

**DHS ISSUES PROPOSED REGULATION RESCINDING NO-MATCH RULE**



**Jerry Pinn** .....

**“DHS gives some hint at future direction of enforcement by stating that it has established and distributed to all field offices guidance about the issuance of administrative fines and standardized criteria for the imposition of such fines.”**

On August 19, 2009, the Department of Homeland Security (DHS) issued its proposed regulation rescinding the procedures that employers may take to acquire safe harbor from receipt of no-match Social Security letters. The 2007 final rule was preliminarily enjoined by a Federal District Court in California on October 10, 2007. After further review, DHS has determined to focus its enforcement efforts relating to the employment of aliens not authorized to work in the U.S. on increased compliance through improved verification, including participation in E-Verify, the IMAGE Program, and other programs.

As a basis for its policy change, DHS explains that other programs provide better tools for employers to reduce incidences of unauthorized employment and to better detect and deter the use of fraudulent identity documents by employees. The targets of ICE investigations are employers who hire undocumented workers to obtain a financial advantage over their competitors by paying lower wages, offering few if any benefits, failing to comply with tax laws, and avoiding health and safety related complaints. ICE focuses on the most egregious violators, namely employers who engage in human smuggling, identity theft, and Social Security number fraud.

DHS gives some hint at future direction of enforcement by stating that it has established and distributed to all field offices guidance about the issuance of administrative fines and standardized criteria for the imposition of such fines. DHS expects that the increased use of the administrative fines process will result in meaningful penalties for those who engage in the employment of unauthorized workers. Further, since 2006, ICE has partnered with employers to provide “best practices,” and in FY 2008, ICE Outreach Coordinators made 517 IMAGE presentations to encourage employers to join that particular program.

DHS also makes an oblique reference to the significance of procedures similar to those suggested in the previous regulation that is being rescinded. It states that Social Security no-match letters have formed a basis for multiple criminal investigations by ICE and prosecutions on charges of harboring or knowingly hiring unauthorized aliens. “ICE has determined that focusing on the management practices of employers would be more efficacious than focusing on a single element of evidence within the totality of the circumstances.”

**Wimberly Lawson Comments**

The first question readers may ask is about the possible effect of a pending House bill that would withhold any funding for rescission of the no-match rule. Because this funding pertains to the next fiscal year, and other factors, it is not expected that the House bill will adversely affect the current proposed regulation.

There is some question suggested in the DHS discussion that no-match letters, officially known as “Employer Correction Requests,” may not be utilized by Social Security in the future. Such letters have not been issued over the

Continued on page 4 ►►

*Our Firm* Wimberly Lawson Seale Wright & Daves, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.

## DEMOCRATS MAKE CARD-CHECK COMPROMISES TO ENCOURAGE PASSAGE



**Gary Wright** .....

**"In addition, the Labor Board could seek injunctive relief in Federal Court where there is reasonable cause to believe that the employer interfered with employee rights."**

.....

either party consenting to the contract, and without employees having a vote on the contract. In addition, penalties for labor law violations by employers would dramatically increase. Legislation would award triple back pay to employees who are unlawfully discharged while involved in a union campaign. Additional civil penalties could be imposed. In addition, the Labor Board could seek injunctive relief in Federal Court where there is reasonable cause to believe that the employer interfered with employee rights.

Union chances have improved since Al Franken has been installed as the Democratic Senator from Minnesota, and a "swing-vote," Sen. Arlen Specter, has allegedly announced his support for the compromise legislation. However, the recent death of Sen. Edward Kennedy may complicate the process, as possibly will the continuing absence of Sen. Robert Byrd, who is recuperating from illness.

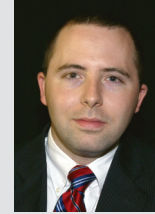
Reports continue to circulate that a group of Democratic senators have worked out a compromise to change the Employee Free Choice Act (EFCA) in order to secure the sixty votes necessary to avoid a filibuster and pass the Bill. A compromise would drop the card-check provision in favor of mandated "quickie" union elections. Elections would have to be held within ten days and after thirty percent of workers sign cards in favor of union representation. Currently such union campaigns average about six weeks.

All of the other onerous provisions of EFCA would remain, however. These include the provision that if the parties are unable to reach agreement on a contract within 120 days, the union could refer the dispute to binding arbitration. The arbitrator would write a first contract for the parties without

## KNOW YOUR ATTORNEY

**James W. Friauf**

.....



JAMES W. FRIAUF is an Associate in the Knoxville, Tennessee office of the Firm, which he joined in September 2009. He practices in the areas of general civil litigation with an emphasis on workers' compensation defense and subrogation. James received his A.S. degree from Richard Bland College of the College of William and Mary. He attended the University of Virginia and Middle Tennessee State University, graduating cum laude in 2005 with a B.S. Degree, majoring in Political Science. James received his J.D. from T.C. Williams School of Law at the University of Richmond in 2008 where he was awarded for outstanding oral advocacy in 2006, was a Member of Moot Court Board 2006-08, a member of Moot Court Interscholastic Competition Team 2007, and Executive Member and Treasurer of Moot Court Board 2007-08.

**Be sure to visit our website often**  
**[www.wimberlylawson.com](http://www.wimberlylawson.com)**  
**for the latest legal updates, seminars, alerts and firm biographical information!**

### Upcoming Seminars

**October 19, 2009 –**

*ADAAA Update and Accessibility Law*  
Northeast State Technical Community College – Blountville

**October 20, 2009 –**

*Aiming at a Moving Target: Tips for Complying with Recent Changes in Workers' Compensation and Employment Law*  
South Central Tennessee Career Center – Columbia

**October 20, 2009 –**

*ADAAA Update and Accessibility Law*  
Walters State Community College – Morristown

**October 27, 2009 –**

*Mandates, Manuals, and Manicures: A Comprehensive Employment Law Seminar*  
Motlow State Community College – Tullahoma

**November 5 – 6, 2009 –**

*Target Out of Range – The Wimberly Lawson Labor & Employment Law Update*  
Knoxville

(There's still time to register – please see enclosed brochure).

## THE PROBLEM WITH BLACKBERRIES



**Carol Merchant** .....  
Consultant

“Employers often think they have a simple solution by maintaining a policy against off-the-clock work or unauthorized overtime.”

Employers that rely on employees to use employer-supplied laptops, BlackBerries, PDAs, Smart Phones, cell phones and remote access to keep them connected to their work site outside the office, on nights and on weekends, have to face numerous legal issues. That is, they face new liability risks on wage and hour issues, confidentiality breaches, inappropriate use of equipment, and safety concerns.

Under the Wage-Hour laws, employers must pay non-exempt employees for all “hours worked.” Such “hours worked” include work done off-premises as long as the employer knows or has reason to know that the work is being performed.

Employers often think they have a simple solution by maintaining a policy against off-the-clock work or unauthorized overtime. Unfortunately such policies are not a complete defense, as it remains the employer’s duty to insure that only authorized work is performed. While these issues do not arise in connection with exempt salaried personnel, the problems with non-exempt employees are significant. Time spent sending and receiving work-related emails is likely to be compensable.

In a recent case handled by Wimberly Lawson, plaintiffs are seeking all emails from and to off-site employees, almost certainly to support a claim that certain “work” was being performed off the clock. There is another publicized settlement involving a Fortune 500 company in which certain personnel were required to login and do certain brief work on their computers before traveling to work. They claimed that the time on their computers was not only “hours worked” but also started the “continuous work day” principle which made their commuting time to work also compensable. The case was ultimately settled for a large amount of money.

There are certain exceptions to the “hours worked” principle, including the *de-minimis* concept. A number of courts have concluded that any task or group of tasks is not compensable or is *de-minimis* if it takes less than 10 minutes, but other courts have tied the *de-minimis* test to the administrative burden of tracking the additional time. Since time spent checking Blackberries, PDAs, cell phones, etc. is probably time which can be tracked, an employer should be cautious in exercising this exception if the total time spent each day in these activities exceeds 10 minutes. For time which cannot be tracked, employees often have a different view of how much time it takes to perform the tasks. Some employers, as a precaution, add “add-on” or “plug” time to give employees a few extra minutes of paid time to compensate for such offsite work, but even that is not a complete defense in every case.

An example of the problem is shown by the recent Ninth Circuit ruling in *Rutti v. Lojack Corp., Inc.*, 2009 WL 2568661. There, an employee brought a class action under the wage-hour laws, seeking compensation for time the technicians spent commuting to and from work sites and for time spent on preliminary and postliminary activities performed at their homes. The plaintiffs argued that they spent time in the morning receiving assignments for the day, mapping routes and prioritizing jobs, and logging on to a hand-held computer device that informed plaintiffs of jobs for the day. The plaintiffs argued that, under the continuous work day doctrine, because their work began and ended at home, they were entitled not only to be paid for the homework time but also for their travel time to and from work. The employer was fortunate to prevail on most of the claims on the basis that such preliminary activities were not related to the commute and were not principal activities or were *de-minimis*.

What is an employer to do with such difficult legal issues existing? One potential but unattractive solution, is simply not to issue BlackBerries to non-exempt personnel. Another potential solution is to devise a BlackBerry policy detailing all aspects of its expectations and directives regarding offsite work and BlackBerry use.

**TO SUBSCRIBE** to our complimentary newsletter,  
please go to our website at [www.wimberlylawson.com](http://www.wimberlylawson.com) or email  
[bhoule@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)

**“DHS PROPOSED  
REGULATION”  
continued from page 1**

last two years. Regardless of whether or not such letters are discontinued in the future, employers continue to receive similar letters from Social Security, entitled “Request for Employer Information” and occasionally, “Request for Employee Information.” Without a safe harbor regulation, employers will need to develop strategy and protocols as to how to respond to such requests

that may or may not put them on constructive notice of unauthorized status, or at least warranting some further action. While some employers may choose to follow procedures similar to those suggested in the no-match regulation that is being rescinded, others may decide to implement either less stringent or more stringent protocols. The key is to take some responsible corrective action or investigation in response to the letters, and to document that such steps have been taken.

### E-VERIFY REQUIREMENT FOR GOVERNMENT CONTRACTORS GOES INTO EFFECT

The Federal Acquisition Regulations (FAR) regarding E-Verify went into effect on September 8, 2009. The U.S. Chamber of Commerce and other groups had attempted to enjoin the regulation pending their appeal of a District Court ruling on the validity of the new regulation. Thus, employers who are covered contractors or subcontractors must comply with the FAR regulations or possibly lose the opportunity to work on government contracts.

*Must an employer re-screen existing employees who have been screened through E-Verify?* No. An employer, however, must screen all existing employees hired after November 6, 1986 who work on the government contract in the United States and who have not been screened through E-Verify.

*If the employer is a supplier of goods to a federal contractor, does the employer have any additional obligations under the new regulations?* Not necessarily. The new regulations apply to subcontracts for commercial and non-commercial services and construction. The new regulations do not apply to subcontracts for commercially available off the shelf (COTS) items. The tier does not matter.

*Does an employer who is a contractor have to verify the employees of a subcontractor?* No, but the contractor is responsible for the subcontractor’s compliance with the E-Verify requirements if the subcontract (1) is for construction or for commercial or noncommercial services (except for commercial services that are part of the purchase of a COTS item [or an item that would be a COTS item, but for minor modifications], are performed by the COTS provider, and are normally provided for that COTS item); (2) has a value of more than \$3,000; and (3) includes work performed in the United States.

*What is a COTS item?* Commercially available off-the-shelf (COTS) item means any item of supply (other than real property) that is (1) used by the general public and made available for sale to the general public; (2) sold in substantial quantities in the commercial marketplace; and (3) offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace. COTS does not include bulk cargo. “Bulk Cargo” means cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and, therefore, ceases to be bulk cargo.

### NEW FORM I-9

The Department of Homeland Security (DHS) issued a new Form I-9 that is available at [www.uscis.gov/forms](http://www.uscis.gov/forms). The new form has a revision date of August 7, 2009 in the lower right hand corner and an expiration date in the upper right hand corner of August 31, 2012.

DHS also announced that employers may continue to use the Form I-9 with the February 2, 2009 revision date even though the expiration date is June 30, 2009.

Accordingly, Form I-9 with either revision date (February 2, 2009 or August 7, 2009) can be used by employers until August 31, 2012.



**Wimberly Lawson**

*Attorneys & Counselors at Law*

We invite you to attend our 30th Annual Labor and Employment Law Update

## **TARGET OUT OF RANGE**



### **THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE**

**Knoxville Marriott Downtown  
500 Hill Avenue, Knoxville, Tennessee  
November 5 & 6, 2009**

#### **A FEW COMMENTS FROM PRIOR YEARS**

““ Accurate updates -  
excellent presentations ““

““ This is always the most  
valuable seminar of the year. ““

““ Very informative -  
great resource ““

““ So well organized -  
materials, speakers;  
the best seminar  
presentation of any  
I have attended. ““



**GUEST SPEAKER**  
Hallerin Hilton Hill  
*Author, Motivational Speaker,  
Trainer, Talk Show Host*



**Wimberly Lawson**

*Attorneys & Counselors at Law*

[www.wimberlylawson.com](http://www.wimberlylawson.com)



**Wimberly Lawson**

*Attorneys & Counselors at Law*

## **TARGET OUT OF RANGE**



Dear Clients and Friends:

Our Annual Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. Please plan now to join us.

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the twenty-five or more topics are:

- FMLA Amendments and Issues
- Records Retention and Destruction
- Amendments to Americans with Disabilities Act
- COBRA Regulations
- Genetic Information Non-Discrimination Act
- Wage/Hour Compliance under New Administration
- Lilly Ledbetter Fair Pay Act
- Employee Free Choice Act
- I-9, E-Verify and Immigration Issues
- Recession and RIFs – Tips for Dealing with the Downturn
- Workers' Compensation Strategies

Join us in Knoxville on November 5 and 6! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves  
Managing Member

**We are also pleased to announce that our keynote speaker will be author, motivational speaker, trainer, radio talk show host and one of the nations most sought after public speakers,**

***Hallerin Hilton Hill***



## AGENDA

**Thursday, November 5, 2009 (9:00 a.m. - 5:00 p.m.)**

**8:00 a.m. – 9:00 a.m. Registration and Continental Breakfast**

**9:15 a.m. - 10:45 a.m. - General Session**

The Year in Review - Employment/Labor Update  
Wage and Hour Insights Regarding U.S. Department of  
Labor Enforcement of FLSA

ADAAA - What Difference Does it Make?

Pending Workplace Legislation - Are You Ready for Change?

**11:00 a.m. - 12:00 p.m. - Breakout Sessions**

Employee and Employer Rights and Obligations Under the FMLA

HR Jeopardy - the Game (Interplay between ADA/FMLA/WC)

OSHA - There is a New Sheriff in Town

Workers Compensation - Strategies to Manage Claims

Immigration Issues from A to Z

**12:00 p.m. - 1:30 p.m. - Lunch** (*Courtesy of Wimberly Lawson*)

**1:30 p.m. - 2:30 p.m. - General Session**

“Striking the Right Chord with the Six Strings of Success for  
Maximum Personal and Professional Effectiveness” (by Hallerin Hilton Hill)

**2:45 p.m. - 3:45 p.m. - Breakout Sessions**

Recession, RIFs and Reality: Tips for Dealing with the Downturn

Major Labor Law Reform - EFCA, NLRB Decisions, and More

Workplace Violence - Prevention and Policies

Wage and Hour Issues - A Refresher Course for Compliance

Individual Employee Contracts - Who, What, When & How

**4:00 p.m. - 5:00 p.m. - General Session**

Records Retention and Destruction

Dress Codes and Employee Appearance Issues

Ledbetter Fair Pay Act - What It Means to You

Electronic Discovery Rules - What They Mean to You Before a Lawsuit is Filed

**5:00 p.m. – 7:00 p.m. - Reception** (*please join us for scrumptious hors d'oeuvres*)

**Friday, November 6, 2009 (8:30 a.m. - 12:30 p.m.)**

**8:00 a.m. – 8:30 a.m. - Continental Breakfast**

**8:45 a.m. - 9:45 a.m. - General Session**

OFCCP and Affirmative Action Update

Class Action Lawsuits - Could This Mean You?

Developing a Crisis Management Plan

**10:00 a.m. - 11:00 a.m. - Breakout Sessions**

Union Organizing Update - Don't Be Caught Unaware

Alternative Dispute Resolution - Mediation & Arbitration Analyzed

Socialism Run Amok - Employee Benefit Strategies in an Era of Governmental Mandates

Immigration Worksite Enforcement

HR Jeopardy - the Game (Interplay between ADA/FMLA/WC)

**11:00 a.m. - 12:30 p.m. General Session**

EEOC Enforcement Initiatives

New Prohibitions Regarding Use of Genetic Information

Diversity - Why Can't We All Get Along?

2009 COBRA Subsidy

**12:30 p.m. - 12:45 p.m. Conclusion and Prizes**



This program has been approved for 9 recertification credit hours toward PHR, SPHR and GPHA recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI home page at [www.hrci.org](http://www.hrci.org).

This program has been accredited by Tennessee CLE for 9.0 general credit hours.



# Wimberly Lawson

Attorneys & Counselors at Law

## Thirtieth Annual Labor & Employment Law Update Conference

Knoxville Marriott - Knoxville, Tennessee  
November 5-6, 2009

### COST:

Early Bird (registration AND payment received by October 1)  
\$295 per person  
\$275 for each additional person from same company  
\$230 for eight or more from same company

Registration and payment received AFTER October 1  
\$335 per person  
\$315 for each additional person from same company  
\$295 for eight or more from same company

### REGISTRATION INCLUDES:

Seminar (1 1/2 days), materials, two continental breakfasts, lunch and evening reception on Thursday, November 5, 2009

### CANCELLATION CHARGE:

50% cancellation fee will be incurred for cancellations after October 14. Cancellations made after October 28, 2009 will forfeit registration fee (registrants will receive the conference materials post-seminar)

### HOTEL ACCOMMODATIONS Knoxville Marriott • 500 Hill Avenue

### SPECIAL RATES AVAILABLE

Be sure to state you are attending the Wimberly Lawson conference in order to receive the room rate of \$105.95/standard.

**800-836-8031**

**RESERVE ONLINE** at [www.marriott.com/TYSMC](http://www.marriott.com/TYSMC)  
(use the Group Code LAWLAWA to reserve at the conference rate)

### FOUR WAYS TO REGISTER

1. Mail to: Bernice Houle  
Wimberly Lawson Seale  
Wright & Daves, PLLC  
P.O. Box 2231  
Knoxville, TN 37901
2. Fax to: 865-546-1001
3. Email to: [bhoul@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)
4. Via website: [www.wimberlylawson.com](http://www.wimberlylawson.com)



### GUEST SPEAKER

Hallerin Hilton Hill  
Author, Motivational Speaker,  
Trainer, and Talk Radio Host

### Striking the Right Chord with the Six Strings of Success for Maximum Personal and Professional Effectiveness!

Hallerin Hilton Hill will inspire and challenge you to reach your own personal and professional success with his latest presentation.

Hallerin is a radio talk show host, motivational speaker, and trainer. Hallerin's morning radio show airs from 5:30-10 every weekday mornings on Newstalk 100 WNOX. Hallerin was named to the "Top 100 Most Powerful People in Tennessee" and the "Top 50 Most Powerful African-Americans in Tennessee by Business Tennessee magazine (April 2004; page 39). He is the author of the books *Make 'em Say WOW!* and *The Seven Pillars of Wisdom*. Hallerin is also the television talk show host of *Anything Is Possible*, airing Sunday's at noon on the NBC affiliate in Knoxville. Hallerin has been voted Best Talk Show host by Metro Pulse 9 years in a row. His mission is to inspire, inform and entertain every time the microphone comes on. Hallerin is a graduate of Oakwood College in Huntsville, Alabama where he studied Communications. He is married to Nedra, and they have two children, Hallerin II and Halle Nicole. Hallerin is the CEO and founder of Wisdom House - a multimedia company focused on inspiring people around the world to grow in wisdom. He speaks to thousands of people each year to help inspire, motivate and encourage excellence.

Name \_\_\_\_\_

Company \_\_\_\_\_ Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ Fax \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_

Email \_\_\_\_\_

BPR and State for CLE: \_\_\_\_\_ No. Attending Reception: \_\_\_\_\_

Special Needs? If you should have any special needs, such as wheel chair access or special dietary requirements, please contact Bernice Houle at 865-546-1000 no later than 10 days before the event.