



*BVHRMA Newsletter*

*January 2010*

*Chapter #0330*



## Articles

➡ Monthly Program and Luncheon

➡ Upcoming HR Events

➡ Legal Briefs

## *Monthly Program & Luncheon*

TOPIC: The Emerging Workforce 2010

WHEN: **Thursday, January 14, 2010**

TIME: Lunch served from 11:30AM to noon;  
Program from noon to 1:00PM

WHERE: *General Services Complex*  
*Building # 1800 – 750 Agronomy Road*

COST: \$12

PROGRAM: Joint Program with Brazos Valley ASTD

SPEAKER: Sandy Mazur, Spherion Sr. Vice President,  
Franchise/Licensee Division

MENU: TBA...

**If Attending: RSVP to Katherine at [rsvpprograms@gmail.com](mailto:rsvpprograms@gmail.com) by noon on Tuesday, January 12, 2010**

What's coming up?~HR Events you *don't* want to miss!!

2010 Texas State Council Global HR Conference  
"Global HR - Survival of the Fittest"  
Thursday, January 14, 2010  
DoubleTree Hotel - Houston Intercontinental Airport  
Registration is Now Open!  
<http://www.tscglobalconference.org/>

Texas Higher Education  
Human Resources Association  
**2010 Winter Conference**  
**January 24-26, 2010 - Austin, TX**

*"HR in the Fast Lane: Stay in the Race!"*

### **Registration**

Registration is \$150 if received by December 21st.  
After December 21st, registration will be \$175.

[Click here to register!](#)

***NOTE: You will need to set up a new registration account as no registration accounts from previous years are saved.***

*The Cancellation Policy is as follows: 100% refund if cancellation of registration is received by December 21, 2009; 50% refund if received between December 22, 2009 and January 4, 2010; and 25% refund if received after January 4, 2010.*

***Registration site courtesy of PeopleAdmin.***



## Benefits Seminar

Co-hosted by **BVHRMA** and **Workforce Solutions Brazos Valley**

February 5, 2010

*Five Reasons YOU should Attend THIS Benefits Seminar*

- 1) **Staying Up-to-Date** - To be an effective HR professional, you have to be current. Ouida Peterson will discuss COBRA and Section 125 updates for 2010.
- 2) **Recertification Credits** - For those certified as a PHR, SPHR, or GPHR through the Human Resource Certification Institute (HRCI), you may earn up to 6 recertification credit hours. (*Credit hours are currently under review and pending confirmation.*)
- 3) **Value for the money** - Seminars can be expensive, but our *early bird registration fee (postmarked by January 15, 2010)* is only \$75.
- 4) **Networking** - You will have an opportunity to get out and meet other HR professionals.
- 5) **Travel Time** - It will save you a commute trip to Austin, Houston, Dallas, Fort Worth, etc. for professional development.

*For more information regarding the Benefits Seminar please visit [www.BVHRMA.org](http://www.BVHRMA.org) or contact the Seminar Chair, Liz Galvan, at [LGalvan1984@gmail.com](mailto:LGalvan1984@gmail.com) or 979-458-7562.*

**\*\*\*The Specifics...**

**Speaker:** Ouida Peterson, CONEXIS  
**Location:** Center for Regional Services  
3991 East 29<sup>th</sup>, Bryan, TX  
**Time:** 8:00AM to 4:00PM  
**Check-In:** 8:00AM to 8:45AM

\*Session 1: COBRA Updates  
\*Session 2: Section 125 Plan Updates  
**Registration Fees:**  
Postmarked *by* January 15, 2010  
Early Bird Registration Fee = \$75.00  
Postmarked *after* January 15, 2010  
Regular Registration Fee = \$99.00  
**Menu: TBD**

## HR CORNER....It's Legal Briefs Time!!!

Welcome to Legal Briefs for HR, an update on employment issues sent to over 4200 HR professionals, in-house counsel and business owners to help them stay in the know about employment issues.

Here's what's up:

1. **Woefully Willful** - A common reaction to being laid off is to examine all possible avenues of recourse against ones former employer and claims of misclassification under the FLSA have particular appeal since part of the remedy is cash for unpaid overtime going back two years or, if the employer's mistake is deemed willful, three years. The seeds for such a payout are often planted on the day the person was hired and mistakenly treated, going forward, as being exempt from the FLSA's minimum wage and overtime requirements. One such story began when a job applicant was offered a mechanical designer job (nonexempt) which he turned down. The company countered with a different job title (exempt) but essentially the same duties. Years later and following the reduction in force, the former employee filed his claim and prevailed by arguing that his job description required 12 years of experience but no particular education. Further, none of his peers with the same job title had a college degree. That alone was enough to snuff out the employer's argument that he was an exempt "professional" under the FLSA. The job did not require knowledge of an advanced type, in a field of science or learning that is customarily acquired by a prolonged course of specialized instruction and study. In the court's eyes, the employer's act, at the time of hiring, of changing the job title with no change in the duties from the originally proffered nonexempt job, was meant to avoid the payment of overtime, supporting the enhanced penalty for a willful violation of the FLSA. *Young v. Cooper Cameron Corp.* (2<sup>nd</sup> Cir. 11-09). Lesson learned? Even though employees may be performing duties which do require knowledge of an advanced type,

if that knowledge did not come via a prolonged course of specialized instruction and study (which, in most cases, means a graduate degree), the professional exemption may not pass muster. Carefully assess each job being performed, document the educational/experience requirements as well as the duties actually being performed. Missing or inaccurate job descriptions are akin to a land mine, just waiting to be stepped on.

2. **More RIF Raff** - A PA jury found an employer willfully selected older workers for a reduction in force (RIF), effectively doubling the backpay given to two plaintiffs, for a total award of \$6.2 million. The award for emotional distress was awarded under state law, avoiding federal caps on damages under the ADEA. Evidence which proved damaging to the employer's cases included [1] average age of those let go was 62 while that of those who remained was 45; [2] the employer's business reasons for their selections changed between the terminations, the EEOC charge and the trial; and [3] there were younger workers who met the RIF selection criteria but were kept on board. *Marcus v. PQ Corp.* (E.D. Pa. 11-09). What can you learn? It's helpful to do disparate impact analyses on your selections, be consistent when articulating your reason for discharge to everyone (e.g., the employee, the unemployment comp agency, the EEOC, in discovery prior to trial) and be very careful in identifying and applying your selection criteria. It's often a good investment to consult with an internal or external labor & employment pro, before these decisions are made. And they are also useful in navigating the ever-changing landscape of drafting OWBPA-compliant and otherwise enforceable separation agreements which, if signed, can avoid litigation.
3. **Define "Unreasonable"** - As discussed in LB4HR #8, it's easier to list the states that don't mandate notice to affected individuals when their personal identifiers (e.g., SSNs) in a database have been compromised than to list the ones that do. At last check, only AL, KY, MS, NM and SD do not require businesses who experience lost, stolen or misplaced PI to notify affected individuals. In most states, the statute reads like CT's, which requires the notice be made "without unreasonable delay." The Attorney General of CT is not so sure that two months is a swift enough response to satisfy the statute, so an investigation has been ordered into the theft of a laptop containing unencrypted data on 19,000 health care providers from the car of an insurance company employee and the reason(s) why it took two months for the insurer to notify CT residents of the theft. Timing is critical in protecting individuals from the effects of identity theft, so this case will be watched to see if it causes CT and other states to tighten up their notice requirements.
4. **That's Not Chicken Feed** - It began with an I-9 audit, followed by an ICE raid and ended with a poultry processor agreeing to pay \$1.5 million to settle criminal charges arising from the hiring of undocumented workers. Taking a peek inside what's involved with such a settlement, the employer has agreed that [1] the criminal case will be continued for two years (allowing the employer to make needed changes to avoid further prosecution); [2] it will adopt a two-year compliance plan, subject to court review; [3] it will begin using E-Verify and SSN verification on all new hires and current employees; [4] Spanish translators will assist with the I-9 process for

Spanish-speaking new hires; [5] it will provide regular training to employees on lawful hiring practices; and [6] its I-9's will be audited externally. Two individual managers named as co-defendants in the criminal case will have their cases dismissed upon successful completion of a one-year pretrial diversion program. *United States v. Crump* (D.S.C. 11-09) You may want to consider if any of these practices could or should be implemented in your organization now, to avoid the problems that led to this costly result.

5. **Help for Employers of Citizen Soldiers** - The Small Business and Military Family Assistance Act (S. 2748, H.R. 4042), if passed, will provide employers of less than 50 workers with a 20% tax credit (maximum \$4000 @) on any "gap pay" (i.e., the difference between the employee's military and civilian pay) provided to employees called to active duty military service. This bill is being offered as a one-year extension of an existing wage credit program. For more info and to see a copy of the bill, go to <http://thomas.loc.gov> and insert the bill number(s).
6. **Moving Targets** - In 2003, IL enacted a law which required employers of 50+ employees to provide up to 12 weeks on unpaid leave per year to victims of sexual or domestic violence. This year, the eligibility line moved and now employers of 15 to 49 employees in IL must provide up to 8 weeks of unpaid leave per year for the same reasons. Multi-state employers must be especially vigilant in staying on top of changes in the applicable law, by delegating the duty to an in-house or outside resource or at least performing an annual review and update of your employee handbook, where these mandated benefits are usually communicated to your workers.
7. **Get to Know GINA** - The U.S. Dept's of Treasury, Labor and Health and Human Services published the 135-page Interim Final Rules Prohibiting Discrimination Based on Genetic Information in Health Insurance Coverage and Group Health Plans about a month ago, and they apply to the first plan year of health plans beginning on or after Dec. 7, 2009. To recap on Genetic Information Nondiscrimination Act (GINA) basics, it has two part or "titles." Title I affects health plans and health insurers by prohibiting the requirement of genetic tests, solicitation of genetic info or the use of genetic info for underwriting. Title II prohibits discrimination in employment based on genetic info, for employers of 15+ employees, and took effect Nov. 21, 2009. As always, the devil's in the details and there are many. Don't make the understandable but completely wrong decision that GINA has no impact on your workplace simply because you do not require or ask for the results of genetic testing. Simple inquires about family health history can cross the line, so make sure you are up to speed on GINA's requirements.
8. **Don't Drive if you're Tipsy, Buzzed or Blitzen** - That's just one of the catchy slogans available on breakroom posters, decals and website/Intranet banners for FREE, thanks to the Texas Dep't of Transportation and the National Safety Council, to remind your employees to drive safely this holiday season (available in English and Spanish). Just go to [www.txdotholiday.com](http://www.txdotholiday.com) and enter TXEMP to order your holiday materials. I've received my package and can attest that they do bring both holiday


cheer with adorable graphics and the quality of these materials (not the mention the message) is top notch! Here's another . . . "He sees you when you're drinking. He knows when you're .08. So designate a driver or take a taxi, for goodness sake." ☺

9. **Simply the Best** - My hat's off, to employers honored by the Dallas Morning News in their Top 100 Places to Work 2009 publication! Many are Legal Briefs for HR subscribers, so give yourself a pat a back for being the best of the best! It's always interesting when a survey asks employees to rate the importance of certain aspects of workplaces, and then opine on how well their employer rates in those same categories. It may come as a surprise to some, but even in a down economy "pay and benefits" is LAST in importance when viewed through employees' eyes. Here is a summary of what matters to them: employee engagement (80%), company direction (79%), execution of company's goals (74%), career paths (71%), workplace conditions (66%), good managers (61%) and pay and benefits (51%). This is great fodder for your next managers' meeting. For more details, go to [www.dallasnews.com/Top100](http://www.dallasnews.com/Top100).
10. **Thanksgiving** - This is the time of year that always remind me to be thankful and to do some thanking! As HR professionals, counsel and business owners and managers, you make your workplaces functional, safe, productive, fun ☺ and a source of pride (not just income) for so many people. You've been tasked with the complex job of shepherding the most important resource any organization has . . . its people. And you do it so well. In case you haven't heard it lately, THANK YOU for what you do, and have a wonderful Thanksgiving and holiday season with friends, family, colleagues and co-workers!
11. **For the Birds** - If you like being "tweeted" and want breaking news on employment law changes, follow me on Twitter. I'm at @amross.

Until next time,

Audrey E. Mross  
Labor & Employment Attorney  
Munck Carter LLP  
600 Banner Place  
12770 Coit Road  
Dallas, TX 75251

972.628.3661 (direct)  
972.628.3616 (fax)  
214.868.3033 (iPhone)  
[amross@munckcarter.com](mailto:amross@munckcarter.com)  
[www.munckcarter.com](http://www.munckcarter.com)



If you plan to attend the  
January Program and Luncheon,  
please RSVP to Katherine at  
[RSVPprograms@gmail.com](mailto:RSVPprograms@gmail.com)  
by 12:00 noon on **January 12<sup>th</sup>!!**