ECKERT SEAMANS
ATTORNEYS AT LAW

Spring 2012

www.eckertseamans.com | info@eckertseamans.com

Legal Update

In This Issue…

Page 1
Labor & Employment
Five things that happened in 2011 every employer should know about (and some quick suggestions for your 2012 "to do" list)

Alternative Energy
Green eggs, electricity & more!

Page 3
E-Discovery
When litigation is over, think about the taxable costs of e-discovery and you may "find the pope in the pizza"

Page 5
Tax
Equity incentives for employees of limited liability companies

Page 6
Employee Benefits
IRS proposal considers the meaning of "governmental plan"

Page 7
Firm News

Labor & Employment

Five things that happened in 2011 every employer should know about (and some quick suggestions for your 2012 "to do" list)

Jeffrey W. Larroca

Everybody likes a list. Here's mine, along with some tips, so the missteps of other employers in 2011 do not become yours in 2012.

Sexual harassment allegations did not go out of style. Just ask Herman Cain. Moreover, in the wake of the publicizing of those allegations, a new survey by Poll Position revealed that 35 percent of women and 22 percent of men say they have been subjected to sexual harassment in the workplace. The Equal Employment Opportunity Commission (EEOC) reported that in fiscal 2010, it recovered nearly $50 million in benefits from American employers to resolve harassment charges.

continued on page 2

Alternative Energy

Green eggs, electricity & more!

John R. Hanger

You might have seen Hillandale Farms eggs in your local grocery store. But few people know that this forward-thinking Adams County egg producer is working with EnergyWorks BioPower, LLC (EnergyWorks) to create a first of its kind bio-energy project in Tyrone Township, Adams County, Pennsylvania. The Hillandale-EnergyWorks project is a model for how "out-of the-coop" solutions can benefit farms, save money and reduce both water and air pollution.

Since Hillandale Farms is the largest chicken laying farm in Pennsylvania, the waste produced by millions of layer hens is

continued on page 3

Labor & Employment

(continued)

> *"The EEOC reported that in fiscal 2010, it recovered nearly $50 million in benefits from American employers to resolve harassment charges."*

To do: Confirm that your anti-harassment policy is adequate and widely distributed, that you are training employees annually (recommended for all employers, but required for many employers in California, Connecticut and Maine) and that when you do receive a harassment allegation, you react promptly and effectively.

The new health care law has a long way to go. The Supreme Court will hear a constitutional challenge to the law. As a result, employers are taking a "wait and see" approach before making major adjustments to their current health care policies, as the most dramatic components of the law do not take effect until 2014. The Society for Human Resource Management recently reported on a new survey that showed 56 percent of employer respondents had yet to plan for the changes in the law.

To do: Confer with your benefits provider and your employment attorney to work on a "what if" strategy. If the law is deemed constitutional, in 2014, businesses with 50 or more employees will face a fine of either $2,000 or $3,000 per employee for failure to offer health insurance coverage.

Wage suits are all the rage. The U.S. Department of Labor and its state counterparts are aggressively investigating employers for a myriad of wage violations, including misclassification of working as independent contractors and misclassification of workers as exempt from overtime. At a time when state and federal budgets are tight, government is stepping up its use of regulatory enforcement.

To do: Audit your pay practices from top-to-bottom. Review your independent contractor agreements to ensure that they are properly classified. Perform an exhaustive analysis of your job descriptions to ensure that you have properly classified employees and you are not failing to pay overtime when you should. Such failure can put you in the ranks of Rent-a-Center ($2.7 million in overtime settlement approved by a California federal judge), J.P. Morgan ($42 million overtime settlement approved by a federal judge in New York) or Wal-Mart ($188 million overtime jury verdict upheld by a Pennsylvania appeals court).

There are a lot more disabled employees than you might imagine. After Congress passed the Americans with Disabilities Act (ADA) in 1990, the Supreme Court took a narrow approach to who was disabled. And if you were not deemed disabled, there was no reason for your employer to accommodate you. But after the passage of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), and the publication of new regulations implementing the ADAAA in May 2011, it is a whole new ball game for employers. There are numerous evaluations of the differences between the ADA and the ADAAA readily available on the web, but what employers should know first and foremost is Congress's edict that the definition of what makes a person disabled should be construed broadly in favor of the most expansive coverage permissible and should not be interpreted as a "demanding standard."

To do: Ensure that you take every request for an accommodation (or even a statement that suggests an accommodation is necessary) seriously and, thereafter, run it though the same rigorous process. Here's a rough example: An employee calls in sick repeatedly and tells his supervisor that he has switched medications and it is making him "messed up." The next day, he fails to call in at all. Based on that little bit of information, presume you may be dealing with a disabled employee who requires an accommodation. This means some or all of the following steps: proactively contacting the employee; sending a form for his doctor to fill out so you can evaluate his disability status; temporarily approving an accommodation (for example, giving him time off until you can determine whether he is, in fact, disabled); and engaging in a discussion with the employee to determine the appropriate accommodation if, in fact, you conclude that he is disabled.

States and localities are on the cutting edge of new law. In 2011, New York revamped its wage law in the form of The Wage Theft Prevention Action requiring employees to give a written notice to each new hire and to all employees by February 1 each year that includes rates of pay; form of payment (by the hour, shift, day, week, commission, etc.); regular payday; the official name of the employer; the address and phone number of the employer's main office or principal location; and any allowances taken as part of the minimum wage (tip, meal and lodging deductions). Many New York employers have no knowledge of this requirement, just as many California employers have no knowledge of a similar bill that became effective on January 1, 2012, or another California law that restricts the use of credit reports in hiring decisions, which also became effective on January 1, 2012. There is also a similar Connecticut law that became effective on October 1, 2011.

To do: You get the point. Make sure you're on top of any legal developments or requirements that may be applicable to your business. Failure to do so could be costly in the end. For example, employers who negligently violate the California credit report law may be subject to fines and lawsuits for actual damages and attorney's fees, and employers who willfully violate the law risk punitive damages and fines up to $5,000.

And on that note, have a great 2012.

Jeffrey W. Larroca is a Member of the Labor and Employment Group based in Washington, D.C. Jeff can be reached at 202.659.6646 or jlarroca@eckertseamans.com

Alternative Energy

(continued)

substantial and must be handled safely. With an eye toward environmental stewardship, Hillandale began to look for solutions. It found EnergyWorks, a full-service provider of ecosystem services.

Hillandale and EnergyWorks will use gasification technology to transform chicken waste (biomass) to renewable energy. The electric plant will generate about 3.25 MW of electricity, enough for about 2700 homes. The electricity will mainly run the farm and plant, with any excess electricity sold back to the grid.

This plant will not only reduce Hillandale's electricity bills but also eliminate over 34,000 tons of CO_2 equivalent greenhouse gas annually and recover about 13,000 tons of mineral byproducts that can be recycled as fertilizer or livestock-feed supplement.

Today, all of the farm's droppings are stored and then spread on land as fertilizer, resulting in potential runoff of nitrogen and phosphorous into our local waters and the Chesapeake Bay. Once the new plant is up and running, the process will contribute to Pennsylvania's 2025 target reductions in nutrient loading to the Chesapeake Bay in amounts equivalent to 3.5 percent of the target for nitrogen and a 4.4 percent of the target for phosphorus. The Pennsylvania Department of Environmental Protection has certified the plant as a nutrient credit generator with a projected annual capacity of over 1 million nitrogen credits and 53,000 phosphorous credits, making it Pennsylvania's largest certified credit generator. The plant is expected to be up and running by the end of 2012.

This plant wouldn't have become a reality without support from government and the private sector, however. EnergyWorks received loans from Pennvest, the state program that helps support projects that improve the Commonwealth's water and sewer infrastructure. The Pennsylvania Public Utility Commission was instrumental in creating regulations and policies to foster the development of alternative a nd renewable energy projects in the Commonwealth generally, and eliminated barriers for the Hillandale project. Over 60 percent of the costs to develop and construct the project will go to Pennsylvania companies, providing immediate benefit in terms of manufacturing and construction jobs.

The local utility, Metropolitan Edison, worked with Hillandale and EnergyWorks to put in place the energy sales contract needed to make the plant economically viable. Pennsylvania State University and several of the state's poultry and livestock feed producers are working with EnergyWorks to qualify the mineral byproducts as commercial feed supplements. This initiative is an important step toward conserving phosphorus as a limited, nonrenewable resource.

The project may be a model of an agricultural and energy project that could be replicated across the Chesapeake Bay Watershed and possibly America. If so, it could help usher in a whole new era of sustainable animal agriculture.

John R. Hanger is Special Counsel to Eckert Seamans. He served as Secretary of the Department of Environmental Protection and is an expert on energy, environment, green economy, competitive electric markets and utility regulation. John can be reached at 717.237.6036 or jhanger@eckertseamans.com

E-Discovery

When litigation is over, think about the taxable costs of e-discovery and you may "find the pope in the pizza"

Until electronic discovery became the norm in complex litigation, shifting the high costs associated with electronic discovery was a pipe dream. But that is changing. For those successful litigants who do their homework and take copious notes, you may get an unexpected prize at the end of the litigation—just like Father Guido Sarducci from "Saturday Night Live" fame circa 1980 when he found a picture of the pope in his pizza. And that prize could be the shifting of costs associated with electronic discovery.

Cost shifting is available under Rule 54(d) only where a federal statute, the Federal Rules of Civil Procedure or a court order expressly provides for an award costs to a prevailing party. Winners wanted cost shifting, and losers were grateful that it was not a viable option. But a seldom-used 2008 change to federal statute 28 U.S.C. § 1920(4) changed the game for litigants in federal court.

Section 1920(4) allows federal courts to tax the costs "for exemplification and the cost of making copies of any materials where the copies are necessarily obtained for use in the case." Prior to the 2008 amendment to the statute, § 1920(4) permitted cost shifting for the exemplification and copying of "papers;" the amendment changed "papers" to "any materials," to reflect that the costs of electronic discovery are recoverable.

Since the amendment, attorneys have increasingly been presenting motions to tax costs on non-prevailing parties in federal courts. Initially, the courts were reluctant to embrace § 1920(4) as a mechanism to shift the costs of e-discovery. But that tide is slowly shifting. To date, there have been more than a dozen cases allowing the shifting of costs related to e-discovery—each one unique and offering insight to the eventual predictability of cost shifting.

Businesses' increased dependence on technology has caused the costs associated with litigation to rise—primarily the costs of e-discovery: gathering, searching and producing documents in response to discovery requests. In complex cases, the projected costs of discovery directly affect litigation and settlement strategy, and the growing trend among federal courts to allow prevailing litigants to shift the costs of e-discovery is changing (and will change) the way litigants prepare and conduct discovery.

The recent decision in *In re Aspartame Antitrust Litig.*, 2011 U.S. Dist. LEXIS 118226 (E.D. Pa. Oct. 5, 2011) is one of the first decisions providing exhaustive detail on the topic. It explains the factors courts will consider in deciding whether to shift costs and which costs are taxable to the non-prevailing party. There, the U.S.

continued on page 4

E-Discovery

(continued)

District Court for the Eastern District of Pennsylvania awarded more than $500,000 for the costs of e-discovery to the prevailing parties in an antitrust litigation matter.

Factual Background in *Aspartame*

After the court dismissed the plaintiff's Sherman Antitrust Act price-fixing claims against multiple manufacturers of aspartame-based sweeteners, the defendants applied for costs under Rule 54(d). The Clerk of Court found a heavy presumption in favor of taxing the costs of electronic discovery against the plaintiffs; and the burden to show that costs should not be taxed fell on the plaintiffs (the non-prevailing parties). The District Court reviewed the Clerk's decision de novo, and largely affirmed.

Legal Analysis

E-Discovery

The court provided a survey of then-current case law on the issue of taxing e-discovery, observing that it "is a new area of law where courts have diverged in their approaches." The court's analysis included discussions of decisions in *Race Tires America v. Hoosier Racing Tire Corp.*, 2011 WL 1748620 (W.D. Pa. May 6, 2011) (now on appeal to the Court of Appeals for the Third Circuit), and *Tibble v. Edison Int'l*, 2011 Lexis 94995 (C.D. Cal., July 8, 2011). Since the *Aspartame* decision, courts in the Seventh, Ninth and Federal Circuits have embraced the power to tax e-discovery costs against the non-prevailing party. *See Jardin v. DATAllegro, Inc.*, 2011 WL 4835742 (S.D. Cal., Oct. 12, 2011); *LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 2011 U.S. Dist. LEXIS 121361 (N.D. Ill. Oct. 20, 2011); *Synopsys, Inc. v. Ricoh Co. (In re Ricoh Co. Patent Litig.)*, 2011 U.S. App. LEXIS 23495 (Fed. Cir. Nov. 23, 2011).

Several factors played into the court's analysis, including the volume of discovery requested and produced; the complexity of the litigation; the e-discovery methods used by the defendants; which parties benefitted from those methods; which parties requested the use of those methods; the "necessity" of the chosen methods; whether the costs were those typically incurred by lawyers or non-lawyers; and the adequacy of documentation submitted to support the defendants' bill of costs.

The court taxed the following costs:

- Creating a litigation database
- Storing data
- Imaging hard drives
- Deduplicating data
- Hosting electronic data
- Conducting keyword and privilege searches
- Making documents searchable using Optical Character Recognition (OCR) software
- Capturing metadata
- Creating "load" files (requested by the plaintiffs)
- Creating CDs and DVDs of the electronic documents
- Data recovery and restoration
- Technical support

It is interesting to note that the court did not tax the plaintiffs with the costs of "the sophisticated e-discovery program" or related applications, because they were not "necessary" for searching and filtering purposes and were mainly used for the convenience of counsel. Costs for Bates-labeling documents were similarly not recoverable by the defendants.

Other courts, however, have held that Bates-labeling is a taxable cost and, alternatively, that converting documents into electronic format is not taxable. The most prominent factor in the differing opinions is whether there was an agreement between the parties concerning how discovery would be conducted. In *Ricoh*, where the parties had a well-developed court-approved discovery plan in place, the court denied the prevailing party's request to tax the costs of e-discovery, because the parties agreed to share the costs of the e-discovery services provided by a mutually agreed-upon e-discovery service provider. In *Specht v. Google*, 2011 U.S. Dist. LEXIS 68968 (N.D. Ill. June 27, 2011), the court refused to tax costs where the prevailing party failed to prove that the parties agreed to conduct discovery electronically.

Depositions and Document Reproduction

Although not taxed pursuant to § 1920(4), the Court in *Aspartame* permitted the taxation of costs for either deposition transcripts or videotapes, but not both, under § 1920(2). The court focused on whether the videotaped deposition (which was more expensive than the transcript) appeared to be "reasonably necessary" to the defendants at the time of the deposition. Other courts, including the Northern District of California and the Federal Circuit, allow the recovery of costs for both depositions transcripts and video.

Key Factor—Itemization of Bill of Costs

Without exception, the most important factor considered by federal courts is the proper itemization of the prevailing party's bill of costs. In *Aspartame*, the court refused to allow the defendants to recover costs that were not sufficiently itemized, specifically those billed for photocopying and scanning documents, and amounts for "hard drives." The situation was similar in *Ricoh*, where the Federal Circuit stated:

> When the prevailing party seeks to recover copying costs related to its own document production, to meet the documentation requirements, the prevailing party must establish, in connection with its proposed Bill of Costs, that the reproduced documents were produced by it pursuant to Rule 26 or other discovery rules; that they were copied at the prevailing party's expense and at the request of the opposing party; and that the copies were tendered to the opposing party . . . . [While] parties cannot be expected to track the identity of each photocopied page along with a record of its relevant to the litigation . . . 'a bill of costs must represent a calculation that is reasonably accurate under the circumstances.'

Conclusion

Litigators should keep detailed records and receipts for all costs associated with e-discovery. In re *Aspartame* and *Ricoh* also serve as a warning: Seeking exhaustive discovery can be a double-edged sword. Attorneys should confer to properly tailor e-discovery stipulations and orders to avoid unnecessary costs.

We do not yet know how much (or whether) In re *Aspartame* will impact the taxing of costs for prevailing parties in state courts—even where state rules of civil procedure are based on the federal rules, and the state courts look to cases that construe Federal Rule 54(d) as persuasive authority.

How each state, district and circuit court will construe Rule 54(d) is anyone's guess, but there is little doubt that each court will have an opportunity to weigh in on the issue. It pays to be prepared going forward in any litigation that, as a prevailing party, there may be an opportunity to shift the costs of discovery under Rule 54(d), and it could be a significant amount if you do your homework.

Originally appeared in *The Legal Intelligencer*.

Kevin F. Brady is a Member and Jill K. Agro an Associate in the Litigation Group based in Wilmington, DE. Kevin focuses his practice on litigation and in particular issues dealing with e-discovery. Jill focuses in the areas of corporate and commercial litigation. Kevin can be reached at 302.574.7412 or kbrady@eckertseamans.com and Jill can be reached at 302.574.7406 or jagro@eckertseamans.com

Tax

Equity incentives for employees of limited liability companies

Paul M. Yenerall

Paul M. Yenerall is a member of the firm's Board of Directors and concentrates his practice on employee benefits and tax law matters. Paul can be reached at 412.566.1944 or pyenerall@eckertseamans.com

Limited liability companies (LLCs) taxed as partnerships have become the preferred legal entity for business. The owners of these entities enjoy the flow-through tax treatment of a partnership as well as the liability insulation of a corporation. Nationally, domestic LLCs represent the largest entity type for partnerships, according to the latest statistics released by the Internal Revenue Service.

Often, the owners of an LLC want to provide an equity interest to motivate and retain key employees. The most commonly used approach is to provide "profits interests." A profits interest essentially is the right to a share of the future income and/or appreciation in value of the LLC. For example, a profits interest could be designed to provide a share of the LLC's future earnings or losses to key management employees (e.g., the holder is entitled to receive 5 percent of the LLC's income or loss) or could be designed to provide a share of the proceeds realized upon sale of the LLC or its assets. A profits interest generally can be designed to have pre-tax economic consequences that are the same as, or come very close to, those of stock options. Typically, profits interests awarded the key management employees are subject to forfeiture under certain circumstances (e.g., the employee quits or is terminated for cause).

In the typical arrangement, an employee would receive an award and would, if the profits interest is subject to forfeiture, make an election under Section 83(b) of the Internal Revenue Code. An 83(b) election fixes the ordinary income tax obligation at the time of grant. The employee would pay income tax at ordinary income tax rates on the value of any difference between the fair market value of the profits interest and any consideration paid. Historically, many tax practitioners took the position that the profits interest always had no fair market value upon receipt, although proposed guidance (discussed below) indicates that the government does not agree with that position. Unless distributions of future income of the LLC are made to the holders of the profits interests, then no further taxes are paid until the profits interests are sold or otherwise disposed. If there is no value at grant, then, the tax is zero, and taxes on the profits interest would only be paid when the interest is sold, at which time capital gains tax rates would apply.

Proposed (not finalized) guidance from the Treasury Department provided a "safe harbor" for valuing profits interest by stating that, if certain requirements are met, the profits interests may be valued at their liquidation value at the time of transfer (generally, this is zero). In order to be eligible for the safe-harbor election, several requirements must be satisfied including: 1) the partners must consent to the election; 2) the election must be filed with the IRS; 3) no partner may report income or fail to file information reports in a manner inconsistent with the election; and 4) the services for which the partnership interest is issued must be rendered to the partnership. Additional requirements also apply. Profits interests can be tax-free at grant only if provided to employees or other service providers. If profits interests are held for at least one year after the interests vest, the amount received is treated as a long-term capital gain; otherwise, it is a short-term gain.

In addition, if profits interests holders make an 83(b) election or when the profits interests are no longer subject to forfeiture, they must be treated as if they had an actual equity stake in the company. That means that they would receive a K-1 statement attributing to them their respective share, if any, of profits or losses and would have to pay taxes on that. Distributions can be made by the LLC for this purpose. If the employee forfeits the profits interests (because they never become vested, for instance), a special allocation must be made to reverse the effects of any gains or losses attributable to the employee.

Employee Benefits

IRS proposal considers the meaning of "governmental plan"

The pension and retirement systems of public employers would be subject to the Employee Retirement Income Security Act of 1974 (ERISA) and various related Internal Revenue Code (Code) tax provisions if it were not for a specific "governmental plan" exemption. The exemption allows "governmental plans" to avoid significant requirements such as ERISA fiduciary standards, minimum funding rules, the non-discrimination rules and coverage by the Pension Benefit Guaranty Corporation (PBGC) and various reporting and disclosure requirements.

On November 8, 2011, the Internal Revenue Service (IRS) published an advanced notice of proposed rulemaking (the Notice) concerning the definition of a "governmental plan" under Code. The Notice sets forth guidelines on the definition of a "governmental plan," including draft regulations.

Governmental Plan Definition

Section 414(d) of the Code generally defines a governmental plan as "a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

It is clear from the Code that plans sponsored by each of the states will qualify, and while the Notice does not specifically define a "political subdivision" of a state, we can assume that plans sponsored by basic governmental entities such as counties, cities and towns will continue to qualify as governmental plans. The more challenging question, and the one that the IRS focuses on in the Notice, is the determination of whether an entity is an "agency or instrumentality of the United States, of any State, or of any political subdivision of a State" for purposes of the "governmental plan" exception. This determination is particularly relevant for other types of government-connected entities such as certain utilities, authorities or hospitals.

For purposes of defining "agency or instrumentality," the IRS employs a facts and circumstances approach generally based upon existing case law and agency guidance. The facts and circumstances would include "major" factors and other "minor" factors to be considered in making the determination.

The "major" factors are whether:

- The entity's governing board or body is controlled by a State or political subdivision of a State
- The members of the governing board or body are publicly nominated and elected
- The entity's employees are treated in the same manner as employees of the State (or political subdivision) for purposes other than providing employee benefits (for example, the entity's employees are granted civil service protection)
- A State (or political subdivision) has fiscal responsibility for the general debts and other liabilities of the entity (including responsibility for the employee benefits under the entity's plans)
- In the case of an entity that is not a political subdivision, the entity is delegated the authority to exercise sovereign powers (i.e., the power of taxation, the power of eminent domain and police powers) of the State (or political subdivision), and the delegation is pursuant to a statute of a State (or political subdivision)

The "minor" factors to be considered in whether an entity is an agency or instrumentality of a State or of a political subdivision of a State include whether:

- The entity's operations are controlled by a State (or political subdivision)
- The entity is directly funded through tax revenues or other public sources (but not from public funds under a contract to provide a governmental service or through grants)
- The entity is created by a State (or political subdivision) pursuant to a specific enabling statute that prescribes the purposes, powers and manners in which the entity is to be established and operated
- The entity is treated as a governmental entity for Federal employment tax or income tax purposes (such as the authority to issue tax-exempt bonds) or under other Federal laws
- The entity is determined to be an agency or instrumentality of a State or of a political subdivision of a State for purposes of State laws (e.g., the entity is subject to open meeting laws or to the requirement to maintain public records that apply only to governmental entities)
- The entity is determined to be an agency or instrumentality of a State or (political subdivision) by a State or Federal court
- A State (or political subdivision) has the ownership interest in the entity and no private interests are involved
- The entity serves a governmental purpose

While no single "major" or "minor" factor is determinative, the IRS appears to place much importance on whether the entity's governing board or body is controlled by the state or political subdivision, and therefore lack of such control alone could be problematic.

Definition of "Established and Maintained"

Under the Notice, the IRS proposed to define when a plan is established and maintained for the employees of a governmental entity. For these purposes:

- The plan is established and maintained by an employer within the meaning of the pension regulations
- The employer is a governmental entity
- The participants covered by the plan are employees of that governmental entity

For purposes of the above, an employee means a common law employee of the employer. It appears, therefore, that a plan covering governmental employees and

continued on page 8

Firm News

Eckert Seamans is committed to seeking out and retaining high-caliber professionals who have a passion for their work, as exemplified by the fine attorneys who recently joined the firm.

Members

Allen Bachman (Washington, D.C.) regularly advises clients on a wide range of antitrust, competition and consumer protection issues and has extensive experience representing clients in complex commercial litigation and arbitration proceedings. He represents clients in Hart-Scott-Rodino merger clearance matters before the Department of Justice Antitrust Division and the Federal Trade commission. Bachman also counsels on antitrust and consumer protection issues including internal audits and price fixing inquiries, marketing and sales practices, licensing and settlement agreements.

Candace Lynn Bell (White Plains, NY) assists clients with developing and managing trademark portfolios on a national and international basis as well as assisting with the acquisition, policing and management of domain names. She has represented clients in trademark, unfair competition and domain name disputes and litigation before the Trademark Trial and Appeal Board and in federal courts. In international matters, Bell frequently advises Canadian businesses expanding into the U.S. on cross-border legal issues including intellectual property and corporate matters.

Jay T. Blount (Pittsburgh, PA) rejoins the firm after spending four years at Dick's Sporting Goods, most recently as VP - Senior Corporate Counsel. He focuses his practice on the hospitality industry, covering various aspects of hotel-related matters for clients whose properties and operations are located throughout the United States as well as in international locations. Blount also has several years of experience practicing bankruptcy and general corporate law outside of the hospitality area, with experience in acquisition and sale transactions, brand acquisition, development and licensing matters and receiverships and bankruptcies.

Kevin F. Brady (Wilmington, DE) represents clients in corporate and commercial litigation in the Delaware Court of Chancery, the Delaware Superior Court and the U.S. District Court for the District of Delaware. He counsels corporations, boards of directors, officers, individual directors and individual shareholders in a wide range of issues relating to mergers and acquisitions, breach of fiduciary duty claims, fraud, advancement/indemnification, D&O insurance, Section 262 appraisals and receiverships as well as matters involving corporate governance and interpretation of the Delaware General Corporation Law and federal securities matters.

James C. Falvey (Washington, D.C.) focuses his practice on telecommunications and other utility-related matters. Prior to joining the firm, he served as VP, Regulatory Affairs and Senior Counsel for Pac-West Telecomm, Inc., where he managed regulatory and legislative matters and successfully addressed a wide variety of regulatory challenges at the federal, state and local level. Over the past 15 years, Falvey also served in various in-house counsel and senior leadership roles with CoreTel Communications, Time Warner Telecom, Xspedius Communications and e.spire Communications.

Michael B. Fein (Philadelphia, PA) is a registered patent attorney representing clients on a full range of intellectual property matters. His experience includes obtaining U.S. and international patent protection of inventions, enforcing and licensing patents and avoiding infringement of competitors' patents. Fein assists clients in evaluating intellectual property assets and counseling on structuring, negotiating and implementing acquisitions, licensing and collaboration agreements. His work includes global and U.S. license agreements, co-development agreements, supply agreements, co-promotion/co-marketing agreements, strategic alliance agreements and IP-intensive mergers and acquisitions.

Gary E. French (Harrisburg, PA) focuses his practice on corporate and business law, federal taxation and real estate matters. With over 34 years of experience, he has advised clients in matters including corporate governance, taxation, choice of entity, S Corp conversions, benefit plans and mergers & acquisitions. His transactional work includes purchase and sales of small and medium-sized businesses as well as real estate purchase and sales. French is a licensed title agent and an authorized attorney for Fidelity National Title Insurance.

Robert J. Hannen (Southpointe, PA) has extensive trial and appellate litigation experience in state and federal courts. He has represented midsize and large companies (Fortune 30, Fortune 100 and Fortune 500 companies) in commercial and employment related litigation involving disputes ranging in amounts up to several hundred million dollars. He has represented financial institutions in litigation involving defense of allegations of breach of contract, predatory lending, fraud, wrongful foreclosure, wrongful dishonor of checks and violations of consumer credit protection laws.

Mark Carlisle Levy (Philadelphia, PA) is a litigator and trial attorney with experience representing Fortune 500 companies in complex commercial litigation in state and federal forums across the country. He provides clients with risk-management advice such as developing and implementing corporate compliance programs in highly regulated environments, conducting internal investigations, evaluating loss exposure to toxic tort litigation and assessing costs in complex, multiparty litigation. Levy also counsels corporations charged with violations of federal criminal law, including alleged government procurement fraud, health care fraud and environmental crimes.

Employee Benefits

(continued)

non-governmental employees might not be considered a governmental plan. Existing practices for some employers permit a small percentage of non-governmental employees to participate in the entity's retirement plan without jeopardizing governmental plan status. However, the IRS has indicated it will review whether that practice should be permitted to continue in certain situations, such as when the non-governmental employees were previously employees of the governmental entity that continues to maintain the retirement plan.

Conclusion

If the proposed standards for being considered a governmental plan are adopted, it is possible that governmental entities that believed their plans were governmental plans could lose their governmental status with the result that they will be subject to the all of the relevant Code requirements and the Employee Retirement Income Security Act of 1974. Therefore, for entities that may be affected, careful attention should be paid to the progress of the draft regulations.

Sandra R. Mihok

Sandra R. Mihok is the Chair of the Employee Benefits Group and focuses on employee benefit and related areas, including plan design, tax compliance, fiduciary and investment issues and HIPAA privacy compliance. Sandra can be reached at 412.566.1903 or smihok@eckertseamans.com

Firm News (continued)

David M. McGlone (Boston, MA) is a first chair trial litigator with over 20 years of experience in federal and superior courts as well as in arbitration proceedings. His practice covers a broad range of commercial litigation matters with a primary focus on construction law. He handles matters such as acceleration and inefficiency claims, assertion and perfection of mechanic's liens and bond claims, collection, bid protests and claim arbitration, defective plans and specifications claims, AIA drafting contracts, direct pay claims and beyond.

Jeffrey J. Norton (Harrisburg & Philadelphia, PA) has extensive experience involving energy, oil & gas, utilities and alternative clean technologies as well as regulatory and compliance matters. He advises clients on wind and solar system projects, plant construction contracts, and natural gas exploration and pipeline matters in the Marcellus Shale. Norton also handles general corporate matters, commercial transactions, mergers and acquisitions, risk management, corporate governance, strategic planning and general litigation. He previously served as VP, General Counsel, Secretary and Chief Compliance Officer for P.H. Glatfelter Company.

Daniel Tomassetti (Southpointe, PA) focuses his practice on commercial litigation. He has wide-ranging experience in state and federal courts in West Virginia and Ohio. Tomassetti has represented employers, governmental entities, hospitals and health maintenance organizations in defense of litigation and has tried a number of cases to verdict. His experience includes representing employers in state and federal courts in litigation involving wrongful termination, Human Rights Act violations and claims of serious injury in the workplace, including deliberate intent to injure.

Associates

Beth A. FitzPatrick (Washington, D.C.) – Aviation

Elizabeth S. Goldberg (Pittsburgh, PA) – Employee Benefits

Michael A. Graziano (Washington, D.C.) – Litigation

Mark J. Hermanovich (Philadelphia, PA) – Litigation

Tyson E. Hubbard (Boston, MA) – Litigation

Bridget Heffernan Labutta (Philadelphia, PA) – Intellectual Property

Steven D. Millman (Philadelphia, PA) – Litigation

Brendan P. Ruddy (Philadelphia, PA) – Litigation

Lisa M. Swan (Philadelphia, PA) – Real Estate

The information in this publication is for the purpose of informing and educating our clients about various aspects of the law and is not intended to be used as legal advice. If you have questions concerning any of the topics, please contact your Eckert Seamans attorney.
Eckert Seamans Cherin & Mellott, LLC. All rights reserved © 2012.

Printed on recycled paper.