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.

BARUCH, GOUSHA, AND SPIVAK HIGHLIGHT OCHDL'S ETHICS SEMINAR

On October 10, 2013, O'Neil, Cannon, Hollman, DeJong and Laing held its annual Continuing Legal Education seminar in Milwaukee, Wisconsin on a number of legal ethics issues of interest to in-house counsel.

Chad Baruch of Texas, a recognized national speaker on legal issues, presented a lecture entitled "Back to the Beginning: *Marberry v. Madison* and the Roots of Judicial Review" and made a presentation on the ethics of legal writing.

Pete Faust, Chair of O'Neil, Cannon, Hollman, DeJong and Laing's Corporate Practice Group, moderated a panel discussion between professional journalists and attorneys entitled "Legal Ethics Issues Relating to the Media and Dealing with the Media." The panel was comprised of two media representatives, Mike Gousha, a television broadcaster and Distinguished Fellow in Law and Public Policy at Marquette University Law School, and Cary Spivak, an investigative reporter with the *Milwaukee Journal-Sentinel*, and O'Neil, Cannon, Hollman, DeJong and Laing attorneys Dean Laing and Steve Slawinski.

Grant Killoran, Chair of O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group, presented a lecture entitled "Ethical (and Practical) Considerations for Managing E-Discovery and Electronically Stored Information" focusing on legal ethics issues relating to electronic data.

O'Neil, Cannon, Hollman, DeJong and Laing will hold this seminar again in the Fall of 2014. If you would like copies of the materials from our recent seminar, or if you would like to attend the 2014 seminar, please contact O'Neil, Cannon, Hollman, DeJong and Laing at 414.276.5000. This seminar is limited to in-house counsel.

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.

FACTORS TO CONSIDER BEFORE YOU AGREE TO SUBMIT YOUR COMPANY TO ARBITRATION

Arbitration is a procedure used in the resolution of legal disputes outside of the traditional court system. In arbitration, the parties agree to submit their disputes to one or more persons, known as "arbitrators" or an "arbitration panel." An arbitrator is someone, usually a former judge or a lawyer with significant experience in an area of law related to the dispute, who hears and decides motions, rules on evidentiary matters, and ultimately decides the disputed case. The arbitrator's decision, known as the arbitration "award," is generally binding on the parties.

Before you agree to subject your business to arbitration in a commercial agreement, you should carefully consider the nature of any future dispute that may arise over that agreement and whether arbitration of any such dispute will be beneficial. Whether you anticipate that your company will be the plaintiff or the defendant may greatly impact your decision.

The following are some of the factors to consider when deciding whether to agree to arbitration:

- **Input into the selection of the decision maker**. In an arbitration proceeding, the parties typically have input into the choice of the arbitrator. The parties can agree on an arbitrator, or choose an arbitration company to select an arbitrator. A party does not have this luxury with respect to choosing a judge, who is randomly assigned to preside over a lawsuit. In addition, the parties to an arbitration are not subject to the same geographic limitations that exist with a judge. The parties can agree to select an arbitrator from anywhere in the world.
- **A firm date for the hearing**. Parties can generally better control the date of the arbitration hearing than the date of a traditional court proceeding. An arbitrator will likely provide more flexibility scheduling the hearing than a judge will provide.
- **Less formality.** Arbitration proceedings are not generally subject to all of the same rules of evidence or pretrial procedures found in a traditional court case.
- **Lack of full discovery**. Since arbitration is less formal than the traditional court case, the ability to conduct full discovery, especially third-party discovery, is potentially more difficult in an arbitration. In addition, non-parties are not subject to the arbitration agreement and, therefore, may have a greater ability to resist discovery efforts.
- **More costly filing fees**. The fees associated with initiating an arbitration proceeding are typically far more costly than the filing fees associated with a court case. In addition, arbitrators typically charge an hourly rate for the time spent working on the arbitration, including review of documents, attendance at hearings, and preparing decisions. In a court case, the judge presides over your case with no costs beyond the initial filing fee.
- **Takes less time**. The typical arbitration proceeding is resolved faster than the typical court case. Although there are exceptions to this, arbitration does not suffer from the same back-log of cases found in the traditional court system.
- **No jury**. Arbitration requires that the parties waive their right to a jury trial. The parties present their evidence and witnesses to the arbitrator, who decides the dispute.
- **Greater finality**. In arbitration, there generally is only a very limited right to appeal. As a result, most arbitrations will end with the arbitrator's decision and the parties are generally stuck with the decision, whether good or bad.
- **Greater ability to keep the dispute private**. Unlike a lawsuit filed with the court, parties to an arbitration have the ability to keep the proceedings, and the result, confidential. A court proceeding is almost always public.

If you have any questions regarding this article, please contact Greg Lyons at O'Neil Cannon at 414-276-5000.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C. PUBLISHES EMPLOYMENT LAW BLOG

The Employment Law Practice Group at O'Neil Cannon recently published an employment law blog in an effort to provide employers with the latest developments and meaningful insight into the ever-changing employment law landscape.

Employment law is one of the most rapidly changing and developing areas of the law, which can make it difficult for employers to navigate through even the most seemingly simple and everyday personnel matters. It is our hope that you will find the articles and resources on the Employment LawScene™ to be an asset in your day-to-day human resources management.

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.”

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