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Welcome to the Spring 2009 edition of the Corporate Counselor, the official newsletter of the Corporate Counsel Section of the Oregon State Bar. The Corporate Counselor is just one of the benefits we offer in our efforts to serve you and return value to all Section members. Other available benefits, in the form of resources and activities, include the Section's website, roundtable discussions with expert moderators, and CLE's on topics of interest to Section members. We often combine these events with social and networking events.

Please join us at these upcoming events:

- May 21, 2009, a CLE at the Multnomah Athletic Club on bankruptcy and reduction in workforce issues,
- June 4, 2009, a networking luncheon at Oswego Lake Country Club,
- October 8, 2009, a roundtable discussion followed by our annual meeting, and
- December 3, 2009, a free CLE on Ethics.

Please check the Section Calendar on our website for details on these and other upcoming Section events. [www.osbcorporatocounsel.com](http://www.osbcorporatocounsel.com)

Every member of the Section is invited to participate in the planning, preparation, and implementation of Section functions. If you have suggestions, comments, questions, or concerns about the Section, what we do, or how you can become involved, please contact me at [brian.thompson@millernash.com](mailto:brian.thompson@millernash.com), or any of the other Executive Committee members.

Respectfully,  
Brian S. Thompson, Section Chair

**E-WASTE: Compliance with Mandatory  
Electronic Recycling Programs***By Kenton Erwin*

Many states are enacting statutes requiring electronics manufacturers to cover the cost of the consumers' eventual disposal of the products. The concern is that electronic monitors can release mercury and other dangerous substances into the Earth. Each state's definition of what constitutes covered "e-waste" is different, but a common theme is to cover devices which contain a display screen larger than four inches (4") when measured diagonally. Although the products primarily intended to be covered are laptops, televisions, personal digital assistants (PDAs), and computer monitors, many other products can be swept up by the regulatory scheme. Some states, however, provide a list of excepted products, such as medical devices, display screens in automobiles, etc. In addition, it is sometimes advisable to contact the regulators (usually within the state's Department of Environmental Quality, or its equivalent) and obtain the state's agreement that a particular product is not covered by the state's e-recycling law.

Failure to comply with the regulatory scheme of every state in which a manufacturer's products are disposed can lead to substantial fines and penalties, and ignorance of the requirements is no excuse. The regulatory schemes vary considerably, raising the question whether there should be just one national scheme of regulation. For example, in Maine (one

**Continued**

of the first states to adopt a scheme), manufacturers are charged for every covered device made by them that is removed by “Consolidators” from the landfills. In Oregon, each manufacturer pays (i) a registration fee based upon its percentage of covered products, and (ii) a weight-based recycling fee. In California, retailers register and collect the fees at the point of sale to end users, and retailers remit the fees to the state.

Some states, such as Maryland, have instituted particularly large registration fees, regardless of how few products, associated with a given manufacturer, are being disposed. It remains to be seen whether the fee burden, and the related compliance effort, on the part of the manufacturers, will at some point incite a constitutional argument against the state programs. One possible constitutional argument would be premised on the fact that the manufacturers did not place the products into the landfill sites, and thus to impose fees on the manufacturers for the actions of others (the consumers) is an unconstitutional taking. Consumers generally have non-polluting alternatives for disposal. Alternatively, an excessive fee may be an unconstitutional tax.

Many states are now hopping on the green bandwagon, by implementing their own versions of e-recycling programs. This gives the states a double benefit: It is “green” (and both environmentally and politically astute) to be tough on pollution, and the state also benefits from a new revenue stream.

Legal professionals with exposure to this issue need to quickly become aware of, and compliant with, the many states’ mandatory programs.

## The Corporate Counselor

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### May 2009 Issue

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*Kenton Erwin is General Counsel of VTech Communications, Inc., in Portland, Oregon, a subsidiary of an Asia-based manufacturer of consumer electronic devices, including cordless telephones and digital learning products. The comments of the author are his own, and should not be attributed to his employer.*

*This article is intended to provide only a general and brief introduction, and is not intended to be relied upon as legal advice. The reader should obtain detailed advice on these issues, from a qualified attorney with expertise in this specialty.*

## REDUCING YOUR WORKFORCE: Layoffs, And Pay Reductions, And Furloughs, Oh My

By Wendy J. Baker

Difficult economic times require creative problem-solving. Be aware, however, that companies must be careful when they act creatively to avoid employee layoffs.

If your company is considering implementing a reduction in work hours or instituting short-term furloughs, you should determine whether those actions could jeopardize the exempt status of employees under the Fair Labor Standards Act (“FLSA”) and Oregon law.

Consider, for example, a workforce where every employee agrees to take a pay reduction so that no one at the company will have to be laid off. All employees, including top executives, managers and hourly employees, continue working full-time but forego ten percent of their normal pay in the interest of saving their colleague’s jobs. This can be a reasonable way of forestalling an economic crisis.

However, what if the employer decides to close the office every Friday during July and August to save additional office expenses or, alternatively, to reward employees for their sacrifice? Now you have a potential violation of the FLSA and Oregon law.

Why?

In most companies, executives and managers are “exempt” employees who are not required to be paid overtime. Under the so-called “salary basis” test, an employee is considered exempt from overtime compensation if he or she receives a predetermined amount of pay (at least \$455 a week) during each pay period, regardless of the number of hours worked. With few exceptions, an exempt employee’s pay may not be reduced except in full-week increments.

If the exempt employee’s pay is temporarily reduced at the mandate of the employer, the exempt status may be lost. In the example above, even if the ten percent pay cut does not directly correspond to the number of days not worked in July and August, an enforcement agency could conclude that the exempt employees were, in fact, being “docked” some amount of their pay.

Under the law, an employer can be liable for back overtime pay of up to two years (three years for a “willful” violation”) for any non-exempt employee who has been misclassified as exempt. In addition, a single misclassification can trigger the loss of exempt status for an entire group of employees if the whole group has been treated similarly under the company’s policies. In other words, even the Chief Executive Officer of a company could lose his or her exempt status under the circumstances described in the example above.

How, then, may hours reductions and furloughs be accomplished legally? Here are some options:

- The employer can make employees take time off for a full week and deduct a full week’s salary. This is because the law provides that exempt employees “need not be paid for any workweek in which they perform no work.” Be careful that the employee actually performs NO work, including responding by Blackberry to work-related inquiries.
- The employer may deduct from an employee’s accrued vacation bank during a short-term layoff, as long as the employee’s

salary remains constant for the pay period. Of course, problems arise when employees have no accrued vacation time.

- An employee's regular workweek could be *permanently* reduced from five days to four, for instance, with a corresponding change in salary, as long as the salary remains higher than \$455 per week.

In employment matters, it is wise to keep in mind that an action taken with the best of intentions can still be an unlawful action.

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*Wendy J. Baker concentrates her practice in the area of Employment Law. She practices at 100 West 13th Ave Ste 200, Eugene OR 97401. 541-345-0753 www.employerlaw.org*

## **INTERNS AS SUMMER ASSOCIATES: Obtain Low Cost Labor While Providing Excellent Educational Opportunities And Serving The Community**

*By Edward Gerdes*

Are you looking for ways to expand the return on your budget? Do you have projects that need to be done, but don't have time to do them? A reasonable way to accomplish both is to hire a student from one of Oregon's three law school's as a summer intern.

When developing an intern model and when hiring your intern, you will need to follow the surprisingly straight forward state and federal laws that regulate internship programs. Failure to follow the rules, accompanied by a complaint to the Wage and Hour Division of the U.S. Department of Labor or Oregon's Bureau of Labor and Industry may result in an audit, a determination that your intern was an employee entitled to an hourly wage, and penalties for double the unpaid hourly wage, plus costs and fees. These penalties can be avoided through forethought. The following discussion serves as a general primer to help you understand rules applicable to an internship program.

The U.S. Department of Labor has said that so long as the six criteria listed below are met, the student intern will not be considered an employee. The six criteria are these:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. The training is for the benefit of the trainee;
3. The trainees do not displace regular employees, but work under close observation;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion the employer's operations may actually be impeded;
5. The trainees are not necessarily entitled to a job at the completion of the training period; and
6. The employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.

Criterion one and two lend themselves well to a legal intern where

exposure to research and writing projects helps improve their abilities for school and in future employment situations. As the intern supervisor, you can edit work product and allow the intern to revise work in order to obtain a superior written product that he or she can use for later job applications.

At Café Yumm!, we satisfy Criterion Three, Five, and Six by limiting our intern to 20 hours per week, hiring a student during the summer between first and second year of law school when they are not yet looking for full-time work upon graduation, mentoring the intern, and ensuring the intern has superior work product he or she can use during on-campus interview programs at the law schools during the Fall of second year. Although we pay no wage, we do provide a stipend at the end of the 8-week internship program which we encourage the student use to purchase a new wardrobe in preparation for fall interviews.

The Fourth Criterion can be a challenge. How can you provide meaningful work experience and training without deriving some "immediate advantage"? Fortunately, you can receive a benefit and still have an intern program. If challenged, the Department of Labor will make an assessment about the spirit of the internship opportunity as a whole. We often allow the intern to shadow officers of the company and we pay for Bar functions to help the intern improve his or her networking skills.

Ideally, a well designed intern program creates a mutually beneficial relationship between your company and the intern. The student intern receives terrific exposure to the work environment and has a designated mentor to help learn while working on important projects. The internship also helps the student gain references and enhances the resume. A small stipend or school credit may also benefit the intern. In exchange, your company will receive an enthusiastic person to help complete some of those lingering projects that you are too busy to complete. Internships can and should be beneficial to both parties. That certainly has been our experience at Café Yumm!.

### **For More Information**

Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq.

U.S. Department of Labor, Wage and Hour Division:

[www.dol.gov/esa/whd/flsa](http://www.dol.gov/esa/whd/flsa)

[www.dol.gov/compliance/laws/comp-flsa.htm](http://www.dol.gov/compliance/laws/comp-flsa.htm)

[www.dol.gov/esa/whd/opinion/](http://www.dol.gov/esa/whd/opinion/)

[FLSANA/2004/2004\\_05\\_17\\_05FLSA\\_NA\\_internship](http://FLSANA/2004/2004_05_17_05FLSA_NA_internship)

Oregon Bureau of Labor and Industry:

[www.boli.state.or.us/BOLI/TA/T\\_FAQ\\_Interns.shtml](http://www.boli.state.or.us/BOLI/TA/T_FAQ_Interns.shtml)

*Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947) (articulates applicable intern test.)

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*Edward Gerdes is Vice-President & General Counsel of Beau Delicious! International, LLC franchisor of Café Yumm! restaurants and manufacturers of Yumm! Sauce, www.cafeyumm.com.*

## Oregon State Bar Corporate Counsel Section

Luncheon and Afternoon CLE

Thursday, May 21, 2009, 11:30-4:00 pm

### Dear Corporate Counsel Section Members,

Block your calendars now for this upcoming CLE doubleheader. In one half day session, including lunch, you will gain valuable insight from several local experts on two of the most pressing issues arising out of the current economic environment:

### Pre- and Post-Bankruptcy Protections

Learn what steps you can take today to help reduce your risk and exposure in the event of a customer, vendor, supplier or other related business bankruptcy. Or, if you are already facing this situation (or think you soon will be), learn more about what options are available to protect or improve your position as you work through the bankruptcy process.

**Presented by:** Michael W. Fletcher and Albert N. Kennedy of Tonkin Torp, LLP



### Layoffs and Reductions in Force: Thinking for the Long Term

Layoffs or RIFs are never an easy decision and can have long term consequences for your business. Before proceeding with a layoff or RIF learn about some possible alternatives, how to document your process to minimize potential claims and how to position yourself to lead in the post-layoff workplace.

**Presented by:** Ellen Raim of the Coraggio Group and Edward J. Reeves of Stoel Rives, LLP

**WHEN:** May 21, 2009, 11:30 a.m. – 4:00 p.m.

**WHERE:** Multnomah Athletic Club  
1849 SW Salmon Street  
Portland, OR 97205

**COST:** \$40.00 (includes lunch)

**MCLE CREDIT:** The Corporate Counsel Section will apply for four (4) General CLE Credits with the Oregon State Bar.

### AGENDA:

**11:30 – 12:00** Lunch  
**12:00 – 2:00** Pre- and Post-Bankruptcy Protections  
**2:00 – 4:00** Layoffs and Reductions in Force:  
Thinking for the Long Term

### REGISTRATION:

Space is limited so please register in advance by mailing a hardcopy of the following form with payment to:

Corporate Counsel – Half Day CLE  
**c/o Gary Lau**  
9275 SW Peyton Lane  
Wilsonville, OR 97070

Please make checks payable to “Oregon State Bar.”

### OSB Corporate Counsel Section

Half-Day CLE – May 21, 2009, 11:30 – 4:00 p.m.

Name: \_\_\_\_\_

OSB#: \_\_\_\_\_

Firm/Company Name: \_\_\_\_\_

List of additional attendees: \_\_\_\_\_

Name: \_\_\_\_\_

OSB#: \_\_\_\_\_

Name: \_\_\_\_\_

OSB#: \_\_\_\_\_

Name: \_\_\_\_\_

OSB#: \_\_\_\_\_

### SPEAKERS

*Michael W. Fletcher* is a partner with Tonkon Torp, LLP . His practice focuses on the representation of privately held companies and institutional lenders including the areas of creditors' rights, reorganizations and bankruptcy. Michael has represented both debtors and creditors in bankruptcy proceedings and, in addition to being a lawyer, he is also a CPA.

*Albert N. Kennedy* is a partner with Tonkon Torp, LLP. His practice focuses on bankruptcy, commercial law and creditors' rights and he has represented creditors, including financial institutions, and debtors in bankruptcy proceedings before both federal and state courts. Al is a frequent speaker on bankruptcy issues, the author of numerous articles on bankruptcy-related topics and is listed as a bankruptcy specialist in *The Best Lawyer's of America*.

*Ellen Raim* is a principal with the Coraggio Group. She is both an attorney and an HR consultant specializing in improving business results through people-focused initiatives. Her work includes large scale change management, improving innovation, designing people initiatives to enable business strategies and building employee engagement. *Ellen has worked both in private practice and as in-house counsel for Intel and Electro Scientific Industries where her practice was focused primarily on labor and employment and human resources issues.*

*Edward J. Reeves* is a partner with Stoel Rives LLP. His practice includes counseling employers and educating management in all areas of labor and employment law. Ed is listed as one of the top employment lawyers in Oregon in *Chambers USA: America's Leading Lawyers for Business* and was also selected by his peers for inclusion in *The Best Lawyers in America*.