



North Country Human Resources Association, Inc.

Society for Human Resource Management (SHRM) Affiliated Professional Chapter #0559

Serving North Country HR Managers since 1998

Website: <http://northcountryhra.org>

Newsletter – February 2011

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What's in the February Newsletter

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February Member's Meeting

DATE:	Tuesday, February 15, 2011
SITE:	Best Western, Watertown
TIME:	11:30 PM Social Networking 11:45 PM Buffet opened 12:00–1:00 PM Meeting Topic
TOPIC:	Employer Solutions seminar J. Martin Brayboy, VP, Employee Benefits Management Group Rose & Kiernan, Inc.
MENU:	Lunch Buffet
COST:	\$15.00 Paid Members \$17.00 Potential Members & Guests \$5.00 Non-Dining Members
RSVP:	Cherie Moore – Treasurer cherie.moore@na.manpower.com by 4 PM Tuesday, February 8, 2011



February's Topic:

The "Employer Solutions" seminar will review current employer Medical plan characteristics and trends. The presentation will compare and contrast high and low-performing benefit plans, and will present three distinct cost control approaches that can help employers achieve high performance. After the seminar, attendees will know what other employers offer for Medical benefits, they will be able to identify whether their employer's plan is high-performing or not, and be able to identify how to improve performance.

Cancellations:

We will make every effort to cancel the RSVP if given reasonable notice of cancellation. If NCHRA is charged for the meal, then you are responsible to pay for the meal.

Name tags will be provided at the door to help every one get to know their fellow members. Please remember to return them before leaving.

Remember...

- Bring your business cards with you to the monthly meetings to share and network with other members.
- At each meeting NCHRA Members can enter their business card in the door prize drawing for a free meal at the next meeting.
- The "Sally Kafka Memorial Membership Drawing" held in December 2011 awards a one year paid membership to the winner. Those members with perfect attendance at the monthly meetings (September 2010-December 2011) will be eligible for the drawing.



Message From The President

Typically this time of year we'd be congratulating any graduates of Jefferson Community College's Human Resource Certification Prep course. But this year the course is taking place in the spring instead of the fall. If you're interested in obtaining your Professional in Human Resources (PHR) or Senior Professional in Human Resources (SPHR) or Global Professional in Human Resources (GPHR) then you should check out JCC for their SHRM Essentials course that starts February 12, 2011. Contact JCC at 786-2438 to get more details. We look forward to congratulating the graduates in

NYS SHRM is also offering a certification preparation course that will be taught via a synchronous online learning environment using a "live" instructor. This will allow for student interaction, real time Q&A and a "virtual" classroom. It's scheduled for March and April. You can contact shrmeducation@shrm.org or call 800-283-7476, option 3 for more information.

The certification testing dates are May 1 through June 30, 2011 and again from December 1, 2011 through January 31, 2012. Applications need to be submitted a few months in advance. You can get more info at <http://www.hrci.org>. Check it out and consider applying. Having your HR credential increases your chances for career advancement and gives you an edge of those who are not certified. It opens up a network of over 115,000 HR practitioners across more than 70 countries. It provides you up-to-date information on the most current HR topics and developments. And don't forget that NCHRA offers scholarships for just this purpose....to increase the skill set of our membership which in turn benefits the agencies in our local community. Take the lead and sign up for your prep course today!

Our February meeting topic is on Employer Solutions for benefit plans. Given the overall general economic condition, and more specifically that of New York State, this topic is critical to employers for future planning. Martin Brayboy will provide information that can be readily utilized by us so we are prepared for various scenarios that lie ahead. I hope to see you there. Be sure to RSVP to Cherie by 4 pm on Tuesday, February 8 at cherie.moore@na.manpower.com



Kathleen Scheible, PHR
President,
North Country Human Resources Association

**JUNE CONFERENCE
PLANNING COMMITTEE MEETING
Following the February 15 General meeting
at the Best Western
COME JOIN US**

2011 Meeting Dates (through June)

March – June 2011 meeting dates for your calendar. All meetings will be held at the Watertown Best Western.

Meeting dates

Tuesday, March 15, 2011 (lunch)

Tuesday, April 26, 2011 (breakfast)

Tuesday, May 24, 2011 (breakfast)

Tuesday, June 7, 2011 (at State Office Building)

Topics

Staffing Services or Wage Theft Prevention Act

Affirmative Action

New Employee Processing and Files

5th Annual NCHRA Conference

2010-2011 NCHRA Membership

We have changed the fiscal year for the NCHRA to coincide with the calendar starting in 2011. The 2010-2011 membership year runs from September 2010 to December 2011. Annual membership dues are payable to NCHRA and mailed to:

NCHRA
PO Box 8302
Watertown NY 13601

A one-year professional membership is \$35 and two-year is \$60.

A one-year associate membership is \$20 and two-year is \$35.

Remember: there is a meal price difference for members and non- members so it's to your advantage to get your membership in early!

Types of memberships:

PROFESSIONAL MEMBERSHIP: Professional Members shall be limited to (a) those individuals engaged in Human Resources or Industrial Relations functions; (b) the teaching, administration or management of Human Resources; (c) individuals who previously served in those positions.

ASSOCIATE MEMBERSHIP: Individuals who do not meet the qualifications of the other classes of membership, but who demonstrate a bona fide interest in human resource management and the mission of the Chapter. Associate members may not vote or hold office in the Chapter.

STUDENT MEMBERSHIP: Individuals who are actively enrolled in Human Resources or related programs at the college or University level. Student members may not vote and may not hold office in the Association. Student members shall be entitled to full membership without the payment of dues.

North Country Human Resources Association Inc.

P.O. Box 8302, Watertown, NY 13601

Society for Human Resource Management (SHRM) Affiliated Professional Chapter #0559

Serving the North Country HR Managers since 1988.

MEMBERSHIP APPLICATION FOR 2010-2011



Web Address: <http://northcountryhra.org/>

Professional Member Dues: \$35.00 one year – non refundable if approved - due with your application.

\$60.00 two years – non refundable if approved -due with your application.

Associate Member Dues: \$20.00 one year – non refundable if approved - due with your application.

\$35.00 two years – non refundable if approved - due with your application.

Membership in NCHRA is contingent upon approval of Board of Directors.

Applicants will receive notification of membership decision.

Name: _____ (Membership is individual-not transferable)

Home Address: _____

Phone: _____

Company: _____

Address: _____

Email Address: _____ Company Web Site: _____

Telephone: _____ Fax: _____

Title: _____

Function(s): _____

Renewal Membership New Membership

Do you have a certification? SPHR PHR GPHR

did you hear about the NCHRA? _____

Are you a SHRM member? Yes No

How long have you been a SHRM member? _____ How

Internal Use Only

Application / Payment submitted on:

Type of Membership: Professional Associate Student Honorary

Membership expires: 2011 2012

Form of Payment: Personal Check Business Check Cash

Date Board approved:

Date Notification sent:

Manpower Employment Law Webinar

Join Manpower for a complimentary webinar about Employment Law.

What's New and What's Next in Employment Law for 2011

Wednesday, February 23

12 – 1 p.m. EST

Register for the webinar here:

<http://us.manpower.com/us/en/research/webinars/manpower-webinar-series/whats-new-and-whats-next-in-employment-law-for-2011.jsp>

This webinar will share:

- Up-to-the-minute information on the latest employment law developments
- A peek into the future of employment law
- Tips and tools on everything from hiring to firing
- Practical solutions based on real-life examples

Learn more about this webinar and the presenters here:

<http://us.manpower.com/us/en/research/webinars/manpower-webinar-series/whats-new-and-whats-next-in-employment-law-for-2011.jsp>

Feel free to forward this information onto colleagues or friends so they can join us on February 23. The presentation time is from **12 p.m. – 1 p.m. EST**.

We hope to see you there!

Cherie Moore

Lowville, NY



This program has been approved for 1 recertification credit hour toward PHR, SPHR and GPHR recertification through the Human Resource Certification Institute (HRCI). Please be sure to note the program ID number on your recertification application form. For more information about certification or recertification, please visit the HRCI homepage at www.hrci.org.

DISCLAIMER

This presentation and the materials are provided for informational purposes only and should not be considered legal or HR advice. Please consult your HR or Legal representative before using or implementing any of the processes or information contained herein.

Following the live webinar an e-mail will be sent out regarding HR Certification Institute continuing education credits. Please follow the directions to receive the Program ID. All certificates will be processed following the webinar due to HR Certification Institute specifications.

HR One HR eNews – Wage Theft Prevention Act (WTPA)

HR eNews- your connection to HR solutions!



Did You Know...

NYS employers will have expanded notice and recordkeeping requirements under a recently enacted regulation?

The Wage Theft Prevention Act (WTPA) was signed by then Governor David Paterson in December 2010 to combat “wage theft” by unscrupulous employers. In addition to expanding workers’ rights to receive wage information, the WTPA substantially increases the penalties that can be imposed against employers that fail to properly pay their workers. The Act goes into effect on April 12, 2011.

Notice Requirements...

New York State employers are currently required to provide written notice to new hires of their rate of pay, overtime rate, if applicable, and the employer’s designated pay day. The WTPA expands the information that will need to be provided to workers upon hire and annually thereafter to include the following:

- The employee’s rate or rates of pay and the basis of the rate(s);
- Whether the employee is being paid by the hour, shift, day, week, salary, piece rate, commission, or some other method;
- Any allowances claimed as part of the minimum wage (e.g., tip, meal, or lodging);
- If the employee is eligible for overtime, the employee’s regular hourly rate and the overtime rate of pay;
- The employer’s designated pay day;
- The name of the employer;
- Any “doing business as” (DBA) names used by the employer;
- The physical address of the employer’s main office or principal place of business and the mailing address, if different;
- The employer’s telephone number; and
- Any other information as the Labor Commissioner deems material and necessary.

The above information must be provided to employees in writing within 10 business days of hire and on or before each February 1st thereafter. The notice must be provided both in English and in the language an employee identifies at the time of hiring as his or her primary language.

Employees must receive at least seven calendar days advance written notice of any changes to be made in the wage information specified above unless the changes are reflected on their pay statements/stubs.

The Act will require that employees sign and date an acknowledgment form showing receipt of the wage notice each time it is issued. The acknowledgment form must include a statement that the employee notified the employer of his or her primary language and that the wage notice was provided in that language. Acknowledgment forms must be maintained by employers for six years.

The model format of the wage notice will be provided by the New York State Department of Labor.

An employer that fails to provide this notice can be required to pay the employee damages of \$50 for each workweek that the violation occurred up to a maximum of \$2,500 for employee-initiated complaints, plus costs and reasonable attorney's fees.

Payroll Recordkeeping Requirements...

The WTPA will require that employee pay stubs/statements include the following expanded information:

- the dates of work covered by that payment of wage;
- the name of the employee;
- the name of the employer;
- the address and phone number of the employer;
- the rate or rates of pay and basis thereof;
- whether the employee was paid by the hour, shift, day, week, salary, piece rate, commission or other;
- gross wages;
- deductions;
- any allowances claimed as part of the minimum wage; and
- net wages.

Pay stubs/statements for non-exempt employees (i.e., employees who must be paid overtime for all hours worked over 40 in a workweek) must also include the following:

- regular hourly rate or rates of pay;
- If paid by piece rate, the applicable piece rate or rates of pay and the number of pieces completed at each piece rate
- overtime rate or rates of pay;
- number of regular hours worked; and
- number of overtime hours worked.

In addition, upon request of an employee, the employer must furnish an explanation of how the employees' wages were computed.

Employers will be required to maintain these payroll records for six years.

Failure to provide the required information on an employee's pay stub/statement can result in a penalty of \$100 for each week that the violation occurred up to a maximum of \$2,500 for employee-initiated complaints, plus costs and attorney's fees.

Penalties for Failure to Comply with Labor Regulations...

Under the WTPA, an employer that fails to properly pay an employee or maintain the required payroll records can be subject to criminal penalties consisting of a fine or imprisonment for up to one year. For cases involving the underpayment of wages, the amount of wages recoverable as liquidated damages is increasing from 25% to 100% of the total wages due.

In cases where an employer retaliates against an employee, the Labor Commissioner can order the employee's reinstatement with back pay, front pay in lieu of reinstatement, liquidated damages of up to \$10,000, plus costs and attorney's fees.

This HR eNews is not intended to render legal advice but is meant for general informational purposes only.

If you have questions, contact HR One's Human Resource Hot Line at 1.800.457.8829.

BSK, PLLC Labor & Employment Law Information

Labor and Employment Law Information Memo

Visit BSK's Labor and Employment Law Practice Web Page

January 2011

THE WAGE THEFT PREVENTION ACT TAKES EFFECT ON APRIL 12, 2011

On December 13, 2010, former New York Governor David Paterson signed into law the Wage Theft Prevention Act (the "Act"), which imposes new notification and recordkeeping requirements on employers, significantly expands the Department of Labor's enforcement powers, and increases employers' potential liability for violations of the Labor Law. The Act goes into effect on April 12, 2011, so employers have less than three months to ensure that they are in compliance.

Written Notice Requirements

The Labor Law has long required employers to provide employees with certain information about their pay, but the Act expands the scope of this requirement. Under the Act, each employee must be given – at time of hire and annually on or before February 1 of each year – written notice of the employee's wage rate, regular pay dates, overtime rate (if applicable), the basis of the employee's wage rate (per shift, per hour, salary, etc.), the existence of any minimum wage allowances (e.g., tip, meal or lodging), the employer's name (and any d/b/a name), telephone number, and physical and mailing address. Importantly, the statutory language gives the Agency significant latitude to add further requirements to the written notice. The Commissioner of Labor is authorized under the Act to require an employer to provide any other information that the Agency deems "material and necessary." At this point, the Agency has not issued any regulations imposing additional requirements. In addition, a new written notice must be provided to an employee at least seven days in advance of any change by an employer, unless the change is reflected on the employee's paystub. The written notice must be provided in English "and in the Employee's primary language."

Written Acknowledgment

Every time a written notice is provided to an employee, the employer must obtain the employee's signed and dated written acknowledgment, which must be maintained for at least six years. The written acknowledgment also must contain certain required information, including an affirmation by the employee that he or she accurately identified his or her primary language to the employer and that the notice provided by the employer was in the primary language identified. The acknowledgment must also adhere to any "requirements" established by the Agency as to "content and form." At this time, the Agency has not published any additional requirements. Like the written notice, the acknowledgment must be in English and the employee's primary language. The Department of Labor is required to prepare sample dual-language "templates" that may be used to satisfy the notice and acknowledgment requirements, but they have not yet been published.

Wage Statements

The Labor Law currently requires employers to provide each employee with a pay stub that includes information relating to gross wages, deductions, and net wages. The new law requires detailed information about how the wages were calculated, including any allowances, the rate and basis of the pay, and the dates of work covered

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by the payment. For employees who are eligible for overtime, additional information must be included on each pay stub, including a statement of the regular and overtime rate of pay, and the number of hours worked at each rate. Piece rate workers must be notified on the pay stub of the applicable piece rate and the number of pieces completed at the applicable rate.

Expanded Remedies

There is a significant increase in potential liability for Labor Law violations under the Act. Employees have the right under the Act to bring a civil action in court for violations of the requirements to provide an employee with written notice of wages and with a compliant pay stub. An employee may recover statutory damages, attorney's fees and costs in connection with such a claim. Additionally, the Department of Labor is authorized to bring a civil or administrative action against an employer and assess penalties of either \$50 or \$100 per week (depending on the violation), with no cap on the penalty amount that may be assessed. Employers and certain "officers and agents" may additionally face criminal liability for failing to maintain payroll records. This criminal liability is extended by the new law to include LLCs and partnerships.

The new law also greatly expands the remedies available where an employer fails to pay wages and benefits to employees. Previously, an employee who prevailed in a court action alleging a failure to pay wages received the total amount of the underpayment, costs, attorney's fees, and, in some instances, liquidated damages equal to 25% of the underpayment. Under the new law, an employee can recover, in addition to the foregoing, prejudgment interest and liquidated damages equal to the 100% of the total wages owed.

The Act also permits the Department of Labor to require an employer who has been found to have violated the law to post in the workplace (on 8 ½ x 11 inch paper) a notice of the various violations committed by the employer. Such a posting must be affixed for up to one year in an area visible to employees. Additionally, where the Agency determines that an employer willfully failed to pay wages to an employee, the employer may be required to post a notice "visible to the general public" regarding the violations.

Anti-Retaliation Protection

Several key changes to the Labor Law's anti-retaliation protections have been made, such as requiring "any person" found to have engaged in unlawful retaliation to pay liquidated damages of up to \$10,000, along with costs and attorney's fees. Additional forms of damages may now be awarded, including front pay in lieu of reinstatement to employment. An employee can also pursue a civil action in court to assert unlawful retaliation. Retaliation is now listed as a class B misdemeanor.

Although the Act does not take effect until April 12, 2011, employers should begin reviewing their payroll practices to determine what they will have to change to comply with the law's various requirements. Given the new notice requirements, enhanced penalties, and ability to recover attorney's fees, we are likely to see an increase in claims as a result of the enactment of the Act.

If you have any questions about this Information Memo, please contact:

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I-9 Audits on Rise in Obama Administration

<http://www.shrm.org/LegalIssues/FederalResources/Pages/I9AuditsObamaAdministration.aspx>

Immigration raids have decreased and the number of I-9 audits has risen dramatically in the first two years of the Obama administration, according to immigration attorneys.

"In the past two years, the Obama administration has significantly changed the direction of Immigration and Customs Enforcement's worksite efforts," Kevin Lashus, an attorney with Greenberg Traurig in Austin, Texas, told *SHRM Online*. "The Bush administration was interested in taking the highest numbers of unauthorized workers into custody during any time frame. The Obama administration, on the other hand, is interested in targeting the employers that hired them."

Criminal Prosecutions

While Immigration and Customs Enforcement (ICE) in the Bush administration locked down buildings and herded workers into interrogations and ultimately onto planes for removal, the Obama ICE has increased administrative fines and paper audits—after which employers are asked to dismiss unauthorized workers, Lashus said. Criminal prosecutions of employers also have risen under the Obama administration, he added.

"Raids the way they used to be are not used by ICE anymore," agreed Mira Mdivani, an attorney with The Mdivani Law Firm in Overland Park, Kan. "In the past, ICE raided workplaces, arrested workers en masse and placed them in deportation proceedings." Since April 2009, ICE's stated priority has been the criminal prosecution of employers, she remarked. While ICE does arrest some undocumented workers, the agency no longer has spectacular raids where hundreds of workers are arrested, processed and tried in makeshift courts set up at plants.

"These days, ICE investigates the employer without the employer's knowledge for months before serving a notice of I-9 inspection on the unsuspecting employer," Mdivani said. "So while the decorum is much nicer, the consequences for the employer may be much more serious, including criminal and civil liability." The focus has changed, Mdivani concluded, to prosecuting employers, not workers.

Some raids may continue where undocumented workers are present, according to Hector Chichoni, an attorney with Duane Morris in Miami. But Secretary of the Department of Homeland Security Janet Napolitano "has pledged over and over to increase the focus on criminal punishment for employer violators." He added that under the Obama administration, possibly in association with other federal agencies such as the Labor Department and Internal Revenue Service, ICE inspections will continue and possibly increase.

"Instead of raids, the Obama administration has focused its efforts on auditing and investigating employers to determine if they are satisfying the Form I-9 requirements and are knowingly or unwittingly employing illegal workers," Chichoni said. "The fines for simple Form I-9 violations range from \$110 to \$1,100 per violation, with the higher range applicable to employers with a higher percentage of mistakes. Employers with large workforces that fail to properly manage the Form I-9 process can face fines of hundreds, or even millions, of dollars. Employers and their managers also can face criminal prosecution if they deliberately neglect their legal responsibilities in this area."

There are many more I-9 audits in the Obama administration, according to Bonnie Gibson, an attorney with Fragomen, Del Rey, Bernsen & Loewy in Phoenix. "There were so few audits in the Bush administration that I don't have any basis for comparison," she remarked. "There is a new crop of audit staff, and ICE investigators and fines and pending notices of intent to fine are up dramatically."

Agency Cooperation

Another change has been the increased cooperation among ICE and other government enforcement agencies. Gibson said ICE recently established a joint agency task force to gather information from multiple government sources and to target joint enforcement efforts.

Fusion centers have been established to facilitate cooperation among agencies, added Mary Pivec, an attorney with Keller and Heckman in Washington, D.C. Wage and hour investigators, ICE auditors and tax auditors all are in one place at the fusion centers to share resources, leverage information and pursue top-to-bottom audits, she said. An employer in trouble tends to have violations that crisscross the workforce enforcement realm, so the government thinks it makes good sense to maximize its resources and have agents from different departments investigate together, Pivec said. What starts out as a wage and hour audit may become an ICE audit, as investigators have been cross-trained to recognize what might be violations of laws other than the ones they enforce, she commented.

Technical Violations

As for government audits of employers, Pivec said employers are being “nicked and dimed with technical violations” of I-9s.

“In the past, an I-9 audit may have ended with a reprimand and a fine,” Mdivani added. “Now, it is ICE’s policy to use I-9 audits to lay the foundation for criminal prosecutions. When ICE is unable to do so, they still get their pounds of flesh.” She said that even in the case of a recent audit of Abercrombie & Fitch, where there wasn’t a single unauthorized worker, “ICE fined the employer \$1 million for what essentially were paperwork I-9 violations. Under these circumstances, every employer is vulnerable.”

Allen Smith, J.D., is SHRM's manager of workplace law content.

**Hancock & Estabrook, LLP Labor &
Employment Law News**



Immigration Newsletter (December 2010)

- Immigration and the 112th Congress
- H-1B Visas Still Available
- “Deemed Export” Attestation by Employers To Be Required on Certain I-129 Petitions
- PERM Labor Certification Program
- Supreme Court and Undocumented Workers — Another Arizona Law Being Tested
- Misuse of Social Security Number Considered a “Crime Involving Moral Turpitude,” Eighth Circuit Rules

Immigration and the 112th Congress

The ramifications of the November 2 elections that saw the GOP win tremendous gains in Congress are still unfolding. What will be the legislative priorities of the new Republican-controlled House? How will Obama and the Democrat majority in the Senate work with the House on various issues and forge bipartisan cooperation? Will gridlock prevail? Despite these uncertainties, one thing is for certain: the prospects for immigration reform will be dramatically and adversely affected by this recent shakeup.

The 112th Congress will have a markedly different composition than its previous

iteration. The House will flip from a 76-seat Democrat majority to a 50-seat Republican majority with some of the new seats being controlled by hard-line immigration conservatives. Meanwhile, the Senate will remain under Democrat control, but with a slimmer majority than what it enjoyed during the 111th Congress, with losses sustained by veteran pro-immigration senators.

With these changes comes a shakeup in the leadership and committee memberships. In the House, several crucial leadership positions are set to change hands when Congress is sworn in on January 5, and the Republicans become the party in power. The most visible change will come as Nancy



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Pelosi (D-CA) hands over the gavel as Speaker of the House to John Boehner (R-OH), who will now set the House's agenda and decide when to take up which issues. To say Rep. Boehner has been less than complimentary about comprehensive immigration reform is an understatement.

Rep. Lamar Smith (R-TX) has been tapped to take over as Chair of the House Judiciary Committee, the committee that oversees immigration. Rep. Smith has led the fight against immigration reform for nearly two decades and is the architect of some of the most unforgiving provisions in current law. In turn, he is widely expected to appoint Rep. Steve King (R-IA) to chair the House Subcommittee on Immigration. Representative King is a Tea Party conservative who relied heavily on virulent anti-immigrant rhetoric during the campaign, so his control over the Immigration Subcommittee is a significant obstacle to real progress. Rep. King is also on record favoring a constitutional amendment to the 14th Amendment to keep children of undocumented aliens from becoming U.S. citizens by birth, and has voiced support for the Arizona law, S.B. 1070, a draconian law that created a storm of controversy when it was enacted last May. Both Smith and King have called for tough enforcement measures and have been fierce critics of legalization proposals. In addition, they are likely to conduct oversight hearings demanding that the Obama Administration prosecute more aggressively the immigration laws on the books.

While it's hard to find a pro-immigration spin to the results in the House, the outcome in the Senate offered a bit more cause for optimism. The Hispanic and largely pro-immigration voting bloc was held largely responsible for Senate Majority Leader Harry Reid keeping his Nevada seat as well as the seats of other pro-immigration candidates — Patty Murray (D-WA), Michael Bennet (D-CO), and Barbara Boxer (D-CA) — whose races were some of the closest this year. These victories underscore the significance of the Latino vote and signal to both parties that campaigns fueled by anti-immigrant rhetoric do not guarantee results at the polls. Fortunately, the Senate immigration leadership positions are not likely to change. Senator Reid will remain Majority Leader and Chuck Schumer (D-NY) is expect to remain chair of the Immigration Subcommittee.

All told, those who oppose comprehensive immigration reform and other pro-immigration legislation will hold a strong and loud voice with tremendous power in the 112th Congress. But, with a President still committed to comprehensive immigration reform, a pro-immigration, majority leadership in the Senate, and a populace moderate on immigration, the prospects for positive immigration reform legislation — perhaps more likely piecemeal than comprehensive — are not entirely lost.



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H-1B Visas Still Available

Following years of extremely high demand, 2010 is proving to be a very slow year for H-1B visa petitions. This is good news for businesses hoping to add foreign professional workers over the next several months and their prospective employees.

As of December 10, the U.S. Citizenship and Immigration Services (USCIS) reports having accepted 52,400 H-1B visa petitions out of the 65,000 visas that are available each year. Another 900 visas are still available for those foreign nationals who are eligible to file under the “master’s cap,” which provides for an additional 20,000 visa numbers annually. For several years before the 2008 economic downturn, all H-1B visa numbers were exhausted the first day they became available. In 2009, the cap was reached on December 24.

If you are considering sponsoring a foreign worker in the near future, now is a good time to do so while visa numbers remain available. Once the cap is reached for FY 2011, employer-petitioners and their prospective employees will have to wait until October 1, 2011 to commence new H-1B work.

**“Deemed Export” Attestation by
Employers To Be Required on Certain I-
129 Petitions**

Beginning December 23, 2010, a new “deemed export” attestation will be required on Form I-129 nonimmigrant visa petitions for H-1B, H-1B1 (Chile/Singapore), L-1, and O-1A petitioners. The Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) require U.S. persons to seek and receive authorization from the U.S. government before releasing controlled technology or technical data to foreign persons in the United States. Under both the EAR and the ITAR, release of such information to a foreign national — even by an employer — is deemed to be an export to that person’s country or countries of nationality. One implication of this rule is that a U.S. company must seek and receive a license from the U.S. government before it releases controlled technology or technical data to its nonimmigrant workers employed as H-1B, L-1, or O-1A beneficiaries. While these licensing requirements will affect only a small percentage of employer-petitioners because most types of technology are not controlled for export or release to foreign persons, a new certification attestation will be included on Form I-129. Most employers will simply certify that no license is required, but if an export license is required, then the employer must further certify that it will not release or otherwise provide access to controlled technology or technical data to the foreign national until it has received the



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required governmental authorization to do so.

For many years now, companies as well as universities have been required to comply with export control laws, but compliance is generally not managed by the same units that prepare I-129 petitions. Even though many activities at companies and universities can benefit from several exclusions to the export license requirement (e.g., the “basic research” exemption), to properly complete the new deemed export attestation on Form I-129, the petitioner would first have to inquire with the appropriate office at his or her company or university that handles export control issues. It would behoove these institutions to develop an institutional protocol for completing the form and assuring the signatory of the I-129 that their attestation is true and correct. Employers considering sponsoring foreign workers should familiarize themselves with these laws and discuss with immigration counsel their impact on future visa petitions.

The technology and technical data that are controlled for release to foreign persons are identified on the EAR’s Commerce Control List (CCL) (generally “dual use” items) and the ITAR’s U.S. Munitions List (USML) (generally defense-related articles). The CCL is found at www.access.gpo.gov/bis/ear/ear_data.html#ccl; the USML at www.pmddtc.state.gov/regulations_laws/itar.html. Additional information about

applying for the appropriate licenses can be found at

www.bis.doc.gov/deemedexports and www.pmddtc.state.gov/faqs/license_foreignpersons.html.

PERM Labor Certification Program

Most foreign nationals who wish to be eligible for employment-based green cards must do so through the PERM labor certification process by having their employer file a labor certification application with the Department of Labor (DOL). The PERM application certifies that there are no U.S. workers who are willing, able, or available to fill a position offered by an American employer, and the employer must undertake extensive recruitment to prove such. The PERM application also certifies that the employer will pay the sponsored employee the prevailing wage for the job. Once approved or “certified,” the foreign-national employee can petition USCIS for eligibility under one of the employment-based preference categories by filing an I-140 immigrant visa petition.

The largely automated PERM program was introduced in March 2005 and touted by DOL as a new and retooled expedited labor certification process through which employers could begin their sponsorship of valued employees. Nevertheless, the PERM process remains laborious and complicated.



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Over the past five years through the issuance of FAQs — DOL's 11th and latest was issued in August — DOL has retroactively applied new rules to old cases and used the informal FAQ process to create or change its requirements. By forgoing the more formal route of promulgating regulations, which would afford public comment and mandate government consideration, the program remains riddled with deficiencies and uncertainties for employers. Moreover, the application takes about four to six months to prepare, plus another nine to ten months for processing by DOL (from online submission to adjudication). And, if DOL requests that the employer's recruitment and other records be audited, another 15 months will be tacked on for a DOL audit response. Beyond the changing rules and lengthy processing times, perhaps the most disheartening aspect of the process is how unforgiving it is — even the tiniest error on the PERM application can completely derail a case.

So why do employers and their employees bother? Despite these and other hurdles inherent in the PERM labor certification process, this route to permanent residence is often the only viable option for many needed employees. And, the process eventually works: long-time nonimmigrant employees and their families can become green card holders and, later, citizens of the United States. However, employers who anticipate long-term sponsorship of current employees must take particular care to ensure consistency throughout what can be a

multi-process, nine- to ten-year immigration odyssey. This can be difficult, especially when the immigration laws are not consistent. For example, a foreign national can be a "professional" for H-1B purposes on the basis of experience and education but not for immigrant visa purposes. Employers also must take care to timely file their PERM applications, especially when their H-1B employees are approaching their final year of their visa status. Indeed, long-term immigration strategies must be considered when hiring H-1Bs.

Until this system changes, employers and their immigration counsel should actively review pending cases to determine whether additional documentation is required to meet ever-changing DOL requirements. Counsel and employers also are advised to determine from the start the best short- and long-term strategies for their employees.

Supreme Court and Undocumented Workers — Another Arizona Law Being Tested

The Supreme Court heard **oral arguments** in early December on a controversial 2007 Arizona law that would revoke the business license of companies who knowingly hire undocumented workers. The legislation, known as the Legal Arizona Workers Act, is being challenged by a coalition of business groups who argued that the law intrudes on the exclusive jurisdiction of the federal government over immigration. While both



sides agree that the federal government, through the 1986 Immigration Reform and Control Act (IRCA), preempted states from enacting legislation that would use employer sanctions to control immigration, Arizona has argued that a parenthetical clause in IRCA allows states to act “through licensing or similar laws.”

The case, while important in its own right, also is being watched closely because it could give some indication on how willing the Justices are to allow states to pass legislation to curb undocumented immigration. In particular, it may serve as a bellwether for a Supreme Court challenge to the high-profile Arizona law passed earlier this summer requiring local law enforcement officials to check the immigration status of

anyone they suspect of being in the country without legal status. That law — S.B. 1070 — garnered extensive, national media attention and spurred protests across the country when Governor Jan Brewer signed it into law in May. S.B. 1070 is currently moving through the courts as the Obama Administration challenges its constitutionality. It is expected to reach the Supreme Court during the 2011 or 2012 term.

**Misuse of Social Security Number
Considered a “Crime Involving Moral
Turpitude,” Eighth Circuit Rules**

The U.S. Court of Appeals for the Eighth Circuit recently joined two other circuits in ruling that a conviction for misuse of a Social Security number is a “crime involving moral turpitude,” and has the effect of precluding foreign nationals from becoming lawful permanent residents. In a unanimous decision, the Eighth Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota) rejected an appeal to cancel the deportation of a Salvadoran man who was found guilty of misusing a Social Security number, labeling his act a “crime involving moral turpitude” (CIMT). A CIMT, unlike most misdemeanors and some felonies, makes a foreign national inadmissible (ineligible to enter the United States) as well as deportable (removable from the United States if already here).

In categorizing the misuse of a Social Security number as a CIMT, the Eighth Circuit adopts the approach long held by the Board of Immigration Appeals (BIA), the administrative appellate court that hears appeals from decisions of the immigration courts. The Sixth and Ninth Circuits have also previously adopted this interpretation; however, not all courts of appeals have. Thus, not all foreign nationals who appeal their cases will be governed by this interpretation.



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Clearly, misuse of Social Security numbers can have drastic consequences. Foreign nationals who may be subject to application

of this category are encouraged to contact immigration counsel to discuss the possible ramifications on their case.

Andrea Godfread-Brown, Esq.

If you have any questions concerning Immigration Law, contact Andrea Godfread-Brown, Esq. at 315-471-3151.

Ms. Godfread-Brown focuses her practice on immigration law, specializing in employment-based applications and is a member of the Firm's Immigration, Labor & Employment and Health Care practice groups. Prior to joining Hancock & Estabrook, she was at the International Center at Syracuse University handling work visa and green card applications for University employees, and in private practice representing clients in connection with varied immigration and employment matters. Ms. Godfread-Brown is fluent in Russian and worked in the Ukraine for the American Bar Association's Central and East European Law Initiative program. She is a member of AILA (American Immigration Lawyers Association). Ms. Godfread-Brown has contributed to the AILA publication, "Immigration Options for Academics and Researchers" and has presented on numerous occasions to employers and employees on immigration-related topics. She has conducted workshops for staff and human resources professionals on I-9 compliance and work visa petitions.

BSK 2010-2011 Breakfast Series

2010-2011 HR Breakfast Series

The Breakfast Series Seminars, co-sponsored by BS&K and MACNY, are designed to address current, important issues and provides updates and insight on a variety of important HR topics.

All Syracuse presentations will take place at MACNY headquarters (see below). Please see reverse for dates and location of our "On The Road HR Series" in Utica.

October 19, 2010

Wage/Hour Update: State and Federal DOL Crackdown and Class Action Issues – Do You Have Exposure?

- DOL Enforcement Initiatives; Review of Enforcement Positions and Opinion Letters and Regulatory Updates
- Deductions from Wages; Meal Periods; Hiring Documentation; and Other State Law Issues
- Class Action Developments
- Equal Pay Act & Potential Amendments to FLSA – Pending legislative and regulatory developments
- Hiring Incentives – how to qualify and practical concerns

November 16, 2010

FMLA and ADA Update: Handling Delicate Medical Issues with Employees

- FMLA Medical Certification Challenges and Solutions
- Intermittent Leave Issues
- ADA – Reasonable Accommodations & the Interactive Process
- Difficult Accommodation Issues
- FMLA and ADA Overlap – additional time off as accommodation and other issues

March 15, 2011

Social Media/Networking – Dangers and Opportunities

- How to Use Social Networking to Screen Applicants and Avoid Litigation
- Legal Pitfalls to be Avoided in the Monitoring and Managing of Employee Use of Social Media
- Developing an Effective Social Media Policy

April 19, 2011

What *all* Employers Need to Know About the NLRB: How new board appointments, rulings and legislative developments are effecting both unionized and non-unionized employers alike.

- The "New" Board – How Changes in Membership Have Influenced the Law
- NLRB Decisions and Impact on Organizing
- NLRB Decisions and Impact on Unionized Employers
- Legislative Developments – Status of EFCA and Other Initiatives
- Preparing for Union Organizing
- Best Practices for Unionized Employers

HRCI Recertification Credit: These programs have been submitted to the HR Certification Institute.

Registration and Breakfast: 7:30 a.m. to 8:00 a.m.; Program: 8:00 a.m. to 9:30 a.m.

Briefings held at MACNY Headquarters, One Webster's Landing, Syracuse, NY

Cost for each HR Breakfast Series Session is \$25 for BS&K Clients and MACNY Members
\$35 for Non-Clients and Non-Members (includes breakfast and handouts)
(Make checks payable to MACNY)

See reverse side for registration information.



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Fax-Back Registration Form

Fax your registration to Bill at MACNY: Fax 315-474-0524; Phone 315-474-4201, ext. 16

Please indicate if you are a BS&K Client or MACNY Member

Participant _____ Contact Name _____

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Seminar _____ Date _____

Seminar _____ Date _____

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If you are unable to honor your registration, please provide 48 hour cancellation notification.
Otherwise, we will be charged by the venue and have to pass along the cost to you.