



April 2008

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April Monthly Luncheon

TOPIC: How to Review and Understand Background Checks
WHEN: April 3, 2008 11:30am - 1pm
WHERE: College Station Conference Center
COST: \$10/members, \$10/first time guest, \$15/non-RSVP guest
SPEAKER: Marc Hamlin, District Clerk, Brazos County
RSVP: www.bvhrma.org

SHRM Upcoming Events...

SHRM Global Conference & Exposition

March 31-April 2, 2008 Boston Marriott Copley Place, Boston, Massachusetts

SHRM Staffing Management Conference & Exposition

April 14-16, 2008 Gaylord Opryland, Nashville, TN

SHRM 60th Annual Conference and Exposition

June 22-25, 2008 Chicago, Illinois

Other Events

Houston Gulf Coast Symposium

May 13th and 14th

NTSHRM Conference

April 31st and May 1st

2008 South Texas Human Resources Symposium

April 17, 2008

BVHRMA Volunteer Opportunity

The B/CS Chamber of Commerce will be holding its annual Job Fair on Tuesday, April 22 from 2:00 – 6:00 at the College Station Hilton. BVHRMA will again supply services to the community by holding a resume review booth during the hours of the Job Fair.

Volunteer shifts are:

2:00 - 3:30

3:00 - 4:30

4:30 - 6:00

Interested volunteers should e-mail BVHRMA at bvhrma@yahoo.com and indicate time available.

Thank you for serving your community and helping individuals in their professional job search.

Legal Briefs for HR

Welcome to Legal Briefs for HR! This monthly update on issues that matter to employers is sent to over 3600 HR professionals, in-house counsel, business owners and others who like to be educated (and entertained) when catching up on employment law issues. Anyone is welcome to join . . . just email me to be added to (or removed from) the list. Missed one? Past issues are posted on my firm's website at www.munckbutrus.com under E-Newsletter.

A warm welcome to new subscribers I had a chance to present to during the Texas Association of Business, Dallas chapter meeting, and the UnicornHRO Illuminations conference in Las Vegas. And the luck o' the Irish to each of you! Here's what's up:

I. March Badness – Yep, it's that time of year again and, once more, the NCAA and CBS have partnered to provide free streaming video of NCAA tourney basketball games via the Internet directly to your employees' desktops. The good news is they won't need to call in sick or take really loooong lunches to catch some hoops, but the bad news is they may be at their desks but "no one's home" if you know what I mean. Last year, the website had a "Boss Button" that allowed the viewer to hot key over to a generic spreadsheet and mute the audio, to at least appear that he/she was hard at work. Check it out, at www.ncaa.com.

2. Ka Ching! – On March 10, the governor of Texas announced a one-year suspension of the .12% unemployment insurance (UI) replenishment tax, which should put \$90 million back in the pockets of 370,000 businesses. Why? “Thanks to our healthy economy and low unemployment rate last year, the state collected more money [for UI] than we need . . .” Thanks, governor!
3. Loss of Ka Ching – In LB4HR#9-2007, you read that the State of NY thought it might be losing money due to employees misclassified as independent contractors and had set out to identify and prosecute employers who did this. Well, the report is in and a 4-month sweep covering only 117 employers found \$19 million in unreported wages, \$3 million underpaid to workers (i.e. minimum wage and OT violations) and \$1.2 million not paid into the state’s UI coffers. The next step is to be a simplified test, to determine employee vs. contractor status, and data-sharing between state agencies, to more quickly identify the violators. Michigan must be impressed, because they are setting up a similar task force. And NJ did this in 2006. I think this qualifies as trend, folks. Get on top of your classifications.
4. NEVA – The New Employee Verification Act (NEVA), introduced by Rep. Sam Johnson (R-Tex), is SHRM’s preferred method for verifying employment eligibility. The idea is to use existing state “new hire reporting” systems to access a new Electronic Employment Verification System (EEVS) that can tap into the SSA database for citizens and the DHS database for non-citizens. There is a voluntary option for employers to use biometrics (e.g., thumbprint) which would nix the problem of stolen, falsified or altered identity documents. Record-keepers everywhere will do a little dance, since the process is done on-line (i.e., the Form I-9 will go away) and those in states with onerous state law (read: AZ) will applaud the provision for federal pre-emption of similar state laws. If you like the sound of this, tell your rep! Full text of the bill (H.R. 5515) can be found at www.thomas.loc.gov.
5. Check it Out – An applicant whose job offer was rescinded due to a faulty background check can move forward, in suing the background checking company under the Fair Credit Reporting Act (FCRA). The case against the employer was tossed, as there’s no breach of contract when the offer is for at-will employment. But the consumer reporting agency will have to show that it followed “reasonable procedures” before it told the prospective employer that the man had a criminal charge pending against him (he didn’t). And the rebuffed applicant does not have to present expert testimony on “reasonableness” in order to continue the lawsuit. That’s kind of self evident, where a quick crosscheck with the applicant’s SSN or date of birth would’ve made the error clear. *Wilson v. CARCO Group Inc.* (D.C. Cir. 2-29-08)
6. Fatal Flaw – You may have read that a court may “fix” a flawed noncompete agreement by modifying the terms (aka “blue lining” the agreement) and then enforce it. Notice that it says “may” and not “will.” When one employer tried to enforce an overbroad noncompete (signed by a former sales manager who went to work for the competition) it was told that judicial modification of unreasonable or over-broad noncompete provisions is discretionary, not mandatory. And it was also told to pay the man’s attorneys’ fees (even though the new employer actually picked up the tab), to the tune of \$300,000. *Cintas v. Perry* (7th Cir. 2-20-08). Lesson learned? Carefully draft those agreements and don’t overreach. One size does not fit all. In many cases, merely going to work for a competitor will not be enough to violate a reasonable and enforceable restrictive covenant.

7. And Then There Were Two – First, San Francisco enacted an ordinance that required employers to provide paid sick days to certain employees. Now, the District of Columbia has OK'd a similar measure which will take effect on April 3 unless Congress says "no." It requires seven "sick or safe" days per year/per worker in a company with 51 or more employees; six days if the company has 31 to 50 employees; five days for those with 11 to 30 employees; and three days for companies with 10 or fewer workers. The days can be taken for the employee's own illness/injury or to care for a child, parent, spouse or domestic partner. The days can also be used for preventative care and when the employee or family member is a victim of stalking, domestic violence or sexual violence. Is a spa day "preventative care?" Hmmm.

8. Fun With FLSA – A recent Dep't of Labor Opinion Letter clarified that the \$455/week salary requirement for several "white collar" exemptions may not be prorated to reflect a worker's reduced hours. A full-time worker earned \$30,000 year, but wanted to work 20 hours/week. The employer agreed and reduced the salary to \$15,000 but this dropped the employee below the minimum needed to maintain the exemption, which equates to \$23,660 per year. Another letter reminded employers that when nonexempt employees work from home, which can include on-line computer training, the actual time spent on the task should be recorded and compensated. You can find these letters at www.dol.gov on the Wage and Hour page.

9. In Focus – Back in 1994, OSHA announced it would begin to focus inspections by industry and would start with the ones that reported the highest number of injuries. It began with construction, and added a program for the maritime industry in 1998. Now, it is adding seven "general industry" categories, to include [1] landscape and horticultural services; [2] oil and gas well drilling and services; [3] preserved fruits and vegetables; [4] primary metals and basic steel products; [5] ship and boat building and repair; [6] public warehousing and storage; and [7] concrete and concrete products.

10. In Fashion – Ah, spring is in the air! And with warmer temps comes scantier clothing that is not workplace-appropriate. If you haven't scrutinized your dress code lately, here are a few suggestions from the "Never Ever at Work List" as listed in O magazine: flip-flops, halter or tube tops, deep cleavage, shirts that gap between buttons, nightclub make-up, strong perfume, sheer dresses and tops without proper lingerie, micro-minis, belly shirts and navel-exposing pants and short shorts. This list is aimed at a largely female readership, so don't forget to include unisex limitations such as cut-off shorts, body-hugging shirts and anything that is soiled, torn or wrinkled.

11. Air Fare – If you are interested in what's being done to improve Texas' air quality, you might want to come to a Texas Association of Business luncheon on March 27, and hear what former Dallas County Judge Margaret Keliher has to say. She's now the Executive Director of Texas Business for Clean Air. For more info and a registration form, go to www.txbiz.org and click on News, then Events, then the March 27 event.

12. With a Little Help From My Friends – Last year, I became a founding member of the Legal Leaders Hot Hundred Who Care. The idea is that 100 Dallas-area lawyers would band together, raise at least \$1000@ and that would be enough to pay the tab for 100 deserving kids to attend Camp John Marc, which specializes in creating a fun experience for kids who have muscular dystrophy (and giving their families a brief break from intense care-giving duties). We exceeded our goal and the happy campers had a great time! So, I'm back again this year, trying to raise at least another \$1000. If you would like to contribute to this worthy cause, please go to www.geocities.com/legalleaders/index.htm, click on the Hot Hundred button, and then on my name.

This will take you a secure page where you can make a donation by credit card (or send in a check, if you prefer). Any amount would be greatly appreciated by me and the kids!

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 1, 2008

June 5, 2008