Burke, Warren, MacKay & Serritella, P.C.

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WEALTH & SUCCESSION PLANNING

Proposed changes to estate, gift, and GST taxes

President Obama recently released his proposed fiscal year 2013 budget. The budget includes major changes to the estate, gift, and generation-skipping transfer (GST) tax laws, which are significantly less favorable to taxpayers than the laws in effect this year.

Karen K. MacKay

If you are considering significant gift-giving, you may want to make those gifts before the new proposals become law or before year-end if Congress takes no action. A gift of $5,120,000 can be made tax-free now, but under the budget proposals or if Congress takes no action, a federal gift tax of $2,111,000 would be due.

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The New Tower Trust Company Multi-Employer Property Trust (MEPT), a $5 billion fund owned by more than 350 public employee and corporate pension plans, recently acquired 200 W. Madison (pictured) in Chicago. The purchase price of the 45-story, 928,000-square-foot office building was in excess of $200 million. The real estate advisor on the transaction was David Nielsen of Bentall Kennedy (U.S.) LP. The Firm's Doug Wambach represented Bentall Kennedy and MEPT in the purchase. The Firm has represented MEPT for more than 20 years. For more information, please contact Doug Wambach at (312) 840-7019 or dwambach@burkelaw.com.

SECURITIES LAW

Pooling investments without drowning in liability:

Securities Laws Compliance for Informal Investment Pools

Mutual funds pool billions of dollars and make millions of investments. If these large-scale investments do not strictly adhere to certain rules and statutes, they may be ordered to return investors' money or pay government fines.

Craig McCrohon

In contrast, many private investments arise from informal pools of funds from friends, family, neighbors and colleagues. A few (or few dozen) people or firms might informally throw some money in the hat to buy a piece of a private venture. The investment could be a small piece of commercial real estate. Or a technology start-up. Or stake in a local bank.

Commonly, behind these informal collective investments is the

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NEXT ISSUE: Client success, Firm grows again and more.

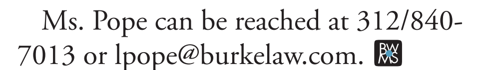
BWM&S

LeAnn Pope presents at National Class Action Defense Conference

LeAnn Pedersen Pope

LeAnn Pedersen Pope was a featured presenter at the American Conference Institute's 13th Annual National Conference on Consumer Finance Class Actions and Litigation in New York January 26 and 27. It is the leading annual event of its kind in the U.S. In her remarks, Ms. Pope provided an analysis on the recent U.S. Supreme Court opinion in *Wal-Mart vs Dukes,* which is being widely watched within the industry.

Ms. Pope chairs the Firm's Consumer Financial Services Class Action Defense Group. Since the proliferation of class action litigation against the mortgage lending industry began more than 20 years ago, Ms. Pope and her team have successfully defended several of the country's major banks and mortgage lending companies in more than 200 nationwide class action cases filed in federal and state courts across the U.S.



Ms. Pope can be reached at 312/840-7013 or lpope@burkelaw.com.

WEALTH & SUCCESSION PLANNING

PROPOSED CHANGES
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Other Proposed Changes

GRATs. A Grantor Retained Annuity Trust ("GRAT") is an irrevocable trust to which you gift assets, while retaining the right to an annuity for a specified term of years. At the end of the term, the remaining assets pass to beneficiaries (usually children), free of gift taxes. Under the proposed 2013 budget, GRATs would have to continue for at least 10 years. This new requirement would increase the odds of you, as grantor, dying within the term, thereby eliminating the tax benefits of the GRAT.

Valuation Discounts. Currently, valuation discounts are available for transfers of interests in closely-held partnerships, corporations, and limited liability companies. Under the proposed 2013 budget, valuation discounts would be eliminated.

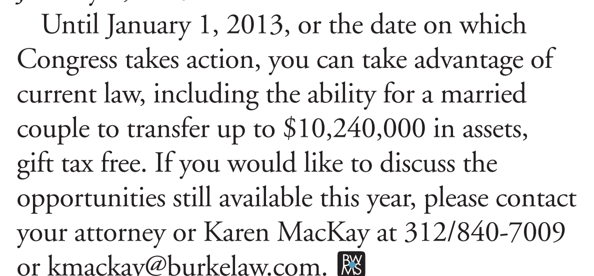
Irrevocable Grantor Trusts. Currently, you can use irrevocable "grantor" trusts to make a large tax-free transfer to a trust. The trust assets are not taxable in your estate for estate tax purposes, but you are treated as the owner of the trust assets for income tax purposes. Consequently, you can sell assets to the trust without triggering capital gains tax on the sale. You also pay income tax on the trust assets, thereby maximizing the amount transferred to your beneficiaries, free of gift tax. Under the proposed 2013 budget, the benefits of such irrevocable grantor trusts would be eliminated, because the trust assets would be taxable in your estate at death, and any distribution out of the trust would be a taxable gift.

GST Trusts. In Illinois, you can create a GST exempt trust that can continue in perpetuity for the benefit of your children and other descendants, free of estate or other transfer taxes. Under the proposed 2013 budget, all assets in GST trusts would be subject to transfer taxes after 90 years.

Window of Opportunity

These proposed changes would be effective only for transfers after the effective date of new legislation. It is very difficult to predict what Congress may ultimately enact. However, if Congress takes no action this year, then effective January 1, 2013, the gift and estate tax exemptions will revert to only $1 million, and the GST tax exemption will revert to only $1 million increased for inflation. The top gift, estate, and GST tax rates will revert to 55% (with a 5% surtax in certain cases). Under both President Obama's budget and current law, the gift tax exemption will drop to only $1 million per taxpayer (or $2 million for a married couple) on January 1, 2013.

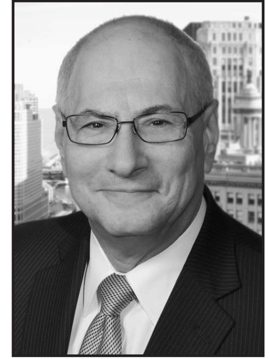
	2012 LAW	PROPOSED 2013 LAW
Gift Tax Exemption (the amount that may be transferred during life free of federal gift tax)	$5,120,000	$1,000,000
Top Gift Tax Rate	35%	45%
Estate Tax Exemption (the amount that may be transferred at death free of federal estate tax)	$5,120,000	$3,500,000
Top Estate Tax Rate	35%	45%
Generation-Skipping Transfer Tax Exemption	$5,120,000	$3,500,000
Top GST Tax Rate	35%	45%



Until January 1, 2013, or the date on which Congress takes action, you can take advantage of current law, including the ability for a married couple to transfer up to $10,240,000 in assets, gift tax free. If you would like to discuss the opportunities still available this year, please contact your attorney or Karen MacKay at 312/840-7009 or kmackay@burkelaw.com.

BWM&S

Firm's leading auto franchise practice adds partner


Jay Statland

Burke, Warren, MacKay & Serritella welcomes Jay Statland to the Firm as a partner and a member of the Corporate, Litigation and Automotive Franchise groups. Mr. Statland represents automobile dealers, focusing on manufacturer relations, acquisition and disposition of automobile dealerships, dealership real estate, and related litigation. Mr. Statland was the attorney of record in two of the most cited pro-dealership cases in the State of Illinois. His practice also includes the representation of closely held businesses, commercial real estate transactions, and complex litigation. "We have been on the other side from Jay Statland for many years and have always respected his work," says Ira Levin, a partner in the Firm's Automotive Franchise group. "When we learned that Jay was considering a firm affiliation, we jumped at the chance to bring someone of his stature into our practice group."

In reflecting on his relationship with Burke, Warren prior to joining the Firm, Mr. Statland said, "I had always practiced in a boutique-type firm environment and resisted a larger firm format. Having known Bill Kelly (a partner in the Firm's Automotive Franchise group) for over 30 years, we have discussed industry issues on an almost weekly basis and, more often than not, Bill has been on the other side of my automotive transactions. I found him to be the model of competence and integrity. During the Chrysler and General Motors Bankruptcy arbitrations, I had the good fortune to get to know and become friends with Ira Levin, an experienced trial lawyer, with a special emphasis on franchise litigation. When Bill and Ira suggested I consider joining Burke, Warren, I interviewed and was interviewed by the other partners at the firm. I found that the group shared my ideals regarding client relations and the provision of legal services. Impressed with the skill, knowledge and experience of the group, I knew it would be a good fit, and was pleased to be invited to join the firm.

Mr. Statland can be reached at 312/840-7101 or jstatland@burkelaw.com.

LABOR & EMPLOYMENT

Six steps to protect against claims by employees

Marty LaPointe

In today's business world, all employers are susceptible to claims brought by their employees and former employees. Lifetime employment and job loyalty no longer exist, and family-owned businesses are not immune from lawsuits by their employees. There is never a guarantee that a company will not be hit with these types of lawsuits. Implementing the following steps, however, will certainly reduce the risk of one.

Employee Handbook

All employers, regardless of size, should have an Employee Handbook that is given to all employees upon their start date. The Employee Handbook should contain an at-will employment disclaimer, which is a statement that their employment is for an unspecified duration and can be terminated with or without cause and with or without advance notice. The personnel file of every employee should contain the signed handbook acknowledgement form, which should also contain the at-will disclaimer. The Employee Handbook should also generally describe the policies of the company. For small businesses, lengthy handbooks are not required.

Anti-Harassment Policy

Every employer, regardless of size, must have an anti-harassment policy. The U.S. Supreme Court has mandated that all employers have such a policy. The policy must communicate to employees the procedure for complaining about illegal harassment in the workplace i.e., sexual harassment, or other harassment based on race, disability, ethnic origin, etc. The policy must contain at least two company representatives to whom to complain about harassment, so that if one of the representatives is the alleged harasser, the employee can still lodge his/her complaint with someone else. The Employee Handbook should include this important policy, and again, it is important to ensure the signed handbook acknowledgment form shows the employee received the policy.

Thorough Investigation of Harassment Complaint

If an employee complains about illegal harassment in the workplace, the law requires employers to immediately conduct a thorough investigation of the complaint. Contacting a qualified employment attorney or Human Resources professional when this arises is important for limiting exposure. Employers should document their investigation to ensure there is proof that

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Firm partner promotions

Each year at Burke, Warren, Firm partners nominate senior associates with seven to eight years of experience and growth within the firm for partnership, and then gather to discuss, evaluate and vote on the nominees. We are pleased to announce and present Burke, Warren's newest firm partners: Andrew LeMar, Alex Marks, Shana Shifrin and Rachel Wanroy.

Andrew D. LeMar

New Partner Andrew D. LeMar has defended numerous class actions and individual suits involving state and federal claims as a member of the Firm's Litigation and Class Action Defense practices. He also has experience with mass accident class actions, securities fraud class actions, trademark, corporate director liability, employment law, torts, unfair competition, and deceptive trade practices.

Andrew LeMar

Mr. LeMar is passionate about volunteer work and regularly serves at the Chicago Legal Assistance Foundation's *Pro Se* Litigant Help Desk at the U.S. District Court of the Northern District of Illinois. He has also participated in the Constitutional Rights Foundation of Chicago's "Lawyers in the Classroom" program, which sends attorneys to elementary school classrooms to enrich students' understanding of our constitution and legal system. Mr. LeMar expresses his dedication to his alma mater by serving on the board of the Chicago Chapter of the Indiana University Alumni Association.

When asked about his experience at Burke, Warren, Mr. LeMar said, "Having worked at other firms before Burke, Warren, I feel that I have finally found the firm that I was looking for and where I wanted to become a partner."

Mr. LeMar received his B.A. in History and a minor in Criminal Justice, with honors, from Indiana University in 2000. He was awarded his J.D. degree, *cum laude*, from the Indiana University School of Law in 2003, where he was the Editor-in-Chief of the *Indiana Law Journal*.

Alexander D. Marks

New Partner Alex Marks works in the Firm's Litigation group, where he handles commercial disputes in both state and federal court, with a further focus on labor and employment cases.

Mr. Marks has consistently obtained successful results for clients in matters ranging from obtaining summary judgment in a federal action brought against a national bank under the Right to Financial Privacy Act, to procuring a settlement for a prison inmate who maintained a Section 1983 Civil Rights claim.

Alexander Marks

About his time with Burke, Warren, Mr. Marks states, "I have a tremendous amount of respect for the individuals I work with, both on a professional and personal level. The quality of work performed is second to none, and such work product is matched by the integrity and character of the office. I feel both privileged and humbled to be a part of such a well-respected firm."

Mr. Marks is also committed to his volunteer work in several Chicago organizations, including the Chicago Bar Foundation's Young Professional Board; the Constitutional Rights Foundation of Chicago's "Lawyers in the Classroom" program; the Chicago Coalition for the Homeless Law Project; and the Statewide Advisory Group for the Illinois Campaign to Prevent Gun Violence. He also maintains a fervent commitment to his alma mater, by serving on the Alumni Board of the University of Illinois College of Law, and volunteering for the University's grassroots advocacy network, "Illinois Connection."

Mr. Marks was named an *Illinois Super Lawyers* Rising Star for 2012, placing him in the state's top 2% of up-and-coming attorneys under the age of 40. He currently serves as the Inaugural Chair on the Firm's Pro Bono Committee.

Mr. Marks received his B.S. with high honors in Business Administration from the University of Illinois at Urbana-Champaign in 2001. He was awarded his J.D. degree, *magna cum laude*, from the University of Illinois College of Law in 2004, where he was awarded Rickert Awards for excellence in oral advocacy and trial advocacy.

Shana A. Shifrin

New Partner Shana Shifrin concentrates on class action defense of banks, mortgage lenders, and related entities in the Firm's Litigation and Class Action Defense practices. Ms. Shifrin defends class actions and individual suits involving state and federal claims, as well as claims for violations of state consumer protection statutes. She also has experience in health care insurance and RICO class actions, health care insurance contract disputes, professional liability, trust and estate litigation, and other complex commercial disputes.

Ms. Shifrin maintains a commitment to pro bono work, having devoted a significant portion of her practice to matters that include a first-degree murder trial, a petition for a stay of execution to the Supreme Court of the United States, post-

Shana Shifrin

conviction hearings, and appeals in the Illinois Appellate Court and the United States Court of Appeals for the Seventh Circuit.

Ms. Shifrin reflects, "I have only been at Burke, Warren since July 2010, but it felt like a perfect fit from the day I started. I am inspired by the challenging matters I work on every day, and the wonderful colleagues I can rely on for support."

Ms. Shifrin received her undergraduate degree, *cum laude*, from the University of Pennsylvania in 2000, graduating with B.A. degrees in History and French. She graduated from Northwestern University School of Law with a J.D. degree in 2003, where she was a Senior Editor on the *Journal of International Law and Business* and worked in the Bluhm Legal Clinic. Ms. Shifrin has also been named an *Illinois Super Lawyer* Rising Star.

Rachel D. Wanroy

New Partner Rachel Wanroy's experience in the Firm's Real Estate practice includes representing landlords and tenants in retail, industrial and commercial leasing matters and negotiating the acquisition, financing and sale of retail and commercial properties. Ms. Wanroy has worked on several major redevelopments of existing shopping centers, including properties in Minneapolis and Kansas City, which have involved tax increment financing (TIF), and the negotiation of a long-term extension and redevelopment of a grocery store anchor tenant. She also works with the Archdiocese of Chicago in leasing and tenant financing matters.

Rachel Wanroy

Having served successfully for two years on Burke, Warren's Marketing Committee, Ms. Wanroy moved to the Firm's Summer Associate Program Committee, stating, "I want to help find candidates who fit the culture of the firm and who will hopefully grow with the firm and stay for many years, eventually becoming partners themselves. I also enjoy mentoring younger attorneys and I think I can help the current summer associates assimilate and find their footing in the Firm."

Ms. Wanroy is a member of the International Council of Shopping Centers and the Governing Council of the Joffrey Ballet Auxiliary Board.

Ms. Wanroy received her B.A. from Tulane University in 2000 and her J.D. from Chicago-Kent College of Law in 2004.

New company guidelines for employee use of Twitter, Facebook and other social media postings

Most private sector employers are subject to the National Labor Relations Act (the "Act"), a 1935 federal statute that governs traditional aspects of labor law such as collective bargaining, strikes, and changes of unfair labor practices, while also defining lawful employer conduct toward private sector workers.

In late January 2012, in an effort to keep up with the times, the National Labor Relations Board (the "Board") issued a Report to Employers (the "Report"), providing guidelines on when and how policies on workplace social media (as well as Facebook, Twitter and other public cyberspace posting services) might run afoul of the Act, and land a private sector employer in hot water.

Fred Mendelsohn

Social media has transformed how American businesses and employers communicate, advertise and go to market. Some communications professionals even suggest that companies who do not use social media to build their brands and customer relationships are at a competitive disadvantage. Labor unions and employees also exploit social media tools to interface with their constituents, coworkers and friends. In addition, employees routinely use social media to "comment" on workplace issues.

Hence, the Board's Report and the challenge: for more than a half century, labor law has prohibited employers from interfering with, disciplining or discharging employees for engaging in "protected, concerted activity," including communications about their company involving co-workers. The Board has now extended this protection to include employee use of social media.

The Report details fourteen recent cases which include "various online technology tools that enable people to communicate easily via the internet to share information and resources." The key legal issue in each of these cases is whether adverse employment action and/or employment policies violate Section 7 of the Act — where employees are guaranteed the right to "form, join or assist unions," and "to engage in other concerted activities for their mutual aid and protection" (such as seeking co-worker support for perceived management indiscretions). Simply put, employers cannot interfere, restrain or coerce employees in exercise of their Section 7 rights, including disciplining them or discharging them for doing so. The Report

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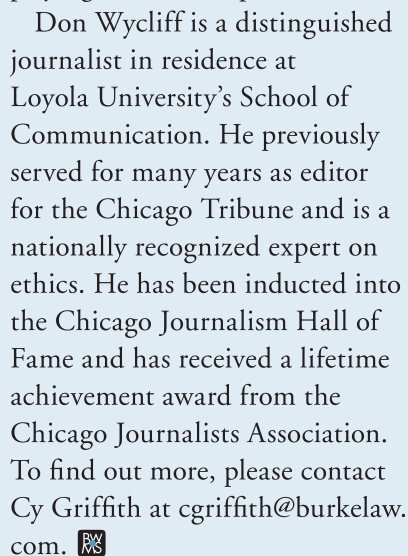
Firm event topic: Religion and the 2012 Election



The Firm's Religious and Not-For-Profit practice will host Don Wycliff for a discussion on Religion and the 2012 Election at Fulton's on the River on April 25. Don will discuss the important role that religion is playing in the 2012 presidential race.

Don Wycliff is a distinguished journalist in residence at Loyola University's School of Communication. He previously served for many years as editor for the Chicago Tribune and is a nationally recognized expert on ethics. He has been inducted into the Chicago Journalism Hall of Fame and has received a lifetime achievement award from the Chicago Journalists Association. To find out more, please contact Cy Griffith at cgriffith@burkelaw.com.

POOLING INVESTMENTS

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"promoter" — the person who found the investment, calls the friends, distributes the financial information, and collects the money to purchase the real estate or equity interests. Unlike a mutual fund professional, this promoter likely has another job and the investment is simple. However, if the informal investment group combines enough money, the promoter may accidentally trigger federal and state securities laws meant to regulate formal investment pools and mutual funds.

Promoters of these pooled financings can heed a few basic rules and guidelines to avoid triggering an avalanche of disclosure and compliance requirements.

Comply with Private Placement Rules. The sale of interests of a collective investment must comply with the same private placement rules applicable to any firm selling stock or bonds. These include rules regarding disclosures of investment details, restrictions on the number of non-wealthy accredited investors, advertising, and investment resales. Promoters of the investment pool should also adhere to guidelines about "testing the market." And yes, the pooled interests may very well constitute securities. See *Money Lost, Money Found: Bringing Back Shareholders Burned by Early Stage Investing* from the Summer 2010 edition of the BWM&S Bulletin.

Create an Entity to Pool Cash and Sign Agreements. In general, individual promoters of an informal investment pool benefit from establishing a separate holding entity. First, this helps shield the promoter from many (but not all) personal liabilities. More directly, the promoter will not personally sign the agreements making the investment, but will sign on behalf of the new holding entity. Second, a separate entity is like a vessel into which each investor's funds may be pooled, allocated and recorded. Logistics such as establishing a bank account are better accomplished with a different entity with its own identification number and identity.

Avoid Becoming an Accidental Investment Company. Under the wrong circumstances, an innocent pool of investments can fall into the quicksand of investment company regulations. These rules require the informal investment group to behave like a multi-billion dollar mutual fund. If the promoter receives any type of compensation, whether cash or an enhanced return on equity, the pool may be deemed to be "in the business of investing or trading securities." The result: tons of detailed disclosure; onerous registration filings, with information about investments, entity structure, and personal details regarding management; and severe restrictions on fund management.

The informal investment pool should ensure that it can use one of two exemptions or exclusions from the Federal Investment Company Act. First, the investment pool may avoid classification by selling interests to 100 or fewer investors. This 100-investor limit can easily increase or decrease, depending on how some detailed rules treat investors related by blood, or held through holding companies. Second, the investment pool may be exempt if it only accepts "qualified purchasers" as investors. These are individuals with more than $5 million in investments, or one who is responsible for an investment pool of at least $25 million.

Avoid Being an Accidental Investment Adviser. After dodging the investment company bullet, the promoter will then need to escape the investment adviser regulations. The Federal Investment Advisers Act of 1940 imposes rules on persons or entities that are in the business of providing investment advice to other persons. This could include investment advice to a single entity, such as the investment pool. Or, the promoter could be deemed to be providing investment advice to the participants. As with the investment company rules, the investment adviser requirements apply to persons "in the business" of providing investment advice. Unfortunately, the rules define "business" broadly — any compensation, direct or indirect, and in any form, may convert the hobby into a regulated business. The registration requirements as an investment adviser are much less burdensome than for an investment company. However, for someone corralling friends and acquaintances, any kind of registration is a throbbing compliance headache.

To avoid the full-blown registration requirements, pools should raise less than $150 million. Even then, however, some limited registration is required.

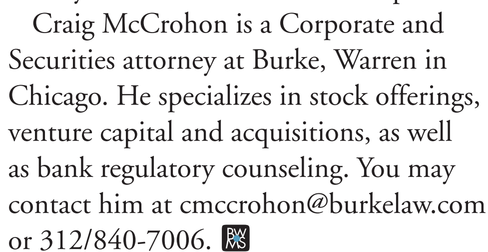
The SEC staff has indicated that it might completely exempt advisers who provide guidance to holders of less than $25 million in investments.

In addition to these federal rules, however, promoters should heed state "baby" versions of the federal adviser regulations. In general, the promoter may create a single holding entity, declare it as its only "client," and qualify it for state exemptions for advisers serving five or fewer clients. Some states establish a higher or lower number of clients to qualify for the exemption.

Look for Special Rules for Special Investments and Holding Companies. Unusual situations may be good news or bad for legal compliance. If the organizers qualify as a family office under the new rules, it may be fully exempt from investment adviser regulations. Persons raising more than about $25 million, and who plan to invest in operating companies, might be prudent to investigate qualification with the federal government as a Small Business Investment Company. This provides certain tax incentives, access to low-cost federal loans and other benefits. On the downside, however, special investments such as commodities or options may trigger rules of the Commodities and Futures Trading Commission. This is an entirely separate set of rules and traps to consider if the pool includes these kinds of investments.

In general, promoters who follow a few guidelines can avoid the nightmares of compliance and liability. However, organizers of informal funds who completely ignore these rules risk triggering an avalanche of regulatory and legal problems. A quick regulatory check can be an easy life saver at the investment pool.

Craig McCrohon is a Corporate and Securities attorney at Burke, Warren in Chicago. He specializes in stock offerings, venture capital and acquisitions, as well as bank regulatory counseling. You may contact him at cmccrohon@burkelaw.com or 312/840-7006.



SIX STEPS

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it took the complaint seriously and conducted a thorough investigation. If the investigation results in a determination that the alleged harasser engaged in inappropriate conduct in the workplace, the company must take prompt remedial action against the alleged harasser. Depending on the seriousness of the offense, either a written warning letter or termination would be appropriate. Regardless of the results of the investigation, the company cannot retaliate against the employee who complained.

Documenting Performance/ Conduct Issues

Employers should document performance and conduct issues of their employees. When the time comes to terminate an employee, it is important to have documents that show the employer has already put the employee on notice of his/her deficiencies and the employee has failed to improve. Juries always determine employment termination cases based on fairness. If there are documents showing an employee has already been put on notice of his or her deficiencies, and the employee failed to improve, there is a much greater chance the employer would be viewed as fair in carrying out the termination. Most importantly, having the documentation in the file will diminish the likelihood of a serious claim. One form of documentation is an employee evaluation. If written employee evaluations are used, they must be an accurate depiction of that person's performance, and not create a "false positive" picture of the employee's performance. In other words, if the employee is performing poorly, the evaluation must show that.

Consistency In Disciplining Employees

Employers must be consistent in the way they discipline and terminate employees. If one employee is terminated for certain misconduct or a record of performance deficiencies, any other employee who engages in the same misconduct or who has the same record of performance deficiencies, should also be discharged. If not, the inconsistency may allow the former employee to claim discrimination based on his/her gender, race, disability, or any other protected category that may apply. Employers should have a mechanism to ensure their managers are treating everyone the same.

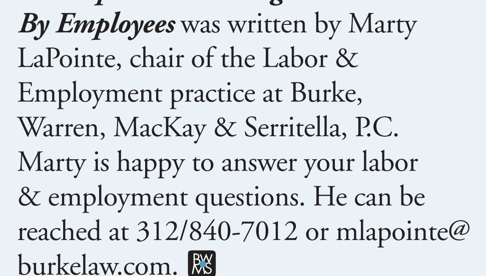
Effective Termination Procedures

Finally, when the time comes to terminate an employee, it is important to do it in the right way. Hopefully, the stage has been set by previous documentation and counseling of the employee, so that when the moment of termination arrives, it does not come as a complete surprise. Employers should be honest and open in their communication with the employee, and should not hesitate to articulate the performance/conduct issues that led to the termination. If an employee is not provided a reason for his/her discharge, and one that makes sense, the employee may believe that the protected categories that may apply to them (age, gender, race, disability, etc.) are the reason(s) for their discharge. It is also important to be professional and respectful to the employee at the point of termination. And above all, document the termination so there is a record of the reason(s) articulated to the employee for the termination.

Conclusion

No company is immune from employment lawsuits. Implementing these procedures, however, will go a long way toward reducing your company's exposure to claims brought by your employees.

Six Steps To Protect Against Claims By Employees was written by Marty LaPointe, chair of the Labor & Employment practice at Burke, Warren, MacKay & Serritella, P.C. Marty is happy to answer your labor & employment questions. He can be reached at 312/840-7012 or mlapointe@burkelaw.com.



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LABOR & EMPLOYMENT

NEW COMPANY GUIDELINES

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details a handful of cases where the Board has found that an employee was unlawfully discharged for exercising his or her right to protected communication by posting on Facebook or Twitter. The Report underscores three main points in this evolving area of the law:

An employee's comments on social media are more likely to be protected when they involve a group, co-worker discussion of the terms and conditions of employment, such as wages, benefits and disciplinary complaints.

An employee's comments on social media are generally not protected by Section 7 of the Act if they are mere gripes not made in relation to employee "group activity." A typical instance of this kind might be where many employees chime in to support a particular employee's position that certain employer conduct (e.g., raises, disciplinary action, supervisor complaints, etc.) is believed to be unfair.

Employer social media policies and similar employment policies are often inextricably intertwined in claims of Act violations, so policy statements must be balanced to ensure they do not (even inadvertently) prohibit the kinds of activities protected by Section 7.

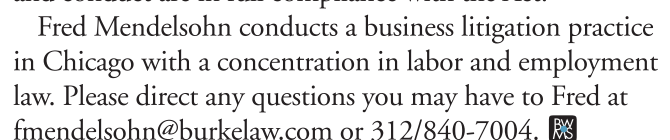
To avoid outright contravention of the Act as to the content of the employment policies themselves, the policymakers must avoid any statement that the Board can identify as "chilling" employees in the exercise of their Section 7 rights. The Board's Report identified several such violative policies, such as those limiting "disrespectful conduct," "inappropriate conversation" or "unprofessional communication that could negatively impact…."

Overbroad and illegal employment policies are not new to the Board. For years the Board has found unlawful workplace policies that range from non-solicitation/non-distribution and confidentiality provisions to non-disparagement and non-fraternization policies; these standards now extend to employer rules regarding social media. In some circumstances, employee disciplinary action or discharge pursuant to an unlawfully overbroad policy can violate the Act. Ultimately, employers need to ensure that their employment policies and handbooks do not run afoul of the Act. Two key points:

Employers must make certain that employment policies balance legitimate business interests (like protecting trade secrets and proprietary information) without restricting the rights of employees to discuss wages, hours and other terms or conditions of employment.

Employment policies should carefully and narrowly define proscribed conduct, without even inadvertently referencing restrictions on Section 7 rights; they should also contain a savings clause to clarify that the intent of the policy is not to trample on Section 7 rights.

Even though union activity in the U.S. may have waned in recent years, the Board is intent on ensuring that all employers comply with the Act. Effective April 30, 2012, the Board has made it mandatory for almost all employers in the private sector to post an Employee Rights Notice to ensure that employees are aware of their rights under the Act (although this matter may get tied up in court). The upshot is that private sector employers should not only be conscious of the scope of the Act, but also take steps to ensure that their policies and conduct are in full compliance with the Act.



Fred Mendelsohn conducts a business litigation practice in Chicago with a concentration in labor and employment law. Please direct any questions you may have to Fred at fmendelsohn@burkelaw.com or 312/840-7004.