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Welcome to Volume 2 of the 2009 edition of Corporate Counselor, the newsletter of the OSB Corporate Counsel Section. Corporate Counselor is just one of the ways our section serves by delivering value to you. Other valuable resources and activities the Section provides include our website, annual roundtables discussions and CLE's on today's pressing topics, and other social and networking events.

I hope that you were able to attend our afternoon CLE on May 21, 2009, at the Multnomah Athletic Club on bankruptcy and reduction in workforce issues and our networking lunch on June 4, 2009, at Oswego Lake Country Club, and our October 26, 2009 roundtable discussion titled "Working with Outside Counsel in a Down Economy," followed immediately by our annual meeting. On December 2, 2009, we will sponsor a free CLE on ethics. Please check the Section Calendar on our website for details about all of our upcoming Section events. <http://www.osbcorporatcounsel.com/>

I encourage you to become involved in the planning and implementation of Section functions. If you have an interest in becoming more involved or have suggestions, comments, questions, or concerns about the Section, please contact me at [brian.thompson@millernash.com](mailto:brian.thompson@millernash.com), our 2010 Chair Joe Pugh at [jpugh@tqs.com](mailto:jpugh@tqs.com) or any of the Executive Committee members. If you would like to write an article for Corporate Counselor, please contact Ed Gerdes, the Editor, at [ed.gerdes@cafeyumm.com](mailto:ed.gerdes@cafeyumm.com). Your membership is important to us and I hope you find exceptional value in remaining a member.

Respectfully,  
Brian S. Thompson, Section Chair

**It's a Legislative Wrap! New Employment Laws Affecting Employers***By Naomi Levelle-Haslitt, Miller Nash LLP*

This brief summary highlights important legislative expansions of current, and legislative creation of new, employment laws. Each law becomes effective January 1, 2010, unless otherwise noted.

The "Gag Rule." Perceived by some as the most controversial of the new legislation, Senate Bill 519, known as the "gag rule", prohibits employers from discharging or disciplining employees who refuse to "attend or participate in an employer-sponsored meeting \* \* \* [with] the primary purpose \* \* \* [of communicating] the opinion of the employer about religious or political matters," which is the legislature's way of saying "anti-union meetings." Under the National Labor Relations Act (the "NLRA"), an employer is generally free to require employees to attend meetings that occur on company time and attempt to persuade employees to vote a particular way in union elections, so long as the employer does not promise benefits or make threats. While SB 519 does not prohibit employers from holding meetings on religious and political matters, an employer cannot require attendance. The "gag rule" sets penalties for employers who enforce attendance. Because the new legislation bans mandatory employer captive audience speeches during a union organization campaign, and because it places strict limits on free speech, opponents to SB 519 argue that it is preempted by the NLRA, and also violates the state and federal constitutions. A similar California law was recently struck down by the Supreme Court, and a proposed Washington statute was shelved after the Washington attorney general concluded that it would be preempted by federal labor law. Stay tuned to see whether this law gets challenged and holds up to a

**Continued**

court's evaluation of whether it is preempted.

**Private-Employer Whistleblower Claims.** House Bill 3162 expands the reach of Oregon's whistleblower protections applicable to private employers. Under existing law, whistleblower protections apply only in fairly narrow circumstances. Currently, private employers are prohibited from discriminating or retaliating against an employee who in good faith reports criminal activity by any person, cooperates with a law enforcement agency conducting a criminal investigation, causes a complaint to be filed against any person, brings a civil proceeding against an employer, or testifies at a civil proceeding or criminal trial. HB 3162 expands whistleblower protection to any employee who "in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule, or regulation." An employee can assert a claim through the Bureau of Labor and Industries ("BOLI") or in court, thereby subjecting employers to additional civil liability.

**Disability Discrimination Law.** SB 874 brings Oregon disability discrimination laws in line with the Americans With Disabilities Act ("ADA") amendments passed by Congress last year (which became effective January 1, 2009). The Oregon amendments generally broaden the definition of "disability" by (1) including in the definition of "major life activities" a lengthy and nonexhaustive list of activities such as eating, standing, bending, concentrating, impairments that are episodic or in remission, and "major bodily functions," such as normal cell growth, digestion, bowel, and bladder functions, and (2) prohibiting employers from considering mitigating measures such as medication, hearing aids, and prosthetics (other than eyeglasses and contacts) when determining whether an impairment substantially

limits a major life activity. The broadening of the definition of what constitutes a disability limits an employer's ability to argue that an employee was not disabled when responding to complaints or assessing whether a reasonable accommodation is necessary. Additionally, as with the ADA amendments, it is now less likely that an employer can obtain dismissal of a lawsuit asserting a violation of Oregon's disability law before it reaches a jury.

**Religious Accommodation.** SB 786 creates a higher standard for an employer's duty to accommodate an employee's religious practices. Under the more rigorous standard enacted by SB 786, an employer refusing to provide a requested accommodation must show that the accommodation is unreasonable and would impose an undue hardship because of significant cost and expense, rather than the de minimis cost that an

employer must show under the current standard. The new standard is not entirely clear but may be akin to that required under the ADA. The new law also requires an employer to allow an employee to use leave (including vacation or other leave available to the employee) for religious observance or practices.

**Domestic Violence Accommodation.** SB 928 creates a new law that prohibits discrimination against and requires employers to provide "reasonable safety accommodations" to employees who are victims of domestic violence, sexual assault, or stalking. Reasonable accommodations can include but are not limited to transfer, reassignment, a modified schedule, and unpaid leave. The employer must provide such an accommodation unless it creates an undue hardship. The undue-hardship standard is the same as under Oregon disability discrimination law. Under the law, an employer can request that the employee certify the need for an accommodation. Certification can include a copy of a police report, protective order, or other documentation from an attorney, law enforcement officer, healthcare professional, or member of the clergy.

**Military Leave and Service.** HB 2744 allows the spouses of members of the Armed Forces, National Guard, or Military Reserve up to 14 days of unpaid leave, if they work for an employer that employs more than 25 people. Currently, under the Family Medical Leave Act, otherwise eligible employees at employers with more than 50 employees who are spouses of members of the National Guard and Reserves (but not regular Armed Forces) can take up to 12 weeks of unpaid leave for "qualifying exigencies," which include (1) short-notice deployment; (2) military events and related activities; (3) child care and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities if the employer and employee agree to the leave. (Becomes effective June 25, 2009.)

A second bill, HB 3256 is the first state law mirroring the federal Uniformed Services Employment and Reemployment Rights Act, which prohibits employment discrimination against service members and veterans. HB 3256 makes it an unlawful employment action for an employer to discriminate against a veteran in initial employment, reemployment following deployment, retention in employment, promotion, or any other term, condition, or privilege of employment, or retaliate against the service member for exercising the rights provided by the Act.

**Everything but the Kitchen Sink—Garnishment, Hands-Free Cell Phone, Child Labor, Attorney Fees, and Customer Use of Employee-Only Bathrooms.**

SB 373 creates potential liability for employers who fail to garnish an employee's wages and turn money over in a timely manner when served with a garnishment order. Liability and penalties may flow to the employer or garnishor for damages resulting from failure to withhold or to pay amounts required by a garnishment order, or for withholding amounts in excess of a garnishment order.

HB 2377 requires drivers to only use hands-free devices for cell phones when operating motor vehicles. Employers with employees who regularly drive in the scope of employment should consider instituting a policy reflecting this new legislation and make employees aware of the new law.

HB 2826 extends the hours that children under 16 can work from 6 p.m. to 7 p.m., and until 9 p.m. from June 1 through Labor Day (during summer vacation).

## The Corporate Counselor

published by the Oregon  
Corporate Counsel Section

### November 2009 Issue

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SB 60 allows BOLI to collect attorney fees from the employer when collecting a judgment on a wage claim. Previously, BOLI could only collect its fees from the claimant's recovery.

HB 2815 directs state agencies including the Department of Revenue, the Employment Department, the Construction Contractors Board, and BOLI to "[w]ork to establish consistency in agency determinations relating to the classification of workers, [and] [g]ather and share information relating to the misclassification of workers, including \* \* \* independent contractors." While a consistent approach by the various agencies in addressing whether a worker is an employee or independent contractor will be helpful, this also means that the agencies will exchange information and that an investigation initiated by one agency could result in an investigation by another.

HB 2433 allows Oregon employees of small employers (2 to 19 employees) who lose their jobs to take advantage of the federal stimulus package that supplements up to 65 percent of premium coverage for up to nine months for employees who elect healthcare benefit continuation coverage. (Becomes effective April 28, 2009.)

HB 2059 requires licensed healthcare professionals to report conduct by fellow licensees that may reasonably constitute grounds for discipline to their governing regulatory board. Those regulatory boards are in turn required by HBI 2118 to investigate any complaint made about a person practicing in violation of the law. These bills combined can implicate the new whistleblower complaint protections applicable to private employers under HB 3162, discussed above.

SB 277 requires places of public accommodation with three or more employees working at the time of the request to make an "employee-only" bathroom available to a customer with an "eligible medical condition" that causes a person to need a bathroom "without delay," as long as (1) the customer presents a letter from a healthcare practitioner asserting the need, (2) the toilet facility is reasonably safe and not located in an area where access would create an obvious health or safety risk, and (3) no other public restroom is "immediately available."

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*Naomi Levell-Haslitt is a partner with MillerNash, LLC in Portland. She can be reached at [naomi.levell-haslitt@millernash.com](mailto:naomi.levell-haslitt@millernash.com) or 503-224-5858 x. 2349*

## ***Evolving In-House Counsel Positions in the Face of the Asian Business Model***

*By Kenton Erwin and Martin Sacks*

In-house legal positions have changed a lot over the past three decades. In 1982, for instance, we commonly had one legal secretary for every two lawyers, a mag card word processing system, and extra staff down the hall. Voicemail and PCs on every desk would not arrive for several years yet. The rate of change since then has increased dramatically, but I suspect the rate of change is increasing even more dramatically, and that the further increased rate is influenced by the Asian business model.

Although there are significant differences between business cultures throughout Asia, the most obvious difference of Asian ownership of U.S. companies for present purposes is the emphasis on cost-cutting. Cost control manifests itself in the legal function

through reductions in staff and limited use of outside counsel. Using our company as an example, before an acquisition in 2000 of our large U.S. telecommunications company by an Asian-based entity, there were four attorneys, two paralegals, and an administrative assistant in our U.S. telecom division. Since the acquisition, staffing has dropped to one attorney and one paralegal. There is no senior legal officer at headquarters. The main factory and approximately ten other offices have no in-house counsel at all. Staff reductions throughout the company, not just in the legal department, were accompanied by revenue growth from US\$900M in 2004 to US\$1.5B in 2008. Our use of outside counsel was also significantly limited to specialized areas like patent litigation and product liability defense, antitrust, bankruptcy, and sweepstakes.

Although lower staffing levels in the legal department increases work load expectations, it does not reduce quality demands and response times. Failure to respond timely, oftentimes the day of the request, may result in the company reacting without legal counsel. We no longer have the luxury of time needed to increase quality from 98% to 99%. Once the work product reaches 98% quality, the additional time necessary to push it to 99% is often unavailable. No attorney can attain legal perfection; the curve is asymptotic—it requires more and more effort to get less and less gain. Determining when the work is good enough that it professionally satisfies specific need is a complex question. Historically, in-house counsel had more latitude than outside counsel to choose this threshold and to determine which risks to take. That luxury no longer exists for in-house counsel.

Under the Asian business model, no one wants your masterpiece, or, at best, a masterpiece may not be what you think it is. General Counsel can no longer just manage a legal department. Instead, General Counsel, and every lawyer must actually practice law and work in the trenches. Every staff member must work largely independently and be highly capable across a wide range of legal tasks. There is a premium upon speed and effective triage. Fortunately, micromanaging, by necessity, has gone the way of the dodo. Legal staff must communicate efficiently and concisely with business-side personnel and with each other. Availability now extends to other countries' working hours. Meetings are kept to a minimum both in number and in duration. As much as many litigators hate it, email is the order of the day.

The Asian Business Model also promotes the growth of paralegal positions. Paralegals will continue to perform more work previously done by attorneys. The recent phenomenon of attorneys working as paralegals will continue and become a growth area for attorney employment.

We anticipate that professional function migration will continue from North America to Asia, because professionals there are more willing to work longer hours for less compensation. Lawyers will not escape this migration. Many U.S. legal positions will be simply eliminated rather than relocated to Asia.

Although this sounds dreary and foreboding for future lawyer prospects, it is possible for some lawyers to not only survive, but to thrive in this environment. Strategic advantages for U.S.-based general counsel are superior knowledge of U.S. legal practices, greater ability to effectively manage outside counsel, greater willingness to adapt quickly, stronger entrepreneurial spirit with corresponding ability to take reasoned risks, and simple efficiency that comes with longevity of practice and familiarity with information.

We have found that although it can take longer to gain the trust of Asian officers than counterparts in the U.S., benefits are considerable. They range from greater autonomy, participation in higher-growth areas of the world economy, possibly more loyalty by the employer, and an emphasis on long-term strategic planning, instead of what some would see as U.S. company's over-emphasis on immediate results.

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*Kenton Erwin is General Counsel and Martin Sacks is Paralegal in the Portland, OR legal department of an Asian-based electronics manufacturing company. The comments of the authors are their own, and should not be attributed to their employer. This article is not intended to be relied upon as legal advice.*

## **INTERNSHIP PROGRAMS: Case Study Follows Spring Corporate Counselor Article**

*By Edward Gerdes*

In the Corporate Counselor, Volume 1 2009, I wrote an article titled "INTERNS AS SUMMER ASSOCIATES: Obtain Low Cost Labor While Providing Excellent Educational Opportunities and Serving the Community." The article prophetically explained the proper way to establish an internship program for students at your business. During this past summer, news reports surfaced concerning an intern program at Centron Solar, a coalition of 30 undisclosed Chinese solar manufacturing firms, which has its U.S. operations based in Eugene, Oregon.

According to the Eugene-Register Guard on September 19, 2009, two individuals filed wage claims with the Oregon Bureau of Labor and Industries alleging that although they were hired as interns, they were really unpaid employees. Allegations included: a promise of employment at the end of the internship, an agreement that at least one intern signed granting commissions for sales leads, undefined internship work, no training, little to no supervision, no structure or established internship program, and an abrupt termination of the internship before completion of its term.

The allegations are textbook violations of the six criteria used by the U.S. Department of Labor to determine whether an intern will be considered an employee, as explained in the article published in Volume 1 2009.

Membership records indicate that Centron Solar has no general counsel who is a member of this section. Furthermore, Centron Solar's troubles haven't ended with its internship program. News sources recently reported that the company renamed itself Grape Solar following a trademark infringement suit filed by CentroSolar out of Arizona. Grape Solar's troubles appear to be examples of deficiencies highlighted in the article in this issue by Mr. Erwin and Mr. Sacks discussing the Asian Business Model.

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*Edward Gerdes is Vice-President & General Counsel of Beau Delicious! International, LLC dba Café Yumm!. The comments and opinions of the author are his own and not of his employer, and are not intended to be relied upon as legal advice.*

## **Actions Employers Should Consider Now To Combat The Flu**

*By Robert J. Barsocchini, General Counsel, Goodwill Industries*

By now, employers have had plenty of time to consider the potential affects the H1N1 virus may have on their businesses. It has already impacted schools around the country and here in Oregon. All general counsels should be following this closely and be prepared to advise our companies on appropriate action.

Besides taking the obvious steps of keeping employees informed and requiring them to practice safe health habits while at work, general counsel should closely review sick leave policies. Policies need to be flexible and non-punitive. It is likely that many existing policies will "go out the window" until this spring. Here's why: The standard refrain is to ask employees to stay home and not return until 24-hours after their fever has subsided. Also, employees may need to care for sick family members, which you probably want them to do to avoid bringing the virus to the workplace. Further, the CDC recommends against requiring a doctor's note before allowing an employee to return to work. Employers may find themselves in the position of simply taking the word of employees that they are sick. These practices likely violate your Employment Handbook and you will want to consider how to deal with them.

Depending on the nature of your business, careful thought should be given to business continuity plans. Where possible, teleworking may help, as will cross-training. Where feasible, add a "button" to your company Web page so employees can access new information.

We have a responsibility to mitigate the effects of this pandemic on our businesses to the extent we have some control and influence over it. The considerations listed here will certainly help.

Additional Resources:

[www.flu.gov/plan/workplaceplanning/index.html](http://www.flu.gov/plan/workplaceplanning/index.html)

One-Stop  
[www.flu.gov](http://www.flu.gov)

2009 H1N1 Influenza Information  
<http://www.cdc.gov/h1n1flu/>

2009 H1N1 Influenza Resources for Businesses and Employers  
<http://www.cdc.gov/h1n1flu/business/>

Worker Safety and Health Guidance for a Pandemic  
[www.osha.gov/dsg/topics/pandemicflu/index.html](http://www.osha.gov/dsg/topics/pandemicflu/index.html)

OSHA's Guidance on Preparing Workplaces for an Influenza Pandemic  
[http://www.osha.gov/Publications/influenza\\_pandemic.html](http://www.osha.gov/Publications/influenza_pandemic.html)

CDC/NIOSH Occupational Health Issues Associated with 2009 H1N1 Influenza Virus  
<http://www.cdc.gov/niosh/topics/h1n1flu/>