



April 2007

CHAPTER #0336

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April Monthly Luncheon

TOPIC: Innovation & Creativity
WHEN: April 5, 2007 11:30am - 1pm
WHERE: College Station Conference Center
COST: \$10/members, \$10/first time guest, \$15/non-RSVP guest
SPEAKER: Dr. Joyce Juntune

Orientation for New Members...

Are you new to BVHRMA, excited about being a member but have questions? New to the area and have not had opportunity at the regular monthly meetings to really get to know others in the association? BVHRMA is excited to announce a new opportunity to help resolve these issues for our new members. On Friday, April 13, 2007 at 11:30, BVHRMA will conduct a new member orientation. This orientation will cover the history of BVHRMA, the benefits of membership, and the opportunities that are available to you as a member. Invitations will be sent next week to those members who have recently joined BVHRMA. along with more details such as the location of the meeting. If you do not receive one, but feel this session would benefit you, please contact Windelan Johnson at Windelan@iGoErgo.com or 778-0502.

Legal Briefs

by Audrey E. Mass

Welcome to Legal Briefs for HR! This update on issues that matter to employers is provided to HR professionals, in-house counsel, business owners and others who can benefit from receiving a monthly update on new laws, recent court cases, helpful websites and pending legislation. Anyone is welcome to join the group of over 3400 subscribers to this FREE newsletter. Just email me to be added to the group (or removed) and you can find previous editions posted on the Munck Butrus P.C. firm website at www.munckbutrus.com under E-Newsletter.

I'd like to welcome new subscribers who attended my presentations to the Montgomery County SHRM chapter (The Woodlands) and to the Texas Association of Business, Dallas chapter.

Here's the latest:

- I. **What's Cookin' in Austin?** – With the filing deadline for bills (March 9) in the Texas Legislature now in our rearview mirror, employers can settle down to the business of examining what has been proposed, determining which of the 7760 bills and resolutions have a snowball's chance in you-know-where of being passed, and focusing our collective efforts on the ones that are most troubling. Here's a small sampling:
 - a. Prohibiting employers from banning firearms in their employee parking areas;
 - b. Mandating daily overtime for day laborers (a toe-hold to mandate it for other non-exempts?);
 - c. Mandating coverage of various conditions (e.g., anorexia/bulimia) and devices (e.g., home defibrillators) under group health plans;
 - d. New protected leaves of absence for family violence and school-related activities (ranging from parent-teacher conference to attending any school activity);
 - e. Wage continuation for ee's first day of jury duty (up to \$40);
 - f. Limits on use of wireless communications devices while driving;
 - g. Beefing up notice to consumers and penalties against businesses for a breach of personal identifying information;
 - h. Prohibition on use of biometrics and limits on use of SSN as ee identifier;
 - i. New private cause of action against er who bullies or harasses an ee; and
 - j. Forcing employers to refund improperly paid UI benefits, where employer did not provide TWC with adequate response to request for info about the claimant

For a complete summary of pending bills of interest to employers, go to www.munckbutrus.com and click on E-Newsletter.

2. **Speaking of Guns** – The Texas Legislature is considering six bills which would require employers to allow firearms on their private property, either in locked cars or a storage facility provided by the employer. Only four of the bills require the employee have a concealed carry license. Per TAB, the other two allow anyone to bring a firearm to work – even convicted felons – and one allows every type of firearm, from pistols to grenade launchers. What the law-makers behind these bills may not understand is [1] employers are currently free to let guns on their premises if they wish, but they have a fundamental right to ban guns from their premises which would be negated by the proposed bills; [2] employers have a duty under OSHA to provide a safe workplace; [3] studies show that the presence of guns in a workplace ups the likelihood of a homicide taking place there; and [4] OSHA stats show that homicide is the 4th-leading cause of occupational fatalities in the U.S. A similar law was passed in OK but nipped in the bud by a coalition of employers who filed for a temporary restraining order against enforcement. If you would like to participate in the effort to stop passage of these bills, you should talk to your state legislators. If you don't know who they are or how to reach them, there are tools available on the Governmental Affairs page at www.shrm.org (click on HR Voice) or, if you are not a SHRM member, go to www.capitol.state.tx.us and enter your address under "Who Represents Me?" Contact **Cathy DeWitt** with the TAB at cdewitt@txbiz.org or 512.477.6721 ex. 118 and she will send you talking points.
3. **How Can You Help?** – Your SHRM Texas State Council is planning a Legislative Impact Day in Austin for April 26. Attendees will spend the morning with experts who will prep them on the issues employers face. In the afternoon, the group will board buses for the Capitol to speak with and educate their legislators on employers' view of key pending bills. Registration for this event is available via the TSC website (www.tsc-shrm.org).
4. **More Fun With FMLA** –If you haven't read and absorbed the entire FMLA regulation, this holding may surprise you. The FMLA regs do allow an employer to substitute "any of the accrued paid vacation leave, personal leave, or family leave of the employee" for FMLA leave granted by the employer. However, the ability to substitute paid leave does not apply when the employee is on an otherwise paid leave, even when the pay is coming from a third-party benefit plan. It only applies when the employee is on an unpaid leave. In the instant case, an employee receiving STD benefits (under the Teamsters' National Master Freight Agreement, not from her employer) for six weeks of post-surgery recovery could not be forced to use available paid leave in addition to receiving STD benefits. *Repa v. Roadway Express, Inc.* (7th Cir. 2-26-07)

5. **Lessons Learned** - Overly restrictive handbook policies once again triggered a successful claim that section 8(a)(1) of the NLRA was violated. At issue were prohibitions against [1] complaining to customers; [2] soliciting and distributing literature while off-duty if in uniform; and [3] fraternizing with co-workers. Section 8 defines unfair labor practices (ULPs) and (a)(1) says it's an ULP for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;" Section 7 includes the right to "self-organization . . . and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" In this case, [1] workers have a statutory right to solicit support from customers as well as the general public; [2] off-duty activity should not have been restricted, whether in uniform or not; and [3] the anti-fraternization rule may have been intended to apply only to "personal entanglements" but did not expressly say so and could be reasonably read to ban co-worker discussions about terms and conditions of employment. Good intentions are no defense . . . make sure your handbook is evaluated by an expert in labor and employment laws and periodically reviewed, to catch policy language that does not comply with changes in the applicable federal, state and local law.
6. **March Badness** – It's that time of year, once again, for productivity to plunge and hopes to soar, as your employees root for their favorite basketball teams in the NCAA and NIT tourneys. CBS and the NCAA are offering free live feeds of games via the Internet, including a "Boss Button" that defaults to a generic spreadsheet in case the viewer needs to quickly appear that he or she is actually getting some work done. Go to www.ncaasports.com/mmod to see for yourself. A few companies have opted for an "if you can't beat 'em, join 'em" approach by showing games at work on in-house projection systems normally used for business presentations or granting long lunches.
7. **A Tip About Caps** – Thanks to **Cindy Kang**, who shared that USCIS will begin taking H-1B applications on April 1, 2007 and the FY2008 cap is set at 58,200 (after allowing for 6800 such visas under the U.S.-Chile and U.S.-Singapore Free Trade Agreements), but there are some exemptions. The FY2007 cap was reached in only eight weeks, and it's likely that the FY2008 cap will be hit within a few weeks or even days of April 1. If you would like to receive email updates from Cindy on this issue, contact her at cindy.kang@haynesboone.com.
8. **Border Bills** – The Texas Legislature has been advised by a TAB-led coalition to table bills relating to immigration, since "comprehensive immigration reform must originate in Washington, not Austin." U.S. Senate Majority Leader Harry Reid (D-Nev.) promises comprehensive immigration reform legislation, to include border protection, legalization of immigrants, a temporary guest-worker program and employer sanctions, on the Senate floor before the August recess. Stay tuned!

9. **Carrying A Big Stick** – The U.S. Supreme Court upheld an appeals court decision which will allow employees to continue their RICO lawsuit, alleging their employer conspired with recruiters to hire undocumented workers, which had the effect of depressing wages for the legal workers/plaintiffs. *Mohawk Industries v. Williams* (U.S. 2-26-07). In the meantime, the largest-ever forfeiture of \$12 million (plus 15 months in prison) has been ordered in a case involving two temp labor services that provided hundreds of undocumented workers. *U.S. v. Garcia* (S.D. Ohio 3-1-07). And a business owner and three managers were arrested by ICE for hiring illegal workers and helping them obtain bogus hiring documents, in order to fulfill U.S. Department of Defense contracts. *U.S. v. Insolia* (D. Mass. 3-6-07). A variety of civil and criminal claims are being brought in these cases, including violation of the Trafficking Victims Protection Act of 2000 (22 USC sec. 7101). The current administration has warned of increased enforcement activity, so make sure your processes (and those of any potential joint-employer entities) are proper.
 10. **Mandatory Paid Time Off** – As promised, Sen. Ed Kennedy (D-Mass.) and Rep. Rosa DeLaura (D-Conn.) introduced a bill on March 15 that would require companies with 15 or more employees to provide workers at least seven paid sick days per year, to care for themselves or a family member. Part-time workers (i.e., between 20 and 30 hours per week) would earn a prorated amount. The Health Families Act is similar to sick leave mandated earlier this year for San Francisco-area employers. See Legal Briefs for HR #11-2006.
 11. **Simply the Best** – Congratulations to all of the finalists in the Dallas Business Journal's 2007 "Best Places to Work" competition. The list, which is posted at <http://dallas.bizjournals.com/dallas/event/3150>, includes many Legal Briefs for HR subscribers. The awards will be handed out on May 3 at the Hilton Anatole. Way to go!
 12. **E-Discovery CLE** – Attorneys who would like to attend a complementary one-hour briefing by Munck Butrus IP lawyers on modifying your enterprise information systems and procedures, in light of the prospect of voluminous, costly e-discovery requests under the new rules, send me a reply and I'll add you to the invitation list!
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13. **Hope to See YOU There** - Yours truly will be presenting at the following seminars during April:
- a. Luncheon keynote for Dallas HR Employment Law Conference at SMU on April 10; go to www.dallashr.org for details and to make a reservation; topic is pending legislation
 - b. Panelist for Current Topics in Computer and Technology Law at the Belo Mansion in Dallas on April 13; email Professor Shubha Ghosh at SMU at sghosh@smu.edu for registration info; topic is data security
 - c. Luncheon keynote for Concho Valley SHRM Annual Seminar in San Angelo, TX on April 19; go to www.cv-shrm.org for information; topic is interviewing
 - d. Speaker for SHRM Texas State Council Legislative Impact Day in Austin on April 26; go to www.tsc-shrm.org for agenda and to make a reservation; topic is pending legislation

Until next time,
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BVHRMA Upcoming Events...

Unless otherwise noted, monthly meetings/luncheons are held on the first Thursday of every month from 11:30AM to 1:00PM at the College Station Conference Center, 1300 George Bush Drive, College Station, TX

*May 3, 2007

Topic: TBD

June 7, 2007

Topic: TBD

July 5, 2007

Topic: TBD

*2nd Thursday of the month

SHRM Upcoming Events...

59th Annual SHRM Conference & Exposition

June 24-27, 2007

Las Vegas Convention Center | Las Vegas, Nevada

SHRM Staffing Management Conference & Exposition

April 23-25, 2007

New Orleans Marriot | New Orleans, Louisiana

HR Southwest 2007

October 23-26, 2007

Fort Worth Convention Center | Fort Worth, Texas
