EMPLOYERS MUST PROVIDE TRAINING FOR OSHA'S REVISED HAZARD COMMUNICATION STANDARD BY DECEMBER 1, 2013

By December 1, 2013, OSHA is requiring employers to provide initial training to its employees on OSHA's new Hazard Communication Standard. OSHA revised its Hazard Communication Standard (HCS) by adopting the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals. The **final rule** for the new HCS was published in the Federal Register on March 20, 2012. The most significant changes to the HCS requires the use of new labeling elements and a standardized format for Safety Data Sheets (SDSs), formerly known as, Material Safety Data Sheets (MSDSs).

The initial training requirement does not include a requirement to re-train on all hazards. However, the mandated initial training does require employers to ensure that employees understand the new label elements and SDS approach. "Label element" means the specified pictogram(s), hazard statement(s), signal word and precautionary statement(s) for each hazard class and category. Initial training on label elements include:

- Product Identifier: How the hazardous chemical is identified.
- Signal Words: Signal words are used to indicate the relative level of severity of hazard. There are only two signal words, "Danger" and "Warning."
- Pictogram: Eight **pictograms** have been designated under the HCS for application to a hazard category.
- Hazard Statement(s): A hazard statement is a statement assigned to a hazard class and category that describes the nature of the hazard(s) of a chemical, including where appropriate, the degree of hazard. An example of a hazard statement is: "Fatal if swallowed."
- Precautionary Statement(s): A precautionary statement is a phrase that describes recommended measures that should be taken to minimize or prevent adverse effects resulting from exposure to a hazardous chemical, or improper storage or handling. For example, a precautionary statement could read: "Do not eat, drink, or smoke when using this product."

The new Safety Data Sheets will be organized using specified order of information. Employers must train employees on the format of the SDS which now consists of a standardized 16-section format, including the type of information found in the various sections. The 16 sections include:

1. Identification
2. Hazard identification
3. Composition/information on ingredients
4. First-Aid measures

5. Fire-fighting measures
6. Accidental release measures
7. Handling and storage
8. Exposure control/personal protection
9. Physical and chemical properties
10. Stability and reactivity
11. Toxicological information
12. Ecological information
13. Disposal considerations
14. Transport information
15. Regulatory information
16. Other information

Although initial training must be completed by December 1, 2013, full compliance with the preparation of new labels and SDSs is not required until **June 1, 2015** and employers will have until June 1, 2016 to update their hazard communication programs or any other workplace labeling as necessary. *See* OSHA's **fact sheet** for additional information on the revised Hazard Communication Standard.

SENATE TO VOTE ON EMPLOYMENT NON-DISCRIMINATION ACT (ENDA)

Senate Majority Leader Harry Reid (D-Nev.) has announced that the U.S. Senate will vote on the Employment Non-Discrimination Act ("ENDA") before the Thanksgiving recess, and perhaps as early as Monday, November 4th.

The Employment Discrimination Act (S. 815) would prohibit employers from discriminating against individuals based on the individual's sexual orientation or gender identity, just as current federal law prohibits discrimination based on race, sex, national origin, religion, age, and disability.

ENDA is sponsored in the Senate by Senators Jeff Merkley (D-Ore.) and Tom Harkin (D-Iowa). The bill would need 60 votes before it goes to a final vote. Employers should stay tuned to find out whether ENDA will become law.

To view a full copy of the Senate Bill, click here.

TENTH CIRCUIT SAYS EMPLOYEES MUST GIVE EXPRESS NOTICE OF RELIGION-WORK CONFLICT

Earlier this month, the U.S. Court of Appeals for the Tenth Circuit found that the EEOC failed to establish a prima facie case of religious discrimination where the EEOC could not show that a prospective employee expressly informed the employer of a conflict between the applicant's religious beliefs and the employer's dress code and of the applicant's desire for a reasonable accommodation from that dress code.

In *EEOC v. Abercrombie and Fitch Stores, Inc.*, the Tenth Circuit reversed the lower court's grant of summary judgment in favor of the EEOC on the EEOC's claim that the employer failed to provide a reasonable religious accommodation for a prospective employee who wore a "hijab" (headscarf) for religious reasons. The employer, a national retail clothing company, maintains a "Look Policy" or dress code that is intended to promote and showcase the company's clothing brand. The policy requires employees to dress in clothing that is consistent with the kinds of clothing that the company sells in its stores and prohibits employees from wearing black clothing and caps.

The employer rejected the prospective employee for employment after she wore a hijab to her job interview. The EEOC filed suit against the company, alleging that the company failed to provide the prospective employee a reasonable religious accommodation in violation of Title VII of the Civil Rights Act of 1964.

The Tenth Circuit recognized employers' obligation under Title VII to reasonably accommodate religious practices of an employee or prospective employee unless the employer demonstrates that the accommodation would pose an undue hardship on its business. The court found that, in this case, the EEOC had failed to establish one of the key elements of a Title VII religious accommodation claim – notice. The Tenth Circuit held that in order to succeed on such a claim, the employee or prospective employee must inform the employer that he or she engages in a religious practice that conflicts with the employer's policy and that the employee would, therefore, require an accommodation for that religious practice.

Because the prospective employee, in this case, did not inform the employer, prior to its hiring decision that she engaged in the conflicting practice of wearing a hijab for religious reasons and that she needed an accommodation for it, the court found that the EEOC could not meet the requirements for a religious accommodation claim under Title VII.

As an employer, you should be aware of the general obligation under Title VII to reasonably accommodate religious practices of employees or prospective employees who inform you of a conflicting religious belief or practice and the need for such an accommodation.

Understand, however, that the reasonable accommodation obligation is implicated *only* when there is a conflict between an employee's religious practice and your neutral policy. If you are made aware of an employee's religious conflict, you should take steps to obtain additional information that would allow you to determine whether an accommodation can be made available to that employee to eliminate the religious conflict without posing an undue hardship on your business. If you have questions about religious accommodation under Title VII, please contact one of our Employment Law attorneys.

U.S. SUPREME COURT WILL DECIDE WHETHER TIME SPENT CHANGING CLOTHES IS COMPENSABLE WORK TIME

Generally, if an employee is required to change into work clothing as part of that employee's job, the Fair Labor Standards Act ("FLSA") requires an employer to pay the employee for the time it takes to do so. Section 203(o) of the FLSA, however, contains an exception to this general rule. The exception provides that any time spent "changing clothes or washing" at the beginning or end of each workday that is excluded from compensable time either by the express terms of or by a custom or practice under a collective bargaining agreement, is not compensable time under the FLSA.

On November 4, 2013, the U.S. Supreme Court will hear oral arguments in *Sandifer v. U.S. Steel*, a case arising out of the Seventh Circuit, to resolve disagreement among circuit courts as to what constitutes "changing clothes" within the meaning of Section 203(o). It is not clear whether the term "clothes" includes personal protective equipment or gear. In *U.S. Steel*, the employer and employees are parties to a collective bargaining agreement, which exempts changing clothing from compensable working time. The employees in *U.S. Steel* argue that they should be compensated for the time it takes to change into and out of their required work clothes because their work clothing is not actually clothing, but is more akin to personal protective gear and, therefore, does not constitute "clothes" within the meaning of Section 203(o).

Most circuit courts that have addressed this issue, including the Seventh Circuit, disagree with the employees' position and have upheld the collective bargaining exemption under Section 203(o), finding that it would be impossible to exclude all work clothing with a protective function from the Section 203(o) exemption.

The U.S. Supreme Court will be hearing the *U.S. Steel* case in the coming weeks. This is an

important case to watch, not only for all employers who may be exempt from compensating employees for donning and doffing activities by virtue of their collective bargaining agreement, but for any employer whose employees change clothes as part of their jobs. Any change to the definitions of "clothing" or "changing clothing" under the current donning and doffing rules could affect all employers' current compensation policies and practices.

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.

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.

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.

EEOC CRACKS DOWN ON EMPLOYERS' USE OF CRIMINAL BACKGROUND CHECKS

Although having a criminal record in itself does not afford individuals protection under Title VII, it is the EEOC's position that the use of criminal records in making employment decisions has a disproportionate effect on certain racial and ethnic groups, which may have a discriminatory effect on those racial or ethnic groups who *are* afforded protections under Title VII.

In April of last year, the EEOC issued guidance to employers regarding the use of arrest or conviction records in making employment decisions. The EEOC makes clear in its guidelines that the law does not expressly prohibit the use of criminal background checks, however, urges employers to conduct an individualized assessment when utilizing criminal background information to consider the nature and gravity of the crime, the time elapsed since the conviction, and whether the circumstances of the arrest or conviction are substantially related to the nature or requirements of the particular job. Employers that disproportionately reject minority employment candidates as a result of criminal background checks may be subject to a discrimination claim based upon a disparate impact theory of discrimination.

Since the issuance of its criminal background check guidelines, the EEOC has stepped up its

enforcement efforts and has begun to systematically crack-down on employers, alleging that employers' blanket policies regarding criminal background checks and arrest or conviction records constitute discriminatory hiring practices. In June 2013, the EEOC filed lawsuits against two large employers for their use of criminal background checks in making hiring decisions. The EEOC's district office in Charlotte, South Carolina filed suit against a large auto manufacturer alleging that it disproportionately screened out African Americans from jobs by implementing and utilizing a criminal conviction policy that denies facility access to employees and employees of contractors who have certain criminal convictions on their record. The EEOC's Chicago, Illinois office also filed a separate suit against a retailer alleging that its policy of conditioning all job offers on criminal background checks has a disproportionate impact on African-American applicants, and, therefore, is unlawful under Title VII.

The EEOC is not the only agency stepping up its enforcement efforts regarding employers' use of arrest and conviction records. A growing number of states and cities have recently enacted "Ban the Box" legislation that regulates the use of criminal background checks in employment decisions. The purpose of the "Ban the Box" laws is to prohibit covered employers from inquiring about a job applicant's criminal background and conviction record on a job application and delay background checks until later in the hiring process. Wisconsin has not yet enacted Ban the Box legislation.

So, what does this all mean for you?

The EEOC's guidance and the Ban the Box legislation trend can present challenges for employers who want to protect clients/customers and other employees from individuals with violent backgrounds or avoid placing people convicted of certain financial crimes in accounting positions or other positions where they are handling money. Certain employers, such as schools or health care providers, should also keep in mind the potential conflict between these laws and other legal requirements that prohibit the employer from employing individuals who have certain criminal convictions in these sensitive positions.

Employers must appropriately balance the EEOC's guiding principles with these practical considerations. Employers should carefully review their policies and practices regarding criminal background checks and the use of arrest and conviction records in making employment decisions to be sure that these policies do not contradict the EEOC's guidance or violate Title VII's prohibition against discrimination.