



BVHRMA Newsletter

June 2010

Chapter #0330



Articles

Monthly Program & Luncheon

➔ Monthly Program and Luncheon

TOPIC: *IMMIGRATION COMPLIANCE HOT BUTTONS FOR HR*

➔ Calendar of Events and Diversity Dates

WHEN: Thursday, June 3, 2010

➔ Legal Briefs

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

WHERE: College Station Conference Center

COST: \$10/member & first time guest
\$15/non-RSVP guest

SPEAKER: Robert F. Loughran, Partner, Foster Quan, LLP

Robert F. Loughran is a Partner of Foster Quan, LLP, and Managing Partner of the Austin Office. He has more than fifteen years of experience representing and advising multinational companies on U.S. immigration law.

Mr. Loughran specializes in representing both large, multinational corporate clients and immigrant investors seeking to establish and grow new businesses in the United States. Now rotating between the firm's Houston and Austin offices, Mr. Loughran originally founded the firm's Global Immigration Practice Group in Houston in 1993, established the firm's Austin Office in 2000, and co-founded the firm's Workforce Compliance Practice Group in 2003. He is Board Certified in Immigration and Nationality Law by the Texas Board of Legal Specialization. Currently serving as Vice Chair of the Texas State Bar Committee on Laws Relating to Immigration and Nationality, Mr. Loughran is also a Member of the Council of the State Bar of Texas Immigration & Nationality Law Section, and the Texas State Board of Legal Specialization Standards and Fitness Subcommittee for Immigration Law. As a Member of the State Bar Committee, he meets regularly with policymakers from U.S. Citizenship & Immigration Services (CIS), U.S. Immigration & Customs Enforcement (ICE), the U.S. Department of State, and the U.S. Department of Labor (DOL). Nationally recognized in U.S. immigration law, Mr. Loughran has previously served as the

American Immigration Lawyers Association (AILA) Liaison to both the Vermont Regional Service Center and the San Antonio District Office of the Department of Homeland Security. He is widely published in bar journals as well as publications of the Society for Human Resource Management (SHRM), HR Houston, Executive Relocation Council (ERC), and Austin Human Resource Management Association (AHRMA).

Mr. Loughran was recently recognized as one of Houston's "Top Lawyers" by Houston Magazine, and he has repeatedly received recognition as a "Texas Super Lawyer" by Texas Monthly Magazine. He has been named by Chambers U.S.A. as one of "The Best Lawyers in America," and has been recognized among "Who's Who Legal-Texas."

Mr. Loughran is a member of the College of the State Bar of Texas and has been admitted to practice before the U.S. District Court for the Southern District of Texas and the U.S. Court of Appeals for the Fifth Circuit. He received his baccalaureate degree from the University of Texas, and his law degree from South Texas College of Law in Houston. He also studied abroad at Universidad de Madrid, Spain, and Universidad de Concepcion, Chile.

If Attending: RSVP to Katherine at rsvpprograms@gmail.com by noon on Tuesday, June 1, 2010

What's coming up?

October 10-13, HR Southwest Conference
www.hrsouthwest.com

Diversity Calendar: JUNE 2010



Children's Awareness Month
Gay and Lesbian Pride Month (United States)

- 5 - World Environment Day
- 6 - Corpus Christi (American, Roman Catholic)
- 6 - D Day (United States)
- 20 - Father's Day (United States)
- 16 - Martyrdom Day of Guru Arjan (Sikh)
- 19 - Juneteenth (United States)
- 22 - America's Kids Day
- 27 - Martyrdom of Joseph & Hyrum Smith (Mormon)
- 28 - Stonewall Rebellion Day (United States)

History of Juneteenth

Juneteenth is the oldest known celebration commemorating the ending of slavery in the United States. Dating back to 1865, it was on June 19th that the Union soldiers, led by Major General Gordon Granger, landed at Galveston, Texas with news that the war had ended and that the enslaved were now free. Note that this was two and a half years after President Lincoln's Emancipation Proclamation - which had become official January 1, 1863. The Emancipation Proclamation had little impact on the Texans due to the minimal number of Union troops to enforce the new Executive order. However, with the surrender of General Lee in April of 1865, and the arrival of General Granger's regiment, the forces were finally strong enough to influence and overcome the resistance.

Later attempts to explain this two and a half year delay in the receipt of this important news have yielded several versions that have been handed down through the years. Often told is the story of a messenger who was murdered on his way to Texas with the news of freedom. Another, is that the news was deliberately withheld by the enslavers to maintain the labor force on the plantations. And still another, is that federal troops actually waited for the slave owners to reap the benefits of one last cotton harvest before going to Texas to enforce the Emancipation Proclamation. All or none of them could be true. For whatever the reason, conditions in Texas remained status quo well beyond what was statutory.

Juneteenth in Texas

On January 1, 1980, Juneteenth became an official state holiday through the efforts of Al Edwards, an African American state legislator. The successful passage of this bill marked Juneteenth as the first emancipation celebration granted official state recognition. Representative Edwards has since actively sought to spread the observance of Juneteenth all across America.

Source: www.juneteenth.com

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

Welcome to Legal Briefs for HR, an update on employment issues sent to over 4500 HR professionals, in-house counsel and business owners all over the U.S. to help them stay in the know about employment issues.

1. **Mothers Day** - The Patient Protection and Affordable Care Act (PPACA), signed into law on March 23, is a voluminous federal statute with all sorts of hidden surprises. One is an amendment to the FLSA at 29 USC sec. 207(r) which requires employers to provide reasonable unpaid breaks to a nursing mother, to express breast milk, for up to one year after birth of her child(ren). Further, the employer is to provide a place that is shielded from view and intrusions, other than a bathroom, which may be used for the task. These requirements will not apply to an employer with less than 50 employees, "if such requirements would impose an undue hardship by causing the employer significant difficulty when considered in relation to the size, financial resources, nature, or structure of the employer's business." PPACA does not pre-empt state law which, in some cases, is more restrictive (e.g., break must be with pay). A helpful website to research these state law variations is www.la lecheleague.com. Click on Resources and then Breastfeeding and the Law.
2. **New Look at ADA Accommodation** - A part-time retail clerk with a 5 to 9 p.m. work schedule asked to be moved to days, after an eye condition left her blind in one eye and made driving after dark "difficult and dangerous." Her request for a day shift was denied and there was no public transportation running after 6 p.m., so relatives drove her to/from work for awhile. She eventually resigned and then sued under the ADA for failure to accommodate her disability. The district court agreed with employer, saying that the requested accommodation had nothing to do with her work environment and that the ADA was meant to address barriers that exist inside the workplace. The 3rd Circuit reversed, noting that "reasonable accommodation" is defined in the ADA to include modified work schedules and holding that, sometimes, the ADA can obligate an employer to accommodate disability-related difficulties in getting to work, if reasonable. *Colwell v. Rite Aid Corporation* (3rd Cir. 4-10). This may be a good example of the effect of the ADAAA, which did not change the statutory definition of a qualifying disability but did expand the way in which the definition is to be interpreted, in order to expand employers' obligation to accommodate.
3. **Next Up?** - Proposed changes to the Diagnostic and Statistical Manual of Mental Disorders (DSM) include recognition of behavioral disorders such as addiction to gambling and the Internet. If the American Psychiatric Association's proposals are accepted, get ready for some ADA claims that might put employers over the edge. ☺
4. **Summer Jobs** - School's nearly out and with a tight job market, some students and recent grads may be offering to work for free, to get a foot in the door and/or gain industry experience. As tempting as that may be, the U.S. Dep't of Labor (DOL) recently reminded employers that there aren't many instances where they can have an

unpaid intern. Check out Fact Sheet #71 at www.dol.gov/whd/regs/compliance/whdfs71.htm. And let's refresh on the factors used by the DOL (and also by the DLSE in CA, effective April 7) to determine if a worker qualifies for unpaid intern status:

1. The training offered is similar to what would be given in a vocational school or academic institution;
 2. The training is for the benefit of the trainee (not the employer);
 3. The trainee does not displace regular employees;
 4. The employer providing the training derives no immediate benefit from the "work" of the trainee and on occasion, the training actually impedes the employer's operations;
 5. The trainee is not necessarily entitled to a job at the conclusion of the training period; and
 6. The employer and the trainee understand the trainee is not entitled to wages for the time spent in training.
5. **For Shame** - DOL is citing to the need for transparency in rolling out an expanded database of enforcement actions taken by the agency. OSHA and MSHA had already posted their stats, but now prospective hires, vendors and plaintiffs' lawyers can search, by employer, to find the number of violations, amount of back pay, number of employees receiving backpay, type of violation and penalties assessed under the Wage and Hour Division, the Office of Federal Contract Compliance Programs and the Employee Benefits Security Administration. Past, unsuccessful efforts to "blacklist" employers with employment law violations seem to have morphed into a public shaming initiative, so keep this in mind before settling complaints filed via a DOL agency.
6. **For the Record** - In the continuing war on employee misclassification, DOL announced a proposed record-keeping regulation change which would require employers who intend to treat an employee as exempt from FLSA's minimum wage and overtime requirements to [1] perform a classification analysis; [2] disclose the analysis results to the affected employee; and [3] keep the analysis on file and produce it, on demand, to a DOL investigator.
7. **More Misclassification Misery** - Another weapon has been added to the arsenal by Congress. Check out the Employee Misclassification Protection Act (H.R. 5107 & S. 3254) which, if passed, will amend the FLSA and require employers to [1] keep records of hours worked by independent contractors; [2] notify workers of their employee or contractor status and provide info from the DOL on how to file a complaint via the DOL website for perceived misclassifications; [3] pay penalties of up to \$1100 (first offense) and \$5000 (repeat or willful offense) per employee; and [4] pay treble damages (i.e., three times the base penalty) for willful violations of minimum wage and/or overtime laws arising from misclassification as a contractor. The bill also gives DOL and IRS the right to share data and enlists state unemployment compensation agencies (e.g., TWC) to conduct employer audits, looking for scofflaws. There are additional penalties for paying unreported wages to contractors who are truly

employees. To check out full text of these bills and monitor their progress, go to <http://thomas.loc.gov> and insert bill numbers.

8. **Weeding Out** - With 14 states permitting individuals' use of prescribed marijuana for medical problems, employers are left to wonder if they must accommodate a worker's use (or being under the influence) while on the job. At least in OR, the answer is "no." The OR Supreme Court noted that employers are free to discipline or discharge workers who violate workplace rules prohibiting use of illegal drugs, in a case involving a steel press operator. While the med-pot was OK under state law, it was still a no-no under federal law. *Emerald Steel Fabricators v. Bureau of Labor and Industries* (Ore. 4-10). If you are in AK, CA, CO, HI, ME, MI, MT, NV, NJ, NM, OR, RI, VT or WA, become familiar with your statute's exceptions and make sure your substance abuse policy is in sync, if you want to keep your workplace grass-free.
9. **Dispute Comes to a Head** - Workers at Carlsberg Brewery in Denmark, including truck drivers, are all frothed up that their unlimited access to free beer throughout the workday has been limited to three pint-sized cups with lunch each day. The company defends the move as socially responsible and mainstream (given a survey showing that 93% of Danish companies are zero-tolerance when it come to alcohol at work) but the workers went on strike and declared the right to swill suds sacred, along with other employee benefits such a year's sick leave at full pay and two free crates of beer each month.
10. **Smoke Signals** - The Centers for Disease Control and Prevention (CDC) notes that Texas is one of only seven states that lacks a statewide smoke-free law for workplaces and that states that have such laws saw a 17% reduction in hospitalizations from heart attack. A smoke-free bill failed during the 2009 Texas legislative session, but it is likely to reappear in 2011. If you have feelings on this issue, you may want to visit with your state legislators before they gather in Austin, in January 2011.
11. **Find It** - If you're looking for the new HIRE Act Employee Affidavit (Form W-11) it can be found at www.irs.gov/pub/irs-pdf/fw11.pdf. This is the form new hires must sign, to certify their prior unemployment (no more than 40 hours worked in preceding 60-day period), thereby qualifying the employer for certain tax breaks. IRS says it will release a revised Employers Quarterly Federal Tax Return (Form 941) in May. The current posted version, with Feb. 2010 revision date, does not address the new tax breaks for hiring the unemployed. Stay tuned!
12. **Post It** - Big thanks to Ron Holifield, CEO of Strategic Government Resources, Inc., for sharing that the SGR job board (www.GovernmentResource.com) now allows private sector firms to post jobs that they think individuals employed in the public sector might be interested in.
13. **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
www.munckcarter.com

If attending luncheon on June 3rd:

Please RSVP to Katherine at
rsvpprograms@gmail.com by noon on
Tuesday, June 1, 2010