SMALL BUSINESS FINED "BIG BUCKS" FOR I-9 MISTAKES

Recently, the Circuit Court of Appeals for the Ninth Circuit upheld the imposition of a $173,250.00 fine against a small drywall installation company for failure to maintain complete and accurate Employment Eligibility Verification Forms ("I-9 Form"). You can find the court's decision at the following link: *Ketchikan Drywall Services, Inc. v. Immigration and Customs Enforcement*.

The court found that the employer violated its legal obligation under the Immigration and Nationality Act (the "Act") to verify that its employees were legally authorized to work in the United States through the following actions:

1. Failure to provide any I-9 form at all for certain employees;
2. Failure to complete certain sections of the I-9 form; and
3. Omitting necessary information from the I-9 form.

The employer argued that although some information was missing from its I-9 forms, it had substantially complied with the law by copying and retaining employees' verification documents and attaching them to the I-9 Forms, and that any omissions were either minor or could be filled in by reference to those documents. The court made it very clear, however, that failing to complete entire sections of the form despite maintaining the necessary information in a separate document was not sufficient to meet the statutory requirements and resulted in a violation of the Act.

Although the employer argued that transcribing the necessary information onto the I-9 forms was a "waste of time" when the information was already available on the attached copies of the relevant document, the court emphasized that "requiring that the parties take the time to copy information onto the I-9 Form helps to ensure that they actually review the verification documents closely enough to ascertain that they are facially valid and authorize the individual to work in the United States" and that the I-9 Form itself "provides concrete evidence that such review took place."

The Court also provided other specific examples of what it would consider I-9 deficiencies that could result in significant fines:

1. Failure by the employee to attest to one of the three specific categories of eligibility and instead attesting that he or she is authorized to work generally.
2. When relying on an employee's driver's license to verify eligibility, failing to provide the issuing authority on the I-9 Form, regardless of whether the issuing authority could be inferred from the format of the driver's license number.
3. When re-hiring a former employee, failing to ensure that the employee again attests to

his or her eligibility to work in the United States and instead simply relying on the employee's former attestation.

This decision serves as an important reminder for all employers to make sure they are strictly complying with all I-9 requirements and paying careful attention that all 1-9 Forms are complete and accurate. Failing to maintain complete and accurate I-9 Forms could result in significant and unnecessary fines. Employers who have questions regarding I-9 compliance should contact us at (414) 276-5000.

DOL EXTENDS OVERTIME COVERAGE FOR DIRECT CARE WORKERS

The U.S. Department of Labor has extended minimum wage and overtime coverage for certain domestic service employees who provide home health care services for the elderly, infirmed, and disabled. The Labor Department's new rule will go in effect on January 1, 2015.

The Fair Labor Standards Act (FLSA) covers individuals employed in domestic services in households. In 1974, Congress extended coverage to "domestic service" workers who perform household services in a private home, including those domestic service workers employed directly by households or by companies too small to be covered under the FLSA. "Domestic service employment" includes services performed in or about a private home by nurses, certified nurse aides, home health care aides and other individuals providing direct care services.

Currently, certain domestic service workers, also known as "direct care workers," who are employed to provide "companionship services," such as companions for elderly persons or persons with an illness, injury, or disability are generally not required to be paid minimum wage and overtime pay. The newly revised regulations attempt, however, to narrow this companionship service exemption so that many of these workers who are now exempt from minimum wage and overtime coverage under the FLSA, such as certified nursing assistants, home health aides, and other caregivers, would be protected under the FLSA once the new regulations go into effect. In addition, third-party employers will no longer be entitled to claim either the companionship services or live-in domestic service employee exemptions under the new regulations.

Under the Department's new regulations, the definition of "companionship services" is more clearly and narrowly defined. Specifically, companionship services will be defined to include providing fellowship and protection (defined as engaging the person in social, physical, and

mental activities such as conversation, reading, games, etc., and being present with the person to monitor his or her safety and well-being), and may also include assisting with activities of daily living (ADLs) (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living (IADLs) (tasks that enable a person to live independently at home such as meal preparation, driving, light housework, managing finances, and assistance with taking medication) as long as this assistance is not more than 20% of the time worked in any workweek. If a direct care worker meets this duties test, an individual, family, or household who employs such a person may claim the companionship services exemption under the FLSA. If, on the other hand, the direct care worker spends more than 20% of his or her workweek providing services that do not consist of fellowship and protection, such as grocery shopping, cooking, and other ADLs and IADLs, then the worker must be paid minimum wage for all hours worked and overtime for any hours worked over 40 in the workweek.

For additional information, see the Department of Labor's Fact Sheet: Application of the Fair Labor Standards Act to Domestic Services, Final Rule.

ATTORNEY CLAUDE KRAWCZYK HONORED FOR COMMUNITY SERVICE

In addition to practicing real estate, banking and transactional law for more than 27 years with O'Neil, Cannon, Hollman, DeJong and Laing, Claude Krawczyk has also volunteered hundreds of hours each year to various community organizations and efforts. Over the past several years, Claude has led two successful community projects, the restoration of the Kosciuszko monument on 9th and Lincoln in Milwaukee and the purchase, improvement and move by the Milwaukee Christian Center to a new building at 14th and National in Milwaukee. Claude is now being honored by two different organizations for his work on both of these projects. On September 23, 2013, the South Side Business Club will name Claude its "Person of the Year" and on November 3, 2013, Claude will be honored by the Polish American Congress-Wisconsin, which has named Claude the 2013 recipient of the Congressman Clement J. Zablocki Civic Achievement Award.

Congratulations Claude!

To learn more about the Kosciuszko monument project, see: http://www.rkmmilwaukee.org/ and to find out more about the Milwaukee Christian Center, see: http://www.mccwi.org/.

BEST LAWYERS® RECOGNIZES 12 ATTORNEYS FROM O'NEIL CANNON

Twelve attorneys from the law firm of O'Neil Cannon were selected for inclusion in the 2013 edition of T*he Best Lawyers in America*®. Nearly 1/3 of the firm's attorneys were listed in 16 distinct practice areas to include:

- James G. DeJong – Corporate Law; Mergers and Acquisitions Law; Securities/Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights; Insolvency and Reorganization Law; Litigation–Bankruptcy
- Peter J. Faust – Corporate Law; Mergers and Acquisitions Law
- John G. Gehringer – Commercial Litigation; Construction Law; Corporate Law; Real Estate Law
- Dennis W. Hollman – Corporate Law; Trusts and Estates
- Dean P. Laing – Commercial Litigation; Personal Injury Litigation–Plaintiffs; Product Liability Litigation–Defendants
- Gregory W. Lyons – Commercial Litigation
- Thomas A. Merkle – Family Law
- Steven J. Slawinski – Construction Law

Since its inception in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. Because *Best Lawyers* is based on an exhaustive peer-review survey in which more than 39,000 leading attorneys cast almost 3.1 million votes on the legal abilities of other lawyers in their practice areas, and because lawyers are not required or allowed to pay a fee to be listed, inclusion in *Best Lawyers* is considered a prestigious honor. *Corporate Counsel* magazine has called *Best Lawyers* "the most respected referral list of attorneys in practice."

WISCONSIN MAY "BAN THE BOX" ON EMPLOYMENT APPLICATIONS

A recent **Employment LawScene™ article** discussed the EEOC's recent heightened efforts to crack down on employers' use of criminal background checks in making hiring decisions. As part of its efforts, the EEOC issued guidance to employers in April 2012, in which the EEOC

endorsed the policy of removing questions regarding criminal conviction history from job applications as a best practice for employers.

Following the EEOC's lead, in what can only be described as a nationwide movement that has recently gained considerable momentum, 53 local jurisdictions and 8 states (including Minnesota) have enacted "ban-the-box" legislation that would prohibit employers from considering a job applicant's criminal conviction record before the applicant has been selected for an interview. Two other states, California and Illinois, have adopted "ban-the-box" policies through administrative directives rather than legislation. (Statistics courtesy of the National Employment Law Project).

Wisconsin could become the next state to "ban the box" on employment applications. On August 27, 2013, a bill that would prohibit employers from asking for information regarding an applicant's criminal conviction record before the applicant has been selected for an interview, was introduced to the Wisconsin legislature and referred to Committee. Wisconsin Assembly Bill 342 provides that requesting an applicant for employment to supply information regarding his or her conviction record on an application form or otherwise inquiring into or considering an applicant's conviction record before the applicant has been selected for an interview, constitutes employment discrimination under Wisconsin law. The bill would not, however, prohibit an employer from notifying applicants for employment that individuals with certain conviction records may be disqualified by law or the employer's policies from employment in particular job positions.

Understandably, a number of employers use criminal background checks to identify job applicants who might present a risk to the employer's business, its employees, and its customers or clients. Wisconsin employers should pay close attention to Assembly Bill 342 as it makes its way through the State legislature, as passage of this bill could result in a number of employers having to make significant changes to their hiring processes and job applications.

KILLORAN NAMED FELLOW OF THE WISCONSIN LAW FOUNDATION

Grant Killoran, Chair of O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group, recently was named a Fellow of the Wisconsin Law Foundation.

The Fellows organization was created in 1999 to honor members of the State Bar of Wisconsin who have achieved significant accomplishments in their careers and contributed

leadership and service to their communities. Membership in the Fellows is limited to 2.5% of the State Bar of Wisconsin's members.

The Fellows aims to energize its members to continue their efforts in the promotion of justice, advancement of the legal profession and improvement of legal education. For more information on the Fellows click here.

WILL WISCONSIN BE NEXT TO BAN EMPLOYERS FROM ACCESSING EMPLOYEE SOCIAL MEDIA ACCOUNTS?

Wisconsin may soon join fourteen other states that have adopted laws prohibiting employers from requesting usernames and passwords to access an employee's or job applicant's social media accounts, including Facebook® and Twitter®.

On Tuesday, August 20, 2013, the Wisconsin Senate Committee on Judiciary and Labor held a public hearing to discuss a bipartisan bill that would prohibit employers from accessing and monitoring the personal internet accounts of employees and job applicants. The bill would make it unlawful for employers to ask employees and applicants for their personal social media account passwords and would permit employees and applicants to file a complaint against their employer for violations of this law with the Wisconsin Department of Workforce Development in the same manner as an employment discrimination complaint. Besides restricting access to employees' personal social media accounts, Senate Bill 223 would also make it unlawful for an employer to discharge or otherwise discriminate against any person for exercising the right to refuse a request for access to such accounts.

Although seen as a prohibition, Senate Bill 223 provides a number of protections for employers. The bill would not prohibit employers from accessing electronic communications devices, accounts, or services that the employer provides to its employee by virtue of the employment relationship or that are paid for by the employer and used for business purposes. Senate Bill 223 would also permit employers to restrict employees' access to certain internet sites and monitor, review, or access electronic data stored on the employer's own network and on devices provided by the employer. The bill would also afford employers certain protections to permit discipline or discharge of employees who transfer the employer's proprietary or confidential information or financial data to the employee's personal internet account without the employer's authorization. Finally, Senate Bill 223 provides employers with a shield to legal liability against claims that an employer should

have known, or should have monitored, an employee's social media account in relation to claims for negligent hiring or negligent retention.

According to the National Conference of State Legislatures, similar laws have been introduced or are pending in at least 36 states. Eight states, including Arkansas, Colorado, Nevada, New Mexico, Oregon, Utah, Vermont, and Washington, have enacted legislation so far in 2013.

A federal law prohibiting employers from requesting or requiring employees and applicants to provide usernames, passwords, or any other form of access to personal social media accounts, is also being pushed through Congress. The Social Networking Online Protection Act was initially introduced in April 2012, but never made it to the House or Senate. The Act was re-introduced and assigned to the Congressional committee on February 6, 2013. If the Act passes committee, it will be passed on and considered by Congress.

Stay Tuned . . .

Employers should stay tuned to both the state and federal legislation that could potentially change the way employers conduct background checks for prospective employees and investigate allegations of misconduct regarding current employees. Please continue to check the Employment LawScene® for updates on these important anticipated changes in state and federal law.

SUPREME COURT ADOPTS NARROW DEFINITION OF "SUPERVISOR" IN CONTEXT OF WORKPLACE HARASSMENT CASES

On June 24, 2013 the Supreme Court of the United States issued a decision in *Vance v. Ball State University*, in which it defined narrowly what it means to be a "supervisor" in the context of workplace harassment claims. The Court's decision in *Vance* has been a long time coming and offers long-awaited guidance to employers as to who constitutes a "supervisor" for purposes of imposing strict liability under Title VII for workplace harassment.

Whether an employee is considered a "supervisor" for purposes of Title VII is of critical importance because an employer's exposure to liability is significantly different depending on whether that employee is a "supervisor" or simply a co-worker. An employer is liable for harassment by a co-worker only if the employer was negligent in controlling working conditions. Different rules apply, however, where the alleged harasser is a "supervisor." In

those situations, an employer may be strictly or automatically liable for the supervisor's creation of a hostile work environment where the supervisor's alleged harassment results in a tangible employment action such as hiring, firing, or failure to promote. Where the harassing conduct is committed by a "supervisor," an employer can only avoid liability in the absence of a tangible employment action if: (1) the employer exercised reasonable care to prevent and correct the harassing conduct (*i.e.*, having a written anti-harassment policy, conducting regular supervisory training, *etc.*); and (2) the employee failed to take advantage of the employer's preventive and corrective measures available to the employee. So, whether an alleged harasser is a "supervisor" or merely a co-worker is important.

In *Vance v. Ball State University*, the Supreme Court defined "supervisor" narrowly to mean only those individuals who have authority to take tangible employment actions including a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. In adopting this narrow definition of supervisor, the Court rejected the EEOC's attempt to broaden the definition of "supervisor." The EEOC attempted to argue that individuals who simply direct the work of another employee should be sufficient to caste the title of "supervisor" upon an individual for the purpose of imposing strict vicarious liability upon the employer, which would include anyone who directs another employee's work tasks.

The Supreme Court's adoption of the more narrow definition of "supervisor" means that not every employee with the authority to direct work will be considered a supervisor for the purpose of imposing strict liability upon an employer for workplace harassment. The Court's holding may result in employers facing less strict liability harassment claims in the future and at the same time provide employers a better opportunity to defend themselves against such claims under the less stringent negligence theory of liability.

What Steps Should You Take to Protect Your Business in Light of the* Vance *Decision?

Be sure to review and update your anti-harassment policies and procedures and communicate those policies and procedures to your employees. You should always be sure to act quickly in conducting a thorough investigation of any complaint or allegation of harassment by one of your employees and take appropriate corrective or disciplinary actions as necessary.

Also, clearly establishing the status of each of your employees will continue to be of critical importance. You should create or review and clarify job descriptions for those employees who you intend to have authority to take tangible employment actions.

Please contact Sarah Matt for more information or to provide you advice regarding your anti-harassment policies and procedures and employee job descriptions.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C.'S MILWAUKEE JUSTICE CENTER ATTORNEY VOLUNTEERS AMONG THOSE NAMED MILWAUKEE BAR ASSOCIATION'S "LAWYERS OF THE YEAR"

At its Annual Meeting on June 11, 2013, the Milwaukee Bar Association collectively honored as its 2013 "Attorneys of the Year" those area attorneys, including the attorneys of O'Neil, Cannon, Hollman, DeJong and Laing S.C., who serve as volunteers at the Milwaukee Justice Center.

The MBA, in conjunction with the Marquette University Law School, the Milwaukee County Circuit Courts and other organizations, established the Milwaukee Justice Center in 2009. The Milwaukee Justice Center is a free limited legal advice clinic held at the Milwaukee County Courthouse. It uses transformative collaborative partnerships to provide free legal assistance to Milwaukee County's unrepresented litigants through court-based self help desks and legal resources.

Recognizing the importance of this project, O'Neil, Cannon, Hollman, DeJong and Laing became a founding member of the consortium of area law firms that agreed to provide attorney volunteers to the staff the Milwaukee Justice Center. O'Neil, Cannon, Hollman, DeJong and Laing's attorneys have been volunteering at the Milwaukee Justice Center since the inception of its formal program in 2009. Grant Killoran, the Chair of O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group, also serves as a member of the MBA Steering Committee overseeing the Milwaukee Justice Center program.

ATTORNEY DIZARD QUOTED IN MILWAUKEE JOURNAL SENTINEL

Judge clears way for Falls Radisson sale

Milwaukee Journal Sentinel – August 26, 2013

The eventual sale of the publicly financed Menomonee Falls Radisson Hotel took an initial step forward Monday. Waukesha County Circuit Judge James Kieffer granted a request by the Village of Menomonee Falls to expand the powers of a court-appointed **...**

See Related Story:

For Sale: The Menomonee Falls Radisson Hotel

Menomonee Falls Patch – August 26, 2013

A Waukesha County Circuit court judge on Monday granted a receivership attorney expanded powers to market and sell the Radisson Hotel property, which has been in foreclosure. Receivership attorney Seth Dizard has overseen operations at the hotel **...**