECTOR will moderate a seminar for lawyers in the American Bar Association's Labor and Employment Law Section, on the impact of HIPAA Privacy Regulations on workers compensation and on occupational safety and health matters.
- DAVID M. BUDAY and CRAIG H. LUBBEN will be speaking at the 10th Annual Michigan Health Law Institute to be held in Troy, Michigan, on March 4 and 5. The seminar is presented by the Institute of Continuing Legal Education. Their topic will be "What Every Health Care Lawyer Needs to Know About Labor & Employment Law."
- DAVID M. BUDAY spoke at the Associated Builders & Contractors' February meeting in Kalamazoo. The topic was "Union Strategies for the Construction Industry."
- GARY A. CHAMBERLIN and TIMOTHY J. RYAN presented "2004 Labor & Employment Law Update" for Grand Rapids Association for Human Resources Management on January 14.
- JOHN F. KORYTO and MICHAEL E. STROSTER conducted training for lawyers and immigrant rights organizations from around the region at a conference held in September sponsored by Catholic Immigration Legal Network, Inc.
- WILLIAM H. FALLON will serve as Chairman of the Board of Thresholds, Inc., an agency serving individuals with developmental disabilities, for 2004.
- JOHN F. KORYTO was appointed to board of directors for Boys and Girls Club of Greater Kalamazoo. He has also been named to the Liaison Committee to the Bureau of Customs and Immigration Enforcement of the American Immigration Lawyers Assoc. - Michigan Chapter.
- JENNIFER L. JORDAN and CRAIG H. LUBBEN were invited to serve on the Hillman Trial Advocacy program faculty.
- KRISTEN L. KROGER is a contributing editor for the Fourth Edition of Employment Discrimination Law (Lindemann & Grossman).
- On March 16, BRENT D. RECTOR is speaking at a seminar co-sponsored by The Right Place & GRCC, on HIPAA Privacy / Employer Use of Employee Medical Information.
- On April 20, BETH MCINTYRE and BRENT D. RECTOR are speaking on Absence Management from a Legal Perspective: FMLA, ADA & Work Comp at a seminar co-sponsored by The Right Place & GRCC, and Morning Star Health.
- On April 23, BRENT D. RECTOR is presenting at a seminar sponsored by the Council on Education in Management, on best practices in occupational safety and health.
- BRENT D. RECTOR will co-present with Marsh USA on May 18, at an all-day seminar, sponsored by the Michigan Chamber of Commerce, on developing an effective safety and health program.
- BRENT D. RECTOR was elected to the Board of Directors of Safe Haven Ministries, a non-profit agency providing refuge and support to those in need due to domestic abuse.
- PETER J. KOK, ELIZABETH M. MCINTYRE, JAMES C. BRUINSMA and NATHAN D. PLANTINGA will present an Employment Law Update to the Human Resources Group on March 18.



2004 Spring Workshops

Miller Johnson is offering a series of workshops on various legal topics throughout 2004. If any of the following topics interest you, please visit our web site at www.millerjohnson.com/resource/workshops.asp for a registration form or contact Jennifer Jenks at 616.831.1886 or jenksj@mjsc.com

Remaining Union Free: Strategies for Overcoming Vulnerability

April 15	Grand Rapids
April 20	Kalamazoo

Beyond HIPAA – Employee Medical Information

May 12	Kalamazoo
May 20	Grand Rapids

FLSA – DOL'S New Regulations on Overtime Exemptions

May 13	Grand Rapids
May 18	Kalamazoo

Workers Compensation

June 8	Grand Rapids
June 10	Kalamazoo

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Have a question
 about a specific
 employment-
 related legal area?
 If so, please
 contact us. We
 would welcome
 the opportunity
 to assist you.

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