# EMPLOYMENT LAWSCENE ALERT: SUCCESSFUL EMPLOYERS RECOGNIZE THE IMPORTANCE OF HAVING WELL-TRAINED SUPERVISORS

Employers in today's society are faced with a variety of workplace challenges, from complying with complex and often confusing employment laws to effectively managing a diverse workforce comprised of individuals from a broad spectrum of society. Let's face it: managing your workforce, making the right employment decisions with regard to hiring, promotions, and terminations; and complying with the numerous, complicated, and sometimes overlapping federal, state, and local employment laws is no easy task. It is even more difficult in these uncertain economic times as employers struggle to maintain their workforce amidst declining revenue and increased costs. The numerous recent changes in employment laws, like the NLRB decisions on union organizing and elections, and proposed changes, such as updates to the FLSA Overtime Exemption, that are certain to take place, will not make things any easier for employers. Successful employers realize that the success of their business to comply with these numerous and complex challenges is dependent upon well-trained supervisors.

A supervisor has several key roles that are essential to the success of the workplace. One of the most critical roles of the supervisor is to carry forward the mission and the vision of the company. This requires the supervisor to embrace and foster the values of the company and to instill those values in the workforce. A supervisor must also possess the technical skills to support the organization, the management skills to achieve the objectives and goals of the company, and the people skills to effectively lead and communicate with employees to enable them to achieve the goals of their job. Supervisors must also direct employees, instruct them, and ensure that they follow organizational policies and procedures. Moreover, supervisors must make important decisions with regard to hiring, job assignments, job performance and evaluation, promotions, pay increases, accommodations, discipline, and termination, all while complying with a myriad of state and federal laws.

Given these very large and demanding responsibilities, individuals placed in a supervisory position soon begin to realize that they have not been given the skills and tools necessary to handle all the dynamic challenges of the job. Successful employers, however, recognize this shortfall and provide their supervisors either inside or outside training to help these individuals become good and successful supervisors.

What defines a good and successful supervisor? A good supervisor is a leader and a motivator who promotes teamwork, teaches safe and efficient work practices, and consistently communicates and enforces work rules and policies. A good supervisor understands his or her role within your organization and the importance of communicating the vision and mission of the company to employees. A good supervisor also demonstrates a loyalty to the values of your company and values the people that contribute to the success of your organization – your employees! Many employers rightly recognize that it is their employees who represent their most important asset and who, in most cases, make the difference between a successful company and an unsuccessful company. Employers also recognize that the best way to achieve value from their employees is to have good and well-trained supervisors who are committed to maximizing the productivity from each and every employee. Well-motivated employees are more productive than less-motivated employees. This is a simple truism but one that is often neglected by employers. Employees who are not motivated in their jobs have lower morale, lower productivity, and diminished loyalty to the organization. Consequently, employees who are not motivated in their jobs usually become disinterested and unsatisfied in their jobs, which, in turn, leads to increased employee turnover and higher operating costs and lower profit margins for the employer. Supervisors are the individuals who have the most influence and effect upon an employee's motivation.

Well-trained supervisors have the ability to enhance an employee's motivation and the overall morale of your workforce. Well-trained supervisors understand that by (i) treating employees fairly; (ii) valuing and appreciating employees' efforts and contributions to the company; (iii) recognizing their work; and (iv) assigning job tasks that match an employee's skills with the employee's interest in the job will increase employees' motivation and interest in their jobs. A good and productive employee is often times determined by a well-trained supervisor who understands that he or she must be a leader, a communicator, a teacher, and a motivator; sometimes all at the same time. These functions are what define a good supervisor.

Many readers, after reading this article, may think that they don't need to actively train their supervisors as their business is successful or profitable. However, being profitable or successful does not mean that you have good supervisors committed to the values of your company or that your employees are motivated or satisfied in their jobs. Also, giving an individual a "supervisor" job title does not make them automatically equipped to handle the various and demanding responsibilities of the job. To determine the level of your supervisors' understanding of their own role in your company, you should ask each of your supervisors the following three questions:

(1) How do you define your role as a supervisor in our company?

(2) What characteristics or traits do you believe you possess that makes you an effective supervisor?

(3) What is the most important skill you possess as a supervisor?

Depending on their answers, you may want to consider whether providing your supervisors training on the fundamentals of good supervision makes good business sense.

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# THE WILAW CONNECTION QUARTERLY NEWSLETTER

- Tax and Wealth Advisor Alert—"The Seven Deadly Sins of Succession Planning Series"
- Employment LawScene Alert—"Successful Employers Recognize the Importance of Having Well-Trained Supervisors"
- Article—"A Family Matter: Protecting an Elderly Parent with Dementia from Financial Abuse"
- Dean Laing Featured in the 2014 *Wisconsin Super Lawyers* Edition
- Welcome Our New Attorneys
- Congrats to Our 2015 Best Lawyers
- Best Lawyers
- *Super Lawyers* Business Edition
- Proud to be a Member of Meritas

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# TAX AND WEALTH ADVISOR ALERT: DIVORCE DOES NOT ALWAYS REVOKE YOUR EX-SPOUSE AS BENEFICIARY

Most states, including Wisconsin, have a statute that automatically revokes as beneficiary a divorced spouse once the divorce is final. *See, e.g.,* Wis. Stat. § 854.15. This means that, unless your will, trust, IRA, 401(k), life insurance, etc., provides otherwise, once a divorce decree is final, an individual's ex-spouse and the ex-spouse's relatives receive nothing under your estate plan, even if they are the named beneficiary. Instead, the funds or property will transfer to the next of kin.

However, this may not be the result for any benefits provided as part of an employee benefit plan. In *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), the United States Supreme Court held that a Washington statute similar to Wisconsin's § 854.15 was preempted by ERISA, the Employee Retirement Income Security Act. Instead of applying the statute and awarding Mr. Egelhoff's life insurance proceeds to his children, the proceeds went to his ex-wife, whom he failed to remove from his beneficiary designation form. The same rule has since been applied in Illinois, *see Melton v. Melton*, 324 F.3d 941 (7th Cir. 2003), and would also apply in Wisconsin.

Often times, the law works for us in helpful ways, automatically. But many times it unfortunately does not. The lesson to be learned from the Egelhoffs is that it is imperative to update your estate plan after major life events such as divorce, marriage, large purchases, or the death of loved ones. And in-between these events, an update about every five years is wise.

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# EMPLOYMENT LAWSCENE ALERT: SUPREME COURT DECIDES SECURITY CHECK TIME DOESN'T NEED TO BE PAID TIME

On December 9, 2014, the Supreme Court of the United States issued its decision in *Integrity Staffing Solutions, Inc. v. Busk et al.*, ruling that time spent waiting to undergo and undergoing security screenings after work each day is not compensable time under the Fair Labor Standards Act ("FLSA"). This case involved a collective claim by employees of a temporary staffing agency who worked at Amazon warehouses in Nevada retrieving products from shelves and packaging those products for delivery. These employees were required to

pass through a security check after the end of their shift to make sure that they had not pilfered any product from the warehouse. At times, employees were required to wait as long as 25 minutes in line before they could leave the premises.

In overruling the Ninth Circuit Court of Appeals, the Supreme Court held that the activity of waiting in a security line, after work, was not a "principal activity or activities which the employee is employed to perform" because they were hired to retrieve products from warehouse shelves and package them, not to go through security screenings. Pursuant to the Portal-to-Portal Act, an employer is not required to pay minimum wage or overtime compensation for activities which are preliminary or postliminary to an employee's principal activities. The U.S. Department of Labor deems that the term "principal activities" encompasses "all activities which are an integral part of the principal activity," including those related activities which are "indispensable to its performance."

The Court concluded that the security screenings were not "integral and indispensable" to the employees' duties because it was not an intrinsic element of retrieving products from shelves and packaging them for shipment and could have been eliminated if the employer so desired. The Court found that the Ninth Circuit had erred in focusing on whether the employer required an activity because that was too broad of an interpretation and the focus under the FLSA and Portal-to-Portal Act is whether the activities are "integral and indispensable" to the productive work that the employee is employed to perform.

Employers should take note of this decision in determining what pre- and post-shift activities must be compensated. Time spent performing activities related to an employee's duties, such as donning and doffing protective gear that is necessary for performing an employee's job duties, should generally be compensated. However, not all activities, such as waiting at a security check and waiting in line to receive pay checks, are compensable.

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## KILLORAN FEATURED IN THE WISCONSIN LAW JOURNAL

Attorney Grant Killoran was featured in the *Wisconsin Law Journal* article entitled, "Killoran takes onstage experience to courtrooms."

Read full article here.

# EMPLOYMENT LAWSCENE ALERT: CAN AN EMPLOYER DEDUCT AN EXEMPT EMPLOYEE'S SALARY WHEN THE EMPLOYER CLOSES ITS BUSINESS DUE TO EITHER INCLEMENT WEATHER OR A POWER OUTAGE?

The Fair Labor Standards Act ("FLSA") provides an employer an exemption for minimum wage and overtime payments for any employee employed in a bona fide executive, administrative, or professional capacity. An employee may qualify for exemption if the employee meets all of the pertinent tests relating to duties and receives compensation on a "salary basis" at not less than the minimum amounts as described in the appropriate section of the regulations. The FLSA regulations provide that, for an exempt employee to be paid on a "salary basis," the employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. An employee will not be considered to be paid on a "salary basis" for any week if deductions are made to an employee's salary for any absence occasioned by the employer or by the operating requirements of the business. However, a deduction may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability.

Oftentimes, the question arises whether an employer can deduct a day's wage from an exempt employee's salary when the employer closes its business due to inclement weather (e.g., a snowstorm) or a power outage. In other words, does an employer need to pay an exempt employee for that day when no work was performed by the employee because of the employer's decision to close its business? It is the U.S. Department of Labor's ("DOL") position that an employer must pay an exempt employee his or her full salary if the employer closes its operations due to a weather-related emergency or other emergency, such as a power outage. The DOL's position is based, in part, on the FLSA's regulations that provide that deductions may not be made for time when work is not available. When it is the employer's decision to close its business because of some emergency, whether it is due to severe weather or a simple loss of power, the DOL presumes that employees remain ready, willing, and able to work. Under such circumstances, deductions may not be made from an exempt employee's salary when work is not available. If deductions are made under such circumstances, the employer risks losing the exemption, thus subjecting it to potential overtime liability.

On the other hand, when an emergency causes an employee to choose not to report to work

for the day, even though the employer remains open for business, the DOL treats such an absence as an absence for personal reasons.  This type of absence does not constitute an absence due to sickness or disability.  Consequently, an employer that remains open for business during a weather emergency may lawfully deduct one full day's wages from an exempt employee's salary if that person does not report for work for the day due to adverse weather conditions.  Such a deduction will not violate the "salary basis" rule or otherwise affect the employee's exempt status.  If, however, the employee works only a partial day because of weather-related issues, the employer may not make deductions from the employee's salary for the lost time because an exempt employee must receive a full day's pay for the partial day worked in order for the employer to meet the "salary basis" rule.

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## EMPLOYMENT LAWSCENE ALERT: HOW TO AVOID BECOMING A WAGE AND HOUR MISCLASSIFICATION HEADLINE

Employers who label their employees as overtime exempt should be cautioned by a recent settlement out of a Florida federal court. The case, *Lytle et al. v. Lowe's Home Centers Inc. et al.,* 12-CV-01848 (M.D. Fla.), was premised on the allegation that plaintiff Lizeth Lytle and a class of similarly situated employees were improperly classified as exempt from the Fair Labor Standards Act ("FLSA") overtime requirements.

The FLSA requires that employees must be paid overtime for all hours worked in excess of forty hours per workweek, unless the employee is exempt. Exempt employees include those who qualify as a bona fide executive, administrative, or professional. Simply being paid on a salary basis does not, by itself, determine the exempt status of an employee. Rather, beyond the requirement that an employee be paid on a salary basis of not less than $455 per week, an employee's job duties must satisfy the criteria to qualify under either the executive, administrative, or professional exemption. Importantly, job titles do not determine exempt status.

In the *Lytle* case, the class alleged that, although classified by their employer as exempt, their duties did not rise to the level required by the FLSA duties tests. The plaintiffs argued that, despite their managerial description as "Human Resource Manager," none had the ability to make meaningful decisions, nor did they supervise employees; instead, their job duties included tasks such as operating cash registers, cleaning bathrooms, greeting customers, and sweeping floors. The employer denied that it violated any laws; however, it agreed to, and the Court approved, a $3.5 million class settlement and a $1.3 million

attorney fee award.

Employers who have classified their employees as “exempt” from overtime pay should not simply rely on the fact that an employee is being paid on a salary basis or that his or her job title may imply executive or administrative job responsibilities. Instead, employers should make sure that the actual job duties of each employee claimed as exempt meet the particular job duties of an executive, administrative, or professional employee. Drafting and keeping up-to-date written job descriptions that accurately describe an employee’s actual job responsibilities is an important step in making sure that employees are properly classified as “exempt” or “non-exempt” and helping your company avoid becoming another wage and hour collective action headline.

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## DEAN LAING FEATURED IN THE WISCONSIN SUPER LAWYERS 2014 EDITION

We are proud to announce that our Partner, Dean Laing, has been featured as the Cover Story for the 2014 *Wisconsin Super Lawyers* magazine. A copy of the article, which calls O’Neil, Cannon, Hollman, DeJong and Laing S.C. “the midsize Milwaukee powerhouse,” can be found here.

For the past 10 years, Super Lawyers has published its annual magazine in Wisconsin, in which it selects approximately 5% of Wisconsin attorneys as “Super Lawyers.” In addition, each year the magazine selects the Top 50 Attorneys in Wisconsin. Super Lawyers’ selection process consists of surveying all Wisconsin attorneys and judges, conducting its own independent research, and having its Blue Ribbon Panel evaluate attorneys.

Since 2006, Dean has been selected each year as one of the Top 50 Attorneys in Wisconsin. He is one of only 10 attorneys out of over 15,000 attorneys in Wisconsin—and the only commercial litigator—to be selected for that honor in each of those nine years. Dean has also been selected as one of the Top 25 Attorneys in Milwaukee each year since Super Lawyers began publishing the list in 2011.

Congratulations Dean on this tremendous honor.

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# EMPLOYMENT LAWSCENE ALERT: 2014 COULD STILL DELIVER IMPORTANT DECISIONS FROM THE NLRB

Although we previously posted an article outlining that the mid-term elections could improve the landscape for employers regarding administrative agency enforcement, including the National Labor Relations Board ("NLRB"), employers may still see a significant pro-union push from the NLRB before the end of 2014.

Democratic-appointee Nancy Schiffer's term on the NLRB ends December 16, 2014. The Obama Administration has nominated Senate Health Education and Pensions Committee chief labor counsel Lauren McFerran to take Schiffer's place on the five-member board. However, the now Republican-controlled Senate must approve all NLRB nominations. If the Senate does not confirm McFerran, or any other proposed nominee, the NLRB could be locked in a 2-2 partisan stalemate. Therefore, many believe that the currently Democratic NLRB will try to get major changes pushed through while they are still in the majority. This could include changes to union election procedures and changes to the definition of joint-employer status.

The NLRB has proposed rule changes that would significantly change the union election process. If issued, they would shorten the period between filing of an election petition and the election itself to only seven days. If this happens, employers will have less time to inform workers of the pros and cons of unionizing. Among other changes, the new rules would also require employers to submit a "statement of position" on the election petition by the time the pre-election hearing is held and waive any issues not raised in the statement.

Also, the NLRB could expand the standard for determining joint employer status in the Browning-Ferris case. A decision from the Board on this important topic is expected soon. For the past thirty years, the NLRB has analyzed whether two or more companies are joint employers under a "degree of control" test. The Board, in its expected decision in Browning-Ferris, could change that standard to a "totality of the circumstances" standard. A broader standard from the Board in finding joint employer liability would be expected given the NLRB's General Counsel recent decision to permit 43 unfair labor practice charges against McDonald's, USA, LLC to move forward under a "joint employer" theory finding that McDonald's should be held liable, along with its independently-owned franchisees, based upon allegations that the franchisees violated workers' rights in responding to workplace protests. If the NLRB expands the definition of "joint employer," as expected, more companies that do not use direct employees could potentially face unfair labor practice charges for the conduct of other companies or could even be required to recognize and bargain with unions.

Employers should monitor the NLRB's decisions and actions through the end of the year and look for rulings that could impact them and their employees.

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## SUPER LAWYERS RECOGNIZES OCHD&L AMONG THE TOP WISCONSIN LAW FIRMS

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to be selected for inclusion in the Super Lawyers Business Edition.  Top firms were chosen based on the number of attorneys within the firm who were selected to a 2013 or 2014 Super Lawyers list in business practice areas, as well as a combination of metrics indicating the quality of those attorneys. Quality factors that were considered included the number of years selected to the list, inclusion on a top list, and their average blue ribbon panel scores.

The following attorneys recognized as outstanding in the business and transactions practice group and featured in the Super Lawyers Business Edition include:

- James G. DeJong – Mergers and Acquisitions
- Seth E. Dizard – Creditor Debtor Rights
- Peter J. Faust – Mergers and Acquisitions
- Chad J. Richter – Business/Corporate
- John R. Schreiber – Creditor Debtor Rights
- Jason R. Scoby – Mergers and Acquisitions