Wimberly Lawson
Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

Briefly

October 2010 Volume 10, Issue 10

STATES AND FEDS FIGHT OVER NEW HEALTHCARE LAW

Catherine Shuck

"Many states have brought legal challenges to the mandate that requires almost all Americans to have some form of insurance by 2014, arguing that the so-called "individual mandate" is unconstitutional."

A growing number of states are challenging the Patient Protection and Affordable Care Act ("PPACA") in one way or another. Many states have brought legal challenges to the mandate that requires almost all Americans to have some form of insurance by 2014, arguing that the so-called "individual mandate" is unconstitutional. The states argue that the federal government is overreaching its taxing and Commerce Clause authority by penalizing people for not taking an action - not purchasing health insurance - and also that the law will destroy the states' constitutional sovereignty and burden them with uncontrolled Medicaid costs. In one of the more high-profile cases, a federal judge in Florida recently denied the Obama Administration's attempt to have the lawsuit there dismissed. Calling the individual mandate an "unprecedented" exercise of Congressional authority, the court ruled on October 14 that the challenge to the healthcare overhaul, brought by the state of Florida and joined by nineteen other states, can go forward.

In a similar case in Virginia, the federal court also rejected the federal government's attempts to have the lawsuit dismissed. The Virginia judge, like the Florida judge, has appeared sympathetic to the states' arguments during the hearings held to date. On the other hand, a federal judge in Michigan recently granted the federal government's motion to dismiss Constitutional challenges to the mandate brought by an interest group, ruling that the individual mandate is Constitutional. The issue will likely ultimately make its way to the U.S. Supreme Court.

Aside from Constitutional challenges, PPACA creates much potential for disagreements between the states and the federal government because it provides for a great deal of interaction between the state and federal governments, and in some cases provides for federal actions should the states fail or refuse to act. For example, should the state fail to set up a high-risk insurance pool, the federal government may take the action instead. In 2014, the law contemplates that the states will have created insurance exchanges to set up plans and coverage, but some big states, such as California and Florida, are already balking at such provisions, as either beyond their state laws or unaffordable.

In addition to the legal attacks, some 39 states have considered or are considering some type of legislative measure proposing to challenge the federal health insurance bill. Five states have already enacted laws saying in one way or another that its residents do not have to purchase health insurance. Four states are conducting referendums on the issue. In a vote held in early August in Missouri, almost 3/4 of the voters voted against key provisions of the healthcare law.

ADMINISTRATION WARNS INSURERS NOT TO BLAME RISING INSURANCE RATES ON HEALTHCARE LAW

Many commentators are predicting that the healthcare cost increases for employers next year will be about 8-9%, with about one-fifth of the increase attributable to the new healthcare law. In September, Kathleen Sebelius, Secretary of Health and Human Services, issued a

Continued on page 4

The Internal Revenue Service (IRS) announced on October 12, 2010 that the W-2 reporting requirement contained in the Patient Protection and Affordable Care Act (PPACA) will not take effect in 2011 as scheduled. PPACA requires employers to report the aggregate cost of applicable employer-sponsored coverage on Form W-2, effective for tax years beginning on January 1, 2011. The IRS explains in Notice 2010-69 that it is granting "interim relief" from the W-2 reporting requirement by providing that the reporting requirement "is not mandatory" for 2011. The IRS expects to issue guidance on the W-2 reporting requirement by the end of this year; look for it to take effect in 2012.

FEDERAL APPEALS COURT FINDS LOCAL IMMIGRATION LAWS TO BE PREEMPTED AND THUS VOID

Jerry Pinn

"An Arizona state immigration law is being challenged by the federal government as preempted by federal immigration laws, and thus void."

A current national controversy relates to the extent that state and local governments can pass and enforce immigration laws. An Arizona state immigration law is being challenged by the federal government as preempted by federal immigration laws, and thus void. The Arizona case is currently pending in the courts. One of the first local entities, however, to pass an immigration law, was the City of Hazelton, PA, which passed various local ordinances attempting to regulate employment of, and provision of rental housing to, illegal aliens. A federal circuit court of appeals has upheld a lower court's ruling prohibiting the enforcement of these ordinances. *Lozano v. City of Hazelton*, 2010 WL 3504538 (C.A. 3, Sept. 9, 2010).

The federal appeals court finds that the city's employment provisions stand as an obstacle to the accomplishment and execution of federal law, and thus are preempted. First, the local law significantly increases an employer's burden by creating a separate and independent adjudicative system for determining whether an employer is guilty of employing unauthorized aliens. Second, the ordinance contravenes Congressional objectives by altering the employment verification scheme created by federal law, inasmuch as the laws contradict Congressional intent for E-Verify to remain fully voluntary. The court comments that because of problems with the relevant databases, E-Verify has been alarmingly ineffective in verifying the employment authorization of work-authorized aliens and naturalized citizens, and thus has effectively resulted in discrimination against these groups. Additionally, the local law scheme increases the burden on interstate employers by failing to provide safe harbor for those who use the I-9 process, thus denying employers the benefits of uniformity. Finally, the local law upsets the careful balance under federal immigration law, by imposing additional sanctions on employers who hire unauthorized aliens, while not penalizing those who discriminate against aliens, thus putting all of its weight on the side of the regulatory scale. The court states this creates the exact situation that Congress feared: a system under which employers might quite rationally choose to err on the side of discriminating against job applicants they perceive to be foreign, a concept inconsistent with federal immigration law, and therefore which cannot be tolerated under the Supremacy Clause of the U.S. Constitution.

For related reasons, the ordinance's housing provisions are also found to be preempted by federal immigration law, the court noting that the federal prohibitions have never been interpreted to apply so broadly as to encompass the typical landlord/tenant relationship.

Editor's Comments

This is an extremely important preemption case, as it would invalidate state and local immigration laws in numerous states requiring use of E-Verify and related State measures. The issue will undoubtedly work its way to the U.S. Supreme Court, as there is now a split in the circuits inasmuch as a federal appeals court in San Francisco has upheld a state law mandating E-Verify. In the Arizona case, the federal government is weighing in on the side of urging federal preemption, which could have some effect on the ultimate resolution of the preemption issue. The decision would also seem to put additional pressure on Congress to come up with some solutions to the immigration dilemma, as the issue will continue to dominate the press and the politicians.

CURRENT STATUS OF FEDERAL IMMIGRATION ENFORCEMENT

While the Obama administration anticipates deporting about 400,000 persons this year, nearly 10% above the Bush Administration's 2008 total, the pace of I-9 audits has roughly quadrupled since President Bush left office. A June 30 memorandum from Immigration and Customs Enforcement (ICE) Director John Morton instructed officers to focus their "principal attention" on felons and repeat lawbreakers, commenting that the federal government lacked the resources to deport substantially greater numbers than are being currently deported. Similarly, the Obama Administration has moved away from using worksite raids to target employers, as just 765 undocumented workers had been arrested at their jobs this year, compared to over 5,000 in 2008, according to Department

Continued on page 4

HEWLETT-PACKARD SUES ORACLE
CLAIMING ITS CEO CAN'T WORK FOR ORACLE BECAUSE OF CONFIDENTIALITY AGREEMENT

Kelly Campbell ..

"While most states have trade secret laws that are applicable even without a signed agreement, confidentiality agreements can be broader and more effective."

Another high-profile non-competition case is making the press, although it involves the enforcement of confidentiality agreements rather than non-competition agreements. Former Hewlett-Packard CEO Mark Hurd had become involved in a scandal involving Jodie Fischer, a marketing contractor, actress and former Playboy model, who accused Hurd of sexual harassment. While the claims could not be substantiated, Hurd allegedly attempted to hide a relationship with Fischer, a move that ultimately led to his resignation. Thereafter, Hurd accepted the position of co-president with Oracle, and HP filed a lawsuit saying the appointment would put its "most valuable trade secrets and confidential information in peril." The suit claimed that serving as Oracle President would make it impossible for him to avoid using or disclosing HP's confidential information, a doctrine sometimes known as "inevitable disclosure." Hurd signed agreements with HP that prevent him from disclosing confidential company information and from soliciting HP customers, employees, or suppliers, according to the complaint. The case is *Hewlett-Packard Co. v. Hurd*, 110-CV-181699, CA. Superior Ct., Santa Clara County (San Jose).

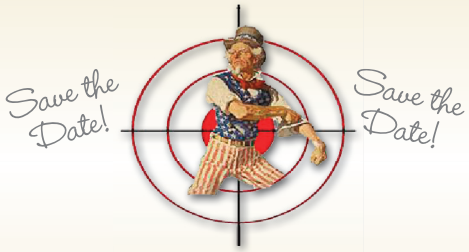
Some employers are reluctant to ask their employees to sign non-competition agreements, as such agreements are controversial, may not be enforceable, and employees may try to refuse to sign them. On the other hand, confidentiality agreements are widely accepted, and in, widespread usage. Almost any employee can in theory be privy to some type of confidential information, and thus they can be used at all levels of the organization. Confidentiality agreements in many states may be permanent, although some states require a reasonable period for such confidentiality agreements, such as five years or so. Of course, if the employer has not actually kept the information confidential, or if the information has become public information, then even a well-drafted confidentiality agreement may not be enforceable.

While most states have trade secret laws that are applicable even without a signed agreement, confidentiality agreements can be broader and more effective. Further, confidentiality agreements, as demonstrated in the HP case, can sometimes be used in a broader sense to keep a key person from working for a key competitor, under the "inevitable disclosure" doctrine that such a position will inevitably involve the disclosure of confidential company information.

KNOW YOUR ATTORNEY
FREDERICK J. BISSINGER

FREDERICK J. BISSINGER is Regional Managing Member of the Nashville, Tennessee office of the firm, which he joined in 1999. His law practice includes an emphasis in employment discrimination and wrongful discharge litigation, ADA and FMLA compliance, workers' compensation, and general liability. He received his Bachelor of Science, cum laude, in Economics from Washington & Lee University and his law degree from the Seton Hall University School of Law. Prior to entering private practice, Fred served in the United States Navy Judge Advocate General Corps from 1993-1997. Fred is a member of the Tennessee Bar Association and the Mid-South Workers' Compensation Association and is the 2010 Legislative Chair for Middle Tennessee Society of Human Resource Management.

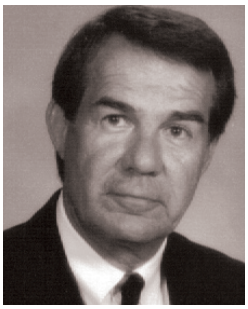
THE 2010 LABOR EMPLOYMENT UPDATE CONFERENCE



November 18 & 19, 2010
KNOXVILLE MARRIOTT
500 HILL AVE SE, KNOXVILLE, TN
Please visit our website
www.wimberlylawson.com
for registration information

TO SUBSCRIBE to our complimentary newsletter, please go to our website at www.wimberlylawson.com or email bhoule@wimberlylawson.com

ADMINISTRATION PAY-BACKS TO ORGANIZED LABOR



Ron Daves

"Some say that the Administration's inability to deliver on EFCA has caused it to be even more accommodating on other issues."

Speaking in August at a meeting at the AFL-CIO Executive Council, President Obama vowed to keep fighting for union-friendly legislation, as he urged labor leaders to get their members out to vote for Democrats in the upcoming mid-term elections. He said he intends to keep fighting to pass the Employee Free Choice Act, stating getting EFCA "through the Senate is going to be tough. It's always been tough, it will continue to be tough, but we'll keep on pushing." After the President's speech, AFL-CIO President Richard Trumka asked Obama what advice he would give workers as the election approaches, particularly for those who are trying to form a union at the workplace. The President responded by expanding on the words of President Franklin D. Roosevelt, who said "If I was a worker in a factory and I wanted to improve my life, I would join a union."

Some say that the Administration's inability to deliver on EFCA, has caused it to be even more accommodating on other issues. Three union attorneys have been appointed to the five-member NLRB, and their presence is already being felt. Over the last month, for example, the NLRB released a long-awaited decision allowing unions to banner and handbill blaming third-party neutral entities for not refusing to do business with the primary parties to a labor dispute, an activity that was once considered to be an unlawful secondary boycott. A new case has come out suggesting that employers may not unilaterally discontinue the union dues checkoff, even after the expiration of a collective bargaining agreement. Many more plans and developments are underway at the NLRB to make it easier for unions to organize. Similarly, the Wage-Hour and OSHA divisions of the Department of Labor have stepped up enforcement, in some cases reversing prior and well established policies.

"FIGHT OVER NEW HEALTHCARE LAW" continued from page 1

warning to the insurance industry that it will track those insurers who enact "unjustified" rate increases linked to the healthcare bill and may block those companies from the new marketplace for insurance coverage, the state exchanges. The Administration is upset that many insurers are notifying enrollees that their insurance premiums will increase next year as a result of the new healthcare law. The Wall Street Journal has reported that some carriers are asking for premium increases over 20%, attributing 1-9% points of the increases to the new healthcare law. Previously, the Administration had calculated that the portion of increases taking effect this fall would raise premiums no more than 1 or 2%, on average.

A debate is also swirling on whether overall healthcare costs will increase as a result of the healthcare bill, rather than go down, as the Administration had stated. Several reports show that the new healthcare bill not may lower the sharp increases in healthcare costs over the short or long term. In February, the Federal Centers for Medicare and Medicaid Services projected that overall national health spending would increase an average of 6.1% a year over the next decade. They also recalculated the numbers in light of the new healthcare bill and now project that the increase will average 6.3% a year. Short term is much worse, as U.S. health spending is projected to rise 9.2% in 2014, up from a 6.6% projected before the new law was passed. Critics of the new law argue that the figures show that it does not solve the cost problem, while advocates argue that the increase in healthcare costs are a bargain price in light of the expanded coverage.

"LOCAL IMMIGRATION LAWS PREEMPTED" continued from page 2

Homeland Security figures. Instead, ICE has increased employer I-9 audits, has examined the employee documentation of almost 3,000 companies suspected of hiring illegal workers, and has assessed $6.4 million in fines.

Editor's Comments

It is submitted that there are at least two significant implications to the most recent immigration developments. Federal immigration enforcement has shifted from massive and well-publicized "raids" to a "kinder and gentler" but potentially more effective method of increasing I-9 audits and fines. Second, while the federal government in the past has been somewhat "neutral" as to its attitude towards state and local immigration laws, the federal government has now taken the position that such state and local immigrations laws are generally preempted by federal immigration law. Of course, the latter change still needs to be played out in the courts, but the policy shift on the part of the federal government is clear. Meanwhile, the development of a new comprehensive federal immigration law seems to be moving very slowly, if at all, with the so-called "amnesty" provisions continuing to be a hang-up, as well as the politics of such a controversial subject.

Wimberly Lawson
Attorneys & Counselors at Law

We invite you to attend our 31st 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 18 & 19, 2010

KEYNOTE SPEAKER

Michael T. Strickland

Founder and CEO of Bandit Lites and Chairman, Knoxville Chamber of Commerce Board of Directors

SPECIAL GUESTS

EEOC OFFICIALS

Opportunities to participate in panel discussions entitled *"What You Always Wanted To Know, But Were Afraid To Ask"* with guest speakers Sarah L. Smith, Director, and Sylvia Hall, Enforcement Supervisory Federal Investigator with the Nashville, Tennessee office of the EEOC.

A FEW COMMENTS FROM LAST YEAR

"Fun, outstanding speakers and presentations... lively, entertaining."

"Very informative - organized and professional."

"It was very positive - I left feeling VERY motivated!"

www.wimberlylawson.com

PHR · SPHR · GPHR Approved Provider HR Certification Institute

The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

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:

- Impact of Healthcare Reform on Employers
- FMLA Intermittent Leave Regs and How They Affect You
- Social Media in the Workplace
- COBRA Expansion
- 21st Century Contracts and Agreements
- Avoiding Issues Later with Effective Hiring Now
- When is Mediation Best?
- Avoid Top Wage-Hour Violations
- Sweatpants, Tattoos and Body Piercings – Issues and What You Need to Know
- Violence in the Workplace
- Latest Developments in Workers Compensation
- Understanding the EEOC – EEOC Officials Will Comprise Panel

Join us in Knoxville on November 18 and 19! 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

AGENDA

Thursday, November 18, 2010 (9:00 a.m. - 5:15 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 - Privacy Rules, Selection Testing and More
DOL's Ramped-Up Enforcement
Jury Waivers/Mandatory Arbitration
Employment Non-Discrimination Act (ENDA)
Crisis Management, Response Plans and Strategies

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)
What OSHA's New Enforcement and Penalty Plan Means to You
Latest Developments on TN Workers Compensation Law
Non-Compete, Confidentiality & Separation Agreements for the 21st Century
Strategies to Meet the New Wave of Immigration Enforcement

12:00 p.m. - 1:15 pm - Lunch *(Courtesy of Wimberly Lawson)*

1:30 p.m. - 2:30 p.m. - General Session
Keynote Speaker - Michael T. Strickland,
Founder and CEO of Bandit Lites and Chairman,
Knoxville Chamber of Commerce Board of Directors

2:45 p.m. - 3:45 p.m. - Breakout Sessions
Defending Wage-Hour Class and Collection Actions/Q&A
The Obama Administration NLRB - What's Next?
EEOC Panel - What You Always Wanted to Know, But Were Afraid to Ask
Workplace Violence - What Should You Do Now?
ADAAA and Reasonable Accommodations Without a Hassle
Healthcare Reform-Effects and Strategies for Employers
Don't Be a Dope - Ensure Protection Under the Tennessee Drug Free Workplace Act

4:00 p.m. - 5:15 p.m. - General Session
Have You Met GINA? Genetic Information Non-Discrimination Act
E-Verify and Immigration Update
WARN Act Issues
Recreational Activities and Workers Compensation
Things That Go Bump In The Dark And Other Things That Keep Corporate Counsel Awake At Night

5:15 pm – 7:00 pm Reception (please join us for scrumptious hors d'oeuvres)

Friday, November 19, 2010 (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
No Safe Sex in the Workplace
Proliferation of Retaliation Claims
Nuts & Bolts of Class Action Claims
Update on Ledbetter Fair Pay Act Cases/Decisions

10:00 a.m. - 11:00 a.m. - Breakout Sessions
Open Forum and Q&A Regarding Compliance with ObamaCare
Most Common Mistakes In Tennessee Workers Comp Settlements
Avoiding and Remedying Wage-Hour Deficiencies
Defining New Reasonable Facts Other than Age in Discrimination Cases
EEOC Panel - What You Always Wanted to Know, But Were Afraid to Ask
Employee Handbooks - Critical Issues
Social Media in the Workplace - Problems and Cures

11:00 a.m. - 12:30 p.m. General Session
Internal Investigations - Risks and Rewards
Strategies for Mediating/Settling Employment Claims
Diversity - Why Can't We All Just Get Along?
Tattoos and Dress Codes - problems and Cures

12:30 p.m. Conclusion

PHR · SPHR · GPHR
Approved Provider
HR Certification Institute

The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

This program has been approved for 9.25 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.

This program has been accredited by Tennessee CLE for 9.25 general credit hours.

Wimberly Lawson
Attorneys & Counselors at Law

Thirty-First Annual Labor & Employment Law Update Conference

Knoxville Marriott - Knoxville, Tennessee
November 18-19, 2010

COST:

Registration and payment received AFTER October 15
- $339 per person
- $329 for each additional person from same company
- $299 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 18, 2010

CANCELLATION CHARGE:

50% cancellation fee will be incurred for cancellations after October 29. Cancellations made after November 10, 2010 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 $102.00/standard.

800-836-8031

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

KEYNOTE SPEAKER

Michael T. Strickland
Founder and CEO, Bandit Lites
Chairman, Knoxville Chamber of Commerce Board of Directors

Michael T. Strickland, founder and CEO of Bandit Lites, grew up in Kingsport, Tennessee. Along the way Michael played football and basketball, was an Eagle Scout, was twice president of his Junior Achievement companies and was an avid church member. Michael attended city schools in Kingsport and graduated from Dobyns Bennett High School in 1973. In 1968 at age 12 while in junior high school Michael started what would become his life long passion and his company, Bandit Lites. Michael moved the firm to Knoxville when he began to attend college at the University of Tennessee. He obtained a Bachelor of Science in Business from the University of Tennessee and then attended the University of Tennessee Law School. The company continued throughout college and has existed ever since under Michael's guidance and ownership. In 1999 CNN USA Today named Michael as Entrepreneur of the Year. Michael currently serves as Chairman, Knoxville Chamber of Commerce Board of Directors.

A large part of Michael's time is now spent philanthropically as Michael and Bandit Lites attempt to give back to a world that has so blessed the staff at Bandit Lites. Michael spends as much time as possible helping others through a number of different charities, agencies and foundations, including Boy Scouts of America, American Heart Association, Make a Wish Foundation and others to which he belongs.

Michael is married to Nicole and has two children, Chase and Cole. Michael and his family live in Knoxville and are very involved with the University of Tennessee as well as many little league sporting events and activities.

FIVE WAYS TO REGISTER

1. *Mail to:* Bernice Houle
   Wimberly Lawson Wright
   Daves & Jones, PLLC
   P.O. Box 2231
   Knoxville, TN 37901
2. *Fax to:* **865-546-1001**
3. *Email to:* bhoule@wimberlylawson.com
4. *Via website:* **www.wimberlylawson.com**
5. *Phone:* **865-546-1000**

*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.